VOLUME EIGHT OF EIGHT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Paul M. Burch, Circuit Court Judge

RECEIVED
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S.C. SUPREME COURT

MARION ALEXANDER LINDSEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001271

APPENDIX

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ORDER DENYING MOTION TO RECONSIDER, ALTER OR AMEND 3751

PROPOSED ORDER OF DISMISSAL 3752

INDICTMENT 3944

THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

APPLICANT'S EXHIBIT #26 (AUDIOTAPE)

APPLICANT'S EXHIBIT #27 (PHOTOGRAPH)

APPLICANT'S EXHIBIT #28 (PHOTOGRAPH)

did it to get attention - implicitly not to kill himself. PCR Tr. 557-58.

Vogelsang again corrected herself concerning the incident three weeks before was not an attempted suicide, but was only a "threat." PCR Tr. 559. She argued there was no attempt or overt act on his part and suggested conflicted evidence that he had a gun, contrary to the family's earlier testimony. PCR Tr. 559. (See PCR Tr. 424, 440, 476-77).

Concerning her lack of a written report, Vogelsang declared she is not required to do a report unless requested. she denied that had she made a report that she would not have made factual mistakes. PCR Tr. 561. She admitted that as a member and past president of the National Association of Social Workers of S.C., that they have a national policy in opposition to the death penalty, but declared she did not vote on the policy. PCR Tr. 562.

Vogelsang then described what matters she reviews as an expert witness in child custody cases. She did not recall trial testimony that Lindsey had given his child alcohol at trial although she had admitted that she read the trial testimony. PCR Tr. 563. See ROA 1820 (Lindsey gave son a beer in a baby bottle). She suggested it would have stood out and it would have been a concern for her in a family court recommendation situation. Similarly, whether an individual carried a weapon, had shot at someone, sold drugs, and had multiple incidents of violence toward his wife would affect her recommendation. Vogelsang declared she would not have recommended visitation for that person, although she had earlier declared "from all sources he was a good father." She confirmed in a child custody situation - with her information - she would have been hesitant and would have recommended that there be no visitation without supervision from someone from the Court present. PCR Tr. 565, ll. 7-20.

Ms. Vogelsang admitted that she did not speak to victim's family members who had long-

term relationship with the Applicant and his family or the mother of Lindsey other child. PCR Tr. 567-69.

Vogelsang admitted that his mother and grandmother - as care givers - had taken Lindsey to doctors for regular checkups. Vogelsang admitted that Steve Pilgrim was a person who was not threatening and a workaholic and supporter of the family. PCR Tr. 573. She stated though that he was not there for "child development", pointing out that he "believed in practice of roots" and "shot a girl", though Lindsey did not witness it. PCR Tr. 574.

When asked about what Marion had told her about the practice of roots in the home (during her November 2009 interview), she asserted various matters including it was confusing to him, made him mixed-up between a difference between roots and home remedies, confused him about family members putting a root on people in their relationships to make them feel sick or die.[37] However, when asked to point out in any of her notes of the interview, she declared - prior to reviewing the notes - that she "may not have written it down." PCR Tr. 575. when she reviewed her multiple page notes, she declared nothing was in there, although she remembered the conversation. PCR Tr. 576.

Vogelsang declared Lindsey "succumbed to the streets" at the eighth grade, as a runner for his uncles, but then could not clarify which uncle nor resolve that Willie was in jail at that period of time. PCR Tr. 578. she then switched it to drug dealing cousins rather than the uncles. PCR Tr. 578-79.

She confirmed that she failed to interview Stanford Wilkins, who Lindsey had shot. She stated she was unaware that Wilkins stated he thought Lindsey was his friend and did not know

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[37] The Court may need to resolve the credibility of these answers by the witness.

why he shot him, admitting that she had not read his trial testimony. PCR Tr. 579.

Concerning her reliance upon Rod Tullis' testimony and interview, she did not recall or know that it conflicted with the defense lawyer's testimony. PCR Tr. 581. See PCR Tr. 39-40. She also confirmed that when she interviewed Lindsey in November 2009, he never told her that he called his lawyer (Tullis) on the day of the crime and threatened to kill himself. PCR Tr. 585.

In suggesting a reason for the crime, she confirmed that he had declared to the EMS that he had shot her because she had a boyfriend - not because she would not let him see his children. PCR Tr. 586. She confirmed at the time that he was under an order of protection and not to see his wife, though she could recall how long before the incident it had been in place. PCR Tr. 587. she confirmed that after the order was entered, Lindsey would not have supposed to have seen his children or have contact with them. PCR Tr. 587.

While she had stated he had provided support for his children, she confirmed that he did not always provide them clothes, food, or try to have visitation. PCR Tr. 588. To the contrary, he had asserted in records that he was not providing any support 4 to 5 months prior to the incident. PCR Tr. 588.

Vogelsang also confirmed that Lindsey had a record of violence, not only toward Nell, but toward other females, including those he claimed to love. PCR Tr. 589. He also had indications of violence toward males.

Vogelsang stated she had talked with Lindsey about violent acts while dealing drugs, including fights and shootings. PCR Tr. 590. She described Lindsey as "controlling", but also scared half to death concerning the drug sales. PCR Tr. 590. She stated he had an "extremely overactive behavior involving violence." PCR Tr. 591, ll. 1-2.

Vogelsang also confirmed that his risk factors made it a high risk that he would end up committing the very act he committed. PCR Tr. 593. She also admitted that the risk factors she found are not treated in the prison system. PCR Tr. 594.

ANALYSIS

The Investigation Concerning the Social History of Lindsey and the Family Members Was Reasonable.

Initially, the underlying issue concerns whether the investigation of the social history of Lindsey and his family was reasonable. Within his memorandum, Applicant does not point to any particular piece of evidence that critical to the defense and mitigation, but merely suggests that it was not done in the depth that he thinks counsel should have done. Although the investigations may not have included Ms. Topp's suggested preference of three years (or the claims 1000 hours of the ABA average), it uncovered the matters necessary for the defense.

A review of the trial testimony of Virginia Lindsey (guilt and penalty), cousin Chris Wilkens (guilt and penalty) and the penalty phase testimony of fried Bill Burton, Leon McDowell and Steve Pilgrim reveal that the essential family background was revealed to the jury. Importantly, concerning the depth of the investigation, the summaries of the interviews that Ms. Topp had with Marion Lindsey and Marion Lindsey's mother in 2004, buttressed by Ms. Topp's own PCR testimony about what she learned in 2004 are virtually in the same detail that the post-conviction evidence from the family members and Jan Vogelsang's testimony in the PCR hearings.

Trial "counsel have a duty to make reasonable investigations or to make a reasonable decision that makes investigations unnecessary." Strickland, at 691, 104 S.Ct. 2052. "In assessing counsel's investigation, we must conduct an objective review of their performance,

measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." *Wiggins v. Smith,* 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (internal quotation marks and citations omitted). "In assessing counsel's performance in this context, we look to how counsel prepared for sentencing, what mitigating evidence counsel accumulated, what additional leads counsel had, and what results counsel could have reasonably expected from those leads." Blanton v. Quarterman, 543 F.3d 230, 236 (5th Cir.2008) (citing *Neal,* 286 F.3d at 237). Courts must consider "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins,* 539 U.S. at 527, 123 S.Ct. 2527.

Lenora Topp made detailed summaries of her interviews with Lindsey and Virginia Lindsey and these written interviews reveals virtually identical data to a significant portion of Social Worker Jan Vogelsang's PCR testimony. Respondent's Exhibit 2, 3, 4. The Applicant has failed to point out any new and critical data revealed post-trial. A review of the data received in 2004 by the defense team reveal that they were aware of Virginia Lindsey background in detail as revealed first from Lindsey and then from Virginia, including her limited education, children and their different fathers, involvement of her mother in raising the children, her employment as a shift worker and not at home in evenings to help with food and homework, Lindsey's lack of an active father to interact with, and Lindsey's opinion that the family was poor. Respondent's Exhibit 2, 3, 4. Topp and the defense team also were aware of Virginia's 8 siblings. They were aware that all five of Bessie Smith's children - in contrast - had completed college. Respondent's Exhibit 2 -4. From Virginia, she revealed that injuries that Marlon has sustained while growing

up - being run over by a car driven by her brother Paul when Lindsey was 19 months old, Lindsey falling and hitting his head frequently, Virginia also reported to Topp that Lindsey had tried to commit suicide by swallowing pills from the medicine cabinet and the reason that he was upset with her after a fight with the brother and she told him that she would not do anything for him again and had stayed in the hospital one week. Respondent Exhibit 4. Virginia had also reported to Topp that Lindsey had raised his younger brother Tim and that her son Fred died while canoeing and was never found. Id. She also reported to Topp about the incident when her brother threw Lindsey's cat into the furnace. She also described to Topp about Lindsey's earlier relationship with Stephanie Petty who they liked and got along . Id. Concerning the relationship between Nell and Lindsey, Virginia had reported that she like and loved Nell, thought Nell's mother had too much influence on her and when there was an issue with money, there were problems in the relationship. Virginia stated to Topp that she knew that Lindsey sold drugs and that he spent money on Virginia and her family during those times.

In Lindsey's interviews with Topp on April 16 and 25, 2004, he reported similar details about the family background. Respondent Exhibit 2, 3. Particularly he noted his knowledge of his father Leon McDowell and referred to him as a "sperm donor" who did not want to get involved with him and Lindsey was bitter toward him. He noted to Topp that his other brothers would go on activities with their fathers and he was left out. Id. He noted that his mother struggled while he was growing up and that they did not have new clothes and had a wringing washer machine and ruined a new one through overuse. Lindsey reported to Topp that his brother Fred died in a canoeing accident when he was with a friend who survived, but Fred's body was never found. He reported that Fred's death affected him for at least three years. Id. He stated that he and Fred used

to fight, but they became friends and worked together in West Virginia until Lindsey became homesick and moved back. Lindsey felt that he raised his brother Tim Sims who would follow him everywhere and that Tim's father was the only father figure in Lindsey's life. Respondent's Exhibit 2,3.

Lindsey also reported to Topp that he did not know his sister Vanessa who was killed in a car accident. In describing growing up, he felt his family was very poor and that they could not afford to eat anything except bologna and that he currently cannot eat it.

Lindsey also reported to Topp that when he was 25, his father's children started to hang round him, although he claimed he was not selling drugs at the time. He noted that half-brother Leon McDowell also took out an assault warrant against him and that family considered him an outsider. Lindsey reported that he did get along with Claude, Marshall Martha Sammy and Kathy Lindsey. Respondent Exhibit 2, 3.

Lindsey also provided Topp a summary of his educational history through 10th grade when he quit school to work and help his mother. Id. He also described his recollection of disciplinary actions taken against him at school, including slapping a girl, being hit in the eye in junior high after a racial epithet but having nothing done to the perpetrator after he reported it to the baseball coach though he was suspended for a week.

Lindsey reported to Topp that none of his family finished school. He stated to her that he played football in junior high , but quit when no one would come to watch. Respondent Exhibit 2, 3.

Lindsey advised Topp that he had two traumatic times in his life, pointing out the incident when his cat was thrown into the heater alive and when he tried to commit suicide when he was

12 years old. Id. He also described running away from home when he was 7 because his mother would not let him go somewhere , but returned home when he got hungry.

Lindsey described that after he quit school, he started working with his brothers at Beecher's Plastic Co.. He described having a bad car accident when the tire blew and the car flipped and he was out of work for a year due to injuries,. He claimed that he lost his memory, broke his hip and gad facial surgery. As a result of the totaling of the car, he stated his brother also lost their jobs. He then went to work at Burger King where his brothers worked until he had words about 1 ½ years later with a female manager. After being out of work a month he then worked at Union Cloth in Spartanburg, but found it boring and had to work with a lot of gossiping women and left there after 6-7 months. Id .

Lindsey told Topp that he then stayed at home and took care of Claude's children by cooking and cleaning so that Claude and his sister could work.

Lindsey described his relationship with Stephanie Petty, working with his brother Fred in West Virginia and returning home.

Lindsey claimed that he partied, drank beer but never did drugs.

Concerning Bill Burton, Lindsey said he was his mentor while growing up and Burton got him a job at his plant when he was plant manager. He stated in his youth he would go fishing with Bill and met his mother . At the plant for 2 years, Lindsey said it was the best job he ever had. He stated that one evening he agreed to work overtime and described that he did all the work while others fooled around with girls. The next day, he stated that he was confronted by the supervisor as to why the work was not completed and when he advised the supervisor that he was the one who did it all, he felt he would not listen to him and Lindsey "jerked Mr. Green up by his

shirt" and he was fired. He stated Burton tried to get his job back, but there was a no-rehire policy.

Unable to get a similar job, Lindsey stated that he started being a drug courier again for cocaine and crack - though he claimed he never used it. Id.

He described to Topp his various jobs after that with Thomas and Betts in Inman, Hudson International.

He also described his life with Stephanie who had moved in with them and her father threatening to kill him, but then would come over on weekends.

Lindsey described his other job at Budweiser as a fork lift operator until he was arrested for a traffic ticket and lost his job after he stayed in jail . He next worked at a body shop until it was shut down.

Lindsey also described shooting Stafford Wilkins in 1994.

Lindsey, during the interview on April 16, 2004 also went into detail about his relationship with Nell Lindsey. Within that part of the interview he described breaking up with Stephanie after Nell became pregnant, he stated that he would also take care of the children. He went into detail about their relationship leading up to the shooting. He told Topp that hee had written suicide notes after Nell had moved back with her mother and told him that he could not see his children after a domestic violence order was taken out Respondent's Exhibit 2, 3. He claimed to have lost weight from 225 to 160 in four weeks and was depressed all the time. He described his version of the day of the shooting including going to his brother hoping he would stop him , seeing Nell's cousin's car seeing Nell and then chasing them, not recalling the shooting , but recalling putting his gun to his temple and hearing a voice tell him to put the gun

down, then being shot. Respondent Exhibit 2, 3.

Respondent submits that the investigation concerning the social history of the family was constitutionally adequate. In addition to this information, the 2004 defense team was aware that there had been mental health concerns for Bessie Smith who had tried to commit suicide, and Steve Pilgrim who at least had nerve and anxiety problems.

"[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying heavy measure of deference to counsel's judgments." Wiggins, 539 U.S. at 521-22. "A defense attorney is not required to investigate all leads ...." Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir.1994).[38] "A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance." Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir.1992). "The attorney's decision not to investigate must not be evaluated with the benefit of hindsight, but accorded a strong presumption of reasonableness." Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir.1985).

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such

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[38]Rejecting a per se rule of ineffective assistance where counsel does not consult family members, the 11th Circuit held in Williams v. Head, 185 F.3d 1223, 1237 (11th Cir.1999), that counsel's investigation was reasonable when he did not interview the defendant's sister or father, the latter because the defendant had not lived with him for very long. '[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary.' Strickland [v. Washington,] 466 U.S. [668] at 690-91, 104 S.Ct. [2052] at 2066 [(1984)]. Accord, Davis v. State, 9 So. 3d 539 (Ala.Crim.App.,2008).

information." Strickland v. Washington, 466 U.S. at 691. "The reasonableness of the investigation involves 'not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." ' St. Aubin v. Quarterman, 470 F.3d 1096, 1101 (5th Cir.2006), quoting in part Wiggins, 539 U.S. at 527.

Applicant has failed to show what material counsel was unaware of that was critical to the defense, just that in depth evidence was not presented. However, he has failed to show that counsel's investigation of the family background was unreasonable. With the further information about the family background, the psychiatric diagnosis is similar, the information provided by and to the social expert is similar to what the 2004 defense team was aware either by their own or Ms. Topp's interviews. The assertions otherwise must be denied.

More clearly, 6th Amendment prejudice has not been shown. Applicant has not pointed to any new information or a gamechanging revelation that creates a reasonably probability of a different outcome. Bean v. Calderon, 163 F.3d 1073, 1081-82 (9th Cir.1998). To the contrary, it is virtually the same information. The Applicant has failed to show that further investigation of the family history undermines confidence in the outcome of the case and creates a reasonable probability that the result of the proceeding would be a life sentence.

The Failure to Employ A Clinical Social Worker Does Not Require A New Trial.

It is undisputed that defense counsel in 2004 did not retain a clinical social worker such as Jan Vogelsang in 2002-2004. Although the decision not to retain a social worker is not reflected in the record due to counsel's death, Respondent submits that the failure does not amount to deficient performance or prejudice under Applicant's argument.

As to deficient performance, Applicant appears to assert that the retention of a social

worker is required in all capital cases. His reliance upon the ABA Standards notwithstanding, the 6th Amendment does not require the retention of any particular expert in every case. See Durr v. Mitchell, 487 F.2d 423 (6th Cir. 2007) (no requirement to employ social worker and no prejudice for failure to do so. Similarly in Wiggins, the Court did not hold that there was an error in retaining a social worker, but the it was not a reasonable investigation to follow up on leads that would have lead to a mental health issue. Cf, Council v. State, 380 S.C. 159, 670 S.E>2d 356 (2007) (counsel ineffective based upon a failure to investigate and present, including retaining a social worker where funds were made available).[39] However, the Court need not address deficient performance where the Applicant has failed to satisfy the prejudice prong.

A review of social worker Vogelsang testimony reveals that it was almost a reading of the reports completed by Ms. Topp in 2004. The Applicant has failed to point to the differences other than she could have presented hearsay testimony to support that Bessie Smith was hospitalized with a alleged attempted suicide and explained that Steve Pilgrim had allegedly had mental health issues as well as a criminal record. The remainder of the focused testimony was known by counsel and reasonably understood by the jury after the testimony of the family and

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[39] This case is decidedly different than the facts in *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004), in which the Court, relying on *Wiggins*, found counsel's investigation was unreasonable. In *Von Dohlen*, the defense psychiatrist at trial opined that the defendant suffered from adjustment reaction disorder. However, upon learning additional records existed, and after having reviewed the additional record in the subsequent PCR action, the psychiatrist testified that his diagnosis would have been "major depressive episodes with severe symptoms of anxiety and possible prepsychotic features." *Von Dohlen*, 360 S.C. at 605, 602 S.E.2d at 741. Von Dohlen contended in his PCR action that trial counsel "fail[ed] to adequately prepare and present evidence in the penalty phase of the trial that he suffered from severe, chronic depression, a major mental illness, at the time of the murder." 360 S.C. at 606, 602 S.E.2d at 742. This Court agreed finding that the medical records that affected the defense expert's opinion were available at the time of trial but not provided to him.

Dr. Melikian. Lindsey was raised by his mother and an absent father in a poor family. The Applicant has failed to pinpoint what difference any of the information Ms. Vogelsang laboriously testified about would have impact upon a jury in a manner that would undermine confidence in the verdict under Strickland.

Respondent submits the Applicant failed to prove that there is a reasonable probability that the jury would have concluded that "the balance of aggravating and mitigating circumstances did not warrant death." See Strickland, 466 U.S. at 695, 104 S.Ct. 2052. See, e.g., Johnson v. Bell, 344 F.3d 567, 573-74 (6th Cir.2003) (although testimony from family members would have helped to humanize the defendant, the jury could have concluded that he was even more culpable because he had enjoyed a loving family and yet had murdered his wife); Martin v. Mitchell, 280 F.3d 594, 613-14 (6th Cir.2002) (defendant did not show prejudice at the mitigation phase where family members testified about his background and a psychological report was given to the jury); Scott v. Mitchell, 209 F.3d 854, 880-81 (6th Cir.2000) (finding that potential mitigating circumstances were overwhelmingly negated by other evidence about the defendant's background).

Further, as pointed out in the cross-examination, the danger of using a social worker who relies frequently on anecdotal hearsay risks making a difficult case even worse. It would have presented an additional opportunity to focus upon certain errors in her presentation and negative factors related to Lindsey that would make a death sentence even more likely. In the questioning concerning her expertise in child custody matters, she admitted that a person with the characteristics of Lindsey should not have been allowed to have visitation without court supervision, if at all, even though he had to be reminded that there was evidence that Lindsey had

feed beer to his baby son in a baby bottle. PCR Tr, 563. See ROA 1820 (Lindsey gave son a beer in a baby bottle). PCR Tr. 565, ll. 7-20. She was inconsistent on what family members - uncles or cousins - he was running drugs. PCR Tr. 578. She also reiterated Lindsey had a record of violence, not only toward Nell, but toward other females, including those he claimed to love. PCR Tr. 589. In confirming that his risk factors made it a high risk that he would end up committing the very act he committed, she also admitted that the risk factors she found are not treated in the prison system. PCR Tr. 593-94.

"To assess the probability [of a different outcome under Strickland], we consider the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding-and reweigh it against the evidence in aggravation." Sears v. Upton, --- U.S. ---, 130 S.Ct. 3259, 3266, 177 L.Ed.2d 1025 (2010). (finding that a proper prejudice analysis must take into account the newly uncovered mitigating evidence, along with the mitigation evidence introduced during the defendant's penalty phase trial, to assess whether there is a reasonable probability that the defendant "would have received a different sentence after a constitutionally sufficient mitigation investigation"). The United States Supreme Court has stated that there "is no prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker ...." Id. at 3266.

Here, the sentencing profile was not altered by the additional testimony of Ms. Vogelsang. Although she presented a social history of known poverty and lack of a father-figure - known to the sentencing jury, she also confirmed that he had become a controlling and violent person. Against the trial backdrop including the evidence in aggravation, as well as the family mitigation the jury actually heard, the burden of proof has not been met by Applicant. The

allegations must be denied.

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

- **Failed to elicit testimony from EMS worker - Joseph Stewart and Vincent Bell - regarding Lindsey's desire to commit suicide after Nell's death.**
- **Failed to interview EMS workers to determine what info and testimony they could provide**
- **Failed to prepare EMS workers to testify in penalty phase.**
- **Failed to ask appropriate questions to elicit admissible info about Applicant's state of mind.**

Memorandum 53-54.

In his eighth argument, he contends that defense counsel failed to present the testimony of Vincent Bell, an EMS worker who treated Marion Lindsey to give the jury a better idea as to Lindsey's state of mind at the time of the crime. He contends that it would have resulted in a different outcome of verdict. Respondent submits that he has failed to show either deficient performance or prejudice. Respondent submits that the 2004 jury was given similar information. Deficiency and prejudice under Strickland has not been shown.

It is undisputed that the defense was aware of Vincent Bell, as well as Susan Horton and Joseph Stewart as the paramedics who arrived at the scene. They had included them on their listing and summary of state witnesses. State Exhibit 9. 277-279. Counsel had also presented evidence through Dr. Melikian that Lindsey had planned to commit suicide that day shot himself after the incident and told the EMS to let him die. ROA 2013. The hospital records confirmed that he had a head wound. ROA 2013-2014. In the guilt phase of the trial, Officer Godfrey denied that he had shot Lindsey in the head. ROA 1577. Defense counsel Doug Brennan called Jason

Stewart in the guilt phase of the trial as a defense witness.[40] Stewart, an EMS worker, testified at trial, that he arrived on the scene on September 18, 2002 and saw the Applicant with a head wound. Stewart was asked whether Lindsey had said anything to him. ROA 1660-1670. At that point, the state objected that it was a self-serving statement by the defendant and inadmissible. However, the defense was able to present the testimony that Lindsey told him that he shot himself in the head. ROA 1674.

Vincent Bell (Paramedic)

Vincent Bell testified that he was a paramedic at Spartanburg EMS on September 18, 2002 and responded to the Inman Police Department after the shooting. PCR Tr. 97. While he responded to the female, his partner went to Lindsey. When Bell went to Lindsey he was conscious and he was asked questions about what happened. Lindsey initially stated he shot himself and in a follow up question stated he shot himself, let me die, and then said "I shot myself and then I shot my wife."[41] PCR Tr. 99. Bell described Lindsey as not cooperative while they worked on his injuries, PCR Tr. 99. While on route, Bell again asked him what happened and he said "I shot myself and then I shot my wife." When Bell asked why, Lindsey then responded "his wife was fooling around with somebody." PCR Tr. 99-100.

On cross-examination, Bell confirmed that he had given a written statement to the police. (State Exhibit 1). In reviewing the statement Bell confirmed and corrected that Lindsey said "I shot my wife and I shot myself in the head", reversing the order of the shots. Bell confirmed that

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[40]Counsel Brannon testified that he interviewed paramedic Jason Stewart prior to trial. PCR 61. He stated that he interviewed him because he wanted to develop that Lindsey had tried to kill himself by shooting himself. PCR 67.

[41] This version of the incident is inconsistent with the trial evidence.

Lindsey did not indicate that he made any reference to his children as a reason for the shooting, but only that he shot her because she was fooling around with another man. PCR Tr. 103.

Bell stated he was subpoenaed for the trial but did not testify. However, he did not recall speaking with anyone at the trial. PCR Tr. 104.

ANALYSIS

The petitioner has failed to show deficient performance where the 2004 jury was told that Lindsey had shot himself in the head, that the police had not shot Lindsey in the head, that an EMS worker (Stewart) who arrived at the scene was told by Lindsey that he shot himself in the head and that Dr. Melikian stated that Lindsey told her that he shot himself in the head and told an EMS worker to let him die. The only difference in including Bell's testimony is that he was the worker that Lindsey said let him die. It is evident that the defense (as well as the jury) knew the existence of the paramedics, knew that Lindsey had shot himself and knew that he had told the paramedics that he had shot himself and knew that he had told the paramedics initially to let him die. The only omission was the failure to put up the paramedic who heard him say the let him die comment. This was clearly a strategic decision on counsel's part as to how to present the witnesses and which witness to present. Although the Applicant may claim that they did not interview Vincent Bell, it is uncontested that they were aware of the information.

Even it the Court would conclude it was deficient, Prejudice cannot be shown. Similar information was given to the jury within both the guilt and sentencing phase. Further, the comment was used by Dr. Melikian in her assessment of depression that she gave the jury. The "let me die" after a person had shot himself in the head fails to suggest how the failure of the additional witness would have the effect to have undermined confidence in the death verdict

under the standards of prejudice set out in Strickland. They had heard similar evidence. He has failed in his burden of proof. Accord, Wong v. Belmontes, supra. Furthermore, "in order to establish prejudice, the new evidence that a habeas petitioner presents must differ in a substantial way-in strength and subject matter-from the evidence actually presented at sentencing." Hill v. Mitchell, 400 F.3d 308, 319 (6th Cir.2005). The witness of the "let me die" comment he now offers does not meet this test, but is cumulative, albeit somewhat more detailed. The new evidence does not differ in subject matter-much less "in a substantial way"-from the evidence already presented at sentencing. It covers the exact same subject. Certainly this new evidence cannot be described as "shocking, disheartening, and utterly disturbing," the kind of evidence that courts have held would generally support a finding of prejudice warranting habeas relief. See Beuke v. Houk, 537 F.3d 618, 646 (6th Cir.2008). The Applicant fails to explain how such evidence, had it been presented, would have done anything to change the jury's perception of Lindsey's moral culpability or mental state for such a brutal and horrific crime. See Jells v. Mitchell, 538 F.3d 478, 498 (6th Cir.2008) ("Prejudice is established where, taken as a whole, the available mitigating evidence might well have influenced [the sentencer's] appraisal of [the petitioner's] moral culpability."). Relief must be denied.

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

- Failed to commit sufficient time to perform adequate investigation in mitigation
  - Failed to assemble complete defense team until one month prior to trial.
  - Failed to perform investigation of Lindsey's life history, family history until 2 months prior to trial
    - first half of investigation done w/o mitigation investigator
    - investigation lasted only 8 weeks.
  - Failed to spend sufficient time interviewing witness to determine beneficial testimony
  - Failed to spend sufficient time preparing witnesses to testify to allow a clear, logically structured and easily understood presentation.

Memo, p. 54-58.

In his ninth allegation, he contends that counsel spent insufficient time in preparation for the trial and sentencing proceedings. In the argument, he merely states that they failed to devote adequate time for preparation for the mitigation phase of the trial. Without designating any necessary item of evidence that the "insufficient time" suggested, he claims it the result of the proceeding would have been different. Within his argument, he stated that studies reported that the average time spent by defense lawyers in capital cases was1889 hours per case and normally 12 times more time spent in a capital case than a normal case. The Applicant solely relies upon the ABA Guidelines, § 10.7 and the comments concerning investigation and § 11.4.1. He also relies upon Wiggins v. Smith, supra , as citing to the ABA Guidelines as appropriate guides on whether counsel provided effective assistance of counsel.

Respondent submits that counsel performed a reasonable investigation into mitigation in this case. Respondent incorporates by reference the summaries of witness testimony from both the trial and PCR hearing set out in argument 8, infra. Respondent assumes that this claim only concerns time spent on the investigation, since he does not assert any particular evidence that was not disclosed to them from the investigation the 2004 defense team did that he now asserts was deficient.

Under the Applicant's assertion the ABA guidelines are not guides, but requirements for capital defense counsel. This assertion, if accepted sets an almost impossibly high bar for defense counsel in capital cases. Defense counsel would now be required "to locate and interview the client's family members ... and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole

officers, and others," Van Hook v. Anderson, 535 F.3d 458, 463 (6th Cir.2008) (quoting the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, ¶10.7, at 83); he must interview them long enough so that those interviews can be characterized as "extensive" and "in-depth," op. at 776; every conceivable family member must be contacted, no matter that defense counsel has spoken with the defendant, his wife, mother, father, brother, sister, aunt, and cousin (along with several non-family members), op. at 778-81; and he must do all this even if he reasonably believes (based on the trial court's rulings and his own reasonable interpretation of state law) that the introduction of any evidence regarding the defendant's family background could open the door to truly disastrous rebuttal evidence by the prosecution. Nothing in Strickland or its progeny requires defense counsel to go to such extreme lengths in order to meet the (relatively low) threshold of "reasonably effective assistance." This assertion was reversed in Bobby v. Van Hook, supra., by the U.S. Supreme Court.

As stated previously, the Applicant has ignored what the 2004 defense team actually did in making his assertion and reliance upon the ABA Guidelines. What the defense team did during the period of representation:

1. Received medical history including Lindsey's ER records from 1973-1992 involving his birth records (1973) , kerosene ingestion (1975), fractured elbow(1981), tylenol overdose (including Psychiatric Ward) (1988), car wreck (1989), motorcycle wreck (1989), football injury (1990), and car wreck. (1992).
2. Received Spartanburg Regional Medical Center Records from 2002 -2004 concerning the incident and other matters.
3. FAMILY and Social History: Interviewed Mother and other family members prior

to and during trial. Received information concerning poverty, domestic violence and neighborhood from Applicant and family. Interviewed Lindsey who gave an extensive family history about the family and his own history. Respondent's Exhibits 2, 2, 4.

4. Educational History - received school records.

5. Job History - Learned from defendant of his employment history through interviews with social worker and mental health expert, as well as family members. Social Worker prepared an extensive written report from her interviews with Lindsey and mother. State Exhibit 2 (Lindsey Summary of His Life); State Exhibit 3 (Lindsey's Summary of His Mother's Life); State Exhibit 4 (Summary of Virginia Lindsey's Background Interview).

6. Prior Adult Prison and Jail Records - Acquired SCDC records, including disciplinary records from 1994 incident after 1996 plea and received jail records from current incident in 2004 until trial.

In addition,

1. Retained an experience mitigation investigator to assist in investigation two months before the trial.

2. Retained a psychiatrist who was able to render an opinion of mental illness, particularly depression used in mitigation.

3. Received opinion from retained mental health experts (Dr. Brawley and Dr. Melikian) to challenge the 2003 state examiner opinion of malingering.

4. Met with Applicant on numerous occasions at jail.

5. Had assistance of third lawyer who prepared extensive summaries of crime scene reports, prior prison history, prior criminal history, and summarized state discovery reviewed.

Further, counsel received the discovery from the state concerning the particular crime and other crimes involving Lindsey. See State Exhibits 9, 10, 11 (PCR 279, 288).

As Applicant concedes by his claim, this is not a case where no investigation was done. Rather, absent Mr. Bartosh's testimony, it appears that the bulk of the preparation was done two months prior to the trial with the retention of the psychologist, psychiatrist and mitigation investigator in that period.

Trial "counsel have a duty to make reasonable investigations or to make a reasonable decision that makes investigations unnecessary." Strickland , at 691, 104 S.Ct. 2052. "In assessing counsel's investigation, [a court] must conduct an objective review of their performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." *Wiggins v. Smith,* 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). "In assessing counsel's performance in this context, we look to how counsel prepared for sentencing, what mitigating evidence counsel accumulated, what additional leads counsel had, and what results counsel could have reasonably expected from those leads." *Blanton v. Quarterman,* 543 F.3d 230, 236 (5th Cir.2008).

A court must consider "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins,* 539 U.S. at 527, 123 S.Ct. 2527. The Supreme Court has held that "investigation into

mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence." *Id.* at 524, 123 S.Ct. 2527. However, "there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." *Bobby v. Van Hook,* —U.S. —, 130 S.Ct. 13, 19, 175 L.Ed.2d 255 (2009). "[C]ounsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052 (emphasis added).

The amount of time trial counsel spent preparing for trial is not dispositive to claims of ineffective assistance of counsel. See, e.g., Hopkinson v. Shillinger, 866 F.2d 1185, 1217 (10th Cir.1989) (defendant must show specific errors, and cannot prevail because of limited time attorney spent on case) (citing United States v. Cronic, 466 U.S. 648, 666, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)), overruled on other grounds by Sawyer v. Smith, 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990); Owens v. Guida, 549 F.3d 399, 408 (C.A.6 (Tenn.),2008). Further, "[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation." Nields v. Bradshaw, 482 F.3d 442, 454 (6th Cir.2007).

In this allegation, the Applicant has merely asserted a general claim that counsel must meet the checklist that he claims the A.B.A. has established. While it appears that counsel did not retain a mitigation investigator under months before the trial, he has not proven that no mitigation investigation was done. He has failed to show that the investigation was unreasonable. He failed to prove either deficiency or prejudice based on his "time spent" argument.

X. Ineffective Assistance of Counsel - Statutory Aggravating Factors

- Failed to argue against statutory aggravating factors alleged by state.

- Counsel did address aggravators, it was cursory and failed to present arguments against application to Lindsey

MEMO , p. 58-60.

In his tenth argument - raised for the first time in the Applicant's post-hearing memorandum, contends that counsel was ineffective in failing to argue against the sole statutory mitigating factor and did not address the aggravators. In the pleading, while conceding that counsel did argue against the applicability of the sole aggravating factor, he contends that his attempt to persuade the jury fell below the level required but does not specify what counsel failed to do. Memo. 58-59. He asserted that in general terms, why the factor does not support a death sentence but failed to assert what the particular omission made by counsel in this area.

The Underlying Merits of the Claim Was Addressed in the Direct Appeal

The State sought the death penalty based upon S.C. Code Ann. § 16-3-20(C)(a)(3) (Supp. 1998). This aggravating circumstance authorizes the imposition of a death sentence where a defendant

> ... by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

The issue was raised in the direct appeal as a directed verdict issue. The South Carolina Supreme Court addressed the merits of the sufficiency of the evidence issue surrounding this factor in the following manner:

> 3. Directed verdict on aggravating circumstance
>
> Appellant moved for a directed verdict on the statutory aggravator provided in § 16-3-20(C)(a)(3) which states:
>
> That the offender by his act of murder knowingly created a great

> risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

Appellant contends that because he shot Victim at close range and no other person was endangered, this aggravator should not apply as a matter of law.

> The trial judge should submit a statutory aggravator to the jury if there is any evidence, direct or circumstantial, to support it. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000). Here, the police department parking lot is clearly a public place and a gun is a weapon hazardous to more than one person. Id. (shooting in church parking lot). Further, appellant knew there were other occupants in the car with Victim when he shot multiple times into the confined space of the car's interior-conduct a reasonable person would know presents a great risk of harm to more than one person. Appellant also pointed his gun at Officer Godfrey in the parking lot. This evidence supports the submission of the statutory aggravator to the jury.
>
> Ignoring the conclusive evidence of the proximity of the two children in the vehicle's backseat with victim Ruby Nell Lindsey, the tinted glass preventing clear recognition, and the location of the bullet hole near the middle of car's backseat where KieraP. head would have been had she not leaned away, Lindsey claims that the statutory aggravating factor was inapplicable because the shooting was "at close range" and he did not mean to harm anyone other than his wife. *Initial Brief of Appellant*, p. 27. At no time does he ever discuss the underlying factual basis of the state's theory of the case of aggravation – the great risk of death to those within the vehicle and particularly Kiera, and instead makes reference to the fact that after shooting into the vehicle, he focuses upon a collateral fact that Lindsey did not shoot the officer when he could have done so. As shown by the evidence set out in Argument III, the evidence conclusively supports the "great risk of death" aggravator and the trial judge had a duty to deny the directed verdict motion. To do otherwise would have been an error of law.

State v. Lindsey, supra.

How the Issue Was Presented At Trial

At the conclusion of the State's penalty phase presentation, counsel Bartosh moved for a directed verdict on the "great risk of death" statutory aggravator. ROA 1972. He initially relied upon a Georgia case, Pope v. State, 256 Ga. 195, 345 S.E.2d 831, 845 (1986), to apparently

contend that shooting someone at fairly close range does not, by itself, create a great risk of death to more than one person because others are in the vicinity. ROA 1974-75. Bartosh asserted that here you had someone firing at a fairly short distance at one person, it must be more than likelihood. ROA 1975-76. Counsel also apparently referred to an unpublished Fourth Circuit opinion, Nolden v. U.S., 856 F.2d 187 (4th Cir. 1988)(unpublished), in support of his position that a .38 caliber handgun (as opposed to an automatic weapon) does not fit the "weapon normally dangerous to the lives of more than one person" definition. ROA 1976-77.

Solicitor Gowdy relied upon State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) in opposition to the motion. ROA 1977. He asserted Locklair stood for the proposition that the handgun satisfied the "weapon" definition. The prosecutor asserted that the parking lot of the Inman Police Station is clearly a "public place." ROA 1977. He noted that in Locklair, the attempted firing with the safety on satisfied the factor. ROA p. 1977, ll. 21-25.

Solicitor Gowdy argued that the facts in Lindsey were much more egregious than Locklair. Here, he noted, children were in the car, one leaning forward and one asleep. In addition, with the tinted windows, Lindsey fired two shots from the back of the victim's head and "then he walked around and fired two more times directly in the direction of the two children." ROA p. 1978, ll. 6-8. Gowdy noted that one of the bullets lodged in the trunk. He noted further that the autopsy photographs revealed one of the bullets that struck the victim had passed through both sides of her skull, lodging in her skin, with a possibility of clearing the skin and striking the children. ROA p. 1978, ll. 9-16.

In recognizing that under Locklair there is no requirement that bystanders be injured, he created a "great risk" where one did miss, which was sufficient. In addition, he added the fact

that Officer Godfrey testified that after the shooting, Lindsey pointed the gun at him in the public place. Gowdy concluded that "but for the fact that her [Kiera's] head was laying either on the front, car seat or on her aunt's [victim] shoulder, we very well could have two homicides. ROA p. 1979, ll. 4-9.

Judge Few rejected the defense motion with apparent ease:

> THE COURT: The facts of the Georgia case seem to me to be a good bit different. This case is pretty simple to me. The evidence is that on the two occasions that Mr. Lindsey apparently saw Ms. Nesbitt's car, he was unable to tell that Ms., that his wife was in there because of the tint in the windows. Once when he passed them and they were driving through Spartanburg to Inman. But more importantly as they stopped side-by-side on the street in Inman outside of the house of Mrs. Nesbitt's mother I believe she said.
>
> They were close enough to have a conversation through the window. And yet Mr. Lindsey could not tell that Mrs. Lindsey was in the back seat because of the tinted windows. Nevertheless, he fired shots into the window from two different angles while the vehicle was parked in a public place. And the second time around looking presumably to through the same window that he could not identify her through only minutes before. He fired shots in the direction of two children.
>
> I have seen the bullet hole in the car, in the seat. The bullet hole is in the area that Kiera would have been sitting in. If she had decided in her -- none of us would know how to react to that situation. ...Certainly, a nine-year-old child is not going to have an ability to make a rational calculated decision as to how to best protect herself in the seconds that followed shots being fired into the head of the adult sitting next to her in the back seat. It is very possible that Kiera could have leaned the other way. She might could have leaned toward Nell for protection. And if she had done that, she would be dead. That bullet goes right through the space that she would have leaned into.
>
> If she had not leaned away, from my view of the evidence she probably would have been hit. I've got absolutely no doubt that the facts in this case are sufficient to go to the jury on the aggravating circumstance of creating a great risk of death in a public place using a weapon that is capable of producing death. I did not get the language, I did not quote the statute. But I have no doubt that that is sufficient. Motion is denied.

ROA p. 1980, l. 10 - p. 1981, l. 6.

The solicitor's closing argument paralleled his response and the judge's order on the statutory aggravating factor, also noting that Kiera was cut by the glass and injured physically and psychologically. ROA 2108-2111. Defense counsel Bartosh challenged the credibility of the witnesses statements about Kiera's location in the car, almost claiming that if she was where she said she was, she would now be dead. See, ROA p. 2135, ll. 18-22. He methodically went through the element of "public place," "knowingly" (asserted that Lindsey's depression, cognitive deficits and possible brain damage "a desperate man who isn't thinking about anything"), the great risk to more than one person factor (the bias of the officers and family who testified, the location of the girl and whether the state's theory was credible), and whether the gun satisfied the terms of a device normally hazardous to the lives of more than one person. ROA 2132-2137. Interestingly, the juror requested the testimony of Kiera and Officer Benny Godfrey be replayed, as well as the 911 audiotape. ROA 2164-65.

The jury found the existence of the statutory aggravating circumstance and recommended the death sentence. ROA 2169-2171. Defense counsel Bartosh made a motion for a new trial based upon the alleged failure of the state to satisfy its burden of proof on the statutory aggravating circumstance. ROA p. 2172, ll. 5-12. Judge Few denied the motion. ROA p. 2172, l. 13.

LAW/ANALYSIS

Respondents submits that the evidence conclusively supports the existence of the statutory aggravating factor of "great risk of death" as found as a matter of state law in the direct appeal because the two children in the back seat were unquestionably within a zone of danger as

a result of the four gunshots into the vehicle, particularly when the shooting began through a tinted window at various dangerous angles and by the testimony showed the bullet that exited the neck of the decedent would have struck and killed the child in the middle of the seat, had she not moved to one side.[42] Nothing presented in the state PCR hearing undermines that legal conclusion.

In State v. Locklair, supra. the court found that the "great risk of death" aggravator was properly supported by the evidence. Lindsay attempts to distinguish Locklair by asserting that it was limited to a situation where a murderer continued to try to fire his weapon after he had already shot and killed his girlfriend, albeit with the safety on. In Locklair, the Court held:

> **Locklair argues that this was a simple case of a victim being shot at close range, not the type of incident contemplated by the statute.** However, the trial testimony does not support this assertion. According to Nichols' testimony, Locklair put more than one person at great risk of danger because he attempted to fire the gun several times, but the safety was on. After he shot Bridges, Locklair pointed the gun at Williams' home where there were children inside. Nichols was forced to tackle Locklair to stop him and Robert Williams, the victim's stepfather, had to struggle with Locklair to retrieve the gun. According to the trial testimony, the gun was dropped several times during the struggle with shots being fired in different directions. Also, at the very least, Nichols and Robert Williams, were placed in great danger as they attempted to stop Locklair from firing and retrieve the gun. **Finally, Locklair put many people at great risk of danger. Nichols, Robert William, Betty Williams, Dewey Morgan, and several children playing in the street were all within firing range when the shooting occurred.**

Id., 341 S.C. at 366, 534 S.E.2d at 427. [43]

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[42] Respondents would also note the summary of the 911 tape, including the children's screams as supportive of the knowledge of the existence of the children in the backseat. See Exhibit 21 (tape). See also, ROA. 1743-45 (opening by Deputy Solicitor Willingham).

[43] In Locklair, the Court also noted that other jurisdictions have held that a gun fired in the direction of two persons satisfies the similar statutory aggravator citing State (N. C.) v. Moose, 310 N.C. 482, 313 S.E.2d 507 (1984); Jones v. Georgia, 243 Ga. 820, 256 S.E.2d 907 (1979); Moran v. Nevada, 103 Nev. 138, 734 P.2d 712 (1987). Id., at n. 4.

Lindsey contended that Locklair is dissimilar from his case. While not completely similar, as Solicitor Gowdy noted, the instant case is even more egregious and stronger on the actual risk of death shown toward the children in the back seat who were within the zone of danger and death from the actually fired bullets, whose lives were spared only due to fortuity of a leaning motion (or lack of movement) at the instant of the firing in a close area.

Conversely, on appeal, he attempted to suggest that the "great risk of death" only exists in a large, crowded setting such as a shopping mall, citing State v. Ivey, 325 S.C. 137, 481 S.E.2d 12 (1997). In Ivey, the defendant fired at a police officer in a shopping mall. The jury found *inter alia* the existence of the "great risk of death" aggravator. However, the Court's ruling did not address the sufficiency of the evidence supporting the aggravator or construe the statute. Nothing in Ivey suggests that the aggravator only applies in the setting suggested by the Applicant.

Wholly absent from the Applicant's argument on this issue is the undisputed fact that two children were seated in the back seat with the victim in close proximity. While the Applicant notes that the victim was shot with four shots, he makes no mention, conspicuously, of the fact of the bullet that grazed the victim and the bullet that entered the center of the seat where Kiera was sitting. Remarkably, the entire basis of the trial judge's ruling cannot vanish by ignorance. The reason for this failing is obvious - to admit its existence was to admit the existence of the aggravating factor. As the defense counsel cogently acknowledged in its closing, if the witness was correct in the statement of her location, she should be dead. That was the risk of her proximity to Mrs. Lindsey - revealed by their screams on the 911 call, Lindsey was not ignorant of their presence nor their great risk of death while they were in the zone of danger. Accord,

Jones v. State, 128 P. 3d 521 (Okla. 2006) (evidence showed defendant killed victim while victim was sitting in vehicle with his sister and two young daughters and defendant knew of their presence when he shot victim); State v. Burns, 979 S.W.2d 276 (Tenn. 1998) (evidence supported aggravator of "great risk of death to two or more people" where defendant shot inside car in which three people were sitting, killing one and wounding another then fired shots at another man who left car, which directly imperiled four men playing basketball nearby).

Since there is evidence to support the existence of the statutory aggravating factor, the trial court correctly denied the motion for a directed verdict as to the aggravating factor. Here, the evidence existed that Lindsey "by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person." It occurred in the Inman Police Department - a public place. The weapon - a .38 revolver - was the type of weapon recognized in Locklair as being hazardous to the lives of more than one person. Lindsey was aware that there was more than one person in the vehicle at the time of his shooting. And finally, the manner of his shooting, through tinted windows and then at various angles put "more than one person at great risk of death" the children in the back seat, would fortuitous positioning saved their lives from the bullets which struck Nell Lindsey.

Trial Counsel Was Not Deficient.

Ineffective assistance of counsel claims are not fungible but instead are highly fact-dependent. Hemmerle v.Schriro, 495 F.3d 1069, 1075 (9th Cir. 2007). Conclusory allegations not supported by specifics do not warrant relief. Jones v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995); James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994); U.S. v. Popoola, 881 F.2d 811, 813 (9th Cir.

1989). A conclusory allegation of ineffectiveness raises no constitutional issue because a petitioner must show how counsel was deficient and how there was prejudice. Miller v. Johnson, 200 F.3d 274, 282 (5th Cir. 2000). Vague and speculative assertions are deficient. U.S. v. Taylor, 802 F.2d 1108, 1119 (9th Cir. 1986), citing U.S. v. Rogers, 769 F.2d 1418, 1425 (9th Cir. 1985). And in order to prevail on an ineffectiveness claim, a petitioner must make a sufficient factual showing to substantiate the claims. U.S. v. Schaflander, 743 F.2d 714 (9th Cir. 1984).

Counsel Bartosh acted reasonably in his argument, legal and factual, against the applicability of the statutory aggravating factor. Applicant has not asserted, in any manner, what counsel could or should have done differently concerning the particular aggravating factor. Strickland v. Washington, 466 U.S. 668 (1984) is the foundation for the presumed effectiveness of counsel's conduct, reciting that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" 466 U.S. at p. 689; 104 S.Ct. at p. 2065. In determining whether counsel's actions are reasonable, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance." Against that presumption -without any contrary argument - his claim must fail.

STRICKLAND PREJUDICE NOT PROVED

Further, the South Carolina Supreme Court addressed the applicability of the particular statutory factor in the direct appeal. Current counsel has not pointed out any errors or flaws in that state law determination of the "great risk" factor. He only asserts that counsel was unsuccessful in arguing its inapplicability. The Applicant has failed to assert any act or omission

on counsel's part in this allegation - just a claimed statement of lack of success in the motion. The South Carolina Supreme Court concluded that there was evidence to support the statutory aggravating factor. Counsel argued against its existence before the judge. He argued before the jury to give Lindsey the benefit of the doubt on whether the element of knowingly - based upon Lindsey's depression, cognitive deficient and brain damage, the element of great risk of death to more than one person - when the evidence suggested that if the little girl was where the state now asserts that she would be dead and therefore a reasonable doubt whether she was at risk, and whether the weapon satisfied the terms of a device that would normally be hazardous to the lives of more than one person. ROA 2134-36. He requested that the doubt be resolved in the favor of Lindsey. ROA 2133-2137.

Since the Applicant has not specific what counsel should have done, contrasted to what he did, Strickland prejudice clearly has not been shown. As the South Carolina Supreme Court stated in rejecting a proportionality review claim: "Applicant contends the imposition of death in his case is disproportionate to other death penalty cases because his case involves only a single victim and resulted from a domestic dispute. See S.C.Code Ann. § 16-3-25 (2003) (proportionality review).We find no support for Appellant's attempt to reduce this crime to simply "a domestic dispute." Appellant's culpability is not lessened by the fact that the victim was his wife. There is no evidence of any immediate dispute leading up to the murder, much less any provocation on Victim's part. In fact, appellant intentionally violated a court order forbidding contact with Victim." State v. Lindsey, supra. His Sixth Amendment allegation is without merit because it lacked specificity and neither prong under Strickland has been proved by the

Applicant.[44]

CONCLUSION

Each and every allegation in the Application, as amended not hereinabove either expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be denied.

Respectfully submitted,

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Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
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Columbia, SC 29211
(803) 734-3601

By: _____
ATTORNEYS FOR RESPONDENT

April 1, 2011.

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[44]Respondent assumed that the Applicant has abandoned claims of ineffective assistance of counsel set out in the Amended Application concerning issues related to evidence of visitation issues and evidence of seeking legal assistance for family court. If this matter is still being pursued, Respondent incorporates by reference its Amended Return , p. 35-39.

CERTIFICATE OF SERVICE

I, **Donald J. Zelenka,** hereby certify that I have served the ***Respondent's Post-Hearing Memorandum of Law*** in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

Richard W. Vieth, Esquire
360 E. Henry Street
Spartanburg, SC 29302

David M. Collins, Jr., Esquire
P. O. Box 5722
Spartanburg, SC 29304

This 1st day of April, 2011.

DONALD J. ZELENKA
Assistant Deputy Attorney General

3536

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)

MARION ALEXANDER LINDSEY, #6015) C/A No. 07-CP-42-2848

Applicant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

ORDER OF DISMISSAL

FILED
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SPARTANBURG COUNTY
2011 AUG 12 PM 2:58
M. HOPE BLACKLEY

This matter comes before this Court on the application for state postconviction relief filed on August 14, 2007, as amended August 6, 2009. The initial application was filed by his appointed appellate counsel, Robert M. Dudek, of the South Carolina Office of Appellate Defense. The Respondents made an initial Return and requested under S.C. Rule of Civil Procedure, Rule 12(e), greater particularity and specificity on September 24, 2007. The Applicant, through appointed PCR counsel Richard Vieth and David Collins made an Amended Application for Post-Conviction Relief on August 6, 2009.

The matter was held before the Court on July 19-21, 2010. The Applicant was present and represented by court-appointed counsel Richard Vieth and David Collins. The Respondent was represented by Assistant Deputy Attorney General Donald Zelenka and Assistant Attorney General Al Simon. At the hearing, testimony was received from Douglas Brannon, Dr. Tora

Brawley, Vincent Bell, Lenora Topp, Rod Tullis, James Aiken, Karen Hatcher, Bill Burton; Mrs. Burton, Virginia Lindsey, Bessie Smith, Steve Pilgrim, Tim Sims, Jan Vogelsang, and Dr. Margaret Melikian. At the conclusion of the hearing, post-hearing memorandum were allowed. The Applicant's memorandum was filed October 26, 2010. The Respondent's memorandum was made on April 1, 2011. On May 2, 2011, this Court requested a proposed order in the matter from Respondent and subsequently from Petitioner. This Order of Dismissal follows.

I.

PRIOR PROCEDURAL HISTORY

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

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M. HOPE BLACKLEY

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

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

(1976) as amended (Cum. Supp. 1990).

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

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

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

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

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

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

he raised the following questions presented:

1.

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

2.

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

3.

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

4.

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

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

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

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

(1985) where the juror testified he could impose death as punishment for murder, and his belief was not incompatible with the law as the trial court reasoned?

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

STATEMENT OF THE CASE

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

> Appellant killed his estranged wife, Ruby Nell Lindsey (Victim), on September 18, 2002, in the parking lot of the Inman City Police Department. The jury found a statutory aggravator pursuant to S.C.Code Ann. § 16-3- 20(C)(a)(3) (2003) and appellant was sentenced to death. We affirm.
>
> FACTS
>
> Celeste Nesbitt, a close friend of Victim, was the State's witness-in-chief. On the day of the murder, Celeste gave Victim a ride home from work at about 8:00 p.m. In the car were Celeste's two young daughters, four-year-old Keysha and ten-year-old Kiera, who were in the back seat with Victim--Keysha in a car seat behind the front passenger seat, Kiera in the middle, and Victim behind the driver's seat. Celeste was driving and Celeste's mother was in the front passenger seat. The car was a Mercury sedan with dark tinted rear windows.
>
> Victim was separated from appellant at the time and was staying with her mother. As they neared Victim's mother's house, they saw appellant in his girlfriend's car. Celeste pulled into the yard and turned the car around so appellant was facing them in a head-on direction. Celeste rolled down her window and greeted him. Appellant asked her if she had seen Victim. Because Celeste knew appellant had threatened to kill Victim, she lied and answered that she had not seen her in three days.
>
> Celeste's youngest daughter, Keysha, leaned forward in her car seat and greeted appellant. Appellant then asked who else was in the back seat. Celeste told him Kiera, her older daughter, was lying on the back seat asleep. Because the windows were tinted, appellant asked Celeste to roll down the window so he could see. Celeste answered that the window was broken. When appellant said he would get out to look, Celeste sped off.

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

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

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

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

Other evidence indicated that during their marriage, appellant struck Victim several times in front of witnesses. In December 2001, he beat her in a restaurant parking lot and left the scene before the responding officer could arrest him. On September 17, 2002, the night before the murder, appellant was arrested on a warrant for criminal domestic violence arising from this incident. He was released on a $1,000 bond; one of the conditions of bond was that he have no contact with Victim.

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

II. ALLEGATIONS

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

I. Ineffective assistance of counsel in violation of the Sixth Amendment to the

United States Constitution for the reasons below and in the attachment to this Application. 10 (A).

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

2. Defense counsel was ineffective for failing to properly argue the "great risk of danger" aggravating circumstance did not apply to petitioner's case since the shot was at close range and it was clear the decedent was the only intended victim. This failure by trial counsel constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. This was also an Eighth Amendment violation since petitioner was wrongfully placed in the class of "death eligible" defendants. 10 (c). (FAILURE TO ADEQUATELY ARGUE INAPPLICABILITY OF "GREAT RISK OF DEATH" AGGRAVATOR).

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

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

5. Defense counsel was ineffective for failing to offer evidence that he was steadily employed to counter the State's evidence that he was a drug dealer. The failure to offer this evidence constituted ineffective assistance of counsel in violation to the Sixth Amendment to the United States Constitution. 10(f). (EVIDENCE IN MITIGATION OF STEADY

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EMPLOYMENT).

6. Defense counsel was ineffective for failing to offer evidence appellant was already lying on the ground when he was shot by the police officer. Allowing the state to distort the crime scene evidence to appellant's prejudice constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. 10(g). (FAILURE TO OFFER EVIDENCE THAT LINDSEY ON GROUND WHEN SHOT BY POLICE).

7. Defense counsel was ineffective in violation of the Sixth and Eighth Amendments to the United States Constitution, by virtue its inadequate *voir dire*, and the failure to challenge for cause certain members of the jury that should not have remained on the jury. A death prone jury was consequently selected. 10(h). (INADEQUATE VOIR DIRE AND FAILURE TO CHALLENGE FOR CAUSE UNNAMED JURORS).

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

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

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

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

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

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

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

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

Amended Application, ¶ 10, 11, page 3.

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

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

MEMO , p. 43

2. **Ineffective Assistance of Counsel- CHALLENGE EVIDENCE OF MALINGERING**

   a. Failed to present issue of malingering to jury.
      i. Failed to call Dr. Brawley in sentencing .
         (1) claims testimony could have refuted allegations that he was malingering when examined by court examiners and Dr. Melikian.

MEMO , p. 46-47.

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

MEMO, p. 47

4. **Ineffective Assistance of Counsel - FAILURE TO ADEQUATELY PRESENT DR. MELIKIAN**
   a. Failed to Provide Sufficient Info to Dr. Melikian to allow evaluation of Lindsey
      i. Failed to obtain and provide historical info and records of family members necessary for proper evaluation.
      ii. Failed to seek continuance after Melikian informed them she needed

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additional time

iii. Failed to elicit from Melikian statutory mitigating factors during testimony.

MEMO, p. 49

5. **Ineffective Assistance of Counsel - FAMILY HISTORY OF MENTAL ILLNESS**
   a. Failed to present to jury family history of mental illness
      i. Failed to adequately interview family members to discover extent of mental illness.
      ii. Failed to prepare family to present extent and nature of illness within family.
      iii. Failed to adequately argue to court the admissibility of evidence of family mental illness.
      iv. Failed to adequately preserve the record relating to family Mental Illness in support of attempt to present evidence and failing to offer proffer.

MEMO, p. 50

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

MEMO, . 51-52.

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7. **Ineffective Assistance of Counsel - FAILURE TO RETAIN SOCIAL HISTORIAN/WORKER**
   a. Failed to retain mitigation expert regarding psycho-social history of Lindsey and relevance to jury determination .

MEMO , p. 52-53.

8. **Ineffective Assistance of Counsel - EMS WORKERS TESTIMONY ABOUT DESIRE FOR SUICIDE.**
   a. Failed to elicit testimony from EMS worker - Joseph Stewart and Vincent Bell - regarding Lindsey's desire to commit suicide after Nell's death.
      i. Failed to interview EMS workers to determine what info and testimony they could provide
      ii. Failed to prepare EMS workers to testify in penalty phase.
      iii. Failed to ask appropriate questions to elicit admissible info about Applicant's state of mind
      iv. Failed to adequately argue testimony of EMS workers related to Lindsey's

words, actions and state of mind after shooting was admissible

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

MEMO , p. 53.

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

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

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

ii. Failed to perform investigation of Lindsey's life history, family history until 2 months prior to trial

(1) first half of investigation done w/o mitigation investigator

(2) investigation lasted only 8 weeks.

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

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

MEMO, p. 54

10. **Ineffective Assistance of Counsel - Statutory Aggravating Factors**

a. Failed to argue against statutory aggravating factors alleged by state.

i. Counsel did address aggravators, it was cursory and failed to present arguments against application to Lindsey

MEMO , p. 58-60.

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III.

STANDARDS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

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

by the Sixth Amendment.'" Id., at 687.

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

An attorney can avoid activities that appear "distractive from more important duties." Bobby v. Van Hook, 558 U. S. ___, ___ (2009) (per curiam) (slip op., at 8). Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. See Knowles v. Mirzayance, 556 U. S. ___, ___ (2009) (slip op., at 14–15); Rompilla v. Beard, 545 U. S. 374, 383 (2005); Wiggins v. Smith, 539 U. S. 510, 525 (2003); Strickland, 466 U. S., at 699.

