VOLUME ONE OF TWO

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Paul M. Burch, Circuit Court Judge

RECEIVED
NOV 07 2022
S.C. SUPREME COURT

MARION ALEXANDER LINDSEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001271

SUPPLEMENTAL APPENDIX II

ROBERT M. DUDEK
Chief Appellate Defender

LARA M. CAUDY
Appellate Defender

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

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ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

MICHAEL D. ROSS
Assistant Attorney General

Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

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The Supreme Court of South Carolina

Marion Alexander Lindsey, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-206087
Lower Court Case No. 07-CP-42-2848

RECEIVED
SEP 30 2014
SC OFFICE OF
APPELLATE DEFENSE

ORDER

This death penalty matter is before the Court on a petition for a writ of certiorari, following the denial of petitioner's application for post-conviction relief (PCR). In light of the Court's concern with the frequency and severity of the drafting errors in the Order of Dismissal, and this Court's admonishments to PCR judges in *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992), and *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004), we vacate the Order of Dismissal and remand the matter to the circuit court for the issuance of an amended order that complies with *Pruitt* and *Hall*, and with S.C. Code Ann. § 17-27-80 (2003), to include specific findings of fact and conclusions of law on each issue presented, based on accurate references to the record and the applicable law. Petitioner may serve and file a new notice of appeal following the issuance of the amended order, or upon receipt of written notice of entry of an order ruling on any motion to alter or amend the judgment.

C.J.

J.

J.

J.

J.

Columbia, South Carolina

September 30, 2014

cc:
Donald J. Zelenka, Esquire
Robert Michael Dudek, Esquire
David Alexander, Esquire
The Honorable M. Hope Blackley

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
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Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 9, 2014

Donald J. Zelenka, Esquire
Senior Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: Marion Lindsey v. State, CA No. 2007-CP-42-2848

Dear Don:

By now, I am sure you have received the Supreme Court's Order dated September 30, 2014.

It is my interpretation of the Order that it forbids the submission or solicitation of a proposed order from the parties. If this is not your interpretation, then please let me know so that I may make a formal motion to place my concerns on the record.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

cc. The Honorable Paul M. Burch
David Alexander, Esq.
Client

4

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

October 16, 2014

The Honorable M. Hope Blackley
Clerk of Court, Spartanburg County
PO Box 3483
Spartanburg SC 29304-3483

REMITTITUR

Re: Marion Alexander Lindsey v. State
Lower Court Case No. 2007-CP-42-02848
Appellate Case No. 2012-206087

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

CLERK

RECEIVED
OCT 16 2014
SC OFFICE OF
APPELLATE DEFENSE

cc:
Donald J. Zelenka, Esquire
Robert Michael Dudek, Esquire
David Alexander, Esquire

6

ALAN WILSON
ATTORNEY GENERAL

January 23, 2015

Honorable Paul Burch
Circuit Court Judge
Post Office Box 276
Pageland, SC 29728

Attn: Sam Thomas

Re: Marion Lindsey v. State

Dear Judge Burch:

Pursuant to the request of your law clerk Sam Thomas, please find enclosed a copy of the proposed Order Granting Post-Conviction Relief submitted by Rick Vieth during the earlier Post-Conviction Relief action. The cover letter was July 29, 2011 and this office received its copy on August 1, 2011. For your information the original Order of Dismissal was signed by you August 10, 2011 and filed August 12, 2011.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lm

Enclosures: Cover Letter from Richard Vieth
Order Granting Post-Conviction Relief (Proposed)

cc: Robert Dudek, Esq.

RECEIVED
JAN 23
SC OFFICE OF
APPELLATE DEFENSE

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

COPY

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Paul M. Burch, Circuit Court Judge

RECEIVED
FEB 2 6 2015
S.C. Supreme Court

MARION ALEXANDER LINDSEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

RECEIVED
FEB 2 6 2015
SC OFFICE OF
APPELLATE DEFENSE

Appellate Case No. 2012-206087

PETITION FOR EXTRAORDINARY RELIEF

Petitioner Marion Lindsey, pursuant to Rule 245 of the SCACR, requests this Court to accept this matter in its original jurisdiction[1] and grant a new Post-Conviction Relief Hearing before a circuit judge other than The Honorable Paul M. Burch. Petitioner shows as follows:

1. On August 14, 2007, petitioner filed a PCR application regarding his conviction and death sentence. App. 2192.

2. On July 19-21, 2010, a hearing was held before Judge Burch. App. 2285.

---

[1] Petitioner also submits that it may be unnecessary to invoke this Court's original jurisdiction in this matter because the trial court's actions in this case are a violation of this Court's Order of September 30, 2014, and this Court, like all courts, retains jurisdiction to enforce its own Orders.

8

3. On May 2, 2011, Judge Burch requested a proposed order only from the State. Supp. App. 1. On May 12, 2011, Judge Burch emailed petitioner's attorney, Rick Veith, requesting a proposed order from petitioner. In this email, Judge Burch stated that "Because of its size, I thought the packet you sent in October included a proposed order." Supp. App. 3. The inference to be drawn from this email is that the PCR court did not even review materials submitted by petitioner for nearly eight months.

4. On June 2, 2011, the State sent a proposed order to Judge Burch. Supp. App. 6.

5. On August 12, 2011, the PCR court denied petitioner's PCR application. App. 3536. As detailed in the petition for certiorari to this Court, the Order signed by Judge Burch was identical to the proposed order submitted by the State. Pet. Cert. at 105-09. Petitioner argued to this Court that the signing of the State's proposed order, which contained numerous errors, sadly indicated that the PCR court had not even read the proposed order. Pet. Cert. 105-09. In its Return, the State carefully avoided alleging that the PCR court read the proposed order, arguing instead that the PCR court had adequate time to review it. State's Return at 110.

6. On September 30, 2014, this Court unanimously vacated the PCR court's Order of Dismissal. Lindsey v. State, Order dated September 30, 2014. This Court found that vacation of the Order of Dismissal was necessary because of (1) "the frequency and severity of the drafting errors in the Order of Dismissal," and (2) "this Court's admonishments to PCR judges in Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004)." The Court directed Judge

Burch to issue an amended order in compliance with Pruitt and Hall. Lindsey v. State, Order dated September 30, 2014.

7. On October 9, 2014, petitioner's attorney, Robert M. Dudek, wrote the State regarding this Court's Order and a copy of this letter is attached as "Exhibit A." The letter stated, "It is my interpretation of the Order **that it forbids the submission or solicitation of a proposed order from the parties. If this is not your interpretation, then please let me know so that I may make a formal motion to place my concerns on the record.**" Exhibit A (emphasis added).

8. Nearly five months after this Court's Order, today, on February 26, 2015, at 11:43 AM, Judge Burch's law clerk sent an email to the parties and copied this Court. A copy of this email is attached as Exhibit B. This email stated that Judge Burch was requesting Microsoft Word versions of the proposed orders submitted by the parties. Exhibit B.

9. The same day, at 12:38 PM, petitioner responded via email. A copy of this email is attached as Exhibit C. Citing and attaching this Court's Order, petitioner objected to the submission of any proposed orders. Exhibit C.

10. Just two minutes before (and arriving after petitioner sent his email), the State emailed its proposed order in Microsoft Word format to Judge Burch. A copy of this email is attached as Exhibit D.

Discussion

At this point it is clear that petitioner Marion Lindsey cannot receive a fair decision from the PCR judge. As was made clear in the Petition for Certiorari, a comparison between the State's proposed order and the Order signed by the PCR judge

revealed a high likelihood that the PCR judge failed to read the proposed order before signing it. And as is shown by today's emails, the PCR court intends, in flagrant disregard of this Court's instructions, to use the proposed order again.

Petitioner can think of no other reason for requesting the State's proposed order in electronic format other than to cut and paste from it. Indeed, the State gave the PCR court a roadmap to correcting the errors in the proposed order when it attached to its email **petitioner's list of the errors** in petitioner's reply. Exhibit D.

The notion that a court would not read an order in a capital case before signing it should be reason alone for a new PCR hearing. But now, after clear instructions from this Court that such a practice will not be tolerated and that the PCR judge should draft his own order, the PCR judge has persisted in a course of conduct violating this Court's instructions both in the September 30, 2014, Order and in precedent that existed well before this action began.

As the Court reiterated in its September 30, 2014, Order, it has on two occasions warned PCR judges against wholesale adoption of proposed orders. In Pruitt, the Court stated:

> We take this opportunity to express our concern with the increasing number of orders in PCR proceedings that fail to address the merits of the issues raised by the applicant. . . . Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to the issuance of the order, and the PCR judge should carefully review the order prior to signing it.

Pruitt, at 255-56, 423 S.E.2d at 128. In Hall, this Court stated:

> Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency.

360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). See also Jefferson v. Upton, 560 U.S. 284 (2010) (criticizing the practice of verbatim adoption of proposed orders in a capital case) *citing* Anderson v. Bessemer City, 470 U.S. 564 (1985); Commonwealth v. Williams, 732 A.2d 1167, 1176 (Pa. 1999) (criticizing practice in a capital case); Dobyne v. State, 805 So.2d 733, 741 (Ala. Crim. App. 2000) (criticizing practice and quoting Anderson). Our Legislature requires "specific findings of fact" and express statements of a court's "conclusions of law" in PCR cases. S.C. Code Ann. § 17-27-80.

This Court's Order, read in light of Pruitt and Hall, could not have been more clear. It has now been **four and a half years** since the PCR judge heard the evidence in this case. Petitioner first received an Order that the PCR judge almost certainly did not read. The PCR judge showed his impatience with petitioner's mitigation evidence during the hearing when he stated, "[I]f the objection stands, I'm gonna overrule it, but we're not gonna spend all morning now going back a hundred years in history.... Let's move on with this thing now.... We bogged down yesterday." App. 2714, ll. 1 – 7.

Judges must recuse themselves when their impartiality might reasonably be questioned. Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004). "A judge's impartiality might reasonably be questioned when his factual findings are not supported by the record." Id. If a judge's impartiality might be questioned when factual findings are not supported by the record, it certainly follows that a judge's impartiality might be questioned when he likely did not read his factual findings and, as this Court said, they contain **frequent and severe** errors. Lindsey v. State, Order dated September 30, 2014.

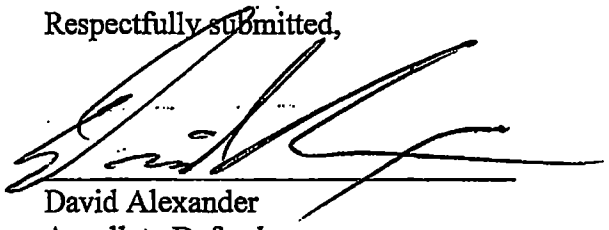
This Court recognized the severe problems with the Order and vacated it with clear instructions. Today the PCR judge manifested his clear intent to disregard this

Court's instructions. Despite placing Judge Burch and the State on notice that petitioner's interpretation of the Order forbids submission or solicitation of proposed orders, the PCR court requested—and the State immediately submitted—its original proposed order in electronic format to be cut-and-pasted into a forthcoming ruling. Petitioner objected within an hour, but the State had already sent the document in an easily copied format to the court. At this point, the damage has been done by sending the electronic copy to the court. But even more damaging than the possession of the electronic version is what is revealed by the request from the court: its intent to again deprive petitioner of due process and to violate this Court's clear instructions.

It is apparent that petitioner will not receive a fair and earnest deliberation from the PCR judge. Both the Eighth Amendment's proscription against cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process have been violated and will be violated if petitioner is not granted a new hearing before a new PCR judge. U.S. Const. amends. VIII, XIV. See also S.C. Const. art. I, §§ 3, 15. Petitioner also submits that the very integrity of our State's judiciary is at stake in this matter. Petitioner has been sentenced to death. This Court's vital concern with upholding the reputation and honor of our judiciary is implicated by the casting aside of its Order. This Court is the guardian of our judiciary's reputation for fairness and competence and its authority in this respect is seriously challenged by the violation of its Order.

WHEREFORE, petitioner respectfully requests that this Court grant a new Post-Conviction Relief Hearing before a circuit judge other than The Honorable Paul M. Burch. Petitioner also respectfully requests that the matter be stayed in the lower court pending disposition of this Court's decision.

Respectfully submitted,



David Alexander
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

This 26th day of February, 2015.

EXHIBIT A

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 9, 2014

Donald J. Zelenka, Esquire
Senior Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: Marion Lindsey v. State, CA No. 2007-CP-42-2848

Dear Don:

By now, I am sure you have received the Supreme Court's Order dated September 30, 2014.

It is my interpretation of the Order that it forbids the submission or solicitation of a proposed order from the parties. If this is not your interpretation, then please let me know so that I may make a formal motion to place my concerns on the record.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

cc. The Honorable Paul M. Burch
David Alexander, Esq.
Client

EXHIBIT B

Robert M. Dudek

From: Burch, Paul M. Law Clerk (Samuel H. Thomas) <PBurchLC@sccourts.org>
Sent: Thursday, February 26, 2015 11:43 AM
To: Zelenka, Don; Robert M. Dudek; Rick Vieth (rvieth@hbvlaw.com)
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

Judge Burch has requested that I contact you about getting us Microsoft Word versions of the proposed orders submitted after the PCR hearing held on July 19-21, 2010 before him if this is at all possible. Please do not hesitate to contact me if further information is needed. Thank you and I look forward to hearing back from you as soon as possible.

Kindest regards,

Sam Thomas

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728
Office: 843-672-3270
Fax: 843-672-5960

From: Don Zelenka [mailto:DZelenka@scag.gov]
Sent: Monday, October 20, 2014 2:52 PM
To: Burch, Paul M. Law Clerk (Samuel H. Thomas); rdudek@sccid.sc.gov
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Mr. Thomas –

Thank you for the follow-up. The remittitur in this case was entered on October 16, 2014 and a copy is attached. I noticed that the correspondence I received only showed copies going to the Clerk of Court and appellate PCR counsel.

By copy of this email I am advising the Ms. Hopkins, a Deputy Clerk of the Supreme Court of this request and the expectation on the part of Judge Burch to receive something from the Court.

Sincerely,

Don Zelenka

Donald J. Zelenka
Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office

18

P.O. Box 11549
Columbia, S.C. 29211
803-734-3601
dzelenka@scag.gov

From: Burch, Paul M. Law Clerk (Samuel H. Thomas) [mailto:PBurchLC@sccourts.org]
Sent: Monday, October 20, 2014 12:37 PM
To: rdudek@sccid.sc.gov; Don Zelenka
Subject: Marlon A. Lindsey v. State, 2007-CP-42-2848

Counsel,

I hope this email finds you well. Judge Burch has asked me to send you both this email stating that we have not yet received anything formal from the Supreme Court on this matter. We will, however, be reviewing the file and will be back in touch with you both in order to set up a game plan on how we should proceed from here in a few weeks.

Kindest regards,

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728
T: 843-672-3270
F: 843-672-5960

CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

EXHIBIT C

20

Robert M. Dudek

From:	Robert M. Dudek
Sent:	Thursday, February 26, 2015 12:38 PM
To:	'Burch, Paul M. Law Clerk (Samuel H. Thomas)'; Zelenka, Don; Rick Vieth (rvieth@hbvlaw.com)
Cc:	Hopkins, Debbie
Subject:	RE: Marion A. Lindsey v. State, 2007-CP-42-2848
Attachments:	Order vacating Ord Dsml & remanding 9.30.14.pdf; Ltr to Zelenka re. remand 10.09.14.pdf

Mr. Thomas: We object to the submission of proposed orders as in violation of the Supreme Court's order of September 30, 2014 remanding this case to Judge Burch. I have attached that order, and also my letter to Mr. Zelenka dated October 9, 2014 stating that the Supreme Court's order prohibits the submission or solicitation of proposed orders in any format. We are filing a motion this afternoon in the Supreme Court consistent with this position. Respectfully,

Bob Dudek
803-734-1955

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201-1589
(803) 734-1330 – Telephone
(803) 734-1397 - Fax

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Sent: Thursday, February 26, 2015 11:43 AM
To: Zelenka, Don; Robert M. Dudek; Rick Vieth (rvieth@hbvlaw.com)
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

Judge Burch has requested that I contact you about getting us Microsoft Word versions of the proposed orders submitted after the PCR hearing held on July 19-21, 2010 before him if this is at all possible. Please do not hesitate to contact me if further information is needed. Thank you and I look forward to hearing back from you as soon as possible.

Kindest regards,

Sam Thomas

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728

Office: 843-672-3270
Fax: 843-672-5960

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Mr. Thomas –

Thank you for the follow-up. The remittitur in this case was entered on October 16, 2014 and a copy is attached. I noticed that the correspondence I received only showed copies going to the Clerk of Court and appellate PCR counsel.

By copy of this email I am advising the Ms. Hopkins, a Deputy Clerk of the Supreme Court of this request and the expectation on the part of Judge Burch to receive something from the Court.

Sincerely,

Don Zelenka

Donald J. Zelenka
Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211
803-734-3601
dzelenka@scag.gov

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Sent: Monday, October 20, 2014 12:37 PM
To: rdudek@sccid.sc.gov; Don Zelenka
Subject: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

I hope this email finds you well. Judge Burch has asked me to send you both this email stating that we have not yet received anything formal from the Supreme Court on this matter. We will, however, be reviewing the file and will be back in touch with you both in order to set up a game plan on how we should proceed from here in a few weeks.

Kindest regards,

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276

EXHIBIT D

Robert M. Dudek

From: Don Zelenka <DZelenka@scag.gov>
Sent: Thursday, February 26, 2015 12:36 PM
To: Burch, Paul M. Law Clerk (Samuel H. Thomas); Robert M. Dudek; Rick Vieth (rvieth@hbvlaw.com)
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

You have received 2 files.
Use the secure links below to download.

Mr. Thomas –

Attached is a copy of the Respondent's original proposed order submitted to you with one typographical correction on the spelling of "shift" on page 153 that I previously made to the document. I do not recall making any other corrections to the best of my recollection to other typographical errors which were pointed out to the Supreme Court in Mr. Dudek's and Mr. Alexander's Reply to the Return to the Petition for Writ of Certiorari which I am also attaching for you information.

I believe my original version in 2011 was completed in Wordperfect and then later automatically converted to WORD during our office document management transition. According to my records, my initial proposed order was sent by request to Judge Burch on June 2, 2011 by email in a pdf and by mail in a paper form, but not WORD or Wordperfect.

I do not have a copy of Mr. Lindsey's proposed order granting PCR in WORD, but do have a pdf of it. If there are other questions, please advise me.

I am sending the documents through Accellion as attachment. If there are problems in opening them, please advise me.

Sincerely,

Don Zelenka

Donald J. Zelenka
Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211
803-734-3601
dzelenka@scag.gov

24
Download Files

Available until: 28 March 2015

Download File: Lindsey Marlon - PCR - DP - Respondent's Proposed Order of D (00453431xD2C78).docx
214.44 KBytes
Download File: reply 2 return 2 petition 4 cert (00453434xD2C78).pdf
688.73 KBytes

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Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

Judge Burch has requested that I contact you about getting us Microsoft Word versions of the proposed orders submitted after the PCR hearing held on July 19-21, 2010 before him if this is at all possible. Please do not hesitate to contact me if further information is needed. Thank you and I look forward to hearing back from you as soon as possible.

Kindest regards,

Sam Thomas

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728
Office: 843-672-3270
Fax: 843-672-5960

From: Don Zelenka [mailto:DZelenka@scag.gov]
Sent: Monday, October 20, 2014 2:52 PM
To: Burch, Paul M. Law Clerk (Samuel H. Thomas); rdudek@sccid.sc.gov
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Mr. Thomas –

Thank you for the follow-up. The remittitur in this case was entered on October 16, 2014 and a copy is attached. I noticed that the correspondence I received only showed copies going to the Clerk of Court and appellate PCR counsel.

By copy of this email I am advising the Ms. Hopkins, a Deputy Clerk of the Supreme Court of this request and the expectation on the part of Judge Burch to receive something from the Court.

Sincerely,

Don Zelenka

Donald J. Zelenka
Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211
803-734-3601
dzelenka@scag.gov

From: Burch, Paul M. Law Clerk (Samuel H. Thomas) [mailto:PBurchLC@sccourts.org]
Sent: Monday, October 20, 2014 12:37 PM
To: rdudek@sccid.sc.gov; Don Zelenka
Subject: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

I hope this email finds you well. Judge Burch has asked me to send you both this email stating that we have not yet received anything formal from the Supreme Court on this matter. We will, however, be reviewing the file and will be back in touch with you both in order to set up a game plan on how we should proceed from here in a few weeks.

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Paul M. Burch, Circuit Court Judge

MARION ALEXANDER LINDSEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for extraordinary relief in this case have been served on Donald J. Zelenka, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, on the Honorable Paul M. Burch, Fourth Judicial Circuit, P.O. Box 276, Pageland, SC 29728, and upon Richard W. Veith, Esquire, 360 East Henry St., Suite 101, Spartanburg, SC 29302, this 26th day of February, 2015.

David Alexander
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of February, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Paul M. Burch, Circuit Court Judge

Appellate Case No. 2012-206087

MARION ALEXANDER LINDSEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

RETURN TO PETITION FOR EXTRAORDINARY RELIEF

The Respondent, above-named, hereby makes a Return to the Petition for Extraordinary Relief received February 26, 2015. In the Petition, Lindsey, through appellate counsel David Alexander and Robert Dudek asks this Court to grant a new post-conviction relief hearing and remove the Honorable Paul Burch from his assignment in this case. Petitioner contends the removal is necessary because on February 26, 2015, Judge Burch, though his law clerk made a request to both parties Petitioner and Respondent's counsel (each side) to provide him in the Microsoft WORD word processing format with the proposed orders that each side had previously submitted in 2011 to the hearing judge.

For reasons that remain unclear to Respondent, Petitioner asserts that this act of requesting the previously submitted orders from each side mandates Judge Burch's recusal from the responsibility in carrying out this Court's mandate from its order in Marion Lindsey v. State,

Appellate Case 2012-206087, Order (S.Ct.S.C September 30, 2014) and the remittitur issued on October 16, 2014.

Respondent respectfully submit that the mere act of requesting **both parties** to submit in WORD format prior orders, matters that are also in this Court and the lower court's record, that each side submitted in 2011 does not violate this Court's mandate to Judge Burch.

This Court's mandate to Judge Burch was clear:

> "we vacate the Order of Dismissal and remand the matter to the circuit court for the issuance of an amended order that complies with Pruitt [v. State, 310 S.C. 254, 423 S.E.2d 127 (1992),] and Hall [v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004),, and with S.C. Code Ann. § 17-27-80 (2003), to include specific findings of fact and conclusions of law on each issue presented, based on accurate references to the record and the applicable law. Petitioner may serve and file a new notice of appeal following the issuance of the amended order, or upon receipt of written notice of entry of an order ruling on any motion to alter or amend the judgment.

Marion Lindsey v. State, Appellate Case 2012-206087, Order (S.Ct.S.C September 30, 2014).

At this time, Judge Burch has not filed any order on remand under challenge. He has merely requested both parties to submit matters that he had previously considered in a word processing format. Nothing in the mandate precludes the receipt of material already on file with the lower court and this Court, albeit in a Word processing format. Further, as Judge Burch's law clerk immediately stated upon receipt of appellate counsel Dudek's objection –

> **Counsel,**
> **Judge Burch was in no way requesting new proposed orders and I apologize if that was misunderstood from my communications with you. However, Judge Burch was requesting Word versions of the proposed orders previously filed and relating to the hearing that took place in July of 2010 for his review.**

Email from Law Clerk Samuel Thomas to Counsel – February 26, 2015 at 1:44 PM. (Exhibit 9 attached)

I.

Certain salient factors and communications are missing from the Petitioner's recitation

from the proceedings. These additional matters undermine the impression of his current complaint and should have resolved Petitioner's anticipated concern and this Court's concern.

1. October 10, 2014 email from Zelenka to Judge Burch and copy to Counsel Dudek

For reasons unclear to Respondent, the Petitioner failed to include the parties' first email correspondence with Judge Burch on October 10, 2014 after this Court's September 30, 2014 Order. It was submitted the same day as and after Mr. Dudek's earlier emailed letter to below-signed counsel and after a personal discussion between both counsel (but not the court) on the same date about their different interpretations of the Court's order and limitations on whether anything could be submitted to the hearing judge. This October 10, 2014 email to Judge Burch reads:

> Dear Judge Burch –
>
> Attached is an order from the South Carolina Supreme Court remanding the matter for issuance of an amended order? As you may be aware, the Petitioner raised an issue in the PCR appeal concerning the fact that the Respondent submitted a requested proposed order in the matter and asserted the failure of the Court to make corrections to my clerical and grammatical errors in the my submission suggested the order was not reviewed by you. Lindsey's Reply to Return to Petition for Writ of Certiorari, p. 2 ("The State Failed to Rebut the Assertion that the PCR Court did not review the State's Proposed Order Before Signing It.").
>
> In light of the issues presented before the Supreme Court, it has taken the action to remand for an amended [order]. **I would suggest a status conference with Mr. Lindsey's counsel concerning how to most efficiently resolve your needs in getting materials.**
>
> ***One of the Petitioner's counsel, Robert Dudek sent a letter to me that I received and discussed with him today which states his opinion that the Supreme Court's order forbids the submission or a solicitation of a proposed order from the parties.*** **I think the Supreme Court's order speaks plainly on the issue with its references to Pruitt v. State and Hall v. Catoe and directions to the court on remand.**
>
> By copy of this email, I am advising opposing counsel of this contact.

October 10, 2014 4:39 PM Email – Zelenka to Judge Burch. Exhibit 1. (emphasis not in original and added).

2. October 10, 2014 Email from Robert Dudek to Judge Burch.

Shortly after the above email, on the same date, counsel Dudek emailed Judge Burch stating: "Judge Burch: I have attached the letter that Don referenced in his email below. We look forward to meeting with you in person at the status conference." In that email, counsel Dudek attached the October 9, 2009 letter. *October 10, 2014 4:58 PM Email – Dudek to Judge Burch. Exhibit 2.*

3. October 20, 2014 Email from Judge Burch's Law Clerk to Parties.

On October 20, 2014, Judge Burch's law clerk, Samuel Thomas emailed both parties stating the following in its pertinent part:

> Judge Burch has asked me to send you both this email stating that we have not yet received anything formal from the Supreme Court on this matter. We will, however, be reviewing the file and will be back in touch with you both in order to set up a game plan on how we should proceed from here in a few weeks.

October 20, 2014 Law Clerk Thomas Email to Counsel Exhibit 3.

4. October 20, 2014 – Follow-up emails concerning Remittitur from Counsel Zelenka and Clerk.

Following the law clerk's email that Judge Burch had not received anything formal from the Court, below-signed counsel emailed the law clerk a copy of the remittitur. Subsequently, Clerk of Court Daniel Shearouse emailed the Judge Burch a copy of the remittitur and order. *Exhibit 4*

5. January 23, 2015 Request from Law Clerk for Copy of Petitioner Lindsey's Proposed Order Granting Relief.

On January 23, 2015, counsel was contacted by Judge Burch's law clerk

requesting a copy of the Proposed Order Granting Post-Conviction Relief submitted ***by Applicant's counsel Rick Vieth*** to Judge Burch on July 29, 2011. Below-signed counsel provided the Applicant's Proposed Order Granting Relief by mail on January 23, 2015. A copy of that was provided to appellate counsel at the same time. *There was no request made for Respondent's prior proposed order of dismissal and it was not provided at that time*. Respondent's below-signed counsel is not aware of any objection to the January 23, 2015 submission of their proposed order to Judge Burch or this Court pursuant to his request. *January 23, 2015 Cover Letter to Judge Burch for enclosures of Applicant's July 29, 2011 Proposed Order Granting Post-conviction Relief. Exhibit 5.*

6. February 26, 2015 Email Requesting Microsoft Word Versions of Both Side Proposed Orders submitted after the 2010 PCR Hearing.

Subsequent to the submission of the Applicant's earlier July 2011 Proposed Order Granting Relief to Judge Burch on January 23, 2015, Respondent's did not have any contact from the hearing judge or Lindsey's counsel about the case until February 26, 2015. At that time, Respondent received an email from Judge Burch's law clerk, Samuel Thomas to counsel Dudek, PCR counsel Rick Vieth and below-signed counsel requesting a Microsoft Word version of the proposed orders submitted after the 2010 PCR hearing. *February 26, 2015 Email Requesting Microsoft Word Versions of Both Side Proposed Orders submitted after the 2010 PCR Hearing. Exhibit 6*

7. February 26, 2015 12:36 Email with Respondent's June 2011 Proposed Order in Word (with at least one earlier made correction on page 153).

Below-signed counsel became aware of the hearing judge's request prior to lunch on February 26. Prior to leaving for lunch, counsel reviewed the document management system and found the Word version of Respondent's June 2011 Proposed Order of Dismissal in two

locations in the office system and emailed it to Judge Burch and counsel with an explanatory email and copy of the petitioner's Reply to the Return to the Petition for Writ of Certiorari which documented early asserted grammatical and spellings errors in the public document pointed out to this Court by Petitioner previously concerning Respondent's below-signed counsel's earlier proposed order. In light of Judge Burch's request, Respondent would have provided the Court with a WORD version of Applicant's Proposed Order Granting Relief, if it had such a version that that proposal. However, it did advise Judge Burch's law clerk and counsel Dudek and Vieth that it did not have one. *February 26, 2015 12:36 Email with Respondent's June 2011 Proposed Order in Word (with at least one earlier made correction on page 153) (Exhibit 7)*

8. February 26, 2015 Email from Appellate Counsel Dudek to Judge Burch's Law Clerk at 12:39 PM.

Subsequent to Respondent' submission, appellate counsel Dudek objected to the submission of any proposed orders and asserted that it was "in violation of the Supreme Court's order. Appellate counsel reminded Judge Burch that he had earlier asserted in a letter to counsel (which he had copied Judge Burch) that his opinion was that the remand order "prohibits the submission or solicitation of proposed orders in any format." He further expressed their intent to file a formal motion that afternoon consistent with the position. *February 26, 2015 Email from Appellate Counsel Dudek to Judge Burch's Law Clerk at 12:39 PM. (Exhibit 8).*

9. February 26, 2015 Email from Judge Burch's Law Clerk Clarifying that He Was Not Requesting New Proposed Orders at 1:44 PM.

At 1:44 PM, Judge Burch's law clerk responded to counsel with the following Clarification that he was not requesting new proposed orders:

> **Judge Burch was in no way requesting new proposed orders and I apologize if that was misunderstood from my communications with you. However, Judge Burch was requesting Word versions of the proposed orders previously filed and relating to the hearing that took place in July of 2010 for**

his review.

February 26, 2015 Email from Judge Burch's Law Clerk Clarifying that He Was Not Requesting New Proposed Orders at 1:44 PM. (Exhibit 9).

10. February 26, 2015 2:11 PM Email From Zelenka to Judge Burch's Law Clerk and Counsel

Respondent's below-signed counsel responded to Judge Burch's law clerk and the opposing counsel with the following response:

> Thank you for the clarification. I did not think the request was for new proposed orders either as stated in my intervening email after receiving Mr. Dudek's.
>
> As noted previously subsequent to Mr. Dudek's letter to me, upon the Judge Burch's request in January, I had earlier provided the Court a copy of Petitioner Lindsey's Proposed Order Granting PCR - albeit in a pdf - without the same controversy or concerns expressed. (Copy of letter attached).

February 26, 2015 2:11 PM Email from Zelenka to Judge Burch's Law Clerk and Counsel (Exhibit 10).

II.

Respondent respectfully submits that the mere fact that the hearing judge on remand requested a copy of proposed orders that had been submitted by both sides in 2011 does not mandate any action by this Court nor does it evidence of "violation" of this Court's remand order. Simply put – no order on remand has been entered and the hearing judge is reviewing matters from both sides that were presented to him in 2011. If fact, the hearing judge had previously requested a copy of **Applicant's** proposed order granting relief in January. Neither of these acts are violation of the order of remand. To the contrary, it suggests that the hearing judge is gathering material to comply with the order of remand.

The Petitioner's suggestion that this requires the removal of Judge Burch and for a new evidentiary hearing to be held de novo is simply misreading those actions of Judge Burch and the effect of this Court's remand. More importantly, any suggestion otherwise was resolved by the response from the Judge's law clerk at 1:44. (Exhibit 9).

Further, as stated before this Court previously in its original Return to Certiorari, the fact that Judge Burch requested proposed orders from each side in 2011 - without objection from either side in 2011 - was not a basis for this Court to disqualify Judge Burch nor were other actions which occurred during the PCR hearing. What is initially extraordinary, is that - again in this Petition as he did in his certiorari Petition for the first time - the Petitioner makes assertions challenging the impartiality of the Honorable Paul Burch at the PCR hearing. *Petition for Extraordinary Relief*, p. 5, citing App.p. 2714. Lindsey's appellate counsel suggests a brief reference during one witness's testimony **in overruling the State's objection to the relevance of testimony**, suggested some bias against the Petitioner in favor of the State. This was a parsed and isolated comment in the context of the lengthy proceeding where fifteen (15) witnesses testified, 32 exhibits were submitted by the Petitioner and 14 exhibits submitted by the Respondent. Subsequent to the hearing, Judge Burch allowed counsel to wait for a transcript of the PCR hearing before post-hearing memorandum were received. App. 2933-2934. At conclusion of the hearing, the Court suggested briefing in 30 days after receipt of the transcript which was provided to Petitioner's counsel by August 24, 2010 and the Petitioner's post-hearing brief was filed October 26, 2010. Subsequent to request and the filing of requested proposed order from the Respondents on May 2, 2011, Judge Burch allowed Petitioner until July 27, 2011 to submit his proposed order. To characterize Judge Burch's handling of the case as

"impatience" flies in the face of any reasonable reading of this record.[1]

Respondent submits that the complaint raised by Judge Burch on whether he is complying with the mandate of this Court is premature. The mandate was to issue and his order in the action – not to blind himself from the respective positions of each party that had been presented to him previously.

The direction by this Court was clear and unambiguous - "the issuance of an amended order that complies with Pruitt [v. State, 310 S.C. 254, 423 S.E.2d 127 (1992),] and Hall [v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004),, and with S.C. Code Ann. § 17-27-80 (2003), to include specific findings of fact and conclusions of law on each issue presented, based on accurate references to the record and the applicable law." The actions of Judge Burch in requesting prior pleading made in the lower court previously by each side cannot be deemed in violation of the order.

For all the foregoing reasons, the Petition for Extraordinary Relief must be denied.

Respectfully submitted,

DONALD J. ZELENKA
Senior Assistant Deputy Attorney Genera

ATTORNEYS FOR PETITIONER

By: _____

March 2, 2015

---

[1] Petitioner's complaint toward Judge Burch about his impatience with the case [suggesting an attitude against the Petitioner] is more extraordinary and incorrect when considered in light of what occurred prior to the case. Judge Burch appointed counsel Vieth and Collins on July 31, 2008 (after relieving prior appointments). An initial scheduling order was set on July 23, 2009 allowing for an amendment to be filed by August 1, 2009 (over one year after initial appointment) and setting January 1, 2010 for the hearing. Lindsey v. State, Scheduling Order, June 23, 2009. The Amended Application was filed August 6, 2009. App. 2210. On June 17, 2010, Respondents made a Return to the Amended Application and Second Rule 12(e) Motion for specificity. App. 2217. The hearing was convened July 19, 2010, nearly two years after counsel was appointed to represent the Petitioner. This is a far cry from impatience from Judge Burch.

October 10, 2014 4:39 PM Email – Zelenka to Judge Burch. Exhibit 1.

ATTACHMENTS TO RETURN

October 10, 2014 4:39 PM Email – Zelenka to Judge Burch. Exhibit 1.

October 10, 2014 4:58 PM Email – Dudek to Judge Burch. Exhibit 2.

October 20, 2014 Law Clerk Thomas Email to Counsel Exhibit 3.

October 20, 2014 – Follow-up emails concerning Remittitur from Counsel Zelenka and Clerk a copy of the remittitur and order. Exhibit 4

January 23, 2015 Cover Letter to Judge Burch for enclosures of Applicant's July 29, 2011 Proposed Order Granting Post-conviction Relief. Exhibit 5.

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February 26, 2015 Email from Appellate Counsel Dudek to Judge Burch's Law Clerk at 12:39 PM. (Exhibit 8).

February 26, 2015 Email from Judge Burch's Law Clerk Clarifying that He Was Not Requesting New Proposed Orders at 1:44 PM. (Exhibit 9).

February 26, 2015 2:11 PM Email from Zelenka to Judge Burch's Law Clerk and Counsel (Exhibit 10).

38

Don Zelenka

From: Don Zelenka
Sent: Friday, October 10, 2014 4:39 PM
To: pburchj@sccourts.org
Cc: Robert M. Dudek; rvieth@hbvlaw.com; David Alexander (dalexander@sccid.sc.gov); Barnette, Barry
Subject: Marion Lindsey v. State - Supreme Court Order - September 30, 2014
Attachments: Lindsey - Ord vacate Order of Dismissal remand to Circuit Court (00453440xD2C78).pdf

Follow Up Flag: Worldox

Dear Judge Burch –

Attached is an order from the South Carolina Supreme Court remanding the matter for issuance of an amended order. As you may be aware, the Petitioner raised an issue in the PCR appeal concerning the fact that the Respondent submitted a requested proposed order in the matter and asserted the failure of the Court to make corrections to my clerical and grammatical errors in the my submission suggested the order was not reviewed by you. Lindsey's Reply to Return to Petition for Writ of Certiorari, p. 2 ("The State Failed to Rebut the Assertion that the PCR Court did not review the State's Proposed Order Before Signing It.").

In light of the issues presented before the Supreme Court, it has taken the action to remand for an amended. I would suggest a status conference with Mr. Lindsey's counsel concerning how to most efficiently resolve your needs in getting materials.

One of the Petitioner's counsel, Robert Dudek sent a letter to me that I received and discussed with him today which states his opinion that the Supreme Court's order forbids the submission or a solicitation of a proposed order from the parties. I think the Supreme Court's order speaks plainly on the issue with its references to Pruitt v. State and Hall v. Catoe and directions to the court on remand.

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Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211
803-734-3601
dzelenka@scag.gov

The Supreme Court of South Carolina

Marion Alexander Lindsey, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-206087
Lower Court Case No. 07-CP-42-2848

ORDER

This death penalty matter is before the Court on a petition for a writ of certiorari, following the denial of petitioner's application for post-conviction relief (PCR). In light of the Court's concern with the frequency and severity of the drafting errors in the Order of Dismissal, and this Court's admonishments to PCR judges in *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992), and *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004), we vacate the Order of Dismissal and remand the matter to the circuit court for the issuance of an amended order that complies with *Pruitt* and *Hall*, and with S.C. Code Ann. § 17-27-80 (2003), to include specific findings of fact and conclusions of law on each issue presented, based on accurate references to the record and the applicable law. Petitioner may serve and file a new notice of appeal following the issuance of the amended order, or upon receipt of written notice of entry of an order ruling on any motion to alter or amend the judgment.

C.J.

J.

J.

J.

J.

Columbia, South Carolina

September 30, 2014

cc:
Donald J. Zelenka, Esquire
Robert Michael Dudek, Esquire
David Alexander, Esquire
The Honorable M. Hope Blackley

October 10, 2014 4:58 PM Email – Dudek to Judge Burch. Exhibit 2.

42

Don Zelenka

From: Robert M. Dudek <RDudek@sccid.sc.gov>
Sent: Friday, October 10, 2014 4:58 PM
To: Don Zelenka; pburchj@sccourts.org
Cc: rvieth@hbvlaw.com; David Alexander; Barnette, Barry
Subject: RE: Marion Lindsey v. State - Supreme Court Order - September 30, 2014
Attachments: Ltr to Zelenka re. remand 10.09.14.pdf

Judge Burch: I have attached the letter that Don referenced in his email below. We look forward to meeting with you in person at the status conference. Best –

Bob Dudek
803-734-1955

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201-1589
(803) 734-1330 – Telephone
(803) 734-1397 - Fax

From: Don Zelenka [mailto:DZelenka@scag.gov]
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dzelenka@scag.gov

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 9, 2014

Donald J. Zelenka, Esquire
Senior Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: Marion Lindsey v. State, CA No. 2007-CP-42-2848

Dear Don:

By now, I am sure you have received the Supreme Court's Order dated September 30, 2014.