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Although courts may not indulge " post-hoc rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland,

however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U. S., at 688. Harrington v. Richter, _ U.S. _ (Jan. 19, 2011). See also Cullen v. Pinholster, 131 S.Ct. 1388, at 1407 (2011) (citing with approval Chief Judge Kozinski's dissenting opinion below in which he stated that the court of appeals was required "to affirmatively entertain the range of possible reasons" that counsel may have had for proceeding as they did).

With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id., at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., at 687. See Harrington v. Richter, _ U.S. _ (Jan. 19, 2011). Stated another way, Petitioner has the burden of showing a reasonable possibility that, but for counsel's deficient performance, the death sentence would not have been imposed. Wong v. Belmontes, ——U.S. ——, 130 S.Ct. 383, 386, 175 L.Ed.2d 328 (2009). For example, where the defendant claims ineffective assistance for failure to file a particular motion, he must "not only demonstrate a likelihood of prevailing on the motion, but also a reasonable probability that the granting of the motion would have resulted in a more favorable outcome." Styers v. Schriro, 547 F.3d 1026, 1030 n. 5 (9th Cir.2008).

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Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U. S. ___, ___ (2010) (slip op., at 14). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland

standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U. S., at 689–690. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id., at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U. S., at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. See Wong v. Belmontes, 558 U. S. ___, ___ (2009) (per curiam) (slip op., at 13); Strickland, 466 U. S., at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id., at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id., at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id., at 693. Harrington, supra.

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Moreover, there may be a significant possibility that, had this highly speculative evidence been given any weight at all, it would have been treated as aggravating rather than mitigating. See Atkins v. Virginia, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In Cullen v.

Pinholster, ——U.S. ——, 131 S.Ct. 1388, —— L.Ed.2d —— (2011), for example, the Supreme Court found that new evidence of an "organic personality syndrome" and "brain damage" was "by no means clearly mitigating, as the jury might have concluded that [the defendant] was simply beyond rehabilitation ." Id. at 1396–97, 1410. The Court concluded that, in light of the ambiguous nature of the brain injury, "[t]here [wa]s no reasonable probability that the additional evidence ... would have changed the jury's verdict." Id. at 1409.

IV. FINDINGS AND CONCLUSIONS

This Court must conclude that the claims, as stated, are insufficient to show entitlement to relief under Strickland v. Washington based upon the entire record before the court. As Strickland and its progeny make clear, assessment of th entire record, including the trial record as well as the record from the collateral proceeding is necessary. As Harrington v. Richter makes clear, counsel is presumed to be competent in making strategic decisions. Here, the assessment and the burden of proof is important because the lead counsel, Michael Bartosh died April 5, 2006 prior to this proceeding. It is evident from each of the attorneys involved in the Lindsey case - Doug Brannon and Karen Quimby Hatcher, that Mr. Bartosh was the primary counsel in the case and he particularly focused his efforts and strategy on the penalty phase of the trial. Each of the 10 specifications of ineffective assistance of counsel address the penalty phase of the trial. In fact, the only relief sought in this action concerns sentencing. As stated in Harrington, "[A]lthough courts may not indulge " post hoc rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects

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trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam)."

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

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

Bobby v. Van Hook, --- U.S. ---, ---, 130 S.Ct. 13, 16, 175 L.Ed.2d 255 (2009) (citations omitted). Accord, *Cox v. McNeil*, 638 F.3d 1356 (11th Cir. 2011) (habeas relief not warranted even if counsel's performance fell short of standards for reasonableness as articulated by American Bar Association guidelines for capital defense work, absent showing that there was reasonable probability that outcome of either his guilt or penalty phase would have been different had his counsel discussed mitigation at greater length with potential jury members). The U.S Supreme Court held the Federal Circuit Court erred in applying 2003 ABA guidelines pertaining to specifics defense counsel should investigate in preparing mitigation evidence, when such guidelines were announced 18 years after the defendant's trial. The Court then reiterated *Strickland*'s emphasis that such bar standards are " 'only guides' to what reasonableness means,

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not its definition." Id., at 17 (quoting Strickland, at 688).[1]

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

WHAT THE JURY HEARD

In the penalty phase, the defense called a series of mitigation witnesses. **Ann Howard,** Special Services Coordinator with the Spartanburg County Mental Health Center testified that she had seen the Applicant on September 8, 2002 and he presented himself as suicidal, crying and very depressed. She opined under a deferred diagnosis and referred him to a psychiatrist, Dr. Freeman Smith. ROA 1984-85. According to his notes, Dr. Freeman put Lindsey on an anti-psychotic drug - Zyphrexa, and was currently on Celexa - and anti-psychotic, a drug for depression - and a mood stabilizer - Abilify. ROA 1988-89. She testified that he is still receiving medication of Celexa, Depakote, and Abilify. ROA 1989.

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

Dr. Margaret Melikian, a forensic psychiatrist retained by the defense [Program

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[1]Petitioner points to the ABA Guidelines to suggest it is per se ineffective assistance of counsel to fail to do as it commands. But ABA Guidelines are not "inexorable commands"; rather, they are " 'only guides' to what reasonableness means, not its definition." Bobby v. Van Hook, --- U.S. ----, ----, 130 S.Ct. 13, 17, 175 L.Ed.2d 255 (2009) (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052) (internal quotations omitted). As the Strickland Court explained, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Id. at 688-89, 104 S.Ct. 2052. Lindsey's counsel were between a rock and a hard place in determining the best way to spare him a death sentence, given the overwhelming evidence of his guilt. See, Post v. Bradshaw 621 F.3d 406, 418 (6th Cir. 2010)

Director of Forensic Psychiatry at M.U.S.C.] testified that she saw Applicant on May 4. She stated that she had reviewed:

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

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

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

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

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

She also opined that Lindsey had a "family history of depression." She reported that he was treated by a psychiatrist after he had an overdose when he was 15 years old. She opined that at the time of the incident, Lindsey appeared to satisfy the diagnostic criteria for depression.

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ROA 2004, l. 23-25. She opined that he suffers from "major depressive disorder." ROA 2005.

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

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

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

As to whether Lindsey would have been operating under the influence of mental or emotional disturbance at the time of the incident, she opined that Lindsey had reported that he had been suicidal for several weeks prior to the incident. He reported that he had weight loss with

decreased appetite, feelings of hopelessness and helplessness and sad mood. She felt that he would meet the criteria for depression at that time. ROA 2008. His depression was recurrent. She opined that the depression was acute as opposed to chronic. ROA 2008.

She opined that he had cognitive deficits. ROA 2009. She reported that the testing at Hall Institute determined that he had well below average IQ and "borderline intellectual functioning" close to mildly retarded range with an IQ of 76. ROA 2009. However, she noted that when Dr. Brawley tested him, the scores were in the 80's although it is still below average.[2] She stated that "I would not have made a diagnosis of borderline intellectual functioning" because he does function better than what his test scores look like. She stated that his intelligence is low, he had trouble in school, but he does have some functioning abilities that she would not say were the basis of worrying or seeing him clinically for decreased intelligence. ROA 2009. She noted that he had problems with verbal fluency, naming words and processing memory. ROA 2009. She opined that in her professional judgement Lindsey had some kind of brain abnormality that causes his low test scores and sudden neurological findings. She concluded that a source of the abnormality could have been from the head trauma or the incident when he injected kerosene when he was an 18/19 month old. ROA 2010. She referred him to a behavioral neurologist after receiving the results from the neuro-psychologist. She also stated that the suicide attempt at age 15 was the result of an overdose of tylenol and other medications.

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Dr. Melikian stated that his neurological problems were chronic. She stated that he had a limited ability to cope with things due to his limited intelligence and by his continuing to have an

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

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

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

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

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

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

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

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

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

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She stated that she did not have his earlier Department of Corrections records when he was serving time for the earlier assault and battery with intent to kill in 1996. ROA 2026-27. She stated that Lindsey had acute periods of depression that he recovered from in between. The State inquired whether he was suffering under depression in 1996 when he shot through the windshield of Stafford Wilkins and was convicted of assault and battery with intent to kill. ROA 2027-28. She stated that she did not have a chronology of his moods for his entire life. ROA 2028. She stated that she relied upon records of his 1988 suicide attempt. ROA 2029-30. She stated that she had reviewed various school records and admitted that they were incorrect in that

some showed he had quit in the 10th grade according to him yet others showed he had either repeated 8th grade three times or seventh grade twice instead. ROA 2032. The state pointed out that Lindsey had lied on his application for employment at BMW that he had graduated from Chapman High School. ROA 2032-33.

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

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

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

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

ROA 2046.

She described Lindsey as a very loving and sweet child. Id. However, she stated that Lindsey inhaled kerosene when he was 18 months old. She described that she was doing dishes and was crawling around the wood heater. She described hearing him scream and saw he had poured kerosene all over his face and down his clothes. She stated that she grabbed him and tried to give him milk and carried him to the rescue squad and he was treated at the hospital for it. ROA 2047. She stated that one month later, Lindsey was run over by a car driven by her brother - Paul Pilgrim - who accidentally backed up over his head which resulted in scars . She stated that he was treated at the hospital that night and returned home that date. ROA 2048.

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

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

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

According to Ms. Lindsey, the Applicant first met Nell Lindsey around 1995. He had been living with a different girlfriend - Stephanie - at that time. She said that Lindsey eventually moved in with Nell and that they had a child July 1995 and a second child in 2002. She described

his relationship with Nell as a little arguing, but never saw violence and around her it was good. She described Nell as being like a daughter to her. She said that they would separate and then go back together several times. She stated that Nell would go to her mother's house during the separations. ROA 2053-54. She said that Lindsey would stay with friends then. Id.

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

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

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

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

At the time of the incident, she thought that they had been separated for a few months. She said that she had attempted to see her grandchildren, but neither her or Marion were allowed to see them. ROA 2057. She said this was for two months before the incident. She said that this made Lindsey upset because his kids had always been with him. She said that she tried calling Nell and learned the phone was blocked 4 days before the incident. ROA 2058. She said that this had an effect on him because all he wanted was to see his kids. Id. He told her that if he could not

get his family back that he could not live any longer. She said that last time she saw Lindsey was three days before the incident. She noted that he had lost weight and appeared worried and upset and was very depressed. ROA 2059.

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

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

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

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

Burton described Lindsey as a kid looking for attention and an adult to look up to. He said he never saw violence in Lindsey from either him or his brothers. He said he knew him for

13 years . He said they came over to his house to fish over 20 times and would always call his mother and seek permission. ROA 2065. He described Lindsey as "the picture of politeness' toward Burton's parents. ROA 2065.

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

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

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

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

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Chris Wilkins , a friend like a brother to Marion, hung out together since 13 and used together sometimes with Marion and Nell, never saw Marion hit Nell, but saw them argue and believed that Marion loved her and asked for mercy. ROA 2073-74. He stated that he saw Lindsey with his sons and that he was a loving father and proud of his boys. He said he was aware that the Lindseys would separate during their marriage. However, he never saw Lindsey hit Nell. He believed that he loved her.

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

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

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

Bessie Smith, Marion's aunt, testified that she lived at one time in house with Marion. ROA 2081. She described a kitten being thrown by her brother into the heater. She said that Marion was hurt by this action. ROA 2081. She also testified that she had attempted suicide. ROA 2082.

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

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The State's Case Against Lindsey

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

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

Dispatch: Spartanburg 911, what is your emergency?

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

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

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

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

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

Dispatch: What's your name?

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Lindsey: Uh, Ruby Lindsey.

Dispatch: What's your phone number?

Lindsey: What's my phone number?

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

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

Dispatch: What's his name?

Lindsey: Marion Lindsey.

Dispatch: Marion Lindsey?

Lindsey: Yep.

Dispatch: What kind of car are you in?

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

Dispatch: What kind of car is the male in?

Lindsey: He's in a Nissan Sentra.

Dispatch: What color?

Lindsey: Uh, gold.

Dispatch: Did he pull in behind you?

Lindsey: Yeah he pulled in behind us.

Lindsey: I'm not getting out!

(Children screaming in the background, conversation inaudible)

Dispatch: Hello?

(Child/Children crying in the background)

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Dispatch: Hello? Hello? Hello?

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

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

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

At that point, Godfrey took cover. He then saw two more flashes from Lindsey's weapon. Seconds later, Officer Godfrey came out and Lindsey pointed the firearm at him. Godfrey reacted and fired four times at Lindsey. ROA. 1567, ll. 19-24, p. 1575, l.19 -p. 1576, l. 8. Lindsey was hit

by him according to Godfrey and went down.[3]

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

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

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

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Evidence also revealed that the Appellant was involved in the sale and distribution of crack cocaine. ROA. p. 1830-1834, 1855-56, 1863-64, 1875 (11.41 grams of crack cocaine in the

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

September 14, 2000 incident).

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

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

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

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The Prison Life Evidence at Trial

The State presented in the penalty phase the testimony of James Sligh, Division Director of Classification and Records at the Department of Corrections. ROA 1908. In his testimony, he stated that a person sentenced to life imprisonment would initially be housed at a Level 3 high security institution. Id. He stated the cell would be 75 by 100 with two inmates in the cell. He stated that they would have access to the yard and have contact with other individuals. He stated

that there could be job assignments or educational classes in a classroom setting. ROA 1909-1910. There could also have contact visitation up to 8 visits a month. ROA 1912.

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

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

The picture the prosecution and evidence revealed was harsh. A violent tempered criminal involved in the drug trade. It also revealed a person who flaunted his responsibility to obey authority. It also revealed a person with a past history for using a handgun and shooting through windshields. It painted a picture of the type of person for which the death penalty was intended - a violent person with a prior criminal history where correctional rehabilitation had not changed his either his violence or his disrespect for the law.

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The Defense Proposed Witness List

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

LAY WITNESSES
Bill Burton*
Pat Burton
Beth Gregg

Alex L.
Trey L.
Virginia Lindsey*
Amy Osbey
Sharon Pilgrim
Steven Pilgrim*
Timothy Sims
Bessie Smith*
Kennia Wilkins
Kristopher Wilkins*

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

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

ANALYSIS OF THE SPECIFICATIONS

I. INEFFECTIVE ASSISTANCE - FEIGNING MENTAL ILLNESS

A. Counsel failed to prepare Lindsey for pretrial evaluation.

(1) Inappropriately allowed Lindsey to take advice of jailhouse lawyer to feign Mental illness.

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

MEMO, p. 43.

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In his first allegation of ineffective assistance of counsel, he contends that his counsel failed to properly prepare him for his pretrial evaluation because Lindsey had allegedly followed

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

the advice of a fellow jail detainee and feigned mental illness after his arrest by creating an imaginary person to try to dupe his counsel and the mental health evaluators.

In the post-hearing memorandum, the Applicant now contends that his counsel failed to maintain an adequate relationship with Lindsey which allowed the faked imaginary friend "Jimmy." Petitioner's Post-Hearing memorandum, p. 43-46. The Applicant now contends that the Applicant's attempt to feign mental illness suggests that his counsel failed to satisfy their duty "to consult with his client and to advise his client of the various aspects of his case", citing S.C.A.C.R. Rule 407, Rules of Professional Conduct, Rule 1.4 and A.B.A. Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Guideline 10.5. He further contends within this section that capital counsel had a duty to be present when Lindsey was interviewed by the State mental health examiner, Dr. Pratap Narayan to insure that Lindsey understood the significance of statements made and potential legal challenges. Further, he now contends that the result of the proceeding would have been different if the relationship had been better with counsel.

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This Court finds the Applicant has failed to prove either deficient performance or 6th Amendment prejudice. A defendant cannot be permitted to manufacture a winning IAC claim by sabotaging his own defense, or else every defendant clever enough to thwart her own attorneys would be able to overturn their sentence on appeal. Cases confirm that a client who interferes with her attorney's attempts to present mitigating evidence cannot then claim prejudice based on the attorney's failure to present that evidence. See Gardner v. Ozmint, 511 F.3d 420, 427 (4th Cir.2007) (relying on client's non-cooperation when rejecting ineffective assistance claim based on attorney's failure to investigate mitigation evidence); Fautenberry v. Mitchell, 515 F.3d 614,

624 (6th Cir.2008) (counsel is not ineffective for failing to persuade client to cooperate); Lorraine v Coyle, 291 F.3d 416, at 435 (6th Cir. 2002)("Trial counsel cannot be faulted for their client's lack of cooperation."); Taylor v. Horn, 504 F.3d 416, 454-56 (3d Cir.2007) (relying on client's refusal to allow attorney to call witnesses in rejecting ineffective assistance claim); Roberts v. Dretke, 356 F.3d 632, 638 (5th Cir.2004) (holding that "when a defendant blocks his attorney's efforts to defend him, including forbidding his attorney from interviewing his family members for purposes of soliciting their testimony as mitigating evidence during the punishment phase of the trial, he cannot later claim ineffective assistance of counsel."); Bryan v. Mullin, 335 F.3d 1207, 1223-24 (10th Cir.2003) (en banc) (counsel not ineffective for failing to present mental health evidence when client told counsel not to present any mental health evidence).

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

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The Post-Conviction Testimony of Dr. Melikian

Dr. Margaret Melikian, the forensic psychiatrist retained by the defense prior to trial in

2004, testified that she spent 7 hours and 45 minutes in preparation for her earlier testimony. PCR Tr. 598, ll. 17-19. Of that time, 2½ hours were actually spent with Lindsey on May 4, 2004. Dr. Melikian stated that she was concerned when she was retained whether she would be ready for trial due to her own lack of experience at the time.[5] PCR Tr. 600. She stated that she accepted the case thinking that if all the mitigation investigation was done, she could be prepared. However, in hindsight, she now declared due to her own lack of experience, she did not understand how much was involved in gathering information, and that the mitigation had barely begun and she now felt that there was no way they could be prepared for trial.[6]

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

Dr. Melikian stated she requested the written report from Dr. Brawley after she was advised that she would be the only one testifying and would put in Dr. Brawley's findings. Dr

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

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

Melikian received the written report on May 20 after the trial had already started on May 17. PCR Tr. 602.

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

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

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

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

Particularly, Dr. Melikian stated that she would have explained the severity of his

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

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

Dr. Melikian stated she had general information in 2004 about the CDV charges and the assault and battery with intent to kill charges. However, she claimed she did not know that he had not been convicted of most of the CDV and the family dynamics of how often the police were called and the severity of the incidents. In addition, she asserted that the assault and battery charge "appeared to have a large element of self-defense in that" which resulted only in a one year sentence "which would be unusual for a crime that severe." PCR Tr. 607. In addition, she claimed that she had not been aware that he had tried to turn himself in 4 times by going to the police. PCR Tr. 607, ll. 1-6.

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

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

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

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

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

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

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

Since the trial, Dr. Melikian said she had learned more information about what Lindsey did at the William S. Hall evaluation, that counsel Brannon described Lindsey talking to a hallucinatory person, Jimmy, who was in the room and pulling out chairs.[7] Dr. Melikian stated when she saw Lindsey in 2004 (and Dr. Brawley), Lindsey described Jimmy as an imaginary friend that he knew was not psychotic experience. PCR Tr. 613, ll. 3-8. She felt that given his level of intelligence it was not far out to not believe that and make a malingering diagnosis with the objective testimony that he was not.

Although Brannon had described his knowledge of Jimmy with Lindsey, Dr. Melikian testified that neither Brannon nor Bartosh told her about the particular experiences they had with Lindsey and Jimmy. Dr. Melikian stated she would have wanted to know this before she reviewed the Hall report. She admitted she questioned Lindsey about it on May 4 and that Lindsey described him as an imaginary friend, but not in a psychotic way, but as a way for someone with a low intelligence to cope. PCR Tr. 614. He had told Dr. Brawley the same thing.

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[7] See *Testimony of Doug Brannon*, PCR Tr. 34-36 where Brannon describes meeting at Detention Center, Lindsey not letting him sit in Jimmy's chair and the continued presence of the empty chair at their meetings. See also, PCR Tr. 613, ll. 13-25. See also *Testimony of Mitigation Investigator Lenora Topp* concerning April 2004 interview with Lindsey concerning "Jimmy". PCR 140 (Lindsey tell Topp that Jimmy can to him from God in his early teens). Also, Trial Evidence that "Jimmy" first discussed by Petitioner on date notice to seek death penalty served. ROA 136-137, 2017-2019 (no mention of Jimmy in reports until October 10, 2002, the same date that the notice of intent to seek the death penalty).

"He did tell me that he had done that with Dr. Narayan and pulled a chair out and behaved in that manner" which she asserted because it was a hostile interview with Dr. Narayan. PCR Tr. 614-15. She recalled during the 2004 trial, he had behaved in the trial in that manner. PCR Tr. 615.

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

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

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

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

Dr. Melikian said since the trial she has met with Lindsey 3 times. She felt that she had

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

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

Cross-Examination of Dr. Melikian

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

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Dr. Melikian confirmed that she had prior to her trial testimony his medical records, his teenage psychiatric hospitalization records, and his infant head injury records, although she now claimed they may have been incomplete. She admitted that as to neurological records in 2004,

she had Dr. Brawley's letter and had spoken with the neurologist, Dr. Abshur. PCR Tr. 623. She stated she wanted Lindsey to see a behavioral neurologist, but he was seen by a clinical general neurologist who would not be specialized in behavior. Id. Also, she said in 2004 she had the school records, but claimed she did not have all of them. However, Dr. Melikian admitted she received 18 pages of school records faxed to her on May 4, 2004. PCR Tr. 624.

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

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

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The Revelation of Feigning Jimmy During the Cross-examination.

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

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

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

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

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

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

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

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

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

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

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

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

PCR TESTIMONY of Dr. TORA BRAWLEY

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

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

Dr. Brawley stated Lindsey reported to her that he had fallen on steps, hit his head 4 to 5 times, and had stitches. He further told her he had been run over by a car at age two, blacked out,

and was in a hospital for 2 weeks. PCR Tr. 74. He reported to her he had surgery on his face. According to Lindsey, he had two motorcycle accidents: in 1993 when he was not wearing a helmet and 1998 when he was thrown off and became dazed. PCR Tr. 74. She was also told about the 2002 self-inflicted gunshot wound and a history of migraine headaches.

As to his educational history, he reported to her that he quit school in the 10th grade and had to repeat the 1st and 7th grades. In addition, he reported to having speech therapy and learning classes with a problem in spelling.

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

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

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Dr. Brawley, in her 2004 written report to Dr. Melikian, listed a number of impairments, including severely impaired speed of mental tracking, below average accuracy of mental tracking, severely impaired verbal fluency, severely impaired confrontation at naming (ability to name objects), below average manual dexterity and speed, below average immediate verbal memory, delayed visual memory, severely impaired verbal learning ability, impaired ability to copy and recall a complex figure. PCR Tr. 76-78. She opined that he fell below the average range of scoring. PCR Tr. 75.

Dr. Brawley could not give an opinion on what caused the brain dysfunction. She noted

there were multiple possibilities from the damage to the brain. PCR Tr. 78. She pointed out that she lacked enough information to determine whether it was consistent with where it should be or was due to head injuries. PCR Tr. 78. She pointed out that she did not have medical or school records in 2004. PCR Tr. 78.

Dr. Brawley stated there was nothing inconsistent in her interview with Dr. Melikian's diagnosis of major depressive disorder. PCR Tr. 78.

Dr. Brawley on Malingering

Concerning the question of malingering, she stated she considered the issue in 2004. PCR Tr. 79. She had learned from counsel Bartosh that Lindsey had an imaginary friend and the State doctors had determined he was malingering. She stated she did malingering tests for cognitive, for memory, and for psychiatric symptoms. She said she gave the Test for Memory Malingering (TOMM) and concluded he was within normal limits. She also gave the Structured Interview of Reported Symptoms (SIRS) test for malingering os psychiatric symptoms. PCR Tr. 80. He again tested within normal limits then. PCR Tr. 81. She determined during her April 2004 interview that there was no evidence of malingering in the testing and reported it to Dr. Melikian and counsel Bartosh. PCR Tr. 81. Dr. Brawley stated she spoke with Bartosh and gave him a verbal report of her conclusions. PCR Tr. 81. She provided the written report to Dr. Melikian pursuant to her request.[8] However, she does not know why she was not called to testify. PCR Tr. 81.

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Dr. Brawley stated that she recommended that medical and school records be obtained

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

because she had not been provided with them and it would help indicate whether the deficits existed earlier. PCR Tr. 81-82. Dr. Brawley stated that she received school records after she had made her written report in 2004, but did not look at them because she had already been advised she was not testifying. PCR Tr. 82. In hindsight, she noted the records showed he had been in the 8th grad for 3 years, whereas he had reported repeating the 7th grade. PCR Tr. 82.

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

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Dr. Brawley on "Jimmy"

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

trouble and suicidal. PCR Tr. 87. However, Dr. Brawley said - unlike Doug Brannon's experience - he did not say Jimmy was in the room with him at the time. PCR Tr. 87.

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

More specifically, Lindsey told her about the suicide attempts. As to the incident at age 12, he had taken pills after he had a fight with his brother and his mother told him that he did not love her anymore resulting in his hospitalization for 1½ months. PCR Tr. 88. As to the 2001 attempt, Lindsey told her he was having troubles with his wife and took a gun, but his cousin took it away. As to the third one in August 2002, his wife had told him she was leaving with the kids and he planned to drive the truck off a cliff, but then decided not to do it. PCR Tr. 88, ll. 12-15. She described another incident in September 2002 when his family talked him out of suicide. PCR Tr. 88, ll. 15-17. The final attempt was the gunshot wound to the head in September 2002 (during the arrest) and resulted in mental health at the jail. PCR Tr. 88.

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

- immediate visual memory.
- delayed verbal learning for stories
- manual speed on his left hand.
- right handed manual dexterity.

- trail making - Part B.
- non-verbal abstract reasoning.
- sequencing ability.

PCR Tr. 90, ll. 9-23.

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

Dr. Brawley confirmed that she consulted with Mr. Bartosh for ½ hour on May 2, 2004. PCR Tr. 91, ll. 10-22. She stated she went over the test results and the other information that she had gathered in the interview. PCR Tr. 91. She recalled that she made a specific request for school records to Dr. Melikian and felt she asked Bartosh for medical records. She stated she received the records on May 20 after she wrote her report. PCR Tr. 92.

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

Dr. Brawley stated her information about suicide ideation came from Applicant. PCR Tr. 94. Similarly, the history represented in her report came from Lindsey that other family members suffered from depression, that he had a chaotic childhood, that his stepfather was a heavy drinker, that his mother worked most of the time, that Lindsey was responsible for his younger sibling and taking care of the home and meals, living with a cousin at the time of the incident and separated from his wife. PCR Tr. 95-96.

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Counsel Brannon's Interaction with Applicant About Jimmy

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

> I went over to the Public Defender's Office, and then I, I rode over to the detention center in, in Mr. Bartosh's car, and Mike said something along the lines of Marion is a unique character, and we got over to the detention center and Pod 5 is the, is the,

> is the lock down pod. And when we got in there, they brought Marion in and there were four chairs around the table. Actually, actually there weren't four chairs around the table. There were four chairs in the room and three chairs around the table, and Marion sat down and I went to sit in the chair next to him and he said no, no, no, no, don't sit there. And, and I said okay, why not and he said cause Jimmy sits in that chair, and I looked at Bartosh and he just kind of pointed at the other chair that was away from the table and I went and drug the chair up to the table and I sat there.
>
> So, every time I met with Marion Lindsey there was an empty chair sitting at the table. Now, sometimes when I met with Marion it was with me and Mr. Bartosh and sometimes it was with me and Ms. Quimby. But there were two or three occasions where it was just he and I, but there was always an empty chair sitting at the table.

PCR Tr. 34, l. 14 - p. 35, l. 11. Brannon testified that after the meeting Bartosh told him that he should have told him about "Jimmy" before their meeting. Brannon stated that in reviewing the reports, it was claimed that it dated back to when Lindsey was previously in the State Hospital and had a roommate who looked like Charles Manson. PCR Tr. 35. Importantly, Brannon stressed that Marion was friendly and that if you asked a question, Lindsey would answer and he never felt threatened by him. PCR Tr. 35-36.

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

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

did not know who had the kids and snapped. PCR Tr. 37.

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

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

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

see if it had meaning in the penalty phase. PCR Tr. 64.

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

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

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

Additional Evidence about Jimmy in 2002

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

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ANALYSIS

In this first allegation, the Applicant complains that the defense team performed deficiently because they failed to maintain an adequate relationship and consultation with Lindsey. Though Lindsey never testified at the PCR hearing that their was any relationship lacking, the record is replete with evidence that from the moment of the serving of the notice of intent to seek the death penalty throughout the trial, Lindsey was maintaining the charade of the existence of his imaginary friend Jimmy - an attempt to scam the state doctors and his lawyers by a suggestion that he was crazy. Simply put , this malingering of a mental illness by Lindsey was

not the product of his lawyer's work, neglect or omission on the case, but according to Dr. Melikian's recent discovery, Lindsey's own creation at the suggestion of other inmates - a suggestion that acting crazy would aid him. It is only Dr. Melikian's recent post-verdict speculation that had she spent more time with Lindsey prior to the trial, he would have uncloaked the fakery of Jimmy and she could have used it to explain his depression by accepting this action - an action taken by Lindsey only after it did not work where the death verdict still resulted.

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

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

malingering symptoms today. There's no evidence of that . But we did find evidence of that on the three occasions that Mr. Lindsey came to our institution." ROA 137, l. 13-16.

The reliance upon the ABA guidelines does not shift the burden or support speculation that counsel necessarily could or would have pieced the veil of fakery that Lindsey was intent on portraying through his statements and actions made in October 2002, actions taken during the competency evaluations with Dr. Musick and Dr. Narayan in April and June 2003, through interviews in 2004 with Doug Brannon, Lenora Topp, Dr. Melikian and Dr. Brawley prior to the trial. Although he has recanted presently after the fact of his conviction and sentence, the blame does not rest at prior counsel's feet as current counsel now speculate. Nor does the fact that Dr. Melikian's speculation or hope that had she spent more time with Lindsey, he would have eliminated his lie of Jimmy's existence.[9] The initial allegation is without merit because he failed in his burden of proof of any deficiency by his defense counsel in failing to make Applicant reveal to them that he had recently concocted "Jimmy" his imaginary friend to feign mental illness in the hopes of avoiding a death sentence at the suggestion of other jail inmates.

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

ii. Failed to present issue of malingering to jury.

iii. Failed to call Dr. Brawley in sentencing .

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

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

MEMO , p. 46-47.

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

As revealed above with ground one, the defense presented in mitigation the testimony of Dr. Melikian. Within her testimony, she presented an opinion that Lindsey was not malingering. She also opined that Lindsey had a "family history of depression." She reported that he was treated by a psychiatrist after he had an overdose when he was 15 years old. She opined that at the time of the incident, Lindsey appeared to satisfy the diagnostic criteria for depression. ROA 2004, l. 23-25. She opined that he suffers from "major depressive disorder." ROA 2005.

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

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

Melikian declared that she did not. ROA 2005-2007.

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

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

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ANALYSIS

Certain salient factors are not clear. First, the State did not affirmatively present testimony at the trial that Applicant was malingering. It was developed to the jury through the testimony of Dr. Melikian where she affirmatively disputed any conclusion that Lindsey was malingering and claimed the prior evaluators misdiagnosed it - apparently in anticipation that the state would challenge the finding on cross-examination of the psychiatrist. Second, although Dr. Brawley did not testify, her findings and conclusions on the issue of malingering were presented through Dr. Melikian. Therefore, plainly the issue of malingering was investigated by counsel

and presented to the jury. It cannot be stated, that from counsel's perspective in 2004, that counsel failed to investigate or present evidence on the issue. He must be found to have failed in his burden of proof on that issue.

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

Further, his complaint that Dr. Brawley was not called as a witness on the issue of malingering cannot be deemed to be ineffective. Her results were presented to the jury on the testing that was done and relied upon by Dr. Melikian. Therefore the although admissible would have been cumulative to the decision to call Dr. Melikian. Dr. Brawley stated that she had been advised prior to the trial that she would not be testifying and prepared her written report for use by Dr. Melikian - consistent with her oral consultation with her. This was not neglect by counsel, but a reflect a conscious decision on counsel Bartosh's part on this issue. The evidence was admitted concerning both of Dr. Brawley's malingering tests as well as the conclusion that the state examiner's objective testing did not show malingering. Counsel cannot be deemed deficient under those circumstances. See Harrington v. Richter, supra.

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Similarly the failure to present the cumulative evidence from Dr. Brawley cannot be deemed prejudicial under the Sixth Amendment and Strickland v. Washington. See, e.g., Wong

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

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

- A. **Failed to adequately present requests for mercy.**
- B. **Failed to prepare witnesses to testify and request jury to show mercy.**
- C. **Failed to call family and non-family members on mercy issue.**
- D. **Failed to ask witnesses appropriate questions to request mercy.**
- E. **Failed to argue the Court's refusal to allow witnesses to request mercy.**
- F. **Failed to preserve record on issue of mercy by not presenting adequate arguments in support of attempt to present mercy issue and not requesting proffer**

MEMO, p. 47.

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

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

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

> In [State v.] Torrence, we adopted the Georgia Supreme Court's distinction between a plea for mercy and the ultimate question to be decided by the jury: "[A]lthough a defendant may present witnesses who know and care for him and are willing on that basis to ask for mercy on his behalf, **a defendant may not**

present witnesses to testify merely to their religious and philosophical attitudes about the death penalty.... Nor is a defendant entitled to present the opinion of a witness about what verdict the jury 'ought' to reach." Torrence, 305 S.C. at 45, 51, 406 S.E.2d 315, at 318 (quoting Childs v. State, 257 Ga. 243, 357 S.E.2d 48, 60 (1987)).

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

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

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

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

State v. Sapp, 366 S.C. 283, 292-294, 621 S.E.2d 883, 887 - 888 (S.C.2005).[10]

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

In their memorandum, Applicant claims that trial counsel failed to adequately present requests for mercy. He claims that counsel failed to locate and ask questions of family members and friends. However, the record of the trial disputes this assertion because four witnesses: mother, father, cousin and mentor - all made specific requests for mercy and the he not be sentenced to death. Concerning mercy requests, contrary to the assertion in the post-hearing memorandum of Petitioner, p. 25, Virginia Lindsey testified that she did talk to the defense team

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

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

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

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

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

and "they did" prepare her to request the jury to have mercy on her son. PCR 368, l. 14-18. [15] However, she *felt* she was not prepared to make a mercy request at trial. She claimed that if she was prepared, she would have asked for mercy on her son because she had lost a son and "would ask for mercy that he not get the death penalty." She stated that he had to be punished, but not the death penalty because it hurts to lose someone. She said she not only lost a son, but that she lost a daughter, a son, and two grandsons. PCR Tr. 369, ll. 1-8. However, the record reflected that she did make that request. ROA 2060. The claim must be denied.

In his memorandum, he also claims that if the court refused to allow the testimony about a request for mercy, counsel had an obligation to preserve the issue for an appeal. The record reveals, as stated above, after four witnesses had responded to open ended questions about whether there is anything they would like to tell the jury with requests for mercy and not a death sentence, Judge Few stated he would not allow that question to be asked. Counsel Bartosh did not object. When the remaining witnesses uncle Steve Pilgrim[16] and aunt Bessie Smith[17] testified, no open ended question was asked and neither expressed an opinion on mercy - nor were they specifically asked. In light of counsel Bartosh's death, we are not aware why a different quest

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

[16]Steve Pilgrim state post-conviction testimony is set forth in detail within this memo. PCR 426-453. Pilgrim stated that counsel had prepared him to ask for mercy. PCR 445. He then asserted that they told him not to ask the jury for mercy. Id. He proffered what he would have told the jury if he had been asked about mercy that he was his favorite nephew and he made a mistake and "I wouldn't want him to , you know, get the death penalty." PCR 445, l. 13-16.

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

was asked eliciting a response on mercy consistent with Torrence and Wise (which was decided on May 11, 2004 just before the trial). However, counsel is presumed competent and the Applicant has failed to dispute it.

Apparently, he claims that had counsel objected it is likely the matter would have been reversed on appeal. However, he ignores the proper test that it is his burden to prove by a preponderance of the that there is a reasonable probability that the result of the proceeding would have been different. To the contrary, four of his six witnesses had made specific mercy requests to the jury as family member and friend. Second, counsel Bartosh made a plea for mercy and a just punishment of life. ROA 2137, 2146. To that extent, the situation is similar to the situation in State v. Sapp where the Court concluded that reversible error could not be shown even though the trial court erred in excluding a question concerning mercy. As in Sapp, there is cumulative evidence of family and friends requesting mercy. He has failed to establish Sixth Amendment prejudice. See State v. Sapp, 366 S.C. 283, 294, 621 S.E.2d 883, 888 (S.C. 2005); State v. Myers, 359 S.C. 40, 596 S.E.2d 488, cert. denied, 543 U.S. 980, 125 S.Ct. 485, 160 L.Ed.2d 359 (2004) (exclusion of testimony is harmless where it is cumulative to other testimony in the record).

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

- **A. Failed to Provide Sufficient Info to Dr. Melikian to allow evaluation of Lindsey.**
- **B. Failed to obtain and provide historical info and records of family members necessary for proper evaluation.**
- **C. Failed to seek continuance after Melikian informed them she needed additional time.**
- **D. Failed to elicit from Dr. Melikian statutory mitigating factors during testimony.**

MEMO, p. 49 .

In his fourth specification, he contends that counsel failed to provide Dr. Melikian with sufficient information. He asserts that Dr. Melikian needed additional information related to his history to properly evaluate him and the defense team failed to locate and investigate his background and claims that they failed to provide her with information. As previously set forth, the summary of the evidence of the trial and the state PCR hearing shows that Dr. Melikian has the same opinion of the particular illnesses that she found Applicant possess. As revealed in the cross-examination during both the trial and the state PCR proceeding, her opinion and the material she additional would have been required to reveal were a two edge sword that failed to satisfy the Strickland prejudice prong. While more time and additional information may have made Dr. Melikian more comfortable with her assessment, it would not have changed the result. Strickland prejudice has not been shown. The Court finds that the summaries of the witness testimony within the Petitioner's memorandum does not summarize any particular items that they feel counsel did not provide.

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As shown within, a lot of Applicant's proffered mitigation testimony is double-edged or even aggravating. See, e.g., Suggs v. McNeil, 609 F.3d 1218, 1231 (11th Cir.2010) (noting that "evidence of drug and alcohol use is often a 'two-edged sword' that provides an independent basis for moral judgment by the jury," and that evidence that the defendant spent time at military school because of behavioral issues "was potentially damaging" (quotation marks and citation omitted)); Reed v. Secretary, Fla. Dept. Of Corrections, 593 F.3d 1217 at 1246 (11th Cir. 2010) ("[I]t would have been all too easy for the State to use Reed's own mitigation witnesses to paint him as a violent, manipulative person with long-standing drug abuse issues and brushes with the

law.... Here, it was not just a reasonable probability, but a virtual certainty that Reed's 'good' mitigation evidence would have led to the introduction of 'bad' evidence."). Nor would any new medical information radically buttress the experts' testimony, causing it to shift from mere "artifice" to gamechanging revelation that creates a reasonably probability of a different outcome. Bean v. Calderon, 163 F.3d 1073, 1081-82 (9th Cir.1998). His assertions must be denied.

The Post-Conviction Testimony of Dr. Melikian

Dr. Margaret Melikian, the forensic psychiatrist retained by the defense prior to trial in 2004, testified that she spent 7 hours and 45 minutes in preparation for her earlier testimony. PCR Tr. 598, ll. 17-19. Of that time, 2½ hours were actually spent with Lindsey on May 4, 2004. Dr. Melikian stated that she was concerned when she was retained whether she would be ready for trial due to her own lack of experience at the time.[18] PCR Tr. 600. She stated that she accepted the case thinking that if all the mitigation investigation was done, she could be prepared. However, in hindsight, she now declared due to her own lack of experience she did not understand how much was involved in gathering information, and that the mitigation had barely begun and she now felt that there was no way they could be prepared for trial.

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Dr. Melikian indicated that she had received records from defense counsel on April 28,

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

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

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

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

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

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

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Dr. Melikian stated the additional material she reviewed would have changed her diagnosis because she did not understand the level of depression he was showing at the time of the evaluation and that way she looked at his cognition in his low testing results. Tr. 604. She

stated this was due to her lack of a family history and did not spend enough time with Lindsey to realize that he was not functioning at his best level.

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

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

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

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

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

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

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

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

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

Dr. Melikian asserted her disagreement with the DMH diagnosis for borderline

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

Dr. Melikian PCR Testimony About Jimmy - Direct Examination.

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

Since the trial, Dr. Melikian said she had learned more information about what Lindsey did at the William S. Hall evaluation, that counsel Brannon described Lindsey talking to a hallucinatory person, Jimmy, who was in the room and pulling out chairs.[20] Dr. Melikian stated when she saw Lindsey in 2004 (and Dr. Brawley), Lindsey described Jimmy as an imaginary friend that he knew was not psychotic experience. PCR Tr. 613, ll. 3-8. She felt that given his level of intelligence it was not far out to not believe that and make a malingering diagnosis with

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[20] See *Testimony of Doug Brannon*, PCR Tr. 34-36 where Brannon describes meeting at Detention Center, Lindsey not letting him sit in Jimmy's chair and the continued presence of the empty chair at their meetings. See also, PCR Tr. 613, ll. 13-25. See also *Testimony of Mitigation Investigator Lenora Topp* concerning April 2004 interview with Lindsey concerning "Jimmy". PCR 140 (Lindsey tell Topp that Jimmy can to him from God in his early teens). Also, Trial Evidence that "Jimmy" first discussed by Petitioner on date notice to seek death penalty served. ROA 136-137, 2017-2019 (no mention of Jimmy in reports until October 10, 2002, the same date that the notice of intent to seek the death penalty).

the objective testimony that he was not.

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

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

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

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

night before. PCR Tr. 616.

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

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

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

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Cross-Examination

Dr. Melikian testified that her clinical diagnosis in 2004 had changed since because she did not understand the severity of his depression. PCR Tr. 621. However, she admitted her conclusions of mental illness under Axis I, II, III, IV would be the same thing. Id. She admitted

that she testified he was depressed in 2004, but she could not elaborate in full the degree. She pointed out that she was aware of suicide notes, but had not seen them. Similarly, she was not aware of the telephone call to Rod Tullis, which would have been useful to understand his mental state close to the time of the offense. PCR Tr. 621-22.

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

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

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

The Revelation of Feigning Jimmy During the Cross-examination.

Dr. Melikian acknowledged that in 2004 she sought to address the existence of "Jimmy."

However, she did not know until the trial that the day "Jimmy" was reported was the day he was served the death notice. As Dr. Melikian stated on cross-examination:

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

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

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

Dr. Melikian admitted that in 2004 she testified that she would not have made a diagnosis of borderline intellectual functioning, that he did have chronic neurological problems, and that she was aware of the existence of the suicide notes from Lindsey. She confirmed that she had learned in 2004 that in 2001 at 15 years old, Lindsey had a gun and planned suicide, but his

cousin talked him out of it. PCR Tr. 632. She also recalled that he stated that he wanted to drive off a cliff, but was worried he wouldn't die. She stated that she learned from Lindsey about his weight loss prior to trial.

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

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

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

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

although her diagnosis has not changed. PCR Tr. 637.

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

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

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COMPARED TO 2004 TRIAL TESTIMONY

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

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

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

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

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

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

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

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

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

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

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

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

She opined that he had cognitive deficits. ROA 2009. She reported that the testing at Hall Institute determined that he had well below average IQ and "borderline intellectual functioning" close to mildly retarded range with an IQ of 76. ROA 2009. However, she noted that when Dr.

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

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Dr. Melikian stated that his neurological problems were chronic. She stated that he had a limited ability to cope with things due to his limited intelligence and by his continuing to have an imaginary friend. She stated his stress with his wife and the separation added to the stress which decreased his coping skills. ROA 2012. She stated that he described the killing of his wife. He told Dr. Melikian that his wife was leaving and taking the kids and that he would never see them again. ROA 2012-13. He told her that he had moved into his cousin's house and planned to commit suicide by driving off the cliff, but he was worried that he might not die. Id. He stated that he begged his wife to return and had written suicide notes, but did not recall what he said. He

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

also told her that he planned to shoot himself and that his cousin had taken his keys and that his mother, brother and uncle and talked to him. He told her that he had been unable to reach his wife because she was blocking his numbers on the telephone. He said that he had been crying which was unusual for him. ROA 2013. He stated that he was able to get in touch with his wife at work where the numbers were not blocked.

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

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

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

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

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

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

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

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

She stated that it might have been helpful if she had been given a copy of the BMW application and could not state that it would have been helpful to review the entire case file, or to

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speak with either Dr. Crawford or Dr. Narayan (who had diagnosed Lindsey with malingering) (because she had his report) or Officer Benny Godfrey1, or Latresse Smith. ROA 2037-38. She confirmed that much of what she testified to was based upon her discussion with Lindsey who she denied was malingering. Id.

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

ANALYSIS

The Applicant has failed to show deficient performance or prejudice under Strickland. It is apparent that there was a difference in the quantity of material that Dr. Melikian reviewed in 2004 contrasted with this hearing. PCR 603. However, she was unable to state with any clarity what particular information she lacked in 2004 was critical to a revision in her assessment. 2004, she had his medical records, the records from a psychiatric hospitalization when he was a teenager, the records from a head injury when he was an infant, his neurological records, and his school records. ROA 2003. She also had the reports from Hall Institute. PCR 601. She also had consulted with Dr. Brawley who did a series of neuro-psychological testing and received and reviewed her written report. PCR 602. Although she complained in hindsight that she had not been provided all the information that the 2004 defense team acquired (PCR 603), Dr. Melikian was unable to cogently express what material made a difference to her conclusions, other than it would be corroborative evidence concerning information that she had learned and relied upon in 2004. Much of her renewed analysis did not concern the way she gave in rendering a mental

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health opinion, but was more directed toward a characterization that was being made of the Applicant by the state's evidence of his character. PCR 607 (information about arrests that she was not aware in 2004).

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

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

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

with her testimony. PCR Tr. 633.

Similarly, this Court concludes that had she been exposed and relied upon the material presented through Jan Vogelsang, the likelihood of a death verdict became even more enhanced.[22] Although she met with investigator Lenora Topp, who prepared extensive summaries of the family history from her interviews with Lindsey, his mother and aunt, Dr. Melikian could not recall the specifics of the information she was provided about Lindsey's family and Topp's interview with Lindsey prior to her trial testimony. PCR Tr. 635. Her ultimate conclusion in 2004 and now is the same - Lindsey met the diagnostic criteria for "major depression" whether she looked at those earlier records and still feel he does after reviewing more records given to her since the trial. PCR Tr. 635-37.

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

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The Applicant does not argue, but claims that counsel erred in failing to request a continuance for Dr. Melikian to have more time to prepare. The Applicant has only shown that she wanted more time, but not that counsel was deficient in failing to make the request nor any likelihood that it would have been granted. Where the defendant claims ineffective assistance for failure to file a particular motion, he must "not only demonstrate a likelihood of prevailing on the motion, but also a reasonable probability that the granting of the motion would have resulted in a

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

more favorable outcome." Styers v. Schriro, 547 F.3d 1026, 1030 n. 5 (9th Cir.2008). Because it is unlikely that Judge Few would have granted the motion for delay, or that the results of any such testing would have changed the outcome of the sentencing, this Court cannot say the alleged deficiency was prejudicial. Dr. Melikian was able to render an opinion to a reasonable degree of medical certainty in her area of expertise. Counsel's failure to request a continuance to make her more comfortable has not been shown to be deficient. As shown above, even with the period of time since the trial her opinion of the particular diagnosis has not change, only an opinion - driven in part by a revelation that Lindsey was intentionally feigning mental illness in 2003 and 2004 - the it suggested the severity of his depression was more severe in 2002 - the Applicant has made no probative showing that there was a reasonable probability that the result of the proceeding would have been a life sentence - nor even that Judge Few would have granted a continuance. Top the contrary, the evidence was that he would have likely denied it through his own testimony - and that she was directed by Mr. Bartosh to get the job done. See Gardner v. Galetka, 568 F.3d 862 (10th Cir 2009) (Capital murder defendant was not prejudiced by his counsel's failure to provide mental health expert with more time to prepare for penalty phase testimony; despite the limitations under which expert was operating, expert did an effective job of conveying mitigating evidence regarding defendant's family history, possible organic brain damage, and social circumstances, and there was a risk of opening the door to damaging evidence by introducing further potential mitigating circumstances).

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Finally, Lindsey asserts, but does not argue that Dr. Melikian should have been asked if there was evidence related to specific statutory mitigating factors. While Respondent admits that some expert witnesses in capital cases are asked that question by some defense counsel, the

Applicant has failed to show that counsel was deficient in failing to make any particular inquiry. In fact, the counsel specifically asked Dr. Melikian whether she could give an opinion as to "whether Mr. Lindsey would have been operating under the influence of mental or emotional disturbance when the incident occurred," a statutory mitigating circumstance. ROA 2007, l. 21-24. Nevertheless, Strickland prejudice has not been shown.

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

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

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

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

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

1. **Failed to adequately interview family members to discover extent of Mental Illness.**
2. **Failed to prepare family to present extent and nature of illness within family.**
3. **Failed to adequately argue to court the admissibility of evidence of family mental illness.**
4. **Failed to adequately preserve the record relating to family Mental Illness in support of attempt to present evidence and failing to offer proffer.**

MEMO, p. 50.

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

members and present evidence on mental impairments within the family. This issue weaves claims and testimony of family members, the surviving lawyers and investigator and proffered social workers. This Court finds that there was some evidence presented of some family members mental health problems involving whether aunt Bessie Smith had attempted suicide (ROA 2056)(testimony of Virginia Lindsey) (2082)(testimony of Bessie Smith) and that Steven Pilgrim suffered from illnesses of panic attack and anxiety attack and that his daughter was being treated for an illness described as panic attack (ROA 2080) (testimony of Steve Pilgrim). See infra., Findings and Conclusion on Argument 7.

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

VI. **Ineffective Assistance of Counsel - Failure to Retain Prison Adaptability Expert. (Memo - 51-52)**
Failed to retain PRISON ADAPTABILITY EXPERT to testify about Lindsey's ability to adapt to prison life others and the relevance of that information to the jury's decision.

Memo., p. 51-52.

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In his sixth allegation, Applicant asserts that counsel were ineffective in failing to present a "prison adaptability expert" during the penalty phase as evidence in mitigation. The Applicant relies upon Skipper v. S.C., 476 U.S. 1 (1986) which concludes the evidence of prison adaptability which suggests the defendant would not pose a danger if his life was spared and he was incarcerated must be considered mitigating and admissible. He further seeks support from the ABA Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases, Section 10.11 (2003) which states that defense counsel ***should consider*** presenting "expert and lay witnesses along with supporting documentation... to ... give a favorable opinion as to his

client's capacity for rehabilitation, or adaptation to prison..." He asserts that the defense team failed to retain and present a prison adaptability expert. He further contends that the failure to do so created a reasonable probability of a different verdict.

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

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

> Without expressing a view on the ultimate reasonableness of the decision not to pursue this evidence further, we note that the Eleventh Circuit majority observed that the state court could reasonably have determined that counsel had strategic grounds for their decision. In particular, evidence about Wood's mental deficiencies may have led to rebuttal testimony about the capabilities he demonstrated through his extensive criminal history, an extraordinarily limited amount of which was actually admitted at the penalty phase of the trial. Counsel's decision successfully thwarted the prosecutor's efforts to admit evidence that Wood murdered his ex-girlfriend while on parole for an attempted murder of a different ex-girlfriend that was strikingly similar in execution to the subsequent successful murder. App. 23-24. Moreover, as the Eleventh Circuit majority noted, evidence of Wood's mental deficiencies also could have undercut the defense's argument that he left school to support his family, suggesting instead that he left

The Applicant may be relying upon *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), *Skipper v. South Carolina,* 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), and *Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). It is unclear whether Lindsey suggests that his proffered evidence was in rebuttal to any specific evidence concerning prison life or otherwise. In *Gardner,* 430 U.S. at 358, 97 S.Ct. 1197, the United States Supreme Court held that a defendant is entitled to due process during the sentencing phase of a criminal trial. The Court concluded that the defendant was "denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.* at 362, 97 S.Ct. 1197.

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

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Critical to the assessment of counsel Bartosh's and the defense team's performance in not presenting such an expert is what information the defense team had about Lindsey's character and prior incarceration and their awareness of prison adaptability as mitigating evidence. As

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> school because of educational difficulties. 542 F.3d, at 1305-1306. **Counsel's decision about which avenues to investigate can therefore plausibly be described as strategic rather than necessarily being the product of "happenstance, inattention, or neglect,"** *post,* at ----.

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

shown below, the Applicant has failed to satisfy his burden of proof. Although counsel Bartosh is deceased, the assessment by the Court must lead to the conclusion that he was not deficient in presenting the generalized testimony and the evident risk that it would have limited probative value and a higher risk of negatively revealing Lindsey's dangerousness and potential for violence in a prison setting due to his prior involvement in incidents in his earlier incarcerations - a point any seasonal prosecutor would seek to establish. The evidence conclusively reveals that the defense team was aware - through the notations of counsel Quimby Hatcher of the fact that prison adaptability evidence could be presented through lay and expert witnesses. In addition, the record is replete with the facts of his involvement in violent prison incidents with inmates and guards before his death sentence (and after). A review of the testimony presented leads to the conclusion that there was neither deficient performance or prejudice under Strickland.

Counsel's Testimony on Prison Adaptability Issue

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

Counsel Brannon confirmed that with the awareness of the admissibility of prison adaptability evidence and conduct in jail (and the fact Brannon called a witness in the penalty

phase), he knew what witnesses Bartosh intended to call in the penalty phase and there were no jail guards on the witness list. PCR Tr. 53. Brannon admitted, however, that he did not review the records of the 1996 incarceration at SCDC. PCR Tr. 55.

Counsel Quimby Hatcher also testified about her records she made in the case. Particularly, she had noted that as a mitigating circumstance to be considered was future adaptability to prison life. PCR Tr. 249. (Exhibit 18). However, she did not know the particular reason Bartosh did not present evidence in the area. PCR Tr. 249-50. See also PCR Tr. 261-62 (Respondent's Exhibit 6). Her records also reflected summaries of the SCDC records and records from the Spartanburg County Detention Facility documenting his disciplinary history which jail and prison assaults and the potential witnesses from the incidents. PCR Tr. 282-83 (Respondent's Exhibit 9).

PCR Testimony of James Aiken

James Aiken, a former South Carolina Department of Corrections Warden, who has a consulting firm relating to death penalty proceedings and jail and prison security testified at the PCR hearing in support of the allegation. PCR Tr. 201-228. He testified that he had reviewed the correctional files concerning Mr. Lindsey, but had never met Lindsey. PCR Tr. 206. He opined that it was not necessary to meet Lindsey before he rendered an opinion about prison adaptability or future dangerousness. PCR Tr. 206. He stated that he relief upon the records of the Spartanburg County Detention Facility and the South Carolina Department of Corrections' records when he was incarcerated for 7½ months in formulating his opinion. PCR Tr. 207. He also admitted that he have reviewed the records since he was on death row, but claimed that it was not included in formulating his opinion. PCR Tr. 206-07. Aiken opined his observations

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were that Lindsey had been guilty of crimes of violence in the community and that the Department of Corrections "can manage this type of offender for the remainder of his life without causing unreasonable risk of harm to staff, inmates, as well as the general community." He indicated his opinion was based upon the fact that he had done time before and that SCDC had the capacity to classify him, evaluate his behavior, and had the necessary staff, equipment and expertise to manage him. PCR Tr. 208. He noted that Lindsey did not have relationships with "security threat groups" or "gangs." PCR Tr. 208. Further, Aiken opined he had not demonstrated a propensity toward random and systematic violence against others while he's in prison. PCR Tr. 208. Aiken admitted that since prisons are dangerous, things can happen. He testified that a life sentence without parole is a severe sentence and reduces a person to the lowest common denominator. PCR Tr. 209. He stated he could have rendered the same opinion during the trial. PCR Tr. 209.

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

On cross-examination, the risks of this generalized adaptability testimony was presented. Particularly, he recognized that it was his opinion that inmates in the Department of Corrections can be managed to avoid injury to other inmates, the general public and prison guards. PCR Tr. 211, ll. 22-25. Aiken noted that you can never say never, but the vast majority of prisoners in SCDC can be incarcerated.

Aiken acknowledged that the best predictor of future behavior is past behavior. He was aware that the prior correctional records of the crime of assault and battery with intent to kill revealed circumstances where there was an altercation on a highway where shots were fired and

the victim was wounded. It was then emphasized - like the present case - that he shot into a vehicle! PCR Tr. 214.

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

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

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

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

Concerning the fight in SCDC, the incident occurred outside the dining hall. However, the February 13, 2004 incident occurred when he left his cell. He described how the officer who broke up the fight got caught in between and another officer gassed him.

Aiken also admitted that Lindsey had two incidents at Lieber since he was sentenced to death in December 2004 with inmate William Bell and a more aggressive fight in December 2006 with inmate Angel Vasquez. PCR Tr. 221-23. However, Aiken would not agree that the incidents showed on those dates that SCDC was unable to manage Lindsey to prevent violence against other inmates. PCR Tr. 223, ll. 9-15.

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

ANALYSIS

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

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

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

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

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

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

list - with the understanding prison adaptability was a potential mitigating evidence basis - they did not include any witness on the list - jail or prison guards - to testify about this area. Additionally, Brannon opined that this decision would have been left up to Mr. Bartosh.

The failure to investigate or retain a private security expert in this case is supported by reasonable professional judgment. See Strickland, 466 U.S. at 690-91, 104 S.Ct. 2052 (stating that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"). Importantly, as in Harrington, the proffered evidence revealed the two-edge sword that any seasoned trial lawyer like Bartosh would have recognized as a high risk of harmless information and emphasis by a prosecutor lay in wait for this type of evidence to be presented due to inconsistent history on being adaptable.

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

system would classify him as a high security inmate because it would consider him to present a potential for violence. Aiken clarified that his opinion was only that Lindsey could be managed not to create an unreasonable risk of harm.

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

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[26]We note that this is not a case in which the State introduced expert testimony about the defendant's future dangerousness and the defendant was denied an opportunity to directly rebut that testimony with his own expert. *See Clisby v. Jones*, 960 F.2d 925, 929 n. 7 (11th Cir.1992). Nor is this a case like *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), in which the State's two experts testified there was a "high probability" that Williams posed a serious continuing security threat and defendant's attorneys failed to elicit: (1) evidence of Williams's "nightmarish childhood," including criminal neglect by his parents, severe abuse by his father, and his time in an abusive foster home; (2) that correctional officers were willing to testify Williams would not pose a danger while incarcerated; (3) that Williams received prison commendations for breaking up a drug ring and returning an officer's wallet; and (4) an admission *from the State's testifying future dangerousness experts* that the defendant would not pose a threat in the future if kept in a structured environment. *Id.* at 368-71, 373 & n. 4, 395-98, 120 S.Ct. at 1500-02 & n. 4, 1514-15.

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

- Aiken noted that you can never say never, but the vast majority of prisoners in SCDC can be incarcerated. PCR 212.
- The best predictor of future behavior is past behavior.
  - the prior correctional records of the crime of assault and battery with intent to kill revealed circumstances where there was an altercation on a highway where shots were fired and the victim was wounded. It was then emphasized - like the present case - that he shot into a vehicle! PCR Tr. 214.
  - Lindsey had also been arrested for criminal domestic violence.
  - Aiken never met with Lindsey about his other arrests and crimes of violence he committed and only based his opinion on paperwork. PCR 215, ll. 5-11.
  - Aiken also admitted "the potential for violence is certainly there" and had failed to mention in direct - that he saw in the prison records that he was recommended for "anger management." PCR Tr. 215, ll. 21-22.
  - His prior prison record reflected violence with fights and indications he acted violently towards others. PCR Tr. 216.
    - March 24, 1996 fight at Dutchman.

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- A Spartanburg Jail violent assault in the jail when he got into another altercation with an inmate and an officer. PCR Tr. 217.
- 20 days segregation and the inmate got GASSED to control his behavior.
- Aiken clarified that his opinion was only that he could be managed not to create an ***unreasonable*** risk of harm, not that he would not be harmful to others. PCR Tr. 224.

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

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evidence was either cumulative of evidence already presented at penalty phase, or would have opened door to damaging testimony).

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

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

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

MEMO , p. 52-53.

In his seventh allegation, he contends that Lindsey failed to present a "family historian." this Court will combine in this area issue concerning the family history presentation of family and friends at trial, the reasonableness of the mitigation investigation and any deficiency and prejudice concerning the failure to retain a social worker to testify about the family history. These claims are encompassed in the Applicant arguments 5, 7, and 9 within his post-hearing memorandum. Although the record reveals that a social worker was not called as a witness by the defense, it revealed that friends and family members, as well as an expert witness, Dr. Melikian,

a forensic psychiatrist, testified at trial. In addition, a mitigation investigator, Lenora Topp, a licensed investigator based in Asheville, N.C., was retained and used by the defense team in this matter. At the hearing , counsel presented family members (Virginia Lindsey, Bessie Smith, Steve Pilgrim, and Tim Sims), Lindsey's friends (Bill Burton and Pat Burton) as well defense counsel (Doug Brannon and Karen Quimby Hatcher) and retained mitigation investigator Lenora Topp. The focus of the testimony was on new witness -social worker Jan Vogelsang.

In his memorandum, the Applicant cites to Eddings v. Oklahoma, 455 U.S. 104 (1982) to suggest that a defense counsel has an obligation to present **all** available mitigating evidence. However, he then asserts that the ABA guidelines states that counsel "should consider presenting "expert and lay witnesses along with supporting documentation . . .to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen that client's culpability for the underlying offense." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), § 10.11 - The Defense Case Concerning Penalty. He asserts that the defense team failed to retain and present a social worker. However, other than that fact, he fails to point to any particular evidence that should have been presented or how it would have uniquely impacted upon the jury.

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The Petitioner has failed to prove either deficient performance or prejudice concerning this matter. As revealed within the evidence, counsel retained a mitigation investigator Lenora Topp who acquired background data concerning the defendant, acquired a understanding of the family from Marion Lindsey and his mother and provided her summaries to the defense team for their use in deciding what information to present. The family background was investigated and

not ignored. In addition, evidence was presented through lay witnesses at trial concerning the background in the guilt and penalty phases. The Applicant has failed to show how this evidence from the social worker - or its absence- undermined the confidence in the verdict under the standards of Strickland.

This Court finds that reviewing the totality of the circumstances from counsel conduct at the time, reveal that counsel was not deficient. An assessment of counsel's actions must begin with a review of the testimony concerning what was presented at trial as previously set out in this Order at pages 17-28.

Counsel's Testimony

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

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

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

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

PCR Tr. 57.

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

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

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

Counsel stated he interviewed Lindsey about the Wilkins incident.

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

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

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

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

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

She stated in the email - that Lindsey only told them in court that he wanted Dr. Henderson as a witness because he used to play with his children. In the email, Topp stated that Virginia has seen the doctor recently and had not ask him to be a witness. Topp also expressed in the email that she felt that she had not done enough for Lindsey. PCR Tr. 118. [Dr. Henderson died April 9, 2006]

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

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

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

Topp testified her first meeting with Lindsey was a 3 hour interview on April 16 when he provided "everything he could remember" about family background starting from the day he was born, the accidents he was in when he was run over, his very poor upbringing and how they

shared rooms, and that he was not raised by his father. Lindsey told her he would not want his children raised without a father because he never had a male figure in his life. PCR Tr. 123. She said they talked about everything up to the incident in the police parking lot. PCR Tr. 123.

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

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

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In discussing his mother, Lindsey told Topp she got names and addresses of potential witnesses from him. She recalled two major interviews with Lindsey on April 16 and April 25. PCR Tr. 125. She noted the summaries of the interviews - State Exhibit 2. The exhibit revealed information about Virginia and father Leon McDowell who had a distant relationship with Applicant and that Lindsey felt bitter towards him. PCR Tr. 127. She confirmed he had hatred towards him because they never could do anything together, describing how others would go off and fish, but not his father. PCR Tr. 128.

Topp stated that Lindsey claimed he had no clothes and had to wash them out every night. PCR Tr. 128-29.

Concerning his relationships with his brothers, Lindsey told her that brother Paul's drowning was emotional for him about 7 years ago. She stated she got his death certificate. PCR Tr. 129. His relationship with Paul Frederick was very close and Lindsey claimed the death affected him for 3 years. She recalled he had moved with Paul to work construction in (West) Virginia, but Applicant got home sick and came back. PCR Tr. 129.

She described that Lindsey felt Tim Sims was the father of the household for Lindsey and he followed him everywhere, but they had different fathers. PCR Tr. 129. She said that Sims' father was the only father figure Applicant had. PCR Tr. 130. Topp reported that Applicant told her that they would eat a lot of bologna as he was growing up as his main food. PCR Tr. 130.

Concerning his drug sales, Topp was told by Lindsey that he sold drugs on and off when he needed the money. He said the drugs afforded him the better lifestyle he wanted to live with including houses, cars and the ability to buy things for his children. PCR Tr. 130. However, Lindsey had denied that he ever used drugs. PCR Tr. 130.

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Topp said she was told that his father's family had taken warrants against him (Leon McDowell, Jr.), got along with him (Teresa), and considered Applicant to be an outsider (Orlando). PCR Tr. 131-32. She was also told about how he related to Claude Lindsey's children. Id.

Topp stated her interview document with Lindsey (Respondent Exhibit 2) was given to Karen Quimby and also included educational history, which reported his school disciplinary actions. These reports included fights against boys and girls, that he was suspended for a week according to Lindsey. PCR Tr. 133.

She reported that Lindsey reported as a traumatic event when his two uncles threw his

favorite cat into the wood heater while it was alive. PCR Tr. 134. Topp reported that she reacted with shock and tears and felt it should have impacted on his life and was disturbing. PCR Tr. 134.

She reported that he told her that he quit school and took some jobs. He reported to her a car accident when a tire blew out and claimed a loss of memory and had to have facial surgery and broke his hip. PCR Tr. 135. He told her he was out of work for a year. she received information from him that he worked at Burger King where his brothers work but lost that job, then worked for United Cloth in Spartanburg. He told her that he thought it was a boring job and complained about the women gossiping, but felt he advanced in the job. PCR Tr. 136.

Topp reported that he advised her of his girlfriends. He reported to her that Stephanie Petty was his girlfriend from 1992-1996. Though Topp did not recall the reason for the break-up she did not recall it as an "ill-parting." PCR Tr. 137.

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Topp also learned from Applicant about Bill Burton. He reported to her that Burton was a plant manager and had offered him a job. Further, their relationship went back to when Burton was a lifeguard and began a friendship with him then and took him fishing at their pond. PCR Tr. 137. Further, Topp learned that when he was fired he tried to get him re-employed. Lindsey worked at the plant for two years. PCR Tr. 137. As to Burton's mother (Patsy), Lindsey reported to her that she was friendly and took care of him when Bill was not there (when he went fishing). PCR Tr. 138.

He also related to her generally about past incarcerations and the shooting of Stafford Wilkins. PCR Tr. 139.

Topp reported to the defense her general impressions of Lindsey. PCR Tr. 139. She

stated to them that he had a hard time in life and did not want to be a drug dealer but ended up there because the money was good. PCR Tr. 140. she said he gave Nell money to take care of the children, but claimed she spent it on boyfriends. He said he also gave his mother-in-law money and fill her car with gas. Id. He tried to show that in his heart he was a good person and tried to keep the drug dealing from his mother because he did not want her to see his weakness. PCR Tr. 140.

Topp stated Applicant also told her about having a friend named Jimmy who told him God had sent him. Id. She reported that "Jimmy" had arrived in his early teens. Lindsey told her that he was resigned to dying and regretted that he did not have enough time to spend with his children. PCR Tr. 140.

Topp confirmed that her interview notes of the meeting on April 16, 2004 with the Applicant revealed a long interview. PCR Tr. 141. She had broken down her notes into various subsections, including Lindsey, background, educational and employment history, about Nell Lindsey and about his mother Virginia. PCR Tr. 141-42. (Respondent Exhibit 3). She stated she prepared the summaries of her interviews at counsel's request. PCR Tr. 142-43.

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Topp also prepared a summary of her interview of Virginia Lindsey which occurred May 15, 2004. PCR Tr. 144. (Respondent's Exhibit 4)

Topp stated she was referred to the defense by Jeff Bloom. She stated the defense asked her to locate identified witnesses, serve subpoenas, and try to get records. PCR Tr. 145.

Topp stated she got some mental health records of Lindsey and sought records for Bessie and Robin. She also retrieved hospital records related to Lindsey's prior injuries, including a return trip about the head trauma when he was run over as a child. PCR Tr. 146. She also

received school records for Lindsey, though she said they may not have had all due to the school being burned down. PCR Tr. 147.

Topp stated her role as a mitigation investigator was to gather records and information "to keep him from getting the death penalty." PCR Tr. 147. She clarified that it was to gather information, both negative and positive and then let the counsel sort through it. PCR Tr. 148.

Topp identified and described her own attempts to communicate with Lindsey's former girlfriend, Stephanie Petty, up to 2 days prior to the trial. PCR Tr. 148-49.

Topp claimed she did not know she was to be a potential witness in the trial and has never testified in a death penalty trial. PCR Tr. 149-150. however, Topp stated she talked with counsel Quimby on a regular basis and was in her office frequently. PCR Tr. 150. She stated she continued to seek document s during the trial. PCR Tr. 150. During the trial, she also met with witnesses outside court to keep them calm and tell them to be honest and responsive to the questions. PCR Tr. 152. Prior to trial, she recalled the meetings with Virginia and talking with Bill Burton on the phone. PCR Tr. 153.

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Topp recalled that around April 19 sending an email to counsel Bartosh about the impact of Lindsey's brother's death upon him and probably stated that the psychiatrist would have a lot to work with and "he definitely had anger management problems throughout his life." PCR Tr. 154. Further, she recalled that around May 12, she reported to counsel questioning who tried to help this kid who from day one cried for help and no one did, after she had received school records. PCR Tr. 154-55. Topp also confirmed that she suggested subpoenaing the family members that were using mental health facilities - Bessie, Steve, Paul and Virginia. PCR Tr. 155.

She confirmed that she was not an expert in mental health area. PCR Tr. 158. She stated that she made notes and provided then to Quimby. PCR 160. She stated that she was not retained in the case in 2004, so she was not "involved immediately" in his defense. PCR Tr. 161.

Family and Friends State PCR Testimony

At the PCR hearing, the Applicant present a series of family members and friends who testified concerning the family history and their knowledge of Lindsey's life and worth. Implicitly, the Applicant was claiming that such evidence would assist in presenting a background to a social historian and could have been presented in more detail or in a more persuasive manner. However, contrasted with the information that counsel had in 2004 and what was used at trial; it reflects a reasonable decision not to use in the unpersuasive and inconsistent detail it was presented. Additionally, the failure to present it in the manner did not show a reasonable probability that the result of the proceeding would have been different under the Strickland test. See, e.g., Johnson v. Bell, 344 F.3d 567, 573-74 (6th Cir.2003) (although testimony from family members would have helped to humanize the defendant, the jury could have concluded that he was even more culpable because he had enjoyed a loving family and yet had murdered his wife); Martin v. Mitchell, 280 F.3d 594, 613-14 (6th Cir.2002) (defendant did not show prejudice at the mitigation phase where family members testified about his background and a psychological report was given to the jury); Scott v. Mitchell, 209 F.3d 854, 880-81 (6th Cir.2000) (finding that potential mitigating circumstances were overwhelmingly negated by other evidence about the defendant's background).

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Virginia Lindsey's PCR Testimony

PCR Tr. 327-386

In his memorandum, the Applicant describes PCR testimony of Virginia Lindsey, the Applicant's mother, as "vastly different" than her trial testimony. Applicant's Memorandum, p. 21. This Court agrees that there was more detail in the post-conviction testimony. He now suggest in lieu of the brevity of her trial testimony (ROA 1674-77, 2044-2061), [27] the alleged details within her PCR testimony was necessary to humanize Lindsey for the jury and to support the testimony of the mitigation expert. This Court concludes that neither deficient performance or prejudice has been shown by this reconstructed PCR testimony.

The Court will summarize her PCR testimony. Mrs. Lindsey testified that she grew up in Inman and went to the 10th grade. PCR Tr. 329. She described having three sisters and five brothers and was the third child. PCR Tr. 330. Only one of her sisters graduated from high school. Of the children, she thought only her brother Paul had difficulty learning.

Her parents were Ruth and Smiley Pilgrim, her father leaving when she was 13. PCR Tr. 331. She said the two youngest were not Smiley's children. She said he stopped coming around for seven years, only stopping by later for couple of days when she was 20. PCR Tr. 332.

She said she went to work at Inman cotton mill from age 17 to 19. Although some of the family worked either in the mill or a nursing home, money was tight because her mother was unable to work causing them to pick peaches and cotton so they could survive because the father was not providing any money. PCR Tr. 333. She described their house (with 10 people) as a pretty big 2 story house with 4 bedrooms. They used a coal heater to keep warm and used quilts to keep the drafts out around doors and windows. PCR Tr. 333.

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Her Children

[27] A summary of Virginia Lindsey's trial testimony is set out in this Order, pages 22-24.

Mrs. Lindsey stated she married her husband when she was 17 for three years before they divorced. She stated they had three children, Claude, Vanessa (who died in a car accident at 7 months) and Frederick. She stated she still ld with her mother all this time during the marriage. PCR Tr. 335. She described this house as a smaller 4 room house with only two bedrooms.

When Marion Lindsey was born, Mrs. Lindsey stated they lived in her own house on Old Furnace Road. PCR Tr. 336. She recalled that the Applicant was 7 years old when they moved out of her mother's house. She said at various times there were 11 to 12 people living in the 4 room house.

Mrs. Lindsey described her daughter Vanessa's death as "pretty hard" because they had to wait for someone to carry her to the hospital. She felt it took a year to come to her senses and affected her ability to deal with day to day matters.

Mrs. Lindsey stated she had a live-in boyfriend for 20 years, Roger Sims [Tim Sims' father]. However, Roger had a drinking problem and became violent, including toward Marion and the boys. PCR Tr. 339. She said on occasion, the Applicant would run across the street to get her mother when Roger was fighting her and when she got there Roger would leave. PCR Tr. 339.

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Mrs. Lindsey stated that the Applicant's father was Leon McDowell. She said he never lived with them and had his own family. PCR Tr. 340. McDowell did not have much interaction with Lindsey "like a father" and every once in a while he would show up about once a year and give him money or allow them to use a credit card for his clothes. PCR Tr. 340-41.

she described how the other children would get to spend time with their fathers on

weekends, but Marion was left because his father was not visiting. PCR Tr. 341.

She described head injuries that the Applicant received. She described when he was one year old, her brother Paul backed over him with a car, resulting in scars around his ear and head. PCR Tr. 342. When he was 6 or 7 he fell and injured the front of his head which required him being carried to the doctor. However, two weeks later, Lindsey fell off her girlfriend's porch and hit his head in the same place. Then, when he was 16 he had a car accident and he was injured resulting in scars around his eye. PCR Tr. 342. The Applicant was also accidently poisoned by kerosene when Lindsey was 8 months old when he had poured a jar on his face and clothes and was gasping to catch his breath. Although his mother tried unsuccessfully to get milk down him, they went to the police station and then the rescue squad took him to the hospital. PCR Tr. 344.

Mrs. Lindsey described her brothers, Paul and Willie, who were both heavy drinkers - Paul more than Willie - and would "love to fight a lot and beat their girlfriends." PCR Tr. 345. She described Paul getting into more fights and carrying guns and knives. PCR Tr. 346. She recalled a time when Paul got into a fight at 3 a.m. and came home and kicked in the door and got his mother's pistol and went out the door shooting and then someone shot back through the house. She described everyone getting down on the floor. PCR Tr. 346-47.

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She also described an incident concerning Marion's kitten. She said Willie and Paul did not like the cat and one night threw the kitten in the heater. PCR Tr. 347. She said Lindsey was there when this happened. PCR Tr. 347-48.

She described one of the Applicant's brothers Frederick (known as Fred) as not getting along with Lindsey. She said Paul thought she cared more about Marion than him because when Fred and Marion stayed out one night, she gave Paul "a whooping", but not Marion who she

"sent to school to punish him." PCR Tr. 348. She said Fred drowned in Jocassee Lake in 1998 when he was 27 without finding his body. PCR Tr. 349. Marion was 23 at the time of his brother's death. Id.

While they were living on Bobo Street, she said they were exposed to drinking, drug dealing and violence in the neighborhood (but not in their apartment). PCR TR. 350. However, she said Marion did not live with them much on Bobo - it was just Tim Sims and her. PCR Tr. 350. She could not state that she saw Lindsey sell drugs on Bobo, but she had a feeling he was selling. PCR Tr. 350.

She described an event when Lindsey was 15 and got into a fight with Fred while she was at work. PCR Tr. 351. She said the oldest son, Claude, called her at work and told her to come home because Marion and Fred were fighting. When she arrived Fred and his half brother were fighting Marion. Id. When she got there they had the Applicant on the ground and Claude had a stick and they got off him. She told Fred and his half brother to leave and don't come back. She said Fred stayed gone for a week or two before he came back. PCR Tr. 351.

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She described another incident when Marion and Fred were fighting one night over the use of the telephone. When she tried to stop them, she said Marion "hauled off and held me down on the bed." She said she told Lindsey to never ask her for anything else in her life because she won't give him anything and "I don't love you no more and you don't treat your mama like that." PCR Tr. 353, ll. 6-15. She stated Lindsey did not like that, went into the bathroom and took a whole lot of pills. While she remained on the bed watching TV, she heard her son Tim call for his father. Next, Roger Sims came to her and told her to call the rescue squad because Marion had taken pills and was on his knees throwing up. She went and saw him

by the commode and he had taken Tylenol, Advil, and Ibuprofen. He was carried to the hospital where they pumped his stomach and then was put into mental health treatment for two weeks. She said they sent him home after that and did not tell her to bring him back. PCR Tr. 353. She never sought any follow-up. PCR Tr. 354.

She said Lindsey had difficulty in school. She stated he was always repeating, could not learn, and got D's and F's. PCR Tr. 354. She stated he left school at age 17. PCR Tr. 355.

Although he did not get a job when he left school, his mother felt he got money first from his girlfriend, Stephanie Petty, and then after that by selling drugs. PCR Tr. 355. She said his drug sales helped her because he made the house payments from his proceeds. He also used the money to help her with payments on the mobile home and groceries. PCR Tr. 355-56.

She said Lindsey would briefly get a legitimate job for 3 to 4 months and then quit it to go back into drug dealing. PCR Tr. 356.

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Mrs. Lindsey stated that while Lindsey was living with Stephanie Petty, Nell got pregnant with the Applicant. PCR Tr. 356. She described Nell and her mother always showing up at Lindsey's house asking for things for herself and the baby. After a while, Stephanie got tired of it and left. PCR Tr. 357.

She stated that when Stephanie left, Lindsey got more serious and eventually got married after their oldest was 5 or 6. PCR Tr. 357. They had two children. She testified that she observed Marion, Nell, and the two boys at her house all the time. PCR Tr. 357. Mrs. Lindsey opined he took care of them by taking them to the barber, out to eat, to the park. PCR Tr. 358.

She described the relationship with Nell that they argues a lot, but she never saw Lindsey hit Nell and it was all right because everyone is going to have ups and downs. PCR Tr. 358. She

said that Nell and Lindsey had already broken up before the shooting, but he had not told her or she did not know it, although he hung at the house a lot. PCR Tr. 358.[28] She said she did not [and could not] have any conversation about a breakup, although Lindsey stayed around her house talking to Nell on her telephone. However, one night he asked her to take groceries over to Nell so the children would have good. PCR Tr. 359.

Concerning the first separation from Nell, she said Lindsey was not angry with her because she would go and come back.

She said that they were separated a month before the shooting, but Mrs. Lindsey felt they were still together because one Sunday they all went out to eat together. PCR Tr. 359. After they ate Lindsey dropped Mrs. Lindsey off and went off with Nell and the family. PCR Tr. 360.

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Later, Mrs. Lindsey stated that she learned Lindsey was not seeing the children when he asked her to call Nell and tell her to bring the boys to her house so he could see them. When Mrs. Lindsey called, she said Nell's mother answered the telephone and in response Nell later returned the call and said for her to tell Marion that she was not bringing the boys over there and he was not seeing them. PCR Tr. 360. Mrs. Lindsey said she then called Lindsey and told him and he told her that if she was not going to let him see them that he was going over to get them. When she called Nell back, Nell told her to "come one, come on." PCR Tr. 361. She told him not to go over because Nell would have the police waiting. Fifteen minutes later the police showed up at Mrs. Lindsey's house and she told them that Lindsey did not live there. When she called Nell and asked her why she sent the police, Nell denied sending them. PCR Tr. 361.

Mrs. Lindsey stated after that she did not think Lindsey ever saw his sons. However,

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[28] [contradiction].

Mrs. Lindsey stated that Nell still carried her to bingo. One night, she asked to keep "the baby", and thought Nell would bring him back after she changed his clothes, but never did. PCR Tr. 362.

She described an incident the first week of September. PCR Tr. 362. She stated that she received a telephone call from Tim while she was at work that Marion had called him and was saying he would kill himself. After discussion that she told him to go and talk to Marion, she left work. She arrived with her brother Steve (Pilgrim), her sister Bessie, and Tim and tried to calm him down. She said Steve gave Marion "a nerve pill", Bessie prayed and they stayed with him until 8 p.m. PCR Tr. 362-63. She said Lindsey gave them some suicide letters for her, Tim, and Trey and Alex (his sons). PCR Tr. 363. She said she carried the notes to her house put them in a box and after the later shooting returned them to Rod Tullis. PCR Tr. 363. Though she requested that they call the rescue squad, her sister talked her out of it saying they did not need to. PCR Tr. 363-64.

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Virginia Lindsey stated she met with Brannon and Lenora Topp on Saturday evening prior to trial for one hour. She said they talked about what happened and she told them she did not know what or why it happened. PCR Tr. 364. She said they also talked to Bessie that night.

Mrs. Lindsey claimed this was the only meeting in preparation for the testimony. In hindsight, she did not feel that they ask her enough questions and did not ask any background questions. PCR Tr. 365. She felt this meeting was about 2 weeks before the trial. She did not recall being asked to sign any releases for her medical or school records, but would have done so if asked.. PCR Tr. 366.

Mrs. Lindsey admitted that she talked to them about Dr. Barry Henderson. PCR Tr. 367.

He was Marion's doctor from when he was a baby til grown. She said he had a relationship with Lindsey because he used to play with his children at a game room that Dr. Henderson owned. Id. She felt Dr. Henderson could have testified about his treatment of Lindsey, as well as what type person he was. PCR Tr. 368. He is now deceased though. PCR Tr. 368.

Concerning mercy requests, contrary to the assertion in the post-hearing memorandum of Petitioner, p. 25, Virginia Lindsey testified that she did talk to the defense team and "they did" prepare her to request the jury to have mercy on her son. PCR 368, l. 14-18. [29] However, she felt she was not prepared to make a mercy request at trial. She claimed that if she was prepared, she would have asked for mercy on her son because she had lost a son and "would ask for mercy that he not get the death penalty." She stated that he had to be punished, but not the death penalty because it hurts to lose someone. She said she not only lost a son, but that she lost a daughter, a son, and two grandsons. PCR Tr. 369, ll. 1-8.

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Mrs. Lindsey asserted that over the last 6 months she had spent around 20 hours with professionals, investigators and attorneys. PCR Tr. 371.

On cross-examination, Mrs. Lindsey admitted in her meetings with Doug Brannon and Lenora Topp that they may have also talked about family history. PCR Tr. 372. She corrected herself and admitted at some point that she told them about

- having two miscarriages
- her first son was Claude
- her daughter Vanessa was killed in car crash
- her second son Frederick died in the lake and body was

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

not found in 1998
- Marion's father was Leon McDowell who did not pay child support
- fourth son was Tim Sims
- Tim Sims, Sr. helped out with kids for 17 years
- Tim Sims was on disability from Milliken where he worked until he got sick with a series of strokes

PCR Tr. 373-74.

Virginia also told Brannon and Topp:

- all three of her sons have children
- Marion was the only one who married the mother of his children
- none of her son's finished high school
- she worked shifts in factories, particularly the second shift
- that she had spoiled Marion "a little bit", because he did not have interaction with his father
- that her mother was deceased
- that she and her family were very poor
- that she had 8 siblings and each had 2 or 3 children
- that they grew up together

PCR . 375-76.

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Virginia Lindsey also testified that she told them Marion was run over as a child by her brother, but that she was at work when this happened and sister Bessie picked her up. She told them that this resulted in the bad cut to his ear and head. In addition, she told them about Marion falling and hurting his head on the concrete porch. PCR Tr. 377.

Concerning the pill incident, she confirmed that she talked with Brannon and Topp about it and that

- Fred and Marion always argued
- Marion took it hard

PCR Tr. 377-78. She told them about efforts to get the death certificates.

She also spoke with them about his relationship with Stephanie Petty and liking Petty's grandmother. PCR Tr. 378. Concerning Nell, she told them that she thought she was a nice girl and like her and that Nell and Lindsey had problems over money. She stated to them:

- she knew Lindsey was selling drugs, but did not see it
- she knew he spent money on her and household from selling drugs

PCR Tr. 379.

Concerning the pill overdose incident, she did not recall telling the doctors that he was a stable kid and did not cause any major problems. PCR Tr. 380.

Mrs. Lindsey stated she have talked with them about how his family was important to him, but that she was aware he had other girlfriends while he was married, including at the time of the shooting. PCR Tr. 380-81.

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Concerning the car incident, she spoke to them about it, but admitted she did nothing to stop it. PCR Tr. 381.

While she admitted she thought about calling to get help at the September 2004 meeting about talking Lindsey out of suicide, that she did not. She admitted the only time she sought help was when he took the pills. PCR Tr. 381. She recalled meeting with a doctor because of his release, but did not recall what they talked about other than that Mrs. Lindsey did not want him to go to a mental hospital because he was not crazy. PCR Tr. 382.

On re-direct, she stated that in discussions with Doug Brannon and Topp, she was confirming some information that they already knew. PCR Tr. 384. In addition, she admitted that there was a pattern of behavior in the family to have multiple girlfriends that Marion saw. In addition, she admitted that she saw the older uncles toss the cat into the fire, shoot guns through

the house, get into fights in the neighborhood. PCR Tr. 385. She stated Lindsey experienced emotion in these events.

Mrs. Lindsey said she was afraid when the shots were fired through the house and was on the floor with Lindsey. PCR Tr. 385-86. Concerning the cat incident, she said she was surprised when they threw the cat into the heater while she was sitting there and it created an awful smell. She said she did not try to stop it because she was afraid of her brothers: "I didn't know what they might do cause they already done grabbed the cat up and thrown him in the heater. He might have thrown me in there, too." PCR Tr. 386-87.

Bessie Smith - PCR Testimony

Bessie Smith, the Applicant's aunt and Virginia Lindsey's sister, testified at the PCR hearing, as well as at trial. PCR Tr. 388-424. ROA 2080-82.

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Smith testified initially about the family history. She testified that she grew up in Inman, S.C. with 9 brothers and sisters. PCR Tr. 389. Her father was Smiley Pilgrim, who left the family when she was in the 4th grade. She went to school until the 7th grade when she left to work to help by picking peaches. She said two years after Smiley left, stepfather Willie Farr came into the picture. Smith described Farr as a godsend and took care of them. She described her mother becoming depressed after Smiley left staying in the bed with the children having to bather and feed her. PCR Tr. 392.

They relied upon her grandmother to bring them food and clothes. Her step-dad did outside work and tried to keep food in the house. PCR Tr. 392.

Smith stated that her brothers and sisters got married and moved out, but Virginia returned home. PCR Tr. 392. Mrs. Smith got married and moved about 3 miles away. She

stated she got a GED and studied at Spartanburg Technical College. She had 5 children. PCR Tr. 393.

She tried to emphasize that her children had a different life than Virginia and Marion. PCR Tr. 393. She described that although Paul was quiet, shy, and timid, yet after he caught his first girlfriend with another boy he was not the same. PCR Tr. 394. She described him as getting into fights and drinking. He then went into the service. PCR Tr. 394. She said Paul gave her mother lots of trouble because he got into fights. She asserted that others were jealous of him and would pick at him, although he did not initiate the fights. She stated that Paul was usually protecting himself "because he grew up without a daddy", or older brother to run to, not because he was mean. PCR Tr. 394-95. She described a man who would come around the house and teach Paul how to open a hawk bill knife. She said Paul would use this technique with his knife to scare them "because Paul was a timid scary kind of person growing up." PCR Tr. 395 ll. 4-17.[30]

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Bessie Smith described after Fred returned from the service, he came to live with them, mother, got married, and had two girls. She acknowledged worse behavior came along after.

Bessie Smith stated that her sister Robin did not display the same drinking behaviors growing up, but she started having problems ("you know how teenagers are") with liking boys early. PCR Tr. 396-97. She was described as being smart in school and worked her senior year to pay for graduation by babysitting Marion. However, she stated using drugs resulted in being

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[30] She said she did not know much about Willie. She said he was away and "on the go." She said he would be out working on his car or out with his friends. PCR Tr. 394.

incarcerated, but claimed she was not violent or robbing people.[31]

Smith stated she was not living with Virginia when her daughter Vanessa died. PCR Tr. 398. She stated that Virginia was devastated and depressed along with her mother. She stated Virginia's mother felt blame for it. After the death, Virginia's husband began to drink more and then started dating Virginia's cousin that was raised with them. That relationship tore Virginia up and she separated from her husband.

After the separation, Virginia and her mother moved closer to Inman. At that time, Virginia started drinking and staying out late, but kept working. PCR Tr. 399. Smith described Virginia's drinking as not daily, but a weekend thing. To clarify, they would work all week and then go out Friday night when they got off work.

Because Virginia worked second shift (3 p.m. to 11/12 p.m.), Smith felt she did not see her children much and they cared for themselves. Virginia's mother would watch them while Marion was small playing outside. She said Steve Pilgrim (her brother) would be working on cars and motorcycles. She said Marion loved to hang around Steve "all the time." PCR Tr. 400.

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She said her mother and Virginia also liked to play bingo, but she did not know how much time they spent playing it. PCR Tr. 401, ll. 1-10. She said when they went to play, the children were left with Steve or another uncle. She said they played "pretty good much" and "sometimes every night." PCR Tr. 401, ll. 17-20.

Bessie Smith described a period that Marion lived with her when he was around 12 to 13. PCR Tr. 401. She observed that Marion was always smiling, crazy about her husband who he

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31 However, Robin Keith is serving a sentence for assault and battery of a high and aggravated nature.

teased about the way her husband talked. PCR Tr. 402. She said Applicant did not like to be around his step-father, but loved being with her family. She said he might have stayed there a few months. PCR Tr. 403.

She described her home as different than Virginia's. She claimed that her sons were in sports and not allowed to run around. She said they knew that they had to finish homework and chores. She said Marion "fell right in there." She said he was a sweet child who she cared about and that he wanted attention. PCR Tr. 403. She said she tried to listen to him, tease him.

Bessie Smith stated that she also worked like Virginia. She saw a difference - in addition to having both parents there - that she was more active in doing things with the children in their sports, activities and schoolwork. She felt Virginia did not push them, did not go to PTA meetings. She said that because she worked second shift, Virginia would be off to work. She said Lindsey's older brother, Bubba, sometimes had to wash the clothes and shoes by hand, claiming Virginia did not have the money to go to the Laundromat. PCR Tr. 405. She also claimed that sometimes the children did not go to school because they did not have clean clothes.

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Smith admitted there were problems in her own family, but claimed she had structure with rules, Marion's family "had freedom." She asserted that Virginia loved and cared for her children, and gave them everything she could and that he would have more "bill money" in his pocket than Smith had. PCR Tr. 406. She said her mother took care of everything, so Virginia never learned about responsibility. PCR Tr. 406-07. Smith said she never gave her own children "bill money." She said though that Virginia was a good mother, but we all had a struggle growing up. PCR Tr. 407, ll. 10-15. she described her own life, growing up rough suggesting at a time she had nothing to eat, nothing to keep warm when her step-father left. PCR Tr. 407.

Bessie Smith described an event a couple of weeks before the shooting at Lindsey's house. She stated she had heard from Virginia that the Applicant was going to kill himself and she went to his house with her sister and brother Steve Pilgrim. She described Lindsey as being depressed, saying he did not have anything to live for and was tired of what was going on. She said they sat down and talked to Lindsey to try to find out why and that he had his whole life. She stayed with Lindsey about an hour or more. PCR Tr. 408-09.

She stated that she told Lindsey that he needed to pray. She left with her brother Steve. She recalled that no ambulance was called although Virginia mentioned that Bessie should call the rescue squad. She said Virginia told her he had tried to kill himself one time before when he took some pills and he stayed and got treatment. PCR Tr. 410.

Bessie Smith stated she talked to Marion later but did not see him. Bessie said she called Lindsey on cell phone days later and he said Nell was trying to take his children from him and he would not see them anymore. PCR Tr. 411-12. He told Bessie that he loved his children, and Bessie said she knew that and don't worry about the woman, and that he'll get to see the children again. PCR Tr. 412. She said he was crying. PCR Tr. 412.

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Bessie Smith described receiving a telephone call from him the next day when he stated that he was still upset. He claimed that he got a job at BMW and was supposed to start work that Monday, but that Nell and her mother had taken out warrants against him. He inquired how could he see his children if he did not have a job. He feared the police would arrest him at BMW and that he would have nothing and would lose the job. PCR Tr. 413. He denied to her what the warrants were for. PCR Tr. 414. She said while they were talking someone clicked in. PCR Tr. 415-16. She tried to call back, but never could reach him. PCR Tr. 415-16. She said the

incident happened about 3 hours later. PCR Tr. 416.

Smith said she told Marion that she had seen him with his boys at the duck pond, that Marion loved his children, that he bought shoes and clothes for them and their mother. She also said that he would give Nell money and she shopped all the time and take them to eat.

She described a time one month before the shooting when Lindsey carried Nell, his mother, and the boys to Greenville to eat and shop. PCR Tr. 414-15.

Preparation for Trial

Bessie Smith testified that prior to the trial, Mr. Bartosh, Mr. Brannon and a lady came out to her house a week or a few days before the trial. she said they asked questions and stayed 30 to 40 minutes. PCR Tr. 416. Smith said that she had already divorced her husband by trial time. She claimed this was the only meeting. PCR Tr. 417. She initially claimed they asked "what kind of child he was growing up", and asking "a lot of stuff about me" (Bessie) that she did not want to answer because she was not on trial. She said that they learned about Marion growing up and what type of house he grew up in. PCR Tr. 417.

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Smith said she was told and agreed to testify. PCR Tr. 417. She claimed this was the only contact she had with counsel since the incident. She pointed out that she had more preparation in this hearing, meeting about 3 or 4 times. PCR Tr. 418.

On cross-examination, Bessie Smith stated concerning Applicant's potential job at BMW and Nell's warrants, that she had heard about it from someone other than Applicant. PCR Tr. 419.

Concerning her alleged telephone call with Applicant on the day of the incident, Smith said that Applicant did not say anything about tracking down his wife or looking for her because

she had a boyfriend. PCR Tr. 40. She denied that Lindsey ever told her then that Nell and a boyfriend was helping take the kids away. She said Lindsey just kept saying that Nell did not want him to see the kids and was talking about taking the kids away from him. PCR Tr. 420.

Smith denied any knowledge on whether Applicant had a girlfriend during the course of his marriage. PCR Tr. 421. She described that Lindsey had various jobs working on motorcycles and working at the Zeman Plant.

She returned to when he was younger and lived with Smith. She confirmed that he was a "child who like attention." PCR Tr. 422. During alleged suicide threat earlier in September, she stated that she and her brother talked to them. She confirmed that she left after 1½ hours because they thought he would not do it and her brother and sister stated he would be all right. She confirmed that there was a discussion about calling the rescue squad by Virginia and they deferred that decision to Virginia. The rescue squad was not called. PCR Tr. 422-23. She stated while "she loved Marion to death", she would "pretty much" have done something if she thought he was in danger, she also felt this was his mother's call. PCR Tr. 423.

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Returning to the phone calls on the date of the incident, Lindsey did not tell her where he was calling from, did not tell her he was going anywhere that day, or about having a gun. Jessie Smith confirmed that when she spoke with Doug Brannon and Lenora Topp, that she told them she had a phone conversation with Lindsey that day. PCR Tr. 424.

Steve Pilgrim (PCR Tr. 426-453)

Steve Pilgrim, the Applicant's uncle, had testified at the original sentencing proceeding. R. 2078-2080. During the PCR proceeding he testified that he was a lifetime resident of Spartanburg, growing up in Inman. PCR Tr. 427. He stated Smiley and Ruth Pilgrim were his

parents. He was 6 when Smiley left.[32] PCR Tr. 428.

Pilgrim stated that he spent a good deal of time growing up with Virginia, Bessie, Robin (Keith), Paul, and Willie. PCR Tr. 430-31.

Pilgrim denied that Virginia had a problem with drinking and drugs. PCR Tr. 431, ll. 2-4. However, he stated at one time Virginia displayed suicidal behavior. Pilgrim then described that Marion was not taken care of by Virginia or Marion's father. Virginia allegedly got upset with the father and decided she did not want to live. PCR Tr. 431, ll. 13-17. However, he did not recall if she was hospitalized for it. PCR Tr. 431.

Pilgrim also described when he was around Mrs. Smith and she attempted suicide. He stated it was between her husband and it was rough taking care of them and they broke up 3 or 4 times and Bessie just did not want to live anymore and was hospitalized. PCR Tr. 432.

As to Robin Keith, he thought she had tried to take her life 3 times. PCR Tr. 433. He described her being "kind of depressed for a long time." She also spent time in a hospital more than once.

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Contrary to other testimony, Pilgrim stated that Robin had exhibited violent behavior around Marion, but Pilgrim could not remember any circumstances. He confirmed that she was presently incarcerated for violent behavior. PCR Tr. 434.

Pilgrim also stated that brothers Paul and Willie also went to prison for violent behavior.

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[32] At this point a relevance objection was made. Counsel Collins asserted that this information should have been gathered by original counsel and second, the information was essential to later expert witnesses, Dr. Melikian and Ms. Vogelsang. Third, he asserted this information supported their mitigating circumstances and humanized the defendant. Counsel declared he would have presented or proffered this evidence at trial. PCR Tr. 429. With the assertion that they claim all evidence should have been put into trial. The objection was withdrawn.

PCR Tr. 434.

Pilgrim testified about the house they lived in on Brock Street in Inman. (Exhibit 27). He stated 10 people lived in the 4 bedroom house, including Marion. PCR Tr. 434-35. He said the Applicant was born there and the family stayed in the house for 10 years. He stated the house lacked indoor plumbing, air conditioning, and was heated with a stove using either wood or coal. PCR Tr. 435.

Pilgrim stated Lindsey experienced violence while living in their house with the actions of Paul and Willie. He described them as being violent toward Pilgrim, other family members, people in the community, and women in their lives. PCR Tr. 436.

Pilgrim described accidents in Lindsey's life. He recalled Lindsey being run over by a car driven by Paul who backed up over him. PCR Tr. 437. When Steve realized it was baby Marion, he grabbed Lindsey and carried him to the Inman Police Department who took him to Spartanburg Regional Hospital. He said Lindsey never cried or moved. PCR Tr. 437. He responded while at the hospital. He was checked and received stitches on his head where the car ran over him. He was released the same evening. PCR TR 437. Pilgrim blamed the fact that Marion would always try to follow him as the reasoning for the accident. He also stated, in general terms, that Lindsey would fall and hit his head other times. PCR Tr. 437-39.

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Concerning Lindsey's suicide threat, he recalled about 3 weeks before the shooting, that he went over to Marion's with his sisters after they called stating Marion had said he was going to kill himself. He said they stayed with Marion 2 to 3 hours. Pilgrim found him real depresses - which was unusual for Lindsey - and talking about wanting to see his kids and that he was having problems with his wife. Pilgrim stated Lindsey was crying that night, which was the first time he

had seen him cry. PCR Tr. 439. Pilgrim said that Lindsey had calmed down that evening. PCR Tr. 439.

The next week, Pilgrim stated he received a telephone call from Lindsey telling him that he wanted a gun. PCR Tr. 439-440. Steve Pilgrim thought he was the only one in the family with a gun because his older brothers are not allowed to possess guns (although they had them in the past). PCR Tr. 440. Pilgrim states he no longer has the gun that Applicant asked for. PCR Tr. 440. Pilgrim stated Marlon did not get his gun. However, shortly after the phone call, someone broke into his house and trashed the house, but they did not find his gun. PCR Tr. 440.

Pilgrim denied getting another phone call from Lindsey after that. PCR Tr. 1-10.

Pilgrim stated that he would loan Lindsey money to take his wife out to eat because he was trying to get back with her. He stated she went out with him 3 to 4 times before this happened. PCR Tr. 441.

As to his trial preparation, he stated he met with the defense counsel one time the day before the trial started. PCR Tr. 442. He thought that it was on a Saturday for 30 to 40 minutes. He recalled Mrs. Topp, Mr. Bartosh, Mr. Brannon, his sister Virginia, and sister Bessie - the people that were going to be testifying. PCR Tr. 442. He stated they discussed his condition and what he was suffering from that resulted in his disability. He stated that he was depressed, had anxiety [and uncontrolled hypertension]. He stated that they did not request that any of them sign releases of medical or psychological records that he would have done. PCR Tr. 443.

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He said he had lived in Spartanburg from the time of the incident to the trial and was available. In hindsight, he felt he was not adequately prepared to take the witness stand and testify. He said that he had never testified before and was nervous and they did not ask him

anything, just about his health. PCR Tr. 444. He said they did not ask about the events leading up to the trial or Marion's personal history. In contrast, for the PCR hearing, Pilgrim described only talking about his health. PCR Tr. 445.

Pilgrim stated that they prepared him and asked him if he wanted to ask for mercy. PCR Tr. 445. In describing it though, Pilgrim stated "they told me not to ask for mercy." PCR Tr. 445, ll. 1-8. Pilgrim stated that he would have asked for mercy, declaring that "we all make mistakes", "I care for my nephew", "he's my favorite nephew and he made a mistake", "and I wouldn't want him ... get the death penalty." PCR Tr. 445, ll. 11-17.

On cross-examination, Pilgrim clarified that he took the picture of the house (Exhibit 27) last Sunday. PCR Tr. 446. Pilgrim further did not recall that at the 2004 trial he testified about being a witness to the car accident (ROA 2079-2080), that he testified about the incident when Lindsey ingested kerosene (ROA 2080), about how long he stayed with the family (ROA 2080) and his own health conditions of high blood pressure and panic attacks. PCR TR. 448. Pilgrim admitted he would have provided this information to counsel. PCR Tr. 448.

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Pilgrim testified that he had been followed by Lindsey and he taught him how to fix things and remained involved in his life after he moved out. PCR Tr. 449. He was consistently in contact with the Applicant throughout his life. PCR Tr. 449.

In explaining his earlier reference to violence in the home, he described it as going out and getting into fights, getting guns and shooting people. He further described drinking and cussing in the home and turmoil. PCR Tr. 450.

In explaining the discussion on mercy, he said it occurred in the 20 to 30 minute meeting with Mr. Bartosh and the others at the office. PCR Tr. 451.

Pilgrim stated that he was not present when either Virginia or Bessie attempted suicide. PCR Tr. 451. He said he was the contact person in the family and would be called whenever anything happened, but he did not see what they did. PCR Tr. 452.

As to Exhibit 27, he stated the house looked the same, except they would mow the grass. PCR Tr. 452.

Timothy Roger Sims (PCR Tr. 453-480)

The Applicant's younger brother, Tim Sims, testified that he is 10 years younger and did not share the same father. PCR Tr. 453. He described his relationship with Applicant as the person who raised him because his own father left when he was 11. Sims stated that Lindsey treated him like he would have wanted his father to treat him. PCR Tr. 454. He said he was 19 when the shooting took place, so for 8 years Lindsey had stood in his place as a father. He said he would see Lindsey everyday and was with him everywhere he went. PCR Tr. 455.

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Sims stated that he got into trouble with the law and had a drug charge in 2003, initially on probation until he violated and got 6 months. PCR Tr. 455, ll. 7-16.

He stated that he had been working s a brick mason, but was not working presently. PCR Tr. 455. He said he was getting married next year.

He claimed at the time of the trial (in 2004) he did not have any criminal charges. PCR Tr. 456.

Sims stated that he knew everything about Lindsey's relationship with Nell because he had lived with them and his children. PCR Tr. 456. He described that everything was going good and he would do everything he could for her. However, he said everybody argues and fusses. He said he never saw Lindsey "put his hands on Nell", but he was not there all the time.

PCR Tr. 457. He said their fusses were "normal arguments", again asserting that he never saw him hit her. PCR Tr. 457.

Sims described his knowledge of the work history. He said Lindsey painted cars and worked at Milliken or a similar place. However, he said Lindsey got into the drug game to take care of his mother and the rest of the family. PCR Tr. 457, ll. 20-24. [He said his own father left after he got sick and went to live with his mother]. PCR Tr. 457.

Sims said Lindsey had to do what he had to do to survive. PCR Tr. 458. In using his drug proceeds, Sims said Lindsey would take care of anything needed for any family member. PCR Tr. 458.

Sims described three weeks before the shooting going to dinner with Lindsey and Nell at The Junction. He said Lindsey paid for the meals for all the family - Sims, his newborn, Sim[illegible] wife, his cousin and her newborn, his cousin's son and niece. PCR Tr. 458-59.

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On that evening, he said that Lindsey and Nell picked him up and they went to pick up Lindsey's other son from his grandmother's house. PCR Tr. 459. After dinner, Lindsey drove everyone home, except for Nell and their children who left with Lindsey. PCR Tr. 459.

Sims described going over to Lindsey's home one day with his mother, Aunt Bessie and Steve after he thinks Lindsey had called him. PCR Tr. 460. Sims described Lindsey's voice as nervous and crying and that "I feel like I'm about to take my life." PCR Tr. 460, ll. 18-22. Sims said he told him not to and asked where he was and told him he's get there. Sims called his mother and they got to Lindsey in 30 minutes. PCR Tr. 461. He found Lindsey at his house laying in the bed, appearing to "let everything go." At that time, Lindsey gave them letters about what he was going to do. He described Lindsey crying for the first time (and a second time on

the day of the shooting). PCR Tr. 461.

Sims recalled that he stayed with Lindsey from around 5-6 p.m. until 8:00-9:00 p.m. PCR Tr. 462, ll. 3-5. He said they had talked to him, Uncle Steve gave him "a nerve pill" to calm him down, and left after it looked like everything was all rights. PCR Tr. 462. [The alleged suicide threat notes were addressed to Nell, his boys, Tim Sims, and Virginia]> PCR Tr. 463. He said his mother had the notes when they left that evening. PCR Tr. 463.

Sims said that Lindsey had expressed concern about Nell at the end after he handed them the notes. PCR Tr. 463. Sims felt he was still "down" though. PCR Tr. 463.

Sims described a subsequent situation a day before the shooting when he asked him to drive by Nell's house. Lindsey had called him because he thought she was seeing another man and wanted him to see if he saw a Lexus in the yard. PCR Tr. 464, ll. 21-25. He said he drove by - saw the Lexus - and kept going. However, Sims said he did not want to tell him he saw the car because he knew it would upset him, so he told him it was not there. PCR Tr. 465. He said he was familiar with Nell's car and it was not hers. PCR Tr. 465.

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Sims said Lindsey was not able to contact Nell or able to see the children. He had been told not to see them. However, Sims said Lindsey told him to take them food so Sims would go to McDonald's get food and take it to them. PCR Tr. 465.

At one point, Sims said Lindsey called him to try to set up a 3-way call using his mother's phone that she would answer. When he did, he heard Lindsey tell Nell he knew she didn't want to see him, but to let him see the boys. PCR Tr. 466. In response, Sims said Nell started cussing and he told her no way and that we are staying away from them, while he heard a son in the background as she told him she did not live with him anymore and "that's not your daddy." PCR

Tr. 466. This was the day before the shooting, according to Sims. PCR Tr. 466-67.

Sims said he did not see him. However, the next day - around 5 p.m. - Lindsey called and asked her to go down the street from "Shirley" who knew something about Nell. PCR Tr. 467, ll. 10-20. Sims said he wanted her to call him so get her number and give her his number. Sims said he took a shower and then Lindsey called back wanting to know if he had gotten the information. PCR Tr. 467. He told him no. He said Lindsey then sought to speak with his friend Chawny. Sims said Chawny left the house and returned. About 40 minutes later, Sims said Lindsey called back crying saying "she" had told him a lot about Nell and her new boyfriend and he was "going out of his mind" over what was told him. PCR Tr. 469, ll. 4-10. Sims told him to calm down and meet at brother Claude's home. He said ok and Sims left to go to Claude's. Shortly thereafter the shooting took place. PCR Tr. 469.

[Despite his earlier testimony], Sims claimed he did not know where Lindsey was living then, except that it was in Linville Hills. He estimated that it would take 15-20 minutes to get to his mother's house, and he would go by Celeste's house. He said he did not see Marion before the shooting. PCR Tr. 471.

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Sims claimed that he never told this information to Bartosh, Brannon or Ms. Quimby. He claimed no one in 2004 talked to him. He said he was not in jail at the time of the trial and saw his mother, Uncle Steve and Aunt Bessie on a regular basis.

However, he said he was present at the trial. He claimed to have approached Doug Brannon and told him "he knew more about Nell and Marion than anybody" and wanted to testify. Counsel told him he would get back to him, but never did. PCR Tr. 472-73.

Sims said if asked he would have testified similarly and would have asked for mercy.

PCR Tr. 473. Sims testified that he would have stated that Nell did not deserve what happened to her and Lindsey deserved to be punished, but did not deserve death because his wife was gone and we didn't need him gone. Sims stated his kids did not need to grow up without parents. He said their children would never be able to know what happened and they would want to ask their father what happened. PCR Tr. 473-74.

On cross-examination, Sims stated in reference to whether he had seen Lindsey violent towards Nell, he denied being aware of the August 1996 incident where he allegedly threatened to harm her and the October 1996 incident when he pushed and shoved her.

He confirmed that he was present at the December 2001 incident at Applebee's but denied seeing him slap or tear her clothes, claiming to be on the other side of the car. PCR Tr. 475, ll. 12-24.

He also confirmed that after he had received the telephone call from Lindsey a month before the incident that he did not attempt suicide at that time, just had talked about it had no weapons and he felt comfortable enough to leave. PCR Tr. 476. Further, on the day of the shooting, Sims was under the impression that Lindsey was going to come to his house and they were going to play games and talk it over. PCR Tr. 476. he confirmed that there was no discussion on that date that Lindsey was looking for Nell, looking for a gun or having a gun. PCR Tr. 476, l. 23 - p. 477, l. 3.

Further, Sims confirmed that when Lindsey asked him to investigate Nell's house, he was looking to see if she was involved with someone else - not to check up on his children. PCR Tr. 477, ll. 7-16. Sims confirmed that Lindsey was also involved with someone else and had girlfriends while he was married. PCR Tr. 477.

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Concerning his drug charge, Sims confirmed that in August 2003, he pled guilty and was sentenced to 6 years, suspended to 11 months probation and was on probation at the time of the May 2004 trial. However, he admitted that he had violated probation then and was awaiting to go to court. PCR Tr. 478.

Concerning Lindsey's violence, Sims confirmed he had been a witness to Lindsey being violent in the past. PCR Tr. 478, ll. 19-21.

On re-direct, Sims stated that both Lindsey and Nell had affairs during their marriage. PCR Tr. 479-80.

PCR Testimony of The Burtons

During the PCR hearing, Applicant called Bill Burton who testified at the trial, and his mother, Mrs. Pat Burton, who was on the trial witness list, but did not testify.

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Bill Burton's PCR Testimony

Bill Burton testified similar to his trial testimony. PCR Tr. 304-05. He stated prior to his trial testimony, when he learned he would be a character witness, tried to contact Mr. Bartosh because it was his first court experience. He said that he wanted some background on the kinds of questions and information he should provide and how to prepare for trial. He found it difficult to contact Bartosh, an extremely busy man. He stated they met either the day before or the day of trial with many other witnesses and did not have any one-on-one discussions with him. PCR Tr. 305.

Burton stated that he sat in the trial for several days. PCR Tr. 306. He said he was aware that guilt was not as much an issue as sentencing. PCR Tr. 306. He said he was told to "say what you know about Marion." However, Burton felt the case was disorganized and he was

concerned about it and did not have a good feeling about preparation. "I wanted to understand the strategy" and how the facts could be used to defend Lindsey and avoid a death sentence. PCR Tr. 307.

Burton stated that he wanted to tell the jury that he got involved as a teenager with Lindsey when he was 6 years old when Burton was giving swimming lessons at a public pool. He found then that Lindsey wanted approval and a parent figure to look up to, anxious to show someone his achievements with swimming, jumping, and fishing. Burton said he later went to Lindsey's house, met his mother and rest of family and began a 13 year relationship. PCR Tr. 309.

Burton reiterated that Lindsey was desperate for approval, attention, and involvement with adults. Burton saw that Lindsey had no supervision at home and they did not have any help or encouragement with their studies which led to Lindsey having a difficult time at school. PCR Tr. 309. He described Lindsey's house, though clean, was falling apart.

Burton felt Lindsey wanted a (normal) family, but his environment made it difficult for him to prepare for that later in life. Lindsey lived on the street, did not do well in school and his education was very limited. PCR Tr. 310.

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Burton stated Lindsey did not see much of his father. He saw his role with Marion as a male figure he could look up to and Burton declared he was happy to provide it. PCR Tr. 311. His last contact with Lindsey was in 1990. PCR Tr. 311, ll. 11-12.

Burton said his company was able to offer Lindsey a job in what he hoped would lead to a good future. However, Burton was transferred and lost touch with Lindsey and learned Lindsey left "for reasons I don't recall." PCR Tr. 311, ll. 17-20.

On cross-examination, Burton did not recall his earlier testimony that when Lindsey left that he had tried to get him his job back. PCR Tr. 313. Although he lost touch in 1990's, Burton said he was aware that Lindsey was continuing to visit his farm and fish through his mother. PCR Tr. 313. He confirmed that he had no contact with Lindsey after he began his relationship with Nell or the actions of Lindsey after he moved. He admitted that he did not know until the trial of the shooting incident of Wilkens, the number of different incidents with his wife, the fact that he was involved in selling drugs, or the reasons why he was let go from the company or if it was due to a conflict with his supervisors. PCR Tr. 314.

Concerning "Jimmy", Burton claimed he was not aware of the imaginary friend during his relationship and became aware of it "later on." PCR Tr. 314-15.

Burton confirmed that in his discussions, he talked with Lindsey about his desires for family and children and having the "ideal family" was a major subject. Burton stated that when asked at trial whether he would have provided financial assistance to get an attorney to help see his children, that he was not aware Lindsey had seen Tullis to get help or Piedmont Legal Services. PCR Tr. 315.

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Mrs. Pat Burton's PCR Testimony

Mrs. Burton said she was present at this hearing "because I love Marion." PCR Tr. 316-17. She recounted a letter she had written in 2008 to Judge Burch expressing that her son did not think he was properly prepared to testify. She also said she was not aware that she was on a witness list in 2004. She only knew about the case through her son when they called him. PCR Tr. 317.

She proffered what her potential testimony in 2004 would have been. She declared that

she met the Applicant when he was 6 or 7 years of age, when after the pool closed where her son was a lifeguard, he would bring a bunch of kids in a pick-up and they would fish and play in the lake. PCR Tr. 318. She thought that Lindsey was special to her son because they talked about him all the time, but not about the other kids he brought. She recalled Marion was happy with a smile. She knew that her son was proud of Lindsey when he learned to swim, but felt Marion was sorry he learned because her son would then spend more time teaching others. PCR Tr. 318.

She recalled that he came out to fish and play after her son went to the Air Force Academy and would always thank her. She stated Lindsey's brothers would bring him and Lindsey would always ask her if it was OK to use the pond - the only one who did this. PCR Tr. 319.

She felt that Lindsey became special to her also, even though she did not see him very much. She knew her son would go to Lindsey's house and describe how poor it was and how Lindsey did not have much. PCR Tr. 319. Her son would stop and see Lindsey when he occasionally came home from the Academy. PCR Tr. 319.

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Mrs. Burton described her visits to Lindsey after he was sentenced to death. She has visited him "many times" and had written letters for three years once a week. PCR Tr. 320. At one time, she said she talked Lindsey out of dropping his appeals, telling him they might outlaw the death penalty and maybe he would see his sons after they grew up. PCR Tr. 321. She also described a poem he had written her after his experience and trying to teach others not to follow in his footsteps, that she gave it to a minister who used it in his church. PCR Tr. 321.

She stated that when she visits death row, she sees the interaction he has with other inmates and guards, and asserted there was not a feeling that they were afraid, but one of

comradery of a closely knit group. PCR Tr. 321-22.

Mrs. Burton regretted that she had not known him more when he was younger and that she could have been able to help him reach his potential. She said she would have asked for mercy "because I don't think one action on a part of the person defines that person's life." PCR Tr. 323, ll. 4-6.

On cross-examination, she admitted that when he visited in his youth, she did not have any in depth conversations with Lindsey nor any discussions with him about his family. She admitted that she was not aware of his relationship with his wife, of his involvement with selling drugs, of his prior shooting incident, or of any of the incidents of criminal domestic violence. PCR Tr. 325. To the contrary, she only knew him as "a happy little kid" and I did not know him intimately. PCR Tr. 325. Like her son, there was no discussion about Jimmy, the imaginary friend. She said she did not come to Lindsey's trial and did not offer to testify because she did not think she would be any good and was against the death penalty anyway. PCR Tr. 326.

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Rod Tullis - PCR Testimony

During the PCR hearing, former attorney Rod Tullis testified. He stated that he had started representing Lindsey in the 1990's until the incident in 2004. PCR Tr. 163. These included criminal, family court, and traffic concerns for Lindsey and family members. Id.

He stated the weeks before the incident, he was representing Lindsey concerning some drug cases and traffic cases in Greenville and Spartanburg. "There may have been something in Family Court near the end that he had spoken to me about." PCR Tr. 164. At some point he interviewed him about ways to resolve issues concerning his children. He felt surprised that Lindsey and his wife would have issues about his children and their discussion involved offering

a payment of child support in order to secure some visitation. PCR Tr. 166, ll. 11-18. He did not know if Lindsey ever offered to do that and Tullis never filed any papers in Family Court for him. Tullis stated that he had not been retained. PCR Tr. 166-67. Tullis felt that at the time of that meeting, Lindsey did not want to be separated from his wife and children nor end his marriage. PCR Tr. 167. He stated that they discussed that he had some evidence his wife may have had an extramarital affair and he was concerned because he did not want someone else to come in "and become daddy to his sons." PCR Tr. 167. Further, he feared if he began family court proceedings that there would be ramifications on the criminal side. PCR Tr. 168. Tullis said Lindsey's fear was that his wife would become a witness for the State, which would also end his relationship with his children because of a prison sentence.[33] PCR Tr. 168.

Tullis claimed that shortly before the shooting took place in September 2002, Lindsey attempted to contact the office. Tullis claimed he learned of this contact after he heard about the incident and went to his office to prepare a notice of representation. PCR Tr. 169. He had learned that Lindsey was in the hospital and had surgery. According to Tullis, when he listened to his answering machine, he heard Lindsey asking for him to pick up the phone. Tullis described Lindsey as sounding distressed and distraught. PCR Tr. 169. Since he claimed he left the office at noon, he thought the tape was made within the hour before the shooting. PCR Tr. 169-170. Tullis stated that the tone was not angry or agitated, but emotionally down and upset. PCR Tr. 170. Tullis recalled retaining the cassette tape for a period of time. PCR Tr. 170.

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Tullis described providing his notice of appearance to the Sheriff, Solicitor, and hospital and was counsel of record for a short period of time. PCR Tr. 171.