It is my interpretation of the Order that it forbids the submission or solicitation of a proposed order from the parties. If this is not your interpretation, then please let me know so that I may make a formal motion to place my concerns on the record.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

cc. The Honorable Paul M. Burch
David Alexander, Esq.
Client

October 20, 2014 Law Clerk Thomas Email to Counsel Exhibit 3.

46

Don Zelenka

From: Burch, Paul M. Law Clerk (Samuel H. Thomas) <PBurchLC@sccourts.org>
Sent: Monday, October 20, 2014 12:37 PM
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October 20, 2014 – Follow-up emails concerning Remittitur from Counsel Zelenka and Clerk a copy of the remittitur and order. Exhibit 4

48

Don Zelenka

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Don Zelenka

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Cc:	Don Zelenka
Subject:	Marion A. Lindsey v. State, 2007-CP-42-2848 (Appellate Court Case No. 2012-206087)
Attachments:	Lindsey - Remittitur (00469199xD2C78).pdf; Lindsey -Order.pdf
Follow Up Flag:	Worldox

Dear Judge Burch:

Although I would have thought that the clerk of the circuit court would have forwarded this to you, I am sending you a copy of the order and remittitur issued in this matter.

Dan Shearouse
Clerk, Supreme Court of South Carolina

From: Hopkins, Debbie
Sent: Monday, October 20, 2014 3:19 PM
To: Shearouse, Daniel
Subject: FW: Marion A. Lindsey v. State, 2007-CP-42-2848

Dan, I scanned the order and remittitur from the copier and sent them to you under separate cover.

From: Don Zelenka [mailto:DZelenka@scag.gov]
Sent: Monday, October 20, 2014 2:52 PM
To: Burch, Paul M. Law Clerk (Samuel H. Thomas); rdudek@sccid.sc.gov
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Mr. Thomas –

Thank you for the follow-up. The remittitur in this case was entered on October 16, 2014 and a copy is attached. I noticed that the correspondence I received only showed copies going to the Clerk of Court and appellate PCR counsel.

By copy of this email I am advising the Ms. Hopkins, a Deputy Clerk of the Supreme Court of this request and the expectation on the part of Judge Burch to receive something from the Court.

Sincerely,

Don Zelenka

Donald J. Zelenka
Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211
803-734-3601

dzelenka@scag.gov

From: Burch, Paul M. Law Clerk (Samuel H. Thomas) [mailto:PBurchLC@sccourts.org]
Sent: Monday, October 20, 2014 12:37 PM
To: rdudek@sccid.sc.gov; Don Zelenka
Subject: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

I hope this email finds you well. Judge Burch has asked me to send you both this email stating that we have not yet received anything formal from the Supreme Court on this matter. We will, however, be reviewing the file and will be back in touch with you both in order to set up a game plan on how we should proceed from here in a few weeks.

Kindest regards,

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728
T: 843-672-3270
F: 843-672-5960

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The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

October 16, 2014

The Honorable M. Hope Blackley
Clerk of Court, Spartanburg County
PO Box 3483
Spartanburg SC 29304-3483

REMITTITUR

Re: Marion Alexander Lindsey v. State
Lower Court Case No. 2007-CP-42-02848
Appellate Case No. 2012-206087

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

CLERK

ATTORNEY GENERAL'S OFFICE
RECEIVED 10-16-14
ADMINISTRATIVE INSTRUCTIONS
FILE OPEN END
HAVE COPIES MADE
ROUTE TO
ORDER: TRANSCRIPT
PEN RECORDS CLERK RECORDS
OTHER:

cc:
Donald J. Zelenka, Esquire
Robert Michael Dudek, Esquire
David Alexander, Esquire

The Supreme Court of South Carolina

Marion Alexander Lindsey, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-206087
Lower Court Case No. 07-CP-42-2848

ORDER

This death penalty matter is before the Court on a petition for a writ of certiorari, following the denial of petitioner's application for post-conviction relief (PCR). In light of the Court's concern with the frequency and severity of the drafting errors in the Order of Dismissal, and this Court's admonishments to PCR judges in *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992), and *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004), we vacate the Order of Dismissal and remand the matter to the circuit court for the issuance of an amended order that complies with *Pruitt* and *Hall;* and with S.C. Code Ann. § 17-27-80 (2003), to include specific findings of fact and conclusions of law on each issue presented, based on accurate references to the record and the applicable law. Petitioner may serve and file a new notice of appeal following the issuance of the amended order, or upon receipt of written notice of entry of an order ruling on any motion to alter or amend the judgment.

C.J.

J.

J.

J.

J.

Columbia, South Carolina

September 30, 2014

cc:
Donald J. Zelenka, Esquire
Robert Michael Dudek, Esquire
David Alexander, Esquire
The Honorable M. Hope Blackley

Don Zelenka

From: Robert M. Dudek <RDudek@sccid.sc.gov>
Sent: Tuesday, October 21, 2014 10:01 AM
To: Burch, Paul M. Law Clerk (Samuel H. Thomas); Don Zelenka
Cc: David Alexander
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Thank you much. Appellate Defender David Alexander is my co-counsel and we both look forward to hearing from you in the future. My direct line is below. Best –

Bob Dudek
803-734-1955

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201-1589
(803) 734-1330 – Telephone
(803) 734-1397 - Fax

From: Burch, Paul M. Law Clerk (Samuel H. Thomas) [mailto:PBurchLC@sccourts.org]
Sent: Monday, October 20, 2014 12:37 PM
To: Robert M. Dudek; dzelenka@scag.gov
Subject: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

I hope this email finds you well. Judge Burch has asked me to send you both this email stating that we have not yet received anything formal from the Supreme Court on this matter. We will, however, be reviewing the file and will be back in touch with you both in order to set up a game plan on how we should proceed from here in a few weeks.

Kindest regards,

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Don Zelenka

From: Burch, Paul M. Law Clerk (Samuel H. Thomas) <PBurchLC@sccourts.org>
Sent: Thursday, February 26, 2015 11:43 AM
To: Don Zelenka; rdudek@sccid.sc.gov; Rick Vieth (rvieth@hbvlaw.com)
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

Judge Burch has requested that I contact you about getting us Microsoft Word versions of the proposed orders submitted after the PCR hearing held on July 19-21, 2010 before him if this is at all possible. Please do not hesitate to contact me if further information is needed. Thank you and I look forward to hearing back from you as soon as possible.

Kindest regards,

Sam Thomas

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
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Pageland, SC 29728
Office: 843-672-3270
Fax: 843-672-5960

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Sincerely,

Don Zelenka

Donald J. Zelenka
Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office

58
P.O. Box 11549
Columbia, S.C. 29211
803-734-3601
dzelenka@scag.gov

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January 23, 2015 Cover Letter to Judge Burch for enclosures of Applicant's July 29, 2011 Proposed Order Granting Post-conviction Relief. Exhibit 5.

ALAN WILSON
ATTORNEY GENERAL

January 23, 2015

Honorable Paul Burch
Circuit Court Judge
Post Office Box 276
Pageland, SC 29728

Attn: Sam Thomas

Re: Marion Lindsey v. State

Dear Judge Burch:

Pursuant to the request of your law clerk Sam Thomas, please find enclosed a copy of the proposed Order Granting Post-Conviction Relief submitted by Rick Vieth during the earlier Post-Conviction Relief action. The cover letter was July 29, 2011 and this office received its copy on August 1, 2011. For your information the original Order of Dismissal was signed by you August 10, 2011 and filed August 12, 2011.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lm

Enclosures: Cover Letter from Richard Vieth
Order Granting Post-Conviction Relief (Proposed)

cc: Robert Dudek, Esq.

February 26, 2015 Email Requesting Microsoft Word Versions of Both Side Proposed Orders submitted after the 2010 PCR Hearing. Exhibit 6

62

Don Zelenka

From: Burch, Paul M. Law Clerk (Samuel H. Thomas) <PBurchLC@sccourts.org>
Sent: Thursday, February 26, 2015 11:43 AM
To: Don Zelenka; rdudek@sccid.sc.gov; Rick Vieth (rvieth@hbvlaw.com)
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

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Kindest regards,

Sam Thomas

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728
Office: 843-672-3270
Fax: 843-672-5960

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To: Burch, Paul M. Law Clerk (Samuel H. Thomas); rdudek@sccid.sc.gov
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

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Sincerely,

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Donald J. Zelenka
Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office

P.O. Box 11549
Columbia, S.C. 29211
803-734-3601
dzelenka@scag.gov

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Sent: Monday, October 20, 2014 12:37 PM
To: rdudek@sccid.sc.gov; Don Zelenka
Subject: Marion A. Lindsey v. State, 2007-CP-42-2848

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February 26, 2015 12:36 Email with Respondent's June 2011 Proposed Order in Word (with at least one earlier made correction on page 153) (Exhibit 7)

Don Zelenka

From:	Don Zelenka
Sent:	Thursday, February 26, 2015 12:36 PM
To:	Burch, Paul M. Law Clerk (Samuel H. Thomas); rdudek@sccid.sc.gov; Rick Vieth (rvieth@hbvlaw.com)
Cc:	Hopkins, Debbie
Subject:	RE: Marion A. Lindsey v. State, 2007-CP-42-2848

You have received 2 files.
Use the secure links below to download.

Mr. Thomas –

Attached is a copy of the Respondent's original proposed order submitted to you with one typographical correction on the spelling of "shift" on page 153 that I previously made to the document. I do not recall making any other corrections to the best of my recollection to other typographical errors which were pointed out to the Supreme Court in Mr. Dudek's and Mr. Alexander's Reply to the Return to the Petition for Writ of Certiorari which I am also attaching for you information.

I believe my original version in 2011 was completed in Wordperfect and then later automatically converted to WORD during our office document management transition. According to my records, my initial proposed order was sent by request to Judge Burch on June 2, 2011 by email in a pdf and by mail in a paper form, but not WORD or Wordperfect.

I do not have a copy of Mr. Lindsey's proposed order granting PCR in WORD, but do have a pdf of it. If there are other questions, please advise me.

I am sending the documents through Accellion as attachment. If there are problems in opening them, please advise me.

Sincerely,

Don Zelenka

Donald J. Zelenka
Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211
803-734-3601
dzelenka@scag.gov

Download Files

Available until: **28 March 2015**

Download File: Lindsey Marion - PCR - DP - Respondent's Proposed Order of D (00453431xD2C78).docx
214.44 KBytes.
Download File: reply 2 return 2 petition 4 cert (00453434xD2C78).pdf
688.73 KBytes.

You have received attachment link(s) within this email sent via Accellion Secure File Transfer. To retrieve the attachment(s), please click on the link(s). To learn how your company can benefit from Accellion Secure File Transfer technology, please visit http://www.accellion.com

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From: Burch, Paul M. Law Clerk (Samuel H. Thomas) [mailto:PBurchLC@sccourts.org]
Sent: Thursday, February 26, 2015 11:43 AM
To: Don Zelenka; rdudek@sccid.sc.gov; Rick Vieth (rvieth@hbvlaw.com)
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

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Kindest regards,

Sam Thomas

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728
Office: 843-672-3270
Fax: 843-672-5960

From: Don Zelenka [mailto:DZelenka@scag.gov]
Sent: Monday, October 20, 2014 2:52 PM
To: Burch, Paul M. Law Clerk (Samuel H. Thomas); rdudek@sccid.sc.gov
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

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Don Zelenka

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P.O. Box 11549
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dzelenka@scag.gov

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February 26, 2015 Email from Appellate Counsel Dudek to Judge Burch's Law Clerk at 12:39 PM. (Exhibit 8).

Don Zelenka

From:	Robert M. Dudek <RDudek@sccid.sc.gov>
Sent:	Thursday, February 26, 2015 12:37 PM
To:	Burch, Paul M. Law Clerk (Samuel H. Thomas); Don Zelenka; Rick Vieth (rvieth@hbvlaw.com)
Cc:	Hopkins, Debbie
Subject:	RE: Marion A. Lindsey v. State, 2007-CP-42-2848
Attachments:	Order vacating Ord Dsml & remanding 9.30.14.pdf; Ltr to Zelenka re. remand 10.09.14.pdf

Mr. Thomas: We object to the submission of proposed orders as in violation of the Supreme Court's order of September 30, 2014 remanding this case to Judge Burch. I have attached that order, and also my letter to Mr. Zelenka dated October 9, 2014 stating that the Supreme Court's order prohibits the submission or solicitation of proposed orders in any format. We are filing a motion this afternoon in the Supreme Court consistent with this position. Respectfully,

Bob Dudek
803-734-1955

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201-1589
(803) 734-1330 – Telephone
(803) 734-1397 - Fax

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Sent: Thursday, February 26, 2015 11:43 AM
To: Zelenka, Don; Robert M. Dudek; Rick Vieth (rvieth@hbvlaw.com)
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

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Kindest regards,

Sam Thomas

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728

70

Office: 843-672-3270
Fax: 843-672-5960

From: Don Zelenka [mailto:DZelenka@scag.gov]
Sent: Monday, October 20, 2014 2:52 PM
To: Burch, Paul M. Law Clerk (Samuel H. Thomas); rdudek@sccid.sc.gov
Cc: Hopkins, Debbie
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Sincerely,

Don Zelenka

Donald J. Zelenka
Senior Assistant Deputy Attorney General
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P.O. Box 11549
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February 26, 2015 Email from Judge Burch's Law Clerk Clarifying that He Was Not Requesting New Proposed Orders at 1:44 PM. (Exhibit 9).

Don Zelenka

From: Burch, Paul M. Law Clerk (Samuel H. Thomas) <PBurchLC@sccourts.org>
Sent: Thursday, February 26, 2015 1:44 PM
To: Robert M. Dudek; Don Zelenka; Rick Vieth (rvieth@hbvlaw.com)
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

Judge Burch was in no way requesting new proposed orders and I apologize if that was misunderstood from my communications with you. However, Judge Burch was requesting Word versions of the proposed orders previously filed and relating to the hearing that took place in July of 2010 for his review.

Sincerely,

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728
Office: 843-672-3270
Fax: 843-672-5960

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T: 843-672-3270
F: 843-672-5960

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February 26, 2015 2:11 PM Email from Zelenka to Judge Burch's Law Clerk and Counsel (Exhibit 10).

Don Zelenka

From: Don Zelenka
Sent: Thursday, February 26, 2015 2:11 PM
To: 'Burch, Paul M. Law Clerk (Samuel H. Thomas)'; Robert M. Dudek; Rick Vieth (rvieth@hbvlaw.com)
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848
Attachments: Lindsey - Coverltr forwarding Order granting PCR (00563918xD2C78).pdf

Follow Up Flag: Worldox

Mr. Thomas,

Thank you for the clarification. I did not think the request was for new proposed orders either as stated in my intervening email after receiving Mr. Dudek's. .

As noted previously subsequent to Mr. Dudek's letter to me, upon the Judge Burch's request in January, I had earlier provided the Court a copy of Petitioner Lindsey's Proposed Order Granting PCR - albeit in a pdf - without the same controversy or concerns expressed. (Copy of letter attached).

Sincerely,

Don Zelenka

Donald J. Zelenka
Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211
803-734-3601
dzelenka@scag.gov

From: Burch, Paul M. Law Clerk (Samuel H. Thomas) [mailto:PBurchLC@sccourts.org]
Sent: Thursday, February 26, 2015 1:44 PM
To: Robert M. Dudek; Don Zelenka; Rick Vieth (rvieth@hbvlaw.com)
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

Judge Burch was in no way requesting new proposed orders and I apologize if that was misunderstood from my communications with you. However, Judge Burch was requesting Word versions of the proposed orders previously filed and relating to the hearing that took place in July of 2010 for his review.

Sincerely,

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728
Office: 843-672-3270
Fax: 843-672-5960

From: Robert M. Dudek [mailto:RDudek@sccid.sc.gov]
Sent: Thursday, February 26, 2015 12:37 PM
To: Burch, Paul M. Law Clerk (Samuel H. Thomas); Zelenka, Don; Rick Vieth (rvieth@hbvlaw.com)
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Mr. Thomas: We object to the submission of proposed orders as in violation of the Supreme Court's order of September 30, 2014 remanding this case to Judge Burch. I have attached that order, and also my letter to Mr. Zelenka dated October 9, 2014 stating that the Supreme Court's order prohibits the submission or solicitation of proposed orders in any format. We are filing a motion this afternoon in the Supreme Court consistent with this position. Respectfully,

Bob Dudek
803-734-1955

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201-1589
(803) 734-1330 – Telephone
(803) 734-1397 - Fax

From: Burch, Paul M. Law Clerk (Samuel H. Thomas) [mailto:PBurchLC@sccourts.org]
Sent: Thursday, February 26, 2015 11:43 AM
To: Zelenka, Don; Robert M. Dudek; Rick Vieth (rvieth@hbvlaw.com)
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

Judge Burch has requested that I contact you about getting us Microsoft Word versions of the proposed orders submitted after the PCR hearing held on July 19-21, 2010 before him if this is at all possible. Please do not hesitate to contact me if further information is needed. Thank you and I look forward to hearing back from you as soon as possible.

Kindest regards,

Sam Thomas

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728
Office: 843-672-3270
Fax: 843-672-5960

From: Don Zelenka [mailto:DZelenka@scag.gov]
Sent: Monday, October 20, 2014 2:52 PM
To: Burch, Paul M. Law Clerk (Samuel H. Thomas); rdudek@sccid.sc.gov
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Mr. Thomas –

Thank you for the follow-up. The remittitur in this case was entered on October 16, 2014 and a copy is attached. I noticed that the correspondence I received only showed copies going to the Clerk of Court and appellate PCR counsel.

By copy of this email I am advising the Ms. Hopkins, a Deputy Clerk of the Supreme Court of this request and the expectation on the part of Judge Burch to receive something from the Court.

Sincerely,

Don Zelenka

Donald J. Zelenka
Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211
803-734-3601
dzelenka@scag.gov

From: Burch, Paul M. Law Clerk (Samuel H. Thomas) [mailto:PBurchLC@sccourts.org]
Sent: Monday, October 20, 2014 12:37 PM
To: rdudek@sccid.sc.gov; Don Zelenka
Subject: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

I hope this email finds you well. Judge Burch has asked me to send you both this email stating that we have not yet received anything formal from the Supreme Court on this matter. We will, however, be reviewing the file and will be back in touch with you both in order to set up a game plan on how we should proceed from here in a few weeks.

Kindest regards,

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728
T: 843-672-3270
F: 843-672-5960

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ALAN WILSON
ATTORNEY GENERAL

January 23, 2015

Honorable Paul Burch
Circuit Court Judge
Post Office Box 276
Pageland, SC 29728

Attn: Sam Thomas

Re: Marion Lindsey v. State

Dear Judge Burch:

Pursuant to the request of your law clerk Sam Thomas, please find enclosed a copy of the proposed Order Granting Post-Conviction Relief submitted by Rick Vieth during the earlier Post-Conviction Relief action. The cover letter was July 29, 2011 and this office received its copy on August 1, 2011. For your information the original Order of Dismissal was signed by you August 10, 2011 and filed August 12, 2011.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lm

Enclosures: Cover Letter from Richard Vieth
Order Granting Post-Conviction Relief (Proposed)

cc: Robert Dudek, Esq.

ALAN WILSON
ATTORNEY GENERAL

January 23, 2015

Honorable Paul Burch
Circuit Court Judge
Post Office Box 276
Pageland, SC 29728

Attn: Sam Thomas

Re: Marion Lindsey v. State

Dear Judge Burch:

Pursuant to the request of your law clerk Sam Thomas, please find enclosed a copy of the proposed Order Granting Post-Conviction Relief submitted by Rick Vieth during the earlier Post-Conviction Relief action. The cover letter was July 29, 2011 and this office received its copy on August 1, 2011. For your information the original Order of Dismissal was signed by you August 10, 2011 and filed August 12, 2011.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lm

Enclosures: Cover Letter from Richard Vieth
Order Granting Post-Conviction Relief (Proposed)

cc: Robert Dudek, Esq.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2012-206087

MARION ALEXANDER LINDSEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served Respondents **Return to Petition for Extraordinary Relief** on:

Robert M. Dudek, Esquire
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

David Alexander, Esquire
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

by depositing a copy in the Mail with sufficient postage this 2nd day of March 2015.

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

COPY

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
MAR - 3 2015
S.C. Supreme Court

Certiorari to Spartanburg County

Paul M. Burch, Circuit Court Judge

MARION ALEXANDER LINDSEY,

PETITIONER,

V.

RECEIVED
MAR - 3 2015
SC SUPREME COURT
APPELLATE DEFENSE

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-206087

REPLY TO THE RETURN TO PETITION FOR EXTRAORDINARY RELIEF

The State failed to rebut petitioner's two main points. First, petitioner asserted that the PCR judge's request for a Microsoft Word version of the State's proposed order can mean only one thing: the court intends to cut and paste from it to draft an order. Petitioner contends this violates both the letter and spirit of this Court's September 30, 2014, Order. The State did not advance any other reason why the PCR judge would request the proposed order in electronic format. Petitioner's second point was that the PCR judge never read the proposed order before signing it. The State's conspicuous silence on this point must mean that it agrees.

The State contends that since the PCR judge already had the proposed order, there can be no harm in receipt of it in an electronic format. This contention misses the point. This case is not about some kind of symmetry in the lower court's various requests for electronic versions of

the 2011 proposed orders. It is about compliance with the law as articulated repeatedly by this Court and the federal courts. Since the PCR judge did not read the initial proposed order and has now demonstrated his intent to use it again by requesting it in electronic format, it is now clear that petitioner cannot receive a fair decision. The PCR judge's failure to read the order has now been compounded by his intent to cut-and-paste from an order that this Court held had frequent and severe errors.

The State appears to believe that petitioner takes issue with the errors themselves. Perhaps this is why the State sent the PCR judge petitioner's catalogue of the errors. It is not the errors but what the errors prove: that the PCR judge did not read the order before signing it. Petitioner submits that this failure, on which the PCR judge has now "doubled down," means that petitioner's constitutional right to due process in this capital case has been violated. U.S. Const. amends. V, XIV, VIII. The rationale of this Court's decisions in Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004) and the United States Supreme Court's decision in Jefferson v. Upton, 560 U.S. 284 (2010) is that wholesale adoption of the State's proposed order in a capital case undermines the deliberative process to which death-sentenced persons have a right. See also Bell v. Ozmint, 332 F.3d 229, (4th Cir. 2003) (stating that the Fourth Circuit does "not applaud" the practice of largely adopting a proposed order from the State).

Pruitt, Hall, and Jefferson require the PCR judge to contemplate the evidence and draft an order to ensure that the evidence and legal issues are fairly considered. Pruitt, Hall, and Jefferson never contemplated that a judge would not even read an order before signing it. The State writes that petitioner's questioning of the PCR judge's impartiality in this case is "extraordinary." State's Ret. at 8. Respectfully, petitioner submits that what is "extraordinary" is that a judge would not read an order in a death penalty case and then, after correction by all

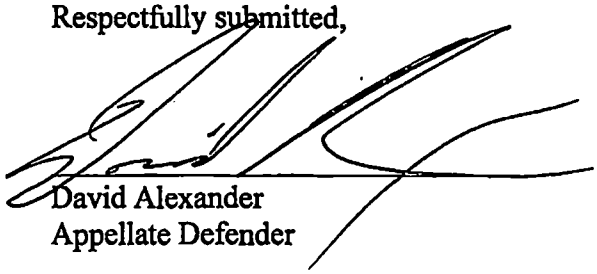
five justices of the Supreme Court of this state, would intend to do so again. If failing to go through the deliberative process of drafting an order is an error under Pruitt, Hall, and Jefferson, then this error has been magnified to an unprecedented extent in this case. Because of the respect petitioner's counsel has for this state's judiciary (and for opposing counsel), we take no pleasure in making this argument. This is a professional, not a personal, disagreement.

The State points to its submission to the PCR court of petitioner's proposed order in January 2015. State's Ret. at 4 – 5 (paragraph 5). It is unclear whether the PCR court also contacted petitioner's counsel regarding its alleged request for petitioner's proposed order. The State's attorney copied petitioner's counsel with his response and seems to insinuate that the fact that petitioner did not object somehow affects petitioner's current argument. Again, the State's error here is in failing to realize the import of requesting the proposed order in an electronic format. The only purpose for requesting it in such a format is to cut and paste from it. Petitioner's primary objection is to this improper purpose which shows an intent to disregard this Court's September 30, 2014, Order. These concerns were not implicated by the State's January 23, 2015, letter. State's Ret. Ex. 5.

This Court rightfully recognized petitioner's due process concerns with the PCR judge's adoption without review of the State's proposed order. The State's Return fails to rebut the key points raised in the instant petition. This Court did not remand this case to the PCR judge for better proofreading. It remanded the case for a fair consideration because the errors are compelling evidence that petitioner did not receive a full and complete hearing and decision. Because petitioner cannot receive a fair determination from the PCR judge, this Court should enforce its September 30, 2014, Order in the only meaningful way that remains: grant petitioner a new PCR hearing before a different circuit judge.

WHEREFORE, petitioner respectfully requests that this Court grant a new Post-Conviction Relief Hearing before a different circuit judge. Petitioner also respectfully requests that the matter be stayed in the lower court pending disposition of this Court's decision.

Respectfully submitted,



David Alexander
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

This 3rd day of March, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Paul M. Burch, Circuit Court Judge

MARION ALEXANDER LINDSEY,

PETITIONER,

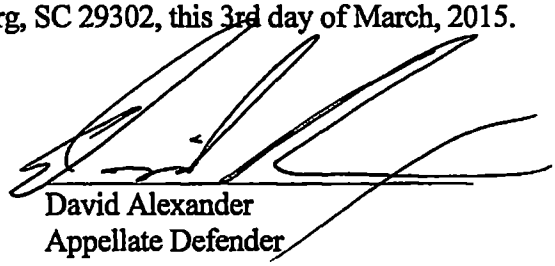
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the reply to the return to petition for extraordinary relief in this case have been served on Donald J. Zelenka, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, on the Honorable Paul M. Burch, Fourth Judicial Circuit, P.O. Box 276, Pageland, SC 29728, and upon Richard W. Veith, Esquire, 360 East Henry St., Suite 101, Spartanburg, SC 29302, this 3rd day of March, 2015.



David Alexander
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

SWORN TO BEFORE ME this 3rd day
of March, 2015.

Rhonda Denise Haworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.

The Supreme Court of South Carolina

Marion Alexander Lindsey, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-000385
Lower Court Case No. 2007-CP-42-02848

ORDER

Petitioner has filed a Petition for Extraordinary Relief requesting the Court grant a new post-conviction relief hearing before an impartial judge. We deny the petition. In light of our ruling, petitioner's request for a stay of proceedings in the lower court is moot.

C.J.

J.

J.

J.

Columbia, South Carolina

April 9, 2015

cc:
David Alexander, Esquire
Robert Michael Dudek, Esquire
Donald J. Zelenka, Esquire
Richard W. Vieth, Esquire
The Honorable Paul M. Burch

RECEIVED

APR - 9 2015

SC OFFICE OF
APPELLATE DEFENSE

ALAN WILSON
ATTORNEY GENERAL

February 12, 2016

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: Marion Alexander Lindsey v. State of South Carolina
Appellate Case No. 2015-000385
2007-CP-42-2848 - Status of Appeal

Dear Mr. Shearouse:

This is to request information concerning the status of the appeal before this Court. On October 2, 2015, this Office received from the Clerk of Court for Spartanburg County a filed copy of the Amended Order Denying Post-Conviction Relief entered October 2, 2015, dated September 28, 2015. The Amended Order was completed pursuant to an Order of Remand by this Court on September 30, 2014. In that Order, this Court directed also that "Petitioner may serve and file a new notice of appeal following the issuance of the amended order, or upon receipt of written notice of entry of an order ruling on any motion to alter or amend judgment."

A certificate of service by the Clerk of Court reflects the amended order was served by mail on October 2, 2015 upon Mr. Lindsey's post-conviction relief hearing counsel, Rick Vieth and David Collins, among others. (Copy attached). My review of the Spartanburg County Clerk of Court Docket Sheet reflects the same. Further, I have not received any motion to alter or amend or notice of appeal.

I bring these matters to the Court's attention to the different procedural history in this case and the fact that the stay of execution has been pending. I await instructions from the Court on how to proceed to resolve this matter.

RECEIVED
FEB 12 2016
APPELLATE DEFENSE

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

By copy of this letter, I am advising post-conviction relief hearing counsel, Rick Vieth and David Collins, and post-conviction relief appellate counsel, Robert M. Dudek and David Alexander, of this communication.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lbb
Enclosure: Certificate of Service

cc: Richard W. Vieth, Esquire
David Collins, Esquire
Robert M. Dudek, Esquire
David Alexander, Esquire
Honorable Paul M. Burch
Barry J. Barnette, Solicitor

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

7TH JUDICIAL CIRCUIT

Marion Alexander Keithley #60015
Applicant

CASE # 2015CP4202648

VS

State
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Amended Order Denying Post-Conviction Relief in this action dated 9-28-2015 on 10-2-15

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Addie Haworth
Rick Wirth
Bill Lockhart
David Collins - Donald Zelenka

10-2-15
(Date)

Christie Seay
(Signature)

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 12, 2016

VIA EMAIL ONLY
Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211
DJHopkins@sccourts.org

Re: Marion Lindsey v. State, CA No. 2007-CP-42-2848
Appellate Case No. 2012-206087

Dear Mr. Shearouse:

This letter will respond to Mr. Zelenka's letter of earlier today and will also confirm today's email correspondence between the parties and the Court.

I have spoken to both Rick Vieth and David Collins. They both thoroughly reviewed their file and told me they did not receive the amended order referred to in Mr. Zelenka's letter. They both stated that it would be extremely unlikely that they could overlook what Mr. Zelenka says is a 187 page order in a death penalty case. They also stated that in their years of practice in Spartanburg County, they cannot recall having ever seen a "certificate of service" from the clerk of court that looked like the one attached to Mr. Zelenka's letter. Appellate co-counsel David Alexander, who practiced in the upstate for a number of years, also said he cannot recall such a form. In any event, the form does not indicate an address of service nor does it indicate that appellate counsel were served with the order. As of the writing of this letter, I still have not seen this amended order.

I would respectfully suggest that either the circuit court or Mr. Zelenka serve the amended order on appellate counsel rather than trial-level PCR counsel, thereby beginning the deadlines for filing either a Rule 59(e) Motion or a Notice of Appeal. Properly serving the amended order would avoid the need to either litigate the service issue or trigger the need for Mr. Lindsey to file a PCR seeking relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Both of these options appear to be a waste of time and judicial resources, especially considering that this action has been pending since 2007.

Thank you for your consideration of this request.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

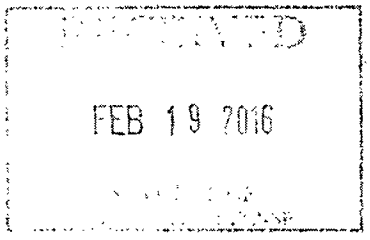
cc. The Honorable Paul M. Burch
Donald J. Zelenka, Esq.
David Alexander, Esq.
Richard W. Vieth, Esq.
David Collins, Esq.
Barry J. Barnette, Esq.
Client (VIA US Mail only)

ALAN WILSON
ATTORNEY GENERAL

February 17, 2016

Robert M. Dudek, Esquire
Division of Appellate Defense
P. O. Box 11589
Columbia, SC 29211

Richard W. Vieth, Esqure
Henderson Brandt & Vieth, PA
360 E. Henry Street, Ste. 101
Spartanburg, SC 29302



David M. Collins, Jr., Esquire
Collins Law Firm, PC
P. O. Box 2465
Greenville, SC 29602-2465

Re: Marion Alexander Lindsey v. State - 07-CP-42-2848
Amended Order Denying Post-Conviction Relief Dated September 28, 2015 and Filed October 2, 2015

Dear All:

Attached is the 187 page Amended Order Denying Post-Conviction Relief signed September 28, 2015, filed October 2, 2015, certificate of service from the Spartanburg County Clerk of Court dated October 2, 2015 and my certificate of service dated today, February 17, 2016. By copy of this letter with my certificate of service attached, I am advising the Clerk of the South Carolina Supreme Court and Clerk of Court for Spartanburg County of this service by this Office.

This service upon PCR hearing counsel Richard Vieth and David Collins is being done because I have been advised by them on February 12, 2016 that they have no record of receiving the Amended Order that was mailed by the Spartanburg County Clerk of Court according to the

Robert M. Dudek, Esquire
Richard W. Vieth, Esquire
David M. Collins

February 17, 2016

October 2, 2015 certificate of service. I am additionally serving PCR appellate counsel Robert Dudek of the South Carolina Division of Appellate Defense with an additional copy.

If further information is necessary, please advise.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lbb
Enclosures: Amended Order Denying Post-Conviction Relief
October 2, 2015 Certificate of Service (Clerk)
February 17, 2016 Certificate of Service (Zelenka)

cc: Debbie Hopkins, SC Supreme Ct. (Certificate of Service (Zelenka))
M. Hope Blackley, Spartanburg Clerk of Court (Certificate of Service (Zelenka))
Honorable Paul M. Burch
Barry J. Barnette, Solicitor

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Marion Alexander Lindsey, SCDC No. 6015 Applicant, vs. State of South Carolina Respondent.	C/A No. 2007-CP-42-2848 AMENDED ORDER DENYING POST-CONVICTION RELIEF

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

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

The matter was held before the Court on July 19-21, 2010. The Applicant was present and

2011 OCT -2 P 9:52

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

I

PRIOR PROCEDURAL HISTORY

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

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

> That the defendant, Marion Alexander Lindsey, did murder Ruby Nell Lindsey, and by his act of murder

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

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

On May 17, 2004, the matter was called for trial before the Honorable John C. Few. Petitioner was present and represented by Spartanburg County Public Defender Michael Bartosh, Doug Brennan and Karen Quimby (Hatcher). The prosecution was represented by Seventh Circuit Solicitor Harold "Trey" Gowdy and Deputy Solicitors Barry Barnette and Donnie Willingham. On May 21, 2004 the jury convicted Lindsey of murder at 4:45 p.m. R., Tr. p. 1718, 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., Tr. p. 2174.

The Petitioner made an appeal to the South Carolina Supreme Court. The Applicant was

represented by Robert Dudek of the South Carolina Office of Appellate Defense. In the appeal, he raised the following questions presented:

> 1.
>
> Whether the court erred by excusing potential Juror Krisher for cause, and ruling that Krisher's belief that life imprisonment without parole was a more substantial punishment that the death penalty was incompatible with South Carolina law, since Krisher stated that he could impose the death penalty and sign the death form and he was a qualified juror?
>
> 2.
>
> Whether the judge erred by refusing to replace Juror Mauldin with an alternate where Mauldin was conducting his own measurements during a jury view of the automobile in which the decedent was shot, since a juror conducting his own measurements or experiments during a jury view was improper?
>
> 3.
>
> Whether the court erred by refusing to direct a verdict on the "great risk of death" aggravator since appellant shot his wife at close range and there was no evidence appellant knowingly created a risk of death to more than one person?
>
> 4.
>
> Whether appellant's death sentence should be vacated as both excessive and disproportionate since this case involves a domestic dispute pertaining to child visitation and no death sentence has been imposed in this state in the 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

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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

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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.

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II

ALLEGATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Amended Application, ¶ 10, 11, page 3.

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

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

   MEMO, p. 43.

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

   MEMO, pp. 46-47.

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

   MEMO, p. 47.

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

   MEMO, p. 49.

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

   MEMO, p. 50.

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

   MEMO, pp. 51-52.

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

   MEMO, pp. 52-53.

8. Ineffective Assistance of Counsel - EMS WORKERS TESTIMONY ABOUT DESIRE FOR SUICIDE
   a. Failed to elicit testimony from EMS workers - Joseph Stewart and Vincent Bell - regarding Lindsey's desire to commit suicide after Nell's death.
   b. Failed to interview EMS workers to determine what info and testimony they could provide.
   c. Failed to prepare EMS workers to testify in penalty phase.
   d. Failed to ask appropriate questions to elicit admissible info about Applicant's state of mind.
   e. Failed to adequately argue testimony of EMS workers related to Lindsey's words, actions and state of mind after shooting was admissible.
   f. Failed to preserve record regarding EMS testimony by not presenting adequate arguments in support of attempt to present testimony.

   MEMO, p. 53.

9. Ineffective Assistance of Counsel - TIME SPENT IN MITIGATION INVESTIGATION
   a. Failed to commit sufficient time to perform adequate investigation in mitigation.
   b. Failed to assemble complete defense team until one month prior to trial.
   c. Failed to perform investigation of Lindsey's life/family history until two months prior to trial.
      (1) First half of investigation done without mitigation investigator

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(2) Investigation lasted only eight weeks

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

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

MEMO, p. 54.

10. Ineffective Assistance of Counsel – STATUTORY AGGRAVATING FACTORS

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

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

MEMO, pp. 58-60.

III

STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL

To establish deficient performance of counsel, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, at 688 (1984). A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.*, at 689. The challenger's burden is to show "that counsel made 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." *Id.* 466 U.S. 668, at 687 (quoting *McMann v. Richardson*, 397 U. S. 759, 770 (1970)); see also *Gentry*, supra, at 7. Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. *Strickland*, supra, at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.

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

Although courts may not indulge "post hoc rationalization" for counsel's decision making contradicting the available evidence of counsel's actions, *Wiggins*, 539 U.S. 510, at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel 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. *Harrington v. Richter*, 562 U.S. 86 (2011). See also *Cullen v. Pinholster*, 131 S.Ct. 1388, at 1407 (2011) (citing with approval Chief Judge Kozinski's dissenting opinion below in which he stated that the court of appeals was required "to affirmatively entertain the range of possible reasons" that counsel may have had for proceeding as they did).

With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. 688, 694. It is not enough "to show that the errors 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*, 562 U.S. 86 (2011). Stated another way, Petitioner has the burden of showing a reasonable possibility that, but for counsel's deficient performance, the death sentence would not have been imposed. *Wong v. Belmontes*, 558 U.S. 15, 130 S.Ct. 383, 386, 175 L.Ed.2d 328 (2009). For example, where the defendant claims ineffective assistance for failure to file a particular motion, he must "not only demonstrate a likelihood of prevailing on the motion, but also a reasonable probability that the granting of the motion would have resulted in a more favorable outcome." *Styers v. Schriro*, 547 F.3d 1026, 1030 (9th Cir. 2008).

"Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S. 688, 689–690. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689; *see also Bell v. Cone*, 535 U.S. 685, 702 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S. 688, 690.

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

Moreover, there' may be a significant possibility that, had this highly speculative evidence been given any weight at all, it would have been treated as aggravating rather than mitigating. *See Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242 (2002). In *Cullen v. Pinholster*, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), for example, the Supreme Court found that new evidence of an "organic personality syndrome" and "brain damage" was "by no means clearly mitigating, as the jury might have concluded that [the defendant] was simply beyond rehabilitation." *Id.* at 1396–97, 1410. The Court concluded that, in light of the ambiguous nature of the brain injury, "[t]here [wa]s no reasonable probability that 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 the entire record, including the trial record as well as the

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

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

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

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Bobby v. Van Hook, 558 U.S. 4, 130 S.Ct. 13, 16, 175 L.Ed.2d 255 (2009). Accord, *Cox v. McNeil*, 638 F.3d 1356 (11th Cir. 2011) (habeas relief not warranted even if counsel's performance fell short of standards for reasonableness as articulated by American Bar Association guidelines for

capital defense work, absent showing that there was reasonable probability that outcome of either his guilt or penalty phase would have been different had his counsel discussed mitigation at greater length with potential jury members).