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[33] This motivation was not developed by the State at the trial.

Subsequently, the Public Defenders Office became counsel. Tullis recalled contacting Mr. Bartosh and telling him that Lindsey had called his office, that a tape existed, and he was the first person to talk to him when he was released from the hospital to the detention center. He also stated to him that he could be a possible witness in the case. PCR Tr. 171. He stated that he was removed from the case.

Tullis said he later provided the audiotape to the Public Defenders Office. PCR Tr. 172, ll. 15-18. Tullis also stated that he was provided some suicide notes. Tullis said that Lindsey had been shot by officers and then tried to commit suicide by shooting himself in the head. When Tullis visited at the Center for the first time, Lindsey was bandaged and bleeding. Still drugged from the surgery, Lindsey told him he had been bashing his head against the cell concrete wall, the stitches had come lose and he was attempting to kill himself. PCR Tr. 173. After he reported it, Tullis stated they put Applicant on suicide watch. PCR Tr. 173.

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Tullis also declared he received notes from family members about an earlier incident, when Lindsey threatened suicide weeks before the incident. PCR Tr. 175. Tullis stated that he handed the notes over to the Public Defender. PCR Tr. 175. He felt the Solicitor's Office was aware of the existence of the notes and that he had turned them over to the Public Defender. PCR 176.

Tullis indicated that he was not contacted about testifying, but inquired about it as the case was proceeding.[34] He felt surprised because he thought he was the best witness as to the state of mind and involvement.

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[34] Note that Tullis was on the witness list by the Public Defender's Office. ROA 150.

On cross-examination, Tullis recalled that he had received the letters from the family immediately after the shooting. He had reported the jail incidents on October 1, 2002. PCR Tr. 181.

Tullis admitted that he was subpoenaed by the Solicitor's Office on May 21, 2004.[35] PCR Tr. 182. He said he provided the records to the State. PCR Tr. 183. However, he did not know what he provided to the State then, except he felt it was everything he had in possession of his files at that time. PCR Tr. 184. As to the information provided on his worksheet (Applicant Exhibit 13), he did not recall when that was prepared. PCR Tr. 185.

Tullis asserted that some weeks before the incident, he learned that Applicant had been denied access to his children. However, he had no notes about that meeting. PCR Tr. 187. He was aware that the court had issued an "order of protection" just days prior to the incident which ordered him not to have contact with his wife. PCR Tr. 187. Tullis stated Lindsey never contacted him about advice concerning the impact of the order of protection. PCR Tr. 187-88.

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As to the message on the answering machine, Tullis attempted to clarify that he did not review the machine until the day after the incident after he learned of the killing the night before. he felt it was probably left the day before, doubting the call was made the next day since he was unable to see him while he was in intensive care. PCR Tr. 189. Tullis also claimed that although he had provided the tape to the Public Defender, he advised the prosecution of it. However, he never provided the prosecution with any copy of the audiotape because he asserted that it was not in his possession when the subpoena was made because he had already given it to the defense.

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[35]On redirect, Tullis indicated that he did not recall being subpoenaed. PCR 195-196. However, he recalled that he would not have had anything to turn over as a result of the subpoena. PCR 196.

PCR 190.

Tullis agreed that when he prepared the information sheet, there was no discussion that he was being deprived of visitation rights. PCR 191. To the contrary, Tullis thought at that time when Lindsey and his wife came into his office that they were trying to work it out, but the meeting was in anticipation of a divorce or separation. Tullis, however felt that closer to the September incident things had changed. He noted that Lindsey was having relationships with other women, felt he wanted to get back with Nell, but was aware that she was anticipating divorce proceedings. PCR 191. Tullis stated that Lindsey's impressions were not always because both Lindsey and Nell were involved with other people and she did not want to be married to him any longer. PCR 192. Tullis felt the children were being used as a pawn in the adult relationship. He agreed though that there were a series of incidents involving Nell in August 1996, October 1996, February 1999, August 200 and December 2001. Oddly, Tullis reported that Nell would come and pay his fees in representing Lindsey in those incidents.

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Tullis admitted that he was no longer practicing law and been disbarred. He stated that he was still a lawyer in May 2004 with an office in Spartanburg. He stated that he did not come to court while the trial was going on, allegedly because he thought he would be a witness in the case and would have been sequestered. He was aware of the trial.

Tullis stated that he spoke with Bartosh and Ms. Quimby as the case was going on. Although he let them know he was available and ready to testify, he did not ask them why he was not being called as a witness or what their defense was, such that his information might not have been germane to their theory of the case. PCR 194-195.

On re-direct, Tullis confirmed that Lindsey had a family court dispute ongoing with the

grandparents at the time over the custody of the children. He stated that matters he had with respect to that dispute were still protected by the attorney-client privilege, including letters in that action. PCR 196. As to the timing of the taped call, he recalled that Lindsey was taken into custody immediately after the shooting. He suggested that at that point of time he would not have had the ability to make phone calls given his medical care and his arrest. This suggested to him that the call had to have been made before the incident. Tullis stated that Lindsey had never been convicted of a criminal domestic violence charge against Mrs. Lindsey or anyone else. PCR 198.

This Court finds that the PCR Testimony of Social Worker Vogelsang Presented The Particular Dangers of Presenting Family Background Testimony concerning Marion Lindsey.

<u>Jan Vogelsang - Social Worker</u> (PCR Tr. 481-594)

Jan Vogelsang, a clinical social worker with expertise in bio-psychological assessments, testified that she conducted such an assessment of Marion Lindsey. She testified that as a part of the assessment she interviewed the Applicant, Virginia Lindsey, Bessie Smith, Steve Pilgrim, Timothy Sims, Patsy Burton, Robin Pilgrim (Keith), Lenora Topp, Rod Tullis, Dr. Melikian, and Dr. Brawley. She also declared she had sat in court and heard testimony of the same. PCR Tr. 495. She described records she reviewed from Ms. Topp and Virginia Lindsey, including medical and criminal domestic violence records, of Bessie Smith (mental health and CDV offense), of Steve Pilgrim (mental health, prior crimes, and medical), of Tim Sims (birth, school, and SCDC records), and of Robin Pilgrim (medical, prison, and mental health and prison visit). PCR Tr. 496. She also reviewed Paul Lindsey's court order declaring death [from drowning disappearance at Jocassee]. PCR Tr. 496.

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Concerning the Applicant, Ms. Vogelsang stated she reviewed his request for legal aid,

his medical records, his school records, SCDC records regarding Stafford Wilkens incident, Lindsey's recent letter to the victim's mother, William S. Hall - DMH records, reports of Dr. Narayan and Dr. Musick, and his mental health records. PCR Tr. 496-97. She also read the testimony of family members, Mr. Burton and Dr. Melikian. PCR Tr. 497. Vogelsang testified that she also visited the community and created a family tree. PCR Tr. 497.

Concerning the family tree, Ms. Vogelsang testified generally about the existence of various members. She identified the existence in some members of "substance abuse, possession or distribution", "any mental, emotional, or behavioral impairments", "sexually inappropriate behavior", and "charges of criminal domestic violence, assault, or having served time in prison." PCR Tr. 502. She noted that the members of the home had very difficult childhoods with issues of family poverty, particularly after Smiley left. PCR Tr. 502-03. Vogelsang opined that this was abject poverty. She also asserted that their grandfather, Porter Pilgrim, was sexually inappropriate with some boys in the family. PCR Tr. 503. She opined that some fo the experiences that had been described in the testimony of the aunts and uncles with whom Lindsey lived played a significant role in the things Lindsey experienced growing up in the household. PCR Tr. 504, ll. 20-24.

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Vogelsang related that his mother Virginia was abandoned by her father - a theme within the family - and raised by an ill parent. Vogelsang questioned her parenting skills. PCR Tr. 505. As to Lindsey's father, Leon McDowell, she opined he had abandoned Applicant and never acted as a father and had his own family.

She stated that Mrs. Lindsey had been married to Claude with 3 children and had two miscarriages. Applicant was born in 1973 two years after she lost her seven month old daughter.

Mrs. Lindsey had no intervention on the death or counseling. She stated Virginia changed after the death, working and would go out and party and was not involved in parenting. PCR Tr. 506.

She stated Lindsey was raised by his grandmother with mostly an absent mother and absent father. PCR Tr. 506. She opined no one was present to help him through the developmental stages. However, Steve Pilgrim was identified as the hardest working and cared deeply about Applicant, but claimed he was not there a lot. PCR Tr. 507. Virginia was working 2nd or 3rd shifts in the mill. PCR Tr. 507.

As to the home living conditions, Vogelsang described that, at times, there were 10 people living in the home, sometimes a 4 bedroom home in rough neighborhoods where conditions were not good, sometimes without indoor plumbing and lacked heating. PCR Tr. 507-08.

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Vogelsang identified photographs that she would have used at a trial. She suggested the early photos of Lindsey would have helped to humanize him. PCR Tr. 509.

She opined that Lindsey had traditional medical care, though she did not see his medical records. PCR Tr. 509. She stated that he saw Dr. Henderson and early critical care would by anecdote, involve being carried to the police then to the hospital. She described his injuries as the car accident, the ingestion of kerosene, and falling off the porch. PCR Tr. 510.

She testified generally about child development. PCR Tr. 510-12. She opined that there was no one at home to help Marion through his developmental stages. PCR Tr. 512. She opined that young boys need a strong male adult. She suggested the lack of a positive role model creates a higher risk to end up in trouble. PCR Tr. 513. This resilience to bad things happening in their lives is learned through child development. PCR Tr. 514.

She opined that Lindsey did not have any strong male figures in his life. PCR Tr. 514. While his family in the home loved and cared for each other, she opined Lindsey was not prepared to face adverse and violent situations and to resolve problems other than through violent options. PCR Tr. 515. She opined there was a lack of guidance and mental health intervention where recommendations were not followed. There were also within the family situation the existence of divorce, separation, and abandonment, as well as emotional abuse and neglect. PCR Tr. 516. She found that the care of children was not the primary concern. PCR Tr. 516. She found a lack of role models and consistent care giving, as well as an inability of trust in relationships. PCR Tr. 517. She also opined there was "worry about violence in the home", "impaired cognitive functioning", "inability to deal with aggressive feelings" (shown through use of guns, knives, and fists), repression of feelings (family representation to mental health stuff that everything is O.K.), and a "sense of helplessness" (poor problem solving skills). PCR Tr. 17-18.

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She opined that outside of home, Mr. Burton was a strong male influence on Lindsey. She opined Burton and his mother and their influence may have made a difference in his life and suggest the reason why his school records between 2nd and 6th grade reflect courtesy, respect for authority. PCR Tr. 518.

She opined that Applicant lived everyday with "a threat of harm", which makes children anxious. She asserted that the relationship with Burton gave him his strengths and gave him hope that he could provide. However, she felt his wanting a different type of family resulting in his guessing how to do that by giving material things. PCR Tr. 519-20.

Vogelsang opined that the community Applicant lived in became exposed to cocaine and

crack. She asserts that when he was around 11 that he sees his family dealing and using drugs. PCR Tr. 520. Although there were programs in the community, such as Scouts to help his learning and mental health issues, they did not use them. PCR Tr. 521.

Concerning his schooling, she did not see the disciplinary or conduct problems in his records that the DMH evaluators had the impression of concerning misbehavior, although he did fail the first grade and had speech problems. PCR Tr. 521. She did find that Applicant had slapped a girl, got into a "wrestling match" with a boy when he was thrown and had to get medical treatment for an elbow, and had a fight with another over a racial remark. PCR Tr. 522.

However, Vogelsang asserted in the eighth grade, Lindsey "succumbed to the streets" when Burton left, his mother started 3rd shit, he became absent from school and his brothers got involved with drugs, driving cars, buying jewelry and having girlfriends. PCR Tr. 522. After repeating 8th grade then placed in ninth grade, he quits school after becoming "a street person." PCR Tr. 522.

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Vogelsang stated Aunt Robin was the only member to graduate from high school but was not at home traveling and eventually getting addicted to crack cocaine. PCR Tr. 523. The others in the house including Willie who went to prison for 15 years for killing, Paul who got into trouble with drugs and Bessie, Robin, and Steve who got mental health treatment. PCR Tr. 524.

She felt Lindsey would retreat to neighbors homes to avoid the chaos and found him lonely and scared. PCR Tr. 524. She also asserted that when his mother got off work she frequently went with her mother to play bingo. PCR Tr. 524. His uncles were described as either beating on him, threw his cat into a heater, hit their girlfriends, revealing a powerful threat of harm. Further, he was claimed to have seen his mother shoot at Mr. Sims. Vogelsang stated

that Lindsey had no oasis for peace unless he went to his neighbors or Mr. Burton. PCR Tr. 526.[36]

Vogelsang stated that Virginia had a volatile relationship with Mr. Sims - evidenced by fighting and arguing all the time. She stated that one time she shot at him several times and missed which Applicant witnessed. PCR Tr. 527. She also recalled the family all had guns. PCR Tr. 527.

Concerning his suicide attempts, Vogelsang described the event which led to his hospitalization. She stated that Fred returned to the home demanding attention and Applicant needed attention from their mother. The brothers got into a fight and Lindsey went into the bathroom took between 50-60 over-the-counter medicine (Tylenol, Nuprin). PCR Tr. 527-28. At the hospital, Applicant told them initially that his mother told him that she did not love him and that they were going to send him to a boys home which caused him to get upset and want - at that moment - to take his life. PCR Tr. 528. However, Vogelsang reported that his mother told the staff he was stable, but they were looking at his recent fighting conduct school. His mother told them about his temper outbursts. Applicant reported to them that he was seeking attention of his mother and "he wanted to leave that place." PCR Tr. 528. Vogelsang stated his mother resisted the recommendations for further assessment and outpatient treatment. PCR Tr. 528-29. Vogelsang described the "red flag" that suicide gestures of a child and the need to stay in treatment. PCR Tr. 529.

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[36] Vogelsang asserted that Paul shot at 3 cousins, had CDV charges, was involved in drugs and went to prison. She stated Willie served 15 years for ABHAN and was convicted of CDV. As to Robin, she was convicted of crack and serving a sentence from charges reduced involving an assault, kidnapping and robbery. PCR Tr. 526.

Vogelsang then reviewed the history of suicide "attempts" of Bessie, Robin, and Virginia and declared that the mental health center was not aware of their history when they saw Applicant or that the family members get depressed and take things ending up in mental health facilities. PCR Tr. 530. She felt the center, unaware of the family history, had little to work with, but they requested further evaluation. PCR Tr. 531.

Vogelsang next described the cultural practice of "roots." PCR Tr. 532. She distinguished its use between some families where it is taught and explained as part of their heritage and other families where there be mental illness and violence and this practice further confuses. Vogelsang found a note in the doctor's records treating Steven Pilgrim on July 15, 2002 who was taking Xanax asserting that he was anxious and feared his wife was "putting a root" on him and putting something in his drink or food claiming it caused his penis to draw up inside him. PCR Tr. 533, ll. 14-25. Vogelsang noted that Steve was the person Lindsey looked up to. She reported Steve had previously shot a woman in an earlier relationship and the mental health records reported his conflicts with his wife. PCR Tr. 534.

Vogelsang reported on direct that Lindsey was confused by the practice of roots[37] and reported that the use of "magical solutions" in a confusing and chaotic family environment only confuses things. PCR Tr. 534-35.

Vogelsang summarized Dr. James Garbarino's theory on psychological battering of children and asserted she would have used his model if she would have testified in 2004 with visual aids. PCR Tr. 535. She stated that there was rejection as revealed by his father's

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[37] On cross-examination, Vogelsang admitted she had no reference to discussing "roots" with Lindsey in her interview notes from November 2009. PCR Tr. 575-76, 585.

abandonment and his mother's alleged lack of involvement in his life. She points to claims that his brothers would leave with their fathers and Applicant would be left behind. She said that suggested his entry into "adulthood" with a fear of rejection and over-reactivity to rejection. PCR Tr. 536.

Another Garbarino factor was "isolation" which she opined there was evidence of minimal exposure to church and scouts, although she claimed he tried to play football, but quit when no one would come to his games. She also saw "exposure to negative behaviors within the home" and other than Mr. Burton, his mother and Steve. PCR Tr. 536

As to "terrorism", she opined he witnessed his uncles fighting, beating up wives and girlfriends, and his uncle throw his cat into the fire. As to the "ignoring" factor, she opined the parents failed to notice his needs for school, mental health, protection and supervision. PCR Tr. 537.

As to the "corruption" factor, she opined it was shown by his uncles' violence, his mother shooting at her boyfriends tires and boyfriend, and his uncle's profit from drugs. PCR Tr. 537. She suggested that these factors mis-socialized the child. PCR Tr. 538.

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Vogelsang reported that Lindsey became involved in the drug trade around age 12 as a courier for his uncles. PCR Tr. 538. This initially provided him some money, and Vogelsang claimed he used the money to help pay for his grandmother's medicine, gave money to his mother, yet also used it to buy clothes and shoes for himself. PCR Tr. 539.

Concerning his school performance, she opined he had potential with extra help and tutoring. PCR Tr. 539. But opportunities were not present.

Vogelsang described Applicant's relationships with women as erratic and chaotic. PCR

Tr. 540. An early relationship with an unbeknownst cousin and breakup demanded by his mother caused Applicant to become very sad and upset. She further equates his mother's alleged rejection prior to the pill injection at age 15.

Vogelsang describes that Lindsey began dating and when rejected becomes upset and over-reactive. She describes the shooting of Stafford Wilkins after he was in a "long-term" relationship with Stephanie, causing him to be sent to jail. PCR 540.

Concerning the victim Nell, Vogelsang reported that the relationship began at age 22. She found "incredible instability" in the relationship. She said the relationship with Nell began while living with Stephanie. He has a child with Nell. Although Vogelsang opines that Applicant loves being a father (PCR Tr. 541, ll. 14-15), she describes breakup where each returns to their mother, arguments and violence resulting in at least one conviction and multiple arrests. PCR Tr. 541. They were married in 1997 after he was released from jail after the Wilkins incident. A conflicted relationship, they have a second child in 1999. She reports that while Lindsey gets jobs for a period, then reverts back to drug dealing "where he can get the money he needs to provide" for things he thinks he wants his family to have. PCR Tr. 542.

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Vogelsang found that he wanted to be a father, but lacked knowing about fatherhood. She denied any knowledge that he ever abused or hit his children. PCR Tr. 543. he only found that his role was to give them things. PCR Tr. 543.

Vogelsang reported that there was, however, violence in his relationship with Nell. Though one CDV conviction, she had made other reports of violence or aggressiveness toward her. PCR Tr. 543.

Vogelsang stated the drowning of brother Fred in 1998was a major loss, even though this

was the brother he fought with. PCR Tr. 544. They had gotten closer and worked in Virginia together. After his death, she opined he got sad and depressed in a "normal grieving process." PCR Tr. 544.

She opined that Lindsey lacked an understanding of fidelity and being committed in a relationship. Vogelsang described a family pattern of marriage and additional involvement in other relationships. PCR Tr. 545. Vogelsang, however, stated this did not apply to Nell though. However, Vogelsang opined that "he became extremely depressed over the loss of his boys" and Nell. Vogelsang pointed out that is when he threaten to take his life - no one called EMS or took him to the E.R. and "just left him there." PCR Tr. 545.

Vogelsang re-stated the major factor in his life was the family system and behaviors he had witnessed through his development years. She declared this affected his judgment, impulsivity, insight, "and placed him at a higher risk to end up committing a serious act." PCR Tr. 547. she opined that had she been a witness in 2004, she would have testified whether Bessie Smith had attempted suicide or suffered mental illness based upon her knowledge of it. foundation, although the Respondents objected to it under hearsay. PCR Tr. 549-550.

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On cross-examination, the dangers inherent in presenting social history testimony was revealed. First, Vogelsang admitted that she misstated on direct that Uncle Willie has killed someone, when in fact it was only an assault. PCR Tr. 556-57. Further, she admitted that Lindsey was not identified in the pill incident as attempting suicide by the hospital, but that it was a gesture, that he had no suicidal ideation, did not realize the medicine was toxic and that he did it to get attention - implicitly not to kill himself. PCR Tr. 557-58.

Vogelsang again corrected herself concerning the incident three weeks before was not an

attempted suicide, but was only a "threat." PCR Tr. 559. She argued there was no attempt or overt act on his part and suggested conflicted evidence that he had a gun, contrary to the family's earlier testimony. PCR Tr. 559. (See PCR Tr. 424, 440, 476-77).

Concerning her lack of a written report, Vogelsang declared she is not required to do a report unless requested. she denied that had she made a report that she would not have made factual mistakes. PCR Tr. 561. She admitted that as a member and past president of the National Association of Social Workers of S.C., that they have a national policy in opposition to the death penalty, but declared she did not vote on the policy. PCR Tr. 562.

Vogelsang then described what matters she reviews as an expert witness in child custody cases. She did not recall trial testimony that Lindsey had given his child alcohol at trial although she had admitted that she read the trial testimony. PCR Tr. 563. See ROA 1820 (Lindsey gave son a beer in a baby bottle). She suggested it would have stood out and it would have been a concern for her in a family court recommendation situation. Similarly, whether an individual carried a weapon, had shot at someone, sold drugs, and had multiple incidents of violence toward his wife would affect her recommendation. Vogelsang declared she would not have recommended visitation for that person, although she had earlier declared "from all sources he was a good father." She confirmed in a child custody situation - with her information - she would have been hesitant and would have recommended that there be no visitation without supervision from someone from the Court present. PCR Tr. 565, ll. 7-20.

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Ms. Vogelsang admitted that she did not speak to victim's family members who had long-term relationship with the Applicant and his family or the mother of Lindsey other child. PCR Tr. 567-69.

Vogelsang admitted that his mother and grandmother - as care givers - had taken Lindsey to doctors for regular checkups. Vogelsang admitted that Steve Pilgrim was a person who was not threatening and a workaholic and supporter of the family. PCR Tr. 573. She stated though that he was not there for "child development", pointing out that he "believed in practice of roots" and "shot a girl", though Lindsey did not witness it. PCR Tr. 574.

When asked about what Marion had told her about the practice of roots in the home (during her November 2009 interview), she asserted various matters including it was confusing to him, made him mixed-up between a difference between roots and home remedies, confused him about family members putting a root on people in their relationships to make them feel sick or die.[38] However, when asked to point out in any of her notes of the interview, she declared - prior to reviewing the notes - that she "may not have written it down." PCR Tr. 575. When she reviewed her multiple page notes, she declared nothing was in there, although she remembered the conversation. PCR Tr. 576.

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Vogelsang declared Lindsey "succumbed to the streets" at the eighth grade, as a runner for his uncles, but then could not clarify which uncle nor resolve that Willie was in jail at that period of time. PCR Tr. 578. she then switched it to drug dealing cousins rather than the uncles. PCR Tr. 578-79.

She confirmed that she failed to interview Stafford Wilkins, who Lindsey had shot. She stated she was unaware that Wilkins stated he thought Lindsey was his friend and did not know

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[38] The Court finds that Ms. Vogelsang's testimony on this "roots"point highly suspect. Additionally, when challenged on cross-examination concerning this conversation, it is telling that the Applicant was not called to corroborate it in this civil setting where he has the burden of proof.

why he shot him, admitting that she had not read his trial testimony. PCR Tr. 579.

Concerning her reliance upon Rod Tullis' testimony and interview, she did not recall or know that it conflicted with the defense lawyer's testimony. PCR Tr. 581. See PCR Tr. 39-40. She also confirmed that when she interviewed Lindsey in November 2009, he never told her that he called his lawyer (Tullis) on the day of the crime and threatened to kill himself. PCR Tr. 585.

In suggesting a reason for the crime, she confirmed that he had declared to the EMS that he had shot her because she had a boyfriend - not because she would not let him see his children. PCR Tr. 586. She confirmed at the time that he was under an order of protection and not to see his wife, though she could recall how long before the incident it had been in place. PCR Tr. 587. she confirmed that after the order was entered, Lindsey would not have supposed to have seen his children or have contact with them. PCR Tr. 587.

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While she had stated he had provided support for his children, she confirmed that he did not always provide them clothes, food, or try to have visitation. PCR Tr. 588. To the contrary he had asserted in records that he was not providing any support 4 to 5 months prior to the incident. PCR Tr. 588.

Vogelsang also confirmed that Lindsey had a record of violence, not only toward Nell, but toward other females, including those he claimed to love. PCR Tr. 589. He also had indications of violence toward males.

Vogelsang stated she had talked with Lindsey about violent acts while dealing drugs, including fights and shootings. PCR Tr. 590. She described Lindsey as "controlling", but also scared half to death concerning the drug sales. PCR Tr. 590. She stated he had an "extremely overactive behavior involving violence." PCR Tr. 591, ll. 1-2.

Vogelsang also confirmed that his risk factors made it a high risk that he would end up committing the very act he committed. PCR Tr. 593. She also admitted that the risk factors she found are not treated in the prison system. PCR Tr. 594.

ANALYSIS

The Investigation Concerning the Social History of Lindsey and the Family Members Was Reasonable.

Initially, the underlying issue concerns whether the investigation of the social history of Lindsey and his family was reasonable. Within his memorandum, Applicant does not point to any particular piece of evidence that critical to the defense and mitigation, but merely suggests that it was not done in the depth that he thinks counsel should have done. Although the investigations may not have included Ms. Topp's suggested preference of three years (or the claims 1,000 hours of the ABA average), it uncovered the matters necessary for the defense.

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A review of the trial testimony of Virginia Lindsey (guilt and penalty), cousin Chris Wilkens (guilt and penalty) and the penalty phase testimony of fried Bill Burton, Leon McDowell and Steve Pilgrim reveal that the essential family background was revealed to the jury. Importantly, concerning the depth of the investigation, the summaries of the interviews that Ms. Topp had with Marion Lindsey and Marion Lindsey's mother in 2004, buttressed by Ms. Topp's own PCR testimony about what she learned in 2004 are virtually in the same detail that the post-conviction evidence from the family members and Jan Vogelsang's testimony in the PCR hearings.

Trial "counsel have a duty to make reasonable investigations or to make a reasonable decision that makes investigations unnecessary." Strickland, at 691, 104 S.Ct. 2052. "In assessing counsel's investigation, we must conduct an objective review of their performance,

measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (internal quotation marks and citations omitted). "In assessing counsel's performance in this context, we look to how counsel prepared for sentencing, what mitigating evidence counsel accumulated, what additional leads counsel had, and what results counsel could have reasonably expected from those leads." Blanton v. Quarterman, 543 F.3d 230, 236 (5th Cir.2008) (citing *Neal*, 286 F.3d at 237). Courts must consider "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527, 123 S.Ct. 2527.

Lenora Topp made detailed summaries of her interviews with Lindsey and Virginia Lindsey and these written interviews reveals virtually identical data to a significant portion of Social Worker Jan Vogelsang's PCR testimony. Respondent's Exhibit 2, 3, 4. The Applicant has failed to point out any new and critical data revealed post-trial. A review of the data received in 2004 by the defense team reveal that they were aware of Virginia Lindsey background in detail as revealed first from Lindsey and then from Virginia, including her limited education, children and their different fathers, involvement of her mother in raising the children, her employment as a shift worker and not at home in evenings to help with food and homework, Lindsey's lack of an active father to interact with, and Lindsey's opinion that the family was poor. Respondent's Exhibit 2, 3, 4. Topp and the defense team also were aware of Virginia's 8 siblings. They were aware that all five of Bessie Smith's children - in contrast - had completed college. Respondent's Exhibit 2 -4. From Virginia, she revealed that injuries that Marion has sustained while growing

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up - being run over by a car driven by her brother Paul when Lindsey was 19 months old, Lindsey falling and hitting his head frequently, Virginia also reported to Topp that Lindsey had tried to commit suicide by swallowing pills from the medicine cabinet and the reason that he was upset with her after a fight with the brother and she told him that she would not do anything for him again and had stayed in the hospital one week. Respondent Exhibit 4. Virginia had also reported to Topp that Lindsey had raised his younger brother Tim and that her son Fred died while canoeing and was never found. Id. She also reported to Topp about the incident when her brother threw Lindsey's cat into the furnace. She also described to Topp about Lindsey's earlier relationship with Stephanie Petty who they liked and got along . Id. Concerning the relationship between Nell and Lindsey, Virginia had reported that she like and loved Nell, thought Nell's mother had too much influence on her and when there was an issue with money, there were problems in the relationship. Virginia stated to Topp that she knew that Lindsey sold drugs and that he spent money on Virginia and her family during those times.

In Lindsey's interviews with Topp on April 16 and 25, 2004, he reported similar details about the family background. Respondent Exhibit 2, 3. Particularly he noted his knowledge of his father Leon McDowell and referred to him as a "sperm donor" who did not want to get involved with him and Lindsey was bitter toward him. He noted to Topp that his other brothers would go on activities with their fathers and he was left out. Id. He noted that his mother struggled while he was growing up and that they did not have new clothes and had a wringing washer machine and ruined a new one through overuse. Lindsey reported to Topp that his brother Fred died in a canoeing accident when he was with a friend who survived, but Fred's body was never found. He reported that Fred's death affected him for at least three years. Id. He stated that he and Fred used

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to fight, but they became friends and worked together in West Virginia until Lindsey became homesick and moved back. Lindsey felt that he raised his brother Tim Sims who would follow him everywhere and that Tim's father was the only father figure in Lindsey's life. Respondent's Exhibit 2,3.

Lindsey also reported to Topp that he did not know his sister Vanessa who was killed in a car accident. In describing growing up, he felt his family was very poor and that they could not afford to eat anything except bologna and that he currently cannot eat it.

Lindsey also reported to Topp that when he was 25, his father's children started to hang round him, although he claimed he was not selling drugs at the time. He noted that half-brother Leon McDowell also took out an assault warrant against him and that family considered him an outsider. Lindsey reported that he did get along with Claude, Marshall Martha Sammy and Kathy Lindsey. Respondent Exhibit 2, 3.

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Lindsey also provided Topp a summary of his educational history through 10th grade when he quit school to work and help his mother. Id. He also described his recollection of disciplinary actions taken against him at school, including slapping a girl, being hit in the eye in junior high after a racial epithet but having nothing done to the perpetrator after he reported it to the baseball coach though he was suspended for a week.

Lindsey reported to Topp that none of his family finished school. He stated to her that he played football in junior high , but quit when no one would come to watch. Respondent Exhibit 2, 3.

Lindsey advised Topp that he had two traumatic times in his life, pointing out the incident when his cat was thrown into the heater alive and when he tried to commit suicide when he was

12 years old. Id. He also described running away from home when he was 7 because his mother would not let him go somewhere , but returned home when he got hungry.

Lindsey described that after he quit school, he started working with his brothers at Beecher's Plastic Co.. He described having a bad car accident when the tire blew and the car flipped and he was out of work for a year due to injuries,. He claimed that he lost his memory, broke his hip and gad facial surgery. As a result of the totaling of the car, he stated his brother also lost their jobs. He then went to work at Burger King where his brothers worked until he had words about 1 ½ years later with a female manager. After being out of work a month he then worked at Union Cloth in Spartanburg, but found it boring and had to work with a lot of gossiping women and left there after 6-7 months. Id .

Lindsey told Topp that he then stayed at home and took care of Claude's children by cooking and cleaning so that Claude and his sister could work.

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Lindsey described his relationship with Stephanie Petty, working with his brother Fred, West Virginia and returning home.

Lindsey claimed that he partied, drank beer but never did drugs.

Concerning Bill Burton, Lindsey said he was his mentor while growing up and Burton got him a job at his plant when he was plant manager. He stated in his youth he would go fishing with Bill and met his mother . At the plant for 2 years, Lindsey said it was the best job he ever had. He stated that one evening he agreed to work overtime and described that he did all the work while others fooled around with girls. The next day, he stated that he was confronted by the supervisor as to why the work was not completed and when he advised the supervisor that he was the one who did it all, he felt he would not listen to him and Lindsey "jerked Mr. Green up by his

shirt" and he was fired. He stated Burton tried to get his job back, but there was a no-rehire policy.

Unable to get a similar job, Lindsey stated that he started being a drug courier again for cocaine and crack - though he claimed he never used it. Id.

He described to Topp his various jobs after that with Thomas and Betts in Inman, Hudson International.

He also described his life with Stephanie who had moved in with them and her father threatening to kill him, but then would come over on weekends.

Lindsey described his other job at Budweiser as a fork lift operator until he was arrested for a traffic ticket and lost his job after he stayed in jail . He next worked at a body shop until it was shut down.

Lindsey also described shooting Stafford Wilkins in 1994.

Lindsey, during the interview on April 16, 2004 also went into detail about his relationship with Nell Lindsey. Within that part of the interview he described breaking up with Stephanie after Nell became pregnant, he stated that he would also take care of the children. He went into detail about their relationship leading up to the shooting. He told Topp that Nee had written suicide notes after Nell had moved back with her mother and told him that he could not see his children after a domestic violence order was taken out Respondent's Exhibit 2, 3. He claimed to have lost weight from 225 to 160 in four weeks and was depressed all the time. He described his version of the day of the shooting including going to his brother hoping he would stop him , seeing Nell's cousin's car seeing Nell and then chasing them, not recalling the shooting , but recalling putting his gun to his temple and hearing a voice tell him to put the gun

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down, then being shot. Respondent Exhibit 2, 3.

This Court finds that the investigation concerning the social history of the family was constitutionally adequate. In addition to this information, the 2004 defense team was aware that there had been mental health concerns for Bessie Smith who had tried to commit suicide, and Steve Pilgrim who at least had nerve and anxiety problems.

"[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying heavy measure of deference to counsel's judgments." Wiggins, 539 U.S. at 521-22. "A defense attorney is not required to investigate all leads ...." Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir.1994).[39] "A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance." Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir.1992). "The attorney's decision not to investigate must not be evaluated with the benefit of hindsight, but accorded a strong presumption of reasonableness." Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir.1985).

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"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such

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[39]Rejecting a per se rule of ineffective assistance where counsel does not consult family members, the 11th Circuit held in Williams v. Head, 185 F.3d 1223, 1237 (11th Cir.1999), that counsel's investigation was reasonable when he did not interview the defendant's sister or father, the latter because the defendant had not lived with him for very long. '[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary.' Strickland [v. Washington,] 466 U.S. [668] at 690-91, 104 S.Ct. [2052] at 2066 [(1984)]. Accord, Davis v. State , 9 So. 3d 539 (Ala.Crim.App.,2008).

information." Strickland v. Washington, 466 U.S. at 691. "The reasonableness of the investigation involves 'not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." ' St. Aubin v. Quarterman, 470 F.3d 1096, 1101 (5th Cir.2006), quoting in part Wiggins, 539 U.S. at 527.

Applicant has failed to show what material counsel was unaware of that was critical to the defense, just that in depth evidence was not presented. However, he has failed to show that counsel's investigation of the family background was unreasonable. With the further information about the family background, the psychiatric diagnosis is similar, the information provided by and to the social expert is similar to what the 2004 defense team was aware either by their own or Ms. Topp's interviews. The assertions otherwise must be denied.

More clearly, 6th Amendment prejudice has not been shown. Applicant has not pointed to any new information or a gamechanging revelation that creates a reasonably probability of a different outcome. Bean v. Calderon, 163 F.3d 1073, 1081-82 (9th Cir.1998). To the contrary, it is virtually the same information. The Applicant has failed to show that further investigation of the family history undermines confidence in the outcome of the case and creates a reasonable probability that the result of the proceeding would be a life sentence.

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The Failure to Employ A Clinical Social Worker Does Not Require A New Trial.

It is undisputed that defense counsel in 2004 did not retain a clinical social worker such as Jan Vogelsang in 2002-2004. Although the decision not to retain a social worker is not reflected in the record due to counsel's death, This Court finds that the failure does not amount to deficient performance or prejudice under Applicant's argument.

As to deficient performance, Applicant appears to assert that the retention of a social

worker is required in all capital cases. His reliance upon the ABA Standards notwithstanding, the 6th Amendment does not require the retention of any particular expert in every case. See Durr v. Mitchell, 487 F.2d 423 (6th Cir. 2007) (no requirement to employ social worker and no prejudice for failure to do so. Similarly in Wiggins, the Court did not hold that there was an error in retaining a social worker, but the it was not a reasonable investigation to follow up on leads that would have lead to a mental health issue. Cf, Council v. State, 380 S.C. 159, 670 S.E>2d 356 (2007) (counsel ineffective based upon a failure to investigate and present, including retaining a social worker where funds were made available).[40] However, the Court need not address deficient performance where the Applicant has failed to satisfy the prejudice prong.

A review of social worker Vogelsang testimony reveals that it was almost a reading of the reports completed by Ms. Topp in 2004. The Applicant has failed to point to the differences other than she could have presented hearsay testimony to support that Bessie Smith was hospitalized with a alleged attempted suicide and explained that Steve Pilgrim had alleged had mental health issues as well as a criminal record. The remainder of the focused testimony was known by counsel and reasonably understood by the jury after the testimony of the family and

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[40] This case is decidedly different than the facts in *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004), in which the Court, relying on *Wiggins*, found counsel's investigation was unreasonable. In *Von Dohlen*, the defense psychiatrist at trial opined that the defendant suffered from adjustment reaction disorder. However, upon learning additional records existed, and after having reviewed the additional record in the subsequent PCR action, the psychiatrist testified that his diagnosis would have been "major depressive episodes with severe symptoms of anxiety and possible prepsychotic features." *Von Dohlen*, 360 S.C. at 605, 602 S.E.2d at 741. Von Dohlen contended in his PCR action that trial counsel "fail[ed] to adequately prepare and present evidence in the penalty phase of the trial that he suffered from severe, chronic depression, a major mental illness, at the time of the murder." 360 S.C. at 606, 602 S.E.2d at 742. This Court agreed finding that the medical records that affected the defense expert's opinion were available at the time of trial but not provided to him.

Dr. Melikian. Lindsey was raised by his mother and an absent father in a poor family. The Applicant has failed to pinpoint what difference any of the information Ms. Vogelsang laboriously testified about would have impact upon a jury in a manner that would undermine confidence in the verdict under Strickland.

Applicant failed to prove that there is a reasonable probability that the jury would have concluded that "the balance of aggravating and mitigating circumstances did not warrant death." See Strickland, 466 U.S. at 695, 104 S.Ct. 2052. See, e.g., Johnson v. Bell, 344 F.3d 567, 573-74 (6th Cir.2003) (although testimony from family members would have helped to humanize the defendant, the jury could have concluded that he was even more culpable because he had enjoyed a loving family and yet had murdered his wife); Martin v. Mitchell, 280 F.3d 594, 613-14 (6th Cir.2002) (defendant did not show prejudice at the mitigation phase where family members testified about his background and a psychological report was given to the jury); Scott v. Mitchell, 209 F.3d 854, 880-81 (6th Cir.2000) (finding that potential mitigating circumstances were overwhelmingly negated by other evidence about the defendant's background).

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Further, as pointed out in the cross-examination, the danger of using a social worker who relies frequently on anecdotal hearsay risks making a difficult case even worse. It would have presented an additional opportunity to focus upon certain errors in her presentation and negative factors related to Lindsey that would make a death sentence even more likely. In the questioning concerning her expertise in child custody matters, she admitted that a person with the characteristics of Lindsey should not have been allowed to have visitation without court supervision, if at all, even though he had to be reminded that there was evidence that Lindsey had feed beer to his baby son in a baby bottle. PCR Tr. 563. See ROA 1820 (Lindsey gave son a beer

in a baby bottle). PCR Tr. 565, ll. 7-20. She was inconsistent on what family members - uncles or cousins - he was running drugs. PCR Tr. 578. She also reiterated Lindsey had a record of violence, not only toward Nell, but toward other females, including those he claimed to love. PCR Tr. 589. In confirming that his risk factors made it a high risk that he would end up committing the very act he committed, she also admitted that the risk factors she found are not treated in the prison system. PCR Tr. 593-94.

"To assess the probability [of a different outcome under Strickland], we consider the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding-and reweigh it against the evidence in aggravation." Sears v. Upton, --- U.S. ----, 130 S.Ct. 3259, 3266, 177 L.Ed.2d 1025 (2010). (finding that a proper prejudice analysis must take into account the newly uncovered mitigating evidence, along with the mitigation evidence introduced during the defendant's penalty phase trial, to assess whether there is a reasonable probability that the defendant "would have received a different sentence after a constitutionally sufficient mitigation investigation"). The United States Supreme Court has stated that there "is no prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker ...." Id. at 3266.

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Here, the sentencing profile was not altered by the additional testimony of Ms. Vogelsang. Although she presented a social history of known poverty and lack of a father-figure - known to the sentencing jury, she also confirmed that he had become a controlling and violent person. Against the trial backdrop including the evidence in aggravation, as well as the family mitigation the jury actually heard, the burden of proof has not been met by Applicant. The allegations must be denied.

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

- **Failed to elicit testimony from EMS worker - Joseph Stewart and Vincent Bell - regarding Lindsey's desire to commit suicide after Nell's death.**
- **Failed to interview EMS workers to determine what info and testimony they could provide**
- **Failed to prepare EMS workers to testify in penalty phase.**
- **Failed to ask appropriate questions to elicit admissible info about Applicant's state of mind.**

Memorandum 53-54.

In his eighth argument, he contends that defense counsel failed to present the testimony of Vincent Bell, an EMS worker who treated Marion Lindsey to give the jury a better idea as to Lindsey's state of mind at the time of the crime. He contends that it would have resulted in a different outcome of verdict. This Court finds that he has failed to show either deficient performance or prejudice. This Court finds that the 2004 jury was given similar information. Deficiency and prejudice under Strickland has not been shown.

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It is undisputed that the defense was aware of Vincent Bell, as well as Susan Horton and Joseph Stewart as the paramedics who arrived at the scene. They had included them on their listing and summary of state witnesses. State Exhibit 9. 277-279. Counsel had also presented evidence through Dr. Melikian that Lindsey had planned to commit suicide that day shot himself after the incident and told the EMS to let him die. ROA 2013. The hospital records confirmed that he had a head wound. ROA 2013-2014. In the guilt phase of the trial, Officer Godfrey denied that he had shot Lindsey in the head. ROA 1577. Defense counsel Doug Brennan called Jason

Stewart in the guilt phase of the trial as a defense witness.[41] Stewart, an EMS worker, testified at trial , that he arrived on the scene on September 18, 2002 and saw the Applicant with a head wound. Stewart was asked whether Lindsey had said anything to him. ROA 1660-1670. At that point, the state objected that it was a self-serving statement by the defendant and inadmissible. However, the defense was able to present the testimony that Lindsey told him that he shot himself in the head. ROA 1674.

Vincent Bell (Paramedic)

Vincent Bell testified that he was a paramedic at Spartanburg EMS on September 18, 2002 and responded to the Inman Police Department after the shooting. PCR Tr. 97. While he responded to the female, his partner went to Lindsey. When Bell went to Lindsey he was conscious and he was asked questions about what happened. Lindsey initially stated he shot himself and in a follow up question stated he shot himself, let me die, and then said "I shot myself and then I shot my wife."[42] PCR Tr. 99. Bell described Lindsey as not cooperative when they worked on his injuries. PCR Tr. 99. While on route, Bell again asked him what happened and he said "I shot myself and then I shot my wife." When Bell asked why, Lindsey then responded "his wife was fooling around with somebody." PCR Tr. 99-100.

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On cross-examination, Bell confirmed that he had given a written statement to the police. (State Exhibit 1). In reviewing the statement Bell confirmed and corrected that Lindsey said "I shot my wife and I shot myself in the head", reversing the order of the shots. Bell confirmed that

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[41]Counsel Brannon testified that he interviewed paramedic Jason Stewart prior to trial. PCR 61. He stated that he interviewed him because he wanted to develop that Lindsey had tried to kill himself by shooting himself. PCR 67.

[42] This version of the incident is inconsistent with the trial evidence.

Lindsey did not indicate that he made any reference to his children as a reason for the shooting, but only that he shot her because she was fooling around with another man. PCR Tr. 103.

Bell stated he was subpoenaed for the trial but did not testify. However, he did not recall speaking with anyone at the trial. PCR Tr. 104.

ANALYSIS

The petitioner has failed to show deficient performance where the 2004 jury was told that Lindsey had shot himself in the head, that the police had not shot Lindsey in the head, that an EMS worker (Stewart) who arrived at the scene was told by Lindsey that he shot himself in the head and that Dr. Melikian stated that Lindsey told her that he shot himself in the head and told an EMS worker to let him die. The only difference in including Bell's testimony is that he was the worker that Lindsey said let him die. It is evident that the defense (as well as the jury) knew the existence of the paramedics, knew that Lindsey had shot himself and knew that he had told the paramedics that he had shot himself and knew that he had told the paramedics initially to let him die. The only omission was the failure to put up the paramedic who heard him say the let him die comment. This was clearly a strategic decision on counsel's part as to how to present the witnesses and which witness to present. Although the Applicant may claim that they did not interview Vincent Bell, it is uncontested that they were aware of the information.

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Even it the Court would conclude it was deficient, Prejudice cannot be shown. Similar information was given to the jury within both the guilt and sentencing phase. Further, the comment was used by Dr. Melikian in her assessment of depression that she gave the jury. The "let me die" after a person had shot himself in the head fails to suggest how the failure of the additional witness would have the effect to have undermined confidence in the death verdict

under the standards of prejudice set out in Strickland. They had heard similar evidence. He has failed in his burden of proof. Accord, Wong v. Belmontes, supra. Furthermore, "in order to establish prejudice, the new evidence that a habeas petitioner presents must differ in a substantial way-in strength and subject matter-from the evidence actually presented at sentencing." Hill v. Mitchell, 400 F.3d 308, 319 (6th Cir.2005). The witness of the "let me die" comment he now offers does not meet this test, but is cumulative, albeit somewhat more detailed. The new evidence does not differ in subject matter-much less "in a substantial way"-from the evidence already presented at sentencing. It covers the exact same subject. Certainly this new evidence cannot be described as "shocking, disheartening, and utterly disturbing," the kind of evidence that courts have held would generally support a finding of prejudice warranting habeas relief. See Beuke v. Houk, 537 F.3d 618, 646 (6th Cir.2008). The Applicant fails to explain how such evidence, had it been presented, would have done anything to change the jury's perception of Lindsey's moral culpability or mental state for such a brutal and horrific crime. See Jells v. Mitchell, 538 F.3d 478, 498 (6th Cir.2008) ("Prejudice is established where, taken as a whole the available mitigating evidence might well have influenced [the sentencer's] appraisal of [the petitioner's] moral culpability."). Relief must be denied.

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

- Failed to commit sufficient time to perform adequate investigation in mitigation
  - Failed to assemble complete defense team until one month prior to trial.
  - Failed to perform investigation of Lindsey's life history, family history until 2 months prior to trial
    - first half of investigation done w/o mitigation investigator
    - investigation lasted only 8 weeks.
  - Failed to spend sufficient time interviewing witness to determine beneficial testimony
  - Failed to spend sufficient time preparing witnesses to testify to allow a clear, logically structured and easily understood presentation.

Memo, p. 54-58.

In his ninth allegation, he contends that counsel spent insufficient time in preparation for the trial and sentencing proceedings. In the argument, he merely states that they failed to devote adequate time for preparation for the mitigation phase of the trial. Without designating any necessary item of evidence that the "insufficient time" suggested, he claims it the result of the proceeding would have been different. Within his argument, he stated that studies reported that the average time spent by defense lawyers in capital cases was1889 hours per case and normally 12 times more time spent in a capital case than a normal case. The Applicant solely relies upon the ABA Guidelines, § 10.7 and the comments concerning investigation and § 11.4.1. He also relies upon Wiggins v. Smith, supra , as citing to the ABA Guidelines as appropriate guides on whether counsel provided effective assistance of counsel.

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This Court finds that counsel performed a reasonable investigation into mitigation in this case. The Court incorporates by reference the summaries of witness testimony from both the trial and PCR hearing set out in argument 8, infra. This Court assumes that this particular claim involves time spent on the investigation, since Applicant did not assert any particular evidence that was not disclosed to them from the investigation the 2004 defense team did that he now asserts was deficient.

Under the Applicant's assertion the ABA guidelines are not guides, but requirements for capital defense counsel. This assertion, if accepted sets an almost impossibly high bar for defense counsel in capital cases. Defense counsel would now be required "to locate and interview the client's family members ... and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole

officers, and others," Van Hook v. Anderson, 535 F.3d 458, 463 (6th Cir.2008) (quoting the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, ¶10.7, at 83); he must interview them long enough so that those interviews can be characterized as "extensive" and "in-depth," op. at 776; every conceivable family member must be contacted, no matter that defense counsel has spoken with the defendant, his wife, mother, father, brother, sister, aunt, and cousin (along with several non-family members), op. at 778-81; and he must do all this even if he reasonably believes (based on the trial court's rulings and his own reasonable interpretation of state law) that the introduction of any evidence regarding the defendant's family background could open the door to truly disastrous rebuttal evidence by the prosecution. Nothing in Strickland or its progeny requires defense counsel to go to such extreme lengths in order to meet the (relatively low) threshold of "reasonably effective assistance." This assertion was reversed in Bobby v. Van Hook, supra., by the U.S. Supreme Court.

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As stated previously, the Applicant has ignored what the 2004 defense team actually did in making his assertion and reliance upon the ABA Guidelines. What the defense team did during the period of representation:

1. Received medical history including Lindsey's ER records from 1973-1992 involving his birth records (1973) , kerosene ingestion (1975), fractured elbow(1981), tylenol overdose (including Psychiatric Ward) (1988), car wreck (1989), motorcycle wreck (1989), football injury (1990), and car wreck. (1992).
2. Received Spartanburg Regional Medical Center Records from 2002 -2004 concerning the incident and other matters.
3. FAMILY and Social History: Interviewed Mother and other family members prior

to and during trial. Received information concerning poverty, domestic violence and neighborhood from Applicant and family. Interviewed Lindsey who gave an extensive family history about the family and his own history. Respondent's Exhibits 2, 2, 4.

4. Educational History - received school records.

5. Job History - Learned from defendant of his employment history through interviews with social worker and mental health expert, as well as family members. Social Worker prepared an extensive written report from her interviews with Lindsey and mother. State Exhibit 2 (Lindsey Summary of His Life); State Exhibit 3 (Lindsey's Summary of His Mother's Life); State Exhibit 4 (Summary of Virginia Lindsey's Background Interview).

6. Prior Adult Prison and Jail Records - Acquired SCDC records, including disciplinary records from 1994 incident after 1996 plea and received jail records from current incident in 2004 until trial.

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In addition,

1. Retained an experience mitigation investigator to assist in investigation two months before the trial.

2. Retained a psychiatrist who was able to render an opinion of mental illness, particularly depression used in mitigation.

3. Received opinion from retained mental health experts (Dr. Brawley and Dr. Melikian) to challenge the 2003 state examiner opinion of malingering.

4. Met with Applicant on numerous occasions at jail.

5. Had assistance of third lawyer who prepared extensive summaries of crime scene reports, prior prison history, prior criminal history, and summarized state discovery reviewed.

Further, counsel received the discovery from the state concerning the particular crime and other crimes involving Lindsey. See State Exhibits 9, 10, 11 (PCR 279, 288).

As Applicant concedes by his claim, this is not a case where no investigation was done. Rather, absent Mr. Bartosh's testimony, it appears that the bulk of the preparation was done two months prior to the trial with the retention of the psychologist, psychiatrist and mitigation investigator in that period.

Trial "counsel have a duty to make reasonable investigations or to make a reasonable decision that makes investigations unnecessary." Strickland , at 691, 104 S.Ct. 2052. "In assessing counsel's investigation, [a court] must conduct an objective review of their performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." *Wiggins v. Smith,* 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). "In assessing counsel's performance in this context, we look to how counsel prepared for sentencing, what mitigating evidence counsel accumulated, what additional leads counsel had, and what results counsel could have reasonably expected from those leads." *Blanton v. Quarterman,* 543 F.3d 230, 236 (5th Cir.2008).

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A court must consider "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins,* 539 U.S. at 527, 123 S.Ct. 2527. The Supreme Court has held that "investigation into

mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence." *Id.* at 524, 123 S.Ct. 2527. However, "there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." *Bobby v. Van Hook*, ---U.S. ----, 130 S.Ct. 13, 19, 175 L.Ed.2d 255 (2009). "[C]ounsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052 (emphasis added).

- The amount of time trial counsel spent preparing for trial is not dispositive to claims of ineffective assistance of counsel. See, e.g., Hopkinson v. Shillinger, 866 F.2d 1185, 1217 (10th Cir.1989) (defendant must show specific errors, and cannot prevail because of limited time attorney spent on case) (citing United States v. Cronic, 466 U.S. 648, 666, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)), overruled on other grounds by Sawyer v. Smith, 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990); Owens v. Guida 549 F.3d 399, 408 (C.A.6 (Tenn.),2008). Further, "[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation." Nields v. Bradshaw, 482 F.3d 442, 454 (6th Cir.2007).

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In this allegation, the Applicant has merely asserted a general claim that counsel must meet the checklist that he claims the A.B.A. has established. While it appears that counsel did not retain a mitigation investigator under months before the trial, he has not proven that no mitigation investigation was done. He has failed to show that the investigation was unreasonable. He failed to prove either deficiency or prejudice based on his "time spent" argument.

X. Ineffective Assistance of Counsel - Statutory Aggravating Factors

- Failed to argue against statutory aggravating factors alleged by state.

- Counsel did address aggravators, it was cursory and failed to present arguments against application to Lindsey

MEMO , p. 58-60.

In his tenth argument - raised for the first time in the Applicant's post-hearing memorandum, contends that counsel was ineffective in failing to argue against the sole statutory mitigating factor and did not address the aggravators. In the pleading, while conceding that counsel did argue against the applicability of the sole aggravating factor, he contends that his attempt to persuade the jury fell below the level required but does not specify what counsel failed to do. Memo. 58-59. He asserted that in general terms, why the factor does not support a death sentence but failed to assert what the particular omission made by counsel in this area.

The Underlying Merits of the Claim Was Addressed in the Direct Appeal

The State sought the death penalty based upon S.C. Code Ann. § 16-3-20(C)(a)(3) (Supp. 1998). This aggravating circumstance authorizes the imposition of a death sentence where defendant

> ... by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

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The issue was raised in the direct appeal as a directed verdict issue. The South Carolina Supreme Court addressed the merits of the sufficiency of the evidence issue surrounding this factor in the following manner:

> 3. Directed verdict on aggravating circumstance
>
> Appellant moved for a directed verdict on the statutory aggravator provided in § 16-3-20(C)(a)(3) which states:
>
> That the offender by his act of murder knowingly created a great

> risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

Appellant contends that because he shot Victim at close range and no other person was endangered, this aggravator should not apply as a matter of law.

The trial judge should submit a statutory aggravator to the jury if there is any evidence, direct or circumstantial, to support it. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000). Here, the police department parking lot is clearly a public place and a gun is a weapon hazardous to more than one person. Id. (shooting in church parking lot). Further, appellant knew there were other occupants in the car with Victim when he shot multiple times into the confined space of the car's interior-conduct a reasonable person would know presents a great risk of harm to more than one person. Appellant also pointed his gun at Officer Godfrey in the parking lot. This evidence supports the submission of the statutory aggravator to the jury.

Ignoring the conclusive evidence of the proximity of the two children in the vehicle's backseat with victim Ruby Nell Lindsey, the tinted glass preventing clear recognition, and the location of the bullet hole near the middle of car's backseat where Kiera Potlow's head would have been had she not leaned away, Lindsey claims that the statutory aggravating factor was inapplicable because the shooting was "at close range" and he did not mean to harm anyone other than his wife. *Initial Brief of Appellant*, p. 27. At no time does he ever discuss the underlying factual basis of the state's theory of the case of aggravation – the great risk of death to those within the vehicle and particularly Kiera, and instead makes reference to the fact that after shooting into the vehicle, he focuses upon a collateral fact that Lindsey did not shoot the officer when he could have done so. As shown by the evidence set out in Argument III, the evidence conclusively supports the "great risk of death" aggravator and the trial judge had a duty to deny the directed verdict motion. To do otherwise would have been an error of law.

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State v. Lindsey, supra.

How the Issue Was Presented At Trial

At the conclusion of the State's penalty phase presentation, counsel Bartosh moved for a directed verdict on the "great risk of death" statutory aggravator. ROA 1972. He initially relied upon a Georgia case, Pope v. State, 256 Ga. 195, 345 S.E.2d 831, 845 (1986), to apparently

contend that shooting someone at fairly close range does not, by itself, create a great risk of death to more than one person because others are in the vicinity. ROA 1974-75. Bartosh asserted that here you had someone firing at a fairly short distance at one person, it must be more than likelihood. ROA 1975-76. Counsel also apparently referred to an unpublished Fourth Circuit opinion, Nolden v. U.S., 856 F.2d 187 (4th Cir. 1988)(unpublished), in support of his position that a .38 caliber handgun (as opposed to an automatic weapon) does not fit the "weapon normally dangerous to the lives of more than one person" definition. ROA 1976-77.

Solicitor Gowdy relied upon State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) in opposition to the motion. ROA 1977. He asserted Locklair stood for the proposition that the handgun satisfied the "weapon" definition. The prosecutor asserted that the parking lot of the Inman Police Station is clearly a "public place." ROA 1977. He noted that in Locklair the attempted firing with the safety on satisfied the factor. ROA p. 1977, ll. 21-25.

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Solicitor Gowdy argued that the facts in Lindsey were much more egregious than Locklair. Here, he noted, children were in the car, one leaning forward and one asleep. In addition, with the tinted windows, Lindsey fired two shots from the back of the victim's head and "then he walked around and fired two more times directly in the direction of the two children." ROA p. 1978, ll. 6-8. Gowdy noted that one of the bullets lodged in the trunk. He noted further that the autopsy photographs revealed one of the bullets that struck the victim had passed through both sides of her skull, lodging in her skin, with a possibility of clearing the skin and striking the children. ROA p. 1978, ll. 9-16.

In recognizing that under Locklair there is no requirement that bystanders be injured, he created a "great risk" where one did miss, which was sufficient. In addition, he added the fact

that Officer Godfrey testified that after the shooting, Lindsey pointed the gun at him in the public place. Gowdy concluded that "but for the fact that her [Kiera's] head was laying either on the front, car seat or on her aunt's [victim] shoulder, we very well could have two homicides. ROA p. 1979, ll. 4-9.

Judge Few rejected the defense motion with apparent ease:

> THE COURT: The facts of the Georgia case seem to me to be a good bit different. This case is pretty simple to me. The evidence is that on the two occasions that Mr. Lindsey apparently saw Ms. Nesbitt's car, he was unable to tell that Ms., that his wife was in there because of the tint in the windows. Once when he passed them and they were driving through Spartanburg to Inman. But more importantly as they stopped side-by-side on the street in Inman outside of the house of Mrs. Nesbitt's mother I believe she said.
>
> They were close enough to have a conversation through the window. And yet Mr. Lindsey could not tell that Mrs. Lindsey was in the back seat because of the tinted windows. Nevertheless, he fired shots into the window from two different angles while the vehicle was parked in a public place. And the second time around looking presumably to through the same window that he could not identify her through only minutes before. He fired shots in the direction of two children.
>
> I have seen the bullet hole in the car, in the seat. The bullet hole is in the area that Kiera would have been sitting in. If she had decided in her - - none of us would know how to react to that situation. ...Certainly, a nine-year-old child is not going to have an ability to make a rational calculated decision as to how to best protect herself in the seconds that followed shots being fired into the head of the adult sitting next to her in the back seat. It is very possible that Kiera could have leaned the other way. She might could have leaned toward Nell for protection. And if she had done that, she would be dead. That bullet goes right through the space that she would have leaned into.
>
> If she had not leaned away, from my view of the evidence she probably would have been hit. I've got absolutely no doubt that the facts in this case are sufficient to go to the jury on the aggravating circumstance of creating a great risk of death in a public place using a weapon that is capable of producing death. I did not get the language, I did not quote the statute. But I have no doubt that that is sufficient. Motion is denied.

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ROA p. 1980, l. 10 - p. 1981, l. 6.

The solicitor's closing argument paralleled his response and the judge's order on the statutory aggravating factor, also noting that Kiera was cut by the glass and injured physically and psychologically. ROA 2108-2111. Defense counsel Bartosh challenged the credibility of the witnesses statements about Kiera's location in the car, almost claiming that if she was where she said she was, she would now be dead. See, ROA p. 2135, ll. 18-22. He methodically went through the element of "public place," "knowingly" (asserted that Lindsey's depression, cognitive deficits and possible brain damage "a desperate man who isn't thinking about anything"), the great risk to more than one person factor (the bias of the officers and family who testified, the location of the girl and whether the state's theory was credible), and whether the gun satisfied the terms of a device normally hazardous to the lives of more than one person. ROA 2132-2137. Interestingly, the juror requested the testimony of Kiera and Officer Benny Godfrey be replayed, as well as the 911 audiotape. ROA 2164-65.

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The jury found the existence of the statutory aggravating circumstance and recommended the death sentence. ROA 2169-2171. Defense counsel Bartosh made a motion for a new trial based upon the alleged failure of the state to satisfy its burden of proof on the statutory aggravating circumstance. ROA p. 2172, ll. 5-12. Judge Few denied the motion. ROA p. 2172, l. 13.

LAW/ANALYSIS

This Court must find the evidence conclusively supports the existence of the statutory aggravating factor of "great risk of death" as found as a matter of state law in the direct appeal. The two children in the back seat were unquestionably within a zone of danger as a result of the

four gunshots into the vehicle, particularly when the shooting began through a tinted window at various dangerous angles and by the testimony showed the bullet that exited the neck of the decedent would have struck and killed the child in the middle of the seat, had she not moved to one side.[43] Nothing presented in the state PCR hearing undermines that legal conclusion.

In State v. Locklair, supra. the court found that the "great risk of death" aggravator was properly supported by the evidence. Lindsay attempts to distinguish Locklair by asserting that it was limited to a situation where a murderer continued to try to fire his weapon after he had already shot and killed his girlfriend, albeit with the safety on. In Locklair, the Court held:

> **Locklair argues that this was a simple case of a victim being shot at close range, not the type of incident contemplated by the statute.** However, the trial testimony does not support this assertion. According to Nichols' testimony, Locklair put more than one person at great risk of danger because he attempted to fire the gun several times, but the safety was on. After he shot Bridges, Locklair pointed the gun at Williams' home where there were children inside. Nichols was forced to tackle Locklair to stop him and Robert Williams, the victim's stepfather, had to struggle with Locklair to retrieve the gun. According to the trial testimony, the gun was dropped several times during the struggle with shots being fired in different directions. Also, at the very least, Nichols and Robert Williams, were placed in great danger as they attempted to stop Locklair from firing and retrieve the gun. **Finally, Locklair put many people at great risk of danger. Nichols, Robert William, Betty Williams, Dewey Morgan, and several children playing in the street were all within firing range when the shooting occurred.**

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Id., 341 S.C. at 366, 534 S.E.2d at 427.[44]

Lindsey contended that Locklair is dissimilar from his case. While not completely similar,

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[43] This Court finds the summary of the 911 tape, including the children's screams as supportive of the knowledge of the existence of the children in the backseat. See Exhibit 21 (tape). See also, ROA. 1743-45 (opening by Deputy Solicitor Willingham).

[44] In Locklair, the Court also noted that other jurisdictions have held that a gun fired in the direction of two persons satisfies the similar statutory aggravator citing State (N. C.) v. Moose, 310 N.C. 482, 313 S.E.2d 507 (1984); Jones v. Georgia, 243 Ga. 820, 256 S.E.2d 907 (1979); Moran v. Nevada, 103 Nev. 138, 734 P.2d 712 (1987). Id., at n. 4.

as Solicitor Gowdy noted, the instant case is even more egregious and stronger on the actual risk of death shown toward the children in the back seat who were within the zone of danger and death from the actually fired bullets, whose lives were spared only due to fortuity of a leaning motion (or lack of movement) at the instant of the firing in a close area.

Conversely, on appeal, he attempted to suggest that the "great risk of death" only exists in a large, crowded setting such as a shopping mall, citing State v. Ivey, 325 S.C. 137, 481 S.E.2d 12 (1997). In Ivey, the defendant fired at a police officer in a shopping mall. The jury found *inter alia* the existence of the "great risk of death" aggravator. However, the Court's ruling did not address the sufficiency of the evidence supporting the aggravator or construe the statute. Nothing in Ivey suggests that the aggravator only applies in the setting suggested by the Applicant.

Wholly absent from the Applicant's argument on this issue is the undisputed fact that two children were seated in the back seat with the victim in close proximity. While the Applicant notes that the victim was shot with four shots, he makes no mention, conspicuously, of the fact of the bullet that grazed the victim and the bullet that entered the center of the seat where Krera was sitting. Remarkably, the entire basis of the trial judge's ruling cannot vanish by ignorance. The reason for this failing is obvious - to admit its existence was to admit the existence of the aggravating factor. As the defense counsel cogently acknowledged in its closing, if the witness was correct in the statement of her location, she should be dead. That was the risk of her proximity to Mrs. Lindsey - revealed by their screams on the 911 call, Lindsey was not ignorant of their presence nor their great risk of death while they were in the zone of danger. Accord, Jones v. State, 128 P. 3d 521 (Okla. 2006) (evidence showed defendant killed victim while

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victim was sitting in vehicle with his sister and two young daughters and defendant knew of their presence when he shot victim); State v. Burns, 979 S.W.2d 276 (Tenn. 1998) (evidence supported aggravator of "great risk of death to two or more people" where defendant shot inside car in which three people were sitting, killing one and wounding another then fired shots at another man who left car, which directly imperiled four men playing basketball nearby).

Since there is evidence to support the existence of the statutory aggravating factor, the trial court correctly denied the motion for a directed verdict as to the aggravating factor. Here, the evidence existed that Lindsey "by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person." It occurred in the Inman Police Department - a public place. The weapon - a .38 revolver - was the type of weapon recognized in Locklair as being hazardous to the lives of more than one person. Lindsey was aware that there was more than one person in the vehicle at the time of his shooting. And finally, the manner of his shooting, through tinted windows and then at various angles put "more than one person at great risk of death" the children in the back seat, would fortuitous positioning saved their lives from the bullets which struck Nell Lindsey.

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Trial Counsel Was Not Deficient.

Ineffective assistance of counsel claims are not fungible but instead are highly fact-dependent. Hemmerle v.Schriro, 495 F.3d 1069, 1075 (9th Cir. 2007). Conclusory allegations not supported by specifics do not warrant relief. Jones v. Gomez; 66 F.3d 199, 204 (9th Cir. 1995); James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994); U.S. v. Popoola, 881 F.2d 811, 813 (9th Cir. 1989). A conclusory allegation of ineffectiveness raises no constitutional issue because a

petitioner must show how counsel was deficient and how there was prejudice. Miller v. Johnson, 200 F.3d 274, 282 (5th Cir. 2000). Vague and speculative assertions are deficient. U.S. v. Taylor, 802 F.2d 1108, 1119 (9th Cir. 1986), citing U.S. v. Rogers, 769 F.2d 1418, 1425 (9th Cir. 1985). And in order to prevail on an ineffectiveness claim, a petitioner must make a sufficient factual showing to substantiate the claims. U.S. v. Schaflander, 743 F.2d 714 (9th Cir. 1984).

Counsel Bartosh acted reasonably in his argument, legal and factual, against the applicability of the statutory aggravating factor. Applicant has not asserted, in any manner, what counsel could or should have done differently concerning the particular aggravating factor. Strickland v. Washington, 466 U.S. 668 (1984) is the foundation for the presumed effectiveness of counsel's conduct, reciting that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" 466 U.S. at p. 689, 104 S.Ct. at p. 2065. In determining whether counsel's actions are reasonable, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance." Against that presumption -without any contrary argument - his claim must fail.

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STRICKLAND PREJUDICE NOT PROVED

Further, the South Carolina Supreme Court addressed the applicability of the particular statutory factor in the direct appeal. Current counsel has not pointed out any errors or flaws in that state law determination of the "great risk" factor. He only asserts that counsel was unsuccessful in arguing its inapplicability. The Applicant has failed to assert any act or omission on counsel's part in this allegation - just a claimed statement of lack of success in the motion.

The South Carolina Supreme Court concluded that there was evidence to support the statutory aggravating factor. Counsel argued against its existence before the judge. He argued before the jury to give Lindsey the benefit of the doubt on whether the element of knowingly - based upon Lindsey's depression, cognitive deficient and brain damage, the element of great risk of death to more than one person - when the evidence suggested that if the little girl was where the state now asserts that she would be dead and therefore a reasonable doubt whether she was at risk, and whether the weapon satisfied the terms of a device that would normally be hazardous to the lives of more than one person. ROA 2134-36. He requested that the doubt be resolved in the favor of Lindsey. ROA 2133-2137.

Since the Applicant has not specific what counsel should have done, contrasted to what he did, Strickland prejudice clearly has not been shown. As the South Carolina Supreme Court stated in rejecting a proportionality review claim: "Applicant contends the imposition of death in his case is disproportionate to other death penalty cases because his case involves only a single victim and resulted from a domestic dispute. See S.C.Code Ann. § 16-3-25 (2003) (proportionality review).We find no support for Appellant's attempt to reduce this crime to simply "a domestic dispute." Appellant's culpability is not lessened by the fact that the victim was his wife. There is no evidence of any immediate dispute leading up to the murder, much less any provocation on Victim's part. In fact, appellant intentionally violated a court order forbidding contact with Victim." State v. Lindsey, supra. His Sixth Amendment allegation is without merit because it lacked specificity and neither prong under Strickland has been proved by the

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Applicant.[45]

CONCLUSION

WHEREFORE, this Court finds that each and every allegation in the Application, as amended, is denied. Based on the foregoing, the application for post-conviction relief is denied in its entirety. Applicant has failed to show error, or if he established error, he failed to show prejudice such as would support the granting of either a new guilt proceeding, or a new sentencing proceeding.

This Court advises Applicant that if he chooses to appeal, he must serve a notice of intent to appeal within thirty (30) days from the receipt of written notice of the entry of judgment, and file same. His attention is directed to Rules 203 and 227 of the South Carolina Appellate Court Rules for the appropriate procedures.

AND IT IS SO ORDERED THIS 10th day of ~~June~~ August, 2011.

HONORABLE PAUL M. BURCH
Presiding Circuit Judge

Pageland, S.C.

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[45]This Court further concludes that the Applicant has abandoned claims of ineffective assistance of counsel set out in the Amended Application concerning issues related to evidence of visitation issues and evidence of seeking legal assistance for family court.

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Marion Alexander Lindsey SCDC No. 6015 Petitioner, vs. State of South Carolina, Respondent.	PETITIONER'S MOTION TO RECONSIDER, ALTER AND AMEND 2007-CP-42-2848

TO: The Honorable Paul M. Burch, Presiding Circuit Court Judge
Don Zelenka, Esquire, Attorney for the State of South Carolina

YOU WILL PLEASE TAKE NOTICE that Applicant Marion Lindsey, by and through the undersigned attorneys, hereby moves The Honorable Paul M. Burch, Presiding Circuit Court Judge, for an Order pursuant to Rule 59 of the South Carolina Rules of Civil Procedure reconsidering, altering or amending its prior Order dated August 10, 2011, filed with the Spartanburg County Clerk of Court on August 12, 2011 and received by Applicant's attorneys on September 8, 2011.

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Applicant Marion Lindsey's request is based on the ground that each of the allegations of Ineffective Assistance of Counsel presented to the Court during the trial in this matter were individually and collectively sufficient to sustain a finding of Ineffective Assistance of Counsel by Applicant's Trial Counsel and to require an Order vacating Applicant's sentence of death and granting Applicant a new sentencing hearing.

More specifically, Applicant alleges that the Court made the following errors in light of the evidence presented at the trial on his Application for Post Conviction Relief:

1. Applicant is informed and believes this Court erred in finding that Applicant's Trial Counsel adequately prepared him for the pre-trial mental health evaluation.

Specifically, Applicant alleges that the evidence presented at trial established the following facts which warrant a finding of that Applicant's Trial Counsel was ineffective:

a. Trial Counsel inappropriately allowed Marion Lindsey to take the advice of a "jail house" lawyer to feign mental illness as part of his defense.

b. Trial Counsel failed to spend sufficient time with Marion Lindsey prior to the evaluation and, as a result, failed to learn of his intentions to feign mental illness and failed to discuss with him the dangers of that course of action.

2. Applicant is informed and believes this Court erred in finding that Applicant's Trial Counsel adequately presented the issue of malingering to the jury during the penalty phase.

Specifically, Applicant alleges that the evidence presented at trial warranted a finding of that Applicant's Trial Counsel was ineffective for failing to call Dr. Tora Brawley as a witness during the sentencing phase of the trial. Dr. Brawley is an expert in Clinical Pscyhology with specialty in neuro-psychology who evaluated Marion Lindsey prior to trial, performed psychological testing on Marion Lindsey and reviewed records from his previous evaluations and testing. Dr. Brawley's testimony could have refuted the State's allegations that Marion Lindsey was malingering when he was examined by defense experts and in psychological testing of the Court-examiners and supported the testimony of Dr. Margaret Melikian.

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3. Applicant is informed and believes this Court erred in finding that Applicant's Trial Counsel adequately presented requests for mercy to the jury during the sentencing phase of the trial.

   Specifically, Applicant alleges that the evidence presented at trial established the following facts which warrant a finding of that Applicant's Trial Counsel was ineffective:

   a. Trial Counsel failed to prepare the witnesses who testified on behalf of Marion Lindsey to request that the jury show mercy and impose a life sentence instead of the penalty of death.

   b. Trial Counsel failed to call both family members and non-family members as witnesses during the penalty phase who could have made an effective request for mercy to the jury.

   c. Trial Counsel failed to ask appropriate questions to elicit the requests for mercy from the witnesses during the penalty phase.

   d. Trial Counsel failed to adequately argue the Court's refusal to allow the witnesses to request mercy during the penalty phase of the trial.

   e. Trial Counsel failed to preserve the trial record on the issue of mercy by not presenting adequate arguments to the court in support of their attempts to present the requests for mercy and by not requesting to proffer the testimony of the witnesses on the issue of mercy.

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4. Applicant is informed and believes this Court erred in finding that Applicant's Trial Counsel provided sufficient information to Dr. Margaret Melikian to allow

her to properly evaluate Marion Lindsey and to testify on his behalf during the penalty phase of the trial.

Specifically, Applicant alleges that the evidence presented at trial established the following facts which warrant a finding of that Applicant's Trial Counsel was ineffective:

a. Trial Counsel failed to obtain and provide to Dr. Melikian historical information and records of Marion Lindsey and his family members which were necessary for her to perform a proper evaluation of Marion Lindsey and to present her findings and conclusions to the jury during the penalty phase of the trial.

b. Trial Counsel failed to seek a continuance of the trial in this action after Dr. Melikian informed them that she needed additional time and information to properly perform her duties and to present her findings and conclusions at trial.

c. Trial Counsel failed to elicit testimony from Dr. Melikian about statutory mitigating factors during her testimony in the penalty phase of the trial.

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5. Applicant is informed and believes this Court erred in finding that Applicant's Trial Counsel adequately presented to the jury the history of mental illness and impairment in Marion Lindsey's family and the relevance of that information to the jury's decision on the issue of sentencing.

Specifically, Applicant alleges that the evidence presented at trial established the following facts which warrant a finding of that Applicant's Trial Counsel was ineffective:

a. Trial Counsel failed to adequately interview the family members to discover the extent and nature of mental illness and impairment in the family.

b. Trial Counsel failed to adequately prepare the family members to present the extent and nature of mental illness and impairment in the family.

c. Trial Counsel failed adequately to argue to the Court the admissibility and relevance of the evidence of family mental illness and impairment.

d. Trial Counsel failed to adequately preserve the record relating to family mental illness and impairment by not presenting adequate arguments to the court in support of their attempts to present the testimony of the family members and by failing to proffer the testimony of the family members on this issue.

6. Applicant is informed and believes this Court erred in finding that Applicant's Trial Counsel was effective despite its failure to retain and present a prison adaptability expert during the penalty phase of the trial to testify about Marion Lindsey's ability to adapt to prison life without undue risk to others and the relevance of that information to the jury's sentencing decision.

7. Applicant is informed and believes this Court erred in finding that Applicant's Trial Counsel was effective despite its failure to retain and present a mitigation expert during the penalty phase of the trial to testify regarding the psycho-social history of Marion Lindsey and the relevance of that information to the jury's sentencing decision.

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8. Applicant is informed and believes this Court erred in finding that Applicant's Trial Counsel was effective despite its failure to elicit testimony from the EMS workers, Joseph Stewart and Vincent Bell, regarding Marion Lindsey's desire to commit suicide immediately after the death of Ruby Nell Lindsey.

Specifically, Applicant alleges that the evidence presented at trial established the following facts which warrant a finding of that Applicant's Trial Counsel was ineffective:

a. Trial Counsel failed to adequately interview the EMS workers to determine what information and testimony they could provide which would be beneficial to Marion Lindsey.

b. Trial Counsel failed to adequately prepare the EMS workers to testify during the penalty phase of the trial.

c. Trial Counsel failed to ask appropriate questions of the EMS workers to elicit admissible testimony regarding Marion Lindsey's state of mind immediately after the shooting occurred.

d. Trial Counsel failed to adequately argue that the testimony of the EMS workers related to Marion Lindsey's words, actions and state of mind immediately after the shooting were admissible.

e. Trial Counsel failed to preserve the trial record regarding the testimony of the EMS workers about Marion Lindsey's words, actions and state of mind immediately after the shooting by not presenting adequate arguments to the court in support of their attempts to present the testimony and by not requesting to proffer the testimony.

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9. Applicant is informed and believes this Court erred in finding that Applicant's Trial Counsel was effective despite its failure to commit sufficient time to perform an adequate investigation for the sentencing phase of the trial and to adequately prepare for the presentation of a case in support of mitigation during the sentencing phase of the trial.

Specifically, Applicant alleges that the evidence presented at trial established the following facts which warrant a finding of that Applicant's Trial Counsel was ineffective:

a. Trial Counsel failed to assemble the complete defense team until approximately one (1) month prior to the trial.

b. Trial Counsel failed to perform an investigation of Marion Lindsey's life history, family history and other relevant factors until approximately two (2) months prior to trial. The first half of the investigation, which lasted approximately four (4) weeks, was conducted without the assistance of a mitigation investigator. The investigation conducted by the defense team only lasted approximately eight (8) weeks, was limited in nature and scope and failed to uncover information which would have been beneficial to Marion Lindsey during the penalty phase of the trial.

c. Trial Counsel failed to spend sufficient time interviewing potential witnesses to determine what beneficial testimony they could provide on behalf of Marion Lindsey during the penalty phase of the trial.

d. Trial Counsel failed to spend sufficient time preparing witnesses to testify during the penalty phase of the trial so that their testimony would include

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all the beneficial information available and would be presented in a manner that was clear, logically structured and easily understood by the jury.

10. Applicant is informed and believes this Court erred in finding that Applicant's Trial Counsel was effective despite its failure to adequately argue against the statutory aggravating factors alleged by the state. Specifically, Marion Lindsey alleges that although Trial Counsel did address the statutory aggravating factors alleged by the State he did so in a cursory fashion and failed to present sufficient arguments against the application of those factors to Applicant Marion Lindsey.

Conclusion

Applicant Marion Lindsey is informed and believes each of these allegations as supported by the evidence presented at trial establishes that the representation Applicant's Trial Counsel provided fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Even if none of the allegations were individually sufficient to support a finding of Ineffective Assistance of Counsel, collectively the failings of Trial Counsel collectively fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Therefore, Applicant Marion Lindsey requests that this Court reconsider, alter and amend its Order dated August 10, 2011 to find that Applicant's Trial Counsel was ineffective, to vacate his sentence of death and to grant Applicant a new sentencing hearing.

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Respectfully submitted:

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ATTORNEY FOR THE APPLICANT

Date: 9/19/11

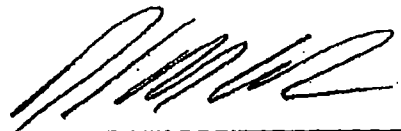
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M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)	SEVENTH JUDICIAL CIRCUIT
Marion Alexander Lindsey,)	
SCDC No. 6015)	
Petitioner,)	
)	CERTIFICATE OF SERVICE
vs.)	
)	20007-CP-42-2848
State of South Carolina,)	
Respondent.)	
)	

I, David M. Collins, Jr. attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 19th day of September, 2011 mailed a copy of the Petitioner's Motion to Reconsider, Alter and Amend in the following manner to the Respondent and the Honorable Paul M. Burch in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Hon. Paul M. Burch
Judge of the Fourth Judicial Circuit
Post Office Box 276
Pageland, SC 29728-0276



David M. Collins, Jr.
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Attorney for Applicant

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS
MARION ALEXANDER LINDSEY, #6015) Applicant, vs. STATE OF SOUTH CAROLINA, Respondent.	)	C/A No. 07-CP-42-2848 RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITIONER'S MOTION TO RECONSIDER, ALTER, AND AMEND

The Respondent State pf South Carolina hereby makes a memorandum in opposition to the September 19, 2011 "Petitioner's Motion to Reconsider, Alter and Amend." On November 9, 2011, below-signed counsel contacted the Court concerning the status of any potential hearing on the motion to alter. Counsel were advised that the Court intended to review the matter on the pleadings and advised that if the State desired to file further materials to complete the matter as soon as possible. This response follows:

I.

The Court entered its 192 page Order of Dismissal on August 12, 2011. Prior to entering the order, the Court had received extensive post-evidentiary hearing briefing from both sides. In addition, upon request after reviewing the briefing matters, the Respondent (on June 2, 2011) and Petitioner (on July 29, 2011) made proposed orders to the Court. In each of his contentions within his Motion to Reconsider, the Applicant merely restates each of the heading of his ten contentions within his original post-hearing memorandum of law. The Applicant fails to assert any particular factor or legal analysis within the Order itself that supports either a reconsideration

or altering and amending the judgment. Instead, the Applicant merely sets out each predicate and conclusory claim as a basis for relief. The Motion to Reconsider should be denied.

1.

In his initial assertion, Lindsey contends that the court erred in finding that counsel adequately prepared Lindsey for his pre-trial mental evaluation. The Court rejected that claim within its order, p. 35-58. In his motion, he only contends that counsel "inappropriately allowed " Lindsey to take the advise of a "jail house" lawyer to feign mental illness and failed to spend adequate time with him to learn of his intention to feign mental illness. Motion, p. 1-2. In the Order factually rejecting the claim, certain salient factors defeat the claim which the Court reasonably found based upon the evidence of Applicant's over two year charade from October 2002 until :

1. " . . Lindsey was maintaining the charade of the existence of his imaginary friend Jimmy - an attempt to scam the state doctors and his lawyers by a suggestion that he was crazy. **Simply put, this malingering of a mental illness by Lindsey was not the product of his lawyer's work, neglect or omission on the case, but according to Dr. Melikian's recent discovery, Lindsey's own creation at the suggestion of other inmates - a suggestion that acting crazy would aid him.** It is only Dr. Melikian's recent post-verdict speculation that had she spent more time with Lindsey prior to the trial, he would have uncloaked the fakery of Jimmy and she could have used it to explain his depression by accepting this action - an action taken by Lindsey only after it did not work where the death verdict still resulted. " Order, p. 57

2. "The speculation within this allegation is simply unproven. There has been no showing that Mr. Bartosh did not regularly meet with Lindsey. To the contrary, the evidence was that Mr. Bartosh had made a good relationship with a series of visits over the years his representation. The alleged fact that Lindsey hid the truth concerning the malingering from counsel from October 2002 throughout the trial (May 2004) does not mean that a different attorney-client relationship could have forced the truth from Lindsey - particularly when he was confronted by additional friendly experts about the existence of Jimmy prior to the trial and after the state hospital evaluation in 2003." Order, p. 55-57.

3. Under any *Strickland* analysis, the matter must be viewed from trial counsel's perspective at the time of the trial in 2004. The fiction of Jimmy was imbedded into the meetings between counsel and Lindsey throughout the relationship from 2002 through the trial, as revealed through counsel Brannon and Lenora Topp's testimony. As revealed in the trial testimony and questioning of Dr. Melikian and the pretrial testimony of Dr. Narayan (ROA 133-135), there was evidence of malingering and evidence from testing done by Dr. Brawley and the state hospital that reflected he was not malingering - other than the vision of Jimmy. In fact, at that pretrial competency hearing, Dr. Narayan stated that morning : "we didn't find any evidence of his malingering symptoms today. There's no evidence of that . But we did find evidence of that on the three occasions that Mr. Lindsey came to our institution." ROA 137, l. 13-16.

Respondent submits that the Court addressed the claims sufficiently in the Order and made appropriate and supportable credibility findings. Other than the conclusory restatement of thee claim, Applicant has not shown a basis for reconsideration. The initial allegation is without merit because he failed in his burden of proof of any deficiency by his defense counsel in failing to make Applicant reveal to them that he had recently concocted "Jimmy" his imaginary friend to feign mental illness in the hopes of avoiding a death sentence at the suggestion of other jail inmates. See Order, p. 35-58.

B.

In his second assertion for reconsideration, Applicant contends that the Court "erred in finding that trial counsel adequately presented the issue of malingering to the jury during the penalty phase." Motion to Reconsider, p. 2. He contends that this was based upon his assertion that trial counsel erred in failing to cal forensic psychologist Dr. Tora Brawley in sentencing which he claims would have "refuted the State's allegations that Marion Lindsey was malingering when he was examined by defense experts and in psychological testing of the Court-examiners and supported the testimony of Dr. Melikian." Motion, p. 2. Respondent submits that

the request to alter and amend should be denied on this assertion.

The Court originally addressed the failure to call Dr. Brawley in the Order at pages 58-62. Importantly, the Court recognized the inconsistency in Applicant's approach with argument one. Order, p. 59. As the Court found in the Order, p. 61-62:

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

#4.

The Court made a factual conclusion that was supported by the record: "Lindsey was feigning mental illness when he was evaluated by the state examiners." Order, p. 61, ¶ 1. As Dr. Melikian recently stated, Applicant revealed to her the creation of Jimmy was an attempt to feign mental illness symptoms, apparently for the purpose of duping them to think that he suffered a major illness. Accepting that admission, it undermines their claim [that he was not malingering and the state evaluators were wrong] and "supports the correctness of Dr. Narayan and Dr. Musick's 2003 assessment that he was malingering." The Court reasonably concluded that Lindsey had failed in his burden of proof. Order, p. 61.

Further,, the failure to call Dr. Brawley was not deficient since her opinion was presented through Dr. Melikian at trial. As the Court found: " this was not neglect by defense counsel, but a reflect a conscious decision on counsel Bartosh's part on this issue. The evidence was admitted

concerning both of Dr. Brawley's malingering tests as well as the conclusion that the state examiner's objective testing did not show malingering." O4rder, p. 61.

The request to alter on this claim should be denied.

C.

In the next portion of the motion, Applicant makes a claim that the defense counsel failed to adequately present requests for "mercy" to the jury during the penalty phase. Motion ,p. 3. Within the motion he restates his original argument from the post-hearing briefs and proposed order that counsel failed to prepare witnesses who testified to show mercy and failed to call certain witnesses who could have testified about mercy including friends and family. Motion, p. 3, ¶¶ a,b, c. These assertions were addressed in the Order of Dismissal, p. 62-66. For the reasons set forth therein, Respondent submits that the issue was appropriately addressed. The Applicant has not pointed to any specific matters that the Court failed to consider, other than the rejection of its conclusory position. The motion to alter should be denied.

In the second portion of his claim, he asserts the Court erred when the counsel "failed to adequately argue the trial court's refusal to allow the witnesses to request mercy and to preserve the record concerning that issue. The Court addressed that claim within its order, page 65-66. The Court relied upon the presumption of competency to address the deficiency prong due to counsel Bartosh's death. Order, p. 65-66. Further, the Court soundly determined that the second prong of Strickland v. Washington, 466 U.S. 668 (1984), a point the Applicant makes no attempt to challenge when the Court concluded:

He had claimed that had counsel objected it is likely the matter would have been reversed on appeal. However, he ignores the proper test that it is his burden to prove by a preponderance

of the that there is a reasonable probability that the result of the proceeding would have been different. To the contrary, four of his six witnesses had made specific mercy requests to the jury as family member and friend. He presented as noted above in the trial summary, a series of family witnesses: mother Virginia Lindsey[1], father Leon McDowell[2] , cousin Chris Wilkens [3], uncle Steve Pilgrim[4] and aunt Bessie Smith. He also called friend mentor Bill Burton who requested : "**please have mercy on him.**" ROA 2076. Second, counsel Bartosh made a plea for mercy and a just punishment of life. ROA 2137, 2146. To that extent, the situation is similar to the situation in State v. Sapp where the Court concluded that reversible error could not be shown even though the trial court erred in excluding a question concerning mercy. As in Sapp, there is cumulative evidence of family and friends requesting mercy. He has failed to establish Sixth Amendment prejudice. See State v. Sapp, 366 S.C. 283, 294, 621 S.E.2d 883, 888 (S.C. 2005); State v. Myers, 359 S.C. 40, 596 S.E.2d 488, cert. denied, 543 U.S. 980, 125 S.Ct. 485, 160 L.Ed.2d 359 (2004) (exclusion of testimony is harmless where it is cumulative to other testimony in the record). The Motion to Alter should be denied.

---

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

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

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

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

D.

In his next contention to reconsider, Applicant asserts that Court erred in finding that Applicant's counsel provided sufficient information to Dr. Melikian to allow her to properly evaluate Lindsey and to testify on his behalf, claiming historical information of family, failed to seek a continuance to allow her to have more time to prepare and failed to elicit specific testimony about the existence her findings of the existence specific statutory mitigating circumstances. The Motion to reconsider should be denied. These matter were adequately addressed in the earlier post-hearing briefing and specifically addressed in the Order at pages 66-89. The Applicant has failed to address any omissions in the Court prior analysis. Since these assertions were adequately addressed in the Order, the motion should be denied.

E.

In his fifth assertion to reconsider, Applicant restates the allegations addressed in his original memorandum at page 50 and addressed in the Order at page 88-89 and within argument 7 at Order pages 102-172. Particularly, this assertion concerns the alleged failure of trial counsel to present a family history of mental illness. It is apparent within the extensive order, that this issue was fully brief, considered and rejected as a ground for relief by the Court. The claim must be denied for reconsideration.

F.

In his sixth assertion, he asserts that the Court erred in finding trial was effective when it failed to retain or present a prison adaptability expert. This issue was raised by the Applicant in his original post-hearing memorandum at pages 51-52. The Court denied relief on the claim within its Order at pages 89-102. Concluding that the defense team *considered* presenting

evidence of prison adaptability (Order, p. 96-98), the Court opined that deficient performance had not been shown where the decision fell within the wide range of professional assistance. Order, p. 98-100. Importantly, the Court independently concluded that Sixth Amendment prejudice had not been shown strength and weakness of the profferred testimony of James Aiken against the trial record. Order, p. 100-102.

The Applicant has failed to show any basis to reconsider and alter or amend its earlier order. The request should be denied.

G.

As stated above, in his seventh assertion, Lindsey restates from his memorandum that the Court erred in finding counsel was effective when he failed to retain and present a mitigation expert (social worker) during the trial to testify about the psycho-social assessment of Lindsey. Motion, p. 5, #7. The Court throughly analyzed the presentation and investigation in the Applicant's background from the retained mitigation investigator Lenora Topp, the family members who testified at trial and at the PCR hearing and the interesting (and conflicting testimony of Social Worker Jan Vogelsang. Order, p. 102- 162. The analysis of the testimony revealed a reasonable conclusion that the original defense team's investigation of Lindsey's social history was reasonable under Strickland. Order, p. 162-168. As the Court concluded:

> Applicant has failed to show what material counsel was unaware of that was critical to the defense, just that in depth evidence was not presented. However, he has failed to show that counsel's investigation of the family background was unreasonable. With the further information about the family background, the psychiatric diagnosis is similar, the information provided by and to the social expert is similar to what the 2004 defense team was aware either by their own or Ms. Topp's interviews. The assertions otherwise must be denied.
>
> More clearly, 6th Amendment prejudice has not been shown. Applicant has not pointed to any new information or a gamechanging revelation that creates a

> reasonably probability of a different outcome. Bean v. Calderon, 163 F.3d 1073, 1081-82 (9th Cir.1998). To the contrary, it is virtually the same information. The Applicant has failed to show that further investigation of the family history undermines confidence in the outcome of the case and creates a reasonable probability that the result of the proceeding would be a life sentence.

Order, p. 169.

Further, the Court also directly addressed the claim on whether there was a error that required a new trial or sentencing based upon the failure to employ a social worker. Order, p. 169-172. In rejecting this showing the Court concluded that defense counsel did not retain social worker in 2004. However, comparing Jan Vogelsang's testimony against the backdrop of the trial witnesses it was almost a reading of Lenora Topp's 2004 reports that were done for counsel. In additionally, in viewing Ms. Vogelsang's testimony, the Court concluded:

> A review of social worker Vogelsang testimony reveals that it was almost a reading of the reports completed by Ms. Topp in 2004. The Applicant has failed to point to the differences other than she could have presented hearsay testimony to support that Bessie Smith was hospitalized with a alleged attempted suicide and explained that Steve Pilgrim had allegedly had mental health issues as well as a criminal record. The remainder of the focused testimony was known by counsel and reasonably understood by the jury after the testimony of the family and Dr. Melikian. Lindsey was raised by his mother and an absent father in a poor family. The Applicant has failed to pinpoint what difference any of the information Ms. Vogelsang laboriously testified about would have impact upon a jury in a manner that would undermine confidence in the verdict under Strickland.
>
> Applicant failed to prove that there is a reasonable probability that the jury would have concluded that "the balance of aggravating and mitigating circumstances did not warrant death." . . .[Order 170-171]
>
> . . . Further, as pointed out in the cross-examination, the danger of using a social worker who relies frequently on anecdotal hearsay risks making a difficult case even worse. It would have presented an additional opportunity to focus upon certain errors in her presentation and negative factors related to Lindsey that would make a death sentence even more likely. In the questioning concerning her expertise in child custody matters, she admitted that a person with the characteristics of Lindsey should not have been allowed to have visitation without court supervision, if at all, even though he had to be reminded that there was

evidence that Lindsey had feed beer to his baby son in a baby bottle. PCR Tr. 563. See ROA 1820 (Lindsey gave son a beer in a baby bottle). PCR Tr. 565, ll. 7-20. She was inconsistent on what family members - uncles or cousins - he was running drugs. PCR Tr. 578. She also reiterated Lindsey had a record of violence, not only toward Nell, but toward other females, including those he claimed to love. PCR Tr. 589. In confirming that his risk factors made it a high risk that he would end up committing the very act he committed, she also admitted that the risk factors she found are not treated in the prison system. PCR Tr. 593-94.

"To assess the probability [of a different outcome under Strickland], we consider the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding-and reweigh it against the evidence in aggravation." Sears v. Upton, --- [Order, p. 171-172]

Here, the sentencing profile was not altered by the additional testimony of Ms. Vogelsang. Although she presented a social history of known poverty and lack of a father-figure - known to the sentencing jury, she also confirmed that he had become a controlling and violent person. Against the trial backdrop including the evidence in aggravation, as well as the family mitigation the jury actually heard, the burden of proof has not been met by Applicant. The allegations must be denied.

Order, p. 170-172.

Applicant has no pointed to any deficiencies in the facts or the analysis as it relates to these issues. The Motion to Alter as to §7 should be denied,

H.

In his eighth specification, in his motion, Lindsey restates that the EMS workers should have had testimony elicited from them concerning Lindsey's desire to commit suicide and the testimony should have been preserved as an issue by counsel. He asserts that this Court erred in rejecting his claims. The issues were briefed earlier by counsel in the their memorandum pages 53-54. The Court, upon review denied relief in the claim within its order, paged 173-175. The Court found that counsel was not deficient (Order, p. 175) and that Petitioner had failed to prove Sixth Amendment prejudice. Order, p. 175-176. Absent any specification other than a conclusory

restatement of the allegation, Respondent submits that he has failed to show a basis that any reconsideration should result in altering this Court original order. The claim for altering the Order should be denied.

I.

In his ninth claim for reconsideration, he claims the Court erred in concluding counsel was effective where he contends that counsel was unable to commit sufficient time for an adequate investigation to prepare for the mitigation in the case. This issue was raised in the Applicant's post-hearing memorandum at pages 54-58. It was addressed in the Order at pages 176-181. The Applicant has failed to point out any specificity of error either as to the factual findings by the Court, the legal standards the Court used, or the conclusions based upon those standards other than his restatement of the issue from his memorandum. Respondent submits that there is no justification for altering and amending its original order on this claim. The issue should be denied.

J.

In his final specification for reconsideration, he claims the Court erred in concluding counsel was effective when he allegedly failed to argue against the statutory aggravating factors "other than in a cursory fashion." Motion to alter, p. 8, #10. The underlying issue was addressed in the Applicant's post-hearing memorandum at pages 181-191. The Applicant has failed to specify what counsel should have done that the Court did not consider in its earlier Order. Particularly, the Court previously found :

1. Counsel Bartosh acted reasonably in his argument, legal and factual, against the applicability of the statutory aggravating factor. Order, p. 190.

2. Current counsel has not pointed out any errors or flaws in that state law determination of the "great risk" factor. He only asserts that counsel was unsuccessful in arguing its inapplicability. The Applicant has failed to assert any act or omission on counsel's part in this allegation - just a claimed statement of lack of success in the motion. Order, p. 190.

3. Since the Applicant has not specific what counsel should have done, contrasted to what he did, Strickland prejudice clearly has not been shown. Order, p. 191.

Respondent submits the deficiency remains. This Court should deny the motion to alter.

#12

II.

For all the foregoing reasons, Respondent respectfully requests that the motion to reconsider, alter and amend be denied.

Respectfully submitted,

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Attorney General

JOHN W. McINTOSH
Deputy Attorney General

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ATTORNEYS FOR RESPONDENTS

By: S/Donald J. Zelenka

November 18, 2011

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the ***Respondent's Memorandum in Opposition to petitioner's Motion to Reconsider, Alter, and Amend*** in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

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David M. Collins, Jr., Esquire
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This 18th day of November, 2011.

DONALD J. ZELENKA
Assistant Deputy Attorney General

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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	OF THE SEVENTH JUDICIAL CIRCUIT
Marion Alexander Lindsey SCDC No. 6015, Petitioner, vs. State of South Carolina, Respondent.	C/A No.: 2007-CP-42-2848 **ORDER DENYING MOTION TO RECONSIDER, ALTER, AND AMEND**

This matter is before the Court on Petitioner's Motion to Reconsider, Alter, and Amend, dated September 19, 2011. In accord with SCRCP 59(f), the Court finds that it is not necessary to hear oral arguments on this matter. After reviewing the Petitioner's Motion and the Respondent's Memorandum in Opposition to the Petitioner's Motion to Reconsider, Alter, and Amend; and upon careful reconsideration, the Court hereby finds that the Petitioner's Motion should be, and hereby is, denied. The Petitioner has failed to assert any basis to support either a reconsideration or an altering or amending of my previous Order dated August 10, 2011.

THEREFORE, Petitioner's Motion to Reconsider, Alter, and Amend is hereby DENIED.

AND IT IS SO ORDERED.

The Honorable Paul M. Burch
Presiding Circuit Court Judge

Chesterfield, South Carolina

December 21, 2011

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)

MARION ALEXANDER LINDSEY, #6015) C/A No. 07-CP-42-2848
)
Applicant,)
)
)
vs.) RESPONDENT'S
) PROPOSED ORDER OF DISMISSAL
)
STATE OF SOUTH CAROLINA,)
)
Respondent.)
)

This matter comes before this Court on the application for state postconviction relief filed on August 14, 2007, as amended August 6, 2009. The initial application was filed by his appointed appellate counsel, Robert M. Dudek, of the South Carolina Office of Appellate Defense. The Respondents made an initial Return and requested under S.C. Rule of Civil Procedure, Rule 12(e), greater particularity and specificity on September 24, 2007. The Applicant, through appointed PCR counsel Richard Vieth and David Collins made an Amended Application for Post-Conviction Relief on August 6, 2009.

The matter was held before the Court on July 19-21, 2010. The Applicant was present and represented by court-appointed counsel Richard Vieth and David Collins. The Respondent was represented by Assistant Deputy Attorney General Donald Zelenka and Assistant Attorney General Al Simon. At the hearing, testimony was received from Douglas Brannon, Dr. Tora

Brawley, Vincent Bell, Lenora Topp, Rod Tullis, James Aiken, Karen Hatcher, Bill Burton, Mrs. Burton, Virginia Lindsey, Bessie Smith, Steve Pilgrim, Tim Sims, Jan Vogelsang, and Dr. Margaret Melikian. At the conclusion of the hearing, post-hearing memorandum were allowed. The Applicant's memorandum was filed October 26, 2010. The Respondent's memorandum was made on April 1, 2011. On May 2, 2011, this Court requested a proposed order in the matter from Respondent and subsequently from Petitioner. This Order of Dismissal follows.

I.

PRIOR PROCEDURAL HISTORY

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

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

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

(1976) as amended (Cum. Supp. 1990).

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

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

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

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

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

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

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

he raised the following questions presented:

> 1.
>
> Whether the court erred by excusing potential Juror Krisher for cause, and ruling that Krisher's belief that life imprisonment without parole was a more substantial punishment that the death penalty was incompatible with South Carolina law, since Krisher stated that he could impose the death penalty and sign the death form and he was a qualified juror?
>
> 2.
>
> Whether the judge erred by refusing to replace Juror Mauldin with an alternate where Mauldin was conducting his own measurements during a jury view of the automobile in which the decedent was shot, since a juror conducting his own measurements or experiments during a jury view was improper?
>
> 3.
>
> Whether the court erred by refusing to direct a verdict on the "great risk of death" aggravator since appellant shot his wife at close range and there was no evidence appellant knowingly created a risk of death to more than one person?
>
> 4.
>
> Whether appellant's death sentence should be vacated as both excessive and disproportionate since this case involves a domestic dispute pertaining to child visitation and no death sentence has been imposed in this state in the modern era under similar circumstances?

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

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

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

(1985) where the juror testified he could impose death as punishment for murder, and his belief was not incompatible with the law as the trial court reasoned?

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

STATEMENT OF THE CASE

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

> Appellant killed his estranged wife, Ruby Nell Lindsey (Victim), on September 18, 2002, in the parking lot of the Inman City Police Department. The jury found a statutory aggravator pursuant to S.C.Code Ann. § 16-3- 20(C)(a)(3) (2003) and appellant was sentenced to death. We affirm.
>
> FACTS
>
> Celeste Nesbitt, a close friend of Victim, was the State's witness-in-chief. On the day of the murder, Celeste gave Victim a ride home from work at about 8:00 p.m. In the car were Celeste's two young daughters, four-year-old Keysha and ten-year-old Kiera, who were in the back seat with Victim--Keysha in a car seat behind the front passenger seat, Kiera in the middle, and Victim behind the driver's seat. Celeste was driving and Celeste's mother was in the front passenger seat. The car was a Mercury sedan with dark tinted rear windows.
>
> Victim was separated from appellant at the time and was staying with her mother. As they neared Victim's mother's house, they saw appellant in his girlfriend's car. Celeste pulled into the yard and turned the car around so appellant was facing them in a head-on direction. Celeste rolled down her window and greeted him. Appellant asked her if she had seen Victim. Because Celeste knew appellant had threatened to kill Victim, she lied and answered that she had not seen her in three days.
>
> Celeste's youngest daughter, Keysha, leaned forward in her car seat and greeted appellant. Appellant then asked who else was in the back seat. Celeste told him Kiera, her older daughter, was lying on the back seat asleep. Because the windows were tinted, appellant asked Celeste to roll down the window so he could see. Celeste answered that the window was broken. When appellant said he would get out to look, Celeste sped off.

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

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

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

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

Other evidence indicated that during their marriage, appellant struck Victim several times in front of witnesses. In December 2001, he beat her in a restaurant parking lot and left the scene before the responding officer could arrest him. On September 17, 2002, the night before the murder, appellant was arrested on a warrant for criminal domestic violence arising from this incident. He was released on a $1,000 bond; one of the conditions of bond was that he have no contact with Victim.

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

II. ALLEGATIONS

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

I. Ineffective assistance of counsel in violation of the Sixth Amendment to the

United States Constitution for the reasons below and in the attachment to this Application. 10 (A).

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

2. Defense counsel was ineffective for failing to properly argue the "great risk of danger" aggravating circumstance did not apply to petitioner's case since the shot was at close range and it was clear the decedent was the only intended victim. This failure by trial counsel constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. This was also an Eighth Amendment violation since petitioner was wrongfully placed in the class of "death eligible" defendants. 10 (c) . (FAILURE TO ADEQUATELY ARGUE INAPPLICABILITY OF "GREAT RISK OF DEATH" AGGRAVATOR).

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

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

5. Defense counsel was ineffective for failing to offer evidence that he was steadily employed to counter the State's evidence that he was a drug dealer. The failure to offer this evidence constituted ineffective assistance of counsel in violation to the Sixth Amendment to the United States Constitution. 10(f). (EVIDENCE IN MITIGATION OF STEADY

EMPLOYMENT).

6. Defense counsel was ineffective for failing to offer evidence appellant was already lying on the ground when he was shot by the police officer. Allowing the state to distort the crime scene evidence to appellant's prejudice constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. 10(g). (FAILURE TO OFFER EVIDENCE THAT LINDSEY ON GROUND WHEN SHOT BY POLICE).

7. Defense counsel was ineffective in violation of the Sixth and Eighth Amendments to the United States Constitution, by virtue its inadequate *voir dire*, and the failure to challenge for cause certain members of the jury that should not have remained on the jury. A death prone jury was consequently selected. 10(h). (INADEQUATE VOIR DIRE AND FAILURE TO CHALLENGE FOR CAUSE UNNAMED JURORS).

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

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

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

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

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

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

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

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

Amended Application, ¶ 10, 11, page 3.

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

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

   MEMO , p. 43

2. **Ineffective Assistance of Counsel- CHALLENGE EVIDENCE OF MALINGERING**

   a. Failed to present issue of malingering to jury.
      i. Failed to call Dr. Brawley in sentencing .
         (1) claims testimony could have refuted allegations that he was malingering when examined by court examiners and Dr. Melikian.

   MEMO , p. 46-47.

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

   MEMO, p. 47

4. **Ineffective Assistance of Counsel - FAILURE TO ADEQUATELY PRESENT DR. MELIKIAN**
   a. Failed to Provide Sufficient Info to Dr. Melikian to allow evaluation of Lindsey
      i. Failed to obtain and provide historical info and records of family members necessary for proper evaluation.
      ii. Failed to seek continuance after Melikian informed them she needed

additional time

iii. Failed to elicit from Melikian statutory mitigating factors during testimony.

MEMO, p. 49

5. **Ineffective Assistance of Counsel - FAMILY HISTORY OF MENTAL ILLNESS**
   a. Failed to present to jury family history of mental illness
      i. Failed to adequately interview family members to discover extent of mental illness.
      ii. Failed to prepare family to present extent and nature of illness within family.
      iii. Failed to adequately argue to court the admissibility of evidence of family mental illness.
      iv. Failed to adequately preserve the record relating to family Mental Illness in support of attempt to present evidence and failing to offer proffer.

MEMO, p. 50

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

MEMO, . 51-52.

7. **Ineffective Assistance of Counsel - FAILURE TO RETAIN SOCIAL HISTORIAN/WORKER**
   a. Failed to retain mitigation expert regarding psycho-social history of Lindsey and relevance to jury determination .

MEMO , p. 52-53.

8. **Ineffective Assistance of Counsel - EMS WORKERS TESTIMONY ABOUT DESIRE FOR SUICIDE.**
   a. Failed to elicit testimony from EMS worker - Joseph Stewart and Vincent Bell - regarding Lindsey's desire to commit suicide after Nell's death.
      i. Failed to interview EMS workers to determine what info and testimony they could provide
      ii. Failed to prepare EMS workers to testify in penalty phase.
      iii. Failed to ask appropriate questions to elicit admissible info about Applicant's state of mind
      iv. Failed to adequately argue testimony of EMS workers related to Lindsey's

words, actions and state of mind after shooting was admissible

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

MEMO , p. 53.

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

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

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

ii. Failed to perform investigation of Lindsey's life history, family history until 2 months prior to trial

(1) first half of investigation done w/o mitigation investigator

(2) investigation lasted only 8 weeks.

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

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

MEMO, p. 54

10. **Ineffective Assistance of Counsel - Statutory Aggravating Factors**

a. Failed to argue against statutory aggravating factors alleged by state.

i. Counsel did address aggravators, it was cursory and failed to present arguments against application to Lindsey

MEMO , p. 58-60.

III.

STANDARDS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

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

by the Sixth Amendment." Id., at 687.

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

An attorney can avoid activities that appear "distractive from more important duties." Bobby v. Van Hook, 558 U. S. ___, ___ (2009) (per curiam) (slip op., at 8). Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. See Knowles v. Mirzayance, 556 U. S. ___, ___ (2009) (slip op., at 14–15); Rompilla v. Beard, 545 U. S. 374, 383 (2005); Wiggins v. Smith, 539 U. S. 510, 525 (2003); Strickland, 466 U. S., at 699.

Although courts may not indulge " post hoc rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland,

however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U. S., at 688. Harrington v. Richter, _ U.S. _ (Jan. 19, 2011). See also Cullen v. Pinholster, 131 S.Ct. 1388, at 1407 (2011) (citing with approval Chief Judge Kozinski's dissenting opinion below in which he stated that the court of appeals was required "to affirmatively entertain the range of possible reasons" that counsel may have had for proceeding as they did).

With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id., at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., at 687. See Harrington v. Richter, _ U.S. _ (Jan. 19, 2011). Stated another way, Petitioner has the burden of showing a reasonable possibility that, but for counsel's deficient performance, the death sentence would not have been imposed. Wong v. Belmontes, —U.S. ——, 130 S.Ct. 383, 386, 175 L.Ed.2d 328 (2009). For example, where the defendant claims ineffective assistance for failure to file a particular motion, he must "not only demonstrate a likelihood of prevailing on the motion, but also a reasonable probability that the granting of the motion would have resulted in a more favorable outcome." Styers v. Schriro, 547 F.3d 1026, 1030 n. 5 (9th Cir.2008).

Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U. S. ___, ___ (2010) (slip op., at 14). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland

standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U. S., at 689–690. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id., at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U. S., at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. See Wong v. Belmontes, 558 U. S. ___, ___ (2009) (per curiam) (slip op., at 13); Strickland, 466 U. S., at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id., at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id., at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id., at 693. Harrington, supra.

Moreover, there may be a significant possibility that, had this highly speculative evidence been given any weight at all, it would have been treated as aggravating rather than mitigating. See Atkins v. Virginia, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In Cullen v.

Pinholster, —U.S. —, 131 S.Ct. 1388, — L.Ed.2d — (2011), for example, the Supreme Court found that new evidence of an "organic personality syndrome" and "brain damage" was "by no means clearly mitigating, as the jury might have concluded that [the defendant] was simply beyond rehabilitation ." Id. at 1396–97, 1410. The Court concluded that, in light of the ambiguous nature of the brain injury, "[t]here [wa]s no reasonable probability that the additional evidence ... would have changed the jury's verdict." Id. at 1409.

IV. FINDINGS AND CONCLUSIONS

This Court must conclude that the claims, as stated, are insufficient to show entitlement to relief under Strickland v. Washington based upon the entire record before the court. As Strickland and its progeny make clear, assessment of th entire record, including the trial record as well as the record from the collateral proceeding is necessary. As Harrington v. Richter makes clear, counsel is presumed to be competent in making strategic decisions. Here, the assessment and the burden of proof is important because the lead counsel, Michael Bartosh died April 5, 2006 prior to this proceeding. It is evident from each of the attorneys involved in the Lindsey case - Doug Brannon and Karen Quimby Hatcher, that Mr. Bartosh was the primary counsel in the case and he particularly focused his efforts and strategy on the penalty phase of the trial. Each of the 10 specifications of ineffective assistance of counsel address the penalty phase of the trial. In fact, the only relief sought in this action concerns sentencing. As stated in Harrington, "[A]lthough courts may not indulge " post hoc rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects

trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam)."

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

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

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

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

not its definition." Id., at 17 (quoting Strickland, at 688). [1]

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

WHAT THE JURY HEARD

In the penalty phase, the defense called a series of mitigation witnesses. **Ann Howard,** Special Services Coordinator with the Spartanburg County Mental Health Center testified that she had seen the Applicant on September 8, 2002 and he presented himself as suicidal, crying and very depressed. She opined under a deferred diagnosis and referred him to a psychiatrist, Dr. Freeman Smith. ROA 1984-85. According to his notes, Dr. Freeman put Lindsey on an anti-psychotic drug - Zyphrexa, and was currently on Celexa - and anti-psychotic, a drug for depression - and a mood stabilizer - Abilify. ROA 1988-89. She testified that he is still receiving medication of Celexa, Depakote, and Abilify. ROA 1989.

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

Dr. Margaret Melikian, a forensic psychiatrist retained by the defense [Program

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[1]Petitioner points to the ABA Guidelines to suggest it is per se ineffective assistance of counsel to fail to do as it commands. But ABA Guidelines are not "inexorable commands"; rather, they are " 'only guides' to what reasonableness means, not its definition." Bobby v. Van Hook, — U.S. ----, ----, 130 S.Ct. 13, 17, 175 L.Ed.2d 255 (2009) (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052) (internal quotations omitted). As the Strickland Court explained, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Id. at 688-89, 104 S.Ct. 2052. Lindsey's counsel were between a rock and a hard place in determining the best way to spare him a death sentence, given the overwhelming evidence of his guilt. See, Post v. Bradshaw 621 F.3d 406, 418 (6th Cir. 2010)

Director of Forensic Psychiatry at M.U.S.C.] testified that she saw Applicant on May 4. She stated that she had reviewed:

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

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

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

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

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

She also opined that Lindsey had a "family history of depression." She reported that he was treated by a psychiatrist after he had an overdose when he was 15 years old. She opined that at the time of the incident, Lindsey appeared to satisfy the diagnostic criteria for depression.

ROA 2004, l. 23-25. She opined that he suffers from "major depressive disorder." ROA 2005.

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

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

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

As to whether Lindsey would have been operating under the influence of mental or emotional disturbance at the time of the incident, she opined that Lindsey had reported that he had been suicidal for several weeks prior to the incident. He reported that he had weight loss with

decreased appetite, feelings of hopelessness and helplessness and sad mood. She felt that he would meet the criteria for depression at that time. ROA 2008. His depression was recurrent. She opined that the depression was acute as opposed to chronic. ROA 2008.

She opined that he had cognitive deficits. ROA 2009. She reported that the testing at Hall Institute determined that he had well below average IQ and "borderline intellectual functioning" close to mildly retarded range with an IQ of 76. ROA 2009. However, she noted that when Dr. Brawley tested him, the scores were in the 80's although it is still below average.[2] She stated that " I would not have made a diagnosis of borderline intellectual functioning" because he does function better than what his test scores look like. She stated that his intelligence is low, he had trouble in school, but he does have some functioning abilities that she would not say were the basis of worrying or seeing him clinically for decreased intelligence. ROA 2009. She noted that he had problems with verbal fluency, naming words and processing memory. ROA 2009. She opined that in her professional judgement Lindsey had some kind of brain abnormality that causes his low test scores and sudden neurological findings. She concluded that a source of the abnormality could have been from the head trauma or the incident when he injected kerosene when he was an 18/19 month old. ROA 2010. She referred him to a behavioral neurologist after receiving the results from the neuro-psychologist. She also stated that the suicide attempt at age 15 was the result of an overdose of tylenol and other medications.

Dr. Melikian stated that his neurological problems were chronic. She stated that he had a limited ability to cope with things due to his limited intelligence and by his continuing to have an

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

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

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

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

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

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

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

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

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

She stated that she did not have his earlier Department of Corrections records when he was serving time for the earlier assault and battery with intent to kill in 1996. ROA 2026-27. She stated that Lindsey had acute periods of depression that he recovered from in between. The State inquired whether he was suffering under depression in 1996 when he shot through the windshield of Stafford Wilkins and was convicted of assault and battery with intent to kill. ROA 2027-28. She stated that she did not have a chronology of his moods for his entire life. ROA 2028. She stated that she relied upon records of his 1988 suicide attempt. ROA 2029-30. She stated that she had reviewed various school records and admitted that they were incorrect in that

some showed he had quit in the 10th grade according to him yet others showed he had either repeated 8th grade three times or seventh grade twice instead. ROA 2032. The state pointed out that Lindsey had lied on his application for employment at BMW that he had graduated from Chapman High School. ROA 2032-33.

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

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

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

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

ROA 2046.

She described Lindsey as a very loving and sweet child. Id. However, she stated that Lindsey inhaled kerosene when he was 18 months old. She described that she was doing dishes and was crawling around the wood heater. She described hearing him scream and saw he had poured kerosene all over his face and down his clothes. She stated that she grabbed him and tried to give him milk and carried him to the rescue squad and he was treated at the hospital for it. ROA 2047. She stated that one month later, Lindsey was run over by a car driven by her brother - Paul Pilgrim - who accidentally backed up over his head which resulted in scars . She stated that he was treated at the hospital that night and returned home that date. ROA 2048.

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

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

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

According to Ms. Lindsey, the Applicant first met Nell Lindsey around 1995. He had been living with a different girlfriend - Stephanie - at that time. She said that Lindsey eventually moved in with Nell and that they had a child July 1995 and a second child in 2002. She described

his relationship with Nell as a little arguing, but never saw violence and around her it was good. She described Nell as being like a daughter to her. She said that they would separate and then go back together several times. She stated that Nell would go to her mother's house during the separations. ROA 2053-54. She said that Lindsey would stay with friends then. Id.

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

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

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

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

At the time of the incident, she thought that they had been separated for a few months. She said that she had attempted to see her grandchildren, but neither her or Marion were allowed to see them. ROA 2057. She said this was for two months before the incident. She said that this made Lindsey upset because his kids had always been with him. She said that she tried calling Nell and learned the phone was blocked 4 days before the incident. ROA 2058. She said that this had an effect on him because all he wanted was to see his kids. Id. He told her that if he could not

get his family back that he could not live any longer. She said that last time she saw Lindsey was three days before the incident. She noted that he had lost weight and appeared worried and upset and was very depressed. ROA 2059.

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

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

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

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

Burton described Lindsey as a kid looking for attention and an adult to look up to. He said he never saw violence in Lindsey from either him or his brothers. He said he knew him for

13 years . He said they came over to his house to fish over 20 times and would always call his mother and seek permission. ROA 2065. He described Lindsey as "the picture of politeness' toward Burton's parents. ROA 2065.

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

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

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

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

Chris Wilkins , a friend like a brother to Marion, hung out together since 13 and lived together sometimes with Marion and Nell, never saw Marion hit Nell, but saw them argue and believed that Marion loved her and asked for mercy. ROA 2073-74. He stated that he saw Lindsey with his sons and that he was a loving father and proud of his boys. He said he was aware that the Lindseys would separate during their marriage. However, he never saw Lindsey hit Nell. He believed that he loved her.

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

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

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

Bessie Smith, Marion's aunt, testified that she lived at one time in house with Marion. ROA 2081. She described a kitten being thrown by her brother into the heater. She said that Marion was hurt by this action. ROA 2081. She also testified that she had attempted suicide. ROA 2082.

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

The State's Case Against Lindsey

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

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

Dispatch: Spartanburg 911, what is your emergency?

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

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

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

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

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

Dispatch: What's your name?

Lindsey: Uh, Ruby Lindsey.

Dispatch: What's your phone number?

Lindsey: What's my phone number?

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

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

Dispatch: What's his name?

Lindsey: Marion Lindsey.

Dispatch: Marion Lindsey?

Lindsey: Yep.

Dispatch: What kind of car are you in?

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

Dispatch: What kind of car is the male in?

Lindsey: He's in a Nissan Sentra.

Dispatch: What color?

Lindsey: Uh, gold.

Dispatch: Did he pull in behind you?