The U.S Supreme Court held the Federal Circuit Court erred in applying the 2003 ABA guidelines pertaining to specifics defense counsel should investigate in preparing mitigation evidence, when such guidelines were announced 18 years after the defendant's trial. The Court then reiterated *Strickland*'s emphasis that such bar standards are "'only guides' to what reasonableness means, ***not its definition.***" *Id.*, at 17 (quoting *Strickland*, at 688). [1]

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

WHAT THE JURY HEARD

In the penalty phase, the defense called a series of mitigation witnesses. **Ann Howard,** Special Services 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 Lindsey was currently on a drug for depression (Celexa) and a mood stabilizer

[1] Petitioner points to the ABA Guidelines to suggest it is per se ineffective assistance of counsel to fail to do as it commands. But ABA Guidelines are not "inexorable commands"; rather, they are " 'only guides' to what reasonableness means, not its definition." *Bobby v. Van Hook*, 558 U.S. 4, 130 S.Ct. 13, 17, 175 L.Ed.2d 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).

(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 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 inhaled kerosene when he was an 18/19 month old. ROA. 2010. She referred him to a behavioral neurologist after receiving the results from the neuro-psychologist. She also stated that the suicide attempt at age 15 was the result of an

[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.

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

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

On the day of the incident, according to Lindsey, he talked with Latresse for a couple of hours and drove the car home. He stated to Dr. Melikian that he was tired and wanted to drive to his mother-in-law's and "blow his brains out" in front of the house. While there he was driving and talking to his wife's cousin and saw an image in the back and then saw his cousin drive off. ROA. 2013. He then stated that he just snapped. ROA. 2013, 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

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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~~ see (AmB) 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.

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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.

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

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

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

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

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

According to Ms. Lindsey, the Applicant first met Nell Lindsey around 1995. He had been

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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 she nor Marion was allowed to see them. ROA. 2057. She said this was for two months before the incident. She said that this made Lindsey upset because his kids had always been with him. She said that she tried calling Nell and

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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.

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Burton described Lindsey as a kid looking for attention and an adult to look up to. He said he never saw violence in Lindsey from either him or his brothers. He said he knew him for 13 years. He said they came over to his house to fish over 20 times and would always call his mother and seek permission. ROA. 2065. He described Lindsey as "the picture of politeness" toward Burton's parents. ROA. 2065.

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

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

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

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

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

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Lindseys would separate during their marriage. However, he never saw Lindsey hit Nell. He believed that he loved her.

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

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

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

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

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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 while 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

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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)

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Dispatch: Hello?

(Child/Children crying in the background)

Dispatch: Hello? Hello? Hello?

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

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

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

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

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

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

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

As Applicant recognizes the events evolved out of a domestic situation. The evidence presented revealed that Marion Lindsey had beaten his wife previously. ROA. 1775-1781, 1823. [Penalty Phase Testimony of Celeste Nesbitt, Sharon Smith] The victim had made calls contacting lawyers concerning a divorce. ROA. 1782. The Applicant referred to his wife as "bitch" and threatened to kill her if "I catch you doing anything." ROA. 1782. Testimony was received about an assault by Applicant on his wife at Applebee's Restaurant in December 2001 which resulted in a criminal domestic violence warrant. ROA. 1918-1921, 1924-1926. Evidence also revealed that the Appellant was involved in the sale and distribution of crack cocaine. ROA. 1830-1834, 1855-56, 1863-64, 1875 (11.41 grams of crack cocaine in the September 14, 2000 incident).

Importantly, Magistrate Sarah Simmons of Spartanburg County testified about the September 17, 2002 arraignment of the Applicant on a criminal domestic violence charge the night

[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.

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before the victim's murder. ROA. 1931. She stated that she directed Lindsey that "there was to be no contact with the victim who is Nell Lindsey. ROA. 1933-1936.

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

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

The Prison Life Evidence at Trial

In the penalty phase, the State presented the testimony of James Sligh, Division Director of Classification and Records at the Department of Corrections. ROA. 1908. In his testimony, he stated that a person sentenced to life imprisonment would initially be housed at a Level 3 high security institution. Id. He stated the cell would be 75 by 100 with two inmates in the cell. He stated that they would have access to the yard and have contact with other individuals. He stated that there could be job assignments or educational classes in a classroom setting. ROA. 1909-1910. There could also have contact visitation up to 8 visits a month. ROA. 1912.

On cross-examination from counsel Bartosh, Sligh indicated that there were 23,000 inmates. He guessed that about 1000 were serving life sentences. He described "patrol controlled

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movement" from cafeteria to the various assignments. He clarified that there was no milling around on the yard. ROA. 1914. He stated that it was based upon how the particular inmate is classified to determine his prison setting. ROA. 1916. This will initially be done at the Reception and Evaluation Center. ROA. 1916. There will be testing then for academic level, mental health issues and security level. ROA. 1917.

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

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

The Defense's Proposed Witness List

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

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

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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 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

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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.*

"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

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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.

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

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

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

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.

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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. Notations 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.

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

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

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

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

Dr. Melikian found his test scores at Hall Institute and with Dr. Brawley showed this level of cognitive ability decreases quite a bit with is depression. She said that in 2004, Lindsey in the

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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's 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

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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

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

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

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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 the 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).

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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. PCR Tr. 615. Since there was no corroboration provided to her, she did not give it much weight.

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

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

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

Dr. Melikian, in a proffer after objection, opined this was the least prepared with the least

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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).

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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 two years later, he did not want to continue this and minimizing it which made it more believable. Dr. Melikian speculated that if she had spent more time with him in 2004 as opposed to meeting him once, "I probably would have gotten that information before trial and would have been able to give much more effective testimony." PCR Tr. 630, 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

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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 Tr. 634. Although she was not confident about her opinion when she was cross-examined at trial, she did not feel it was destroyed. PCR Tr. 634.

Dr. Melikian admitted that she met with investigator Lenora Topp, but could not recall the specifics of the information she was provided about Lindsey's family and Topp's interview with

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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.

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PCR TESTIMONY of Dr. TORA BRAWLEY

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

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

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

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

As to psychiatric history, she stated that Lindsey reported to her that he had suicide

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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 decréase 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

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

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

In addition to the school records, she received the report from Hall Institute [Applicant's Exhibit 12] and the raw test data. PCR Tr. 83. She noted his Hall IQ test was 76, where her IQ test was 85, with the discrepancy in performance IQ. She opined that the difference could have been due to depression in 2002. PCR Tr. 83-84. She opined that the subtests that reflected the difference in the IQ scores were "attention and concentration" and "abstract reasoning" which is a

[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.

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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 one and one half months. PCR Tr. 88. As to the 2001 attempt, Lindsey told her he was having troubles with his wife and took a gun, but his cousin took it away. As to the third one in August 2002, his wife had told him she was leaving with the kids and he planned to drive the truck off a cliff, but then decided not to do it. PCR Tr. 88, l

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12-15. She described another incident in September 2002 when his family talked him out of suicide. PCR Tr. 88, ll. 15-17. The final attempt was the gunshot wound to the head in September 2002 (during the arrest) and resulted in mental health at the jail. PCR Tr. 88.

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

- immediate visual memory
- delayed verbal learning for stories
- manual speed on his left hand
- right 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 one half hour on May 2, 2004. PCR Tr. 91, ll. 10-22. She stated she went over the test results and the other information that she had gathered in the interview. PCR Tr. 91. She recalled that she made a specific request for school records to Dr. Melikian and felt she asked Bartosh for medical records. She stated she received the records on May 20 after she wrote her report. PCR Tr. 92.

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

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

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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

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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.

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Brannon felt it was believable to have "snapped," that based upon his miserable life and minimal intelligence level. PCR Tr. 47.

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

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

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

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

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

Additional Evidence about Jimmy in 2002

Mitigation investigator Lenora Topp also testified at the hearing that she discussed "Jimmy" with Lindsey during her interview on April 16, 2004. She stated that he told her that he

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had a friend named Jimmy who told him that God sent him. PCR Tr. 140. In addition, he stated that he had arrived during his early teens. Id.

ANALYSIS

In this first allegation, the Applicant complains that the defense team performed deficiently because they failed to maintain an adequate relationship and consultation with Lindsey. Though Lindsey never testified at the PCR hearing that there was any relationship lacking, the record is replete with evidence that from the moment of the serving of the notice of intent to seek the death penalty throughout the trial, Lindsey was maintaining the charade of the existence of his imaginary friend Jimmy - an attempt to scam the state doctors and his lawyers by a suggestion that he was crazy. Simply put, this malingering of a mental illness by Lindsey was not the product of his lawyer's work, neglect or omission on the case, but according to Dr. Melikian's recent discovery, Lindsey's own creation at the suggestion of other inmates - a suggestion that acting crazy would aid him. It is only Dr. Melikian's recent post-verdict speculation that had she spent more time with Lindsey prior to the trial, he would have uncloaked the fakery of Jimmy and she could have used it to explain his depression by accepting this action - an action taken by Lindsey only after the death verdict result remained.

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

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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 on prior counsel's shoulders. Further, prior counsel is not responsible for the notion that Dr. Melikian's speculation or hope that if she had spent more time with Lindsey, then he would not have fabricated Jimmy's existence.[9] The initial allegation is without merit because he

[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

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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.**

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

MEMO, p. 46-47.

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

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

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

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

At trial, she then gave her reasons. She stated that the issue of malingering came up because Lindsey reports that when he was in the hospital at age 15 after an overdose, that an imaginary friend named Jimmy came to visit him and he heard voices that were comforting to him. She stated that he never discussed this with anyone but that his roommate noticed him talking to unseen others. Lindsey stated that when he is stressed that his friend Jimmy is with him and tells him good things and supports him. She stated that after the incident, Lindsey was nervous and reported that his friend Jimmy was with him. ROA. 2006-07. He told her that Jimmy first appeared after his overdose when he was in the hospital and felt he had no friends. ROA. 2007. She felt that 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, although admissible, it would have been cumulative to the decision to call Dr. Melikian. Dr. Brawley stated that she had been advised prior to the trial that she would not be testifying and prepared her written report for use by

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Dr. Melikian - consistent with her oral consultation with her. This was not neglect by counsel, but reflects a conscious decision on counsel Bartosh's part on this issue. The evidence was admitted concerning both of Dr. Brawley's malingering tests as well as the conclusion that the state examiner's objective testing did not show malingering. Counsel cannot be deemed deficient under those circumstances. See *Harrington v. Richter*, supra.

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

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

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

MEMO, p. 47.

In his third allegation, Applicant contends that counsel were ineffective in failing to present requests of family members for "mercy" in the case. This Court finds that the Applica

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has failed to prove either deficient performance or prejudice.

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

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

> In [*State v.*] *Torrence*, we adopted the Georgia Supreme Court's distinction between a plea for mercy and the ultimate question to be decided by the jury: "[A]lthough a defendant may present witnesses who know and care for him and are willing on that basis to ask for mercy on his behalf, **a defendant may not present witnesses to testify merely to their religious and philosophical attitudes about the death penalty.... Nor is a defendant entitled to present the opinion of a witness about what verdict the jury 'ought' to reach.**" *Torrence*, 305 S.C. at 45, 51, 406 S.E.2d 315, at 318 (quoting *Childs v. State*, 257 Ga. 243, 357 S.E.2d 48, 60 (1987)).
>
> In *Johnson*, notwithstanding the ruling that the trial court should have permitted Johnson to inquire of his sister whether she wanted him to die, we found no prejudice to Johnson because the sister was able to make a general plea for mercy on her brother's behalf in the form of testimony concerning their abusive family life, and the fact that she expressed her love and affection for Johnson at trial.
>
> More recently, in *State v. Wise*, 359 S.C. 14, 596 S.E.2d 475, 481-482, cert. denied 543 U.S. 948, 125 S.Ct. 355, 160 L.Ed.2d 263 (2004), we addressed the issue of whether the trial court erred in refusing to allow a surviving victim to testify on cross-examination during the sentencing phase of the trial that he did not personally believe Wise should receive the death penalty. We reiterated our holding in Johnson, stating, "[a] close relative of a defendant, such as his sister, may be asked whether she wants the defendant to die, which is akin to asking her to make a general plea for mercy and not explicitly directed toward eliciting her opinion of what verdict the jury should reach." *Id.*, 359 S.C. at 26, 596 S.E.2d at 481. FN2.
>
> FN2. However, in Wise, we held the trial court properly prohibited the defendant from inquiring of a security officer who had been shot by Wise whether he thought Wise should be sentenced to death, stating, "[w]e accept as true the proffer by Appellant's attorney Vance would testify he told the media shortly after the shootings he did not personally believe Appellant should receive the death penalty. However, such a statement by Vance would not constitute a plea for mercy on behalf of Appellant. Instead, it would

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> constitute Vance' opinion of what verdict-life in prison versus the death penalty-the jury should reach. Accordingly, the trial judge properly disallowed the question, recognizing it was an attempt to elicit an inadmissible opinion from a witness." *Id.*, 596 S.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

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

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

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

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

[14]Before the witness testified, a bench conference was held and Judge Few declared "that was 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.

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requests for mercy. He claims that counsel failed to locate and ask questions of family members and friends. However, the record of the trial disputes this assertion because four witnesses: mother, father, cousin and mentor - all made specific requests for mercy and that he not be sentenced to death. Concerning mercy requests, contrary to the assertion in the post-hearing memorandum of Petitioner, p. 25, Virginia Lindsey testified that she did talk to the defense team and "they did" prepare her to request the jury to have mercy on her son. PCR Tr. 368, 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

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

[16]Steve Pilgrim post-conviction testimony is set forth in detail within this memo. PCR Tr. 426-433. Pilgrim stated that counsel had prepared him to ask for mercy. PCR Tr. 445. He then asserted that they told him not to ask the jury for mercy. Id. He proffered what he would have told the jury if he had been asked about mercy that he was his favorite nephew and he made a mistake and "I wouldn't want him to , you know, get the death penalty." PCR Tr.445, l. 13-16.

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ended question was asked and neither expressed an opinion on mercy - nor were they specifically asked. In light of counsel Bartosh's death, this Court is not aware why a different quest was asked eliciting a response on mercy consistent with *Torrence* and *Wise* (which was decided on May 11, 2004 just before the trial). However, counsel is presumed competent and the Applicant has failed to dispute it.

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

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

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Lindsey

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

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

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

MEMO, p. 49.

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

As shown within, a lot of Applicant's proffered mitigation testimony is double-edged or even aggravating. *See Suggs v. McNeil*, 609 F.3d 1218, 1231 (11th Cir.2010) (noting that "evidence of drug and alcohol use is often a 'two-edged sword' that provides an independent basis for moral judgment by the jury," and that evidence that the defendant spent time at military school because of behavioral issues "was potentially damaging" (quotation marks and citation omitted));

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Reed v. Secretary, Fla. Dept. Of Corrections, 593 F.3d 1217 at 1246 (11th Clr. 2010) ("[I]t would have been all too easy for the State to use Reed's own mitigation witnesses to paint him as a violent, manipulative person with long-standing drug abuse issues and brushes with the law.... Here, it was not just a reasonable probability, but a virtual certainty that Reed's 'good' mitigation evidence would have led to the introduction of 'bad' evidence."). Nor would any new medical information radically buttress the experts' testimony, causing it to shift from mere "artifice" to game changing revelation that creates a reasonable probability of a different outcome. *Bean v. Calderon*, 163 F.3d 1073, 1081-82 (9th Cir.1998). His assertions must be denied.

The Post-Conviction Testimony of Dr. Melikian

Dr. Margaret Melikian, the forensic psychiatrist retained by the defense prior to trial in 2004, testified that she spent 7 hours and 45 minutes in preparation for her earlier testimony. PCR Tr. 598, ll. 17-19. Of that time, 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]

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[18] Dr. Melikian stated this was either her first or second trial as a defense expert. PCR Tr. 599, 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.

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

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

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.

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and that way she looked at his cognition in his low testing results. PCR Tr. 604. She stated this was due to her lack of a family history and did not spend enough time with Lindsey to realize that he was not functioning at his best level.

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

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

Dr. Melikian found his test scores at Hall Institute and with Dr. Brawley showed his level of cognitive ability decreases quite a bit with 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

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

Dr. Melikian claimed this paints a different picture of Lindsey of rather than just showing that he had been charged and convicted of assault and battery with multiple CDV charges to "a more accurate picture of who this person is as opposed to just a list of he was bad in school, his IQ is low, and he's had these charges in the past." PCR Tr. 607, 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. 61

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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 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 the objective testimony that he was not.

[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 came 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).

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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. PCR Tr. 615. Since there was no corroboration provided to her, she did not give it much weight.

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

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

Cross-Examination

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

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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

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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 <u>not</u> 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

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was worried he wouldn't die. She stated that she learned from Lindsey about his weight loss prior to trial.

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

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

Dr. Melikian admitted that she met with investigator Lenora Topp, but could not recall the specifics of the information she was provided about Lindsey's family and Topp's interview with Lindsey. PCR Tr. 635. She stated that prior to the trial date she had only spent 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.

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

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Institute [DMH} evaluation. ROA. 2003.

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

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

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

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

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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

[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.

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

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

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unusual for him. ROA. 2013. He stated that he was able to get in touch with his wife at work where the numbers were not blocked.

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

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

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

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

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

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ROA. 2021.

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

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

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

She stated that it might have been helpful if she had been given a copy of the BMW application and could not state that it would have been helpful to review the entire case file, or to speak with either Dr. Crawford or Dr. Narayan (who had diagnosed Lindsey with malingering) (because she had his report) or Officer Benny 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

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denied was malingering. Id.

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

ANALYSIS

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

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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]

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

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). This (post) 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 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

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

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

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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.

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

MEMO, p. 50.

In his fifth allegation, he contends that counsel failed to adequately interview family members and present evidence on mental impairments within the family. This issue weaves claims and testimony of family members, the surviving lawyers and investigator and proffered social workers. This Court finds that there was some evidence presented of some family members' mental health problems involving whether aunt Bessie Smith had attempted suicide (ROA 20[illegible]) (testimony of Virginia Lindsey) (2082)(testimony of Bessie Smith) and that Steven Pilgrim

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suffered from illnesses of panic attack and anxiety attack and that his daughter was being treated for an illness described as panic attack (ROA 2080) (testimony of Steve Pilgrim). See infra., Findings and Conclusion on Argument 7.

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

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

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

Memo., p. 51-52.

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

First, there has been no showing that the Applicant would have been "adaptable to prison in the future or was adaptable in the past." It was primarily prison consultant James Aiken's

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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]

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

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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 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).

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

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was neither deficient performance nor prejudice under *Strickland*.

Counsel's Testimony on Prison Adaptability Issue

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

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

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

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Exhibit 9).

PCR Testimony of James Aiken

James Aiken, a former South Carolina Department of Corrections Warden, who has a consulting firm relating to death penalty proceedings and jail and prison security testified at the PCR hearing in support of the allegation. PCR Tr. 201-228. He testified that he had reviewed the correctional files concerning Mr. Lindsey, but had never met Lindsey. PCR Tr. 206. He opined that it was not necessary to meet Lindsey before he rendered an opinion about prison adaptability or future dangerousness., PCR Tr. 206. He stated that he relied upon the records of the Spartanburg County Detention Facility and the South Carolina Department of Corrections' records when Lindsey was incarcerated for seven and one half months in formulating his opinion. PCR Tr. 207. He also admitted that he had reviewed the records since he was on death row, but claimed that it was not included in formulating his opinion. PCR Tr. 206-07. Aiken opined his observations were that Lindsey had been guilty of crimes of violence in the community and that the Department of Corrections "can manage this type of offender for the remainder of his life without causing unreasonable risk of harm to staff, inmates, as well as the general community." He indicated his opinion was based upon the fact that he had done time before and that SCDC had the capacity to classify him, evaluate his behavior, and had the necessary staff, equipment and expertise to manage him. PCR Tr. 208. He noted that Lindsey did not have relationships with "security threat groups" or "gangs." PCR Tr. 208. Further, Aiken opined he had not demonstrated a propensity toward random and systematic violence against others while he's in prison. PCR Tr. 208. Aiken admitted that since prisons are dangerous, things can happen. He testified that a life sentence without parole is a severe sentence and reduces a person to the lowest common

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denominator. PCR Tr. 209. He stated he could have rendered the same opinion during the trial. PCR Tr. 209.

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

On cross-examination, the risk of this generalized adaptability testimony was presented. Particularly, he recognized that it was his opinion that inmates in the Department of Corrections can be managed to avoid injury to other inmates, the general public and prison guards. PCR Tr. 211, 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

[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.

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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 fight is not automatic. PCR Tr. 217-18. He further opined that the use of gas against Lindsey appeared appropriate.

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

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ANALYSIS

This Court finds that this claim is without merit. Deficient performance has not been

shown. Evidence concerning prison adaptability by lay or expert witnesses as a response to claims of future dangerousness and the Applicant's character under *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) is admissible in mitigation in death penalty cases and should be considered by reasonable counsel.[25] While defense counsel did not retain an expert in this area, this Court must find that the defense team ***considered*** the issue.

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

The mere fact that Bartosh is not available to express his decision on why he did not specifically retain a correctional expert for trial does not shift the burden. As recognized in *Harrington*, although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, *Wiggins*, 539 U.S., at 526–

[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).

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527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam).

What is undisputed is that the defense team was aware of the potential for the admission of evidence of prison adaptability, acquired records of his current and prior incarceration and evidence of his actions in jail, which included gassing, segregation and anger management courses. Further, the evidence is undisputed that as the defense team culled and created a witness list - with the understanding prison adaptability was a potential mitigating evidence basis - they did not include any witness on the list - jail or prison guards - to testify about this area. Additionally, Brannon opined that this decision would have been left up to Mr. Bartosh.

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

This Court finds that a trial counsel's not presenting this expert's future dangerousness testimony "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. First, Aiken's opinions that Lindsey would be unlikely to harm guards or

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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]

[26] This is not a case in which the State introduced expert testimony about the defendant's future dangerousness and the defendant was denied an opportunity to directly rebut that testimony with his own expert. *See*

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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

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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.

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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

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L.Ed.2d 1291 (2009) (citing *Gaskin v. Sec'y, Dep't of Corr.*, 494 F.3d 997, 1004 (11th Cir.2007); *Grayson v. Thompson*, 257 F.3d 1194, 1227 (11th Cir.2001)); see *Wong v. Belmontes*, 130 S.Ct. at 387-90 (finding no prejudice where proposed mitigation evidence was either cumulative of evidence already presented at penalty phase, or would have opened door to damaging testimony).

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

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

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

MEMO , p. 52-53.

In his seventh allegation, he contends that Lindsey failed to present a "family historian." This Court will combine the issues concerning the family history presentation of family and friends at trial, the reasonableness of the mitigation investigation and any deficiency and prejudice concerning the failure to retain a social worker to testify about the family history. These claims are encompassed in the Applicant arguments 5, 7, and 9 within his post-hearing memorandum. Although the record reveals that a social worker was not called as a witness by the defense, it revealed that friends and family members, as well as an expert witness, Dr. Melikian, a forensic psychiatrist, testified at trial. In addition, a mitigation investigator, Lenora Topp, a licensed investigator based in Asheville, N.C., was retained and used by the defense team in this matter. At

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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

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worker - or its absence- undermined the confidence in the verdict under the standards of *Strickland*.

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

Counsel's Testimony

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

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

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

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

Brannon also testified that Karen Quimby, an assistant public defender, got involved late

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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

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

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

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

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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 has since handled other cases in Greenville and Spartanburg Counties including Kamel Evans. She stated that she did not spend 3 years on those cases, asserted she had spent no more than two months on those also declaring "I didn't have enough time on those cases either." PCR Tr. 122.

Topp testified her first meeting with Lindsey was a 3 hour interview on April 16 when he provided "everything he could remember" about family background starting from the day he was born, the accidents he was in when he was run over, his very poor upbringing and how they shared rooms, and that he was not raised by his father. Lindsey told her he would not want his children raised without a father because he never had a male figure in his life. PCR Tr. 123. She said they talked about everything up to the incident in the police parking lot. PCR Tr. 123.

Lenora Topp stated that she learned about Lindsey's imaginary friend Jimmy, but he was

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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 even though he had to wash them out every night. PCR Tr. 128-29.

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

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Virginia, but Applicant got homesick and came back. PCR Tr. 129.

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

Concerning his drug sales, Topp was told by Lindsey that he sold drugs on 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

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broke his hip. PCR Tr. 135. He told her he was out of work for a year. She received information from him that he worked at Burger King where his brothers worked but lost that job, then worked for United Cloth in Spartanburg. He told her that he thought it was a boring job and complained about the women gossiping, but felt he advanced in the job. PCR Tr. 136.

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

Topp also learned from Applicant about Bill Burton. He reported to her that Burton was a plant manager and 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 to fill her car with gas. Id. He tried to show that in his heart he was a good person and tried to keep the drug dealing from his mother because he did not want her to see his weakness. PCR Tr. 140.

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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

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girlfriend, Stephanie Petty, up to 2 days prior to the trial. PCR Tr. 148-49.

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

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

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

Family and Friends PCR Testimony

At the PCR hearing, the Applicant presented a series of family members and friends who testified concerning the family history and their knowledge of Lindsey's life and worth. Implicitly, the Applicant was claiming that such evidence would assist in presenting a background to a social

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

Virginia Lindsey's PCR Testimony

PCR Tr. 327-386

In his memorandum, the Applicant describes PCR testimony of Virginia Lindsey, the Applicant's mother, as "vastly different" than her trial testimony. Applicant's Memorandum, p. 21. This Court agrees that there was more detail in the post-conviction testimony. He now suggests, in lieu of the brevity of her trial testimony (ROA 1674-77, 2044-2061),[27] the alleged details within her PCR testimony were necessary to humanize Lindsey for the jury and to support the testimony of the mitigation expert, This Court concludes that neither deficient performance nor

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

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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.

Her Children

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

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

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house.

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

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

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

Mrs. Lindsey described how the other children would get to spend time with their fathers on weekends, but Marion was left because his father was not visiting. PCR Tr. 341.

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

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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

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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; he then went into the bathroom and took a whole lot of pills. While she remained on the bed watching TV, she heard her son Tim call for his father. Next, Roger Sims came to her and told her to call the rescue squad because Marion had taken pills and was on his knees throwing up. She went and saw him by the commode and he had taken Tylenol, Advil, and Ibuprofen. He was carried to the hospital where they pumped his stomach and then was put into mental health treatment for two weeks. She said they sent him home after that and did not tell her to bring him back. PCR Tr. 353. She never sought any follow-up. PCR Tr. 354.

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

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

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to help her with payments on the mobile home and groceries. PCR Tr. 355-56.

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

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

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

She described the relationship with Nell that they argues a lot, but she never saw Lindsey hit Nell and it was all right because everyone is going to have ups and downs. PCR Tr. 358. She said that Nell and Lindsey had already broken up before the shooting, but he had not told her or she did not know it, although he hung at the house a lot. PCR Tr. 358.[28] She said she did not [and could not] have any conversation about a breakup, although Lindsey stayed around her house talking to Nell on her telephone. However, one night he asked her to take groceries over to Nell so the children would have food. PCR Tr. 359.

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

She said that they were separated a month before the shooting, but Mrs. Lindsey felt they

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[28] [contradiction].

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, 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

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box and after the later shooting returned them to Rod Tullis. PCR Tr. 363. Though she requested that they call the rescue squad, her sister talked her out of it saying they did not need to. PCR Tr. 363-64.

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

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

Mrs. Lindsey admitted that she talked to them about Dr. Barry Henderson. PCR Tr. 367. He was Marion's doctor from when he was a baby until grown. She said he had a relationship with Lindsey because he used to play with his children at a game room that Dr. Henderson owned. Id. She felt Dr. Henderson could have testified about his treatment of Lindsey, as well as what type person he was. PCR Tr. 368. He is now deceased though. PCR Tr. 368.

Concerning mercy requests, contrary to the assertion in the post-hearing memorandum of Petitioner, p. 25, Virginia Lindsey testified that she did talk to the defense team and "they did" prepare her to request the jury to have mercy on her son. PCR 368, 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

[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.

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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 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 sons finished high school
- she worked shifts in factories, particularly the second shift
- that she had spoiled Marion "a little bit", because he did not have interaction with his father
- that her mother was deceased
- that she and her family were very poor

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- 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 liked her and that Nell and Lindsey had problems over money. She stated to them:

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

PCR Tr. 379.

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

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

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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, 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.

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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 bath and feed her. PCR Tr. 392.

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

Smith stated that her brothers and sisters got married and moved out, but Virginia returned home. PCR Tr. 392. Mrs. Smith got married and moved about 3 miles away. She stated she got a GED and studied at Spartanburg Technical College. She had 5 children. PCR Tr. 393.

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

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"because Paul was a timid scary kind of person growing up." PCR Tr. 395, ll. 16-17.[30]

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

Bessie Smith stated that her sister Robin did not display the same drinking behaviors growing up, but she started having problems ("you know how teenagers are") with liking boys early. PCR Tr. 396-97. She was described as being smart in school and worked her senior year to pay for graduation by babysitting Marion. However, she stated using drugs resulted in being incarcerated, but claimed she was not violent or robbing people.[31]

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

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

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

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 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

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

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

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

Bessie Smith stated she talked to Marion later but did not see him. Bessie said she called Lindsey on cell phone days later and he said Nell was trying to take his children from him and would not see them anymore. PCR Tr. 411-12. 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 would take them to eat.

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

Preparation for Trial

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

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contact she had with counsel since the incident. She pointed out that she had more preparation in this hearing, meeting about 3 or 4 times. PCR Tr. 418.

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

Concerning her alleged telephone call with Applicant on the day of the incident, Smith said that Applicant did not say anything about tracking down his wife or looking for her because she had a boyfriend. PCR Tr. 40. She denied that Lindsey ever told her then that Nell and a boyfriend was helping take the kids away. She said Lindsey just kept saying that Nell did not want him to see the kids and was talking about taking the kids away from him. PCR Tr. 420.

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

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

Returning to the phone calls on the date of the incident, Lindsey did not tell her from where he was calling, did not tell her he was going anywhere that day, or about having a gun. Bessie

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Smith confirmed with Doug Brannon and Lenora Topp, that she told them she had a phone conversation with Lindsey that day. PCR Tr. 424.

Steve Pilgrim (PCR Tr. 426-453)

Steve Pilgrim, the Applicant's uncle, had testified at the original sentencing proceeding. R. 2078-2080. During the PCR proceeding he testified that he was a lifetime resident of Spartanburg, growing up in Inman. PCR Tr. 427. He stated Smiley and Ruth Pilgrim were his parents. He was six when Smiley left.[32] PCR Tr. 428.

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

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

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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.

than once.

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

Pilgrim also stated that brothers Paul and Willie also went to prison for violent behavior. PCR Tr. 434.

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

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

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

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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 very depressed, *which was unusual for Lindsey*, and talking about wanting to see his kids and that he was having problems with his wife. Pilgrim stated Lindsey was crying that night, which was the first time he had seen him cry. PCR Tr. 439.. Pilgrim said that Lindsey had calmed down that evening. PCR Tr. 439.

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

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

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

As to his trial preparation, he stated he met with the defense counsel one time the day before the trial started.. PCR Tr. 442. He thought that it was on a Saturday for 30 to 40 minutes. He recalled Mrs. Topp, Mr. Bartosh, Mr. Brannon, his sister Virginia, and sister Bessie the people that were going to be testifying. PCR Tr. 442. He stated they discussed his condition and what he was suffering from that resulted in his disability. He stated that he was depressed, had

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anxiety [and uncontrolled hypertension]. He stated that they did not request that any of them sign releases of medical or psychological records that he would have done. PCR Tr. 443.

He said he had lived in Spartanburg from the time of the incident to the trial and was available. In hindsight, he felt he was not adequately prepared to take the witness stand and testify. He said that he had never testified before and was nervous and they did not ask him anything, just about his health. PCR Tr. 444. He said they did not ask about the events leading up to the trial or Marion's personal history. In contrast, for the PCR hearing, Pilgrim described only talking about his health. PCR Tr. 445.

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

On cross-examination, Pilgrim clarified that he took the picture of the house (Exhibit 27) last Sunday. PCR Tr. 446. Pilgrim further did not recall that at the 2004 trial he testified about being a witness to the car accident (ROA 2079-2080), that he testified about the incident when Lindsey inhaled kerosene (ROA 2080), about how long he stayed with the family (ROA 2080) and his own health conditions of high blood pressure and panic attacks. PCR Tr. 448. Pilgrim admitted he would have provided this information to counsel. PCR Tr. 448.

Pilgrim testified that he had been followed by Lindsey and he taught him how to fix things and remained involved in his life after he moved out. PCR Tr. 449. He was consistently in contact with the Applicant throughout his life. PCR Tr. 449.

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In explaining his earlier reference to violence in the home, he described it as going out and getting into fights, getting guns and shooting people. He further described drinking and cussing in the home and turmoil. PCR Tr. 450.

In explaining the discussion on mercy, he said it occurred in the 20 to 30 minute meeting with Mr. Bartosh and the others at the office. PCR Tr. 451.

Pilgrim stated that he was not present when either Virginia or Bessie attempted suicide. PCR Tr. 451. He said he was the contact person in the family and would be called whenever anything happened, but he did not see what they did. PCR Tr. 452.

As to Exhibit 27, he stated the house looked the same, except they would mow the grass. PCR Tr. 452.

Timothy Roger Sims (PCR Tr. 453-480)

The Applicant's younger brother, Tim Sims, testified that he is 10 years younger and did not share the same father. PCR Tr. 453. He described his relationship with Applicant as the person who raised him because his own father left when he was 11. Sims stated that Lindsey treated him like he would have wanted his father to treat him. PCR Tr. 454. He said he was 19 when the shooting took place, so for 8 years Lindsey had stood in his place as a father. He said he would see Lindsey every day and was with him everywhere he went. PCR Tr. 455.

Sims stated that he got into trouble with the law and had a drug charge in 2003 initially on probation until he violated and got 6 months. PCR Tr. 455, ll. 7-16.

He stated that he had been working as a brick mason, but was not working presently. PCR Tr. 455. He said he was getting married next year.

He claimed at the time of the trial (in 2004) he did not have any criminal charges. PCR Tr.

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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

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nervous and crying and that "I feel like I'm about to take my life." PCR Tr. 460, ll. 18-22. Sims said he told him not to and asked where he was and told him he would get there. Sims called his mother and they got to Lindsey in 30 minutes. PCR Tr. 461. He found Lindsey at his house lying in the bed, appearing to "let everything go." At that time, Lindsey gave them letters about what he was going to do. He described Lindsey crying for the first time (and a second time on the day of the shooting). PCR Tr. 461.

Sims recalled that he stayed with Lindsey from around 5-6 p.m. until 8:00-9:00 p.m. PCR Tr. 462, ll. 3-5. He said they had talked to him, Uncle Steve gave him "a nerve pill" to calm him down, and left after it looked like everything was all right. PCR Tr. 462. [The alleged suicide threat notes were addressed to Nell, his boys, Tim Sims, and Virginia.] PCR Tr. 463. He said his mother had the notes when they left that evening. PCR Tr. 463.

Sims said that Lindsey had expressed concern about Nell at the end after he handed them the notes. PCR Tr. 463. Sims felt he was still "down" though. PCR Tr. 463.

Sims described a subsequent situation a day before the shooting when he asked him to drive by Nell's house. Lindsey had called him because he thought she was seeing another man and wanted him to see if he saw a Lexus in the yard. PCR Tr. 464, ll. 21-25. He said he drove by, saw the Lexus, and kept going. However, Sims said he did not want to tell him he saw the car because he knew it would upset him, so he told him it was not there. PCR Tr. 465. He said he was familiar with Nell's car and it was not hers. PCR Tr. 465.

Sims said Lindsey was not able to contact Nell or able to see the children. He had been told not to see them. However, Sims said Lindsey told him to take them food so Sims would go to McDonald's get food and take it to them. PCR Tr. 465.

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At one point, Sims said Lindsey called him to try to set up a 3-way call using his mother's phone that she would answer. When he did, he heard Lindsey tell Nell he knew she didn't want to see him, but to let him see the boys. PCR Tr. 466. In response, Sims said Nell started cussing and he told her no way and that we are staying away from them, while he heard a son in the background as she told him she did not live with him anymore and "that's not your daddy." PCR Tr. 466. This was the day before the shooting, according to Sims. PCR Tr. 466-67.

Sims said he did not see him. However, the next day, around 5 p.m., Lindsey called and asked her to go down the street from "Shirley" who knew something about Nell. PCR Tr. 467, ll. 10-20. Sims said he wanted her to call him so get her number and give her his number. Sims said he took a shower and then Lindsey called back wanting to know if he had gotten the information. PCR Tr. 467. He told him no. He said Lindsey then sought to speak with his friend Chawny. Sims said Chawny left the house and returned. About 40 minutes later, Sims said Lindsey called back crying saying "she" had told him a lot about Nell and her new boyfriend and he was "going out of his mind" over what was told him. PCR Tr. 469, ll. 4-10. Sims told him to calm down and meet at his brother Claude's home. He said ok and Sims left to go to Claude's. Shortly thereafter the shooting took place. PCR Tr. 469.

Despite his earlier testimony, Sims claimed he did not know where Lindsey was living then, except that it was in Linville Hills. He estimated that it would take 15-20 minutes to get to his mother's house, and he would go by Celeste's house. He said he did not see Marion before the shooting. PCR Tr. 471.

Sims claimed that he never told this information to Bartosh, Brannon or Ms. Quimby. He claimed no one in 2004 talked to him. He said he was not in jail at the time of the trial and saw his

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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

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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 of probation and was on probation at the time of the May 2004 trial. However, he admitted that he had violated probation then and was waiting to go to court. PCR Tr. 478.

Concerning Lindsey's violence, Sims confirmed he had been a witness to Lindsey being violent in the past. PCR Tr. 478, ll. 19-21.

On re-direct, Sims stated that both Lindsey and Nell had affairs during their marriage. PCR Tr. 479-80.

PCR Testimony of The Burtons

During the PCR hearing, Applicant called Bill Burton who testified at the trial, and his mother, Mrs. Pat Burton, who was on the trial witness list, but did not testify.

Bill Burton's PCR Testimony

Bill Burton's testimony was similar to his trial testimony. PCR Tr. 304-05. He stated prior to his trial testimony, when he learned he would be a character witness, he tried to contact 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 the

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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 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.

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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

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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. She gave the poem to a minister who used it in his church. PCR Tr. 321.

She stated that when she visits death row, she sees the interaction he has with other inmates

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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

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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.

Tullis described providing his notice of appearance to the Sheriff, Solicitor, and hospital

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[33] This motivation was not developed by the State at the trial.

and was counsel of record for a short period of time. PCR Tr. 171.

Subsequently, the Public Defender's Office became involved to provide Lindsey with counsel. Tullis recalled contacting Mr. Bartosh and telling him that Lindsey had called his office, that a tape existed, and he was the first person to talk to him when he was released from the hospital to the detention center. He also stated to him that he could be a possible witness in the case. PCR Tr. 171. He stated that he was removed from the case.

Tullis said he later provided the audiotape to the Public Defender's Office. PCR Tr. 172, ll. 15-18. Tullis also stated that he was provided some suicide notes. Tullis said that Lindsey had been shot by officers and then tried to commit suicide by shooting himself in the head. When Tullis visited at the Center for the first time, Lindsey was bandaged and bleeding. Still drugged from the surgery, Lindsey told him he had been bashing his head against the cell concrete wall, the stitches had come lose and he was attempting to kill himself. PCR Tr. 173. After he reported it, Tullis stated they put Applicant on suicide watch. PCR Tr. 173.

Tullis also declared he received notes from family members about an earlier incident when Lindsey threatened suicide weeks before the incident. PCR Tr. 175. Tullis stated that he handed the notes over to the Public Defender. PCR Tr. 175. He felt the Solicitor's Office was aware of the existence of the notes and that he had turned them over to the Public Defender. PCR Tr. 176.