Lindsey: Yeah he pulled in behind us.

Lindsey: I'm not getting out!

(Children screaming in the background, conversation inaudible)

Dispatch: Hello?

(Child/Children crying in the background)

Dispatch: Hello? Hello? Hello?

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

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

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

At that point, Godfrey took cover. He then saw two more flashes from Lindsey's weapon. Seconds later, Officer Godfrey came out and Lindsey pointed the firearm at him. Godfrey reacted and fired four times at Lindsey. ROA. 1567, ll. 19-24, p. 1575, l.19 -p. 1576, l. 8. Lindsey was hit

by him according to Godfrey and went down. [3]

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

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

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

Evidence also revealed that the Appellant was involved in the sale and distribution of crack cocaine. ROA. p. 1830-1834, 1855-56, 1863-64, 1875 (11.41 grams of crack cocaine in the

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

September 14, 2000 incident).

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

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

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

The Prison Life Evidence at Trial

The State presented in the penalty phase the testimony of James Sligh, Division Director of Classification and Records at the Department of Corrections. ROA 1908. In his testimony, he stated that a person sentenced to life imprisonment would initially be housed at a Level 3 high security institution. Id. He stated the cell would be 75 by 100 with two inmates in the cell. He stated that they would have access to the yard and have contact with other individuals. He stated

that there could be job assignments or educational classes in a classroom setting. ROA 1909-1910. There could also have contact visitation up to 8 visits a month. ROA 1912.

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

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

The picture the prosecution and evidence revealed was harsh. A violent tempered criminal involved in the drug trade. It also revealed a person who flaunted his responsibility to obey authority. It also revealed a person with a past history for using a handgun and shooting through windshields. It painted a picture of the type of person for which the death penalty was intended - a violent person with a prior criminal history where correctional rehabilitation had not changed his either his violence or his disrespect for the law.

The Defense Proposed Witness List

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

LAY WITNESSES
Bill Burton*
Pat Burton
Beth Gregg

Alex Lindsey
Trey Lindsey
Virginia Lindsey*
Amy Osbey
Sharon Pilgrim
Steven Pilgrim*
Timothy Sims
Bessie Smith*
Kennia Wilkins
Kristopher Wilkins*

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

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

ANALYSIS OF THE SPECIFICATIONS

I. INEFFECTIVE ASSISTANCE - FEIGNING MENTAL ILLNESS

A. Counsel failed to prepare Lindsey for pretrial evaluation.

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

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

MEMO , p. 43.

In his first allegation of ineffective assistance of counsel, he contends that his counsel failed to properly prepare him for his pretrial evaluation because Lindsey had allegedly followed

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

the advice of a fellow jail detainee and feigned mental illness after his arrest by creating an imaginary person to try to dupe his counsel and the mental health evaluators.

In the post-hearing memorandum, the Applicant now contends that his counsel failed to maintain an adequate relationship with Lindsey which allowed the faked imaginary friend "Jimmy." Petitioner's Post-Hearing memorandum, p. 43-46. The Applicant now contends that the Applicant's attempt to feign mental illness suggests that his counsel failed to satisfy their duty "to consult with his client and to advise his client of the various aspects of his case", citing S.C.A.C.R. Rule 407, Rules of Professional Conduct, Rule 1.4 and A.B.A. Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Guideline 10.5. He further contends within this section that capital counsel had a duty to be present when Lindsey was interviewed by the State mental health examiner, Dr. Pratap Narayan to insure that Lindsey understood the significance of statements made and potential legal challenges. Further, he now contends that the result of the proceeding would have been different if the relationship had been better with counsel.

This Court finds the Applicant has failed to prove either deficient performance or 6th Amendment prejudice. A defendant cannot be permitted to manufacture a winning IAC claim by sabotaging his own defense, or else every defendant clever enough to thwart her own attorneys would be able to overturn their sentence on appeal. Cases confirm that a client who interferes with her attorney's attempts to present mitigating evidence cannot then claim prejudice based on the attorney's failure to present that evidence. See Gardner v. Ozmint, 511 F.3d 420, 427 (4th Cir.2007) (relying on client's non-cooperation when rejecting ineffective assistance claim based on attorney's failure to investigate mitigation evidence); Fautenberry v. Mitchell, 515 F.3d 614,

624 (6th Cir.2008) (counsel is not ineffective for failing to persuade client to cooperate); Lorraine v Coyle, 291 F.3d 416, at 435 (6th Cir. 2002)("Trial counsel cannot be faulted for their client's lack of cooperation."); Taylor v. Horn, 504 F.3d 416, 454-56 (3d Cir.2007) (relying on client's refusal to allow attorney to call witnesses in rejecting ineffective assistance claim); Roberts v. Dretke, 356 F.3d 632, 638 (5th Cir.2004) (holding that "when a defendant blocks his attorney's efforts to defend him, including forbidding his attorney from interviewing his family members for purposes of soliciting their testimony as mitigating evidence during the punishment phase of the trial, he cannot later claim ineffective assistance of counsel."); Bryan v. Mullin, 335 F.3d 1207, 1223-24 (10th Cir.2003) (en banc) (counsel not ineffective for failing to present mental health evidence when client told counsel not to present any mental health evidence).

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

The Post-Conviction Testimony of Dr. Melikian

Dr. Margaret Melikian, the forensic psychiatrist retained by the defense prior to trial in

2004, testified that she spent 7 hours and 45 minutes in preparation for her earlier testimony. PCR Tr. 598, ll. 17-19. Of that time, 2½ hours were actually spent with Lindsey on May 4, 2004. Dr. Melikian stated that she was concerned when she was retained whether she would be ready for trial due to her own lack of experience at the time.[5] PCR Tr. 600. She stated that she accepted the case thinking that if all the mitigation investigation was done, she could be prepared. However, in hindsight, she now declared due to her own lack of experience, she did not understand how much was involved in gathering information, and that the mitigation had barely begun and she now felt that there was no way they could be prepared for trial.[6]

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

Dr. Melikian stated she requested the written report from Dr. Brawley after she was advised that she would be the only one testifying and would put in Dr. Brawley's findings. Dr.

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

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

Melikian received the written report on May 20 after the trial had already started on May 17. PCR Tr. 602.

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

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

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

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

Particularly, Dr. Melikian stated that she would have explained the severity of his

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

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

Dr. Melikian stated she had general information in 2004 about the CDV charges and the assault and battery with intent to kill charges. However, she claimed she did not know that he had not been convicted of most of the CDV and the family dynamics of how often the police were called and the severity of the incidents. In addition, she asserted that the assault and battery charge "appeared to have a large element of self-defense in that" which resulted only in a one year sentence "which would be unusual for a crime that severe." PCR Tr. 607. In addition, she claimed that she had not been aware that he had tried to turn himself in 4 times by going to the police. PCR Tr. 607, ll. 1-6.

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

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

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

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

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

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

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

Since the trial, Dr. Melikian said she had learned more information about what Lindsey did at the William S. Hall evaluation, that counsel Brannon described Lindsey talking to a hallucinatory person, Jimmy, who was in the room and pulling out chairs.[7] Dr. Melikian stated when she saw Lindsey in 2004 (and Dr. Brawley), Lindsey described Jimmy as an imaginary friend that he knew was not psychotic experience. PCR Tr. 613, ll. 3-8. She felt that given his level of intelligence it was not far out to not believe that and make a malingering diagnosis with the objective testimony that he was not.

Although Brannon had described his knowledge of Jimmy with Lindsey, Dr. Melikian testified that neither Brannon nor Bartosh told her about the particular experiences they had with Lindsey and Jimmy. Dr. Melikian stated she would have wanted to know this before she reviewed the Hall report. She admitted she questioned Lindsey about it on May 4 and that Lindsey described him as an imaginary friend, but not in a psychotic way, but as a way for someone with a low intelligence to cope. PCR Tr. 614. He had told Dr. Brawley the same thing.

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[7] See *Testimony of Doug Brannon*, PCR Tr. 34-36 where Brannon describes meeting at Detention Center, Lindsey not letting him sit in Jimmy's chair and the continued presence of the empty chair at their meetings. See also, PCR Tr. 613, ll. 13-25. See also *Testimony of Mitigation Investigator Lenora Topp* concerning April 2004 interview with Lindsey concerning "Jimmy". PCR 140 (Lindsey tell Topp that Jimmy can to him from God in his early teens). Also, Trial Evidence that "Jimmy" first discussed by Petitioner on date notice to seek death penalty served. ROA 136-137, 2017-2019 (no mention of Jimmy in reports until October 10, 2002, the same date that the notice of intent to seek the death penalty).

"He did tell me that he had done that with Dr. Narayan and pulled a chair out and behaved in that manner" which she asserted because it was a hostile interview with Dr. Narayan. PCR Tr. 614-15. She recalled during the 2004 trial, he had behaved in the trial in that manner. PCR Tr. 615.

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

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

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

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

Dr. Melikian said since the trial she has met with Lindsey 3 times. She felt that she had

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

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

Cross-Examination of Dr. Melikian

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

Dr. Melikian confirmed that she had prior to her trial testimony his medical records, his teenage psychiatric hospitalization records, and his infant head injury records, although she now claimed they may have been incomplete. She admitted that as to neurological records in 2004,

she had Dr. Brawley's letter and had spoken with the neurologist, Dr. Abshur. PCR Tr. 623. She stated she wanted Lindsey to see a behavioral neurologist, but he was seen by a clinical general neurologist who would not be specialized in behavior. Id. Also, she said in 2004 she had the school records, but claimed she did not have all of them. However, Dr. Melikian admitted she received 18 pages of school records faxed to her on May 4, 2004. PCR Tr. 624.

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

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

The Revelation of Feigning Jimmy During the Cross-examination.

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

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

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

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

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

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

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

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

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

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

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

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

PCR TESTIMONY of Dr. TORA BRAWLEY

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

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

Dr. Brawley stated Lindsey reported to her that he had fallen on steps, hit his head 4 to 5 times, and had stitches. He further told her he had been run over by a car at age two, blacked out,

and was in a hospital for 2 weeks. PCR Tr. 74. He reported to her he had surgery on his face. According to Lindsey, he had two motorcycle accidents: in 1993 when he was not wearing a helmet and 1998 when he was thrown off and became dazed. PCR Tr. 74. She was also told about the 2002 self-inflicted gunshot wound and a history of migraine headaches.

As to his educational history, he reported to her that he quit school in the 10th grade and had to repeat the 1st and 7th grades. In addition, he reported to having speech therapy and learning classes with a problem in spelling.

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

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

Dr. Brawley, in her 2004 written report to Dr. Melikian, listed a number of impairments, including severely impaired speed of mental tracking, below average accuracy of mental tracking, severely impaired verbal fluency, severely impaired confrontation at naming (ability to name objects), below average manual dexterity and speed, below average immediate verbal memory, delayed visual memory, severely impaired verbal learning ability, impaired ability to copy and recall a complex figure. PCR Tr. 76-78. She opined that he fell below the average range of scoring. PCR Tr. 75.

Dr. Brawley could not give an opinion on what caused the brain dysfunction. She noted

there were multiple possibilities from the damage to the brain. PCR Tr. 78. She pointed out that she lacked enough information to determine whether it was consistent with where it should be or was due to head injuries. PCR Tr. 78. She pointed out that she did not have medical or school records in 2004. PCR Tr. 78.

Dr. Brawley stated there was nothing inconsistent in her interview with Dr. Melikian's diagnosis of major depressive disorder. PCR Tr. 78.

Dr. Brawley on Malingering

Concerning the question of malingering, she stated she considered the issue in 2004. PCR Tr. 79. She had learned from counsel Bartosh that Lindsey had an imaginary friend and the State doctors had determined he was malingering. She stated she did malingering tests for cognitive, for memory, and for psychiatric symptoms. She said she gave the Test for Memory Malingering (TOMM) and concluded he was within normal limits. She also gave the Structured Interview of Reported Symptoms (SIRS) test for malingering os psychiatric symptoms. PCR Tr. 80. He again tested within normal limits then. PCR Tr. 81. She determined during her April 2004 interview that there was no evidence of malingering in the testing and reported it to Dr. Melikian and counsel Bartosh. PCR Tr. 81. Dr. Brawley stated she spoke with Bartosh and gave him a verbal report of her conclusions. PCR Tr. 81. She provided the written report to Dr. Melikian pursuant to her request.[8] However, she does not know why she was not called to testify. PCR Tr. 81.

Dr. Brawley stated that she recommended that medical and school records be obtained

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

because she had not been provided with them and it would help indicate whether the deficits existed earlier. PCR Tr. 81-82. Dr. Brawley stated that she received school records after she had made her written report in 2004, but did not look at them because she had already been advised she was not testifying. PCR Tr. 82. In hindsight, she noted the records showed he had been in the 8th grad for 3 years, whereas he had reported repeating the 7th grade. PCR Tr. 82.

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

Dr. Brawley on "Jimmy"

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

trouble and suicidal. PCR Tr. 87. However, Dr. Brawley said - unlike Doug Brannon's experience - he did not say Jimmy was in the room with him at the time. PCR Tr. 87.

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

More specifically, Lindsey told her about the suicide attempts. As to the incident at age 12, he had taken pills after he had a fight with his brother and his mother told him that he did not love her anymore resulting in his hospitalization for 1½ months. PCR Tr. 88. As to the 2001 attempt, Lindsey told her he was having troubles with his wife and took a gun, but his cousin took it away. As to the third one in August 2002, his wife had told him she was leaving with the kids and he planned to drive the truck off a cliff, but then decided not to do it. PCR Tr. 88, ll. 12-15. She described another incident in September 2002 when his family talked him out of suicide. PCR Tr. 88, ll. 15-17. The final attempt was the gunshot wound to the head in September 2002 (during the arrest) and resulted in mental health at the jail. PCR Tr. 88.

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

- immediate visual memory.
- delayed verbal learning for stories
- manual speed on his left hand.
- right handed manual dexterity.

- trail making - Part B.
- non-verbal abstract reasoning.
- sequencing ability.

PCR Tr. 90, ll. 9-23.

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

Dr. Brawley confirmed that she consulted with Mr. Bartosh for ½ hour on May 2, 2004. PCR Tr. 91, ll. 10-22. She stated she went over the test results and the other information that she had gathered in the interview. PCR Tr. 91. She recalled that she made a specific request for school records to Dr. Melikian and felt she asked Bartosh for medical records. She stated she received the records on May 20 after she wrote her report. PCR Tr. 92.

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

Dr. Brawley stated her information about suicide ideation came from Applicant. PCR Tr. 94. Similarly, the history represented in her report came from Lindsey that other family members suffered from depression, that he had a chaotic childhood, that his stepfather was a heavy drinker, that his mother worked most of the time, that Lindsey was responsible for his younger sibling and taking care of the home and meals, living with a cousin at the time of the incident, and separated from his wife. PCR Tr. 95-96.

Counsel Brannon's Interaction with Applicant About Jimmy

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

> I went over to the Public Defender's Office, and then I, I rode over to the detention center in, in Mr. Bartosh's car, and Mike said something along the lines of Marion is a unique character, and we got over to the detention center and Pod 5 is the, is the,

> is the lock down pod. And when we got in there, they brought Marion in and there were four chairs around the table. Actually, actually there weren't four chairs around the table. There were four chairs in the room and three chairs around the table, and Marion sat down and I went to sit in the chair next to him and he said no, no, no, no, don't sit there. And, and I said okay, why not and he said cause Jimmy sits in that chair, and I looked at Bartosh and he just kind of pointed at the other chair that was away from the table and I went and drug the chair up to the table and I sat there.
>
> So, every time I met with Marion Lindsey there was an empty chair sitting at the table. Now, sometimes when I met with Marion it was with me and Mr. Bartosh and sometimes it was with me and Ms. Quimby. But there were two or three occasions where it was just he and I, but there was always an empty chair sitting at the table.

PCR Tr. 34, l. 14 - p. 35, l. 11. Brannon testified that after the meeting Bartosh told him that he should have told him about "Jimmy" before their meeting. Brannon stated that in reviewing the reports, it was claimed that it dated back to when Lindsey was previously in the State Hospital and had a roommate who looked like Charles Manson. PCR Tr. 35. Importantly, Brannon stressed that Marion was friendly and that if you asked a question, Lindsey would answer and he never felt threatened by him. PCR Tr. 35-36.

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

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

did not know who had the kids and snapped. PCR Tr. 37.

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

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

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

see if it had meaning in the penalty phase. PCR Tr. 64.

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

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

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

Additional Evidence about Jimmy in 2002

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

ANALYSIS

In this first allegation, the Applicant complains that the defense team performed deficiently because they failed to maintain an adequate relationship and consultation with Lindsey. Though Lindsey never testified at the PCR hearing that their was any relationship lacking, the record is replete with evidence that from the moment of the serving of the notice of intent to seek the death penalty throughout the trial, Lindsey was maintaining the charade of the existence of his imaginary friend Jimmy - an attempt to scam the state doctors and his lawyers by a suggestion that he was crazy. Simply put , this malingering of a mental illness by Lindsey was

not the product of his lawyer's work, neglect or omission on the case, but according to Dr. Melikian's recent discovery, Lindsey's own creation at the suggestion of other inmates - a suggestion that acting crazy would aid him. It is only Dr. Melikian's recent post-verdict speculation that had she spent more time with Lindsey prior to the trial, he would have uncloaked the fakery of Jimmy and she could have used it to explain his depression by accepting this action - an action taken by Lindsey only after it did not work where the death verdict still resulted.

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

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

malingering symptoms today. There's no evidence of that . But we did find evidence of that on the three occasions that Mr. Lindsey came to our institution." ROA 137, l. 13-16.

The reliance upon the ABA guidelines does not shift the burden or support speculation that counsel necessarily could or would have pieced the veil of fakery that Lindsey was intent on portraying through his statements and actions made in October 2002, actions taken during the competency evaluations with Dr. Musick and Dr. Narayan in April and June 2003, through interviews in 2004 with Doug Brannon, Lenora Topp, Dr. Melikian and Dr. Brawley prior to the trial. Although he has recanted presently after the fact of his conviction and sentence, the blame does not rest at prior counsel's feet as current counsel now speculate. Nor does the fact that Dr. Melikian's speculation or hope that had she spent more time with Lindsey, he would have eliminated his lie of Jimmy's existence.[9] The initial allegation is without merit because he failed in his burden of proof of any deficiency by his defense counsel in failing to make Applicant reveal to them that he had recently concocted "Jimmy" his imaginary friend to feign mental illness in the hopes of avoiding a death sentence at the suggestion of other jail inmates.

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

ii. Failed to present issue of malingering to jury.

iii. Failed to call Dr. Brawley in sentencing .

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

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

MEMO , p. 46-47.

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

As revealed above with ground one, the defense presented in mitigation the testimony of Dr. Melikian. Within her testimony, she presented an opinion that Lindsey was not malingering. She also opined that Lindsey had a "family history of depression." She reported that he was treated by a psychiatrist after he had an overdose when he was 15 years old. She opined that at the time of the incident, Lindsey appeared to satisfy the diagnostic criteria for depression. ROA 2004, l. 23-25. She opined that he suffers from "major depressive disorder." ROA 2005.

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

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

Melikian declared that she did not. ROA 2005-2007.

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

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

ANALYSIS

Certain salient factors are not clear. First, the State did not affirmatively present testimony at the trial that Applicant was malingering. It was developed to the jury through the testimony of Dr. Melikian where she affirmatively disputed any conclusion that Lindsey was malingering and claimed the prior evaluators misdiagnosed it - apparently in anticipation that the state would challenge the finding on cross-examination of the psychiatrist. Second, although Dr. Brawley did not testify, her findings and conclusions on the issue of malingering were presented through Dr. Melikian. Therefore, plainly the issue of malingering was investigated by counsel

and presented to the jury. It cannot be stated, that from counsel's perspective in 2004, that counsel failed to investigate or present evidence on the issue. He must be found to have failed in his burden of proof on that issue.

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

Further, his complaint that Dr. Brawley was not called as a witness on the issue of malingering cannot be deemed to be ineffective. Her results were presented to the jury on the testing that was done and relied upon by Dr. Melikian. Therefore the although admissible would have been cumulative to the decision to call Dr. Melikian. Dr. Brawley stated that she had been advised prior to the trial that she would not be testifying and prepared her written report for use by Dr. Melikian - consistent with her oral consultation with her. This was not neglect by counsel, but a reflect a conscious decision on counsel Bartosh's part on this issue. The evidence was admitted concerning both of Dr. Brawley's malingering tests as well as the conclusion that the state examiner's objective testing did not show malingering. Counsel cannot be deemed deficient under those circumstances. See Harrington v. Richter, supra.

Similarly the failure to present the cumulative evidence from Dr. Brawley cannot be deemed prejudicial under the Sixth Amendment and Strickland v. Washington. See, e.g., Wong

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

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

- **A. Failed to adequately present requests for mercy.**
- **B. Failed to prepare witnesses to testify and request jury to show mercy.**
- **C. Failed to call family and non-family members on mercy issue.**
- **D. Failed to ask witnesses appropriate questions to request mercy.**
- **E. Failed to argue the Court's refusal to allow witnesses to request mercy.**
- **F. Failed to preserve record on issue of mercy by not presenting adequate arguments in support of attempt to present mercy issue and not requesting proffer**

MEMO, p. 47.

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

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

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

> In [State v.] Torrence, we adopted the Georgia Supreme Court's distinction between a plea for mercy and the ultimate question to be decided by the jury: "[A]lthough a defendant may present witnesses who know and care for him and are willing on that basis to ask for mercy on his behalf, **a defendant may not**

present witnesses to testify merely to their religious and philosophical attitudes about the death penalty.... Nor is a defendant entitled to present the opinion of a witness about what verdict the jury 'ought' to reach." Torrence, 305 S.C. at 45, 51, 406 S.E.2d 315, at 318 (quoting Childs v. State, 257 Ga. 243, 357 S.E.2d 48, 60 (1987)).

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

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

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

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

State v. Sapp, 366 S.C. 283, 292-294, 621 S.E.2d 883, 887 - 888 (S.C.2005).[10]

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

In their memorandum, Applicant claims that trial counsel failed to adequately present requests for mercy. He claims that counsel failed to locate and ask questions of family members and friends. However, the record of the trial disputes this assertion because four witnesses: mother, father, cousin and mentor - all made specific requests for mercy and the he not be sentenced to death. Concerning mercy requests, contrary to the assertion in the post-hearing memorandum of Petitioner, p. 25, Virginia Lindsey testified that she did talk to the defense team

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

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

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

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

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

and "they did" prepare her to request the jury to have mercy on her son. PCR 368, l. 14-18. [15] However, she *felt* she was not prepared to make a mercy request at trial. She claimed that if she was prepared, she would have asked for mercy on her son because she had lost a son and "would ask for mercy that he not get the death penalty." She stated that he had to be punished, but not the death penalty because it hurts to lose someone. She said she not only lost a son, but that she lost a daughter, a son, and two grandsons. PCR Tr. 369, ll. 1-8. However, the record reflected that she did make that request. ROA 2060. The claim must be denied.

In his memorandum, he also claims that if the court refused to allow the testimony about a request for mercy, counsel had an obligation to preserve the issue for an appeal. The record reveals, as stated above, after four witnesses had responded to open ended questions about whether there is anything they would like to tell the jury with requests for mercy and not a death sentence, Judge Few stated he would not allow that question to be asked. Counsel Bartosh did not object. When the remaining witnesses uncle Steve Pilgrim[16] and aunt Bessie Smith[17] testified, no open ended question was asked and neither expressed an opinion on mercy - nor were they specifically asked. In light of counsel Bartosh's death, we are not aware why a different quest

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

[16]Steve Pilgrim state post-conviction testimony is set forth in detail within this memo. PCR 426-453. Pilgrim stated that counsel had prepared him to ask for mercy. PCR 445. He then asserted that they told him not to ask the jury for mercy. Id. He proffered what he would have told the jury if he had been asked about mercy that he was his favorite nephew and he made a mistake and "I wouldn't want him to , you know, get the death penalty." PCR 445, l. 13-16.

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

was asked eliciting a response on mercy consistent with Torrence and Wise (which was decided on May 11, 2004 just before the trial). However, counsel is presumed competent and the Applicant has failed to dispute it.

Apparently, he claims that had counsel objected it is likely the matter would have been reversed on appeal. However, he ignores the proper test that it is his burden to prove by a preponderance of the that there is a reasonable probability that the result of the proceeding would have been different. To the contrary, four of his six witnesses had made specific mercy requests to the jury as family member and friend. Second, counsel Bartosh made a plea for mercy and a just punishment of life. ROA 2137, 2146. To that extent, the situation is similar to the situation in State v. Sapp where the Court concluded that reversible error could not be shown even though the trial court erred in excluding a question concerning mercy. As in Sapp, there is cumulative evidence of family and friends requesting mercy. He has failed to establish Sixth Amendment prejudice. See State v. Sapp, 366 S.C. 283, 294, 621 S.E.2d 883, 888 (S.C. 2005); State v. Myers, 359 S.C. 40, 596 S.E.2d 488, cert. denied, 543 U.S. 980, 125 S.Ct. 485, 160 L.Ed.2d 359 (2004) (exclusion of testimony is harmless where it is cumulative to other testimony in the record).

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

- **A. Failed to Provide Sufficient Info to Dr. Melikian to allow evaluation of Lindsey.**
- **B. Failed to obtain and provide historical info and records of family members necessary for proper evaluation.**
- **C. Failed to seek continuance after Melikian informed them she needed additional time.**
- **D. Failed to elicit from Dr. Melikian statutory mitigating factors during testimony.**

MEMO, p. 49 .

In his fourth specification, he contends that counsel failed to provide Dr. Melikian with sufficient information. He asserts that Dr. Melikian needed additional information related to his history to properly evaluate him and the defense team failed to locate and investigate his background and claims that they failed to provide her with information. As previously set forth, the summary of the evidence of the trial and the state PCR hearing shows that Dr. Melikian has the same opinion of the particular illnesses that she found Applicant possess. As revealed in the cross-examination during both the trial and the state PCR proceeding, her opinion and the material she additional would have been required to reveal were a two edge sword that failed to satisfy the Strickland prejudice prong. While more time and additional information may have made Dr. Melikian more comfortable with her assessment, it would not have changed the result. Strickland prejudice has not been shown. The Court finds that the summaries of the witness testimony within the Petitioner's memorandum does not summarize any particular items that they feel counsel did not provide.

As shown within, a lot of Applicant's proffered mitigation testimony is double-edged or even aggravating. See, e.g., Suggs v. McNeil, 609 F.3d 1218, 1231 (11th Cir.2010) (noting that "evidence of drug and alcohol use is often a 'two-edged sword' that provides an independent basis for moral judgment by the jury," and that evidence that the defendant spent time at military school because of behavioral issues "was potentially damaging" (quotation marks and citation omitted)); Reed v. Secretary, Fla. Dept. Of Corrections, 593 F.3d 1217 at 1246 (11th Cir. 2010) ("[I]t would have been all too easy for the State to use Reed's own mitigation witnesses to paint him as a violent, manipulative person with long-standing drug abuse issues and brushes with the

law.... Here, it was not just a reasonable probability, but a virtual certainty that Reed's 'good' mitigation evidence would have led to the introduction of 'bad' evidence."). Nor would any new medical information radically buttress the experts' testimony, causing it to shift from mere "artifice" to gamechanging revelation that creates a reasonably probability of a different outcome. Bean v. Calderon, 163 F.3d 1073, 1081-82 (9th Cir.1998). His assertions must be denied.

The Post-Conviction Testimony of Dr. Melikian

Dr. Margaret Melikian, the forensic psychiatrist retained by the defense prior to trial in 2004, testified that she spent 7 hours and 45 minutes in preparation for her earlier testimony. PCR Tr. 598, ll. 17-19. Of that time, 2½ hours were actually spent with Lindsey on May 4, 2004. Dr. Melikian stated that she was concerned when she was retained whether she would be ready for trial due to her own lack of experience at the time.[18] PCR Tr. 600. She stated that she accepted the case thinking that if all the mitigation investigation was done, she could be prepared. However, in hindsight, she now declared due to her own lack of experience, she did not understand how much was involved in gathering information, and that the mitigation had barely begun and she now felt that there was no way they could be prepared for trial.[19]

Dr. Melikian indicated that she had received records from defense counsel on April 28,

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

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

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

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

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

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

Dr. Melikian stated the additional material she reviewed would have changed her diagnosis because she did not understand the level of depression he was showing at the time of the evaluation and that way she looked at his cognition in his low testing results. Tr. 604. She

stated this was due to her lack of a family history and did not spend enough time with Lindsey to realize that he was not functioning at his best level.

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

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

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

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

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

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

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

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

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

Dr. Melikian asserted her disagreement with the DMH diagnosis for borderline

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

Dr. Melikian PCR Testimony About Jimmy - Direct Examination.

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

Since the trial, Dr. Melikian said she had learned more information about what Lindsey did at the William S. Hall evaluation, that counsel Brannon described Lindsey talking to a hallucinatory person, Jimmy, who was in the room and pulling out chairs.[20] Dr. Melikian stated when she saw Lindsey in 2004 (and Dr. Brawley), Lindsey described Jimmy as an imaginary friend that he knew was not psychotic experience. PCR Tr. 613, ll. 3-8. She felt that given his level of intelligence it was not far out to not believe that and make a malingering diagnosis with

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[20] See *Testimony of Doug Brannon*, PCR Tr. 34-36 where Brannon describes meeting at Detention Center, Lindsey not letting him sit in Jimmy's chair and the continued presence of the empty chair at their meetings. See also, PCR Tr. 613, ll. 13-25. See also *Testimony of Mitigation Investigator Lenora Topp* concerning April 2004 interview with Lindsey concerning "Jimmy". PCR 140 (Lindsey tell Topp that Jimmy can to him from God in his early teens). Also, Trial Evidence that "Jimmy" first discussed by Petitioner on date notice to seek death penalty served. ROA 136-137, 2017-2019 (no mention of Jimmy in reports until October 10, 2002, the same date that the notice of intent to seek the death penalty).

the objective testimony that he was not.

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

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

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

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

night before. PCR Tr. 616.

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

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

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

Cross-Examination

Dr. Melikian testified that her clinical diagnosis in 2004 had changed since because she did not understand the severity of his depression. PCR Tr. 621. However, she admitted her conclusions of mental illness under Axis I, II, III, IV would be the same thing. Id. She admitted

that she testified he was depressed in 2004, but she could not elaborate in full the degree. She pointed out that she was aware of suicide notes, but had not seen them. Similarly, she was not aware of the telephone call to Rod Tullis, which would have been useful to understand his mental state close to the time of the offense. PCR Tr. 621-22.

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

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

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

The Revelation of Feigning Jimmy During the Cross-examination.

Dr. Melikian acknowledged that in 2004 she sought to address the existence of "Jimmy."

However, she did not know until the trial that the day "Jimmy" was reported was the day he was served the death notice. As Dr. Melikian stated on cross-examination:

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

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

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

Dr. Melikian admitted that in 2004 she testified that she would not have made a diagnosis of borderline intellectual functioning, that he did have chronic neurological problems, and that she was aware of the existence of the suicide notes from Lindsey. She confirmed that she had learned in 2004 that in 2001 at 15 years old, Lindsey had a gun and planned suicide, but his

cousin talked him out of it. PCR Tr. 632. She also recalled that he stated that he wanted to drive off a cliff, but was worried he wouldn't die. She stated that she learned from Lindsey about his weight loss prior to trial.

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

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

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

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

although her diagnosis has not changed. PCR Tr. 637.

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

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

COMPARED TO 2004 TRIAL TESTIMONY

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

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

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

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

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

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

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

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

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

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

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

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

She opined that he had cognitive deficits. ROA 2009. She reported that the testing at Hall Institute determined that he had well below average IQ and "borderline intellectual functioning" close to mildly retarded range with an IQ of 76. ROA 2009. However, she noted that when Dr.

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

Dr. Melikian stated that his neurological problems were chronic. She stated that he had a limited ability to cope with things due to his limited intelligence and by his continuing to have an imaginary friend. She stated his stress with his wife and the separation added to the stress which decreased his coping skills. ROA 2012. She stated that he described the killing of his wife. He told Dr. Melikian that his wife was leaving and taking the kids and that he would never see them again. ROA 2012-13. He told her that he had moved into his cousin's house and planned to commit suicide by driving off the cliff, but he was worried that he might not die. Id. He stated that he begged his wife to return and had written suicide notes, but did not recall what he said. He

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

also told her that he planned to shoot himself and that his cousin had taken his keys and that his mother, brother and uncle and talked to him. He told her that he had been unable to reach his wife because she was blocking his numbers on the telephone. He said that he had been crying which was unusual for him. ROA 2013. He stated that he was able to get in touch with his wife at work where the numbers were not blocked.

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

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

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

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

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

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

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

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

She stated that it might have been helpful if she had been given a copy of the BMW application and could not state that it would have been helpful to review the entire case file, or to

speak with either Dr. Crawford or Dr. Narayan (who had diagnosed Lindsey with malingering) (because she had his report) or Officer Benny Godfrey1, or Latresse Smith. ROA 2037-38. She confirmed that much of what she testified to was based upon her discussion with Lindsey who she denied was malingering. Id.

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

ANALYSIS

The Applicant has failed to show deficient performance or prejudice under Strickland. It is apparent that there was a difference in the quantity of material that Dr. Melikian reviewed in 2004 contrasted with this hearing. PCR 603. However, she was unable to state with any clarity what particular information she lacked in 2004 was critical to a revision in her assessment. In 2004, she had his medical records, the records from a psychiatric hospitalization when he was a teenager, the records from a head injury when he was an infant, his neurological records, and his school records. ROA 2003. She also had the reports from Hall Institute. PCR 601. She also had consulted with Dr. Brawley who did a series of neuro-psychological testing and received and reviewed her written report. PCR 602. Although she complained in hindsight that she had not been provided all the information that the 2004 defense team acquired (PCR 603), Dr. Melikian was unable to cogently express what material made a difference to her conclusions, other than it would be corroborative evidence concerning information that she had learned and relied upon in 2004. Much of her renewed analysis did not concern the way she gave in rendering a mental

health opinion, but was more directed toward a characterization that was being made of the Applicant by the state's evidence of his character. PCR 607 (information about arrests that she was not aware in 2004).

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

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

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

with her testimony. PCR Tr. 633.

Similarly, this Court concludes that had she been exposed and relied upon the material presented through Jan Vogelsang, the likelihood of a death verdict became even more enhanced.[22] Although she met with investigator Lenora Topp, who prepared extensive summaries of the family history from her interviews with Lindsey, his mother and aunt, Dr. Melikian could not recall the specifics of the information she was provided about Lindsey's family and Topp's interview with Lindsey prior to her trial testimony. PCR Tr. 635. Her ultimate conclusion in 2004 and now is the same - Lindsey met the diagnostic criteria for "major depression" whether she looked at those earlier records and still feel he does after reviewing more records given to her since the trial. PCR Tr. 635-37.

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

The Applicant does not argue, but claims that counsel erred in failing to request a continuance for Dr. Melikian to have more time to prepare. The Applicant has only shown that she wanted more time, but not that counsel was deficient in failing to make the request nor any likelihood that it would have been granted. Where the defendant claims ineffective assistance for failure to file a particular motion, he must "not only demonstrate a likelihood of prevailing on the motion, but also a reasonable probability that the granting of the motion would have resulted in a

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

more favorable outcome." Styers v. Schriro, 547 F.3d 1026, 1030 n. 5 (9th Cir.2008). Because it is unlikely that Judge Few would have granted the motion for delay, or that the results of any such testing would have changed the outcome of the sentencing, this Court cannot say the alleged deficiency was prejudicial. Dr. Melikian was able to render an opinion to a reasonable degree of medical certainty in her area of expertise. Counsel's failure to request a continuance to make her more comfortable has not been shown to be deficient. As shown above, even with the period of time since the trial her opinion of the particular diagnosis has not change, only an opinion - driven in part by a revelation that Lindsey was intentionally feigning mental illness in 2003 and 2004 - the it suggested the severity of his depression was more severe in 2002 - the Applicant has made no probative showing that there was a reasonable probability that the result of the proceeding would have been a life sentence - nor even that Judge Few would have granted a continuance. Top the contrary, the evidence was that he would have likely denied it - through her own testimony - and that she was directed by Mr. Bartosh to get the job done. See Gardner v. Galetka, 568 F.3d 862 (10th Cir 2009) (Capital murder defendant was not prejudiced by his counsel's failure to provide mental health expert with more time to prepare for penalty phase testimony; despite the limitations under which expert was operating, expert did an effective job of conveying mitigating evidence regarding defendant's family history, possible organic brain damage, and social circumstances, and there was a risk of opening the door to damaging evidence by introducing further potential mitigating circumstances).

Finally, Lindsey asserts, but does not argue that Dr. Melikian should have been asked if there was evidence related to specific statutory mitigating factors. While Respondent admits that some expert witnesses in capital cases are asked that question by some defense counsel, the

Applicant has failed to show that counsel was deficient in failing to make any particular inquiry. In fact, the counsel specifically asked Dr. Melikian whether she could give an opinion as to "whether Mr. Lindsey would have been operating under the influence of mental or emotional disturbance when the incident occurred," a statutory mitigating circumstance. ROA 2007, l. 21-24. Nevertheless, Strickland prejudice has not been shown.

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

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

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

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

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

1. **Failed to adequately interview family members to discover extent of Mental Illness.**
2. **Failed to prepare family to present extent and nature of illness within family.**
3. **Failed to adequately argue to court the admissibility of evidence of family mental illness.**
4. **Failed to adequately preserve the record relating to family Mental Illness in support of attempt to present evidence and failing to offer proffer.**

MEMO, p. 50.

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

members and present evidence on mental impairments within the family. This issue weaves claims and testimony of family members, the surviving lawyers and investigator and proffered social workers. This Court finds that there was some evidence presented of some family members mental health problems involving whether aunt Bessie Smith had attempted suicide (ROA 2056)(testimony of Virginia Lindsey) (2082)(testimony of Bessie Smith) and that Steven Pilgrim suffered from illnesses of panic attack and anxiety attack and that his daughter was being treated for an illness described as panic attack (ROA 2080) (testimony of Steve Pilgrim). See infra., Findings and Conclusion on Argument 7.

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

> **VI. Ineffective Assistance of Counsel - Failure to Retain Prison Adaptability Expert. (Memo - 51-52)**
> Failed to retain PRISON ADAPTABILITY EXPERT to testify about Lindsey's ability to adapt to prison life others and the relevance of that information to the jury's decision.

Memo., p. 51-52.

In his sixth allegation, Applicant asserts that counsel were ineffective in failing to present a "prison adaptability expert" during the penalty phase as evidence in mitigation. The Applicant relies upon Skipper v. S.C., 476 U.S. 1 (1986) which concludes the evidence of prison adaptability which suggests the defendant would not pose a danger if his life was spared and he was incarcerated must be considered mitigating and admissible. He further seeks support from the ABA Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases, Section 10.11 (2003) which states that defense counsel ***should consider*** presenting "expert and lay witnesses along with supporting documentation... to ... give a favorable opinion as to his

client's capacity for rehabilitation, or adaptation to prison..." He asserts that the defense team failed to retain and present a prison adaptability expert. He further contends that the failure to do so created a reasonable probability of a different verdict.

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

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

> Without expressing a view on the ultimate reasonableness of the decision not to pursue this evidence further, we note that the Eleventh Circuit majority observed that the state court could reasonably have determined that counsel had strategic grounds for their decision. In particular, evidence about Wood's mental deficiencies may have led to rebuttal testimony about the capabilities he demonstrated through his extensive criminal history, an extraordinarily limited amount of which was actually admitted at the penalty phase of the trial. Counsel's decision successfully thwarted the prosecutor's efforts to admit evidence that Wood murdered his ex-girlfriend while on parole for an attempted murder of a different ex-girlfriend that was strikingly similar in execution to the subsequent successful murder. App. 23-24. Moreover, as the Eleventh Circuit majority noted, evidence of Wood's mental deficiencies also could have undercut the defense's argument that he left school to support his family, suggesting instead that he left

The Applicant may be relying upon *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), *Skipper v. South Carolina,* 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), and *Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). It is unclear whether Lindsey suggests that his proffered evidence was in rebuttal to any specific evidence concerning prison life or otherwise. In *Gardner,* 430 U.S. at 358, 97 S.Ct. 1197, the United States Supreme Court held that a defendant is entitled to due process during the sentencing phase of a criminal trial. The Court concluded that the defendant was "denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.* at 362, 97 S.Ct. 1197.

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

Critical to the assessment of counsel Bartosh's and the defense team's performance in not presenting such an expert is what information the defense team had about Lindsey's character and prior incarceration and their awareness of prison adaptability as mitigating evidence. As

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> school because of educational difficulties. 542 F.3d, at 1305-1306. **Counsel's decision about which avenues to investigate can therefore plausibly be described as strategic rather than necessarily being the product of "happenstance, inattention, or neglect,"** *post,* at ----.

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

shown below, the Applicant has failed to satisfy his burden of proof. Although counsel Bartosh is deceased, the assessment by the Court must lead to the conclusion that he was not deficient in presenting the generalized testimony and the evident risk that it would have limited probative value and a higher risk of negatively revealing Lindsey's dangerousness and potential for violence in a prison setting due to his prior involvement in incidents in his earlier incarcerations - a point any seasonal prosecutor would seek to establish. The evidence conclusively reveals that the defense team was aware - through the notations of counsel Quimby Hatcher of the fact that prison adaptability evidence could be presented through lay and expert witnesses. In addition, the record is replete with the facts of his involvement in violent prison incidents with inmates and guards before his death sentence (and after). A review of the testimony presented leads to the conclusion that there was neither deficient performance or prejudice under Strickland.

Counsel's Testimony on Prison Adaptability Issue

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

Counsel Brannon confirmed that with the awareness of the admissibility of prison adaptability evidence and conduct in jail (and the fact Brannon called a witness in the penalty

phase), he knew what witnesses Bartosh intended to call in the penalty phase and there were no jail guards on the witness list. PCR Tr. 53. Brannon admitted, however, that he did not review the records of the 1996 incarceration at SCDC. PCR Tr. 55.

Counsel Quimby Hatcher also testified about her records she made in the case. Particularly, she had noted that as a mitigating circumstance to be considered was future adaptability to prison life. PCR Tr. 249. (Exhibit 18). However, she did not know the particular reason Bartosh did not present evidence in the area. PCR Tr. 249-50. See also PCR Tr. 261-62 (Respondent's Exhibit 6). Her records also reflected summaries of the SCDC records and records from the Spartanburg County Detention Facility documenting his disciplinary history which jail and prison assaults and the potential witnesses from the incidents. PCR Tr. 282-83 (Respondent's Exhibit 9).

PCR Testimony of James Aiken

James Aiken, a former South Carolina Department of Corrections Warden, who has a consulting firm relating to death penalty proceedings and jail and prison security testified at the PCR hearing in support of the allegation. PCR Tr. 201-228. He testified that he had reviewed the correctional files concerning Mr. Lindsey, but had never met Lindsey. PCR Tr. 206. He opined that it was not necessary to meet Lindsey before he rendered an opinion about prison adaptability or future dangerousness. PCR Tr. 206. He stated that he relief upon the records of the Spartanburg County Detention Facility and the South Carolina Department of Corrections' records when he was incarcerated for 7½ months in formulating his opinion. PCR Tr. 207. He also admitted that he have reviewed the records since he was on death row, but claimed that it was not included in formulating his opinion. PCR Tr. 206-07. Aiken opined his observations

were that Lindsey had been guilty of crimes of violence in the community and that the Department of Corrections "can manage this type of offender for the remainder of his life without causing unreasonable risk of harm to staff, inmates, as well as the general community." He indicated his opinion was based upon the fact that he had done time before and that SCDC had the capacity to classify him, evaluate his behavior, and had the necessary staff, equipment and expertise to manage him. PCR Tr. 208. He noted that Lindsey did not have relationships with "security threat groups" or "gangs." PCR Tr. 208. Further, Aiken opined he had not demonstrated a propensity toward random and systematic violence against others while he's in prison. PCR Tr. 208. Aiken admitted that since prisons are dangerous, things can happen. He testified that a life sentence without parole is a severe sentence and reduces a person to the lowest common denominator. PCR Tr. 209. He stated he could have rendered the same opinion during the trial. PCR Tr. 209.

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

On cross-examination, the risks of this generalized adaptability testimony was presented. Particularly, he recognized that it was his opinion that inmates in the Department of Corrections can be managed to avoid injury to other inmates, the general public and prison guards. PCR Tr. 211, ll. 22-25. Aiken noted that you can never say never, but the vast majority of prisoners in SCDC can be incarcerated.

Aiken acknowledged that the best predictor of future behavior is past behavior. He was aware that the prior correctional records of the crime of assault and battery with intent to kill revealed circumstances where there was an altercation on a highway where shots were fired and

the victim was wounded. It was then emphasized - like the present case - that he shot into a vehicle! PCR Tr. 214.

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

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

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

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

Concerning the fight in SCDC, the incident occurred outside the dining hall. However, the February 13, 2004 incident occurred when he left his cell. He described how the officer who broke up the fight got caught in between and another officer gassed him.

Aiken also admitted that Lindsey had two incidents at Lieber since he was sentenced to death in December 2004 with inmate William Bell and a more aggressive fight in December 2006 with inmate Angel Vasquez. PCR Tr. 221-23. However, Aiken would not agree that the incidents showed on those dates that SCDC was unable to manage Lindsey to prevent violence against other inmates. PCR Tr. 223, ll. 9-15.

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

ANALYSIS

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

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

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

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

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

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

list - with the understanding prison adaptability was a potential mitigating evidence basis - they did not include any witness on the list - jail or prison guards - to testify about this area. Additionally, Brannon opined that this decision would have been left up to Mr. Bartosh.

The failure to investigate or retain a private security expert in this case is supported by reasonable professional judgment. See Strickland, 466 U.S. at 690-91, 104 S.Ct. 2052 (stating that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"). Importantly, as in Harrington, the proffered evidence revealed the two-edge sword that any seasoned trial lawyer like Bartosh would have recognized as a high risk of harmless information and emphasis by a prosecutor lay in wait for this type of evidence to be presented due to inconsistent history on being adaptable.

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

system would classify him as a high security inmate because it would consider him to present a potential for violence. Aiken clarified that his opinion was only that Lindsey could be managed not to create an unreasonable risk of harm.

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

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[26]We note that this is not a case in which the State introduced expert testimony about the defendant's future dangerousness and the defendant was denied an opportunity to directly rebut that testimony with his own expert. *See Clisby v. Jones*, 960 F.2d 925, 929 n. 7 (11th Cir.1992). Nor is this a case like *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), in which the State's two experts testified there was a "high probability" that Williams posed a serious continuing security threat and defendant's attorneys failed to elicit: (1) evidence of Williams's "nightmarish childhood," including criminal neglect by his parents, severe abuse by his father, and his time in an abusive foster home; (2) that correctional officers were willing to testify Williams would not pose a danger while incarcerated; (3) that Williams received prison commendations for breaking up a drug ring and returning an officer's wallet; and (4) an admission *from the State's testifying future dangerousness experts* that the defendant would not pose a threat in the future if kept in a structured environment. *Id.* at 368-71, 373 & n. 4, 395-98, 120 S.Ct. at 1500-02 & n. 4, 1514-15.

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

- Aiken noted that you can never say never, but the vast majority of prisoners in SCDC can be incarcerated. PCR 212.
- The best predictor of future behavior is past behavior.
  - the prior correctional records of the crime of assault and battery with intent to kill revealed circumstances where there was an altercation on a highway where shots were fired and the victim was wounded. It was then emphasized - like the present case - that he shot into a vehicle! PCR Tr. 214.
  - Lindsey had also been arrested for criminal domestic violence.
  - Aiken never met with Lindsey about his other arrests and crimes of violence he committed and only based his opinion on paperwork. PCR Tr. 215, ll. 5-11.
  - Aiken also admitted "the potential for violence is certainly there" and had failed to mention in direct - that he saw in the prison records that he was recommended for "anger management." PCR Tr. 215, ll. 21-22.
  - His prior prison record reflected violence with fights and indications he acted violently towards others. PCR Tr. 216.
  - March 24, 1996 fight at Dutchman.

- A Spartanburg Jail violent assault in the jail when he got into another altercation with an inmate and an officer. PCR Tr. 217.
- 20 days segregation and the inmate got GASSED to control his behavior.
- Aiken clarified that his opinion was only that he could be managed not to create an ***unreasonable*** risk of harm, not that he would not be harmful to others. PCR Tr. 224.

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

evidence was either cumulative of evidence already presented at penalty phase, or would have opened door to damaging testimony).

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

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

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

MEMO , p. 52-53.

In his seventh allegation, he contends that Lindsey failed to present a "family historian." this Court will combine in this area issue concerning the family history presentation of family and friends at trial, the reasonableness of the mitigation investigation and any deficiency and prejudice concerning the failure to retain a social worker to testify about the family history. These claims are encompassed in the Applicant arguments 5, 7, and 9 within his post-hearing memorandum. Although the record reveals that a social worker was not called as a witness by the defense, it revealed that friends and family members, as well as an expert witness, Dr. Melikian,

a forensic psychiatrist, testified at trial. In addition, a mitigation investigator, Lenora Topp, a licensed investigator based in Asheville, N.C., was retained and used by the defense team in this matter. At the hearing , counsel presented family members (Virginia Lindsey, Bessie Smith, Steve Pilgrim, and Tim Sims), Lindsey's friends (Bill Burton and Pat Burton) as well defense counsel (Doug Brannon and Karen Quimby Hatcher) and retained mitigation investigator Lenora Topp. The focus of the testimony was on new witness -social worker Jan Vogelsang.

In his memorandum, the Applicant cites to Eddings v. Oklahoma, 455 U.S. 104 (1982) to suggest that a defense counsel has an obligation to present all available mitigating evidence. However, he then asserts that the ABA guidelines states that counsel "should consider presenting "expert and lay witnesses along with supporting documentation . . .to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen that client's culpability for the underlying offense." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), § 10.11 - The Defense Case Concerning Penalty. He asserts that the defense team failed to retain and present a social worker. However, other than that fact, he fails to point to any particular evidence that should have been presented or how it would have uniquely impacted upon the jury.

The Petitioner has failed to prove either deficient performance or prejudice concerning this matter. As revealed within the evidence, counsel retained a mitigation investigator Lenora Topp who acquired background data concerning the defendant, acquired a understanding of the family from Marion Lindsey and his mother and provided her summaries to the defense team for their use in deciding what information to present. The family background was investigated and

not ignored. In addition, evidence was presented through lay witnesses at trial concerning the background in the guilt and penalty phases. The Applicant has failed to show how this evidence from the social worker - or its absence- undermined the confidence in the verdict under the standards of Strickland.

This Court finds that reviewing the totality of the circumstances from counsel conduct at the time, reveal that counsel was not deficient. An assessment of counsel's actions must begin with a review of the testimony concerning what was presented at trial as previously set out in this Order at pages 17-28.

Counsel's Testimony

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

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

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

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

PCR Tr. 57.

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

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

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

Counsel stated he interviewed Lindsey about the Wilkins incident.

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

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

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

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

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

She stated - in the email - that Lindsey only told them in court that he wanted Dr. Henderson as a witness because he used to play with his children. In the email, Topp stated that Virginia has seen the doctor recently and had not ask him to be a witness. Topp also expressed in the email that she felt that she had not done enough for Lindsey. PCR Tr. 118. [Dr. Henderson died April 9, 2006]

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

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

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

Topp testified her first meeting with Lindsey was a 3 hour interview on April 16 when he provided "everything he could remember" about family background starting from the day he was born, the accidents he was in when he was run over, his very poor upbringing and how they

shared rooms, and that he was not raised by his father. Lindsey told her he would not want his children raised without a father because he never had a male figure in his life. PCR Tr. 123. She said they talked about everything up to the incident in the police parking lot. PCR Tr. 123.

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

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

In discussing his mother, Lindsey told Topp she got names and addresses of potential witnesses from him. She recalled two major interviews with Lindsey on April 16 and April 25. PCR Tr. 125. She noted the summaries of the interviews - State Exhibit 2. The exhibit revealed information about Virginia and father Leon McDowell who had a distant relationship with Applicant and that Lindsey felt bitter towards him. PCR Tr. 127. She confirmed he had hatred towards him because they never could do anything together, describing how others would go off and fish, but not his father. PCR Tr. 128.

Topp stated that Lindsey claimed he had no clothes and had to wash them out every night. PCR Tr. 128-29.

Concerning his relationships with his brothers, Lindsey told her that brother Paul's drowning was emotional for him about 7 years ago. She stated she got his death certificate. PCR Tr. 129. His relationship with Paul Frederick was very close and Lindsey claimed the death affected him for 3 years. She recalled he had moved with Paul to work construction in (West) Virginia, but Applicant got home sick and came back. PCR Tr. 129.

She described that Lindsey felt Tim Sims was the father of the household for Lindsey and he followed him everywhere, but they had different fathers. PCR Tr. 129. She said that Sims' father was the only father figure Applicant had. PCR Tr. 130. Topp reported that Applicant told her that they would eat a lot of bologna as he was growing up as his main food. PCR Tr. 130.

Concerning his drug sales, Topp was told by Lindsey that he sold drugs on and off when he needed the money. He said the drugs afforded him the better lifestyle he wanted to live with including houses, cars and the ability to buy things for his children. PCR Tr. 130. However, Lindsey had denied that he ever used drugs. PCR Tr. 130.

Topp said she was told that his father's family had taken warrants against him (Leon McDowell, Jr.), got along with him (Teresa), and considered Applicant to be an outsider (Orlando). PCR Tr. 131-32. She was also told about how he related to Claude Lindsey's children. Id.

Topp stated her interview document with Lindsey (Respondent Exhibit 2) was given to Karen Quimby and also included educational history, which reported his school disciplinary actions. These reports included fights against boys and girls, that he was suspended for a week according to Lindsey. PCR Tr. 133.

She reported that Lindsey reported as a traumatic event when his two uncles threw his

favorite cat into the wood heater while it was alive. PCR Tr. 134. Topp reported that she reacted with shock and tears and felt it should have impacted on his life and was disturbing. PCR Tr. 134.

She reported that he told her that he quit school and took some jobs. He reported to her a car accident when a tire blew out and claimed a loss of memory and had to have facial surgery and broke his hip. PCR Tr. 135. He told her he was out of work for a year. she received information from him that he worked at Burger King where his brothers work but lost that job, then worked for United Cloth in Spartanburg. He told her that he thought it was a boring job and complained about the women gossiping, but felt he advanced in the job. PCR Tr. 136.

Topp reported that he advised her of his girlfriends. He reported to her that Stephanie Petty was his girlfriend from 1992-1996. Though Topp did not recall the reason for the break-up she did not recall it as an "ill-parting." PCR Tr. 137.

Topp also learned from Applicant about Bill Burton. He reported to her that Burton was a plant manager and had offered him a job. Further, their relationship went back to when Burton was a lifeguard and began a friendship with him then and took him fishing at their pond. PCR Tr. 137. Further, Topp learned that when he was fired he tried to get him re-employed. Lindsey worked at the plant for two years. PCR Tr. 137. As to Burton's mother (Patsy), Lindsey reported to her that she was friendly and took care of him when Bill was not there (when he went fishing). PCR Tr. 138.

He also related to her generally about past incarcerations and the shooting of Stafford Wilkins. PCR Tr. 139.

Topp reported to the defense her general impressions of Lindsey. PCR Tr. 139. She

stated to them that he had a hard time in life and did not want to be a drug dealer but ended up there because the money was good. PCR Tr. 140. she said he gave Nell money to take care of the children, but claimed she spent it on boyfriends. He said he also gave his mother-in-law money and fill her car with gas. Id. He tried to show that in his heart he was a good person and tried to keep the drug dealing from his mother because he did not want her to see his weakness. PCR Tr. 140.

Topp stated Applicant also told her about having a friend named Jimmy who told him God had sent him. Id. She reported that "Jimmy" had arrived in his early teens. Lindsey told her that he was resigned to dying and regretted that he did not have enough time to spend with his children. PCR Tr. 140.

Topp confirmed that her interview notes of the meeting on April 16, 2004 with the Applicant revealed a long interview. PCR Tr. 141. She had broken down her notes into various subsections, including Lindsey, background, educational and employment history, about Nell Lindsey and about his mother Virginia. PCR Tr. 141-42. (Respondent Exhibit 3). She stated she prepared the summaries of her interviews at counsel's request. PCR Tr. 142-43.

Topp also prepared a summary of her interview of Virginia Lindsey which occurred May 15, 2004. PCR Tr. 144. (Respondent's Exhibit 4)

Topp stated she was referred to the defense by Jeff Bloom. She stated the defense asked her to locate identified witnesses, serve subpoenas, and try to get records. PCR Tr. 145.

Topp stated she got some mental health records of Lindsey and sought records for Bessie and Robin. She also retrieved hospital records related to Lindsey's prior injuries, including a return trip about the head trauma when he was run over as a child. PCR Tr. 146. She also

received school records for Lindsey, though she said they may not have had all due to the school being burned down. PCR Tr. 147.

Topp stated her role as a mitigation investigator was to gather records and information "to keep him from getting the death penalty." PCR Tr. 147. She clarified that it was to gather information, both negative and positive and then let the counsel sort through it. PCR Tr. 148.

Topp identified and described her own attempts to communicate with Lindsey's former girlfriend, Stephanie Petty, up to 2 days prior to the trial. PCR Tr. 148-49.

Topp claimed she did not know she was to be a potential witness in the trial and has never testified in a death penalty trial. PCR Tr. 149-150. however, Topp stated she talked with counsel Quimby on a regular basis and was in her office frequently. PCR Tr. 150. She stated she continued to seek document s during the trial. PCR Tr. 150. During the trial, she also met with witnesses outside court to keep them calm and tell them to be honest and responsive to the questions. PCR Tr. 152. Prior to trial, she recalled the meetings with Virginia and talking with Bill Burton on the phone. PCR Tr. 153.

Topp recalled that around April 19 sending an email to counsel Bartosh about the impact of Lindsey's brother's death upon him and probably stated that the psychiatrist would have a lot to work with and "he definitely had anger management problems throughout his life." PCR Tr. 154. Further, she recalled that around May 12, she reported to counsel questioning who tried to help this kid who from day one cried for help and no one did, after she had received school records. PCR Tr. 154-55. Topp also confirmed that she suggested subpoenaing the family members that were using mental health facilities - Bessie, Steve, Paul and Virginia. PCR Tr. 155.

She confirmed that she was not an expert in mental health area. PCR Tr. 158. She stated that she made notes and provided then to Quimby. PCR 160. She stated that she was not retained in the case in 2004, so she was not "involved immediately" in his defense. PCR Tr. 161.

Family and Friends State PCR Testimony

At the PCR hearing, the Applicant present a series of family members and friends who testified concerning the family history and their knowledge of Lindsey's life and worth. Implicitly, the Applicant was claiming that such evidence would assist in presenting a background to a social historian and could have been presented in more detail or in a more persuasive manner. However, contrasted with the information that counsel had in 2004 and what was used at trial; it reflects a reasonable decision not to use in the unpersuasive and inconsistent detail it was presented. Additionally, the failure to present it in the manner did not show a reasonable probability that the result of the proceeding would have been different under the Strickland test. See, e.g., Johnson v. Bell, 344 F.3d 567, 573-74 (6th Cir.2003) (although testimony from family members would have helped to humanize the defendant, the jury could have concluded that he was even more culpable because he had enjoyed a loving family and yet had murdered his wife); Martin v. Mitchell, 280 F.3d 594, 613-14 (6th Cir.2002) (defendant did not show prejudice at the mitigation phase where family members testified about his background and a psychological report was given to the jury); Scott v. Mitchell, 209 F.3d 854, 880-81 (6th Cir.2000) (finding that potential mitigating circumstances were overwhelmingly negated by other evidence about the defendant's background).

Virginia Lindsey's PCR Testimony

PCR Tr. 327-386

In his memorandum, the Applicant describes PCR testimony of Virginia Lindsey, the Applicant's mother, as "vastly different" than her trial testimony. Applicant's Memorandum, p. 21. This Court agrees that there was more detail in the post-conviction testimony. He now suggest in lieu of the brevity of her trial testimony (ROA 1674-77, 2044-2061),[27] the alleged details within her PCR testimony was necessary to humanize Lindsey for the jury and to support the testimony of the mitigation expert. This Court concludes that neither deficient performance or prejudice has been shown by this reconstructed PCR testimony.