Tullis indicated that he was not contacted about testifying, but inquired about it as the case was proceeding.[34] He felt surprised because he thought he was the best witness as to the state of mind and involvement.

On cross-examination, Tullis recalled that he had received the letters from the family

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[34]Note that Tullis was on the witness list by the Public Defender's Office. ROA 150.

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. PCR Tr. 190.

Tullis agreed that when he prepared the information sheet, there was no discussion that he

[35]On redirect, Tullis indicated that he did not recall being subpoenaed. PCR Tr. 195-196. However, he recalled that he would not have had anything to turn over as a result of the subpoena. PCR Tr. 196.

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was being deprived of visitation rights. PCR Tr. 191. To the contrary, Tullis thought at that time when Lindsey and his wife came into his office that they were trying to work it out, but the meeting was in anticipation of a divorce or separation. Tullis, however felt that closer to the September incident things had changed. He noted that Lindsey was having relationships with other women, felt he wanted to get back with Nell, but was aware that she was anticipating divorce proceedings. PCR Tr. 191. Tullis stated that Lindsey's impressions were not always because both Lindsey and Nell were involved with other people and she did not want to be married to him any longer. PCR Tr. 192. Tullis felt the children were being used as a pawn in the adult relationship. He agreed though that there were a series of incidents involving Nell in August 1996, October 1996, February 1999, August 2000 and December 2001. Oddly, Tullis reported that Nell would come and pay his fees in representing Lindsey in those incidents.

Tullis admitted that he was no longer practicing law and been disbarred. He stated that he was still a lawyer in May 2004 with an office in Spartanburg. He stated that he did not come to court while the trial was ongoing, allegedly, because he thought he would be a witness in the case and would have been sequestered. He was aware of the trial.

Tullis stated that he spoke with Bartosh and Ms. Quimby as the case was going on. Although he let them know he was available and ready to testify, he did not ask them why he was not being called as a witness or what their defense was, such that his information might not have been germane to their theory of the case. PCR 194-195.

On re-direct, Tullis confirmed that Lindsey had a family court dispute ongoing with the grandparents at the time over the custody of the children. He stated that matters he had with respect to that dispute were still protected by the attorney-client privilege, including letters in that action. PCR 196. As to the timing of the taped call, he recalled that Lindsey was taken into custody immediately after the shooting. He suggested that at that point of time he would not have had the ability to make phone calls given his medical care and his arrest.

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This suggested to him that the call had to have been made before the incident. Tullis stated that Lindsey had never been convicted of a criminal domestic violence charge against Mrs. Lindsey or anyone else. PCR 198. **This Court finds that the PCR Testimony of Social Worker Vogelsang Presented The Particular Dangers of Presenting Family Background Testimony concerning Marion Lindsey.**

Jan Vogelsang - Social Worker (PCR Tr. 481-594)

Jan Vogelsang, a clinical social worker with expertise in bio-psychological assessments, testified that she conducted such an assessment of Marion Lindsey. She testified that as a part of the assessment she interviewed the Applicant, Virginia Lindsey, Bessie Smith, Steve Pilgrim, Timothy Sims, Patsy Burton, Robin Pilgrim (Keith), Lenora Topp, Rod Tullis, Dr. Melikian and Dr. Brawley. She also declared she had sat in court and heard testimony of the same. PCR Tr. 495. She described records she reviewed from Ms. Topp and Virginia Lindsey, including medical and criminal domestic violence records, of Bessie Smith (mental health and CDV offense), of Steve Pilgrim (mental health, prior crimes, and medical), of Tim Sims (birth, school, and SCDC records), and of Robin Pilgrim (medical, prison, and mental health and prison visit). PCR Tr. 496. She also reviewed Paul Lindsey's court order declaring death [from drowning disappearance at Jocassee]. PCR Tr. 496.

Concerning the Applicant, Ms. Vogelsang stated she reviewed his request for legal aid, his medical records, his school records, SCDC records regarding Stafford Wilkens incident, Lindsey's recent letter to the victim's mother, William S. Hall - DMH records, reports of Dr. Narayan and Dr. Musick, and his mental health records. PCR Tr. 496-97. She also read the testimony of family members, Mr. Burton and Dr. Melikian. PCR Tr. 497. Vogelsang testified that she also visited the community and created a family tree. PCR Tr. 497.

Concerning the family tree, Ms. Vogelsang testified generally about the existence of

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various members. She identified the existence in some members of "substance abuse, possession or distribution", "any mental, emotional, or behavioral impairments," "sexually inappropriate behavior," and "charges of criminal domestic violence, assault, or having served time in prison." PCR Tr. 502. She noted that the members of the home had very difficult childhoods with issues of family poverty, particularly after Smiley left. PCR Tr. 502-03. Vogelsang opined that this was abject poverty. She also asserted that their grandfather, Porter Pilgrim, was sexually inappropriate with some boys in the family. PCR Tr. 503. She opined that some of the experiences that had been described in the testimony of the aunts and uncles with whom Lindsey lived played a significant role in the things Lindsey experienced growing up in the household. PCR Tr. 504, ll. 20-24.

Vogelsang related that his mother Virginia was abandoned by her father and raised by an ill parent. Vogelsang questioned her parenting skills. PCR Tr. 505. As to Lindsey's father, Leon McDowell, she opined he had abandoned Applicant and never acted as a father and had his own family.

She stated that Mrs. Lindsey had been married to Claude with 3 children and had two miscarriages. Applicant was born in 1973 two years after she lost her seven month old daughter. Mrs. Lindsey had no intervention on the death or counseling. She stated Virginia changed after the death, working and would go out and party and was not involved in parenting. PCR Tr. 506.

She stated Lindsey was raised by his grandmother with mostly an absent mother and absent father. PCR Tr. 506. She opined no one was present to help him through the developmental stages. However, Steve Pilgrim was identified as the hardest working and cared deeply about Applicant, but claimed he was not there a lot. PCR Tr. 507. Virginia was working second or third shifts in the mill. PCR Tr. 507.

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As to the home living conditions, Vogelsang described that, at times, there were ten people living in the home, sometimes a four bedroom home in rough neighborhoods where conditions were not good, sometimes without indoor plumbing and lacked heating. PCR Tr. 507-08.

Vogelsang identified photographs that she would have used at a trial. She suggested the early photos of Lindsey would have helped to humanize him. PCR Tr. 509.

She opined that Lindsey had traditional medical care, though she did not see his medical records. PCR Tr. 509. She stated that he saw Dr. Henderson and early critical care would, by anecdote, involve being carried to the police then to the hospital. She described his injuries as the car accident, the ingestion of kerosene, and falling off the porch. PCR Tr. 510.

She testified generally about child development. PCR Tr. 510-12. She opined that there was no one at home to help Marion through his developmental stages. PCR Tr. 512. She opined that young boys need a strong male adult. She suggested the lack of a positive role model creates a higher risk to end up in trouble. PCR Tr. 513. This resilience to bad things happening in their lives is learned through child development. PCR Tr. 514.

She opined that Lindsey did not have any strong male figures in his life. PCR Tr. 514. While his family in the home loved and cared for each other, she opined Lindsey was not prepared to face adverse and violent situations and to resolve problems other than through violent options. PCR Tr. 515. She opined there was a lack of guidance and mental health intervention where recommendations were not followed. There were also within the family situation the existence of divorce, separation, and abandonment, as well as emotional abuse and neglect. PCR Tr. 516. She found that the care of children was not the primary concern. PCR Tr. 516. She found a lack of role models and consistent care giving, as well as an inability of trust in relationships. PCR Tr. 517.

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She also opined there was "worry about violence in the home", "impaired cognitive functioning", "inability to deal with aggressive feelings" (shown through use of guns, knives, and fists), repression of feelings (family representation to mental health staff that everything is O.K.), and a "sense of helplessness" (poor problem solving skills). PCR Tr. 517-18.

She opined that outside of home, Mr. Burton was a strong male influence on Lindsey. She opined Burton and his mother and their influence may have made a difference in his life and suggest the reason why his school records between 2nd and 6th grade reflect courtesy, respect for authority. PCR Tr. 518.

She opined that Applicant lived everyday with "a threat of harm", which makes children anxious. She asserted that the relationship with Burton gave him his strengths and gave him hope that he could provide. However, she felt his wanting a different type of family resulting in his guessing how to do that by giving material things. PCR Tr. 519-20.

Vogelsang opined that the community Applicant lived in became exposed to cocaine and crack. She asserts that when he was around 11 that he saw his family dealing and using drugs. PCR Tr. 520. Although there were programs in the community, such as Scouts to help his learning and mental health issues, they did not use them. PCR Tr. 521.

Concerning his schooling, she did not see the disciplinary or conduct problems in his records that the DMH evaluators had the impression of concerning misbehavior, although he did fail the first grade and had speech problems. PCR Tr. 521. She did find that Applicant had slapped a girl, got into a "wrestling match" with a boy when he was thrown and had to get medical treatment for an elbow, and had a fight with another over a racial remark. PCR Tr. 522.

However, Vogelsang asserted in the eighth grade, Lindsey "succumbed to the streets"

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when Burton left, his mother started 3rd shift, he became absent from school and his brothers got involved with drugs, driving cars, buying jewelry and having girlfriends. PCR Tr. 522. After repeating 8th grade then placed in ninth grade, he quits school after becoming "a street person." PCR Tr. 522.

Vogelsang stated Aunt Robin was the only member to graduate from high school but was never at home and eventually got addicted to crack cocaine. PCR Tr. 523. The others in the house were, including Willie who went to prison for 15 years for killing Paul and got into trouble with drugs, and Bessie, Robin, and Steve who received mental health treatment. PCR Tr. 524.

She felt Lindsey would retreat to neighbors' homes to avoid the chaos and found him lonely and scared. PCR Tr. 524. She also asserted that when his mother got off work she frequently went with her mother to play bingo. PCR Tr. 524. His uncles were described as either beating on him, threw his cat into a heater, hit their girlfriends, revealing a powerful threat of harm. Further, he was claimed to have seen his mother shoot at Mr. Sims. Vogelsang stated that Lindsey had no oasis for peace unless he went to his neighbors or Mr. Burton. PCR Tr. 526.[36]

Vogelsang stated that Virginia had a volatile relationship with Mr. Sims - evidenced by fighting and arguing all the time. She stated that one time she shot at him several times and missed which Applicant witnessed. PCR Tr. 527. She also recalled that all of the family had guns. PCR Tr. 527.

Concerning his suicide attempts, Vogelsang described the event which led to his hospitalization. She stated that Fred returned to the home demanding attention and Applicant

[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.

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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 boy's home causing him to get upset and want to, at that moment, 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.

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 is mental illness and violence and this practice further confuses. Vogelsang found a note in the doctor's records treating Steven Pilgrim on July 15, 2002 who was taking Xanax asserting that he was anxious and feared his wife was "putting a root" on him and putting something in his drink or food claiming it caused his penis to draw up inside him. PCR Tr. 533, ll.

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14-25. Vogelsang noted that Steve was the person Lindsey looked up to. She reported Steve had previously shot a woman in an earlier relationship and the mental health records reported his conflicts with his wife. PCR Tr. 534.

Vogelsang reported on direct that Lindsey was confused by the practice of roots.[37] She reported that the use of "magical solutions" in a confusing and chaotic family environment only confuses things. PCR Tr. 534-35.

Vogelsang summarized Dr. James Garbarino's theory on psychological battering of children and asserted she would have used his model if she would have testified in 2004 with visual aids. PCR Tr. 535. She stated that there was rejection as revealed by his father's abandonment and his mother's alleged lack of involvement in his life. She points to claims that his brothers would leave with their fathers and Applicant would be left behind. She said that suggested his entry into "adulthood" with a fear of rejection and 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 their wives and girlfriends, and 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

[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.

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shooting at her boyfriend's tires and boyfriend, and his uncle's profit from drugs. PCR Tr. 537. She suggested that these factors miss-socialized the child. PCR Tr. 538.

Vogelsang reported that Lindsey became involved in the drug trade around age 12 as a courier for his uncles. PCR Tr. 538. This initially provided him some money, and Vogelsang claimed he used the money to help pay for his grandmother's medicine, gave money to his mother, yet also used it to buy clothes and shoes for himself. PCR Tr. 539.

Concerning his school performance, she opined he had potential with extra help and tutoring. PCR Tr. 539. But opportunities were not present.

Vogelsang described Applicant's relationships with women as erratic and chaotic. PCR Tr. 540. An early relationship with an unbeknownst cousin and breakup demanded by his mother caused Applicant to become very sad and upset. She further equates his mother's alleged rejection prior to the pill injection at age 15.

Vogelsang describes that Lindsey began dating and when rejected becomes upset and over-reactive. She describes the shooting of Stafford Wilkins after he was in a "long-term" relationship with Stephanie, causing him to be sent to jail. PCR Tr. 540.

Concerning the victim Nell, Vogelsang reported that the relationship began at age 22. She found "incredible instability" in the relationship. She said the relationship with Nell began while living with Stephanie. He has a child with Nell. Although Vogelsang opines that Applicant loves being a father (PCR Tr. 541, ll. 14-15), she describes breakup where each returns to their mother, arguments and violence resulting in at least one conviction and multiple arrests. PCR Tr. 54[illegible] 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

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period, he always reverts back to drug dealing "where he can get the money he needs to provide" for things he thinks he wants his family to have. PCR Tr. 542.

Vogelsang found that he wanted to be a father, but lacked knowing about fatherhood. She denied any knowledge that he ever abused or hit his children. PCR Tr. 543. He only found that his role was to give them things. PCR Tr. 543.

Vogelsang reported that there was, however, violence in his relationship with Nell. Though one CDV conviction, she had made other reports of violence or aggressiveness toward her. PCR Tr. 543.

Vogelsang stated the drowning of his brother, Fred, in 1998 was a major loss, even though this was the brother with whom he fought. PCR Tr. 544. They had gotten closer and worked in Virginia together. After his death, she opined he got sad and depressed in a "normal grieving process." PCR Tr. 544.

She opined that Lindsey lacked an understanding of fidelity and being committed in a relationship. Vogelsang described a family pattern of marriage and additional involvement in other relationships. PCR Tr. 545. Vogelsang, however, stated this did not apply to Nell. However, Vogelsang opined that "he became extremely depressed over the loss of his boys" and Nell. Vogelsang pointed out that is when he threatened to take his life and no one called EMS or took him to the E.R. and "just left him there." PCR Tr. 545.

Vogelsang re-stated the major factor in his life was the family system and behaviors he had witnessed through his development years. She declared this affected his judgment, impulsivity, insight, "and placed him at a higher risk to end up committing a serious act." PCR Tr. 547. She opined that had she been a witness in 2004, she would have testified whether Bessie Smith had

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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 were revealed. First, Vogelsang admitted that she misstated on direct that Uncle Willie has killed someone, when in fact it was only an assault. PCR Tr. 556-57. Further, she admitted that Lindsey was not identified in the pill incident as attempting suicide by the hospital, but that it was a gesture, that he had no suicidal ideation, did not realize the medicine was toxic and that he did it to get attention and not to kill himself. PCR Tr. 557-58.

Vogelsang again corrected herself concerning the incident three weeks before was not an attempted suicide, but was only a "threat." PCR Tr. 559. She argued there was no attempt or overt act on his part and 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., 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

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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 the practice of roots" and "shot a girl," though Lindsey did not witness it. PCR Tr. 574.

When asked about what Marion told her about the practice of roots in the home (during her November 2009 interview), she asserted various matters including it was confusing to him, made him mixed-up between a difference between roots and home remedies, confused him about family members putting a root on people in their relationships to make them feel sick or die.[38] However, when asked to point out in any of her notes of the interview, she declared, prior to reviewing the notes, she "may not have written it down." PCR Tr. 575. When she reviewed her multiple page

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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.

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notes, she declared nothing was in there, although she remembered the conversation. PCR Tr. 576.

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

She confirmed that she failed to interview Stafford Wilkins, who Lindsey had shot. She stated she was unaware that Wilkins stated he thought Lindsey was his friend and did not know why he shot him, admitting that she had not read his trial testimony. PCR Tr. 579.

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

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

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

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

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

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

ANALYSIS

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

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

A review of the trial testimony of Virginia Lindsey (guilt and penalty), cousin Chris Wilkens (guilt and penalty) and the penalty phase testimony of Bill Burton, Leon McDowell and Steve Pilgrim suggests that the essential family background was revealed to the jury. Importantly, concerning the depth of the investigation, the summaries of the interviews that Ms. Topp had with

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Marion Lindsey and Marion Lindsey's mother in 2004, buttressed by Ms. Topp's own PCR testimony about what she learned in 2004 are virtually in the same detail that the post-conviction evidence from the family members and Jan Vogelsang's testimony in the PCR hearings.

Trial "counsel have a duty to make reasonable investigations or to make a reasonable decision that makes investigations unnecessary." *Strickland*, at 691, 104 S.Ct. 2052. "In assessing counsel's investigation, we must conduct an objective review of their performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (internal quotation marks and citations omitted). "In assessing counsel's performance in this context, we look to how counsel prepared for sentencing, what mitigating evidence counsel accumulated, what additional leads counsel had, and what results counsel could have reasonably expected from those leads." *Blanton v. Quarterman*, 543 F.3d 230, 236 (5th Cir.2008) (citing *Neal*, 286 F.3d at 237). Courts must consider "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527, 123 S.Ct. 2527.

Lenora Topp made detailed summaries of her interviews with Lindsey and Virginia Lindsey and these written interviews reveals virtually identical data to a significant portion of Social Worker Jan Vogelsang's PCR testimony. Respondent's Exhibit 2, 3, 4. The Applicant has failed to point out any new and critical data revealed post-trial. A review of the data received in 2004 by the defense team revealed that they were aware of Virginia Lindsey's background in detail as revealed first from Lindsey and then from Virginia, including her limited education, children

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and their different fathers, involvement of her mother in raising the children, her employment as a shift worker and not at home in evenings to help with food and homework, Lindsey's lack of an active father to interact with, and Lindsey's opinion that the family was poor. Respondent's Exhibit 2, 3, 4. Topp and the defense team also were aware of Virginia's 8 siblings. They were aware that all five of Bessie Smith's children - in contrast - had completed college. Respondent's Exhibit 2-4. From Virginia, she revealed that injuries that Marion has sustained while growing up - being run over by a car driven by her brother Paul when Lindsey was 19 months old, Lindsey falling and hitting his head frequently, Virginia also reported to Topp that Lindsey had tried to commit suicide by swallowing pills from the medicine cabinet and the reason that he was upset with her after a fight with the brother and she told him that she would not do anything for him again and had stayed in the hospital one week. Respondent Exhibit 4. Virginia had also reported to Topp that Lindsey had raised his younger brother Tim and that her son Fred died while canoeing and was never found. Id. She also reported to Topp about the incident when her brother threw Lindsey's cat into the furnace. She also described to Topp about Lindsey's earlier relationship with Stephanie Petty who they liked and got along. Id. Concerning the relationship between Nell and Lindsey, Virginia had reported that she liked and loved Nell, thought Nell's mother had too much influence on her and when there was an issue with money, there were problems in the relationship. Virginia stated to Topp that she knew that Lindsey sold drugs and that he spent money on Virginia and her family during those times.

In Lindsey's interviews with Topp on April 16 and 25, 2004, he reported similar details about the family background. Respondent Exhibit 2, 3. Particularly he noted his knowledge of his father Leon McDowell and referred to him as a "sperm donor" who did not want to get involved

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with him and Lindsey was bitter toward him. He noted to Topp that his other brothers would go on activities with their fathers and he was left out. Id. He noted that his mother struggled while he was growing up and that they did not have new clothes and had a wringing washer machine and ruined a new one through overuse. Lindsey reported to Topp that his brother Fred died in a canoeing accident when he was with a friend who survived, but Fred's body was never found. He reported that Fred's death affected him for at least three years. Id. He stated that he and Fred used to fight, but they became friends and worked together in West Virginia until Lindsey became homesick and moved back. Lindsey felt that he raised his brother Tim Sims who would follow him everywhere and that Tim's father was the only father figure in Lindsey's life. Respondent's Exhibit 2,3.

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

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

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

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

Lindsey advised Topp that he had two traumatic times in his life, pointing out the incident when his cat was thrown into the heater alive and when he tried to commit suicide when he was 12 years old. Id. He also described running away from home when he was seven because his mother would not let him go somewhere, but returned home when he got hungry.

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

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

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

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

Concerning Bill Burton, Lindsey said he was his mentor while growing up and Burton got him a job at his plant when he was plant manager. He stated in his youth he would go fishing with

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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 he had written suicide notes after Nell had moved back with her mother and told him that he could not see his children after domestic violence order was taken out. Respondent's Exhibit 2, 3. He claimed to have lost weight

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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

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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).

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the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." *Strickland v. Washington*, 466 U.S. at 691. "The reasonableness of the investigation involves 'not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.'" *St. Aubin v. Quarterman*, 470 F.3d 1096, 1101 (5th Cir.2006), quoting in part *Wiggins*, 539 U.S. at 527.

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

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

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

It is undisputed that defense counsel in 2004 did not retain a clinical social worker such as Jan Vogelsang in 2002-2004. Although the decision not to retain a social worker is not reflected in

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the record due to counsel's death, this Court finds that the failure does not amount to deficient performance or prejudice under Applicant's argument.

As to deficient performance, Applicant appears to assert that the retention of a social worker is required in all capital cases. His reliance upon the ABA Standards notwithstanding, the 6th Amendment does not require the retention of any particular expert in every case. See *Durr v. Mitchell*, 487 F.2d 423 (6th Cir. 2007) (no requirement to employ social worker and no prejudice for failure to do so.) Similarly in *Wiggins*, the Court did not hold that there was an error in retaining a social worker, but that it was not an unreasonable investigation to follow up on leads that would have led to a mental health issue. *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2007) (counsel ineffective based upon a failure to investigate and present, including retaining a social worker where funds were made available).[40] However, the Court need not address deficient performance where the Applicant has failed to satisfy the prejudice prong.

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

[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.

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and reasonably understood by the jury after the testimony of the family and Dr. Melikian. Lindsey was raised solely by his mother and they were of very modest means. The Applicant has failed to pinpoint what difference any of the information Ms. Vogelsang laboriously testified about that would have an impact upon a jury in a manner that would undermine confidence in the verdict under *Strickland*.

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

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

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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 decision maker ...." *Id.* at 3266.

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

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be denied.

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

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

Memorandum 53-54.

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

It is undisputed that the defense was aware of Vincent Bell, as well as Susan Horton and Joseph Stewart as the paramedics who arrived at the scene. They had included them on their listing and summary of state 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

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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 Tr. 66. He stated that he interviewed him because he wanted to develop that Lindsey had tried to kill himself by shooting himself. PCR Tr. 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 if the Court would conclude it was deficient, Prejudice cannot be shown. Similar information was given to the jury within both the guilt and sentencing phase. Further, the comment was used by Dr. Melikian in her assessment of depression that she gave the jury. The "let me die" after a person had shot himself in the head fails to suggest how the failure of the additional witness would have the effect to have undermined confidence in the death verdict under the standards of

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

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

a. Failed to commit sufficient time to perform adequate investigation in mitigation.
b. Failed to assemble complete defense team until one month prior to trial
c. Failed to perform investigation of Lindsey's life history, family history until 2 months prior to trial
d. First half of investigation done w/o mitigation investigator
e. Investigation lasted only 8 weeks
f. Failed to spend sufficient time interviewing witness to determine beneficial testimony
g. Failed to spend sufficient time preparing witnesses to testify to allow a clear, logical

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Memo, p. 54-58.

In his ninth allegation, he contends that counsel spent insufficient time in preparation for the trial and sentencing proceedings. In the argument, he merely states that they failed to devote adequate time for preparation for the mitigation phase of the trial. Without designating any necessary item of evidence that the "insufficient time" suggested, he claims the result of the proceeding would have been different. Within his argument, he stated that studies reported that the average time spent by defense lawyers in capital cases was 1889 hours per case and normally 12 times more time spent in a capital case than a normal case. The Applicant solely relies upon the ABA Guidelines, § 10.7 and the comments concerning investigation and § 11.4.1. He also relies upon *Wiggins v. Smith*, supra, as citing to the ABA Guidelines as appropriate guides on whether counsel provided effective assistance of counsel.

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

If the Applicant's assertion that the ABA guidelines are not guides, but are requirements for capital defense counsel are accepted, it sets an almost impossibly high bar for defense counsel in capital cases. Defense counsel would now be required "to locate and interview the client's family members ... and virtually everyone else who knew the client and his family, including

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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.

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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.

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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."

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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 (Tenn. 2008). Further, "[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation." *Nields v. Bradshaw*, 482 F.3d 442, 454 (6th Cir.2007).

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

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X. Ineffective Assistance of Counsel - Statutory Aggravating Factors

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

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

MEMO , p. 58-60.

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

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

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

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

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

3. Directed verdict on aggravating circumstance

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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

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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.

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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

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> 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

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two children in the back seat were unquestionably within a zone of danger as a result of the four gunshots into the vehicle, particularly when the shooting began through a tinted window at various dangerous angles and by the testimony showed the bullet that exited the neck of the decedent would have struck and killed the child in the middle of the seat, had she not moved to one side.[43] Nothing presented in the state PCR hearing undermines that legal conclusion.

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

> **Locklair argues that this was a simple case of a victim being shot at close range, not the type of incident contemplated by the statute.** However, the trial testimony does not support this assertion. According to Nichols' testimony, Locklair put more than one person at great risk of danger because he attempted to fire the gun several times, but 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. 1743-44 (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.

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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 and that was the risk of her proximity to Mrs. Lindsey, as was portrayed by their screams in the 911 recording. Lindsey was not ignorant of their presence or their great risk of death while they were in the zone of danger. *Jones v. State*, 128 P.3d 521 (Okla. 2006) (evidence showed defendant killed victim while victim was sitting in vehicle with his sister and two young daughters and defendant knew of their

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presence when he shot victim); *State v. Burns*, 979 S.W.2d 276 (Tenn. 1998) (evidence supported aggravator of "great risk of death to two or more people" where defendant shot inside car in which three people were sitting, killing one and wounding another then fired shots at another man who left car, which directly imperiled four men playing basketball nearby).

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

Trial Counsel Was Not Deficient

Ineffective assistance of counsel claims are not fungible but instead are highly fact-dependent. *Hemmerle v.Schriro*, 495 F.3d 1069, 1075 (9th Cir. 2007). Conclusory allegations not supported by specifics do not warrant relief. *Jones v. Gomez*, 66 F.3d 199, 204 (9th Cir. 1995); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994); *U.S. v. Popoola*, 881 F.2d 811, 813 (9th Cir. 1989). A conclusory allegation of ineffectiveness raises no constitutional issue because a petitioner must show how counsel was deficient and how there was prejudice. *Miller v. Johnson*, 200 F.3d 274,

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282 (5th Cir. 2000). Vague and speculative assertions are deficient. *U.S. v. Taylor*, 802 F.2d 1108, 1119 (9th Cir. 1986), citing *U.S. v. Rogers*, 769 F.2d 1418, 1425 (9th Cir. 1985).

And in order to prevail on an ineffectiveness claim, a petitioner must make a sufficient factual showing to substantiate the claims. *U.S. v. Schaflander*, 743 F.2d 714 (9th Cir. 1984).

Counsel Bartosh acted reasonably in his argument, legal and factual, against the applicability of the statutory aggravating factor. Applicant has not asserted, in any manner, what counsel could or should have done differently concerning the particular aggravating factor. *Strickland v. Washington*, 466 U.S. 668 (1984) is the foundation for the presumed effectiveness of counsel's conduct, reciting that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at p. 689, 104 S.Ct. 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, only a statement of lack of success in the motion. The South Carolina Supreme Court concluded that there was evidence to support the statutory aggravating factor. Counsel

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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

[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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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 28th day of September, 2015.

HONORABLE PAUL M. BURCH
Presiding Circuit Judge

Pageland, S.C.

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Paul M. Burch, Circuit Court Judge

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FEB 26 2016

SC SUPREME COURT

MARION ALEXANDER LINDSEY,

PETITIONER,

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APPELLATE DEFENSE

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-206087

RENEWED PETITION FOR EXTRAORDINARY RELIEF FOR FAILURE OF THE PCR COURT TO COMPLY WITH THIS COURT'S SEPTEMBER 30, 2014, REMAND ORDER AND FOR A STAY OF PROCEEDINGS IN THE PCR COURT

The PCR court has now flagrantly disobeyed this Court's September 30, 2014, Order remanding this case. This Court remanded this death penalty matter to the PCR court to draft its own order in compliance with Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). Despite this Court's clear instructions, the PCR court issued an Amended Order Denying Post-Conviction Relief ("Amended Order") that, but for correction of typographical errors, is exactly the same as its previous order (and exactly the same as the proposed order submitted by the State). Petitioner Marion Lindsey, pursuant to Rule 245 of the SCACR, renews his

request to this Court to accept this matter in its original jurisdiction[1] and grant a new Post-Conviction Relief Hearing before a circuit judge other than The Honorable Paul M. Burch. Petitioner also asks this Court to stay the matter below until it decides this petition.

The Amended Order contains **no substantive changes** from the State's proposed order. It contains no new factual findings. It contains no new legal conclusions. It cites no new cases. Almost every sentence has exactly the same wording. The most significant change between the State's proposed order and the Amended Order is that the Amended Order italicizes case names instead of underlining them.

This Court did not take the extraordinary step of remanding a capital PCR as an exercise in proofreading. This Court remanded the case because of the serious federal and state due process concerns involved when a PCR judge: (1) does not read an order in a death penalty case before signing it; (2) allows the State to draft an order, thereby substituting an advocate's judgment for the court's; and (3) impairs a litigant's right to a fair hearing before a neutral arbiter. Petitioner shows as follows:

1. On August 14, 2007, petitioner filed a PCR application regarding his conviction and death sentence. App. 2192.

2. On July 19-21, 2010, a hearing was held before Judge Burch. App. 2285.

3. On May 2, 2011, Judge Burch requested a proposed order only from the State. Supp. App. 1. On May 12, 2011, Judge Burch emailed petitioner's attorney, Rick Veith, requesting a proposed order from petitioner. In this email, Judge Burch stated that

[1] See S.C. Const. art. V, § 5. Petitioner also submits that it may be unnecessary to invoke this Court's original jurisdiction in this matter because the trial court's actions in this case are a violation of this Court's Order of September 30, 2014, and this Court, like all courts, retains jurisdiction to enforce its own Orders.

"Because of its size, I thought the packet you sent in October included a proposed order." Supp. App. 3. The inference to be drawn from this email is that the PCR court did not even review materials submitted by petitioner for nearly eight months.

4. On June 2, 2011, the State sent a proposed order to Judge Burch. Supp. App. 6.

5. On August 12, 2011, the PCR court denied petitioner's PCR application. App. 3536. As detailed in the petition for certiorari to this Court, the Order signed by Judge Burch was **identical** to the proposed order submitted by the State. Pet. Cert. at 105-109. Petitioner argued to this Court that the signing of the State's proposed order, which contained numerous errors, sadly indicated that the PCR court **had not even read the proposed order.** Pet. Cert. 105-109. In its Return, the State carefully avoided alleging that the PCR court read the proposed order, arguing instead that the PCR court had adequate time to review it. State's Return at 110.

6. On September 30, 2014, this Court unanimously vacated the PCR court's Order of Dismissal. Lindsey v. State, Order dated September 30, 2014 ("September 2014, Order"). This Court found that vacation of the Order of Dismissal was necessary because of (1) "the frequency and severity of the drafting errors in the Order of Dismissal," and (2) "this Court's admonishments to PCR judges in Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004)." The Court directed Judge Burch to issue an amended order in compliance with Pruitt and Hall. September 2014, Order.

7. On October 9, 2014, petitioner's attorney, Robert M. Dudek, wrote the State regarding the September 2014, Order and a copy of this letter is attached as

"Exhibit A." The letter stated, "It is my interpretation of the Order **that it forbids the submission or solicitation of a proposed order from the parties. If this is not your interpretation, then please let me know so that I may make a formal motion to place my concerns on the record.**" Exhibit A (emphasis added).

8. Nearly five months after this Court's September 2014, Order, on February 26, 2015, Judge Burch's law clerk sent an email to the parties and copied this Court. A copy of this email is attached as "Exhibit B." This email stated that Judge Burch was requesting Microsoft Word versions of the proposed orders submitted by the parties. Exhibit B.

9. The same day petitioner responded via email. A copy of this email is attached as "Exhibit C." Citing and attaching this Court's September 2014, Order, petitioner objected to the submission of any proposed orders. Exhibit C.

10. Just two minutes before (and arriving after petitioner sent his email), the state emailed its proposed order in Microsoft Word format to Judge Burch. A copy of this email is attached as "Exhibit D." Importantly, the State also attached petitioner's Reply to the state's Return to the Petition for Certiorari. Exhibit D. Petitioner's Reply contained a list of 155 identical typographical and grammatical errors in both the PCR court's Order of Dismissal and the state's proposed order. A copy of this list of errors that was attached to petitioner's original Reply is, for this Court's convenience, attached as "Exhibit E."

11. Later that same day, on February 26, 2015, petitioner filed a Petition for Extraordinary Relief in this Court. Petitioner argued that "the PCR court intends, in flagrant disregard of this Court's instructions, to use the proposed order again." Pet. Ext.

Relief at 4. Petitioner also argued that "the State gave the PCR court a roadmap to correcting the errors in the proposed order when it attached to its email **petitioner's list of the errors** in petitioner's reply." Pet. Ext. Relief at 4.

12. The next day, on February 27, 2015, this Court requested a return from the State, which it filed on March 2, 2015. The State argued, "Respondent submits that the complaint raised by Judge Burch [sic] on whether he is complying with the mandate of this Court is premature." State's Ret. Pet. Ext. Relief at 9.

13. On April 9, 2015, this Court denied the Petition for Extraordinary Relief.

14. On February 12, 2016, the State emailed a letter to petitioner's attorneys, petitioner's PCR trial level attorneys, and this Court advising all parties that the State received the Amended Order on October 2, 2015. A copy of this letter is attached as "Exhibit F." The state attached a "certificate of service" from the Spartanburg County Clerk of Court purportedly serving the Amended Order on the State and PCR trial level counsel. Exhibit F. It did not show that petitioner's appellate attorneys were served. Exhibit F. Petitioner's PCR trial attorneys advised the Court and the State that they never received the Amended Order and, on February 17, 2016, the State served the Amended Order with a copy to this Court.

15. Petitioner has made a line-by-line comparison between the Amended Order and the original Order/State's proposed order. As predicted by petitioner in his first Petition for Extraordinary Relief, the Amended Order is exactly the same document, except for the correction of the errors noted by petitioner in Exhibit E and a few other minor stylistic and typographical corrections. These minor changes include:

a. Italicizing instead of underlining case names in citations;

b. Decreasing the point size of the footnotes;

c. Altering outline formats from bullet points or roman numerals to letters;

d. Bolding some headings and un-bolding other headings;

e. Altering spacing in headings;

f. Correcting some typographical errors petitioner did not include in its list; however, many typographical errors petitioner did not catch were not fixed. For example, a sentence on page 109 of the Amended Order (and the original Order, App. 3648), reads: "She confirmed that she was not an expert in mental health area."

16. Petitioner points the Court to page 58 of the original Order/State's proposed order (App. 3593) and page 56 of the Amended Order as the most significant change between the two documents that was not suggested by petitioner's list of errors. The original Order states: "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." App. 3593. The Amended Order's version is: "Although he has recanted presently after the fact of his conviction and sentence, the blame does not rest on prior counsel's shoulders." Amended Order at 56. Stylistic changes were also made to the immediately following sentence. As the Court can see, this change—which is the most significant difference between the two documents—is no change at all.

Discussion

Despite an Order from this Court and the protests of petitioner, the PCR court has utterly failed in its duties under Pruitt, Hall, and the due process clauses of the federal and state constitutions. Along with Marion Lindsey's life and right to a fair PCR proceeding,

the reputation of our state's judiciary is at stake in this matter. The original failure by the PCR judge to read the State's proposed order before signing it was a gross violation of petitioner's rights and this Court's instructions. Now, after remand and additional proceedings warning of this outcome, it has again come to pass that the PCR court has used the State's proposed order in its entirety.

Petitioner predicted this outcome in his original Petition for Extraordinary Relief and tried to prevent it. The State argued the petition was premature and, presumably, this Court agreed and gave the PCR judge a chance to follow its instructions. Now, petitioner's predictions have come true and this Court can no longer ignore the fact that petitioner has not yet received a genuine "bite at the apple" from the PCR court.

This Court did not remand this death penalty case simply to correct the "frequency and severity of the drafting errors" in the original order of dismissal. September 2014, Order. It remanded this case because the presence of identical errors in both the State's proposed order and the original Order indicated a violation of petitioner's due process rights. As the Court reiterated in its September 2014, Order, it has on two occasions warned PCR judges against wholesale adoption of proposed orders. In Pruitt, the Court stated:

> We take this opportunity to express our concern with the increasing number of orders in PCR proceedings that fail to address the merits of the issues raised by the applicant. . . . Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to the issuance of the order, and the PCR judge should carefully review the order prior to signing it.

Pruitt, at 255-56, 423 S.E.2d at 128. In Hall, this Court stated:

> Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also

> acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency.

360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). See also Jefferson v. Upton, 560 U.S. 284 (2010) (criticizing the practice of verbatim adoption of proposed orders in a capital case) *citing* Anderson v. Bessemer City, 470 U.S. 564 (1985); Commonwealth v. Williams, 732 A.2d 1167, 1176 (Pa. 1999) (criticizing practice in a capital case); Dobyne v. State, 805 So.2d 733, 741 (Ala. Crim. App. 2000) (criticizing practice and quoting Anderson). Our Legislature requires "specific findings of fact" and express statements of a court's "conclusions of law" in PCR cases. S.C. Code Ann. § 17-27-80.

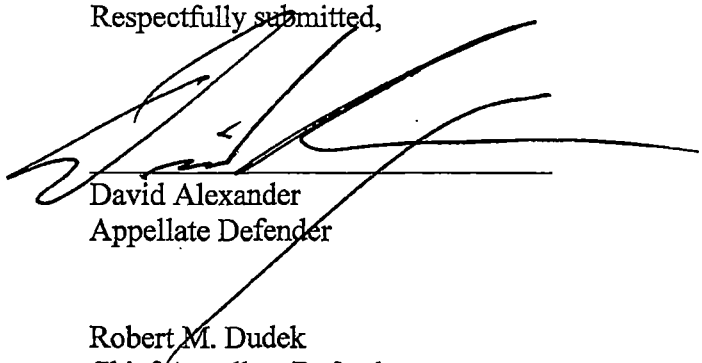
This Court's Order, read in light of Pruitt and Hall, could not have been more clear. It has now been almost six years since the PCR judge heard the evidence in this case. The PCR court's violation of this Court's September 2014, Order is proof that it cannot now issue an order in this case. Judges must recuse themselves when their impartiality might reasonably be questioned. Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004). "A judge's impartiality might reasonably be questioned when his factual findings are not supported by the record." Id. If a judge's impartiality might be questioned when factual findings are not supported by the record, it certainly follows that a judge's impartiality might be questioned when he likely did not read his first order and ignored this Court's mandate in issuing a poorly camouflaged version of the first order as an Amended Order. The issuance of this Amended Order deprives petitioner of due process. U.S. Const. amend. V, VII, XIV,

It now falls to this Court, as the guardian of its citizens' constitutional rights and the integrity of the state's judicial system, to correct this injustice. Petitioner has been sentenced to death, and the cavalier treatment of this Court's September 2014, Order is a

violation of both the Eighth Amendment's proscription against cruel and unusual punishment and the Fifth and Fourteenth Amendment's guarantee of due process. U.S. Const. amends. V, VIII, XIV. See also S.C. Const. art. I, §§ 3, 15. It is unfortunately apparent that, at this point, petitioner cannot receive a fair adjudication below. By granting petitioner a new PCR hearing before a different judge, this Court can not only correct the deprivation of petitioner's rights, but send a message to the State and to PCR judges that such activity will no longer be tolerated.