The Court will summarize her PCR testimony. Mrs. Lindsey testified that she grew up in Inman and went to the 10th grade. PCR Tr. 329. She described having three sisters and five brothers and was the third child. PCR Tr. 330. Only one of her sisters graduated from high school. Of the children, she thought only her brother Paul had difficulty learning.

Her parents were Ruth and Smiley Pilgrim, her father leaving when she was 13. PCR Tr. 331. She said the two youngest were not Smiley's children. She said he stopped coming around for seven years, only stopping by later for couple of days when she was 20. PCR Tr. 332.

She said she went to work at Inman cotton mill from age 17 to 19. Although some fo the family worked either in the mill or a nursing home, money was tight because her mother was unable to work causing them to pick peaches and cotton so they could survive because the father was not providing any money. PCR Tr. 333. She described their house (with 10 people) as a pretty big 2 story house with 4 bedrooms. They used a coal heater to keep warm and used quilts to keep the drafts out around doors and windows. PCR Tr. 333.

Her Children

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[27]A summary of Virginia Lindsey's trial testimony is set out in this Order, pages 22-24.

Mrs. Lindsey stated she married her husband when she was 17 for three years before they divorced. She stated they had three children, Claude, Vanessa (who died in a car accident at 7 months) and Frederick. She stated she still ld with her mother all this time during the marriage. PCR Tr. 335. She described this house as a smaller 4 room house with only two bedrooms.

When Marion Lindsey was born, Mrs. Lindsey stated they lived in her own house on Old Furnace Road. PCR Tr. 336. She recalled that the Applicant was 7 years old when they moved out of her mother's house. She said at various times there were 11 to 12 people living in the 4 room house.

Mrs. Lindsey described her daughter Vanessa's death as "pretty hard" because they had to wait for someone to carry her to the hospital. She felt it took a year to come to her senses and affected her ability to deal with day to day matters.

Mrs. Lindsey stated she had a live-in boyfriend for 20 years, Roger Sims [Tim Sims' father]. However, Roger had a drinking problem and became violent, including toward Marion and the boys. PCR Tr. 339. She said on occasion, the Applicant would run across the street to get her mother when Roger was fighting her and when she got there Roger would leave. PCR Tr. 339.

Mrs. Lindsey stated that the Applicant's father was Leon McDowell. She said he never lived with them and had his own family. PCR Tr. 340. McDowell did not have much interaction with Lindsey "like a father" and every once in a while he would show up about once a year and give him money or allow them to use a credit card for his clothes. PCR Tr. 340-41.

she described how the other children would get to spend time with their fathers on

weekends, but Marion was left because his father was not visiting. PCR Tr. 341.

She described head injuries that the Applicant received. She described when he was one year old, her brother Paul backed over him with a car, resulting in scars around his ear and head. PCR Tr. 342. When he was 6 or 7 he fell and injured the front of his head which required him being carried to the doctor. However, two weeks later, Lindsey fell off her girlfriend's porch and hit his head in the same place. Then, when he was 16 he had a car accident and he was injured resulting in scars around his eye. PCR Tr. 342. The Applicant was also accidently poisoned by kerosene when Lindsey was 8 months old when he had poured a jar on his face and clothes and was gasping to catch his breath. Although his mother tried unsuccessfully to get milk down him, they went to the police station and then the rescue squad took him to the hospital. PCR Tr. 344.

Mrs. Lindsey described her brothers, Paul and Willie, who were both heavy drinkers - Paul more than Willie - and would "love to fight a lot and beat their girlfriends." PCR Tr. 345. She described Paul getting into more fights and carrying guns and knives. PCR Tr. 346. She recalled a time when Paul got into a fight at 3 a.m. and came home and kicked in the door and got his mother's pistol and went out the door shooting and then someone shot back through the house. She described everyone getting down on the floor. PCR Tr. 346-47.

She also described an incident concerning Marion's kitten. She said Willie and Paul did not like the cat and one night threw the kitten in the heater. PCR Tr. 347. She said Lindsey was there when this happened. PCR Tr. 347-48.

She described one of the Applicant's brothers Frederick (known as Fred) as not getting along with Lindsey. She said Paul thought she cared more about Marion than him because when Fred and Marion stayed out one night, she gave Paul "a whooping", but not Marion who she

"sent to school to punish him." PCR Tr. 348. She said Fred drowned in Jocassee Lake in 1998 when he was 27 without finding his body. PCR Tr. 349. Marion was 23 at the time of his brother's death. Id.

While they were living on Bobo Street, she said they were exposed to drinking, drug dealing and violence in the neighborhood (but not in their apartment). PCR TR. 350. However, she said Marion did not live with them much on Bobo - it was just Tim Sims and her. PCR Tr. 350. She could not state that she saw Lindsey sell drugs on Bobo, but she had a feeling he was selling. PCR Tr. 350.

She described an event when Lindsey was 15 and got into a fight with Fred while she was at work. PCR Tr. 351. She said the oldest son, Claude, called her at work and told her to come home because Marion and Fred were fighting. When she arrived Fred and his half brother were fighting Marion. Id. When she got there they had the Applicant on the ground and Claude had a stick and they got off him. She told Fred and his half brother to leave and don't come back. She said Fred stayed gone for a week or two before he came back. PCR Tr. 351.

She described another incident when Marion and Fred were fighting one night over the use of the telephone. When she tried to stop them, she said Marion "hauled off and held me down on the bed." She said she told Lindsey to never ask her for anything else in her life because she won't give him anything and "I don't love you no more and you don't treat your mama like that." PCR Tr. 353, ll. 6-15. She stated Lindsey did not like that, went into the bathroom and took a whole lot of pills. While she remained on the bed watching TV, she heard her son Tim call for his father. Next, Roger Sims came to her and told her to call the rescue squad because Marion had taken pills and was on his knees throwing up. She went and saw him

by the commode and he had taken Tylenol, Advil, and Ibuprofen. He was carried to the hospital where they pumped his stomach and then was put into mental health treatment for two weeks. She said they sent him home after that and did not tell her to bring him back. PCR Tr. 353. She never sought any follow-up. PCR Tr. 354.

She said Lindsey had difficulty in school. She stated he was always repeating, could not learn, and got D's and F's. PCR Tr. 354. She stated he left school at age 17. PCR Tr. 355.

Although he did not get a job when he left school, his mother felt he got money first from his girlfriend, Stephanie Petty, and then after that by selling drugs. PCR Tr. 355. She said his drug sales helped her because he made the house payments from his proceeds. He also used the money to help her with payments on the mobile home and groceries. PCR Tr. 355-56.

She said Lindsey would briefly get a legitimate job for 3 to 4 months and then quit it to go back into drug dealing. PCR Tr. 356.

Mrs. Lindsey stated that while Lindsey was living with Stephanie Petty, Nell got pregnant with the Applicant. PCR Tr. 356. She described Nell and her mother always showing up at Lindsey's house asking for things for herself and the baby. After a while, Stephanie got tired of it and left. PCR Tr. 357.

She stated that when Stephanie left, Lindsey got more serious and eventually got married after their oldest was 5 or 6. PCR Tr. 357. They had two children. She testified that she observed Marion, Nell, and the two boys at her house all the time. PCR Tr. 357. Mrs. Lindsey opined he took care of them by taking them to the barber, out to eat, to the park. PCR Tr. 358.

She described the relationship with Nell that they argues a lot, but she never saw Lindsey hit Nell and it was all right because everyone is going to have ups and downs. PCR Tr. 358. She

said that Nell and Lindsey had already broken up before the shooting, but he had not told her or she did not know it, although he hung at the house a lot. PCR Tr. 358.[28] She said she did not [and could not] have any conversation about a breakup, although Lindsey stayed around her house talking to Nell on her telephone. However, one night he asked her to take groceries over to Nell so the children would have good. PCR Tr. 359.

Concerning the first separation from Nell, she said Lindsey was not angry with her because she would go and come back.

She said that they were separated a month before the shooting, but Mrs. Lindsey felt they were still together because one Sunday they all went out to eat together. PCR Tr. 359. After they ate Lindsey dropped Mrs. Lindsey off and went off with Nell and the family. PCR Tr. 360.

Later, Mrs. Lindsey stated that she learned Lindsey was not seeing the children when he asked her to call Nell and tell her to bring the boys to her house so he could see them. When Mrs. Lindsey called, she said Nell's mother answered the telephone and in response Nell later returned the call and said for her to tell Marion that she was not bringing the boys over there and he was not seeing them. PCR Tr. 360. Mrs. Lindsey said she then called Lindsey and told him and he told her that if she was not going to let him see them that he was going over to get them. When she called Nell back, Nell told her to "come one, come on." PCR Tr. 361. She told him not to go over because Nell would have the police waiting. Fifteen minutes later the police showed up at Mrs. Lindsey's house and she told them that Lindsey did not live there. When she called Nell and asked her why she sent the police, Nell denied sending them. PCR Tr. 361.

Mrs. Lindsey stated after that she did not think Lindsey ever saw his sons. However,

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[28] [contradiction].

Mrs. Lindsey stated that Nell still carried her to bingo. One night, she asked to keep "the baby", and thought Nell would bring him back after she changed his clothes, but never did. PCR Tr. 362.

She described an incident the first week of September. PCR Tr. 362. She stated that she received a telephone call from Tim while she was at work that Marion had called him and was saying he would kill himself. After discussion that she told him to go and talk to Marion, she left work. She arrived with her brother Steve (Pilgrim), her sister Bessie, and Tim and tried to calm him down. She said Steve gave Marion "a nerve pill", Bessie prayed and they stayed with him until 8 p.m. PCR Tr. 362-63. She said Lindsey gave them some suicide letters for her, Tim, and Trey and Alex (his sons). PCR Tr. 363. She said she carried the notes to her house put them in a box and after the later shooting returned them to Rod Tullis. PCR Tr. 363. Though she requested that they call the rescue squad, her sister talked her out of it saying they did not need to. PCR Tr. 363-64.

Virginia Lindsey stated she met with Brannon and Lenora Topp on Saturday evening prior to trial for one hour. She said they talked about what happened and she told them she did not know what or why it happened. PCR Tr. 364. She said they also talked to Bessie that night.

Mrs. Lindsey claimed this was the only meeting in preparation for the testimony. In hindsight, she did not feel that they ask her enough questions and did not ask any background questions. PCR Tr. 365. She felt this meeting was about 2 weeks before the trial. She did not recall being asked to sign any releases for her medical or school records, but would have done so if asked.. PCR Tr. 366.

Mrs. Lindsey admitted that she talked to them about Dr. Barry Henderson. PCR Tr. 367.

He was Marion's doctor from when he was a baby til grown. She said he had a relationship with Lindsey because he used to play with his children at a game room that Dr. Henderson owned. Id. She felt Dr. Henderson could have testified about his treatment of Lindsey, as well as what type person he was. PCR Tr. 368. He is now deceased though. PCR Tr. 368.

Concerning mercy requests, contrary to the assertion in the post-hearing memorandum of Petitioner, p. 25, Virginia Lindsey testified that she did talk to the defense team and "they did" prepare her to request the jury to have mercy on her son. PCR 368, l. 14-18. [29] However, she felt she was not prepared to make a mercy request at trial. She claimed that if she was prepared, she would have asked for mercy on her son because she had lost a son and "would ask for mercy that he not get the death penalty." She stated that he had to be punished, but not the death penalty because it hurts to lose someone. She said she not only lost a son, but that she lost a daughter, a son, and two grandsons. PCR Tr. 369, ll. 1-8.

Mrs. Lindsey asserted that over the last 6 months she had spent around 20 hours with professionals, investigators and attorneys. PCR Tr. 371.

On cross-examination, Mrs. Lindsey admitted in her meetings with Doug Brannon and Lenora Topp that they may have also talked about family history. PCR Tr. 372. She corrected herself and admitted at some point that she told them about

- having two miscarriages
- her first son was Claude
- her daughter Vanessa was killed in car crash
- her second son Frederick died in the lake and body was

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

not found in 1998
- Marion's father was Leon McDowell who did not pay child support
- fourth son was Tim Sims
- Tim Sims, Sr. helped out with kids for 17 years
- Tim Sims was on disability from Milliken where he worked until he got sick with a series of strokes

PCR Tr. 373-74.

Virginia also told Brannon and Topp:

- all three of her sons have children
- Marion was the only one who married the mother of his children
- none of her son's finished high school
- she worked shifts in factories, particularly the second shift
- that she had spoiled Marion "a little bit", because he did not have interaction with his father
- that her mother was deceased
- that she and her family were very poor
- that she had 8 siblings and each had 2 or 3 children
- that they grew up together

PCR . 375-76.

Virginia Lindsey also testified that she told them Marion was run over as a child by her brother, but that she was at work when this happened and sister Bessie picked her up. She told them that this resulted in the bad cut to his ear and head. In addition, she told them about Marion falling and hurting his head on the concrete porch. PCR Tr. 377.

Concerning the pill incident, she confirmed that she talked with Brannon and Topp about it and that

- Fred and Marion always argued
- Marion took it hard

PCR Tr. 377-78. She told them about efforts to get the death certificates.

She also spoke with them about his relationship with Stephanie Petty and liking Petty's grandmother. PCR Tr. 378. Concerning Nell, she told them that she thought she was a nice girl and like her and that Nell and Lindsey had problems over money. She stated to them:

> - she knew Lindsey was selling drugs, but did not see it
> - she knew he spent money on her and household from selling drugs

PCR Tr. 379.

Concerning the pill overdose incident, she did not recall telling the doctors that he was a stable kid and did not cause any major problems. PCR Tr. 380.

Mrs. Lindsey stated she have talked with them about how his family was important to him, but that she was aware he had other girlfriends while he was married, including at the time of the shooting. PCR Tr. 380-81.

Concerning the car incident, she spoke to them about it, but admitted she did nothing to stop it. PCR Tr. 381.

While she admitted she thought about calling to get help at the September 2004 meeting about talking Lindsey out of suicide, that she did not. She admitted the only time she sought help was when he took the pills. PCR Tr. 381. She recalled meeting with a doctor because of his release, but did not recall what they talked about other than that Mrs. Lindsey did not want him to go to a mental hospital because he was not crazy. PCR Tr. 382.

On re-direct, she stated that in discussions with Doug Brannon and Topp, she was confirming some information that they already knew. PCR Tr. 384. In addition, she admitted that there was a pattern of behavior in the family to have multiple girlfriends that Marion saw. In addition, she admitted that she saw the older uncles toss the cat into the fire, shoot guns through

the house, get into fights in the neighborhood. PCR Tr. 385. She stated Lindsey experienced emotion in these events.

Mrs. Lindsey said she was afraid when the shots were fired through the house and was on the floor with Lindsey. PCR Tr. 385-86. Concerning the cat incident, she said she was surprised when they threw the cat into the heater while she was sitting there and it created an awful smell. She said she did not try to stop it because she was afraid of her brothers: "I didn't know what they might do cause they already done grabbed the cat up and thrown him in the heater. He might have thrown me in there, too." PCR Tr. 386-87.

Bessie Smith - PCR Testimony

Bessie Smith, the Applicant's aunt and Virginia Lindsey's sister, testified at the PCR hearing, as well as at trial. PCR Tr. 388-424. ROA 2080-82.

Smith testified initially about the family history. She testified that she grew up in Inman, S.C. with 9 brothers and sisters. PCR Tr. 389. Her father was Smiley Pilgrim, who left the family when she was in the 4th grade. She went to school until the 7th grade when she left to work to help by picking peaches. She said two years after Smiley left, stepfather Willie Farr came into the picture. Smith described Farr as a godsend and took care of them. She described her mother becoming depressed after Smiley left staying in the bed with the children having to bather and feed her. PCR Tr. 392.

They relied upon her grandmother to bring them food and clothes. Her step-dad did outside work and tried to keep food in the house. PCR Tr. 392.

Smith stated that her brothers and sisters got married and moved out, but Virginia returned home. PCR Tr. 392. Mrs. Smith got married and moved about 3 miles away. She

stated she got a GED and studied at Spartanburg Technical College. She had 5 children. PCR Tr. 393.

She tried to emphasize that her children had a different life than Virginia and Marion. PCR Tr. 393. She described that although Paul was quiet, shy, and timid, yet after he caught his first girlfriend with another boy he was not the same. PCR Tr. 394. She described him as getting into fights and drinking. He then went into the service. PCR Tr. 394. She said Paul gave her mother lots of trouble because he got into fights. She asserted that others were jealous of him and would pick at him, although he did not initiate the fights. She stated that Paul was usually protecting himself "because he grew up without a daddy", or older brother to run to, not because he was mean. PCR Tr. 394-95. She described a man who would come around the house and teach Paul how to open a hawk bill knife. She said Paul would use this technique with his knife to scare them "because Paul was a timid scary kind of person growing up." PCR Tr. 395, ll. 16-17.[30]

Bessie Smith described after Fred returned from the service, he came to live with their mother, got married, and had two girls. She acknowledged worse behavior came along after.

Bessie Smith stated that her sister Robin did not display the same drinking behaviors growing up, but she started having problems ("you know how teenagers are") with liking boys early. PCR Tr. 396-97. She was described as being smart in school and worked her senior year to pay for graduation by babysitting Marion. However, she stated using drugs resulted in being

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[30] She said she did not know much about Willie. She said he was away and "on the go." She said he would be out working on his car or out with his friends. PCR Tr. 394.

incarcerated, but claimed she was not violent or robbing people.[31]

Smith stated she was not living with Virginia when her daughter Vanessa died. PCR Tr. 398. She stated that Virginia was devastated and depressed along with her mother. She stated Virginia's mother felt blame for it. After the death, Virginia's husband began to drink more and then started dating Virginia's cousin that was raised with them. That relationship tore Virginia up and she separated from her husband.

After the separation, Virginia and her mother moved closer to Inman. At that time, Virginia started drinking and staying out late, but kept working. PCR Tr. 399. Smith described Virginia's drinking as not daily, but a weekend thing. To clarify, they would work all week and then go out Friday night when they got off work.

Because Virginia worked second shift (3 p.m. to 11/12 p.m.), Smith felt she did not see her children much and they cared for themselves. Virginia's mother would watch them while Marion was small playing outside. She said Steve Pilgrim (her brother) would be working on cars and motorcycles. She said Marion loved to hang around Steve "all the time." PCR Tr. 400.

She said her mother and Virginia also liked to play bingo, but she did not know how much time they spent playing it. PCR Tr. 401, ll. 1-10. She said when they went to play, the children were left with Steve or another uncle. She said they played "pretty good much" and "sometimes every night." PCR Tr. 401, ll. 17-20.

Bessie Smith described a period that Marion lived with her when he was around 12 to 13. PCR Tr. 401. She observed that Marion was always smiling, crazy about her husband who he

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[31] However, Robin Keith is serving a sentence for assault and battery of a high and aggravated nature.

teased about the way her husband talked. PCR Tr. 402. She said Applicant did not like to be around his step-father, but loved being with her family. She said he might have stayed there a few months. PCR Tr. 403.

She described her home as different than Virginia's. She claimed that her sons were in sports and not allowed to run around. She said they knew that they had to finish homework and chores. She said Marion "fell right in there." She said he was a sweet child who she cared about and that he wanted attention. PCR Tr. 403. She said she tried to listen to him, tease him.

Bessie Smith stated that she also worked like Virginia. She saw a difference - in addition to having both parents there - that she was more active in doing things with the children in their sports, activities and schoolwork. She felt Virginia did not push them, did not go to PTA meetings. She said that because she worked second shift, Virginia would be off to work. She said Lindsey's older brother, Bubba, sometimes had to wash the clothes and shoes by hand, claiming Virginia did not have the money to go to the Laundromat. PCR Tr. 405. She also claimed that sometimes the children did not go to school because they did not have clean clothes.

Smith admitted there were problems in her own family, but claimed she had structure with rules, Marion's family "had freedom." She asserted that Virginia loved and cared for her children, and gave them everything she could and that he would have more "bill money" in his pocket than Smith had. PCR Tr. 406. She said her mother took care of everything, so Virginia never learned about responsibility. PCR Tr. 406-07. Smith said she never gave her own children "bill money." She said though that Virginia was a good mother, but we all had a struggle growing up. PCR Tr. 407, ll. 10-15. she described her own life, growing up rough suggesting at a time she had nothing to eat, nothing to keep warm when her step-father left. PCR Tr. 407.

Bessie Smith described an event a couple of weeks before the shooting at Lindsey's house. She stated she had heard from Virginia that the Applicant was going to kill himself and she went to his house with her sister and brother Steve Pilgrim. She described Lindsey as being depressed, saying he did not have anything to live for and was tired of what was going on. She said they sat down and talked to Lindsey to try to find out why and that he had his whole life. She stayed with Lindsey about an hour or more. PCR Tr. 408-09.

She stated that she told Lindsey that he needed to pray. She left with her brother Steve. She recalled that no ambulance was called although Virginia mentioned that Bessie should call the rescue squad. She said Virginia told her he had tried to kill himself one time before when he took some pills and he stayed and got treatment. PCR Tr. 410.

Bessie Smith stated she talked to Marion later but did not see him. Bessie said she called Lindsey on cell phone days later and he said Nell was trying to take his children from him and he would not see them anymore. PCR Tr. 411-12. He told Bessie that he loved his children, and Bessie said she knew that and don't worry about the woman, and that he'll get to see the children again. PCR Tr. 412. She said he was crying. PCR Tr. 412.

Bessie Smith described receiving a telephone call from him the next day when he stated that he was still upset. He claimed that he got a job at BMW and was supposed to start work that Monday, but that Nell and her mother had taken out warrants against him. He inquired how could he see his children if he did not have a job. He feared the police would arrest him at BMW and that he would have nothing and would lose the job. PCR Tr. 413. He denied to her what the warrants were for. PCR Tr. 414. She said while they were talking someone clicked in. PCR Tr. 415-16. She tried to call back, but never could reach him. PCR Tr. 415-16. She said the

incident happened about 3 hours later. PCR Tr. 416.

Smith said she told Marion that she had seen him with his boys at the duck pond, that Marion loved his children, that he bought shoes and clothes for them and their mother. She also said that he would give Nell money and she shopped all the time and take them to eat.

She described a time one month before the shooting when Lindsey carried Nell, his mother, and the boys to Greenville to eat and shop. PCR Tr. 414-15.

Preparation for Trial

Bessie Smith testified that prior to the trial, Mr. Bartosh, Mr. Brannon and a lady came out to her house a week or a few days before the trial. she said they asked questions and stayed 30 to 40 minutes. PCR Tr. 416. Smith said that she had already divorced her husband by trial time. She claimed this was the only meeting. PCR Tr. 417. She initially claimed they asked "what kind of child he was growing up", and asking "a lot of stuff about me" (Bessie) that she did not want to answer because she was not on trial. She said that they learned about Marion growing up and what type of house he grew up in. PCR Tr. 417.

Smith said she was told and agreed to testify. PCR Tr. 417. She claimed this was the only contact she had with counsel since the incident. She pointed out that she had more preparation in this hearing, meeting about 3 or 4 times. PCR Tr. 418.

On cross-examination, Bessie Smith stated concerning Applicant's potential job at BMW and Nell's warrants, that she had heard about it from someone other than Applicant. PCR Tr. 419.

Concerning her alleged telephone call with Applicant on the day of the incident, Smith said that Applicant did <u>not</u> say anything about tracking down his wife or looking for her because

she had a boyfriend. PCR Tr. 40. She denied that Lindsey ever told her then that Nell and a boyfriend was helping take the kids away. She said Lindsey just kept saying that Nell did not want him to see the kids and was talking about taking the kids away from him. PCR Tr. 420.

Smith denied any knowledge on whether Applicant had a girlfriend during the course of his marriage. PCR Tr. 421. She described that Lindsey had various jobs working on motorcycles and working at the Zeman Plant.

She returned to when he was younger and lived with Smith. She confirmed that he was a "child who like attention." PCR Tr. 422. During alleged suicide threat earlier in September, she stated that she and her brother talked to them. She confirmed that she left after 1½ hours because they thought he would not do it and her brother and sister stated he would be all right. She confirmed that there was a discussion about calling the rescue squad by Virginia and they deferred that decision to Virginia. The rescue squad was not called. PCR Tr. 422-23. She stated while "she loved Marion to death", she would "pretty much" have done something if she thought he was in danger, she also felt this was his mother's call. PCR Tr. 423.

Returning to the phone calls on the date of the incident, Lindsey did not tell her where he was calling from, did not tell her he was going anywhere that day, or about having a gun. Bessie Smith confirmed that when she spoke with Doug Brannon and Lenora Topp, that she told them she had a phone conversation with Lindsey that day. PCR Tr. 424.

Steve Pilgrim (PCR Tr. 426-453)

Steve Pilgrim, the Applicant's uncle, had testified at the original sentencing proceeding. R. 2078-2080. During the PCR proceeding he testified that he was a lifetime resident of Spartanburg, growing up in Inman. PCR Tr. 427. He stated Smiley and Ruth Pilgrim were his

parents. He was 6 when Smiley left.[32] PCR Tr. 428.

Pilgrim stated that he spent a good deal of time growing up with Virginia, Bessie, Robin (Keith), Paul, and Willie. PCR Tr. 430-31.

Pilgrim denied that Virginia had a problem with drinking and drugs. PCR Tr. 431, ll. 2-4. However, he stated at one time Virginia displayed suicidal behavior. Pilgrim then described that Marion was not taken care of by Virginia or Marion's father. Virginia allegedly got upset with the father and decided she did not want to live. PCR Tr. 431, ll. 13-17. However, he did not recall if she was hospitalized for it. PCR Tr. 431.

Pilgrim also described when he was around Mrs. Smith and she attempted suicide. He stated it was between her husband and it was rough taking care of them and they broke up 3 or 4 times and Bessie just did not want to live anymore and was hospitalized. PCR Tr. 432.

As to Robin Keith, he thought she had tried to take her life 3 times. PCR Tr. 433. He described her being "kind of depressed for a long time." She also spent time in a hospital more than once.

Contrary to other testimony, Pilgrim stated that Robin had exhibited violent behavior around Marion, but Pilgrim could not remember any circumstances. He confirmed that she was presently incarcerated for violent behavior. PCR Tr. 434.

Pilgrim also stated that brothers Paul and Willie also went to prison for violent behavior.

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[32] At this point a relevance objection was made. Counsel Collins asserted that this information should have been gathered by original counsel and second, the information was essential to later expert witnesses, Dr. Melikian and Ms. Vogelsang. Third, he asserted this information supported their mitigating circumstances and humanized the defendant. Counsel declared he would have presented or proffered this evidence at trial. PCR Tr. 429. With the assertion that they claim all evidence should have been put into trial. The objection was withdrawn.

PCR Tr. 434.

Pilgrim testified about the house they lived in on Brock Street in Inman. (Exhibit 27). He stated 10 people lived in the 4 bedroom house, including Marion. PCR Tr. 434-35. He said the Applicant was born there and the family stayed in the house for 10 years. He stated the house lacked indoor plumbing, air conditioning, and was heated with a stove using either wood or coal. PCR Tr. 435.

Pilgrim stated Lindsey experienced violence while living in their house with the actions of Paul and Willie. He described them as being violent toward Pilgrim, other family members, people in the community, and women in their lives. PCR Tr. 436.

Pilgrim described accidents in Lindsey's life. He recalled Lindsey being run over by a car driven by Paul who backed up over him. PCR Tr. 437. When Steve realized it was baby Marion, he grabbed Lindsey and carried him to the Inman Police Department who took him to Spartanburg Regional Hospital. He said Lindsey never cried or moved. PCR Tr. 437. He responded while at the hospital. He was checked and received stitches on his head where the car ran over him. He was released the same evening. PCR TR 437. Pilgrim blamed the fact that Marion would always try to follow him as the reasoning for the accident. He also stated, in general terms, that Lindsey would fall and hit his head other times. PCR Tr. 437-39.

Concerning Lindsey's suicide threat, he recalled about 3 weeks before the shooting, that he went over to Marion's with his sisters after they called stating Marion had said he was going to kill himself. He said they stayed with Marion 2 to 3 hours. Pilgrim found him real depresses - which was unusual for Lindsey - and talking about wanting to see his kids and that he was having problems with his wife. Pilgrim stated Lindsey was crying that night, which was the first time he

had seen him cry. PCR Tr. 439. Pilgrim said that Lindsey had calmed down that evening. PCR Tr. 439.

The next week, Pilgrim stated he received a telephone call from Lindsey telling him that he wanted a gun. PCR Tr. 439-440. Steve Pilgrim thought he was the only one in the family with a gun because his older brothers are not allowed to possess guns (although they had them in the past). PCR Tr. 440. Pilgrim states he no longer has the gun that Applicant asked for. PCR Tr. 440. Pilgrim stated Marion did not get his gun. However, shortly after the phone call, someone broke into his house and trashed the house, but they did not find his gun. PCR Tr. 440.

Pilgrim denied getting another phone call from Lindsey after that. PCR Tr. 1-10.

Pilgrim stated that he would loan Lindsey money to take his wife out to eat because he was trying to get back with her. He stated she went out with him 3 to 4 times before this happened. PCR Tr. 441.

As to his trial preparation, he stated he met with the defense counsel one time the day before the trial started. PCR Tr. 442. He thought that it was on a Saturday for 30 to 40 minutes. He recalled Mrs. Topp, Mr. Bartosh, Mr. Brannon, his sister Virginia, and sister Bessie - the people that were going to be testifying. PCR Tr. 442. He stated they discussed his condition and what he was suffering from that resulted in his disability. He stated that he was depressed, had anxiety [and uncontrolled hypertension]. He stated that they did not request that any of them sign releases of medical or psychological records that he would have done. PCR Tr. 443.

He said he had lived in Spartanburg from the time of the incident to the trial and was available. In hindsight, he felt he was not adequately prepared to take the witness stand and testify. He said that he had never testified before and was nervous and they did not ask him

anything, just about his health. PCR Tr. 444. He said they did not ask about the events leading up to the trial or Marion's personal history. In contrast, for the PCR hearing, Pilgrim described only talking about his health. PCR Tr. 445.

Pilgrim stated that they prepared him and asked him if he wanted to ask for mercy. PCR Tr. 445. In describing it though, Pilgrim stated "they told me not to ask for mercy." PCR Tr. 445, ll. 1-8. Pilgrim stated that he would have asked for mercy, declaring that "we all make mistakes", "I care for my nephew", "he's my favorite nephew and he made a mistake", "and I wouldn't want him ... get the death penalty." PCR Tr. 445, ll. 11-17.

On cross-examination, Pilgrim clarified that he took the picture of the house (Exhibit 27) last Sunday. PCR Tr. 446. Pilgrim further did not recall that at the 2004 trial he testified about being a witness to the car accident (ROA 2079-2080), that he testified about the incident when Lindsey ingested kerosene (ROA 2080), about how long he stayed with the family (ROA 2080) and his own health conditions of high blood pressure and panic attacks. PCR TR. 448. Pilgrim admitted he would have provided this information to counsel. PCR Tr. 448.

Pilgrim testified that he had been followed by Lindsey and he taught him how to fix things and remained involved in his life after he moved out. PCR Tr. 449. He was consistently in contact with the Applicant throughout his life. PCR Tr. 449.

In explaining his earlier reference to violence in the home, he described it as going out and getting into fights, getting guns and shooting people. He further described drinking and cussing in the home and turmoil. PCR Tr. 450.

In explaining the discussion on mercy, he said it occurred in the 20 to 30 minute meeting with Mr. Bartosh and the others at the office. PCR Tr. 451.

Pilgrim stated that he was not present when either Virginia or Bessie attempted suicide. PCR Tr. 451. He said he was the contact person in the family and would be called whenever anything happened, but he did not see what they did. PCR Tr. 452.

As to Exhibit 27, he stated the house looked the same, except they would mow the grass. PCR Tr. 452.

Timothy Roger Sims (PCR Tr. 453-480)

The Applicant's younger brother, Tim Sims, testified that he is 10 years younger and did not share the same father. PCR Tr. 453. He described his relationship with Applicant as the person who raised him because his own father left when he was 11. Sims stated that Lindsey treated him like he would have wanted his father to treat him. PCR Tr. 454. He said he was 19 when the shooting took place, so for 8 years Lindsey had stood in his place as a father. He said he would see Lindsey everyday and was with him everywhere he went. PCR Tr. 455.

Sims stated that he got into trouble with the law and had a drug charge in 2003 initially on probation until he violated and got 6 months. PCR Tr. 455, ll. 7-16.

He stated that he had been working s a brick mason, but was not working presently. PCR Tr. 455. He said he was getting married next year.

He claimed at the time of the trial (in 2004) he did not have any criminal charges. PCR Tr. 456.

Sims stated that he knew everything about Lindsey's relationship with Nell because he had lived with them and his children. PCR Tr. 456. He described that everything was going good and he would do everything he could for her. However, he said everybody argues and fusses. He said he never saw Lindsey "put his hands on Nell", but he was not there all the time.

PCR Tr. 457. He said their fusses were "normal arguments", again asserting that he never saw him hit her. PCR Tr. 457.

Sims described his knowledge of the work history. He said Lindsey painted cars and worked at Milliken or a similar place. However, he said Lindsey got into the drug game to take care of his mother and the rest of the family. PCR Tr. 457, ll. 20-24. [He said his own father left after he got sick and went to live with his mother]. PCR Tr. 457.

Sims said Lindsey had to do what he had to do to survive. PCR Tr. 458. In using his drug proceeds, Sims said Lindsey would take care of anything needed for any family member. PCR Tr. 458.

Sims described three weeks before the shooting going to dinner with Lindsey and Nell at The Junction. He said Lindsey paid for the meals for all the family - Sims, his newborn, Sims' wife, his cousin and her newborn, his cousin's son and niece. PCR Tr. 458-59.

On that evening, he said that Lindsey and Nell picked him up and they went to pick up Lindsey's other son from his grandmother's house. PCR Tr. 459. After dinner, Lindsey drove everyone home, except for Nell and their children who left with Lindsey. PCR Tr. 459.

Sims described going over to Lindsey's home one day with his mother, Aunt Bessie and Steve after he thinks Lindsey had called him. PCR Tr. 460. Sims described Lindsey's voice as nervous and crying and that "I feel like I'm about to take my life." PCR Tr. 460, ll. 18-22. Sims said he told him not to and asked where he was and told him he's get there. Sims called his mother and they got to Lindsey in 30 minutes. PCR Tr. 461. He found Lindsey at his house laying in the bed, appearing to "let everything go." At that time, Lindsey gave them letters about what he was going to do. He described Lindsey crying for the first time (and a second time on

the day of the shooting). PCR Tr. 461.

Sims recalled that he stayed with Lindsey from around 5-6 p.m. until 8:00-9:00 p.m. PCR Tr. 462, ll. 3-5. He said they had talked to him, Uncle Steve gave him "a nerve pill" to calm him down, and left after it looked like everything was all rights. PCR Tr. 462. [The alleged suicide threat notes were addressed to Nell, his boys, Tim Sims, and Virginia]> PCR Tr. 463. He said his mother had the notes when they left that evening. PCR Tr. 463.

Sims said that Lindsey had expressed concern about Nell at the end after he handed them the notes. PCR Tr. 463. Sims felt he was still "down" though. PCR Tr. 463.

Sims described a subsequent situation a day before the shooting when he asked him to drive by Nell's house. Lindsey had called him because he thought she was seeing another man and wanted him to see if he saw a Lexus in the yard. PCR Tr. 464, ll. 21-25. He said he drove by - saw the Lexus - and kept going. However, Sims said he did not want to tell him he saw the car because he knew it would upset him, so he told him it was not there. PCR Tr. 465. He said he was familiar with Nell's car and it was not hers. PCR Tr. 465.

Sims said Lindsey was not able to contact Nell or able to see the children. He had been told not to see them. However, Sims said Lindsey told him to take them food so Sims would go to McDonald's get food and take it to them. PCR Tr. 465.

At one point, Sims said Lindsey called him to try to set up a 3-way call using his mother's phone that she would answer. When he did, he heard Lindsey tell Nell he knew she didn't want to see him, but to let him see the boys. PCR Tr. 466. In response, Sims said Nell started cussing and he told her no way and that we are staying away from them, while he heard a son in the background as she told him she did not live with him anymore and "that's not your daddy." PCR

Tr. 466. This was the day before the shooting, according to Sims. PCR Tr. 466-67.

Sims said he did not see him. However, the next day - around 5 p.m. - Lindsey called and asked her to go down the street from "Shirley" who knew something about Nell. PCR Tr. 467, ll. 10-20. Sims said he wanted her to call him so get her number and give her his number. Sims said he took a shower and then Lindsey called back wanting to know if he had gotten the information. PCR Tr. 467. He told him no. He said Lindsey then sought to speak with his friend Chawny. Sims said Chawny left the house and returned. About 40 minutes later, Sims said Lindsey called back crying saying "she" had told him a lot about Nell and her new boyfriend and he was "going out of his mind" over what was told him. PCR Tr. 469, ll. 4-10. Sims told him to calm down and meet at brother Claude's home. He said ok and Sims left to go to Claude's. Shortly thereafter the shooting took place. PCR Tr. 469.

[Despite his earlier testimony], Sims claimed he did not know where Lindsey was living then, except that it was in Linville Hills. He estimated that it would take 15-20 minutes to get to his mother's house, and he would go by Celeste's house. He said he did not see Marion before the shooting. PCR Tr. 471.

Sims claimed that he never told this information to Bartosh, Brannon or Ms. Quimby. He claimed no one in 2004 talked to him. He said he was not in jail at the time of the trial and saw his mother, Uncle Steve and Aunt Bessie on a regular basis.

However, he said he was present at the trial. He claimed to have approached Doug Brannon and told him "he knew more about Nell and Marion than anybody" and wanted to testify. Counsel told him he would get back to him, but never did. PCR Tr. 472-73.

Sims said if asked he would have testified similarly and would have asked for mercy.

PCR Tr. 473. Sims testified that he would have stated that Nell did not deserve what happened to her and Lindsey deserved to be punished, but did not deserve death because his wife was gone and we didn't need him gone. Sims stated his kids did not need to grow up without parents. He said their children would never be able to know what happened and they would want to ask their father what happened. PCR Tr. 473-74.

On cross-examination, Sims stated in reference to whether he had seen Lindsey violent towards Nell, he denied being aware of the August 1996 incident where he allegedly threatened to harm her and the October 1996 incident when he pushed and shoved her.

He confirmed that he was present at the December 2001 incident at Applebee's but denied seeing him slap or tear her clothes, claiming to be on the other side of the car. PCR Tr. 475, ll. 12-24.

He also confirmed that after he had received the telephone call from Lindsey a month before the incident that he did not attempt suicide at that time, just had talked about it, had no weapons and he felt comfortable enough to leave. PCR Tr. 476. Further, on the day of the shooting, Sims was under the impression that Lindsey was going to come to his house and they were going to play games and talk it over. PCR Tr. 476. he confirmed that there was no discussion on that date that Lindsey was looking for Nell, looking for a gun or having a gun. PCR Tr. 476, l. 23 - p. 477, l. 3.

Further, Sims confirmed that when Lindsey asked him to investigate Nell's house, he was looking to see if she was involved with someone else - not to check up on his children. PCR Tr. 477, ll. 7-16. Sims confirmed that Lindsey was also involved with someone else and had girlfriends while he was married. PCR Tr. 477.

Concerning his drug charge, Sims confirmed that in August 2003, he pled guilty and was sentenced to 6 years, suspended to 11 months probation and was on probation at the time of the May 2004 trial. However, he admitted that he had violated probation then and was awaiting to go to court. PCR Tr. 478.

Concerning Lindsey's violence, Sims confirmed he had been a witness to Lindsey being violent in the past. PCR Tr. 478, ll. 19-21.

On re-direct, Sims stated that both Lindsey and Nell had affairs during their marriage. PCR Tr. 479-80.

PCR Testimony of The Burtons

During the PCR hearing, Applicant called Bill Burton who testified at the trial, and his mother, Mrs. Pat Burton, who was on the trial witness list, but did not testify.

Bill Burton's PCR Testimony

Bill Burton testified similar to his trial testimony. PCR Tr. 304-05. He stated prior to his trial testimony, when he learned he would be a character witness, tried to contact Mr. Bartosh because it was his first court experience. He said that he wanted some background on the kinds of questions and information he should provide and how to prepare for trial. He found it difficult to contact Bartosh, an extremely busy man. He stated they met either the day before or the day of trial with many other witnesses and did not have any one-on-one discussions with him. PCR Tr. 305.

Burton stated that he sat in the trial for several days. PCR Tr. 306. He said he was aware that guilt was not as much an issue as sentencing. PCR Tr. 306. He said he was told to "say what you know about Marion." However, Burton felt the case was disorganized and he was

concerned about it and did not have a good feeling about preparation. "I wanted to understand the strategy" and how the facts could be used to defend Lindsey and avoid a death sentence. PCR Tr. 307.

Burton stated that he wanted to tell the jury that he got involved as a teenager with Lindsey when he was 6 years old when Burton was giving swimming lessons at a public pool. He found then that Lindsey wanted approval and a parent figure to look up to, anxious to show someone his achievements with swimming, jumping, and fishing. Burton said he later went to Lindsey's house, met his mother and rest of family and began a 13 year relationship. PCR Tr. 309.

Burton reiterated that Lindsey was desperate for approval, attention, and involvement with adults. Burton saw that Lindsey had no supervision at home and they did not have any help or encouragement with their studies which led to Lindsey having a difficult time at school. PCR Tr. 309. He described Lindsey's house, though clean, was falling apart.

Burton felt Lindsey wanted a (normal) family, but his environment made it difficult for him to prepare for that later in life. Lindsey lived on the street, did not do well in school and his education was very limited. PCR Tr. 310.

Burton stated Lindsey did not see much of his father. He saw his role with Marion as a male figure he could look up to and Burton declared he was happy to provide it. PCR Tr. 311. His last contact with Lindsey was in 1990. PCR Tr. 311, ll. 11-12.

Burton said his company was able to offer Lindsey a job in what he hoped would lead to a good future. However, Burton was transferred and lost touch with Lindsey and learned Lindsey left "for reasons I don't recall." PCR Tr. 311, ll. 17-20.

On cross-examination, Burton did not recall his earlier testimony that when Lindsey left that he had tried to get him his job back. PCR Tr. 313. Although he lost touch in 1990's, Burton said he was aware that Lindsey was continuing to visit his farm and fish through his mother. PCR Tr. 313. He confirmed that he had no contact with Lindsey after he began his relationship with Nell or the actions of Lindsey after he moved. He admitted that he did not know until the trial of the shooting incident of Wilkens, the number of different incidents with his wife, the fact that he was involved in selling drugs, or the reasons why he was let go from the company or if it was due to a conflict with his supervisors. PCR Tr. 314.

Concerning "Jimmy", Burton claimed he was not aware of the imaginary friend during his relationship and became aware of it "later on." PCR Tr. 314-15.

Burton confirmed that in his discussions, he talked with Lindsey about his desires for family and children and having the "ideal family" was a major subject. Burton stated that when asked at trial whether he would have provided financial assistance to get an attorney to help see his children, that he was not aware Lindsey had seen Tullis to get help or Piedmont Legal Services. PCR Tr. 315.

Mrs. Pat Burton's PCR Testimony

Mrs. Burton said she was present at this hearing "because I love Marion." PCR Tr. 316-17. She recounted a letter she had written in 2008 to Judge Burch expressing that her son did not think he was properly prepared to testify. She also said she was not aware that she was on a witness list in 2004. She only knew about the case through her son when they called him. PCR Tr. 317.

She proffered what her potential testimony in 2004 would have been. She declared that

she met the Applicant when he was 6 or 7 years of age, when after the pool closed where her son was a lifeguard, he would bring a bunch of kids in a pick-up and they would fish and play in the lake. PCR Tr. 318. She thought that Lindsey was special to her son because they talked about him all the time, but not about the other kids he brought. She recalled Marion was happy with a smile. She knew that her son was proud of Lindsey when he learned to swim, but felt Marion was sorry he learned because her son would then spend more time teaching others. PCR Tr. 318.

She recalled that he came out to fish and play after her son went to the Air Force Academy and would always thank her. She stated Lindsey's brothers would bring him and Lindsey would always ask her if it was OK to use the pond - the only one who did this. PCR Tr. 319.

She felt that Lindsey became special to her also, even though she did not see him very much. She knew her son would go to Lindsey's house and describe how poor it was and how Lindsey did not have much. PCR Tr. 319. Her son would stop and see Lindsey when he occasionally came home from the Academy. PCR Tr. 319.

Mrs. Burton described her visits to Lindsey after he was sentenced to death. She has visited him "many times" and had written letters for three years once a week. PCR Tr. 320. At one time, she said she talked Lindsey out of dropping his appeals, telling him they might outlaw the death penalty and maybe he would see his sons after they grew up. PCR Tr. 321. She also described a poem he had written her after his experience and trying to teach others not to follow in his footsteps, that she gave it to a minister who used it in his church. PCR Tr. 321.

She stated that when she visits death row, she sees the interaction he has with other inmates and guards, and asserted there was not a feeling that they were afraid, but one of

comradery of a closely knit group. PCR Tr. 321-22.

Mrs. Burton regretted that she had not known him more when he was younger and that she could have been able to help him reach his potential. She said she would have asked for mercy "because I don't think one action on a part of the person defines that person's life." PCR Tr. 323, ll. 4-6.

On cross-examination, she admitted that when he visited in his youth, she did not have any in depth conversations with Lindsey nor any discussions with him about his family. She admitted that she was not aware of his relationship with his wife, of his involvement with selling drugs, of his prior shooting incident, or of any of the incidents of criminal domestic violence. PCR Tr. 325. To the contrary, she only knew him as "a happy little kid" and I did not know him intimately. PCR Tr. 325. Like her son, there was no discussion about Jimmy, the imaginary friend. She said she did not come to Lindsey's trial and did not offer to testify because she did not think she would be any good and was against the death penalty anyway. PCR Tr. 326.

Rod Tullis - PCR Testimony

During the PCR hearing, former attorney Rod Tullis testified. He stated that he had started representing Lindsey in the 1990's until the incident in 2004. PCR Tr. 163. These included criminal, family court, and traffic concerns for Lindsey and family members. Id.

He stated the weeks before the incident, he was representing Lindsey concerning some drug cases and traffic cases in Greenville and Spartanburg. "There may have been something in Family Court near the end that he had spoken to me about." PCR Tr. 164. At some point he interviewed him about ways to resolve issues concerning his children. He felt surprised that Lindsey and his wife would have issues about his children and their discussion involved offering

a payment of child support in order to secure some visitation. PCR Tr. 166, ll. 11-18. He did not know if Lindsey ever offered to do that and Tullis never filed any papers in Family Court for him. Tullis stated that he had not been retained. PCR Tr. 166-67. Tullis felt that at the time of that meeting, Lindsey did not want to be separated from his wife and children nor end his marriage. PCR Tr. 167. He stated that they discussed that he had some evidence his wife may have had an extramarital affair and he was concerned because he did not want someone else to come in "and become daddy to his sons." PCR Tr. 167. Further, he feared if he began family court proceedings that there would be ramifications on the criminal side. PCR Tr. 168. Tullis said Lindsey's fear was that his wife would become a witness for the State, which would also end his relationship with his children because of a prison sentence.[33] PCR Tr. 168.

Tullis claimed that shortly before the shooting took place in September 2002, Lindsey attempted to contact the office. Tullis claimed he learned of this contact after he heard about the incident and went to his office to prepare a notice of representation. PCR Tr. 169. He had learned that Lindsey was in the hospital and had surgery. According to Tullis, when he listened to his answering machine, he heard Lindsey asking for him to pick up the phone. Tullis described Lindsey as sounding distressed and distraught. PCR Tr. 169. Since ne claimed he left the office at noon, he thought the tape was made within the hour before the shooting. PCR Tr. 169-170. Tullis stated that the tone was not angry or agitated, but emotionally down and upset. PCR Tr. 170. Tullis recalled retaining the cassette tape for a period of time. PCR Tr. 170.

Tullis described providing his notice of appearance to the Sheriff, Solicitor, and hospital and was counsel of record for a short period of time. PCR Tr. 171.

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[33] This motivation was not developed by the State at the trial.

Subsequently, the Public Defenders Office became counsel. Tullis recalled contacting Mr. Bartosh and telling him that Lindsey had called his office, that a tape existed, and he was the first person to talk to him when he was released from the hospital to the detention center. He also stated to him that he could be a possible witness in the case. PCR Tr. 171. He stated that he was removed from the case.

Tullis said he later provided the audiotape to the Public Defenders Office. PCR Tr. 172, ll. 15-18. Tullis also stated that he was provided some suicide notes. Tullis said that Lindsey had been shot by officers and then tried to commit suicide by shooting himself in the head. When Tullis visited at the Center for the first time, Lindsey was bandaged and bleeding. Still drugged from the surgery, Lindsey told him he had been bashing his head against the cell concrete wall, the stitches had come lose and he was attempting to kill himself. PCR Tr. 173. After he reported it, Tullis stated they put Applicant on suicide watch. PCR Tr. 173.

Tullis also declared he received notes from family members about an earlier incident when Lindsey threatened suicide weeks before the incident. PCR Tr. 175. Tullis stated that he handed the notes over to the Public Defender. PCR Tr. 175. He felt the Solicitor's Office was aware of the existence of the notes and that he had turned them over to the Public Defender. PCR 176.

Tullis indicated that he was not contacted about testifying, but inquired about it as the case was proceeding.[34] He felt surprised because he thought he was the best witness as to the state of mind and involvement.

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[34] Note that Tullis was on the witness list by the Public Defender's Office. ROA 150.

On cross-examination, Tullis recalled that he had received the letters from the family immediately after the shooting. He had reported the jail incidents on October 1, 2002. PCR Tr. 181.

Tullis admitted that he was subpoenaed by the Solicitor's Office on May 21, 2004.[35] PCR Tr. 182. He said he provided the records to the State. PCR Tr. 183. However, he did not know what he provided to the State then, except he felt it was everything he had in possession of his files at that time. PCR Tr. 184. As to the information provided on his worksheet (Applicant Exhibit 13), he did not recall when that was prepared. PCR Tr. 185.

Tullis asserted that some weeks before the incident, he learned that Applicant had been denied access to his children. However, he had no notes about that meeting. PCR Tr. 187. He was aware that the court had issued an "order of protection" just days prior to the incident which ordered him not to have contact with his wife. PCR Tr. 187. Tullis stated Lindsey never contacted him about advice concerning the impact of the order of protection. PCR Tr. 187-88.

As to the message on the answering machine, Tullis attempted to clarify that he did not review the machine until the day after the incident after he learned of the killing the night before. he felt it was probably left the day before, doubting the call was made the next day since he was unable to see him while he was in intensive care. PCR Tr. 189. Tullis also claimed that although he had provided the tape to the Public Defender, he advised the prosecution of it. However, he never provided the prosecution with any copy of the audiotape because he asserted that it was not in his possession when the subpoena was made because he had already given it to the defense.

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[35]On redirect, Tullis indicated that he did not recall being subpoenaed. PCR 195-196. However, he recalled that he would not have had anything to turn over as a result of the subpoena. PCR 196.

PCR 190.

Tullis agreed that when he prepared the information sheet, there was no discussion that he was being deprived of visitation rights. PCR 191. To the contrary, Tullis thought at that time when Lindsey and his wife came into his office that they were trying to work it out, but the meeting was in anticipation of a divorce or separation. Tullis, however felt that closer to the September incident things had changed. He noted that Lindsey was having relationships with other women, felt he wanted to get back with Nell, but was aware that she was anticipating divorce proceedings. PCR 191. Tullis stated that Lindsey's impressions were not always because both Lindsey and Nell were involved with other people and she did not want to be married to him any longer. PCR 192. Tullis felt the children were being used as a pawn in the adult relationship. He agreed though that there were a series of incidents involving Nell in August 1996, October 1996, February 1999, August 200 and December 2001. Oddly, Tullis reported that Nell would come and pay his fees in representing Lindsey in those incidents.

Tullis admitted that he was no longer practicing law and been disbarred. He stated that he was still a lawyer in May 2004 with an office in Spartanburg. He stated that he did not come to court while the trial was going on, allegedly because he thought he would be a witness in the case and would have been sequestered. He was aware of the trial.

Tullis stated that he spoke with Bartosh and Ms. Quimby as the case was going on. Although he let them know he was available and ready to testify, he did not ask them why he was not being called as a witness or what their defense was, such that his information might not have been germane to their theory of the case. PCR 194-195.

On re-direct, Tullis confirmed that Lindsey had a family court dispute ongoing with the

grandparents at the time over the custody of the children. He stated that matters he had with respect to that dispute were still protected by the attorney-client privilege, including letters in that action. PCR 196. As to the timing of the taped call, he recalled that Lindsey was taken into custody immediately after the shooting. He suggested that at that point of time he would not have had the ability to make phone calls given his medical care and his arrest. This suggested to him that the call had to have been made before the incident. Tullis stated that Lindsey had never been convicted of a criminal domestic violence charge against Mrs. Lindsey or anyone else. PCR 198.

This Court finds that the PCR Testimony of Social Worker Vogelsang Presented The Particular Dangers of Presenting Family Background Testimony concerning Marion Lindsey.

<u>Jan Vogelsang - Social Worker</u> (PCR Tr. 481-594)

Jan Vogelsang, a clinical social worker with expertise in bio-psychological assessments, testified that she conducted such an assessment of Marion Lindsey. She testified that as a part of the assessment she interviewed the Applicant, Virginia Lindsey, Bessie Smith, Steve Pilgrim, Timothy Sims, Patsy Burton, Robin Pilgrim (Keith), Lenora Topp, Rod Tullis, Dr. Melikian and Dr. Brawley. She also declared she had sat in court and heard testimony of the same. PCR Tr. 495. She described records she reviewed from Ms. Topp and Virginia Lindsey, including medical and criminal domestic violence records, of Bessie Smith (mental health and CDV offense), of Steve Pilgrim (mental health, prior crimes, and medical), of Tim Sims (birth, school, and SCDC records), and of Robin Pilgrim (medical, prison, and mental health and prison visit). PCR Tr. 496. She also reviewed Paul Lindsey's court order declaring death [from drowning disappearance at Jocassee]. PCR Tr. 496.

Concerning the Applicant, Ms. Vogelsang stated she reviewed his request for legal aid,

his medical records, his school records, SCDC records regarding Stafford Wilkens incident, Lindsey's recent letter to the victim's mother, William S. Hall - DMH records, reports of Dr. Narayan and Dr. Musick, and his mental health records. PCR Tr. 496-97. She also read the testimony of family members, Mr. Burton and Dr. Melikian. PCR Tr. 497. Vogelsang testified that she also visited the community and created a family tree. PCR Tr. 497.

Concerning the family tree, Ms. Vogelsang testified generally about the existence of various members. She identified the existence in some members of "substance abuse, possession or distribution", "any mental, emotional, or behavioral impairments", "sexually inappropriate behavior", and "charges of criminal domestic violence, assault, or having served time in prison." PCR Tr. 502. She noted that the members of the home had very difficult childhoods with issues of family poverty, particularly after Smiley left. PCR Tr. 502-03. Vogelsang opined that this was abject poverty. She also asserted that their grandfather, Porter Pilgrim, was sexually inappropriate with some boys in the family. PCR Tr. 503. She opined that some fo the experiences that had been described in the testimony of the aunts and uncles with whom Lindsey lived played a significant role in the things Lindsey experienced growing up in the household. PCR Tr. 504, ll. 20-24.

Vogelsang related that his mother Virginia was abandoned by her father - a theme within the family - and raised by an ill parent. Vogelsang questioned her parenting skills. PCR Tr. 505. As to Lindsey's father, Leon McDowell, she opined he had abandoned Applicant and never acted as a father and had his own family.

She stated that Mrs. Lindsey had been married to Claude with 3 children and had two miscarriages. Applicant was born in 1973 two years after she lost her seven month old daughter.

Mrs. Lindsey had no intervention on the death or counseling. She stated Virginia changed after the death, working and would go out and party and was not involved in parenting. PCR Tr. 506.

She stated Lindsey was raised by his grandmother with mostly an absent mother and absent father. PCR Tr. 506. She opined no one was present to help him through the developmental stages. However, Steve Pilgrim was identified as the hardest working and cared deeply about Applicant, but claimed he was not there a lot. PCR Tr. 507. Virginia was working 2nd or 3rd shifts in the mill. PCR Tr. 507.

As to the home living conditions, Vogelsang described that, at times, there were 10 people living in the home, sometimes a 4 bedroom home in rough neighborhoods where conditions were not good, sometimes without indoor plumbing and lacked heating. PCR Tr. 507-08.

Vogelsang identified photographs that she would have used at a trial. She suggested the early photos of Lindsey would have helped to humanize him. PCR Tr. 509.

She opined that Lindsey had traditional medical care, though she did not see his medical records. PCR Tr. 509. She stated that he saw Dr. Henderson and early critical care would by anecdote, involve being carried to the police then to the hospital. She described his injuries as the car accident, the ingestion of kerosene, and falling off the porch. PCR Tr. 510.

She testified generally about child development. PCR Tr. 510-12. She opined that there was no one at home to help Marion through his developmental stages. PCR Tr. 512. She opined that young boys need a strong male adult. She suggested the lack of a positive role model creates a higher risk to end up in trouble. PCR Tr. 513. This resilience to bad things happening in their lives is learned through child development. PCR Tr. 514.

She opined that Lindsey did not have any strong male figures in his life. PCR Tr. 514. While his family in the home loved and cared for each other, she opined Lindsey was not prepared to face adverse and violent situations and to resolve problems other than through violent options. PCR Tr. 515. She opined there was a lack of guidance and mental health intervention where recommendations were not followed. There were also within the family situation the existence of divorce, separation, and abandonment, as well as emotional abuse and neglect. PCR Tr. 516. She found that the care of children was not the primary concern. PCR Tr. 516. She found a lack of role models and consistent care giving, as well as an inability of trust in relationships. PCR Tr. 517. She also opined there was "worry about violence in the home", "impaired cognitive functioning", "inability to deal with aggressive feelings" (shown through use of guns, knives, and fists), repression of feelings (family representation to mental health stuff that everything is O.K.), and a "sense of helplessness" (poor problem solving skills). PCR Tr. 517-18.

She opined that outside of home, Mr. Burton was a strong male influence on Lindsey. She opined Burton and his mother and their influence may have made a difference in his life and suggest the reason why his school records between 2nd and 6th grade reflect courtesy, respect for authority. PCR Tr. 518.

She opined that Applicant lived everyday with "a threat of harm", which makes children anxious. She asserted that the relationship with Burton gave him his strengths and gave him hope that he could provide. However, she felt his wanting a different type of family resulting in his guessing how to do that by giving material things. PCR Tr. 519-20.

Vogelsang opined that the community Applicant lived in became exposed to cocaine and

crack. She asserts that when he was around 11 that he sees his family dealing and using drugs. PCR Tr. 520. Although there were programs in the community, such as Scouts to help his learning and mental health issues, they did not use them. PCR Tr. 521.

Concerning his schooling, she did not see the disciplinary or conduct problems in his records that the DMH evaluators had the impression of concerning misbehavior, although he did fail the first grade and had speech problems. PCR Tr. 521. She did find that Applicant had slapped a girl, got into a "wrestling match" with a boy when he was thrown and had to get medical treatment for an elbow, and had a fight with another over a racial remark. PCR Tr. 522.

However, Vogelsang asserted in the eighth grade, Lindsey "succumbed to the streets" when Burton left, his mother started 3rd shit, he became absent from school and his brothers got involved with drugs, driving cars, buying jewelry and having girlfriends. PCR Tr. 522. After repeating 8th grade then placed in ninth grade, he quits school after becoming "a street person." PCR Tr. 522.

Vogelsang stated Aunt Robin was the only member to graduate from high school but was not at home traveling and eventually getting addicted to crack cocaine. PCR Tr. 523. The others in the house including Willie who went to prison for 15 years for killing, Paul who got int rouble with drugs and Bessie, Robin, and Steve who got mental health treatment. PCR Tr. 524.