WHEREFORE, petitioner respectfully requests that this Court grant a new Post-Conviction Relief Hearing before a circuit judge other than The Honorable Paul M. Burch. Petitioner also respectfully requests that the matter be stayed in the lower court pending disposition of this Court's decision.

Respectfully submitted,



David Alexander
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

This 26th day of February, 2016.

EXHIBIT A

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 9, 2014

Donald J. Zelenka, Esquire
Senior Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: Marion Lindsey v. State, CA No. 2007-CP-42-2848

Dear Don:

By now, I am sure you have received the Supreme Court's Order dated September 30, 2014.

It is my interpretation of the Order that it forbids the submission or solicitation of a proposed order from the parties. If this is not your interpretation, then please let me know so that I may make a formal motion to place my concerns on the record.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

cc. The Honorable Paul M. Burch
David Alexander, Esq.
Client

EXHIBIT B

Robert M. Dudek

From: Burch, Paul M. Law Clerk (Samuel H. Thomas) <PBurchLC@sccourts.org>
Sent: Thursday, February 26, 2015 11:43 AM
To: Zelenka, Don; Robert M. Dudek; Rick Vieth (rvieth@hbvlaw.com)
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

Judge Burch has requested that I contact you about getting us Microsoft Word versions of the proposed orders submitted after the PCR hearing held on July 19-21, 2010 before him if this is at all possible. Please do not hesitate to contact me if further information is needed. Thank you and I look forward to hearing back from you as soon as possible.

Kindest regards,

Sam Thomas

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728
Office: 843-672-3270
Fax: 843-672-5960

From: Don Zelenka [mailto:DZelenka@scag.gov]
Sent: Monday, October 20, 2014 2:52 PM
To: Burch, Paul M. Law Clerk (Samuel H. Thomas); rdudek@sccld.sc.gov
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Mr. Thomas –

Thank you for the follow-up. The remittitur in this case was entered on October 16, 2014 and a copy is attached. I noticed that the correspondence I received only showed copies going to the Clerk of Court and appellate PCR counsel.

By copy of this email I am advising the Ms. Hopkins, a Deputy Clerk of the Supreme Court of this request and the expectation on the part of Judge Burch to receive something from the Court.

Sincerely,

Don Zelenka

Donald J. Zelenka
Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office

P.O. Box 11549
Columbia, S.C. 29211
803-734-3601
dzelenka@scag.gov

From: Burch, Paul M. Law Clerk (Samuel H. Thomas) [mailto:PBurchLC@sccourts.org]
Sent: Monday, October 20, 2014 12:37 PM
To: rdudek@sccid.sc.gov; Don Zelenka
Subject: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

I hope this email finds you well. Judge Burch has asked me to send you both this email stating that we have not yet received anything formal from the Supreme Court on this matter. We will, however, be reviewing the file and will be back in touch with you both in order to set up a game plan on how we should proceed from here in a few weeks.

Kindest regards,

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728
T: 843-672-3270
F: 843-672-5960

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EXHIBIT C

Robert M. Dudek

From:	Robert M. Dudek
Sent:	Thursday, February 26, 2015 12:38 PM
To:	'Burch, Paul M. Law Clerk (Samuel H. Thomas)'; Zelenka, Don; Rick Vieth (rvieth@hbvlaw.com)
Cc:	Hopkins, Debbie
Subject:	RE: Marion A. Lindsey v. State, 2007-CP-42-2848
Attachments:	Order vacating Ord Dsml & remanding 9.30.14.pdf; Ltr to Zelenka re. remand 10.09.14.pdf

Mr. Thomas: We object to the submission of proposed orders as in violation of the Supreme Court's order of September 30, 2014 remanding this case to Judge Burch. I have attached that order, and also my letter to Mr. Zelenka dated October 9, 2014 stating that the Supreme Court's order prohibits the submission or solicitation of proposed orders in any format. We are filing a motion this afternoon in the Supreme Court consistent with this position. Respectfully,

Bob Dudek
803-734-1955

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201-1589
(803) 734-1330 – Telephone
(803) 734-1397 - Fax

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Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

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Kindest regards,

Sam Thomas

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Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728

Office: 843-672-3270
Fax: 843-672-5960

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Sent: Monday, October 20, 2014 2:52 PM
To: Burch, Paul M. Law Clerk (Samuel H. Thomas); rdudek@sccid.sc.gov
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

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Sincerely,

Don Zelenka

Donald J. Zelenka
Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211
803-734-3601
dzelenka@scag.gov

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Subject: Marion A. Lindsey v. State, 2007-CP-42-2848

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Kindest regards,

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276

EXHIBIT D

Robert M. Dudek

From: Don Zelenka <DZelenka@scag.gov>
Sent: Thursday, February 26, 2015 12:36 PM
To: Burch, Paul M. Law Clerk (Samuel H. Thomas); Robert M. Dudek; Rick Vieth (rvieth@hbvlaw.com)
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

You have received 2 files
Use the secure links below to download.

Mr. Thomas –

Attached is a copy of the Respondent's original proposed order submitted to you with one typographical correction on the spelling of "shift" on page 153 that I previously made to the document. I do not recall making any other corrections to the best of my recollection to other typographical errors which were pointed out to the Supreme Court in Mr. Dudek's and Mr. Alexander's Reply to the Return to the Petition for Writ of Certiorari which I am also attaching for you information.

I believe my original version in 2011 was completed in Wordperfect and then later automatically converted to WORD during our office document management transition. According to my records, my initial proposed order was sent by request to Judge Burch on June 2, 2011 by email in a pdf and by mail in a paper form, but not WORD or Wordperfect.

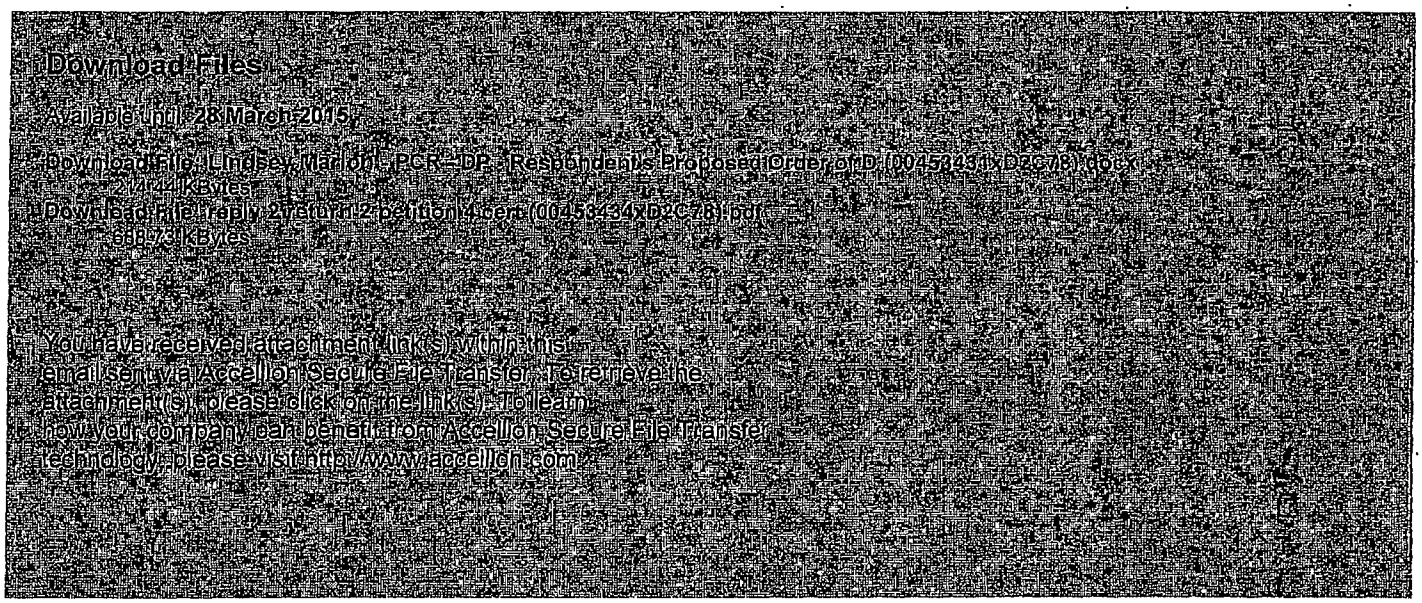
I do not have a copy of Mr. Lindsey's proposed order granting PCR in WORD, but do have a pdf of it. If there are other questions, please advise me.

I am sending the documents through Accellion as attachment. If there are problems in opening them, please advise me.

Sincerely,

Don Zelenka

Donald J. Zelenka
Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211
803-734-3601
dzelenka@scag.gov



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Kindest regards,

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EXHIBIT E

Catalogue of Identical Errors in the State's Proposed Order and Order Signed by PCR Court

ERROR NUMBER	PAGE NUMBER OF ERROR IN PROPOSED ORDER	PAGE NUMBER OF ERROR IN PCR COURT'S ORDER	TYPE OF ERROR	TEXT OF ERROR OR EXPLANATION OF ERROR
1	4	4	Missing Comma	"The Petitioner, through counsel Dudek[,] made a...."
2	7	7	Misspelled word	"adulteress relationship"
3	9	9	Typographical	Inconsistent use of periods
4	10	10	Typographical	Inconsistent use of periods
5	11	11	Typographical	Inconsistent use of periods
6	13	13	Citation	Citation errors with Supreme Court decisions
7	14	14	Citation	Citation errors with Supreme Court decisions
8	15	15	Misspelled word	"th" instead of "the"
9	16	16	Typographical	Unmatched quotation mark
10	17	17	Citation	Emphasis added or in original?
11	17	17	Subject-verb disagreement	"Petitioner points to the ABA guidelines to suggest it is per se ineffective assistance of counsel to fail to do as it commands."
12	17	17	Grammatical	Sentence indicates that Doctor Freeman, not Lindsey, was on Celexa
13	18	18	Typographical	"and accident"
14	20	20	Cut-and-paste	"within this pleading" in footnote.
15	20	20	Incorrect word choice	"Injected" instead of "ingested"
16	20	20	Capitalization	"tylenol"
17	21	21	Incorrect word choice	"he was tires"
18	21	21	Missing apostrophe	"mother-in-law[']s"
19	22	22	Subject-verb disagreement	"he tried to saw it"
20	24	24	Incorrect word choice	"She described that her son as slow"
21	26	26	Incorrect word choice	"and described it a 'desperate poverty'"
22	27	27	Mismatched quotes	"the picture of politeness'
23	27	27	Incorrect word choice	"befits" instead of "benefits"
24	31	31	Typographical	"somebody else id back there"
25	32	32	Misplaced	"drivers side'"

			apostrophe	
26	32	32	Cut-and-paste	Reference to "arguments" made by the Court. Courts make conclusions and findings.
27	33	33	Mismatched quotation mark	"Nell Lindsey["]"
28	33	33	Citation	"ROA [p.] 1908"
29	34	34	Sentence fragment	"A violent tempered criminal involved in the drug trade."
30	40	40	Typographical	"is" instead of "his"
31	40	40	Grammatical	"he bad in school"
32	44	44	Typographical	"she" instead of "[he] had contact visits"
33	48	48	Misspelling	"Dr. Abshur"
34	49	49	Typographical	"9sic"
35	51	51	Misspelling	"8th grad"
36	51	51	Singular instead of plural	"subtest"
37	52	52	Missing period	"-delayed verbal learning for stories[.]"
38	55	55	Typographical	"on" instead of "or"
39	56	56	Incorrect word choice	"subpoenaed from [for] trial"
40	57	57	Incorrect pronoun usage	"[s]he would have eliminated"
41	61	61	Subject-verb disagreement	"This was not neglect by counsel, but a reflect a conscious decision...."
42	62	62	Typographical	Period missing after "proffer"
43	64	64	Typographical	"witness es"
44	64	64	Typographical	"for mercy and the he not"
45	65	65	Cut-and-paste	"we are not aware" instead of "the Court is not aware"
46	65	65	Typographical	"Steve Pilgrim state post-conviction testimony...."
47	65	65	Typographical	"Bessie Smith state PCR testimony is summarized...."
48	67	67	Subject-verb disagreement	"that she found Applicant possess."
49	67	67	Typographical	"the material she additional would"
50	67	67	Incorrect usage	"two edge" instead of "two edged"
51	67	67	Subject-verb disagreement	"the summaries . . . does not"
52	71	71	Grammatical	"he bad in school"
53	72	72	No Possessive	"Dr. Melikian PCR testimony"
54	72	72	Typographical	"Jimmy can to him"
55	81	81	Incorrect word choice	"Injected" instead of "ingested"
56	81	81	Capitalization	"tylenol"
57	82	82	Incorrect word choice	"he was tires"
58	82	82	Missing apostrophe	"mother-in-law[']s"
59	87	87	Typographical	"Top the contrary"
60	87	87	Cut-and-paste	"Respondent" instead of "Applicant"
61	89	89	Possessive	"members['] mental health"
62	89	89	Citation	"([ROA] 2082)"

63	92	92	Incorrect word choice	"any seasonal prosecutor"
64	93	93	Incorrect word choice	"he relief upon"
65	93	93	Grammatical	"when he was incarcerated" – pronoun refers back to James Aiken, who was not incarcerated
66	93	93	Incorrect verb	"admitted that he have reviewed"
67	94	94	Grammatical	Incorrect pronoun usage: "[Aiken] indicated his opinion was based upon the fact that he had done time before."
68	94	94	Incorrect tense	"risks . . . was presented"
69	95	95	Singular/plural disagreement	"gassing an inmate in a fights"
70	96	96	Incorrect word choice	"did not retain and expert"
71	97	97	Incorrect word choice	"defense tam" instead of "defense team"
72	97	97	Grammatical	"on why he not specifically retain a correctional expert"
73	97-98	97-98	Missing article	"created [a] witness list"
74	98	98	Incorrect usage	"two-edge" instead of "two edged"
75	98	98	Grammatical	"and emphasis by a prosecutor lay in wait for"
76	98	98	Typographical	"the Aiken's opinion"
77	98	98	Subject-verb disagreement	"opinion . . . were based"
78	99	99	Cut-and-paste	"We note" instead of "The Court notes"
79	102	102	Formatting	Heading bunched into the right margin
80	102	102	Capitalization	Sentence begins: "this Court"
81	104	104	Grammatical	"the circumstances from counsel conduct at the time"
82	105	105	Typographical	"Lindsey"s"
83	106	106	Capitalization	Sentence begins: "she stated"
84	107	107	Grammatical	"Virginia has seen the doctor recently and had not ask him to be a witness"
85	108	108	Nonsensical sentence	"claimed he had no clothes and had to wash them out every night"
86	109	109	Misspelling	"homesick" is one word, not two
87	110	110	Capitalization	Sentence begins: "she received"
88	110	110	Erroneous tense	"he worked at Burger King where his brothers work"
89	111	111	Capitalization	Sentence begins: "she said"
90	111	111	Incorrect tense	"He said he also gave his mother-in-law money and fill her car with gas."
91	112	112	Capitalization	Sentence begins: "however, Topp"
92	112	112	Typographical	"document s during"
93	113	113	Incorrect punctuation	"was used at trial; it reflects a reasonable decision"
94	114	114	Subject-verb disagreement	"He now suggest"
95	114	114	Subject-verb disagreement	"details … was necessary"
96	114	114	Misspelling	"some fo the"

97	115	115	Typographical	"She stated she still ld with her mother"
98	115	115	Capitalization	Paragraph begins: "she described"
99	116	116	Word usage	"who" used instead of "whom"
100	119	119	Incomplete sentence	"over to Nell so the children would have good."
101	120	120	Incorrect tense	"she did not feel they ask her enough questions"
102	122	122	Incorrect use of possessive	"none of her son's finished high school
103	123	123	Incorrect verb tense	"Mrs. Lindsey stated she have talked"
104	124	124	Misspelling	"with the children having to bather and feed her"
105	127	127	Capitalization	Sentence begins: "she described"
106	129	129	Incorrect verb tense	"she shopped all the time and take them to eat"
107	129	129	Capitalization	Sentence begins: "she said they asked"
108	131	131	Sentence fragment	"With the assertion that they claim all evidence should have been put into trial."
109	132	132	Typographical	"Pilgrim found him real depresses"
110	136	136	Nonsensical sentence	"Sims said he told him not to and asked where he was and told him he's get there."
111	137	137	Typographical	"after it looked like everything was all rights."
112	137	137	Typographical	"and Virginia]>"
113	138	138	Unnecessary brackets	"[Despite his earlier testimony],"
114	139	139	Capitalization	Sentence begins: "he confirmed"
115	140	140	Grammatical	"Bill Burton testified similar to his trial testimony."
116	140	140	Missing word	"when he learned he would be a character witness, [he] tried to contact"
117	143	143	Unnecessary pronoun	"that she gave it to a minister"
118	144	144	Quotation marks needed	"['']I did not know him intimately.['']"
119	145	145	Misspelling	"Since ne claimed"
120	148	148	Typographical	"August 200"
121	150	150	Typographical	"some fo the experiences"
122	152	152	Incorrect word choice	"mental health stuff" instead of "mental health staff"
123	153	153	Tense disagreement	"She asserts that when he was around 11 that he sees his family dealing and using drugs."
124	153	153	Typographical	"3rd shit" instead of "3rd shift"
125	153	153	Sentence fragment	"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."
126	153	153	Incorrect possessive	"would retreat to neighbors homes"
127	155	155	Grammatical	"and other families where there be mental illness"

128	157	157	Capitalization	Sentence begins: "he only found"
129	158	158	Incorrect tense	"Vogelsang pointed out that is when he threaten to take his life"
130	158	158	Capitalization	Sentence begins: "she opined"
131	159	159	Capitalization	Sentence begins: "she denied"
132	160	160	Capitalization	Sentence begins: "she then"
133	161	161	Capitalization	Sentence begins: "she confirmed"
134	162	162	Grammatical	"(or the claims 1000 hours of the ABA average)"
135	162	162	Subject-verb disagreement	"A review... reveal"
136	163	163	Possessive	"were aware of Virginia Lindsey background"
137	164	164	Incorrect tense	"Virginia had reported that she like and loved Nell"
138	165	165	Typographical	"hang round him"
139	166	166	Misspelling	"broke his hip and gad facial surgery"
140	166	166	Modifier disagreement	"his brother also lost their jobs"
141	167	167	Misspelling	"hee had"
142	167	167	Punctuation	No period at end of sentence: "domestic violence order was taken out[.]"
143	169	169	Punctuation	Quotation marks mismatched before St. Aubin v. Quarterman citation
144	169	169	Capitalization	"due to counsel's death, This Court finds..."
145	170	170	Citation	Missing parentheses after Durr v. Mitchell parenthetical
146	170	170	Grammatical	"but the it"
147	170	170	Typographical	"670 S.E>2d 356"
148	170	170	Possessive	"social worker Vogelsang testimony"
149	170	170	Incorrect article	"with a alleged"
150	170	170	Punctuation-missing comma	"This Court agreed[,] finding that"
151	171	171	Nonsensical sentence	"Lindsey was raised by his mother and an absent father"
152	177	177	Sentence fragment	"Under the applicant's assertion... capital defense counsel."
153	181	181	Citation	"(C.A.6 (Tenn.),2008)."
154	182	182	Missing word	"In his tenth argument... contends"
155	189	189	Incomprehensible phrase	"would fortuitous positioning saved their lives"

EXHIBIT F

ALAN WILSON
ATTORNEY GENERAL

February 12, 2016

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: Marion Alexander Lindsey v. State of South Carolina
Appellate Case No. 2015-000385
2007-CP-42-2848 - Status of Appeal

Dear Mr. Shearouse:

This is to request information concerning the status of the appeal before this Court. On October 2, 2015, this Office received from the Clerk of Court for Spartanburg County a filed copy of the Amended Order Denying Post-Conviction Relief entered October 2, 2015, dated September 28, 2015. The Amended Order was completed pursuant to an Order of Remand by this Court on September 30, 2014. In that Order, this Court directed also that "Petitioner may serve and file a new notice of appeal following the issuance of the amended order, or upon receipt of written notice of entry of an order ruling on any motion to alter or amend judgment."

A certificate of service by the Clerk of Court reflects the amended order was served by mail on October 2, 2015 upon Mr. Lindsey's post-conviction relief hearing counsel, Rick Vieth and David Collins, among others. (Copy attached). My review of the Spartanburg County Clerk of Court Docket Sheet reflects the same. Further, I have not received any motion to alter or amend or notice of appeal.

I bring these matters to the Court's attention to the different procedural history in this case and the fact that the stay of execution has been pending. I await instructions from the Court on how to proceed to resolve this matter.

RECEIVED
FEB 12 2016
SUPREME COURT
APPELLATE DEFENSE

By copy of this letter, I am advising post-conviction relief hearing counsel, Rick Vieth and David Collins, and post-conviction relief appellate counsel, Robert M. Dudek and David Alexander, of this communication.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lbb
Enclosure: Certificate of Service

cc: Richard W. Vieth, Esquire
David Collins, Esquire
Robert M. Dudek, Esquire
David Alexander, Esquire
Honorable Paul M. Burch
Barry J. Barnette, Solicitor

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2391
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

7TH JUDICIAL CIRCUIT

CASE # 2011CP42-2648

CERTIFICATE OF SERVICE

Marion Alexander Keithley #60015
Applicant

VS

State
Respondent

I certify that, on this date, I served a copy of the Amended Order Denying Post-Conviction Relief in this action dated 9-28-2015 on 10-2-15

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Adele Haltiwanger
Rick Watts
Bill Lockhart
David Collins - Donald Zelenka

10-2-15
(Date)

Christie Seay
(Signature)

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Paul M. Burch, Circuit Court Judge

MARION ALEXANDER LINDSEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the Renewed Petition for Extraordinary Relief for Failure of the PCR Court to Comply with this Court's September 30, 2014, Remand Order and for a Stay of Proceedings in the PCR Court together with attached exhibits in this case has been served on Donald J. Zelenka, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, on the Honorable Paul M. Burch, Fourth Judicial Circuit, P.O. Box 276, Pageland, SC 29728, this 26th day of February, 2016.

David Alexander
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of February, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 29, 2016

Donald J. Zelenka, Esquire
Senior Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728

Re: Marion Alexander Lindsey v. State of South Carolina

Dear Judge Burch and Mr. Zelenka:

Enclosed is applicant's motion for stay, for a new PCR hearing before a different circuit judge, and, alternatively, to alter or amend the judgment pursuant to Rule 59(e).

If you have any questions concerning this matter, please contact me.

Sincerely,

David Alexander
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

DA/lmv
Enclosures

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
Marion Alexander Lindsey	)	**MOTION FOR A STAY, FOR A NEW PCR HEARING BEFORE A DIFFERENT CIRCUIT JUDGE, AND, ALTERNATIVELY, TO ALTER OR AMEND THE JUDGMENT PURSUANT TO RULE 59(E)**
SCDC No. 6015	)	
Petitioner,	)	
	)	
vs.	)	
	)	
State of South Carolina,	)	
Respondent.	)	
	)	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 ("Applicant" or "Lindsey"), by and through the undersigned attorneys, hereby moves The Honorable Paul M. Burch, Presiding Circuit Court Judge, for an Order staying this matter until the South Carolina Supreme Court rules on Lindsey's Renewed Petition for Extraordinary Relief for Failure of the PCR Court to Comply with this Court's September 30, 2014, Remand Order and for a Stay of Proceedings in the PCR Court ("Renewed Petition"). In the Renewed Petition, Lindsey has also asked the South Carolina Supreme Court to stay all proceedings in this Court until the Supreme Court decides the Renewed Petition. Alternatively, Lindsey asks this Court to: (1) grant him a new PCR hearing before a different circuit judge, or (2) to alter or amend the judgment and grant him a new sentencing proceeding.

Judicial Economy Requires a Stay

In its Renewed Petition, Lindsey asks the Supreme Court to grant him a new PCR hearing before a different circuit judge. Copies of the Renewed Petition and its exhibits are attached as "Exhibit A" to this motion and the arguments therein are incorporated by

reference into this motion. Briefly, in the Renewed Petition, Lindsey argues that this Court failed to comply with the Supreme Court's September 30, 2014, Order (hereinafter, the "September 2014, Order") remanding this case for the drafting of a new order. The Supreme Court's September 2014, Order required this Court to issue an amended order "that complies with Pruitt and Hall" and this Court's Amended Order fails to do so.[1] In light of the arguments made in the Renewed Petition and that Lindsey has asked the Supreme Court to issue a stay, in the interests of judicial economy, this Court should stay the matter until the Supreme Court renders its decision.

Alternatively, this Court Should Grant Lindsey a New PCR Hearing Before a Different Circuit Judge

As detailed in Lindsey's Renewed Petition, attached as Exhibit A and incorporated by reference, this Court has violated Lindsey's due process rights by issuing an Amended Order that, but for correction of typographical errors pointed out by Lindsey and other minor stylistic changes, is exactly the same as the original Order of Dismissal. Summarizing the points made in the Renewed Petition, all evidence suggests this Court failed to read the State's proposed order before signing it as its original Order of Dismissal. This Court's original Order of Dismissal was exactly the same as the State's proposed order and included the exact same vast number of typographical, grammatical, and other errors. This Court's adoption of the State's proposed order under these

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[1] See Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). See also Jefferson v. Upton, 560 U.S. 284 (2010) (criticizing the practice of verbatim adoption of proposed orders in a capital case) *citing* Anderson v. Bessemer City, 470 U.S. 564 (1985); Commonwealth v. Williams, 732 A.2d 1167, 1176 (Pa. 1999) (criticizing practice in a capital case); Dobyne v. State, 805 So.2d 733, 741 (Ala. Crim. App. 2000) (criticizing practice and quoting Anderson).

circumstances violates Lindsey's due process rights under the federal and state constitutions and Lindsey's Eighth Amendment rights under the federal constitution.

In Pruitt, the Court stated:

> We take this opportunity to express our concern with the increasing number of orders in PCR proceedings that fail to address the merits of the issues raised by the applicant. . . . Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to the issuance of the order, and the PCR judge should carefully review the order prior to signing it.

Pruitt, at 255-56, 423 S.E.2d at 128. In Hall, the Court stated:

> Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency.

360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). The United States Supreme Court also heavily criticized the practice of wholesale adoption of proposed orders in capital cases. Jefferson v. Upton, 560 U.S. 284 (2010).

The Supreme Court's September 2014, Order, read in light of Pruitt and Hall, could not have been more clear. The Court's violation of the September 2014, Order is proof that it cannot now issue an order in this case. Judges must recuse themselves when their impartiality might reasonably be questioned. Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004). "A judge's impartiality might reasonably be questioned when his factual findings are not supported by the record." Id.

If a judge's impartiality might be questioned when factual findings are not supported by the record, it certainly follows that a judge's impartiality might be questioned when he likely did not read his first order and ignored the Supreme Court's mandate in issuing a poorly camouflaged version of the first order as an Amended Order.

The issuance of this Amended Order deprives petitioner of due process and because of the circumstances surrounding its issuance, this Court's impartiality is now capable of being questioned. For these reasons, and the reasons stated in the Renewed Petition, this Court should recuse itself and grant Lindsey a new PCR hearing before a different circuit judge.

Alternatively, this Court should Grant Lindsey a New Sentencing Proceeding

Pursuant to Rule 59(e), SCRCP, Applicant requests that this court alter its judgment and grant Applicant a new sentencing proceeding. This motion 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. Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to conduct an adequate mitigation investigation and failing to prepare and present an adequate mitigation case at trial.

   a. Trial counsel Michael Bartosh waited until **one month** before Marion Lindsey's capital trial to begin preparations. Two years elapsed between Lindsey's arrest and his trial. In those two years, Bartosh failed to: (1) assemble his trial team; (2) hire a psychiatrist; (3) hire an investigator; (4)

obtain all of Lindsey's medical, school, and incarceration records; (5) hire a social worker who could investigate Lindsey's miserable[2] upbringing; (6) interview and prepare witnesses; and (7) hire a prison adaptability expert. The ABA Guidelines for Death Penalty trials advise, and the Sixth, Eighth, and Fourteenth Amendment require, that all of these things should have been timely and thoroughly done.

b. Trial counsel failed to prepare Dr. Margaret Melikian and failed to obtain a continuance so that she could be ready for trial.

c. Trial Counsel improperly allowed Marion Lindsey to take the advice of a "jail house" lawyer to feign mental illness as part of his defense.

d. Trial Counsel failed to spend sufficient time with Marion Lindsey prior to mental health evaluations 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.

e. Trial Counsel failed to adequately present and respond to the question of whether Applicant was malingering during the penalty phase. Trial counsel failed to call Dr. Tora Brawley as a witness. Dr. Brawley is an expert in Clinical Psychology with specialty in neuro-psychology who

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[2] The evidence at the PCR hearing showed, *inter alia*, that Lindsey's family comes from extreme poverty; mental illness runs in his family; several members of Lindsey's immediate family attempted suicide; Lindsey was ignored and abandoned by his father; Lindsey's mother played a limited role in his upbringing; Lindsey failed the eighth grade three times and dropped out of school in the ninth grade; virtually every member of Lindsey's immediate family had been convicted of violent crimes; Lindsey suffered from kerosene inhalation and his head was run over by a car as a baby; Lindsey's uncles, who lived in his house, were violent men who burned Lindsey's cat alive in front of him when he was a small child; and Lindsey tried to kill himself when he was a teenager and spent three weeks in inpatient treatment in mental health.

evaluated Marion Lindsey prior to trial and performed psychological testing on Marion Lindsey. Dr. Brawley found that Lindsey's brain did not function normally and he suffered from severely impaired speed of mental tracking; severely impaired verbal fluency; severely impaired confrontation naming; below average immediate verbal memory; severely impaired verbal learning ability; and impaired ability to copy and recall a complex figure. 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-appointed examiners and supported the testimony of Dr. Melikian.

f. Trial counsel failed to preserve evidence from Rod Tullis and failed to call Rod Tullis as a witness at trial. Tullis collected suicide notes written by Lindsey from Lindsey's mother. Trial counsel lost the answering machine tape containing a message from Lindsey hours before the shooting that would have shown his state of mind and been powerful evidence in mitigation.

g. This Court erred in finding that 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. Trial Counsel failed to adequately interview the family members to discover the extent and nature of mental illness and impairment in the family. Trial Counsel failed to adequately prepare the family members to present the extent and nature of mental illness and

impairment in the family. Trial Counsel failed adequately to argue to the Court the admissibility and relevance of the evidence of family mental illness and impairment. 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.

h. Trial counsel failed to interview and prepare witnesses and family members, including Vincent Bell, Bill and Patsy Burton, Virginia Lindsey, Bessie Smith, Steven Pilgrim, and Timothy Sims. Trial Counsel also failed to prepare these witnesses to request that the jury show mercy and impose a life sentence instead of the penalty of death. Trial Counsel failed to ask proper questions to elicit the requests for mercy from the witnesses during the penalty phase. Trial Counsel failed to adequately argue the Court's refusal to allow the witnesses to request mercy during the penalty phase of the trial. 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.

i. Trial Counsel failed to adequately interview and prepare to testify the EMS workers to elicit admissible testimony regarding Marion Lindsey's state of mind immediately after the shooting occurred. 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. 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.

j. This Court erred by interpreting Lindsey's argument as only that trial counsel failed to spend enough time investigating and preparing a mitigation case. While the failure to investigate and prepare until one month before trial is deficient performance, this Court misunderstood that it was not only the lack of time spent, but: (1) the evidence the jury never heard; and (2) the ineffective way the witnesses testified that denied Lindsey's rights under the Sixth, Eighth, and Fourteenth Amendments.

k. This Court incorrectly disregarded the ABA Guidelines in measuring Trial Counsel's performance. The United States Supreme Court has consistently explained that the ABA Guidelines provide evidence of well-defined and prevailing professional norms. "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" Wiggins v. Smith, 539 U.S. 510, 524 (2003) (citing ABA Guidelines for the Appointment and Performance of Counsel in Death

Penalty Cases 11.4.1(C)(1989). Together with Wiggins, the United States Supreme Court has used the ABA Guidelines to reverse death sentences in two other ineffective assistance of counsel cases. Rompilla v. Beard, 545 U.S. 374, 387, n.6, n.7 (2005); Williams v. Taylor, 529 U.S. 362, 396 (2000). The citation of and approval of the ABA Guidelines demonstrates their importance in providing an objective standard against which an attorney's performance can be measured. This Court erred in disregarding the ABA Guidelines as a tool to measure trial counsel's performance:

i. Trial counsel failed to promptly investigate and assemble the defense team. 2003 Guideline 1.1(B), App. 3115; see 1989 Guideline 11.3, 11.4.1. 2003 Guideline 4.1(A)1 & 2, App. 3148; see 1989 Guidelines 11.4.1, 11.8.3(A), (D), & (F).

ii. Trial counsel failed to attend important interviews with the State's mental health expert and prepare Applicant for these interviews. 2003 Guideline 10.11(J). 1989 Guideline 11.8.3(D).

iii. Trial counsel failed to call witnesses and preserve evidence. 2003 Guideline 10.11(F)(1). 1989 Guideline 11.8.3(F)(1).

iv. Trial counsel failed to retain, prepare, and present expert witnesses. 2003 Guideline 10.11(F)(2). 1989 Guideline 11.8.3(F)(1) & (2).

l. This Court also erred in holding that Lindsey cannot show prejudice. It determined that because trial counsel presented some mitigating evidence, that *ipso facto* Lindsey could not show prejudice. The United States Supreme Court directly rebuffed this approach in Sears v. Upton, 561 U.S.

945 (2010). In Sears, a *per curiam* opinion, the state PCR court found counsel's mitigation investigation was constitutionally deficient, but in a "surprising" conclusion, determined that the defendant was not prejudiced. Id. at 3264. The state PCR court concluded that "[b]ecause Sears' counsel did present some mitigation evidence during his penalty phase . . . '[t]his case cannot be fairly compared with those where little or no mitigation evidence is presented and where a reasonable prediction of outcome can be made.'" Id. (quoting the state PCR court). The United States Supreme Court resoundingly rejected this interpretation of the prejudice prong of Strickland and its progeny, stating:

> Second, and more fundamentally, the court failed to apply the proper prejudice inquiry. We have never limited the prejudice inquiry under Strickland to cases in which there was only "little or no mitigation evidence" presented. True, we have considered cases involving such circumstances, and we have explained that there is no prejudice when the new mitigating evidence "would barely have altered the sentencing profile presented" to the decisionmaker, Strickland, *supra*, at 700, 104 S.Ct. 2052. But we also have found deficiency *and* prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase.

Id. at 3265-66 (emphasis in original). Had the jury heard the testimony of the lay and expert witnesses as was presented in the PCR hearing, the result would have been different.

2. Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a social work expert who could testify regarding Marion Lindsey's horrible

> upbringing, his awful family history, and the effect this had on his mental state at the time of the shooting. Had trial counsel called an expert like Jan Vogelsang, the result of the proceeding would have been different.

The ABA Guidelines state that counsel should consider presenting:

> Witnesses **familiar with and evidence relating to the client's life and development, from conception to the time of sentencing**, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death;

2003 Guideline 10.11(F)(1), App. 3250-51; see 1989 Guideline 11.8.3(F)(1) (emphasis added). The Order of Dismissal engages in a lengthy comparison of Lenora Topp's investigation and that of Vogelsang, but fails to explain how this comparison is relevant **because Topp did not testify at trial.** The Court also wrongly concludes that Lindsey cannot show prejudice because of the danger that Vogelsang's testimony would open the door for the prosecution to highlight bad incidents in Lindsey's life. This conclusion ignores the fact that the State actually introduced much of this evidence during its case in aggravation. Nor did the State need to wait on Lindsey to open to the door to introduce such evidence.

The trial judge may allow the introduction of additional evidence of aggravation to aid the jury in determining whether to recommend a death sentence. State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442, (2003). Vogelsang's expert analysis would have allowed the jury to place Lindsey's family history in its proper context as it related to the crime and the statutory mitigating circumstances. In Lindsey's family, Vogelsang found patterns of substance abuse; "mental, emotional, and behavioral impairments;" abandonment; sexually inappropriate behavior; and criminal domestic violence charges,

assaults, and incarcerations. Failure to present this evidence prevented the jury from giving "meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual." Abdul-Kamir v. Quarterman, 550 U.S. 233, 246 (2007). Council v. State, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008)(finding Council's attorneys deficient for failing to hire a social history investigator and referencing the ABA Guidelines in reaching that conclusion).

3. Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by hiring an inexperienced forensic psychiatrist one month before trial and failing to prepare her to testify. Margaret Melikian was ill-prepared in all respects for this trial. Trial counsel's decision to hire her and failure to prepare her was constitutionally deficient and prejudiced Lindsey.

Melikian had little to no experience in capital cases. She was hired only a month before trial. Bartosh did not give her complete records and she did not have time to review the records she had. She only saw Lindsey one time. This complete breakdown in preparation led to her destruction on cross-examination and essentially left Lindsey without the benefit of a mental health expert, or worse off than none at all. Bartosh's retention of Melikian a month before trial falls short of the ABA Guidelines' advice that assembling the defense team shall begin immediately and the team shall include "at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments." 2003 Guideline 4.1(A)1 & 2. See 1989 Guidelines 11.4.1, 11.8.3(A), (D), & (F). Bartosh's late and haphazard mitigation investigation violated constitutional requirements and the ABA Guidelines. See Wiggins,

539 U.S. at 527; Council at 172, 670 S.E.2d at 363; 2003 Guideline 10.7(A); 1989 Guideline 11.4.1(C) & (E).

The PCR court's conclusion that Lindsey cannot show deficient performance because of a lack of specificity regarding the information Melikian received and her lack of preparation is not supported by the record. Melikian specifically testified that she did not see the suicide notes Lindsey wrote three weeks before the shooting and did not know about Lindsey's call to Tullis the day of the shooting. She also testified that she did not see any pictures and had incomplete incident reports from Lindsey's self-inflicted injuries at the Spartanburg County Detention Center. At trial, she "didn't know much of Mr. Lindsey's family history at all" and what she did know came mostly from Lindsey. Regarding the records that were provided by Bartosh, Melikian testified at the PCR hearing that they were incomplete. Furthermore, the fact that the first thing the jury heard was that Melikian only saw Lindsey one time two weeks before trial immediately created the perception that she was a "hired gun" and that her opinion lacked credibility. Trial Counsel failed to obtain and provide to Melikian historical information and records of Applicant and his family members which were necessary for her to perform a proper evaluation of Applicant and to present her findings and conclusions to the jury during the penalty phase, and to withstand the State's cross-examination.

Perhaps most importantly, the defense team failed to prepare Melikian concerning "Jimmy" and the accusation of malingering. They did not provide Melikian with Lindsey's incarceration records showing that Lindsey made statements that Jimmy had taken over his body or was responsible for the shooting. They did not tell her that Lindsey acted with them as if Jimmy were a real person and present in the room with

them. Had Bartosh been even minimally competent and attended the interview with Dr. Narayan, he would have known the importance placed on Lindsey's conduct regarding Jimmy and relayed this critical information to Melikian. Most importantly, as glaringly pointed out by the State at trial, the defense team never told Melikian that the first time Jimmy appeared coincided with the day he was served with the State's intent to seek the death penalty. Melikian was destroyed on cross-examination because of her lack of knowledge about Jimmy and her lack of records to corroborate what Lindsey had told her about his background. The lack of preparation with Melikian regarding the serious accusation of malingering is startlingly constitutionally deficient.

The Court's "double-edged sword" reasoning is legally and logically wrong. First, trial counsel's strategy was not to show that Lindsey was a good person. Bartosh attempted to show Lindsey had a miserable background and suffered from depression; Bartosh just failed to begin preparation in time to adequately present this evidence to the jury. Bartosh's decision to allow Melikian—**alone**—to attempt to persuade Judge Few to grant a continuance conclusively proves that trial counsel was not making strategic decisions, but simply had not prepared. In this case, no reasonable trial strategy could exist that would justify withholding information from the defense team's psychiatrist. Second, any aggravating evidence was admissible and available to the State regardless of the expert witnesses used by the defense. Furthermore, the State's destruction of Melikian on cross-examination deprived Lindsey of any credible expert witness. Trial counsel's failure to prepare Melikian prevented her from credibly testifying about the severity of Lindsey's depression. Had she known about the Tullis message, seen the suicide notes, and known about the family history of depression, she could have better

withstood cross-examination. Had the jury seen a prepared psychiatrist who had done a thorough investigation and examination instead of a "hired gun" doctor who had done nothing in the case until weeks before trial, the result could have been different.

Furthermore the Court's conclusion that simply because Melikian's diagnosis of mental illness did not change between trial and the PCR hearing, Lindsey could not show prejudice is incorrect. If Melikian had more time to prepare and understand the significance of Jimmy, she could have explained to the jury that creating Jimmy demonstrated not that Lindsey was a liar and malingerer, but a seriously mentally ill person whose depression was so severe that he could not even comprehend the stupidity of inventing Jimmy. Had the defense team presented a psychiatrist with the experience, time, and support from counsel to explain Jimmy and the malingering accusation, the result at trial could have been different.

4. Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a prison adaptability expert who could dispute the State's aggravation evidence. Trial counsel presented nothing to counter the State's evidence that Lindsey posed a future danger.

The State presented testimony from Celeste Nesbitt, Sharon Smith, law enforcement officers Chris Smith, Brian Duncan, and Brian White, Stanford Wilkins, Jessica Cannon, the clerk of court, and a magistrate judge all to show Lindsey posed a future danger if incarcerated. The State also presented testimony from James Sligh, to testify regarding how inmates who receive life sentences are classified. Sligh testified that inmates who receive life sentences have: cellmates, access to the yard, frequent interaction with other inmates, opportunities to work and go to school, are fed in a

cafeteria setting, receive visitation, and have contact with guards and other prison employees, all of which has been called into question by our Supreme Court. See State v. Plath, 281 S.C. 1, 8-9, 313 S.E.2d 619, 623 (1984); see also State v. Burkhart, 371 S.C. 482, 487-88, 540 S.E.2d 450, 453 (2007); State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 387 (2005).

This Court erred in holding there was "no showing" that Lindsey would have been adaptable to prison, which completely disregarded Aiken's testimony. Second, the court improperly speculated regarding the existence of a trial strategy regarding prison adaptability. Even if such speculation were allowed, the reasoning for this holding regarding effectiveness is flawed. Both the 1989 and 2003 Guidelines provide that trial counsel should consider presenting evidence of the client's prison adaptability and expert testimony concerning such. 1989 Guidelines, 11.8.6(B)(6) & (8)(1989); 2003 Guidelines, 10.11.F.2 & 3. The Court's guess that Bartosh exercised "reasonable professional judgment" in not calling such an expert because it could introduce harmful evidence is based on an error of law because the State did not need to wait for the defense to open the door in order to introduce this evidence. "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing." Skipper v. South Carolina, 476 U.S. 1, 8 (1986); State v. Matthews, 291 S.C. 339, 348-49, 353 S.E.2d 444, 449-50 (1986).

The Court also incorrectly held that Lindsey was not prejudiced by the failure to call Aiken. The Court ruled that Lindsey did not suffer prejudice because of the "horrific evidence in aggravation." This ruling is error. Only one aggravator, used in its most technical sense, was proven at trial. "When a defendant challenges a death sentence,

prejudice is established when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998) (quoting Strickland, 466 U.S. at 695 (1984)). As this Court noted "the evaluation of the consequences of an error in the sentencing phase of a capital case [is] more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all." State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000).

Aiken's opinion that Lindsey was adaptable to prison was sufficient to demonstrate prejudice. Aiken's opinion was not seriously challenged by the State at the hearing. Had the jury heard Aiken's opinion, it would have placed Lindsey's history in the proper context for consideration of a life sentence. Aiken's testimony would have given the jury the ability to understand the severity of a life sentence and that the DOC manages inmates like Lindsey successfully every day. The only reason this case qualified for capital sentencing is because Lindsey shot his wife in a public place, therefore transforming a domestic homicide into a capital crime. Whether this code section even applied to Lindsey's case was argued on direct appeal. With a case that met only the bare minimum of qualifications under the statutory aggravator, ny evidence in mitigation presented by the defense could have made a difference in this close case.

CONCLUSION

Applicant Marion Lindsey is informed and believes each of these allegations as supported by the evidence and arguments presented at the PCR hearing, the pleadings submitted by Applicant, and the evidence at trial, establishes that the representation by Applicant's Trial Counsel 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.

WHEREFORE, Applicant Marion Lindsey requests that this Court stay these proceedings pending a decision by the Supreme Court on the Renewed Petition for Extraordinary Relief; alternatively grant Applicant a new PCR hearing before a different circuit judge; and, alternatively reconsider, alter and amend its Amended Order to find that Applicant's Trial Counsel was ineffective, to vacate Lindsey's sentence of death and to grant him a new sentencing hearing.

Respectfully submitted,

Rick Vick for
David Alexander

David Alexander
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

This 29th day of February, 2016.

EXHIBIT A

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Paul M. Burch, Circuit Court Judge

MARION ALEXANDER LINDSEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-206087

RENEWED PETITION FOR EXTRAORDINARY RELIEF FOR FAILURE OF THE PCR COURT TO COMPLY WITH THIS COURT'S SEPTEMBER 30, 2014, REMAND ORDER AND FOR A STAY OF PROCEEDINGS IN THE PCR COURT

The PCR court has now flagrantly disobeyed this Court's September 30, 2014, Order remanding this case. This Court remanded this death penalty matter to the PCR court to draft its own order in compliance with Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). Despite this Court's clear instructions, the PCR court issued an Amended Order Denying Post-Conviction Relief ("Amended Order") that, but for correction of typographical errors, is exactly the same as its previous order (and exactly the same as the proposed order submitted by the State). Petitioner Marion Lindsey, pursuant to Rule 245 of the SCACR, renews his

request to this Court to accept this matter in its original jurisdiction[1] and grant a new Post-Conviction Relief Hearing before a circuit judge other than The Honorable Paul M. Burch. Petitioner also asks this Court to stay the matter below until it decides this petition.

The Amended Order contains **no substantive changes** from the State's proposed order. It contains no new factual findings. It contains no new legal conclusions. It cites no new cases. Almost every sentence has exactly the same wording. The most significant change between the State's proposed order and the Amended Order is that the Amended Order italicizes case names instead of underlining them.

This Court did not take the extraordinary step of remanding a capital PCR as an exercise in proofreading. This Court remanded the case because of the serious federal and state due process concerns involved when a PCR judge: (1) does not read an order in a death penalty case before signing it; (2) allows the State to draft an order, thereby substituting an advocate's judgment for the court's; and (3) impairs a litigant's right to a fair hearing before a neutral arbiter. Petitioner shows as follows:

1. On August 14, 2007, petitioner filed a PCR application regarding his conviction and death sentence. App. 2192.

2. On July 19-21, 2010, a hearing was held before Judge Burch. App. 2285.

3. On May 2, 2011, Judge Burch requested a proposed order only from the State. Supp. App. 1. On May 12, 2011, Judge Burch emailed petitioner's attorney, Rick Veith, requesting a proposed order from petitioner. In this email, Judge Burch stated that

[1] See S.C. Const. art. V, § 5. Petitioner also submits that it may be unnecessary to invoke this Court's original jurisdiction in this matter because the trial court's actions in this case are a violation of this Court's Order of September 30, 2014, and this Court, like all courts, retains jurisdiction to enforce its own Orders.

"Because of its size, I thought the packet you sent in October included a proposed order." Supp. App. 3. The inference to be drawn from this email is that the PCR court did not even review materials submitted by petitioner for nearly eight months.

4. On June 2, 2011, the State sent a proposed order to Judge Burch. Supp. App. 6.

5. On August 12, 2011, the PCR court denied petitioner's PCR application. App. 3536. As detailed in the petition for certiorari to this Court, the Order signed by Judge Burch was **identical** to the proposed order submitted by the State. Pet. Cert. at 105-109. Petitioner argued to this Court that the signing of the State's proposed order, which contained numerous errors, sadly indicated that the PCR court **had not even read the proposed order.** Pet. Cert. 105-109. In its Return, the State carefully avoided alleging that the PCR court read the proposed order, arguing instead that the PCR court had adequate time to review it. State's Return at 110.

6. On September 30, 2014, this Court unanimously vacated the PCR court's Order of Dismissal. Lindsey v. State, Order dated September 30, 2014 ("September 2014, Order"). This Court found that vacation of the Order of Dismissal was necessary because of (1) "the frequency and severity of the drafting errors in the Order of Dismissal," and (2) "this Court's admonishments to PCR judges in Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004)." The Court directed Judge Burch to issue an amended order in compliance with Pruitt and Hall. September 2014, Order.

7. On October 9, 2014, petitioner's attorney, Robert M. Dudek, wrote the State regarding the September 2014, Order and a copy of this letter is attached as

"Exhibit A." The letter stated, "It is my interpretation of the Order **that it forbids the submission or solicitation of a proposed order from the parties. If this is not your interpretation, then please let me know so that I may make a formal motion to place my concerns on the record.**" Exhibit A (emphasis added).

8. Nearly five months after this Court's September 2014, Order, on February 26, 2015, Judge Burch's law clerk sent an email to the parties and copied this Court. A copy of this email is attached as "Exhibit B." This email stated that Judge Burch was requesting Microsoft Word versions of the proposed orders submitted by the parties. Exhibit B.

9. The same day petitioner responded via email. A copy of this email is attached as "Exhibit C." Citing and attaching this Court's September 2014, Order, petitioner objected to the submission of any proposed orders. Exhibit C.

10. Just two minutes before (and arriving after petitioner sent his email), the state emailed its proposed order in Microsoft Word format to Judge Burch. A copy of this email is attached as "Exhibit D." Importantly, the State also attached petitioner's Reply to the state's Return to the Petition for Certiorari. Exhibit D. Petitioner's Reply contained a list of 155 identical typographical and grammatical errors in both the PCR court's Order of Dismissal and the state's proposed order. A copy of this list of errors that was attached to petitioner's original Reply is, for this Court's convenience, attached as "Exhibit E."

11. Later that same day, on February 26, 2015, petitioner filed a Petition for Extraordinary Relief in this Court. Petitioner argued that "the PCR court intends, in flagrant disregard of this Court's instructions, to use the proposed order again." Pet. Ext.

Relief at 4. Petitioner also argued that "the State gave the PCR court a roadmap to correcting the errors in the proposed order when it attached to its email **petitioner's list of the errors** in petitioner's reply." Pet. Ext. Relief at 4.

12. The next day, on February 27, 2015, this Court requested a return from the State, which it filed on March 2, 2015. The State argued, "Respondent submits that the complaint raised by Judge Burch [sic] on whether he is complying with the mandate of this Court is premature." State's Ret. Pet. Ext. Relief at 9.

13. On April 9, 2015, this Court denied the Petition for Extraordinary Relief.

14. On February 12, 2016, the State emailed a letter to petitioner's attorneys, petitioner's PCR trial level attorneys, and this Court advising all parties that the State received the Amended Order on October 2, 2015. A copy of this letter is attached as "Exhibit F." The state attached a "certificate of service" from the Spartanburg County Clerk of Court purportedly serving the Amended Order on the State and PCR trial level counsel. Exhibit F. It did not show that petitioner's appellate attorneys were served. Exhibit F. Petitioner's PCR trial attorneys advised the Court and the State that they never received the Amended Order and, on February 17, 2016, the State served the Amended Order with a copy to this Court.

15. Petitioner has made a line-by-line comparison between the Amended Order and the original Order/State's proposed order. As predicted by petitioner in his first Petition for Extraordinary Relief, the Amended Order is exactly the same document, except for the correction of the errors noted by petitioner in Exhibit E and a few other minor stylistic and typographical corrections. These minor changes include:

a. Italicizing instead of underlining case names in citations;

b. Decreasing the point size of the footnotes;

c. Altering outline formats from bullet points or roman numerals to letters;

d. Bolding some headings and un-bolding other headings;

e. Altering spacing in headings;

f. Correcting some typographical errors petitioner did not include in its list; however, many typographical errors petitioner did not catch were not fixed. For example, a sentence on page 109 of the Amended Order (and the original Order, App. 3648), reads: "She confirmed that she was not an expert in mental health area."

16. Petitioner points the Court to page 58 of the original Order/State's proposed order (App. 3593) and page 56 of the Amended Order as the most significant change between the two documents that was not suggested by petitioner's list of errors. The original Order states: "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." App. 3593. The Amended Order's version is: "Although he has recanted presently after the fact of his conviction and sentence, the blame does not rest on prior counsel's shoulders." Amended Order at 56. Stylistic changes were also made to the immediately following sentence. As the Court can see, this change—which is the most significant difference between the two documents—is no change at all.

Discussion

Despite an Order from this Court and the protests of petitioner, the PCR court has utterly failed in its duties under Pruitt, Hall, and the due process clauses of the federal and state constitutions. Along with Marion Lindsey's life and right to a fair PCR proceeding,

the reputation of our state's judiciary is at stake in this matter. The original failure by the PCR judge to read the State's proposed order before signing it was a gross violation of petitioner's rights and this Court's instructions. Now, after remand and additional proceedings warning of this outcome, it has again come to pass that the PCR court has used the State's proposed order in its entirety.

Petitioner predicted this outcome in his original Petition for Extraordinary Relief and tried to prevent it. The State argued the petition was premature and, presumably, this Court agreed and gave the PCR judge a chance to follow its instructions. Now, petitioner's predictions have come true and this Court can no longer ignore the fact that petitioner has not yet received a genuine "bite at the apple" from the PCR court.

This Court did not remand this death penalty case simply to correct the "frequency and severity of the drafting errors" in the original order of dismissal. September 2014, Order. It remanded this case because the presence of identical errors in both the State's proposed order and the original Order indicated a violation of petitioner's due process rights. As the Court reiterated in its September 2014, Order, it has on two occasions warned PCR judges against wholesale adoption of proposed orders. In Pruitt, the Court stated:

> We take this opportunity to express our concern with the increasing number of orders in PCR proceedings that fail to address the merits of the issues raised by the applicant. . . . Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to the issuance of the order, and the PCR judge should carefully review the order prior to signing it.

Pruitt, at 255-56, 423 S.E.2d at 128. In Hall, this Court stated:

> Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also

> acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency.

360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). See also Jefferson v. Upton, 560 U.S. 284 (2010) (criticizing the practice of verbatim adoption of proposed orders in a capital case) *citing* Anderson v. Bessemer City, 470 U.S. 564 (1985); Commonwealth v. Williams, 732 A.2d 1167, 1176 (Pa. 1999) (criticizing practice in a capital case); Dobyne v. State, 805 So.2d 733, 741 (Ala. Crim. App. 2000) (criticizing practice and quoting Anderson). Our Legislature requires "specific findings of fact" and express statements of a court's "conclusions of law" in PCR cases. S.C. Code Ann. § 17-27-80.

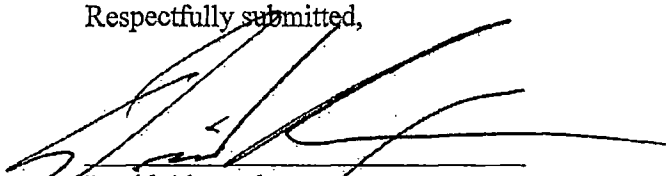
This Court's Order, read in light of Pruitt and Hall, could not have been more clear. It has now been almost six years since the PCR judge heard the evidence in this case. The PCR court's violation of this Court's September 2014, Order is proof that it cannot now issue an order in this case. Judges must recuse themselves when their impartiality might reasonably be questioned. Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004). "A judge's impartiality might reasonably be questioned when his factual findings are not supported by the record." Id. If a judge's impartiality might be questioned when factual findings are not supported by the record, it certainly follows that a judge's impartiality might be questioned when he likely did not read his first order and ignored this Court's mandate in issuing a poorly camouflaged version of the first order as an Amended Order. The issuance of this Amended Order deprives petitioner of due process. U.S. Const. amend. V, VII, XIV,

It now falls to this Court, as the guardian of its citizens' constitutional rights and the integrity of the state's judicial system, to correct this injustice. Petitioner has been sentenced to death, and the cavalier treatment of this Court's September 2014, Order is a

violation of both the Eighth Amendment's proscription against cruel and unusual punishment and the Fifth and Fourteenth Amendment's guarantee of due process. U.S. Const. amends. V, VIII, XIV. See also S.C. Const. art. I, §§ 3, 15. It is unfortunately apparent that, at this point, petitioner cannot receive a fair adjudication below. By granting petitioner a new PCR hearing before a different judge, this Court can not only correct the deprivation of petitioner's rights, but send a message to the State and to PCR judges that such activity will no longer be tolerated.

WHEREFORE, petitioner respectfully requests that this Court grant a new Post-Conviction Relief Hearing before a circuit judge other than The Honorable Paul M. Burch. Petitioner also respectfully requests that the matter be stayed in the lower court pending disposition of this Court's decision.

Respectfully submitted,



David Alexander
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

This 26th day of February, 2016.

EXHIBIT A

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1387

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 9, 2014

Donald J. Zelenka, Esquire
Senior Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: Marion Lindsey v. State, CA No. 2007-CP-42-2848

Dear Don:

By now, I am sure you have received the Supreme Court's Order dated September 30, 2014.

It is my interpretation of the Order that it forbids the submission or solicitation of a proposed order from the parties. If this is not your interpretation, then please let me know so that I may make a formal motion to place my concerns on the record.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

cc. The Honorable Paul M. Burch
David Alexander, Esq.
Client

EXHIBIT B

Robert M. Dudek

From: Burch, Paul M. Law Clerk (Samuel H. Thomas) <PBurchLC@sccourts.org>
Sent: Thursday, February 26, 2015 11:43 AM
To: Zelenka, Don; Robert M. Dudek; Rick Vieth (rvieth@hbvlaw.com)
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

Judge Burch has requested that I contact you about getting us Microsoft Word versions of the proposed orders submitted after the PCR hearing held on July 19-21, 2010 before him if this is at all possible. Please do not hesitate to contact me if further information is needed. Thank you and I look forward to hearing back from you as soon as possible.

Kindest regards,

Sam Thomas

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728
Office: 843-672-3270
Fax: 843-672-5960

From: Don Zelenka [mailto:DZelenka@scag.gov]
Sent: Monday, October 20, 2014 2:52 PM
To: Burch, Paul M. Law Clerk (Samuel H. Thomas); rdudek@sccid.sc.gov
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Mr. Thomas –

Thank you for the follow-up. The remittitur in this case was entered on October 16, 2014 and a copy is attached. I noticed that the correspondence I received only showed copies going to the Clerk of Court and appellate PCR counsel.

By copy of this email I am advising the Ms. Hopkins, a Deputy Clerk of the Supreme Court of this request and the expectation on the part of Judge Burch to receive something from the Court.

Sincerely,

Don Zelenka

Donald J. Zelenka
Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office

P.O. Box 11549
Columbia, S.C. 29211
803-734-3601
dzelenka@scag.gov

From: Burch, Paul M. Law Clerk (Samuel H. Thomas) [mailto:PBurchLC@sccourts.org]
Sent: Monday, October 20, 2014 12:37 PM
To: rdudek@sccld.sc.gov; Don Zelenka
Subject: Marlon A. Lindsey v. State, 2007-CP-42-2848

Counsel,

I hope this email finds you well. Judge Burch has asked me to send you both this email stating that we have not yet received anything formal from the Supreme Court on this matter. We will, however, be reviewing the file and will be back in touch with you both in order to set up a game plan on how we should proceed from here in a few weeks.

Kindest regards,

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728
T: 843-672-3270
F: 843-672-5960

CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

EXHIBIT C

Robert M. Dudek

From:	Robert M. Dudek
Sent:	Thursday, February 26, 2015 12:38 PM
To:	'Burch, Paul M. Law Clerk (Samuel H. Thomas)'; Zelenka, Don; Rick Vieth (rvieth@hbvlaw.com)
Cc:	Hopkins, Debbie
Subject:	RE: Marion A. Lindsey v. State, 2007-CP-42-2848
Attachments:	Order vacating Ord Dsml & remanding 9.30.14.pdf; Ltr to Zelenka re. remand 10.09.14.pdf

Mr. Thomas: We object to the submission of proposed orders as in violation of the Supreme Court's order of September 30, 2014 remanding this case to Judge Burch. I have attached that order, and also my letter to Mr. Zelenka dated October 9, 2014 stating that the Supreme Court's order prohibits the submission or solicitation of proposed orders in any format. We are filing a motion this afternoon in the Supreme Court consistent with this position. Respectfully,

Bob Dudek
803-734-1955

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201-1589
(803) 734-1330 – Telephone
(803) 734-1397 - Fax

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Sent: Thursday, February 26, 2015 11:43 AM
To: Zelenka, Don; Robert M. Dudek; Rick Vieth (rvieth@hbvlaw.com)
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

Judge Burch has requested that I contact you about getting us Microsoft Word versions of the proposed orders submitted after the PCR hearing held on July 19-21, 2010 before him if this is at all possible. Please do not hesitate to contact me if further information is needed. Thank you and I look forward to hearing back from you as soon as possible.

Kindest regards,

Sam Thomas

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728

Office: 843-672-3270
Fax: 843-672-5960

From: Don Zelenka [mailto:DZelenka@scag.gov]
Sent: Monday, October 20, 2014 2:52 PM
To: Burch, Paul M. Law Clerk (Samuel H. Thomas); rdudek@sccid.sc.gov
Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

Mr. Thomas –

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By copy of this email I am advising the Ms. Hopkins, a Deputy Clerk of the Supreme Court of this request and the expectation on the part of Judge Burch to receive something from the Court.

Sincerely,

Don Zelenka

Donald J. Zelenka
Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211
803-734-3601
dzelenka@scag.gov

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Sent: Monday, October 20, 2014 12:37 PM
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Subject: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

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Kindest regards,

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276

EXHIBIT D

Robert M. Dudek

From:	Don Zelenka <DZelenka@scag.gov>
Sent:	Thursday, February 26, 2015 12:36 PM
To:	Burch, Paul M. Law Clerk (Samuel H. Thomas); Robert M. Dudek; Rick Vieth (rvieth@hbvlaw.com)
Cc:	Hopkins, Debbie
Subject:	RE: Marion A. Lindsey v. State, 2007-CP-42-2848

You have received 2 files
Use the secure links below to download.

Mr. Thomas –

Attached is a copy of the Respondent's original proposed order submitted to you with one typographical correction on the spelling of "shift" on page 153 that I previously made to the document. I do not recall making any other corrections to the best of my recollection to other typographical errors which were pointed out to the Supreme Court in Mr. Dudek's and Mr. Alexander's Reply to the Return to the Petition for Writ of Certiorari which I am also attaching for you information.

I believe my original version in 2011 was completed in Wordperfect and then later automatically converted to WORD during our office document management transition. According to my records, my initial proposed order was sent by request to Judge Burch on June 2, 2011 by email in a pdf and by mail in a paper form, but not WORD or Wordperfect.

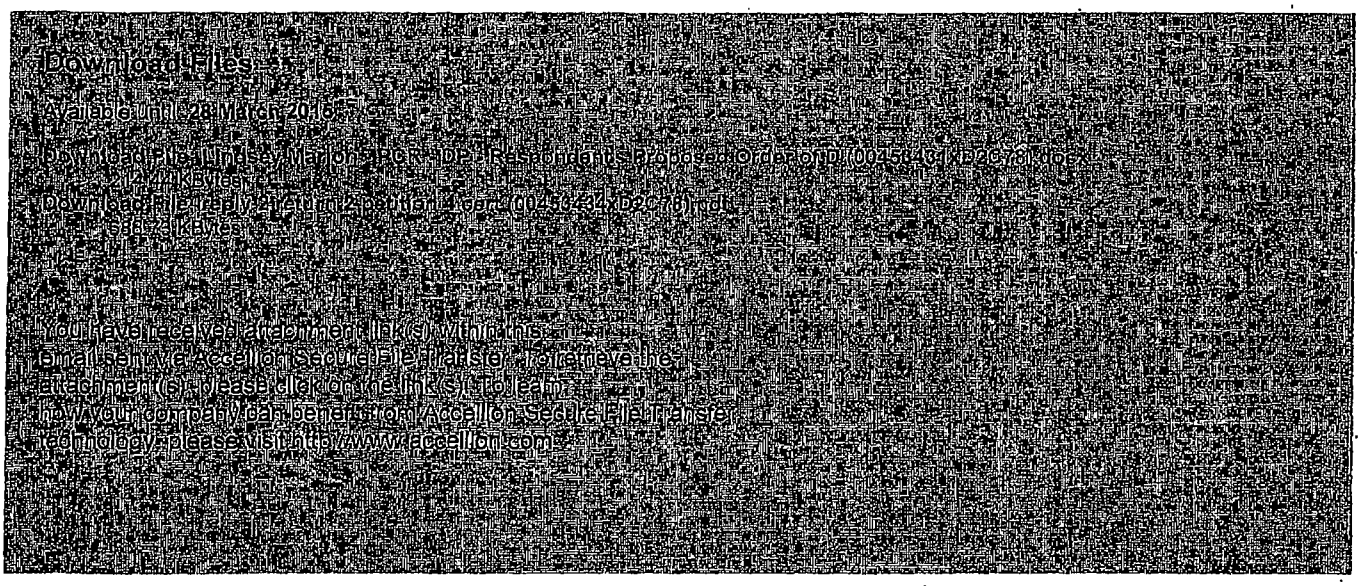
I do not have a copy of Mr. Lindsey's proposed order granting PCR in WORD, but do have a pdf of it. If there are other questions, please advise me.

I am sending the documents through Accellion as attachment. If there are problems in opening them, please advise me.

Sincerely,

Don Zelenka

Donald J. Zelenka
Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211
803-734-3601
dzelenka@scag.gov



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Cc: Hopkins, Debbie
Subject: RE: Marion A. Lindsey v. State, 2007-CP-42-2848

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Kindest regards,

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Sincerely,

Don Zelenka

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dzelenka@scag.gov

From: Burch, Paul M. Law Clerk (Samuel H. Thomas) [mailto:PBurchLC@sccourts.org]
Sent: Monday, October 20, 2014 12:37 PM
To: rdudek@sccid.sc.gov; Don Zelenka
Subject: Marion A. Lindsey v. State, 2007-CP-42-2848

Counsel,

I hope this email finds you well. Judge Burch has asked me to send you both this email stating that we have not yet received anything formal from the Supreme Court on this matter. We will, however, be reviewing the file and will be back in touch with you both in order to set up a game plan on how we should proceed from here in a few weeks.

Kindest regards,

Samuel H. Thomas
Law Clerk to The Honorable Paul M. Burch
Fourth Judicial Circuit
P.O. Box 276
Pageland, SC 29728
T: 843-672-3270
F: 843-672-5960

CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

EXHIBIT E

Catalogue of Identical Errors in the State's Proposed Order and Order Signed by PCR Court

ERROR NUMBER	PAGE NUMBER OF ERROR IN PROPOSED ORDER	PAGE NUMBER OF ERROR IN PCR COURT'S ORDER	TYPE OF ERROR	TEXT OF ERROR OR EXPLANATION OF ERROR
1	4	4	Missing Comma	"The Petitioner, through counsel Dudek[,] made a...."
2	7	7	Misspelled word	"adulteress relationship"
3	9	9	Typographical	Inconsistent use of periods
4	10	10	Typographical	Inconsistent use of periods
5	11	11	Typographical	Inconsistent use of periods
6	13	13	Citation	Citation errors with Supreme Court decisions
7	14	14	Citation	Citation errors with Supreme Court decisions
8	15	15	Misspelled word	"th" instead of "the"
9	16	16	Typographical	Unmatched quotation mark
10	17	17	Citation	Emphasis added or in original?
11	17	17	Subject-verb disagreement	"Petitioner points to the ABA guidelines to suggest it is per se ineffective assistance of counsel to fail to do as it commands."
12	17	17	Grammatical	Sentence indicates that Doctor Freeman, not Lindsey, was on Celexa
13	18	18	Typographical	"and accident"
14	20	20	Cut-and-paste	"within this pleading" in footnote.
15	20	20	Incorrect word choice	"Injected" instead of "ingested"
16	20	20	Capitalization	"tylenol"
17	21	21	Incorrect word choice	"he was tires"
18	21	21	Missing apostrophe	"mother-in-law[']s"
19	22	22	Subject-verb disagreement	"he tried to saw it"
20	24	24	Incorrect word choice	"She described that her son as slow"
21	26	26	Incorrect word choice	"and described it a 'desperate poverty'"
22	27	27	Mismatched quotes	"the picture of politeness'
23	27	27	Incorrect word choice	"befits" instead of "benefits"
24	31	31	Typographical	"somebody else id back there"
25	32	32	Misplaced	"drivers side'"

			apostrophe	
26	32	32	Cut-and-paste	Reference to "arguments" made by the Court. Courts make conclusions and findings.
27	33	33	Mismatched quotation mark	"Nell Lindsey["]"
28	33	33	Citation	"ROA [p.] 1908"
29	34	34	Sentence fragment	"A violent tempered criminal involved in the drug trade."
30	40	40	Typographical	"is" instead of "his"
31	40	40	Grammatical	"he bad in school"
32	44	44	Typographical	"she" instead of "[he] had contact visits"
33	48	48	Misspelling	"Dr. Abshur"
34	49	49	Typographical	"9sic"
35	51	51	Misspelling	"8th grad"
36	51	51	Singular instead of plural	"subtest"
37	52	52	Missing period	"-delayed verbal learning for stories[.]"
38	55	55	Typographical	"on" instead of "or"
39	56	56	Incorrect word choice	"subpoenaed from [for] trial"
40	57	57	Incorrect pronoun usage	"[s]he would have eliminated"
41	61	61	Subject-verb disagreement	"This was not neglect by counsel, but a reflect a conscious decision...."
42	62	62	Typographical	Period missing after "proffer"
43	64	64	Typographical	"witness es"
44	64	64	Typographical	"for mercy and the he not"
45	65	65	Cut-and-paste	"we are not aware" instead of "the Court is not aware"
46	65	65	Typographical	"Steve Pilgrim state post-conviction testimony...."
47	65	65	Typographical	"Bessie Smith state PCR testimony is summarized...."
48	67	67	Subject-verb disagreement	"that she found Applicant possess."
49	67	67	Typographical	"the material she additional would"
50	67	67	Incorrect usage	"two edge" instead of "two edged"
51	67	67	Subject-verb disagreement	"the summaries . . . does not"
52	71	71	Grammatical	"he bad in school"
53	72	72	No Possessive	"Dr. Melikian PCR testimony"
54	72	72	Typographical	"Jimmy can to him"
55	81	81	Incorrect word choice	"Injected" instead of "ingested"
56	81	81	Capitalization	"tylenol"
57	82	82	Incorrect word choice	"he was tires"
58	82	82	Missing apostrophe	"mother-in-law[']s"
59	87	87	Typographical	"Top the contrary"
60	87	87	Cut-and-paste	"Respondent" instead of "Applicant"
61	89	89	Possessive	"members[']' mental health"
62	89	89	Citation	"([ROA] 2082)"

63	92	92	Incorrect word choice	"any seasonal prosecutor"
64	93	93	Incorrect word choice	"he relief upon"
65	93	93	Grammatical	"when he was incarcerated" – pronoun refers back to James Aiken, who was not incarcerated
66	93	93	Incorrect verb	"admitted that he have reviewed"
67	94	94	Grammatical	Incorrect pronoun usage: "[Aiken] indicated his opinion was based upon the fact that he had done time before."
68	94	94	Incorrect tense	"risks . . . was presented"
69	95	95	Singular/plural disagreement	"gassing an inmate in a fights"
70	96	96	Incorrect word choice	"did not retain and expert"
71	97	97	Incorrect word choice	"defense tam" instead of "defense team"
72	97	97	Grammatical	"on why he not specifically retain a correctional expert"
73	97-98	97-98	Missing article	"created [a] witness list"
74	98	98	Incorrect usage	"two-edge" instead of "two edged"
75	98	98	Grammatical	"and emphasis by a prosecutor lay in wait for"
76	98	98	Typographical	"the Aiken's opinion"
77	98	98	Subject-verb disagreement	"opinion . . . were based"
78	99	99	Cut-and-paste	"We note" instead of "The Court notes"
79	102	102	Formatting	Heading bunched into the right margin
80	102	102	Capitalization	Sentence begins: "this Court"
81	104	104	Grammatical	"the circumstances from counsel conduct at the time"
82	105	105	Typographical	"Lindsey"s"
83	106	106	Capitalization	Sentence begins: "she stated"
84	107	107	Grammatical	"Virginia has seen the doctor recently and had not ask him to be a witness"
85	108	108	Nonsensical sentence	"claimed he had no clothes and had to wash them out every night"
86	109	109	Misspelling	"homesick" is one word, not two
87	110	110	Capitalization	Sentence begins: "she received"
88	110	110	Erroneous tense	"he worked at Burger King where his brothers work"
89	111	111	Capitalization	Sentence begins: "she said"
90	111	111	Incorrect tense	"He said he also gave his mother-in-law money and fill her car with gas."
91	112	112	Capitalization	Sentence begins: "however, Topp"
92	112	112	Typographical	"document s during"
93	113	113	Incorrect punctuation	"was used at trial; it reflects a reasonable decision"
94	114	114	Subject-verb disagreement	"He now suggest"
95	114	114	Subject-verb disagreement	"details ... was necessary"
96	114	114	Misspelling	"some fo the"

97	115	115	Typographical	"She stated she still ld with her mother"
98	115	115	Capitalization	Paragraph begins: "she described"
99	116	116	Word usage	"who" used instead of "whom"
100	119	119	Incomplete sentence	"over to Nell so the children would have good."
101	120	120	Incorrect tense	"she did not feel they ask her enough questions"
102	122	122	Incorrect use of possessive	"none of her son's finished high school
103	123	123	Incorrect verb tense	"Mrs. Lindsey stated she have talked"
104	124	124	Misspelling	"with the children having to bather and feed her"
105	127	127	Capitalization	Sentence begins: "she described"
106	129	129	Incorrect verb tense	"she shopped all the time and take them to eat"
107	129	129	Capitalization	Sentence begins: "she said they asked"
108	131	131	Sentence fragment	"With the assertion that they claim all evidence should have been put into trial."
109	132	132	Typographical	"Pilgrim found him real depresses"
110	136	136	Nonsensical sentence	"Sims said he told him not to and asked where he was and told him he's get there."
111	137	137	Typographical	"after it looked like everything was all rights."
112	137	137	Typographical	"and Virginia]>"
113	138	138	Unnecessary brackets	"[Despite his earlier testimony],"
114	139	139	Capitalization	Sentence begins: "he confirmed"
115	140	140	Grammatical	"Bill Burton testified similar to his trial testimony."
116	140	140	Missing word	"when he learned he would be a character witness, [he] tried to contact"
117	143	143	Unnecessary pronoun	"that she gave it to a minister"
118	144	144	Quotation marks needed	"[']I did not know him intimately.[']"
119	145	145	Misspelling	"Since ne claimed"
120	148	148	Typographical	"August 200"
121	150	150	Typographical	"some fo the experiences"
122	152	152	Incorrect word choice	"mental health stuff" instead of "mental health staff"
123	153	153	Tense disagreement	"She asserts that when he was around 11 that he sees his family dealing and using drugs."
124	153	153	Typographical	"3rd shit" instead of "3rd shift"
125	153	153	Sentence fragment	"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."
126	153	153	Incorrect possessive	"would retreat to neighbors homes"
127	155	155	Grammatical	"and other families where there be mental illness"

128	157	157	Capitalization	Sentence begins: "he only found"
129	158	158	Incorrect tense	"Vogelsang pointed out that is when he threaten to take his life"
130	158	158	Capitalization	Sentence begins: "she opined"
131	159	159	Capitalization	Sentence begins: "she denied"
132	160	160	Capitalization	Sentence begins: "she then"
133	161	161	Capitalization	Sentence begins: "she confirmed"
134.	162	162	Grammatical	"(or the claims 1000 hours of the ABA average)"
135	162	162	Subject-verb disagreement	"A review... reveal"
136	163	163	Possessive	"were aware of Virginia Lindsey background"
137	164	164	Incorrect tense	"Virginia had reported that she like and loved Nell"
138	165	165	Typographical	"hang round him"
139	166	166	Misspelling	"broke his hip and gad facial surgery"
140	166	166	Modifier disagreement	"his brother also lost their jobs"
141	167	167	Misspelling	"hee had"
142	167	167	Punctuation	No period at end of sentence: "domestic violence order was taken out[.]"
143	169	169	Punctuation	Quotation marks mismatched before St. Aubin v. Quarterman citation
144	169	169	Capitalization	"due to counsel's death, This Court finds..."
145	170	170	Citation	Missing parentheses after Durr v. Mitchell parenthetical
146	170	170	Grammatical	"but the it"
147	170	170	Typographical	"670 S.E>2d 356"
148	170	170	Possessive	"social worker Vogelsang testimony"
149	170	170	Incorrect article	"with a alleged"
150	170	170	Punctuation-missing comma	"This Court agreed[,] finding that"
151	171	171	Nonsensical sentence	"Lindsey was raised by his mother and an absent father"
152	177	177	Sentence fragment	"Under the applicant's assertion... capital defense counsel."
153	181	181	Citation	"(C.A.6 (Tenn.),2008)."
154	182	182	Missing word	"In his tenth argument... contends"
155	189	189	Incomprehensible phrase	"would fortuitous positioning saved their lives"

EXHIBIT F

ALAN WILSON
ATTORNEY GENERAL

February 12, 2016

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: Marion Alexander Lindsey v. State of South Carolina
Appellate Case No. 2015-000385
2007-CP-42-2848 - Status of Appeal

Dear Mr. Shearouse:

This is to request information concerning the status of the appeal before this Court. On October 2, 2015, this Office received from the Clerk of Court for Spartanburg County a filed copy of the Amended Order Denying Post-Conviction Relief entered October 2, 2015, dated September 28, 2015. The Amended Order was completed pursuant to an Order of Remand by this Court on September 30, 2014. In that Order, this Court directed also that "Petitioner may serve and file a new notice of appeal following the issuance of the amended order, or upon receipt of written notice of entry of an order ruling on any motion to alter or amend judgment."

A certificate of service by the Clerk of Court reflects the amended order was served by mail on October 2, 2015 upon Mr. Lindsey's post-conviction relief hearing counsel, Rick Vieth and David Collins, among others. (Copy attached). My review of the Spartanburg County Clerk of Court Docket Sheet reflects the same. Further, I have not received any motion to alter or amend or notice of appeal.

I bring these matters to the Court's attention to the different procedural history in this case and the fact that the stay of execution has been pending. I await instructions from the Court on how to proceed to resolve this matter.

RECEIVED
FEB 12 2016
SC SUPREME COURT
APPELLATE DEFENSE

By copy of this letter, I am advising post-conviction relief hearing counsel, Rick Vieth and David Collins, and post-conviction relief appellate counsel, Robert M. Dudek and David Alexander, of this communication.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lbb
Enclosure: Certificate of Service

cc: Richard W. Vieth, Esquire
David Collins, Esquire
Robert M. Dudek, Esquire
David Alexander, Esquire
Honorable Paul M. Burch
Barry J. Barnette, Solicitor

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

7TH JUDICIAL CIRCUIT

CASE # 2015CP42-2648

CERTIFICATE OF SERVICE

M Jason Alexander Keithley #60015
Applicant

VS

Stile
Respondent

I certify that, on this date, I served a copy of the Amended Order Denying Post-Conviction Relief in this action dated 9-28-2015 on 10-2-15

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Adele Haltiwanger
Rick Wirth
Pete Goodfred
David Collins - Donald Zelenka

10-2-15
(Date)

Chris Seay
(Signature)

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Paul M. Burch, Circuit Court Judge

MARION ALEXANDER LINDSEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the Renewed Petition for Extraordinary Relief for Failure of the PCR Court to Comply with this Court's September 30, 2014, Remand Order and for a Stay of Proceedings in the PCR Court together with attached exhibits in this case has been served on Donald J. Zelenka, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, on the Honorable Paul M. Burch, Fourth Judicial Circuit, P.O. Box 276, Pageland, SC 29728, this 26th day of February, 2016.