She felt Lindsey would retreat to neighbors homes to avoid the chaos and found him lonely and scared. PCR Tr. 524. She also asserted that when his mother got off work she frequently went with her mother to play bingo. PCR Tr. 524. His uncles were described as either beating on him, threw his cat into a heater, hit their girlfriends, revealing a powerful threat of harm. Further, he was claimed to have seen his mother shoot at Mr. Sims. Vogelsang stated

that Lindsey had no oasis for peace unless he went to his neighbors or Mr. Burton. PCR Tr. 526.[36]

Vogelsang stated that Virginia had a volatile relationship with Mr. Sims - evidenced by fighting and arguing all the time. She stated that one time she shot at him several times and missed which Applicant witnessed. PCR Tr. 527. She also recalled the family all had guns. PCR Tr. 527.

Concerning his suicide attempts, Vogelsang described the event which led to his hospitalization. She stated that Fred returned to the home demanding attention and Applicant needed attention from their mother. The brothers got into a fight and Lindsey went into the bathroom took between 50-60 over-the-counter medicine (Tylenol, Nuprin). PCR Tr. 527-28. At the hospital, Applicant told them initially that his mother told him that she did not love him and that they were going to send him to a boys home which caused him to get upset and want - at that moment - to take his life. PCR Tr. 528. However, Vogelsang reported that his mother told the staff he was stable, but they were looking at his recent fighting conduct school. His mother told them about his temper outbursts. Applicant reported to them that he was seeking attention of his mother and "he wanted to leave that place." PCR Tr. 528. Vogelsang stated his mother resisted the recommendations for further assessment and outpatient treatment. PCR Tr. 528-29. Vogelsang described the "red flag" that suicide gestures of a child and the need to stay in treatment. PCR Tr. 529.

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[36] Vogelsang asserted that Paul shot at 3 cousins, had CDV charges, was involved in drugs and went to prison. She stated Willie served 15 years for ABHAN and was convicted of CDV. As to Robin, she was convicted of crack and serving a sentence from charges reduced involving an assault, kidnapping and robbery. PCR Tr. 526.

Vogelsang then reviewed the history of suicide "attempts" of Bessie, Robin, and Virginia and declared that the mental health center was not aware of their history when they saw Applicant or that the family members get depressed and take things ending up in mental health facilities. PCR Tr. 530. She felt the center, unaware of the family history, had little to work with, but they requested further evaluation. PCR Tr. 531.

Vogelsang next described the cultural practice of "roots." PCR Tr. 532. She distinguished its use between some families where it is taught and explained as part of their heritage and other families where there be mental illness and violence and this practice further confuses. Vogelsang found a note in the doctor's records treating Steven Pilgrim on July 15, 2002 who was taking Xanax asserting that he was anxious and feared his wife was "putting a root" on him and putting something in his drink or food claiming it caused his penis to draw up inside him. PCR Tr. 533, ll. 14-25. Vogelsang noted that Steve was the person Lindsey looked up to. She reported Steve had previously shot a woman in an earlier relationship and the mental health records reported his conflicts with his wife. PCR Tr. 534.

Vogelsang reported on direct that Lindsey was confused by the practice of roots.[37] She reported that the use of "magical solutions" in a confusing and chaotic family environment only confuses things. PCR Tr. 534-35.

Vogelsang summarized Dr. James Garbarino's theory on psychological battering of children and asserted she would have used his model if she would have testified in 2004 with visual aids. PCR Tr. 535. She stated that there was rejection as revealed by his father's

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[37] On cross-examination, Vogelsang admitted she had no reference to discussing "roots" with Lindsey in her interview notes from November 2009. PCR Tr. 575-76, 585.

abandonment and his mother's alleged lack of involvement in his life. She points to claims that his brothers would leave with their fathers and Applicant would be left behind. She said that suggested his entry into "adulthood" with a fear of rejection and over-reactivity to rejection. PCR Tr. 536.

Another Garbarino factor was "isolation" which she opined there was evidence of minimal exposure to church and scouts, although she claimed he tried to play football, but quit when no one would come to his games. She also saw "exposure to negative behaviors within the home" and other than Mr. Burton, his mother and Steve. PCR Tr. 536

As to "terrorism", she opined he witnessed his uncles fighting, beating up wives and girlfriends, and his uncle throw his cat into the fire. As to the "ignoring" factor, she opined the parents failed to notice his needs for school, mental health, protection and supervision. PCR Tr. 537.

As to the "corruption" factor, she opined it was shown by his uncles' violence, his mother shooting at her boyfriends tires and boyfriend, and his uncle's profit from drugs. PCR Tr. 537. She suggested that these factors mis-socialized the child. PCR Tr. 538.

Vogelsang reported that Lindsey became involved in the drug trade around age 12 as a courier for his uncles. PCR Tr. 538. This initially provided him some money, and Vogelsang claimed he used the money to help pay for his grandmother's medicine, gave money to his mother, yet also used it to buy clothes and shoes for himself. PCR Tr. 539.

Concerning his school performance, she opined he had potential with extra help and tutoring. PCR Tr. 539. But opportunities were not present.

Vogelsang described Applicant's relationships with women as erratic and chaotic. PCR

Tr. 540. An early relationship with an unbeknownst cousin and breakup demanded by his mother caused Applicant to become very sad and upset. She further equates his mother's alleged rejection prior to the pill injection at age 15.

Vogelsang describes that Lindsey began dating and when rejected becomes upset and over-reactive. She describes the shooting of Stafford Wilkins after he was in a "long-term" relationship with Stephanie, causing him to be sent to jail. PCR 540.

Concerning the victim Nell, Vogelsang reported that the relationship began at age 22. She found "incredible instability" in the relationship. She said the relationship with Nell began while living with Stephanie. He has a child with Nell. Although Vogelsang opines that Applicant loves being a father (PCR Tr. 541, ll. 14-15), she describes breakup where each returns to their mother, arguments and violence resulting in at least one conviction and multiple arrests. PCR Tr. 541. They were married in 1997 after he was released from jail after the Wilkins incident. A conflicted relationship, they have a second child in 1999. She reports that while Lindsey gets jobs for a period, then reverts back to drug dealing "where he can get the money he needs to provide" for things he thinks he wants his family to have. PCR Tr. 542.

Vogelsang found that he wanted to be a father, but lacked knowing about fatherhood. She denied any knowledge that he ever abused or hit his children. PCR Tr. 543. he only found that his role was to give them things. PCR Tr. 543.

Vogelsang reported that there was, however, violence in his relationship with Nell. Though one CDV conviction, she had made other reports of violence or aggressiveness toward her. PCR Tr. 543.

Vogelsang stated the drowning of brother Fred in 1998was a major loss, even though this

was the brother he fought with. PCR Tr. 544. They had gotten closer and worked in Virginia together. After his death, she opined he got sad and depressed in a "normal grieving process." PCR Tr. 544.

She opined that Lindsey lacked an understanding of fidelity and being committed in a relationship. Vogelsang described a family pattern of marriage and additional involvement in other relationships. PCR Tr. 545. Vogelsang, however, stated this did not apply to Nell though. However, Vogelsang opined that "he became extremely depressed over the loss of his boys" and Nell. Vogelsang pointed out that is when he threaten to take his life - no one called EMS or took him to the E.R. and "just left him there." PCR Tr. 545.

Vogelsang re-stated the major factor in his life was the family system and behaviors he had witnessed through his development years. She declared this affected his judgment, impulsivity, insight, "and placed him at a higher risk to end up committing a serious act." PCR Tr. 547. she opined that had she been a witness in 2004, she would have testified whether Bessie Smith had attempted suicide or suffered mental illness based upon her knowledge of its foundation, although the Respondents objected to it under hearsay. PCR Tr. 549-550.

On cross-examination, the dangers inherent in presenting social history testimony was revealed. First, Vogelsang admitted that she misstated on direct that Uncle Willie has killed someone, when in fact it was only an assault. PCR Tr. 556-57. Further, she admitted that Lindsey was not identified in the pill incident as attempting suicide by the hospital, but that it was a gesture, that he had no suicidal ideation, did not realize the medicine was toxic and that he did it to get attention - implicitly <u>not</u> to kill himself. PCR Tr. 557-58.

Vogelsang again corrected herself concerning the incident three weeks before was <u>not</u> an

attempted suicide, but was only a "threat." PCR Tr. 559. She argued there was no attempt or overt act on his part and suggested conflicted evidence that he had a gun, contrary to the family's earlier testimony. PCR Tr. 559. (See PCR Tr. 424, 440, 476-77).

Concerning her lack of a written report, Vogelsang declared she is not required to do a report unless requested. she denied that had she made a report that she would not have made factual mistakes. PCR Tr. 561. She admitted that as a member and past president of the National Association of Social Workers of S.C., that they have a national policy in opposition to the death penalty, but declared she did not vote on the policy. PCR Tr. 562.

Vogelsang then described what matters she reviews as an expert witness in child custody cases. She did not recall trial testimony that Lindsey had given his child alcohol at trial although she had admitted that she read the trial testimony. PCR Tr. 563. See ROA 1820 (Lindsey gave son a beer in a baby bottle). She suggested it would have stood out and it would have been a concern for her in a family court recommendation situation. Similarly, whether an individual carried a weapon, had shot at someone, sold drugs, and had multiple incidents of violence toward his wife would affect her recommendation. Vogelsang declared she would not have recommended visitation for that person, although she had earlier declared "from all sources he was a good father." She confirmed in a child custody situation - with her information - she would have been hesitant and would have recommended that there be no visitation without supervision from someone from the Court present. PCR Tr. 565, ll. 7-20.

Ms. Vogelsang admitted that she did not speak to victim's family members who had long-term relationship with the Applicant and his family or the mother of Lindsey other child. PCR Tr. 567-69.

Vogelsang admitted that his mother and grandmother - as care givers - had taken Lindsey to doctors for regular checkups. Vogelsang admitted that Steve Pilgrim was a person who was not threatening and a workaholic and supporter of the family. PCR Tr. 573. She stated though that he was not there for "child development", pointing out that he "believed in practice of roots" and "shot a girl", though Lindsey did not witness it. PCR Tr. 574.

When asked about what Marion had told her about the practice of roots in the home (during her November 2009 interview), she asserted various matters including it was confusing to him, made him mixed-up between a difference between roots and home remedies, confused him about family members putting a root on people in their relationships to make them feel sick or die.[38] However, when asked to point out in any of her notes of the interview, she declared - prior to reviewing the notes - that she "may not have written it down." PCR Tr. 575. When she reviewed her multiple page notes, she declared nothing was in there, although she remembered the conversation. PCR Tr. 576.

Vogelsang declared Lindsey "succumbed to the streets" at the eighth grade, as a runner for his uncles, but then could not clarify which uncle nor resolve that Willie was in jail at that period of time. PCR Tr. 578. she then switched it to drug dealing cousins rather than the uncles. PCR Tr. 578-79.

She confirmed that she failed to interview Stafford Wilkins, who Lindsey had shot. She stated she was unaware that Wilkins stated he thought Lindsey was his friend and did not know

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[38] The Court finds that Ms. Vogelsang's testimony on this "roots"point highly suspect. Additionally, when challenged on cross-examination concerning this conversation, it is telling that the Applicant was not called to corroborate it in this civil setting where he has the burden of proof.

why he shot him, admitting that she had not read his trial testimony. PCR Tr. 579.

Concerning her reliance upon Rod Tullis' testimony and interview, she did not recall or know that it conflicted with the defense lawyer's testimony. PCR Tr. 581. See PCR Tr. 39-40. She also confirmed that when she interviewed Lindsey in November 2009, he never told her that he called his lawyer (Tullis) on the day of the crime and threatened to kill himself. PCR Tr. 585.

In suggesting a reason for the crime, she confirmed that he had declared to the EMS that he had shot her because she had a boyfriend - not because she would not let him see his children. PCR Tr. 586. She confirmed at the time that he was under an order of protection and not to see his wife, though she could recall how long before the incident it had been in place. PCR Tr. 587. she confirmed that after the order was entered, Lindsey would not have supposed to have seen his children or have contact with them. PCR Tr. 587.

While she had stated he had provided support for his children, she confirmed that he did not always provide them clothes, food, or try to have visitation. PCR Tr. 588. To the contrary, he had asserted in records that he was not providing any support 4 to 5 months prior to the incident. PCR Tr. 588.

Vogelsang also confirmed that Lindsey had a record of violence, not only toward Nell, but toward other females, including those he claimed to love. PCR Tr. 589. He also had indications of violence toward males.

Vogelsang stated she had talked with Lindsey about violent acts while dealing drugs, including fights and shootings. PCR Tr. 590. She described Lindsey as "controlling", but also scared half to death concerning the drug sales. PCR Tr. 590. She stated he had an "extremely overactive behavior involving violence." PCR Tr. 591, ll. 1-2.

Vogelsang also confirmed that his risk factors made it a high risk that he would end up committing the very act he committed. PCR Tr. 593. She also admitted that the risk factors she found are not treated in the prison system. PCR Tr. 594.

ANALYSIS

The Investigation Concerning the Social History of Lindsey and the Family Members Was Reasonable.

Initially, the underlying issue concerns whether the investigation of the social history of Lindsey and his family was reasonable. Within his memorandum, Applicant does not point to any particular piece of evidence that critical to the defense and mitigation, but merely suggests that it was not done in the depth that he thinks counsel should have done. Although the investigations may not have included Ms. Topp's suggested preference of three years (or the claims 1000 hours of the ABA average), it uncovered the matters necessary for the defense.

A review of the trial testimony of Virginia Lindsey (guilt and penalty), cousin Chris Wilkens (guilt and penalty) and the penalty phase testimony of fried Bill Burton, Leon McDowell and Steve Pilgrim reveal that the essential family background was revealed to the jury. Importantly, concerning the depth of the investigation, the summaries of the interviews that Ms. Topp had with Marion Lindsey and Marion Lindsey's mother in 2004, buttressed by Ms. Topp's own PCR testimony about what she learned in 2004 are virtually in the same detail that the post-conviction evidence from the family members and Jan Vogelsang's testimony in the PCR hearings.

Trial "counsel have a duty to make reasonable investigations or to make a reasonable decision that makes investigations unnecessary." Strickland, at 691, 104 S.Ct. 2052. "In assessing counsel's investigation, we must conduct an objective review of their performance,

measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." *Wiggins v. Smith,* 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (internal quotation marks and citations omitted). "In assessing counsel's performance in this context, we look to how counsel prepared for sentencing, what mitigating evidence counsel accumulated, what additional leads counsel had, and what results counsel could have reasonably expected from those leads." Blanton v. Quarterman, 543 F.3d 230, 236 (5th Cir.2008) (citing *Neal,* 286 F.3d at 237). Courts must consider "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins,* 539 U.S. at 527, 123 S.Ct. 2527.

Lenora Topp made detailed summaries of her interviews with Lindsey and Virginia Lindsey and these written interviews reveals virtually identical data to a significant portion of Social Worker Jan Vogelsang's PCR testimony. Respondent's Exhibit 2, 3, 4. The Applicant has failed to point out any new and critical data revealed post-trial. A review of the data received in 2004 by the defense team reveal that they were aware of Virginia Lindsey background in detail as revealed first from Lindsey and then from Virginia, including her limited education, children and their different fathers, involvement of her mother in raising the children, her employment as a shift worker and not at home in evenings to help with food and homework, Lindsey's lack of an active father to interact with, and Lindsey's opinion that the family was poor. Respondent's Exhibit 2, 3, 4. Topp and the defense team also were aware of Virginia's 8 siblings. They were aware that all five of Bessie Smith's children - in contrast - had completed college. Respondent's Exhibit 2 -4. From Virginia, she revealed that injuries that Marion has sustained while growing

up - being run over by a car driven by her brother Paul when Lindsey was 19 months old, Lindsey falling and hitting his head frequently, Virginia also reported to Topp that Lindsey had tried to commit suicide by swallowing pills from the medicine cabinet and the reason that he was upset with her after a fight with the brother and she told him that she would not do anything for him again and had stayed in the hospital one week. Respondent Exhibit 4. Virginia had also reported to Topp that Lindsey had raised his younger brother Tim and that her son Fred died while canoeing and was never found. Id. She also reported to Topp about the incident when her brother threw Lindsey's cat into the furnace. She also described to Topp about Lindsey's earlier relationship with Stephanie Petty who they liked and got along . Id. Concerning the relationship between Nell and Lindsey, Virginia had reported that she like and loved Nell, thought Nell's mother had too much influence on her and when there was an issue with money, there were problems in the relationship. Virginia stated to Topp that she knew that Lindsey sold drugs and that he spent money on Virginia and her family during those times.

In Lindsey's interviews with Topp on April 16 and 25, 2004, he reported similar details about the family background. Respondent Exhibit 2, 3. Particularly he noted his knowledge of his father Leon McDowell and referred to him as a "sperm donor" who did not want to get involved with him and Lindsey was bitter toward him. He noted to Topp that his other brothers would go on activities with their fathers and he was left out. Id. He noted that his mother struggled while he was growing up and that they did not have new clothes and had a wringing washer machine and ruined a new one through overuse. Lindsey reported to Topp that his brother Fred died in a canoeing accident when he was with a friend who survived, but Fred's body was never found. He reported that Fred's death affected him for at least three years. Id. He stated that he and Fred used

to fight, but they became friends and worked together in West Virginia until Lindsey became homesick and moved back. Lindsey felt that he raised his brother Tim Sims who would follow him everywhere and that Tim's father was the only father figure in Lindsey's life. Respondent's Exhibit 2,3.

Lindsey also reported to Topp that he did not know his sister Vanessa who was killed in a car accident. In describing growing up, he felt his family was very poor and that they could not afford to eat anything except bologna and that he currently cannot eat it.

Lindsey also reported to Topp that when he was 25, his father's children started to hang round him, although he claimed he was not selling drugs at the time. He noted that half-brother Leon McDowell also took out an assault warrant against him and that family considered him an outsider. Lindsey reported that he did get along with Claude, Marshall Martha Sammy and Kathy Lindsey. Respondent Exhibit 2, 3.

Lindsey also provided Topp a summary of his educational history through 10th grade when he quit school to work and help his mother, Id. He also described his recollection of disciplinary actions taken against him at school, including slapping a girl, being hit in the eye in junior high after a racial epithet but having nothing done to the perpetrator after he reported it to the baseball coach though he was suspended for a week.

Lindsey reported to Topp that none of his family finished school. He stated to her that he played football in junior high , but quit when no one would come to watch. Respondent Exhibit 2, 3.

Lindsey advised Topp that he had two traumatic times in his life, pointing out the incident when his cat was thrown into the heater alive and when he tried to commit suicide when he was

12 years old. Id. He also described running away from home when he was 7 because his mother would not let him go somewhere , but returned home when he got hungry.

Lindsey described that after he quit school, he started working with his brothers at Beecher's Plastic Co.. He described having a bad car accident when the tire blew and the car flipped and he was out of work for a year due to injuries,. He claimed that he lost his memory, broke his hip and gad facial surgery. As a result of the totaling of the car, he stated his brother also lost their jobs. He then went to work at Burger King where his brothers worked until he had words about 1 ½ years later with a female manager. After being out of work a month he then worked at Union Cloth in Spartanburg, but found it boring and had to work with a lot of gossiping women and left there after 6-7 months. Id .

Lindsey told Topp that he then stayed at home and took care of Claude's children by cooking and cleaning so that Claude and his sister could work.

Lindsey described his relationship with Stephanie Petty, working with his brother Fred in West Virginia and returning home.

Lindsey claimed that he partied, drank beer but never did drugs.

Concerning Bill Burton, Lindsey said he was his mentor while growing up and Burton got him a job at his plant when he was plant manager. He stated in his youth he would go fishing with Bill and met his mother . At the plant for 2 years, Lindsey said it was the best job he ever had. He stated that one evening he agreed to work overtime and described that he did all the work while others fooled around with girls. The next day, he stated that he was confronted by the supervisor as to why the work was not completed and when he advised the supervisor that he was the one who did it all, he felt he would not listen to him and Lindsey "jerked Mr. Green up by his

shirt" and he was fired. He stated Burton tried to get his job back, but there was a no-rehire policy.

Unable to get a similar job, Lindsey stated that he started being a drug courier again for cocaine and crack - though he claimed he never used it. Id.

He described to Topp his various jobs after that with Thomas and Betts in Inman, Hudson International.

He also described his life with Stephanie who had moved in with them and her father threatening to kill him, but then would come over on weekends.

Lindsey described his other job at Budweiser as a fork lift operator until he was arrested for a traffic ticket and lost his job after he stayed in jail . He next worked at a body shop until it was shut down.

Lindsey also described shooting Stafford Wilkins in 1994.

Lindsey, during the interview on April 16, 2004 also went into detail about his relationship with Nell Lindsey. Within that part of the interview he described breaking up with Stephanie after Nell became pregnant, he stated that he would also take care of the children. He went into detail about their relationship leading up to the shooting. He told Topp that hee had written suicide notes after Nell had moved back with her mother and told him that he could not see his children after a domestic violence order was taken out Respondent's Exhibit 2, 3. He claimed to have lost weight from 225 to 160 in four weeks and was depressed all the time. He described his version of the day of the shooting including going to his brother hoping he would stop him , seeing Nell's cousin's car seeing Nell and then chasing them, not recalling the shooting , but recalling putting his gun to his temple and hearing a voice tell him to put the gun

down, then being shot. Respondent Exhibit 2, 3.

This Court finds that the investigation concerning the social history of the family was constitutionally adequate. In addition to this information, the 2004 defense team was aware that there had been mental health concerns for Bessie Smith who had tried to commit suicide, and Steve Pilgrim who at least had nerve and anxiety problems.

"[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying heavy measure of deference to counsel's judgments." Wiggins, 539 U.S. at 521-22. "A defense attorney is not required to investigate all leads ...." Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir.1994).[39] "A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance." Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir.1992). "The attorney's decision not to investigate must not be evaluated with the benefit of hindsight, but accorded a strong presumption of reasonableness." Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir.1985).

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such

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[39]Rejecting a per se rule of ineffective assistance where counsel does not consult family members, the 11th Circuit held in Williams v. Head, 185 F.3d 1223, 1237 (11th Cir.1999), that counsel's investigation was reasonable when he did not interview the defendant's sister or father, the latter because the defendant had not lived with him for very long. '[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary.' Strickland [v. Washington,] 466 U.S. [668] at 690-91, 104 S.Ct. [2052] at 2066 [(1984)]. Accord, Davis v. State , 9 So. 3d 539 (Ala.Crim.App.,2008).

information." Strickland v. Washington, 466 U.S. at 691. "The reasonableness of the investigation involves 'not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." ' St. Aubin v. Quarterman, 470 F.3d 1096, 1101 (5th Cir.2006), quoting in part Wiggins, 539 U.S. at 527.

Applicant has failed to show what material counsel was unaware of that was critical to the defense, just that in depth evidence was not presented. However, he has failed to show that counsel's investigation of the family background was unreasonable. With the further information about the family background, the psychiatric diagnosis is similar, the information provided by and to the social expert is similar to what the 2004 defense team was aware either by their own or Ms. Topp's interviews. The assertions otherwise must be denied.

More clearly, 6th Amendment prejudice has not been shown. Applicant has not pointed to any new information or a gamechanging revelation that creates a reasonably probability of a different outcome. Bean v. Calderon, 163 F.3d 1073, 1081-82 (9th Cir.1998). To the contrary, it is virtually the same information. The Applicant has failed to show that further investigation of the family history undermines confidence in the outcome of the case and creates a reasonable probability that the result of the proceeding would be a life sentence.

The Failure to Employ A Clinical Social Worker Does Not Require A New Trial.

It is undisputed that defense counsel in 2004 did not retain a clinical social worker such as Jan Vogelsang in 2002-2004. Although the decision not to retain a social worker is not reflected in the record due to counsel's death, This Court finds that the failure does not amount to deficient performance or prejudice under Applicant's argument.

As to deficient performance, Applicant appears to assert that the retention of a social

worker is required in all capital cases. His reliance upon the ABA Standards notwithstanding, the 6th Amendment does not require the retention of any particular expert in every case. See Durr v. Mitchell, 487 F.2d 423 (6th Cir. 2007) (no requirement to employ social worker and no prejudice for failure to do so. Similarly in Wiggins, the Court did not hold that there was an error in retaining a social worker, but the it was not a reasonable investigation to follow up on leads that would have lead to a mental health issue. Cf, Council v. State, 380 S.C. 159, 670 S.E>2d 356 (2007) (counsel ineffective based upon a failure to investigate and present, including retaining a social worker where funds were made available).[40] However, the Court need not address deficient performance where the Applicant has failed to satisfy the prejudice prong.

A review of social worker Vogelsang testimony reveals that it was almost a reading of the reports completed by Ms. Topp in 2004. The Applicant has failed to point to the differences other than she could have presented hearsay testimony to support that Bessie Smith was hospitalized with a alleged attempted suicide and explained that Steve Pilgrim had allegedly had mental health issues as well as a criminal record. The remainder of the focused testimony was known by counsel and reasonably understood by the jury after the testimony of the family and

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[40] This case is decidedly different than the facts in *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004), in which the Court, relying on *Wiggins*, found counsel's investigation was unreasonable. In *Von Dohlen*, the defense psychiatrist at trial opined that the defendant suffered from adjustment reaction disorder. However, upon learning additional records existed, and after having reviewed the additional record in the subsequent PCR action, the psychiatrist testified that his diagnosis would have been "major depressive episodes with severe symptoms of anxiety and possible prepsychotic features." *Von Dohlen*, 360 S.C. at 605, 602 S.E.2d at 741. Von Dohlen contended in his PCR action that trial counsel "fail[ed] to adequately prepare and present evidence in the penalty phase of the trial that he suffered from severe, chronic depression, a major mental illness, at the time of the murder." 360 S.C. at 606, 602 S.E.2d at 742. This Court agreed finding that the medical records that affected the defense expert's opinion were available at the time of trial but not provided to him.

Dr. Melikian. Lindsey was raised by his mother and an absent father in a poor family. The Applicant has failed to pinpoint what difference any of the information Ms. Vogelsang laboriously testified about would have impact upon a jury in a manner that would undermine confidence in the verdict under Strickland.

Applicant failed to prove that there is a reasonable probability that the jury would have concluded that "the balance of aggravating and mitigating circumstances did not warrant death." See Strickland, 466 U.S. at 695, 104 S.Ct. 2052. See, e.g., Johnson v. Bell, 344 F.3d 567, 573-74 (6th Cir.2003) (although testimony from family members would have helped to humanize the defendant, the jury could have concluded that he was even more culpable because he had enjoyed a loving family and yet had murdered his wife); Martin v. Mitchell, 280 F.3d 594, 613-14 (6th Cir.2002) (defendant did not show prejudice at the mitigation phase where family members testified about his background and a psychological report was given to the jury); Scott v. Mitchell, 209 F.3d 854, 880-81 (6th Cir.2000) (finding that potential mitigating circumstances were overwhelmingly negated by other evidence about the defendant's background).

Further, as pointed out in the cross-examination, the danger of using a social worker who relies frequently on anecdotal hearsay risks making a difficult case even worse. It would have presented an additional opportunity to focus upon certain errors in her presentation and negative factors related to Lindsey that would make a death sentence even more likely. In the questioning concerning her expertise in child custody matters, she admitted that a person with the characteristics of Lindsey should not have been allowed to have visitation without court supervision, if at all, even though he had to be reminded that there was evidence that Lindsey had feed beer to his baby son in a baby bottle. PCR Tr. 563. See ROA 1820 (Lindsey gave son a beer

in a baby bottle). PCR Tr. 565, ll. 7-20. She was inconsistent on what family members - uncles or cousins - he was running drugs. PCR Tr. 578. She also reiterated Lindsey had a record of violence, not only toward Nell, but toward other females, including those he claimed to love. PCR Tr. 589. In confirming that his risk factors made it a high risk that he would end up committing the very act he committed, she also admitted that the risk factors she found are not treated in the prison system. PCR Tr. 593-94.

"To assess the probability [of a different outcome under Strickland], we consider the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding-and reweigh it against the evidence in aggravation." Sears v. Upton, --- U.S. ----, 130 S.Ct. 3259, 3266, 177 L.Ed.2d 1025 (2010). (finding that a proper prejudice analysis must take into account the newly uncovered mitigating evidence, along with the mitigation evidence introduced during the defendant's penalty phase trial, to assess whether there is a reasonable probability that the defendant "would have received a different sentence after a constitutionally sufficient mitigation investigation"). The United States Supreme Court has stated that there "is no prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker ...." Id. at 3266.

Here, the sentencing profile was not altered by the additional testimony of Ms. Vogelsang. Although she presented a social history of known poverty and lack of a father-figure - known to the sentencing jury, she also confirmed that he had become a controlling and violent person. Against the trial backdrop including the evidence in aggravation, as well as the family mitigation the jury actually heard, the burden of proof has not been met by Applicant. The allegations must be denied.

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

- **Failed to elicit testimony from EMS worker - Joseph Stewart and Vincent Bell - regarding Lindsey's desire to commit suicide after Nell's death.**
- **Failed to interview EMS workers to determine what info and testimony they could provide**
- **Failed to prepare EMS workers to testify in penalty phase.**
- **Failed to ask appropriate questions to elicit admissible info about Applicant's state of mind.**

Memorandum 53-54.

In his eighth argument, he contends that defense counsel failed to present the testimony of Vincent Bell, an EMS worker who treated Marion Lindsey to give the jury a better idea as to Lindsey's state of mind at the time of the crime. He contends that it would have resulted in a different outcome of verdict. This Court finds that he has failed to show either deficient performance or prejudice. This Court finds that the 2004 jury was given similar information. Deficiency and prejudice under Strickland has not been shown.

It is undisputed that the defense was aware of Vincent Bell, as well as Susan Horton and Joseph Stewart as the paramedics who arrived at the scene. They had included them on their listing and summary of state witnesses. State Exhibit 9. 277-279. Counsel had also presented evidence through Dr. Melikian that Lindsey had planned to commit suicide that day shot himself after the incident and told the EMS to let him die. ROA 2013. The hospital records confirmed that he had a head wound. ROA 2013-2014. In the guilt phase of the trial, Officer Godfrey denied that he had shot Lindsey in the head. ROA 1577. Defense counsel Doug Brennan called Jason

Stewart in the guilt phase of the trial as a defense witness.[41] Stewart, an EMS worker, testified at trial , that he arrived on the scene on September 18, 2002 and saw the Applicant with a head wound. Stewart was asked whether Lindsey had said anything to him. ROA 1660-1670. At that point, the state objected that it was a self-serving statement by the defendant and inadmissible. However, the defense was able to present the testimony that Lindsey told him that he shot himself in the head. ROA 1674.

Vincent Bell (Paramedic)

Vincent Bell testified that he was a paramedic at Spartanburg EMS on September 18, 2002 and responded to the Inman Police Department after the shooting. PCR Tr. 97. While he responded to the female, his partner went to Lindsey. When Bell went to Lindsey he was conscious and he was asked questions about what happened. Lindsey initially stated he shot himself and in a follow up question stated he shot himself, let me die, and then said "I shot myself and then I shot my wife."[42] PCR Tr. 99. Bell described Lindsey as not cooperative while they worked on his injuries. PCR Tr. 99. While on route, Bell again asked him what happened and he said "I shot myself and then I shot my wife." When Bell asked why, Lindsey then responded "his wife was fooling around with somebody." PCR Tr. 99-100.

On cross-examination, Bell confirmed that he had given a written statement to the police. (State Exhibit 1). In reviewing the statement Bell confirmed and corrected that Lindsey said "I shot my wife and I shot myself in the head", reversing the order of the shots. Bell confirmed that

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[41]Counsel Brannon testified that he interviewed paramedic Jason Stewart prior to trial. PCR 61. He stated that he interviewed him because he wanted to develop that Lindsey had tried to kill himself by shooting himself. PCR 67.

[42] This version of the incident is inconsistent with the trial evidence.

Lindsey did not indicate that he made any reference to his children as a reason for the shooting, but only that he shot her because she was fooling around with another man. PCR Tr. 103.

Bell stated he was subpoenaed for the trial but did not testify. However, he did not recall speaking with anyone at the trial. PCR Tr. 104.

ANALYSIS

The petitioner has failed to show deficient performance where the 2004 jury was told that Lindsey had shot himself in the head, that the police had not shot Lindsey in the head, that an EMS worker (Stewart) who arrived at the scene was told by Lindsey that he shot himself in the head and that Dr. Melikian stated that Lindsey told her that he shot himself in the head and told an EMS worker to let him die. The only difference in including Bell's testimony is that he was the worker that Lindsey said let him die. It is evident that the defense (as well as the jury) knew the existence of the paramedics, knew that Lindsey had shot himself and knew that he had told the paramedics that he had shot himself and knew that he had told the paramedics initially to let him die. The only omission was the failure to put up the paramedic who heard him say the let him die comment. This was clearly a strategic decision on counsel's part as to how to present the witnesses and which witness to present. Although the Applicant may claim that they did not interview Vincent Bell, it is uncontested that they were aware of the information.

Even it the Court would conclude it was deficient, Prejudice cannot be shown. Similar information was given to the jury within both the guilt and sentencing phase. Further, the comment was used by Dr. Melikian in her assessment of depression that she gave the jury. The "let me die" after a person had shot himself in the head fails to suggest how the failure of the additional witness would have the effect to have undermined confidence in the death verdict

under the standards of prejudice set out in Strickland. They had heard similar evidence. He has failed in his burden of proof. Accord, Wong v. Belmontes, supra. Furthermore, "in order to establish prejudice, the new evidence that a habeas petitioner presents must differ in a substantial way-in strength and subject matter-from the evidence actually presented at sentencing." Hill v. Mitchell, 400 F.3d 308, 319 (6th Cir.2005). The witness of the "let me die" comment he now offers does not meet this test, but is cumulative, albeit somewhat more detailed. The new evidence does not differ in subject matter-much less "in a substantial way"-from the evidence already presented at sentencing. It covers the exact same subject. Certainly this new evidence cannot be described as "shocking, disheartening, and utterly disturbing," the kind of evidence that courts have held would generally support a finding of prejudice warranting habeas relief. See Beuke v. Houk, 537 F.3d 618, 646 (6th Cir.2008). The Applicant fails to explain how such evidence, had it been presented, would have done anything to change the jury's perception of Lindsey's moral culpability or mental state for such a brutal and horrific crime. See Jells v. Mitchell, 538 F.3d 478, 498 (6th Cir.2008) ("Prejudice is established where, taken as a whole, the available mitigating evidence might well have influenced [the sentencer's] appraisal of [the petitioner's] moral culpability."). Relief must be denied.

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

- Failed to commit sufficient time to perform adequate investigation in mitigation
  - Failed to assemble complete defense team until one month prior to trial.
  - Failed to perform investigation of Lindsey's life history, family history until 2 months prior to trial
    - first half of investigation done w/o mitigation investigator
    - investigation lasted only 8 weeks.
  - Failed to spend sufficient time interviewing witness to determine beneficial testimony
  - Failed to spend sufficient time preparing witnesses to testify to allow a clear, logically structured and easily understood presentation.

Memo, p. 54-58.

In his ninth allegation, he contends that counsel spent insufficient time in preparation for the trial and sentencing proceedings. In the argument, he merely states that they failed to devote adequate time for preparation for the mitigation phase of the trial. Without designating any necessary item of evidence that the "insufficient time" suggested, he claims it the result of the proceeding would have been different. Within his argument, he stated that studies reported that the average time spent by defense lawyers in capital cases was1889 hours per case and normally 12 times more time spent in a capital case than a normal case. The Applicant solely relies upon the ABA Guidelines, § 10.7 and the comments concerning investigation and § 11.4.1. He also relies upon Wiggins v. Smith, supra , as citing to the ABA Guidelines as appropriate guides on whether counsel provided effective assistance of counsel.

This Court finds that counsel performed a reasonable investigation into mitigation in this case. The Court incorporates by reference the summaries of witness testimony from both the trial and PCR hearing set out in argument 8, infra. This Court assumes that this particular claim involves time spent on the investigation, since Applicant did not assert any particular evidence that was not disclosed to them from the investigation the 2004 defense team did that he now asserts was deficient.

Under the Applicant's assertion the ABA guidelines are not guides, but requirements for capital defense counsel. This assertion, if accepted sets an almost impossibly high bar for defense counsel in capital cases. Defense counsel would now be required "to locate and interview the client's family members ... and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole

officers, and others," Van Hook v. Anderson, 535 F.3d 458, 463 (6th Cir.2008) (quoting the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, ¶10.7, at 83); he must interview them long enough so that those interviews can be characterized as "extensive" and "in-depth," op. at 776; every conceivable family member must be contacted, no matter that defense counsel has spoken with the defendant, his wife, mother, father, brother, sister, aunt, and cousin (along with several non-family members), op. at 778-81; and he must do all this even if he reasonably believes (based on the trial court's rulings and his own reasonable interpretation of state law) that the introduction of any evidence regarding the defendant's family background could open the door to truly disastrous rebuttal evidence by the prosecution. Nothing in Strickland or its progeny requires defense counsel to go to such extreme lengths in order to meet the (relatively low) threshold of "reasonably effective assistance." This assertion was reversed in Bobby v. Van Hook, supra., by the U.S. Supreme Court.

As stated previously, the Applicant has ignored what the 2004 defense team actually did in making his assertion and reliance upon the ABA Guidelines. What the defense team did during the period of representation:

1. Received medical history including Lindsey's ER records from 1973-1992 involving his birth records (1973), kerosene ingestion (1975), fractured elbow(1981), tylenol overdose (including Psychiatric Ward) (1988), car wreck (1989), motorcycle wreck (1989), football injury (1990), and car wreck. (1992).
2. Received Spartanburg Regional Medical Center Records from 2002 -2004 concerning the incident and other matters.
3. FAMILY and Social History: Interviewed Mother and other family members prior

to and during trial. Received information concerning poverty, domestic violence and neighborhood from Applicant and family. Interviewed Lindsey who gave an extensive family history about the family and his own history. Respondent's Exhibits 2, 2, 4.

4. Educational History - received school records.

5. Job History - Learned from defendant of his employment history through interviews with social worker and mental health expert, as well as family members. Social Worker prepared an extensive written report from her interviews with Lindsey and mother. State Exhibit 2 (Lindsey Summary of His Life); State Exhibit 3 (Lindsey's Summary of His Mother's Life); State Exhibit 4 (Summary of Virginia Lindsey's Background Interview).

6. Prior Adult Prison and Jail Records - Acquired SCDC records, including disciplinary records from 1994 incident after 1996 plea and received jail records from current incident in 2004 until trial.

In addition,

1. Retained an experience mitigation investigator to assist in investigation two months before the trial.

2. Retained a psychiatrist who was able to render an opinion of mental illness, particularly depression used in mitigation.

3. Received opinion from retained mental health experts (Dr. Brawley and Dr. Melikian) to challenge the 2003 state examiner opinion of malingering.

4. Met with Applicant on numerous occasions at jail.

5. Had assistance of third lawyer who prepared extensive summaries of crime scene reports, prior prison history, prior criminal history, and summarized state discovery reviewed.

Further, counsel received the discovery from the state concerning the particular crime and other crimes involving Lindsey. See State Exhibits 9, 10, 11 (PCR 279, 288).

As Applicant concedes by his claim, this is not a case where no investigation was done. Rather, absent Mr. Bartosh's testimony, it appears that the bulk of the preparation was done two months prior to the trial with the retention of the psychologist, psychiatrist and mitigation investigator in that period.

Trial "counsel have a duty to make reasonable investigations or to make a reasonable decision that makes investigations unnecessary." Strickland , at 691, 104 S.Ct. 2052. "In assessing counsel's investigation, [a court] must conduct an objective review of their performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." *Wiggins v. Smith,* 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). "In assessing counsel's performance in this context, we look to how counsel prepared for sentencing, what mitigating evidence counsel accumulated, what additional leads counsel had, and what results counsel could have reasonably expected from those leads." *Blanton v. Quarterman,* 543 F.3d 230, 236 (5th Cir.2008).

A court must consider "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins,* 539 U.S. at 527, 123 S.Ct. 2527. The Supreme Court has held that "investigation into

mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence." *Id.* at 524, 123 S.Ct. 2527. However, "there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." *Bobby v. Van Hook*, ---U.S. ----, 130 S.Ct. 13, 19, 175 L.Ed.2d 255 (2009). "[C]ounsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052 (emphasis added).

The amount of time trial counsel spent preparing for trial is not dispositive to claims of ineffective assistance of counsel. See, e.g., Hopkinson v. Shillinger, 866 F.2d 1185, 1217 (10th Cir.1989) (defendant must show specific errors, and cannot prevail because of limited time attorney spent on case). (citing United States v. Cronic, 466 U.S. 648, 666, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)), overruled on other grounds by Sawyer v. Smith, 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990); Owens v. Guida 549 F.3d 399, 408 (C.A.6 (Tenn.),2008). Further, "[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation." Nields v. Bradshaw, 482 F.3d 442, 454 (6th Cir.2007).

In this allegation, the Applicant has merely asserted a general claim that counsel must meet the checklist that he claims the A.B.A. has established. While it appears that counsel did not retain a mitigation investigator under months before the trial, he has not proven that no mitigation investigation was done. He has failed to show that the investigation was unreasonable. He failed to prove either deficiency or prejudice based on his "time spent" argument.

X. Ineffective Assistance of Counsel - Statutory Aggravating Factors

- Failed to argue against statutory aggravating factors alleged by state.

- Counsel did address aggravators, it was cursory and failed to present arguments against application to Lindsey

MEMO , p. 58-60.

In his tenth argument - raised for the first time in the Applicant's post-hearing memorandum, contends that counsel was ineffective in failing to argue against the sole statutory mitigating factor and did not address the aggravators. In the pleading, while conceding that counsel did argue against the applicability of the sole aggravating factor, he contends that his attempt to persuade the jury fell below the level required but does not specify what counsel failed to do. Memo. 58-59. He asserted that in general terms, why the factor does not support a death sentence but failed to assert what the particular omission made by counsel in this area.

The Underlying Merits of the Claim Was Addressed in the Direct Appeal

The State sought the death penalty based upon S.C. Code Ann. § 16-3-20(C)(a)(3) (Supp. 1998). This aggravating circumstance authorizes the imposition of a death sentence where a defendant

> ... by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

The issue was raised in the direct appeal as a directed verdict issue. The South Carolina Supreme Court addressed the merits of the sufficiency of the evidence issue surrounding this factor in the following manner:

> 3. Directed verdict on aggravating circumstance
>
> Appellant moved for a directed verdict on the statutory aggravator provided in § 16-3-20(C)(a)(3) which states:
>
> That the offender by his act of murder knowingly created a great

> risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

Appellant contends that because he shot Victim at close range and no other person was endangered, this aggravator should not apply as a matter of law.

The trial judge should submit a statutory aggravator to the jury if there is any evidence, direct or circumstantial, to support it. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000). Here, the police department parking lot is clearly a public place and a gun is a weapon hazardous to more than one person. Id. (shooting in church parking lot). Further, appellant knew there were other occupants in the car with Victim when he shot multiple times into the confined space of the car's interior-conduct a reasonable person would know presents a great risk of harm to more than one person. Appellant also pointed his gun at Officer Godfrey in the parking lot. This evidence supports the submission of the statutory aggravator to the jury.

Ignoring the conclusive evidence of the proximity of the two children in the vehicle's backseat with victim Ruby Nell Lindsey, the tinted glass preventing clear recognition, and the location of the bullet hole near the middle of car's backseat where Kiera Potlow's head would have been had she not leaned away, Lindsey claims that the statutory aggravating factor was inapplicable because the shooting was "at close range" and he did not mean to harm anyone other than his wife. *Initial Brief of Appellant*, p. 27. At no time does he ever discuss the underlying factual basis of the state's theory of the case of aggravation – the great risk of death to those within the vehicle and particularly Kiera, and instead makes reference to the fact that after shooting into the vehicle, he focuses upon a collateral fact that Lindsey did not shoot the officer when he could have done so. As shown by the evidence set out in Argument III, the evidence conclusively supports the "great risk of death" aggravator and the trial judge had a duty to deny the directed verdict motion. To do otherwise would have been an error of law.

State v. Lindsey, supra.

How the Issue Was Presented At Trial

At the conclusion of the State's penalty phase presentation, counsel Bartosh moved for a directed verdict on the "great risk of death" statutory aggravator. ROA 1972. He initially relied upon a Georgia case, Pope v. State, 256 Ga. 195, 345 S.E.2d 831, 845 (1986), to apparently

contend that shooting someone at fairly close range does not, by itself, create a great risk of death to more than one person because others are in the vicinity. ROA 1974-75. Bartosh asserted that here you had someone firing at a fairly short distance at one person, it must be more than likelihood. ROA 1975-76. Counsel also apparently referred to an unpublished Fourth Circuit opinion, Nolden v. U.S., 856 F.2d 187 (4th Cir. 1988)(unpublished), in support of his position that a .38 caliber handgun (as opposed to an automatic weapon) does not fit the "weapon normally dangerous to the lives of more than one person" definition. ROA 1976-77.

Solicitor Gowdy relied upon State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) in opposition to the motion. ROA 1977. He asserted Locklair stood for the proposition that the handgun satisfied the "weapon" definition. The prosecutor asserted that the parking lot of the Inman Police Station is clearly a "public place." ROA 1977. He noted that in Locklair, the attempted firing with the safety on satisfied the factor. ROA p. 1977, ll. 21-25.

Solicitor Gowdy argued that the facts in Lindsey were much more egregious than Locklair. Here, he noted, children were in the car, one leaning forward and one asleep. In addition, with the tinted windows, Lindsey fired two shots from the back of the victim's head and "then he walked around and fired two more times directly in the direction of the two children." ROA p. 1978, ll. 6-8. Gowdy noted that one of the bullets lodged in the trunk. He noted further that the autopsy photographs revealed one of the bullets that struck the victim had passed through both sides of her skull, lodging in her skin, with a possibility of clearing the skin and striking the children. ROA p. 1978, ll. 9-16.

In recognizing that under Locklair there is no requirement that bystanders be injured, he created a "great risk" where one did miss, which was sufficient. In addition, he added the fact

that Officer Godfrey testified that after the shooting, Lindsey pointed the gun at him in the public place. Gowdy concluded that "but for the fact that her [Kiera's] head was laying either on the front, car seat or on her aunt's [victim] shoulder, we very well could have two homicides. ROA p. 1979, ll. 4-9.

Judge Few rejected the defense motion with apparent ease:

> THE COURT: The facts of the Georgia case seem to me to be a good bit different. This case is pretty simple to me. The evidence is that on the two occasions that Mr. Lindsey apparently saw Ms. Nesbitt's car, he was unable to tell that Ms., that his wife was in there because of the tint in the windows. Once when he passed them and they were driving through Spartanburg to Inman. But more importantly as they stopped side-by-side on the street in Inman outside of the house of Mrs. Nesbitt's mother I believe she said.
>
> They were close enough to have a conversation through the window. And yet Mr. Lindsey could not tell that Mrs. Lindsey was in the back seat because of the tinted windows. Nevertheless, he fired shots into the window from two different angles while the vehicle was parked in a public place. And the second time around looking presumably to through the same window that he could not identify her through only minutes before. He fired shots in the direction of two children.
>
> I have seen the bullet hole in the car, in the seat. The bullet hole is in the area that Kiera would have been sitting in. If she had decided in her -- none of us would know how to react to that situation. ...Certainly, a nine-year-old child is not going to have an ability to make a rational calculated decision as to how to best protect herself in the seconds that followed shots being fired into the head of the adult sitting next to her in the back seat. It is very possible that Kiera could have leaned the other way. She might could have leaned toward Nell for protection. And if she had done that, she would be dead. That bullet goes right through the space that she would have leaned into.
>
> If she had not leaned away, from my view of the evidence she probably would have been hit. I've got absolutely no doubt that the facts in this case are sufficient to go to the jury on the aggravating circumstance of creating a great risk of death in a public place using a weapon that is capable of producing death. I did not get the language, I did not quote the statute. But I have no doubt that that is sufficient. Motion is denied.

ROA p. 1980, l. 10 - p. 1981, l. 6.

The solicitor's closing argument paralleled his response and the judge's order on the statutory aggravating factor, also noting that Kiera was cut by the glass and injured physically and psychologically. ROA 2108-2111. Defense counsel Bartosh challenged the credibility of the witnesses statements about Kiera's location in the car, almost claiming that if she was where she said she was, she would now be dead. See, ROA p. 2135, ll. 18-22. He methodically went through the element of "public place," "knowingly" (asserted that Lindsey's depression, cognitive deficits and possible brain damage "a desperate man who isn't thinking about anything"), the great risk to more than one person factor (the bias of the officers and family who testified, the location of the girl and whether the state's theory was credible), and whether the gun satisfied the terms of a device normally hazardous to the lives of more than one person. ROA 2132-2137. Interestingly, the juror requested the testimony of Kiera and Officer Benny Godfrey be replayed, as well as the 911 audiotape. ROA 2164-65.

The jury found the existence of the statutory aggravating circumstance and recommended the death sentence. ROA 2169-2171. Defense counsel Bartosh made a motion for a new trial based upon the alleged failure of the state to satisfy its burden of proof on the statutory aggravating circumstance. ROA p. 2172, ll. 5-12. Judge Few denied the motion. ROA p. 2172, l. 13.

LAW/ANALYSIS

This Court must find the evidence conclusively supports the existence of the statutory aggravating factor of "great risk of death" as found as a matter of state law in the direct appeal. The two children in the back seat were unquestionably within a zone of danger as a result of the

four gunshots into the vehicle, particularly when the shooting began through a tinted window at various dangerous angles and by the testimony showed the bullet that exited the neck of the decedent would have struck and killed the child in the middle of the seat, had she not moved to one side.[43] Nothing presented in the state PCR hearing undermines that legal conclusion.

In State v. Locklair, supra. the court found that the "great risk of death" aggravator was properly supported by the evidence. Lindsay attempts to distinguish Locklair by asserting that it was limited to a situation where a murderer continued to try to fire his weapon after he had already shot and killed his girlfriend, albeit with the safety on. In Locklair, the Court held:

> **Locklair argues that this was a simple case of a victim being shot at close range, not the type of incident contemplated by the statute.** However, the trial testimony does not support this assertion. According to Nichols' testimony, Locklair put more than one person at great risk of danger because he attempted to fire the gun several times, but the safety was on. After he shot Bridges, Locklair pointed the gun at Williams' home where there were children inside. Nichols was forced to tackle Locklair to stop him and Robert Williams, the victim's stepfather, had to struggle with Locklair to retrieve the gun. According to the trial testimony, the gun was dropped several times during the struggle with shots being fired in different directions. Also, at the very least, Nichols and Robert Williams, were placed in great danger as they attempted to stop Locklair from firing and retrieve the gun. **Finally, Locklair put many people at great risk of danger. Nichols, Robert William, Betty Williams, Dewey Morgan, and several children playing in the street were all within firing range when the shooting occurred.**

Id., 341 S.C. at 366, 534 S.E.2d at 427. [44]

Lindsey contended that Locklair is dissimilar from his case. While not completely similar,

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[43] This Court finds the summary of the 911 tape, including the children's screams as supportive of the knowledge of the existence of the children in the backseat. See Exhibit 21 (tape). See also, ROA. 1743-45 (opening by Deputy Solicitor Willingham).

[44] In Locklair, the Court also noted that other jurisdictions have held that a gun fired in the direction of two persons satisfies the similar statutory aggravator citing State (N. C.) v. Moose, 310 N.C. 482, 313 S.E.2d 507 (1984); Jones v. Georgia, 243 Ga. 820, 256 S.E.2d 907 (1979); Moran v. Nevada, 103 Nev. 138, 734 P.2d 712 (1987). Id., at n. 4.

as Solicitor Gowdy noted, the instant case is even more egregious and stronger on the actual risk of death shown toward the children in the back seat who were within the zone of danger and death from the actually fired bullets, whose lives were spared only due to fortuity of a leaning motion (or lack of movement) at the instant of the firing in a close area.

Conversely, on appeal, he attempted to suggest that the "great risk of death" only exists in a large, crowded setting such as a shopping mall, citing State v. Ivey, 325 S.C. 137, 481 S.E.2d 12 (1997). In Ivey, the defendant fired at a police officer in a shopping mall. The jury found *inter alia* the existence of the "great risk of death" aggravator. However, the Court's ruling did not address the sufficiency of the evidence supporting the aggravator or construe the statute. Nothing in Ivey suggests that the aggravator only applies in the setting suggested by the Applicant.

Wholly absent from the Applicant's argument on this issue is the undisputed fact that two children were seated in the back seat with the victim in close proximity. While the Applicant notes that the victim was shot with four shots, he makes no mention, conspicuously, of the fact of the bullet that grazed the victim and the bullet that entered the center of the seat where Kiera was sitting. Remarkably, the entire basis of the trial judge's ruling cannot vanish by ignorance. The reason for this failing is obvious - to admit its existence was to admit the existence of the aggravating factor. As the defense counsel cogently acknowledged in its closing, if the witness was correct in the statement of her location, she should be dead. That was the risk of her proximity to Mrs. Lindsey - revealed by their screams on the 911 call, Lindsey was not ignorant of their presence nor their great risk of death while they were in the zone of danger. Accord, Jones v. State, 128 P. 3d 521 (Okla. 2006) (evidence showed defendant killed victim while

victim was sitting in vehicle with his sister and two young daughters and defendant knew of their presence when he shot victim); State v. Burns, 979 S.W.2d 276 (Tenn. 1998) (evidence supported aggravator of "great risk of death to two or more people" where defendant shot inside car in which three people were sitting, killing one and wounding another then fired shots at another man who left car, which directly imperiled four men playing basketball nearby).

Since there is evidence to support the existence of the statutory aggravating factor, the trial court correctly denied the motion for a directed verdict as to the aggravating factor. Here, the evidence existed that Lindsey "by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person." It occurred in the Inman Police Department - a public place. The weapon - a .38 revolver - was the type of weapon recognized in Locklair as being hazardous to the lives of more than one person. Lindsey was aware that there was more than one person in the vehicle at the time of his shooting. And finally, the manner of his shooting, through tinted windows and then at various angles put "more than one person at great risk of death" the children in the back seat, would fortuitous positioning saved their lives from the bullets which struck Nell Lindsey.

Trial Counsel Was Not Deficient.

Ineffective assistance of counsel claims are not fungible but instead are highly fact-dependent. Hemmerle v.Schriro, 495 F.3d 1069, 1075 (9th Cir. 2007). Conclusory allegations not supported by specifics do not warrant relief. Jones v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995); James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994); U.S. v. Popoola, 881 F.2d 811, 813 (9th Cir. 1989). A conclusory allegation of ineffectiveness raises no constitutional issue because a

petitioner must show how counsel was deficient and how there was prejudice. Miller v. Johnson, 200 F.3d 274, 282 (5th Cir. 2000). Vague and speculative assertions are deficient. U.S. v. Taylor, 802 F.2d 1108, 1119 (9th Cir. 1986), citing U.S. v. Rogers, 769 F.2d 1418, 1425 (9th Cir. 1985). And in order to prevail on an ineffectiveness claim, a petitioner must make a sufficient factual showing to substantiate the claims. U.S. v. Schaflander, 743 F.2d 714 (9th Cir. 1984).

Counsel Bartosh acted reasonably in his argument, legal and factual, against the applicability of the statutory aggravating factor. Applicant has not asserted, in any manner, what counsel could or should have done differently concerning the particular aggravating factor. Strickland v. Washington, 466 U.S. 668 (1984) is the foundation for the presumed effectiveness of counsel's conduct, reciting that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" 466 U.S. at p. 689, 104 S.Ct. at p. 2065. In determining whether counsel's actions are reasonable, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance." Against that presumption -without any contrary argument - his claim must fail.

STRICKLAND PREJUDICE NOT PROVED

Further, the South Carolina Supreme Court addressed the applicability of the particular statutory factor in the direct appeal. Current counsel has not pointed out any errors or flaws in that state law determination of the "great risk" factor. He only asserts that counsel was unsuccessful in arguing its inapplicability. The Applicant has failed to assert any act or omission on counsel's part in this allegation - just a claimed statement of lack of success in the motion.

The South Carolina Supreme Court concluded that there was evidence to support the statutory aggravating factor. Counsel argued against its existence before the judge. He argued before the jury to give Lindsey the benefit of the doubt on whether the element of knowingly - based upon Lindsey's depression, cognitive deficient and brain damage, the element of great risk of death to more than one person - when the evidence suggested that if the little girl was where the state now asserts that she would be dead and therefore a reasonable doubt whether she was at risk, and whether the weapon satisfied the terms of a device that would normally be hazardous to the lives of more than one person. ROA 2134-36. He requested that the doubt be resolved in the favor of Lindsey. ROA 2133-2137.

Since the Applicant has not specific what counsel should have done, contrasted to what he did, Strickland prejudice clearly has not been shown. As the South Carolina Supreme Court stated in rejecting a proportionality review claim: "Applicant contends the imposition of death in his case is disproportionate to other death penalty cases because his case involves only a single victim and resulted from a domestic dispute. See S.C.Code Ann. § 16-3-25 (2003) (proportionality review).We find no support for Appellant's attempt to reduce this crime to simply "a domestic dispute." Appellant's culpability is not lessened by the fact that the victim was his wife. There is no evidence of any immediate dispute leading up to the murder, much less any provocation on Victim's part. In fact, appellant intentionally violated a court order forbidding contact with Victim." State v. Lindsey, supra. His Sixth Amendment allegation is without merit because it lacked specificity and neither prong under Strickland has been proved by the

Applicant. [45]

CONCLUSION

WHEREFORE, this Court finds that each and every allegation in the Application, as amended, is denied. Based on the foregoing, the application for post-conviction relief is denied in its entirety. Applicant has failed to show error, or if he established error, he failed to show prejudice such as would support the granting of either a new guilt proceeding, or a new sentencing proceeding.

This Court advises Applicant that if he chooses to appeal, he must serve a notice of intent to appeal within thirty (30) days from the receipt of written notice of the entry of judgment, and file same. His attention is directed to Rules 203 and 227 of the South Carolina Appellate Court Rules for the appropriate procedures.

AND IT IS SO ORDERED THIS _____ day of June, 2011.

HONORABLE PAUL M. BURCH
Presiding Circuit Judge

Pageland, S.C.

[45]This Court further concludes that the Applicant has abandoned claims of ineffective assistance of counsel set out in the Amended Application concerning issues related to evidence of visitation issues and evidence of seeking legal assistance for family court.

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CLERK OF COURT
SPARTANBURG COUNTY

MARC KITCHENS

DOCKET NO. 02-GS-42-4753

The State of South Carolina

County of Spartanburg

Trey Gowdy, *Solicitor*

COURT OF GENERAL SESSIONS

OCT 07 2002 TERM

THE STATE
vs.

Marion Alexander Lindsey
A/K/A MARIONA ALEXANDER LINDSEY

Indictment for

MURDER

SC Code 16-03-0010, 0020
CDR Code 116
Class FEL-EXM

WITNESSES

Vown

Spartanburg Co. Sheriff Dept.

1. SENTENCE MADE
2. REPORT ENDED
3. RAP SHEET PULLED
4. INDEXED
5. CHECKED WARRANTS
6. CHECKED SIGNATURE
7. ASSESSMENT AND FINE CARD MADE
8. TRAFFIC VIOLATIONS COPY

Computer

ARREST WARRANT NUMBER

1252531

ACTION OF GRAND JURY

True Bill

/s/ Todd E. Kelly

Foreperson of Grand Jury

Date: 10/3/02

VERDICT

guilty

/s/ Ashley Driscoll

Foreperson of Petit Jury

Date: 5/21/08

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

OCT 0 3 2002

At a Court of General Sessions, convened on _____, the Grand Jurors of Spartanburg County present upon their oath:

MURDER

The Defendant, Marion Alexander Lindsey, did in Spartanburg County on or about September 18, 2002, feloniously, willfully, and with malice aforethought, kill one Ruby Lindsey, by shooting the victim with a gun, and the victim died as a proximate result thereof, all in violation of Section 16-3-0010, 0020, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Barry Barnette
DEPUTY SOLICITOR