David Alexander
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of February, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

ALAN WILSON
ATTORNEY GENERAL

March 7, 2016

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: Marion Alexander Lindsey v. State of South Carolina
Appellate Case No. 2012-206087

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Return to Renewed Petition for Extraordinary Relief** in the above-captioned matter for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Senior Assistant Deputy Attorney General

/lbb
Enclosure

cc: Robert M. Dudek, Esquire
David Alexander, Esquire
Richard W. Vieth, Esquire
David Collins, Esquire
Honorable Paul M. Burch

RECEIVED
MAR 9 2016
SC OFFICE OF
APPELLATE DEFENSE

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Paul M. Burch, Circuit Court Judge

Appellate Case No. 2012-206087
2007-CP-42-2848

MARION ALEXANDER LINDSEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

RETURN TO RENEWED PETITION FOR EXTRAORDINARY RELIEF

The Respondent, above-named, hereby makes a Return to the "Renewed Petition for Extraordinary Relief For Failure of the PCR Court to Comply with this Court's September 30, 2014 Remand Order and for A Stay of Proceedings in the PCR Court" dated February 26, 2016. In the Petition, Lindsey, through appellate counsel David Alexander and Robert Dudek asks this Court to grant a new post-conviction relief hearing and remove the Honorable Paul Burch from his assignment in this case and stay the pending Rule 59 proceedings in the Circuit Court. Petitioner contends the stay of the further Rule 59 proceedings (filed subsequently in the Court of Common Pleas dated February 29, 2016) removal of Judge Paul Burch is necessary because he claims that Judge Burch "flagrantly disobeyed" the Order of this Court dated September 24, 2014 when the Court remanded the case and directed the Court to draft its order in compliance with Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) and Hall v. Catoe, 360 S.C. 353, 601

S.E.2d 335 (2004) on its Amended Order of Dismissal.

Respondent incorporates by reference its March 2, 2005 Return to the first Petition for An Extraordinary Writ in its response. On April 9, 2015, the Supreme Court of South Carolina entered a Order denying the initial petition requesting the Court to grant a new post-conviction relief hearing before an impartial judge and concluded the request for a stay of proceedings was moot.

The Petitioner now contends that because Judge Burch did not make significant changes from the original vacated order of dismissal and the state's earlier proposed order that he is entitled to the extraordinary step of having the September 29, 2015 amended order vacated in this Court's original jurisdiction, a stay any further proceedings on his now pending Rule 59 motion, and to re-assign that matter to another judge, essentially starting the case *de novo* with a new PCR hearing

Respondent submit that the Writ is improper because under SCACR Rule 245 "*the Supreme Court will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties.*" Since the same assertions are being made in the pending Rule 59 motion, Respondent submits that the original writ petition, once again, is improvidently made.

In the September 30, 2014 Order, this Court's mandate to Judge Burch "[I][n light of the Court's concern with the frequency and severity of the drafting errors in the Order of Dismissal, and this Court's admonishments to PCR judges in Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004)" was as follows:

> "we vacate the Order of Dismissal and remand the matter to the circuit court for the issuance of an amended order that complies with Pruitt [v. State, 310 S.C. 254, 423 S.E.2d 127 (1992),] and Hall [v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004),, and with S.C. Code Ann. § 17-27-80 (2003), to include specific findings

> of fact and conclusions of law on each issue presented, based on accurate references to the record and the applicable law. Petitioner may serve and file a new notice of appeal following the issuance of the amended order, or upon receipt of written notice of entry of an order ruling on any motion to alter or amend the judgment.

Marion Lindsey v. State, Appellate Case 2012-206087, Order (S.Ct.S.C September 30, 2014).

I.

Respondent submits on October 2, 2015, this Office received from the Clerk of Court for Spartanburg County a filed copy of the Amended Order Denying Post-Conviction Relief entered October 2, 2015, dated September 28, 2015 with a certificate of service to counsel in the PCR court dated October 2, 2015. The Amended Order was completed pursuant to an Order of Remand by this Court on September 30, 2014. In that Order, this Court directed also that "Petitioner may serve and file a new notice of appeal following the issuance of the amended order, or upon receipt of written notice of entry of an order ruling on any motion to alter or amend judgment."

After receiving no notice of appeal or Rule 59 motion, the State made inquiry of opposing PCR hearing and appellate counsel of their status in the action on February 12, 2016. Below-signed counsel was advised by each that they had not received the Amended Order of Dismissal from the Clerk of Court.

On February 17, 2016, below-signed counsel sent the 187 page Amended Order Denying Post-Conviction Relief signed September 28, 2015, filed October 2, 2015, the certificate of service from the Spartanburg County Clerk of Court dated October 2, 20151 and my certificate of service dated February 17, 2016.

On February 26, 2016, Respondent's counsel received the "Renewed Petition for

1 A certificate of service by the Clerk of Court reflects the amended order was served by mail on October 2, 2015 upon Mr. Lindsey's post-conviction relief hearing counsel, Rick Vieth and David Collins, among others.

Extraordinary Relief For Failure of the PCR Court to Comply with this Court's September 30, 2014 Remand Order and for A Stay of Proceedings in the PCR Court" in the jurisdiction of the South Carolina Supreme Court.

On February 29, 2016, Respondent was served by mail through PCR counsel in the Court of Common Pleas for Spartanburg County a "Motion for A Stay, For a New PCR Hearing Before a Different Circuit Judge, and Alternately, to Alter or Amend the Judgment Pursuant to Rule 59."

II.

EARLIER PROCEEDINGS RELATED TO THIS ORDER

On February 26, 2015, Judge Burch, though his law clerk made a request to both parties Petitioner and Respondent's counsel (each side) to provide him in the Microsoft WORD word processing format with the proposed orders that each side had previously submitted in 2011 to the hearing judge.

For reasons that remain unclear to Respondent, Petitioner asserts that this act of requesting the previously submitted orders from each side mandates Judge Burch's recusal from the responsibility in carrying out this Court's mandate from its order in Marion Lindsey v. State, Appellate Case 2012-206087, Order (S.Ct.S.C September 30, 2014) and the remittitur issued on October 16, 2014.

Respondent respectfully submit that the initial act of requesting **both parties** to submit in WORD format prior orders, matters that are also matters of public record in this Court and the lower court's record, that each side submitted in 2011 does not violate this Court's mandate to Judge Burch. Marion Lindsey v. State, Appellate Case 2012-206087, Order (S.Ct.S.C September 30, 2014).

Judge Burch's subsequent action do not suggest that the mandate was "flagrantly disobeyed" as Petitioner suggests. He has merely requested both parties to submit matters that he had previously considered in a word processing format. Nothing in the mandate precluded the receipt of material already on file with the lower court and this Court, albeit in a Word processing format. Further, as Judge Burch's law clerk immediately stated upon receipt of appellate counsel Dudek's objection –

> **Counsel,**
> **Judge Burch was in no way requesting new proposed orders and I apologize if that was misunderstood from my communications with you. However, Judge Burch was requesting Word versions of the proposed orders previously filed and relating to the hearing that took place in July of 2010 for his review.**

Email from Law Clerk Samuel Thomas to Counsel – February 26, 2015 at 1:44 PM. (Exhibit 9 attached)

I.

Certain salient factors and communications are missing from the Petitioner's recitation from the proceedings. These additional matters undermine the impression of his current complaint and should have resolved Petitioner's anticipated concern and this Court's concern.

1. October 10, 2014 email from Zelenka to Judge Burch and copy to Counsel Dudek |

In the original Return to the first Petition for Extraordinary Writ , the Respondent included the parties' first email correspondence with Judge Burch on October 10, 2014 after this Court's September 30, 2014 Order. It was submitted the same day as and after Mr. Dudek's earlier emailed letter to below-signed counsel and after a personal discussion between both counsel (but not the court) on the same date about their different interpretations of the Court's order and limitations on whether anything could be submitted to the hearing judge. This October 10, 2014 email to Judge Burch reads:

> Dear Judge Burch –

> Attached is an order from the South Carolina Supreme Court remanding the matter for issuance of an amended order? As you may be aware, the Petitioner raised an issue in the PCR appeal concerning the fact that the Respondent submitted a requested proposed order in the matter and asserted the failure of the Court to make corrections to my clerical and grammatical errors in the my submission suggested the order was not reviewed by you. Lindsey's Reply to Return to Petition for Writ of Certiorari, p. 2 ("The State Failed to Rebut the Assertion that the PCR Court did not review the State's Proposed Order Before Signing It.").
>
> In light of the issues presented before the Supreme Court, it has taken the action to remand for an amended [order]. **I would suggest a status conference with Mr. Lindsey's counsel concerning how to most efficiently resolve your needs in getting materials.**
>
> ***One of the Petitioner's counsel, Robert Dudek sent a letter to me that I received and discussed with him today which states his opinion that the Supreme Court's order forbids the submission or a solicitation of a proposed order from the parties.*** **I think the Supreme Court's order speaks plainly on the issue with its references to Pruitt v. State and Hall v. Catoe and directions to the court on remand.**
>
> By copy of this email, I am advising opposing counsel of this contact.

October 10, 2014 4:39 PM Email – Zelenka to Judge Burch. Exhibit 1. (emphasis not in original and added).

2. October 10, 2014 Email from Robert Dudek to Judge Burch.

Shortly after the above email, on the same date, counsel Dudek emailed Judge Burch stating: "Judge Burch: I have attached the letter that Don referenced in his email below. We look forward to meeting with you in person at the status conference." In that email, counsel Dudek attached the October 9, 2009 letter. *October 10, 2014 4:58 PM Email – Dudek to Judge Burch. Exhibit 2.*

3. October 20, 2014 Email from Judge Burch's Law Clerk to Parties.

On October 20, 2014, Judge Burch's law clerk, Samuel Thomas emailed both parties stating the following in its pertinent part:

> Judge Burch has asked me to send you both this email stating that we have not yet received anything formal from the Supreme Court on this matter. We will, however, be reviewing the file and will be back in touch with you both in order to set up a game plan on how we should proceed from here in a few weeks.

October 20, 2014 Law Clerk Thomas Email to Counsel Exhibit 3.

4. October 20, 2014 – Follow-up emails concerning Remittitur from Counsel Zelenka and Clerk.

Following the law clerk's email that Judge Burch had not received anything formal from the Court, below-signed counsel emailed the law clerk a copy of the remittitur. Subsequently, Clerk of Court Daniel Shearouse emailed the Judge Burch a copy of the remittitur and order. *Exhibit 4*

5. January 23, 2015 Request from Law Clerk for Copy of Petitioner Lindsey's Proposed Order Granting Relief.

On January 23, 2015, counsel was contacted by Judge Burch's law clerk requesting a copy of the Proposed Order Granting Post-Conviction Relief submitted ***by Applicant's counsel Rick Vieth*** to Judge Burch on July 29, 2011. Below-signed counsel provided the Applicant's Proposed Order Granting Relief by mail on January 23, 2015. A copy of that was provided to appellate counsel at the same time. *There was no request made for Respondent's prior proposed order of dismissal and it was not provided at that time.* Respondent's below-signed counsel is not aware of any objection to the January 23, 2015 submission of their proposed order to Judge Burch or this Court pursuant to his request. *January 23, 2015 Cover Letter to Judge Burch for enclosures of Applicant's July 29, 2011 Proposed Order Granting Post-conviction Relief. Exhibit 5.*

6. February 26, 2015 Email Requesting Microsoft Word Versions of Both Side Proposed Orders submitted after the 2010 PCR Hearing.

Subsequent to the submission of the Applicant's earlier July 2011 Proposed Order Granting

Relief to Judge Burch on January 23, 2015, Respondent's did not have any contact from the hearing judge or Lindsey's counsel about the case until February 26, 2015. At that time, Respondent received an email from Judge Burch's law clerk, Samuel Thomas to counsel Dudek, PCR counsel Rick Vieth and below-signed counsel requesting a Microsoft Word version of the proposed orders submitted after the 2010 PCR hearing. *February 26, 2015 Email Requesting Microsoft Word Versions of Both Side Proposed Orders submitted after the 2010 PCR Hearing. Exhibit 6*

7. February 26, 2015 12:36 Email with Respondent's June 2011 Proposed Order in Word (with at least one earlier made correction on page 153).

Below-signed counsel became aware of the hearing judge's request prior to lunch on February 26. Prior to leaving for lunch, counsel reviewed the document management system and found the Word version of Respondent's June 2011 Proposed Order of Dismissal in two locations in the office system and emailed it to Judge Burch and counsel with an explanatory email and copy of the petitioner's Reply to the Return to the Petition for Writ of Certiorari which documented early asserted grammatical and spellings errors in the public document pointed out to this Court by Petitioner previously concerning Respondent's below-signed counsel's earlier proposed order. In light of Judge Burch's request, Respondent would have provided the Court with a WORD version of Applicant's Proposed Order Granting Relief, if it had such a version that that proposal. However, it did advise Judge Burch's law clerk and counsel Dudek and Vieth that it did not have one. *February 26, 2015 12:36 Email with Respondent's June 2011 Proposed Order in Word (with at least one earlier made correction on page 153) (Exhibit 7)*

8. February 26, 2015 Email from Appellate Counsel Dudek to Judge Burch's Law Clerk at 12:39 PM.

Subsequent to Respondent' submission, appellate counsel Dudek objected to the submission

of any proposed orders and asserted that it was "in violation of the Supreme Court's order. Appellate counsel reminded Judge Burch that he had earlier asserted in a letter to counsel (which he had copied Judge Burch) that his opinion was that the remand order "prohibits the submission or solicitation of proposed orders in any format." He further expressed their intent to file a formal motion that afternoon consistent with the position. *February 26, 2015 Email from Appellate Counsel Dudek to Judge Burch's Law Clerk at 12:39 PM. (Exhibit 8).*

9. February 26, 2015 Email from Judge Burch's Law Clerk Clarifying that He Was Not Requesting New Proposed Orders at 1:44 PM.

At 1:44 PM, Judge Burch's law clerk responded to counsel with the following Clarification that he was not requesting new proposed orders:

> **Judge Burch was in no way requesting new proposed orders and I apologize if that was misunderstood from my communications with you. However, Judge Burch was requesting Word versions of the proposed orders previously filed and relating to the hearing that took place in July of 2010 for his review.**

February 26, 2015 Email from Judge Burch's Law Clerk Clarifying that He Was Not Requesting New Proposed Orders at 1:44 PM. (Exhibit 9).

10. February 26, 2015 2:11 PM Email From Zelenka to Judge Burch's Law Clerk and Counsel

Respondent's below-signed counsel responded to Judge Burch's law clerk and the opposing counsel with the following response:

> Thank you for the clarification. I did not think the request was for new proposed orders either as stated in my intervening email after receiving Mr. Dudek's.
>
> As noted previously subsequent to Mr. Dudek's letter to me, upon the Judge Burch's request in January, I had earlier provided the Court a copy of Petitioner Lindsey's Proposed Order Granting PCR - albeit in a pdf - without the same controversy or concerns expressed. (Copy of letter attached).

February 26, 2015 2:11 PM Email from Zelenka to Judge Burch's Law Clerk and Counsel (Exhibit 10).

II.

In his petition, the Petitioner concedes that numerous changes were made by Judge Burch in the Amended Order from the Proposed Order, Petition, p. 5-6, but suggests the changes, even the substantive changes, were not significant enough to comply with the Court's mandate. He complains that the mandate was not to correct the frequency and severity of the original drafting errors in the state's initial proposed order, but implicitly that it could not agree and adopt findings and conclusions made in the original order, but somehow was required to make different findings and conclusions in the matters before him; albeit on the same issues. In other words it had to be a complete re-write bearing no similarity (or consistency) to the initial order. Under Applicant's theory, if the Judge Burch agreed with those findings and conclusions, he had violated the Court's mandate, apparently even if the conclusions were consistent with his own findings.

Respondent respectfully submits that the logic of his assertion about the order is in error. The mere fact that the hearing judge on remand requested a copy of proposed orders that had been submitted by both sides in 2011 does not mandate any action by this Court nor does it evidence of "violation" of this Court's remand order. Simply put – no order on remand has been entered and the hearing judge is reviewing matters from both sides that were presented to him in 2011. If fact, the hearing judge had previously requested a copy of **Applicant's** proposed order granting relief in January 2015. Neither of these acts were in violation of the order of remand. To the contrary, it suggests that the hearing judge was gathering material to comply with the order of remand.

Similarly, the act of entering an amended order with numerous changes, albeit maintaining consistency with his original order's conclusions does not suggest either non-compliance with the Court mandate or violate the precepts of Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). In Hall, the Court did not forbid the action Applicant suggests was in violation of it:

> **Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases**, we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency. In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it.

Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004).

The Petitioner's suggestion that this requires the removal of Judge Burch and for a new evidentiary hearing to be held *de novo* is simply misreading those actions of Judge Burch and the effect of this Court's remand according to Respondent's review of the Court's order of remand, the decision in Hall and Pruitt and the subsequent order denying the initial Petition for an extraordinary writ .

Further, as stated before this Court previously in its original Return to Certiorari and Return to the initial Petition for Extraordinary Writ, the fact that Judge Burch requested proposed orders from each side in 2011 - without objection from either side in 2011 - was not a basis for this Court to disqualify Judge Burch nor were other actions which occurred during the PCR hearing. What is initially extraordinary, is that - again in this Petition as he did in his certiorari Petition for the first time - the Petitioner makes assertions challenging the impartiality of the Honorable Paul Burch at the PCR hearing. *Petition for Extraordinary Relief*, p. 5, citing

App.p. 27142; *Renewed Petition for Extraordinary Relief*, p. 8.

II.

Respondent submits that the complaint raised against Judge Burch on whether he is complied with the mandate of this Court is premature because the same claims are pending before Judge Burch in the Rule 59 proceeding.3 However, if the Court takes the extraordinary step of reviewing the Amended Order which includes changes made by Judge Burch alone after a significant period of time for review had passed and consideration of the earlier proposed orders had been made, Respondent submits that Court should find the original mandate was complied with. The mandate was to issue his own order in the action – not to blind himself from the respective positions of each party that had been presented to him previously.

III.

The direction by this Court was clear and unambiguous - "the issuance of an amended order that complies with Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992),] and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004),, and with S.C. Code Ann. § 17-27-80 (2003), to include

---

2 Lindsey's appellate counsel suggested a brief reference during one witness's testimony in overruling the State's objection to the relevance of testimony. suggested some bias against the Petitioner in favor of the State. This was a parsed and isolated comment in the context of the lengthy proceeding where fifteen (15) witnesses testified, 32 exhibits were submitted by the Petitioner and 14 exhibits submitted by the Respondent. Subsequent to the hearing, Judge Burch allowed counsel to wait for a transcript of the PCR hearing before post-hearing memorandum were received. App. 2933-2934. At conclusion of the hearing, the Court suggested briefing in 30 days after receipt of the transcript which was provided to Petitioner's counsel by August 24, 2010 and the Petitioner's post-hearing brief was filed October 26, 2010. Subsequent to request and the filing of requested proposed order from the Respondents on May 2, 2011, Judge Burch allowed Petitioner until July 27, 2011 to submit his proposed order. To characterize Judge Burch's handling of the case as "impatience" flies in the face of any reasonable reading of this record.

Petitioner's complaint toward Judge Burch about his impatience with the case [suggesting an attitude against the Petitioner] is more extraordinary and incorrect when considered in light of what occurred prior to the case. Judge Burch appointed counsel Vieth and Collins on July 31, 2008 (after relieving prior appointments). An initial scheduling order was set on July 23, 2009 allowing for an amendment to be filed by August 1, 2009 (over one year after initial appointment) and setting January 1, 2010 for the hearing. Lindsey v. State, Scheduling Order, June 23, 2009. The Amended Application was filed August 6, 2009. App. 2210. On June 17, 2010, Respondents made a Return to the Amended Application and Second Rule 12(e) Motion for specificity. App. 2217. The hearing was convened July 19, 2010, nearly two years after counsel was appointed to represent the Petitioner. This is a far cry from impatience from Judge Burch.

3 Respondent notes that the stay is requested in the Rule 59 proceeding pending the resolution of the Renewed Petition for an Extraordinary Writ in this Court.

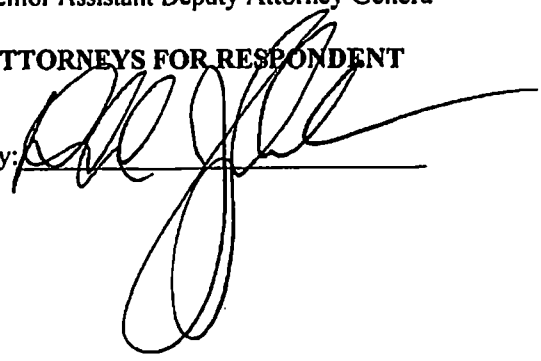
specific findings of fact and conclusions of law on each issue presented, based on accurate references to the record and the applicable law." The actions of Judge Burch in requesting prior pleadings made in the lower court previously by each side and preparing his own order with a series of changes different from the initial proposed order and original order should not be deemed in violation of the Court's remand order nor suggest it was "flagrantly disobeyed" or in violation of Hall v. Catoe.

For all the foregoing reasons, the Petition for Extraordinary Relief must be denied.

Respectfully submitted,

DONALD J. ZELENKA
Senior Assistant Deputy Attorney Genera

ATTORNEYS FOR RESPONDENT

By: 

March 7, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2012-206087

MARION ALEXANDER LINDSEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served Respondents **Return to Petition for Extraordinary Relief** on:

Robert M. Dudek, Esquire
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

David Alexander, Esquire
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

by depositing a copy in the Mail with sufficient postage this 7th day of March 2016.

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

COPY

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

March 24, 2016

RECEIVED
MAR 24 2016
SC SUPREME COURT

RECEIVED
MAR 24 2016
SC OFFICE OF
APPELLATE DEFENSE

Honorable Daniel E. Shearouse
Attn: Debbie Hopkins
Clerk, South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

Re: Marion Lindsey v. State, CA No. 2007-CP-42-2848
Appellate Case No. 2012-206087

Dear Mr. Shearouse:

Pursuant to the Court's request, I am writing to inform the Court of the pending matters in the above-referenced case. Currently pending before this Court is petitioner Marion Lindsey's Renewed Petition for Extraordinary Relief for Failure of the PCR Court to Comply with this Court's September 30, 2014, Remand Order and for a Stay of Proceedings in the PCR Court. Petitioner filed the Renewed Petition in this Court on February 26, 2016. The State filed its Return on March 7, 2016.

In the PCR court, on February 29, 2016, petitioner filed a Motion for a Stay, for a New PCR Hearing Before a Different Circuit Judge, and, Alternatively, to Alter or Amend the Judgment Pursuant to Rule 59(e).

If the Court has any further questions or requires any additional information, please do not hesitate to contact me.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

cc. The Honorable Paul M. Burch
Donald J. Zelenka, Esq.
David Alexander, Esq.

Richard W. Vieth, Esq.
David Collins, Esq.
Barry J. Barnette, Esq.
Client (VIA US Mail only)

COPY

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

June 13, 2016

RECEIVED
JUN 14 2016
SC SUPREME COURT

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

Re: Marion Lindsey v. State, CA No. 2007-CP-42-2848
Appellate Case No. 2012-206087

Dear Mr. Shearouse:

Enclosed are eight (8) copies of the United States Supreme Court's recent decision in Williams v. Pennsylvania, Op. No. 15-5040, ___ U.S. ___ (June 9, 2016). Pursuant to Rule 208(b)(7), SCACR, I am advising the Court that Williams represents pertinent and significant authority for the argument presented in the Renewed Petition for Extraordinary Relief.

Specifically, the Williams Court applied the Due Process Clause to a judicial recusal question. It also found that the error was structural and not subject to a harmless error analysis.

If the Court has any further questions or requires any additional information, please do not hesitate to contact me.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

cc. The Honorable Paul M. Burch
Donald J. Zelenka, Esq.
David Alexander, Esq.
Richard W. Vieth, Esq.
David Collins, Esq.
Barry J. Barnette, Esq.
Client (VIA US Mail only)

The Supreme Court of South Carolina

Marion Alexander Lindsey, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-000404

ORDER

Petitioner has filed a Renewed Petition for Extraordinary Relief and for a Stay of Proceedings in the PCR Court. The State has filed a return in opposition to the petition. The petition is denied.

C.J.

FOR THE COURT

Justice John Cannon Few, not participating

Columbia, South Carolina

March 25, 2016

cc:
Robert Michael Dudek, Esquire
David Alexander, Esquire
Donald J. Zelenka, Esquire

COPY 387

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

June 17, 2016

RECEIVED
JUN 17 2016
SC SUPREME COURT

RECEIVED
JUN 17 2016
SC OFFICE OF
APPELLATE DEFENSE

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
PO Box 11330
Columbia, SC 29211
Attn. Debbie Hopkins

Re: Marion Lindsey v. State, CA No. 2007-CP-42-2848
Appellate Case No. 2012-206087

Dear Mr. Shearouse:

After reviewing our file, we did not receive a copy of the Court's March 25, 2016, Order denying our Renewed Petition for Extraordinary Relief in the above-captioned case. Ms. Hopkins emailed me a copy of the Court's Order after receiving our letter dated June 13, 2016, providing the Court with the United States Supreme Court's decision in Williams v. Pennsylvania, Op. No. 15-5040 (June 9, 2016) as supplemental authority. A copy of our supplemental authority letter was also sent to Judge Burch.

Regardless, currently pending before Judge Burch is Petitioner's Motion for a Stay, for a New PCR Hearing Before a Different Circuit Judge, and, Alternatively, to Alter or Amend the Judgment Pursuant to Rule 59(e). The Williams case that was forwarded to the Court nonetheless applies to the continued involvement of Judge Burch in this PCR remand.

In the event that there are any inquiries about this petition and letter, please do not hesitate to contact me.

Sincerely,

DAB

Robert M. Dudek
Chief Appellate Defender

RMD/ssd

cc: Donald J. Zelenka, Esquire
Client

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

1231 GERVAIS STREET
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June 27, 2016

Robert Michael Dudek, Esquire
PO Box 11589
Columbia SC 29211

Re: Marion Alexander Lindsey v. State of South Carolina
Appellate Case No. 2016-000404

Dear Counsel:

This responds to your supplemental citation dated June 13, 2016, and your letter dated June 17, 2016.[1] Since the above appellate case was resolved by this Court's order March 25, 2016, and the time for any rehearing of that order has expired under Rule 221 of the South Carolina Appellate Court Rules, this matter has been concluded. Therefore, there is simply no reason for this Court to consider either your supplemental citations or your letter.

Very truly yours,

CLERK

RECEIVED
JUN 27
SC OFFICE OF
APPELLATE DEFENSE

cc: David Alexander, Esquire
Donald J. Zelenka, Esquire

[1] I believe your letter of June 17, 2016, references the wrong appellate case number. Appellate Case Number 2012-206087 that your reference was related to the 2007 PCR case that is currently pending before Judge Burch.

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS NONJURY
COUNTY OF SPARTANBURG)

MARION ALEXANDER LINDSEY, #6015,) TRANSCRIPT
APPLICANT,) OF
vs.) RECORD
STATE OF SOUTH CAROLINA,) 2007-CP-42-2848
RESPONDENT.)

September 22nd, 2016
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE PAUL M. BURCH, Judge.

A P P E A R A N C E S:

DAVID ALEXANDER, LARA CAUDY, and RICHARD VIETH ESQ.
Attorneys for the Applicant

DONALD ZELENKA and AL SIMON
ASSISTANT Attorney General
Attorneys for the Respondent

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

E X H I B I T S

NO.	DESCRIPTION	ID	EV
	Court's Exhibits		
C-1	Brief		3

PROCEEDINGS

(WHEREUPON, a supplemental brief was marked as Court's Exhibit No. 1 and received into evidence at this time.)

MR. ALEXANDER: Your Honor, I think if we have Mr. Lindsey brought in we'll be ready.

THE COURT: Okay. Sheriff, take care of that for me.

(WHEREUPON, Mr. Lindsey was brought into the courtroom at this time.)

THE COURT: All right. Counsel, a couple of preliminary questions I need to pose.

First of all, has there been any action in the Supreme, our Supreme Court, the State Supreme Court, that would moot the necessity of this hearing?

If there is, I don't know about it, and has there been anything---

MR. ALEXANDER: Our---

THE COURT: ---over there?

MR. ALEXANDER: Our position would be no, Your Honor.

MR. ZELENKA: No. The, the most recent motion for extraordinary relief and the stay of the proceedings was denied on March 25th of 2016. So there's nothing to preclude you from going forward in this matter according to our interpretation.

THE COURT: Okay. If, if everybody will identify

themselves, and we need to be clear and concise on the record. I am -- I'm, I'm set up here to take my notes, but, of course, Madam Court Reporter will be taking everything down, and sometimes the acoustics in these courtrooms are not very good. So if everybody will be -- speak loudly and clearly and concisely.

Mr. Alexander, I believe you're up.

MR. ALEXANDER: Thank you, Your Honor.

May it please the Court?

THE COURT: Yes, sir.

MR. ALEXANDER: They're two motions before Your Honor today. There's, of course, the Rule 59 motion but the first motion that we need to address is the recusal motion.

The relief we are seeking is for the Court to vacate its amended order filed October 2nd, 2015, and to recuse itself from any further proceedings in this case. The result of this would necessarily be a new PCR hearing before a different judge.

Procedural history, facts, and law related to this issue have already been briefed extensively before this Court and the Supreme Court. To summarize, on June the 2nd, 2011, the Attorney General emailed its proposed order to the Court. On August 10th, 2011, this Court signed the proposed order. The only change made to the Attorney General's proposed order was crossing out June on the

signature page and handwriting August. The Attorney General has never disputed that this was the only change made. The amended order filed in 2015 also contains no significant changes from the original proposed order submitted by the Attorney General.

After the Supreme Court unanimously took the extraordinary step of remanding this case because of the identical errors, the Attorney General provided this Court with two things. First, an electronic version of the proposed order and, second, a roadmap to fixing the errors in the proposed order, which was actually the list of errors found and cataloged by Petitioner in its reply at the certiorari stage. The Attorney General sent these documents despite being placed on notice in a letter from Petitioner's counsel that it was our opinion that the Supreme Court's remand order forbade submission of a proposed order. Mr. Dudek's October 9th, 2014, letter to that effect is in the record attached as an exhibit to our motion.

The amended order makes only superficial changes, fixes the typographical errors pointed out by Petitioner, and is, in all important respects, no different than the order issued in 2011. It contains no new or different factual findings. It contains no new or different legal conclusions. It contains no new or different case citations.

So we've handed up to Your Honor the case of Doyle Lee Hamm versus Alabama, a supplemental brief by Petitioner's counsel in that case. Four days from today the United States Supreme Court will take up this proposed order issue. That's Court's Exhibit 1.

The Supreme Court has already called for the lower record, from -- the record from the Lower Courts in Hamm and the briefing before the United States Court and then what we handed up on Page 3 specifically notes that Courts adopting the State's proposed orders in capital cases is a problem in several states and specifically mentions South Carolina. If the Petitioner in Hamm is successful, then such orders like the one in this case will be accorded no deference in Federal Court. We bring this to the Court's attention to be sure that all parties are proceeding with their eyes wide open as to what it would mean if the amended order stays in place.

As I'm sure Your Honor's aware, the standard of review by our Supreme Court is extremely deferential, any evidence standard in PCR cases, but if this amended order stays in place, it will likely strip away that deferential standard of review. That means a de novo review both at our Court and before the Federal Courts in Habeas.

Respectfully, we argue to our Supreme Court and argue today that the sheer number of identical serious

typographical and grammatical errors in the State's proposed order and the order signed by the Court prove that the Court did not read the proposed order before signing it. This deprives Marion Lindsey of due process in this capital case where the stakes could not be higher. The Attorney General has never disputed this point and has only argued that the Court had adequate time to review the order.

We sincerely hope this does not happen. But if the Court today, in ruling on the motion, asserts that it read a proposed order before signing it, then, respectfully, we believe that would trigger Marion Lindsey's rights under the Confrontation Clause and we would ask for this hearing to be reconvened before another circuit judge to take sworn testimony from the Court through the rights of cross-examination. And authority for that procedure is In Re: Whetstone, 354 S.C. 213.

Again, this is not a procedure we desire but we have no alternative to ask for that if the Court makes a finding from the bench that it read the order. But that drastic step isn't necessary because the recusal standard is only whether the impartiality of the tribunal can be reasonably questioned. In the circumstances of this case, respectfully, indicate that the tribunal's impartiality is in question.

The adoption, again, of the Attorney General's proposed

order after remand violates both the letter and the spirit of our Supreme Court's order remanding the case. Our Supreme Court, in its remand order, cited Pruitt versus State and Hall versus Catoe, both of which instruct PCR judges to draft their own orders in capital cases.

This Court has not complied with the holdings of those cases or the Federal cases, Anderson versus Bessemer City and Jefferson versus Upton, nor has it complied with the Supreme Court's 2014 remand. The amended order now in place substitutes the judgment of the Attorney General, an advocate, for the judgment of the Court and deprives Marion Lindsey of his right to a hearing and a decision from a neutral arbitrator.

We do not seek impossible from this Court. To comply with the Court's remand order and due process clause, this Court would have to draft its own order from scratch but it is now been six years since the last witness testified in Marion Lindsey's PCR hearing. No one, not me, not Mr. Zelenka, Mr. Zelenka, much less a busy circuit judge who hears thousands of matters every year would be expected to remember what happened in a hearing six years ago and draft an order from anything but the cold record. Let alone due process. The simple passage of time in this case means that drafting an order down that complies in Pruett, Paul, Anderson, and Upton is now impossible.

But we're here today on the ground floor in Common Pleas attempting to address this important issue. The Supreme Court took the extraordinary step of remanding this case and there's no sense in going back up to our Supreme Court with the exact same issue existing as before its remand. If the amended order stands, it will be in flagrant violation of the Supreme Court's 2014 remand order, and not only Marion Lindsey's life is at stake, but as in Hamm, so is the reputation of our State's judiciary.

It is apparent now the only way to fix this dilemma is for the Court to vacates its amended order and recuse itself from any further proceedings and start over with a clean record.

I think we'll address the -- if it suits Your Honor, we'll address the 59 after Mr. Zelenka's had his response.

THE COURT: That's fine.

MR. ALEXANDER: Thank you, Your Honor.

MR. ZELENKA: May it please the Court?

THE COURT: Yes, sir.

MR. ZELENKA: I'm Don Zelenka on behalf of the Respondent, the State of South Carolina.

Respectfully, in light of the nature of these proceedings that have been before Judge Burch, it's our position that you, as a, as a fact finder and a judge, has no obligation, under the law or under the remand from the

South Carolina Supreme Court, to recuse yourself in this particular case.

On September 14th, 2014, the South Carolina Supreme Court, after the Petition for Certiorari was presented to the Supreme Court, and complaints were made within the petition concerning what they perceived to be grammatical errors and within the proposed order which we had submitted, which were consistently presented in the final Order of Dismissal that you prepared, vacated the Order of Dismissal and remanded the matter to the Circuit Court for the issuance of an amended order that complied with Pruitt and Hall v. Catoe and directed the Court to make specific findings of facts and conclusions of law in each issue presented based on accurate references to the record and applicable law.

In the proceedings that followed that, we are of the opinion that you complied with a mandate from the Court in the preparation of the order which you eventually filed in this particular case as the amended order. Implicit within and somewhat extraordinary within the argument that appears to be presented before the Court is that you never read the amended Order of Dismissal which you signed and filed in this particular proceeding.

The Petitioner is correct that, in the representations before the Court, Respondent could not state previously that

you had read and signed the order because the law assumes that any order signed by a judge has been read in the presentation that it makes to both that Court and the Appellate Court above. So that is not a concession. That is a reality that our justice system depends on and relies upon, that an order of the Court is an order that is read and reviewed by the Court.

On February 16th, upon request by your law clerk, the order was submitted. A prior proposed order was submitted to you and a similar request was made for proposed order from opposing counsel in that particular action. At that particular time, on February 26th, after those were submitted, your law clerk, in an email, at that time it was Samuel Thomas, to counsel clarified that there was no request for new proposed orders and wanted to make sure that that wasn't a misunderstanding between the parties. But he was requesting Word versions of the proposed orders filed relating to the hearing that took place in July of 2010 for his review.

Again, that suggests that it was being reviewed by you to make a determination. If we need to backtrack, on October 10th, 2014, you were advised and a copy was sent to appellate counsel, Mr. Dudek, about the status of the particular case where you were advised of the remand order being done and this particular assertion. I also included

in that October 10th, 2014, email to you that one of the counsel sent a letter to me that I received and discussed with him today which states his opinion that the Supreme Court order forbids a submission or a solicitation of proposed order from the parties.

THE COURT: I vehemently disagree with Appellate Defense in making, in making that statement. No where have I read that.

Pardon me for interrupting you.

MR. ZELENKA: Again, Mr. Dudek, on October 20th, 2014, made a response requesting a status conference. On October 20th, 2014, an email was sent from Judge Burch's law clerk, from you, your law clerk, to the parties stating that they had not received anything formal from the Supreme Court on the matter and will be reviewing the file and get back to us.

On October 20th, follow-up emails concerning the remittitur were sent from my office and the Clerk's Office because you had not directly received that remittitur which had been discussed before.

On January 23, 2015, there was a request from the law clerk for a copy of Mr. Lindsey's proposed order granting relief, which had been previously submitted by judge, excuse me, by Mr. Vieth on behalf of the Petitioner. I believe it was on July 29th, 2011. I provided that proposed order

upon receipt of that email, and there was no request, at that time, even made for the Respondent's prior proposed Order of Dismissal and it was not provided at that particular time.

On February 26th, 2015, I received, in -- a request for a Microsoft Word version of both of the proposed orders submitted after the 2010 hearing. I did not have a Microsoft version of the Petitioner's order but I did provide a copy of our proposed order acknowledging that it did include one correction. That was submitted on February 26th, 2015.

On the same date, Mr. Dudek, on behalf of the Petitioner, made a response that it was his opinion that the request for the proposed orders was in violation of the South Carolina Supreme Court's remand and expressed an intent to file a motion before the South Carolina Supreme Court at that time.

Again, as I stated before, on February 26th, 2015, Mr. Thomas, your law clerk, clarified again that they weren't asking for new proposed orders but just orders essentially from the prior proceedings for your review. And on February 26th, 2015, in an email from me to your law clerk, and these were all going to opposing counsel, that I thanked him for his clarification. I acknowledged Mr. Dudek's prior letters to us.

Subsequently, we received the order which you had prepared and filed in this particular proceeding. The order did include some -- it wasn't an exact replica of the Word document which we had submitted to you, and it was essentially done after a significant period of time.

The Petitioner is of the opinion that, as he reads Hall v. Catoe, it specifically forbids an adoption or a presumed adoption of a proposed order, a -- significant portions of a proposed order. In Hall v. Catoe, the South Carolina Supreme Court stated, and, again, this is the opinion that the remand came down on, was although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that, in all other cases, it's -- it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency. In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it.

This is the same situation we have before Your Honor. This order that you signed and filed in this particular proceeding was not done within a brief period of time. It took a significant period of time from the remand from the South Carolina Supreme Court until the filing of this particular order, the amended order, in this particular

case. It does not violate the mandate in Hall v. Catoe because it was an order that had that significant time for review and it is not forbidden under Hall versus Catoe.

By the preparation and signing of the order within your chambers, I submit that the requirements of Pruitt versus State and Hall v. Catoe were satisfied for the purposes of the remand. The Petitioner has, has cited, within his motion, the United States Supreme Court opinion in Jefferson versus Upton. This case is significantly different then Jefferson versus Upton because Jefferson versus Upton, all the submissions were done ex parte without the other side being shown a copy of what was being submitted to the Court nor given an opportunity to make a complaint about those particular submissions.

To, to state it another way, they were blindly ghost-written presumably in those particular scenarios. That's not what happened in this case.

As Your Honor is well aware, and as -- was well aware by the request, both sides in this proceeding provided proposed orders to you for your review back before the case went up on appeal. Those orders were still subject to consideration by Your Honor. Those orders -- those proposed orders were not done blindly without the other side having the opportunity to review it, as in Pruitt, or the opportunity to make complaints about those particular issues

as they were presented within those proposed orders.

We were each given that opportunity and that opportunity extended to this time on remand where you still had those orders presented to you for your consideration and review. It was not ex parte, unlike Upton, and you had a -- more than an adequate time to make that consideration, and as if the South Carolina Supreme Court acknowledged in Hall v. Catoe, you were encouraged to draft a separate order but it is not a requirement as a matter of law.

To some extent, it offends Respondents that they would be an assumption that, based upon typographical errors which may have occurred within a proposed order that was done on submission, that any judge in South Carolina therefore would be presumed, as they're suggesting in this proceeding, to have never read the order and to have blindly signed the order without consideration, review, or acceptance of that particular document. I think the presumption necessarily should go the other way and the presumption must clearly go the other way in this scenario because the judge asked -- you asked, excuse me, if I'm referring -- sometimes I think I'm in a different Court. I'm directing this directly to you because you asked for the submission of the orders, significant period of time after it, it's clear that the order that came out was prepared differently than the original order, proposed order which had been submitted to

you.

To suggest that recusal is appropriate in these proceedings would suggest that recusal is appropriate anytime a judge signs a proposed order that is submitted either by if you would have signed Mr. Vieth's order or if you would have signed our order. This system does not require that and certainly a suggestion that recusal by a judge who asked for orders from both sides, who reviews those orders prior to the time that they are making their order, that is wholly inappropriate. There's no requirement by this Court and I would submit that the remand certainly would not have required that and does not require that.

I would suggest that that motion to recuse and request for another judge to hear these proceedings must be denied. There's no showing, Your Honor, of any bias or prejudice in this matter against either side. There's no showing of any dereliction of judicial duty which would require such to have occurred.

THE COURT: Thank you, counsel.

Mr. Alexander.

MR. ALEXANDER: May I be heard briefly in reply, Your Honor?

THE COURT: Yes, sir.

MR. ALEXANDER: Just very briefly, Your Honor, to clear up a few things from the Attorney General's remarks.

Our contention today, the problem with the amended order that is now in place is not that Your Honor did not read that order. It's that it does not comply with the Supreme Court's remand order. I don't know of any other way to interpret the Supreme Court's remand order when it's read together with Hall and Pruitt is that it intended the Court to draft its own order. The amended order in place is identical, in all material respects, to the original order, and I don't believe that the Supreme Court sent this case back in a death penalty case merely as a proofreading exercise.

Thank you, Your Honor.

THE COURT: Okay. In regards to this, I remember more about this case than y'all would ever imagine cause the initial post-conviction relief hearing was held right here in this courthouse and we ran sometimes very late in the evening hearing this case and, you know, I'm not even from here, and, you know, I've, I've held Court in Spartanburg County over the past 25 years on several occasions and I know a few of the lawyers but I don't have any relatives that live here anymore. So I don't have any reason to have any close friends in the Spartanburg area.

So, you know, I was an out-of-town judge sent in here to handle this case. Knew no one -- I knew some of the attorneys involved but nothing that would give me any reason

to, to recuse myself from hearing it at that time, and certain things I disagree with, and certain things I partially agree with here.

When I received that first set of proposed orders from both sides, I'm known as a speed reader. Judge Kinard, years ago, enticed me into taking a couple of courses about speed reading because that was his practice, and, if anything here, I went, I went through those orders probably too hastily and I didn't make any corrections because of that. I admit that. But the base order was exactly as I, as I saw the case that was presented to me.

And on this remand, y'all would never even imagine the number of hours that Sam Thomas and I spent going through all these documents. And even after we loaded the final proposed order, and after all my changes and adjustments, after we loaded that, I even instructed Sam to not make some corrections on purpose to prove to everyone that could possibly be concerned on this case that I was involved in redrafting that order and there were many changes made.

As I said, I purposely asked him to leave some errors in there so I could initial them to prove that point, and I even took the extra step to call the Clerk of the Supreme Court to let them know over there that I had purposely done that to prove what I'm just stating.

So I wanted to put that on the record because I didn't

want anybody to say well, Judge Burch didn't even correct this last order. That was purposefully done. If anybody questions that later on, we're clear on the record now.

No, there's nothing personal about this, this entire matter that would even cause me to have another thought about granting your recusal motion.

So, with all that said, that motion is denied.

MR. ALEXANDER: Thank you, Your Honor.

Are you ready to hear the Rule 59?

THE COURT: (Nods affirmatively.)

MR. ALEXANDER: Thank you, Your Honor.

Your Honor, the briefing before the Court is extensive on the Rule 59, and to the extent I don't hit any of those points today, I would fall back onto those briefs.

Just a few points that I want to hit, and if Your Honor desires argument on any other portions, I will be happy to address those matters.

THE COURT: Okay.

MR. ALEXANDER: The central legal error we contend in the order is -- relies on a fact that the introduction of the mitigating evidence or Jan Vogelsang's testimony or James Aiken's prison adaptability testimony or Margaret Melikian's testimony after being adequately prepared. What opened the door to bad evidence of Mr. Lindsey's character or failure ability to adapt in prison or other bad things

that he had done in his background, that's a legal error, Your Honor. That evidence is admissible anyway. The State can always introduce that kind of aggravating evidence.

The, the facts of this case sadly suggest that trial counsel simply failed to do any investigation or preparation till about a month before the trial began, and in Wiggins, the United States Supreme Court case, says in order to make a reasonable strategic decision and to have that decision afforded any deference by the Court, you must first undertake a full and thorough investigation of the client's history, his background, and all phases in the law and we believe that that was not done. And to submit that he had strategic reasons because he would be afraid that this would open the door to other aggravating evidence, well, if it -- if indeed he did have that strategic rationale, that would be based on an error of law because all of that was admissible anyway.

The other key point I wanted to address and let the Court know about is that on our issue related to prison adaptability regarding James Aiken's testimony, our Supreme Court's already granted certiorari in a PCR case, a capital PCR case, on this issue. It's the case of Marion Bogan versus State and Marion Lindsey's case is actually a much worse case than the case before the Supreme Court now because, in this case, Jim Sly testified. His testimony is

not admissible.

Our Court has held that evidence of so called good prison conditions is simply not admissible. It's an arbitrary statutory factor and it's an arbitrary factor also under the Eighth Amendment and we have nothing to counter that. James Aiken testified at the PCR hearing that the prison could manage Mr. Lindsey.

So all the jury heard was James Sly telling them that, in prison, it's like a country club. You can work, you can see your family, and they never heard James Aiken's testimony that Mr. Lindsey could adapt.

There's no strategic reason here, Your Honor, because there's no evidence that Mr. Bartosh ever consulted with a prison adaptability expert. So he could not have made a strategic decision without the ability to first research that, and the idea that it would open the door to good prison conditions or any fights that Marion Lindsey had been in while he was incarcerated, again, Your Honor, that evidence -- the evidence of these fights was already admissible and fair game. So trial counsel needed to be ready for that. But the good prison conditions evidence is inadmissible.

If they're any other points Your Honor wants me to address under the Rule 59 I'll be happy to do so.

THE COURT: I think you covered it. Thank you.

MR. ALEXANDER: Thank you, Your Honor.

MR. ZELENKA: Okay. Your Honor, briefly.

We think the Rule 59 is, is not appropriate or necessary in this particular proceeding primarily based upon that your order adequately covered these particular issues. Your order reviewed the effect of what Mr. Bartosh's representation actually was in the, the evidence that they presented at the, at the time of trial and the investigation that they had done concerning the particular issues that, that have been presented.

The, the argument that he makes concerning Mr. Bartosh's strategic determinations, as Your Honor is well aware, at the time of, of the particular post-conviction relief proceeding, Mr. Bartosh was deceased. The Court, therefore, was, to some extent, hamstrung by relying on the evidence that was actually presented in the particular proceeding, the record presented through individuals who were involved with him at various times concerning his preparation in the case.

What, what we do know is reflected in the order that the defense team did have some consideration on prison adaptability, that it was aware that it was some type of evidence that could be presented in this particular case. They were aware by the presentation of Lenora Topp of investigating various mitigating circumstances and aware

through Doctor Melikian, of the ability to present mental health evidence and defenses in this particular case.

What this -- what Your Honor is also aware of, there's a presumption in these cases that counsel is acting within the reasonable standards required of lawyers in the practice of criminal law. What Your Honor's determination was, they hadn't met their burden of proof in satisfying those showing, and that burden of proof I think was well addressed within Your Honor's order that's -- that is being challenged at this particular time.

There is always a risk as to what may occur. If counsel's actions occur one way, that there will be something which may cause a good prosecutor to react to it in a different way than had been presented previously. I think that is what Your Honor and that was our position before Your Honor in the particular proceeding that there is some risk with actions that are taken, that were not taken, and this evidence before Your Honor, by the risk of putting in Ms. Vogelsang's testimony, by the, the risk of putting in the prison adaptability testimony in this particular proceeding, which they suggest was error, I think Your Honor has addressed those matters to show that it doesn't undermine confidence in the verdict that was given by the jury at that particular time. That had the steps that Petitioner's currently asserting should have been taken is a

reasonable probability that the result of the proceeding would of resulted in life rather than death, I think that Your Honor was correct in making that determination that it would not have made that difference, that they had failed in that particular burden of proof.

Within the pleadings before this Court, they appeared to assert that the ABA standards applied a required checklist of the law that should be applied in these proceedings. We agree and I think it's reflected in your order that these are merely guides, that they aren't requirements for counsel to take. They're trying to apply these things as they're individual requirements that reasonable counsel must take in every action.

Respectively, we submit that they failed in their burden of proof, that, as reflected in, in your order, there isn't a need to revise or grant the Rule 59 motion before this Court based upon the reasons we have previously submitted to this Court both in our proposed order, our prior post hearing memorandum of law, and our earlier response to the motion to alter or amend that was done at the time of the earlier proceedings.

Unless the Court has further questions, I can rest.

THE COURT: I don't.

Mr. Alexander.

MR. ALEXANDER: Briefly in reply, Your Honor.

Mr. Zelenka's argued that trial counsel was aware of this evidence but being aware of it is not exactly the point. The point is what did the jury hear and the PCR hearing was about what the jury did not hear, and what was not presented was a literal mountain of mitigating evidence that the jury never heard.

And Mr. Zelenka's argument seems to be that trial counsel was afraid of a very able prosecutor and then elected not to present this mitigating evidence that was clearly admissible. To me, that almost sounds like a concession of deficient performance. If you're not introducing legally admissible mitigation evidence because you're afraid of what the prosecutor can do, then you're not preparing your case and that's based on a mistake of law because a prosecutor can go into those matters anyway.

Mr. Zelenka also mentioned the ABA standards. The, the order that's in place now I believe overstates the holding of the U.S. Supreme Court's case in Van Hook and uses Van Hook to say that the ABA guideline are not commandments. And while that's true they aren't commandments, in many federal cases since Van Hook, and in Wiggins, and Rompilla, and Williams, the Federal Courts and our Court, in Von Dohlen and in Council have continuously used the ABA guidelines as a, as a measuring stick for counsel's performance, and is as detailed categorically and

exhaustively in our briefing. You -- there's a giant laundry list of ABA guidelines that trial counsel failed to meet.

Your Honor, as you know, in a death penalty case, a juror can recommend life for any reason or no reason at all. And had they heard this mitigating evidence that was not presented by trial counsel, the result of this case certainly would have been different.

Thank you, Your Honor.

THE COURT: Thank you.

All right. All right. What is before the Court I will not rule on this last issue at this time. I'm gonna hold that under advisement. I'm not gonna put Appellate's or Applicant's counsel in a precarious situation by asking for proposed orders. I think I can handle that on my own, but, once again, I certainly disagree with any proposition that trial judges can not ask for proposed orders. If that were to become in actuality, I think the whole Court system would lock down because we just don't have the resources in this state that other states have, and we have to go with what we have. Anyway, enough said on that.

I will though invite very brief briefs to give me a framework to finalize this for both sides. I certainly am not going to put you in a position to ask for proposed orders because I don't see that, that I really need it here.

Anything else?

MR. ALEXANDER: No, Your Honor.

When would you like those briefs?

THE COURT: Tell me what kind of time y'all need.

MR. ALEXANDER: Thirty days be okay with Your Honor?

THE COURT: That's fine.

MR. ZELENKA: That's fine with us.

THE COURT: Sounds good to me.

MR. ZELENKA: If you need it sooner, we can do that too, judge.

THE COURT: All right. Thank y'all so much for your work on these cases. Mr. Lindsey certainly deserves to have every issue heard and I appreciate y'all's presentation and cooperation with the Court.

I know y'all have worked very closely with the -- Bryan, my new law clerk, to get this scheduled and probably y'all had to revamp your own schedules to do this. Since I was gonna be up here in Spartanburg this one last -- well, it's the only time I've been up here probably in two years. But since I was up here on a PCR term, this worked out well for us as well as the staff, and I, I really appreciate y'all working with Bryan to get that done.

MR. ZELENKA: Thank you, judge.

MR. ALEXANDER: Thank you, Your Honor.

THE COURT: Thank you.

* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 22nd day of September, 2016.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

September 22nd, 2016

Pamela E. Green

PAMELA E. GREEN, Court Reporter

RECEIPT FOR EXHIBITS

Case No. 07-CP-42-2848 Judge Burch

Plaintiff: Marion Lindsey Plf's Atty D. Zelenka, Al Simon

Defendant: State Def's Atty. D. Alexander, L Caudy, R. Vieth

Date Trial Started 9/22/16 Date Trial Ended: 9/22/16

Received of Pam Green, Court Reporter for the above case, these exhibits:

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This 24th day of October, 2016. Page 1 of 1

By: Martha Long, DC / Alexandra Miller, DC.

Spartanburg County, Clerk of Court.

Court's Exhibit 1

No. 15-8753

IN THE SUPREME COURT OF THE UNITED STATES

DOYLE LEE HAMM,

Petitioner,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

BERNARD E. HARCOURT
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September 15, 2016

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SUPPLEMENTAL BRIEF OF PETITIONER

This supplemental brief calls the Court's attention to three intervening developments, not readily available at the time of Petitioner's last filing on June 14, 2016, that may affect the Court's consideration of this case.

I. The American Bar Association Has Filed an Amicus Brief in A Separate Case That Adds Further Reason to Grant Certiorari on Question 1.

The question of whether AEDPA deference should apply to the results of deeply flawed state fact-finding procedures is the subject of a circuit split and scholarly commentary in favor of Mr. Hamm's position. Since his filings, Mr. Hamm has learned that an additional certiorari petition and an amicus brief by the American Bar Association ("ABA") are also asking this Court to resolve this question. That case, *Gray v. Zook*, No. 15-9473 in this Court, involves different factual circumstances but the identical question presented.

In *Gray*, the petitioner did not receive a hearing in state court in Virginia on his state habeas corpus petition, but instead had factual findings made by an appellate court from a cold record. Mr. Hamm was denied a neutral fact-finder of any kind in state habeas corpus, as the state court simply signed the "PROPOSED MEMORANDUM OPINION" submitted by the Alabama Attorney General without meaningfully reviewing it.

Mr. Gray's and the ABA's legal positions are identical to Mr. Hamm's. As the ABA writes, relying expressly on the very same provision of AEDPA and the same opinions of this Court, where a state court's decision in state post-conviction rests on

an unreasonable process for the determination of the facts, "the federal courts should not defer to the [state court] factual conclusions.... Instead, when a petitioner has raised a substantial claim of constitutional error, that claim should be given the full and fair consideration it deserves." *Brief of The American Bar Association as Amicus Curiae in Support of Petitioner* at 7, *Gray v. Zook*, No. 15-9473 (June 23, 2016). The ABA's argument applies equally to Mr. Hamm.

Given the circuit split, the continued use of dubious fact-finding processes in state courts, and the recurring nature of this question, this Court should now resolve whether factual findings derived from unreasonable procedures should nonetheless be entitled to deference. Mr. Hamm's case, because of the flagrantly inadequate nature of the state court process, presents an ideal vehicle on which to provide the answer. In the ABA's words, Mr. Hamm's case "call[s] for this Court's intervention." *ABA Amicus Brief* at 23.

II. A Journalistic Investigation Revealed That Other States Would Benefit From This Court's Answer to Question 1.

When Mr. Hamm originally filed his petition with this Court, he asserted that the problem of "ghost-written opinions," uniquely abusive in his case, also affected other Alabama death penalty cases. *See Petition for Writ of Certiorari* at 17 ("wholesale judicial adoption of proposed orders and opinions is 'virtually the norm in Alabama capital post-conviction cases.'") However, through the work of an investigative journalist at the *Marshall Project*, petitioner has learned that the practice of adopting prosecution-written opinions in capital cases also exists elsewhere, although generally in a less

egregious form. The *Marshall Project* investigation reveals that, to a lesser extent, the practice of ghost-written opinions in capital cases occurs in states such as Georgia, Louisiana, Kentucky, South Carolina, Ohio, and Texas. Some of those states address the issue themselves and sanction the judge under the state's judicial code of conduct, but not uniformly. *See* Andrew Cohen, *Letting Prosecutors Write the Law: It's More Common Than You Think*, THE MARSHALL PROJECT, July 18, 2016, available at http://www.themarshallproject.org/2016/07/18/letting-prosecutors-write-the-law. In Alabama, as noted in Mr. Hamm's previous filings, as well as the *amicus* brief in this case, essentially no action has been taken by the state courts to address this problem.

Although Mr. Hamm's case presents the most extreme example within an outlier state, a decision in his case would benefit and provide necessary guidance to other state courts regarding the acceptability of this practice. This Court has already taken one such step by noting three factors that make ghostwritten opinions untrustworthy in the pre-AEDPA case of *Jefferson v. Upton*, 560 U.S. 284, 294 (2010). Clarifying that these factors are meaningful in cases governed by AEDPA as well would do much to ensure that the more problematic ghostwritten opinions would be addressed by the state courts in the first instance.

III. Another Case Before This Court Presents the Identical Question Presented (Question 2 in Mr. Hamm's Case) Concerning the Applicability of *Martinez v. Ryan* Where Post-conviction Counsel Fails to Develop the Facts Supporting a Claim

After filing his reply brief, Mr. Hamm learned that another condemned man in Tennessee, Mr. Farris Genner Morris, has raised in this Court an identical question regarding the reach of this Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012). *See Petition for Writ of Certiorari* at 36-39, *Morris v. Westbrooks*, No. 15-9002 (Apr. 15, 2016) (Question #2a). Mr. Morris's case is similarly set for conference on September 26, 2016. Mr. Morris's petition demonstrates well, in its discussion of the reasoning of Justices Breyer and Sotomayor's statement in *Gallow v. Cooper*, 133 S.Ct. 2730, 2731 (2013), the direct conflict in his case (and thus Mr. Hamm's) with *Newbury v. Stephens*, 756 F.3d 850 (5th Cir. 2014) and *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc)—and also the fact that this Court's decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011) has effectively left the question open. As indicated by the multiple petitions presenting identical questions, this issue is important, recurring, and will not resolve itself absent this Court's review.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 21, 2016

The Honorable M. Hope Blackley
Post Office Box 3483
Spartanburg, SC 29304-3483
Office: (864) 596-2591
Fax: (864) 596-2259

Re: Marion Alexander Lindsey v. State, CA No. 2007-CP-42-2848

Dear Ms. Blackley:

I represent petitioner Marion Lindsey in the above – referenced case. Enclosed for filing is petitioner's post-hearing supplemental memorandum together with a certificate of service for same.

Please return a clocked copy in the enclosed self-addressed, stamped envelope.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

David Alexander
Appellate Defender

cc. The Hon. Paul M. Burch
Donald J. Zelenka, Esq.
Alphonso Simon, Jr., Esq.
Barry Joe Barnette, Esq.
Robert M. Dudek, Esq.
Lara M. Caudy, Esq.
Richard W. Vieth, Esq.
David Collins, Esq.
Marion Alexander Lindsey

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M. Hope Blackley
Clerk of Court

Gail Moffitt
Assistant Clerk of Court

To: Whom it may concern,

On August 23, 2016 Spartanburg County Clerk of Courts went live with E-Filing. It is now mandatory that all SC attorneys file their documents through E-Filing.

Sincerely,

CLERK OF COURT
SPARTANBURG, S.C.
2016 OCT 25 AM 9:48
M. HOPE BLACKLEY

Senior Court Clerk
Spartanburg County Clerk of Court

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October 27, 2016

The Honorable M. Hope Blackley
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Re: Marion Alexander Lindsey v. State, CA No. 2007-CP-42-2848

Dear Ms. Blackley:

I represent petitioner Marion Lindsey in the above-referenced case. **This is a death penalty PCR case.**

On October 21, 2016, I mailed to you for filing petitioner's post-hearing supplemental memorandum with a certificate of service.

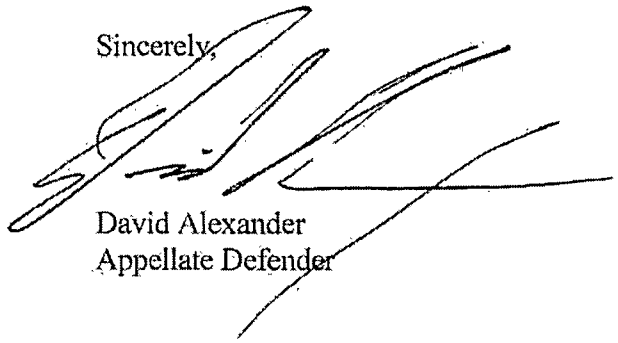
Today I received my original filing returned to me with a letter from Pam Moore in your office informing me that documents in Spartanburg must be e-filed. I just spoke with Ms. Moore via telephone and she confirmed that this was an error because the e-filing program does not include PCR cases.

Enclosed again for filing is petitioner's post-hearing supplemental memorandum together with a certificate of service for same. Also enclosed is the original letter I sent with these documents and a copy of the letter from Ms. Moore returning my filing. I would ask that these documents be filed as of the original date they were received because they were erroneously not filed.

Please return a clocked copy in the enclosed self-addressed, stamped envelope.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,



David Alexander
Appellate Defender

cc. The Hon. Paul M. Burch
Donald J. Zelenka, Esq.
Alphonso Simon, Jr., Esq.
Barry Joe Barnette, Esq.
Robert M. Dudek, Esq. (w/o enclosure)
Lara M. Caudy, Esq. (w/o enclosure)
Richard W. Vieth, Esq. (w/o enclosure)
David Collins, Esq. (w/o enclosure)
Marion Alexander Lindsey (w/o enclosure)

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)	SEVENTH JUDICIAL CIRCUIT
Marion Alexander Lindsey)	CA NO. 2007-CP-42-2848
SCDC No. 6015)	
Petitioner,)	
)	
vs.)	**POST-HEARING SUPPLEMENTAL MEMORANDUM**
)	
State of South Carolina,)	
Respondent.)	

COPY

On September 22, 2016, the Court held a hearing on petitioner's Motion for a Stay, for a New PCR Hearing Before a Different Circuit Judge, and, Alternatively, to Alter or Amend the Judgment Pursuant to Rule 59(e), SCRCP. The Court denied petitioner's recusal motion from the bench. Sept. 22, 2016, Hearing Tr. 18, l. 13 – 20, l. 7. After hearing argument on the Rule 59(e) motion, the Court requested "very brief" supplemental memoranda from the parties. Sept. 22, 2016, Hearing Tr. 27, ll. 22 – 23. Pursuant to the Court's request, petitioner submits for the Court's consideration this post-hearing memorandum. This memorandum is in addition to, not a replacement of, the prior briefing before the Court, and petitioner refers the Court to the more extensive briefing already filed.

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1. Evidence of Prison Adaptability

At the hearing, the state continued to press this Court to adopt a legal error concerning evidence of petitioner's ability to adapt to prison. Sept. 22, 2016, Hearing Tr. 23, l. 20 – 25, l. 21. The legal error pressed by the state is its incorrect theory that prison adaptability evidence is only a "response" to the state's evidence of future dangerousness or that it would "open the door" to evidence of Lindsey's bad conduct and evidence that

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life in prison is easy. None of these assertions are correct. Prison adaptability evidence and evidence of future dangerousness and bad conduct are both admissible **independent of each other**. Evidence that life in prison is easy is independently inadmissible and has been since State v. Plath (Plath II), 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984). The state's erroneous argument on this issue, unfortunately, was adopted by the Court in its Amended Order of Dismissal when it stated that prison adaptability evidence is admissible "**as a response** to claims of future dangerousness." Am. Order Dismissal at 94.

As early as 1984, in Plath II, the Court ruled that "determinations as to the time, place, manner, and conditions of execution **or incarceration**, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury." Plath II at 15, 313 S.E.2d at 627. See also State v. Atkinson, 253 S.C. 531, 535, 172 S.E.2d 111, 112-13 (1970) (stating that what happened during incarceration was of "no concern" to jurors and that "another agency" was charged "with the responsibility of how a life sentence should be executed."). This ruling meant that evidence of "good prison conditions" was inadmissible as an arbitrary factor. The Court emphasized this point in State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 385 (2005), when it stated that "questions regarding . . . prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole." Bowman at 498-99, 623 S.E.2d at 385. "We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is

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inappropriate evidence in the penalty phase of a capital trial." Id. The Supreme Court made these statements in Bowman despite finding the issue unpreserved for appeal.[1]

In Bowman, the challenged evidence was introduced through improper cross-examination of the exact same expert presented by petitioner at PCR: James Aiken. Id. The Court's findings in Bowman conclusively prove the invalidity of the state's argument here: that introduction of prison adaptability evidence through an expert like Aiken would somehow "open the door" to evidence regarding "good prison conditions" if petitioner received a sentence of life imprisonment. Because evidence of "good prison conditions" is inadmissible as an arbitrary factor, this is a door that cannot be opened by the defense.

The Supreme Court's subsequent holding in State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007) further proves the error in the state's analysis that has, unfortunately, been adopted by the Court in the Amended Order. In Burkhart, the state called James Sligh ("Sligh") as an expert witness. Burkhart at 487, 640 S.E.2d at 452-53. Over the defendant's objection, Sligh testified "regarding the privileges available to an inmate who receives a sentence of life without parole." Id. Sligh told the jury the defendant would have "access to the yard, work, education, meals, canteen, phone, library, recreation, mail, television, and outside visitors." Id.

Citing Plath II, the Supreme Court reversed Burkhart's sentence. Id. at 488-89, 640 S.E.2d at 453. The Burkhart Court held that "this entire subject matter injected an arbitrary factor into the jury's sentencing considerations." Id. The Court made clear that

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[1] This exact issue, in the context of an ineffective assistance of counsel claim, is currently pending before the South Carolina Supreme Court after it granted certiorari to review the PCR judge's denial of relief. Marion Bowman v. State, App. Case No. 2012-213468, Order dated April 15, 2016.

evidence of the defendant's prison adaptability was "clearly admissible," but that evidence of general prison life was restricted. Id. In the sentencing phase, "any relevant mitigating evidence" must be admitted. Skipper v. South Carolina, 476 U.S. 1, 4 (1986). U.S. Const. amend. XIII. Skipper specifically held that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." Id. at 5. Skipper's phrase "would not pose a danger if spared (but incarcerated)" means that evidence that a defendant can adapt to prison is mitigating and admissible. Eddings v. Oklahoma, 438 U.S. 586 (1978); Lockett v. Ohio, 438 U.S. 586 (1978).

Burkhart shows that the reasoning urged by the state—and adopted in the Amended Order—is an error of law. Trial counsel cannot be credited with a "strategic" reason that would be a mistake of law. Using a prison adaptability expert would not have opened the door to the arbitrary and inadmissible evidence of "good prison conditions." The two concepts are unrelated. Trial counsel had no strategic reason for not using an expert like James Aiken. Trial counsel simply did not prepare even a minimally adequate mitigation case.

The state also urges this Court to adopt another legal error regarding "opening the door"—that calling James Aiken would have allowed the prosecution to introduce evidence of petitioner's bad conduct in prison. Whether petitioner called James Aiken or not, the door to such aggravating evidence was already wide open because it is relevant to assessing petitioner's character. Jurek v. Texas, 428 U.S. 262, 274-75 (1976) (holding that a jury may consider a defendant's future dangerousness); Skipper, 476 U.S. at 5 ("The Court has therefore held that evidence that a defendant would in the future pose a

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danger to the community if he were not executed may be treated as an 'aggravating factor' for purposes of capital sentencing."). The solicitor was free to call his own witnesses regarding petitioner's future dangerousness, including any witnesses who could testify regarding petitioner's alleged bad conduct while incarcerated. Again, any "strategic" decision not to call a prison adaptability expert because it would open the door to aggravating evidence would have been a mistake of law by trial counsel. The Court's "two-edged sword" analysis in the Amended Order compounds trial counsel's mistake of law. Am. Order Dismissal at 95.

The prejudice on this record is overwhelming. The jury failed to hear Aiken's testimony, which was presented at PCR, that Lindsey could adapt to prison and that a prison could manage him. Aiken's opinion was not seriously challenged by the state at the hearing. Had the jury heard Aiken's opinion, it would have placed petitioner's history in the proper context for consideration of a life sentence. Aiken's testimony would have given the jury the ability to understand the severity of a life sentence and that the DOC manages inmates like Lindsey successfully every day.

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Furthermore, the prejudice in this case is manifest because of the admission of testimony from Sligh, which was **alone** sufficient to reverse the death sentence in Burkhart. Here, like in Burkhart, Sligh testified that petitioner would have cell mates, access to the yard, could have a job, go to school, meals in a cafeteria, recreation programs, and visitation. Trial Tr. 1908, l. 5 – 1912, l. 15. Trial counsel failed to object to this inadmissible evidence, which meant that the jury heard only the arbitrary factor introduced by Sligh's testimony. Trial Tr. 1908, l. 5 – 1912, l. 15. Trial counsel utterly failed in his responsibility to ensure that the jury heard that petitioner could adapt to

prison and that a prison could manage him. Simply put, trial counsel did not understand the law governing the admissibility of evidence during the sentencing phase and failed to prepare accordingly. Petitioner was prejudiced by this failure. This Court should amend its judgment and grant petitioner a new sentencing hearing on this issue.

2. The Amended Order Erroneously Disregards the ABA Guidelines

Many of this Court's legal errors in the Amended Order of Dismissal stem from its acceptance of the state's position that the ABA Guidelines should not be used to measure trial counsel's performance. See, e.g., Am. Order Dismissal at 15-16, 87, 165, 175-76. In dismissing the ABA Guidelines as a measuring stick, the Court relies on the case of Bobby v. Van Hook, 558 U.S. 4 (2009). Nothing in Van Hook represents a reluctance by the United States Supreme Court to use the ABA Guidelines to measure an attorney's performance. In Van Hook, the Supreme Court simply reversed the Sixth Circuit for applying **the 2003 Guidelines** to the conduct of trial counsel **in 1985.** Van Hook, 130 S.Ct. at 17. The Court emphasized the "narrow grounds" of its holding in Van Hook and that it should not "be regarded as accepting the legitimacy of a less categorical use of the Guidelines to evaluate post-2003 representation." Id. at n.1. In a later decision, the Court recognized that the comment in Van Hook that the ABA Guidelines are not "inexorable commands" does not permit them to be ignored. See Padilla v. Kentucky, 130 S.Ct. 1473, 1482 (2010) (citing the "ABA Standards for Criminal Justice").

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Van Hook has never been cited by a South Carolina appellate court. Van Hook has never been cited by the Fourth Circuit. However, the ABA Guidelines have been cited by our Supreme Court in capital cases. Ard v. Catoe, 372 S.C. 318, 332, 642 S.E.2d

590, 597 (2007) (citing the 2003 Guidelines); Council v. State, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008) (citing 1989 Guidelines). The United States Supreme Court has also repeatedly referred to the ABA Guidelines in capital cases. Wiggins v. Smith, 539 U.S. 510, 524 (2003); Rompilla v. Beard, 545 U.S. 374, 387, n.6, n.7 (2005); Williams v. Taylor, 529 U.S. 362, 396 (2000).

Adopting the state's position and disregarding the ABA Guidelines led this Court to erroneously conclude that trial counsel did not perform deficiently when he failed to begin investigating and preparing a mitigation case until a month before trial, failed to prepare witnesses and family members, and failed to retain, prepare, and use expert witnesses. Trial counsel failed to prepare.

The reversal of a PCR court's decision in a capital case decided since this Court issued the initial Order of Dismissal further proves that our Supreme Court will not tolerate invented strategic decisions. Weik v. State, 409 S.C. 214, 761 S.E.2d 757 (2014). In Weik, just like petitioner's case, trial counsel failed to uncover and present mitigating evidence. Id. at 233-38, 761 S.E.2d at 761-70. Our Supreme Court held that trial counsel's failure indicated "there simply was no mitigation strategy regarding Petitioner's social history." Id. at 236, 761 S.E.2d at 768. "Decisions made in ignorance of relevant, available information cannot be characterized as strategic." Id. Petitioner's case is very similar to Weik in that trial counsel failed to prepare a mitigation case. This Court erred in crediting trial counsel with strategic decisions when the lack of preparation meant that no such credit was due.

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3. The Amended Order Remains Unchanged and Substitutes the Judgment of the Attorney General for the Court

The above errors urged upon this Court by the state, and unfortunately incorporated into the Amended Order, demonstrate why our Supreme Court requires judges in capital PCR cases to draft their own orders. See Order of the South Carolina Supreme Court, dated September 30, 2014, remanding this case. See also Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992); Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004); Jefferson v. Upton, 560 U.S. 284 (2010); Anderson v. Bessemer City, 470 U.S. 564 (1985).

With all due respect to the Court's statements at the September 22, 2016, hearing, except for correcting errors pointed out by petitioner and cosmetic and formatting differences, the Amended Order is exactly the same as the first order, which was exactly the same as the proposed order submitted by the Attorney General. Respectfully, this Court has yet to comply with the Supreme Court's remand order or with Due Process. Petitioner renews his request that this Court recuse itself, or, in the alternative, draft its own order that complies with the Supreme Court's directive.

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WHEREFORE, Marion Lindsey requests this Court grant him a new PCR hearing before a different circuit judge; and, alternatively reconsider, alter and amend its Amended Order to find that Petitioner's Trial Counsel was ineffective, to vacate Petitioner's sentence of death and to grant him a new sentencing hearing.

Respectfully submitted,

David Alexander
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

Lara M. Caudy
Appellate Defender

October 21, 2016

ATTORNEYS FOR PETITIONER

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STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)	SEVENTH JUDICIAL CIRCUIT
Marion Alexander Lindsey)	CA NO. 2007-CP-42-2848
SCDC No. 6015)	
Petitioner,)	
)	
vs.)	**CERTIFICATE OF SERVICE**
)	
State of South Carolina,)	
Respondent.)	
)	

The undersigned hereby certifies that a true copy of the Post – Hearing Supplemental Memorandum in the above referenced case has been served upon the following by depositing in the United States mail, first class: The Honorable Paul M. Burch, Post Office Box 276, Pageland, SC 29728; Donald J. Zelenka, Esquire, Post Office Box 11549, Columbia, SC 29211; Alphonso Simon, Jr., Esquire, Post Office Box 11549, Columbia, SC 29211; Barry Joe Barnette, Seventh Circuit Solicitor's Office, Spartanburg County Courthouse, 180 Magnolia Street, Spartanburg, SC 29306; and Marion Alexander Lindsey, #6015, Lieber Correctional Institution, Post Office Box 205, Ridgeville, SC 29472, this 21st day of October, 2016.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 21st day of October, 2016.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

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MARIE BLACKLEY

ALAN WILSON
ATTORNEY GENERAL

November 10, 2016

David Alexander, Esquire
Division of Appellate Defense
P. O. Box 11589
Columbia, SC 29211

Richard W. Vieth, Esqure
Henderson Brandt & Vieth, PA
360 E. Henry Street, Ste. 101
Spartanburg, SC 29302

Re: Marion Alexander Lindsey v. State - 07-CP-42-2848
Respondent's Rule 59 Hearing Memorandum

Dear Counsel:

Enclosed please find copy of Respondent's Rule 59 Hearing Memorandum in the above-referenced case. By copy of this letter, I will be filing copy with the Spartanburg County Clerk of Court's Office.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: M. Hope Blackley, Spartanburg Clerk of Court
Honorable Paul M. Burch
Barry J. Barnette, Solicitor
David M. Collins, Esquire

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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
) RULE 59 HEARING MEMORANDUM
)
)
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 matter was remanded to the Court on September 30, 2014 for an entry of an Order pursuant to Pruitt v. State, 310 S,E,2d 254, 423 S.E.2d 127(1992) and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). On October 5, 2015, the Court filed an Amended Order Denying Post-Conviction Relief. On February 29, 2016, the Applicant filed a " Motion for Stay, For a New PCR Hearing Before a Different Judge, and Alternately, to Alter or Amend the Judgment Pursuant to Rule 59(E). On September 22, 2016 a motion hearing was held in Spartanburg. The Applicant was present and represented by appellate counsel David Alexander and Lara Caudy and original PCR counsel Richard Vieth. The Respondent was represented by Assistant Deputy Attorney General Donald Zelenka and Assistant Attorney General Alphonso Simon. At the conclusion of the hearing the Court requested memorandum of law.

RECUSAL OF JUDGE ISSUE

At the outset of the hearing, counsel Alexander made an extensive argument that Judge Burch should recuse himself from further consideration in the case. The essence of his argument was that the October 2015 Amended Order was not in compliance with the remand order of the Supreme Court because it only made superficial changes and contained no new legal or factual conclusions and no different case citations. In additional support of his argument, the Applicant provided the Court with *Doyle Lee Hamm, Petitioner, v. Commissioner, Alabama Department of Corrections, Respondent*, No. 15-8753, No. 8753, *Supplemental Brief of Petitioner* before the United States Supreme Court, a federal habeas corpus matter where he claimed the collateral order was "ghost-written" by the government and also cited another pending certiorari petition in *Gray v. Zook*, No, 15-9473. The United States Supreme Court denied certiorari on October 3, 2016 in *Hamm v. Commissioner. Hamm v. Allen*, 2016 WL 1259209, No. 15-8753 (U.S.S.Ct., Oct 3, 2016) (cert denied). Certiorari was also denied by the Supreme Court in *Gray v. Zook* on October 3, 2016. *Gray v. Zook*, No. 15-9473, 2016 WL 3002346 (U.S. Oct. 3, 2016) (Mem).

The Applicant urged that the recent order deprived Lindsey of due process of law and claimed that he was entitled to have a second judge for the mere purpose of determining whether an assertion by the Court that he read the order before signing it was a credibility determination. Lindsey's counsel indicated that the tribunal's integrity was in question by its actions.

The Applicant contended that the signing of a similar order from the original order violated the letter and spirit of the 2014 remand contended it required the Court to create a different order "from scratch" and asserted that the drafting of an order over the passage of time was impossible.

Respondent submitted at the hearing that recusal was not appropriate and that the order itself did not violate that mandates of the remand. In the September 30, 2014 Order, the Supreme Court issued a mandate to Judge Burch "[I][n light of the Court's concern with the frequency and severity of the drafting errors in the Order of Dismissal, and this Court's admonishments to PCR judges in Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004)." It was as follows:

> "we vacate the Order of Dismissal and remand the matter to the circuit court for the issuance of an amended order that complies with Pruitt [v. State, 310 S.C. 254, 423 S.E.2d 127 (1992),] and Hall [v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004),, and with S.C. Code Ann. § 17-27-80 (2003), to include specific findings of fact and conclusions of law on each issue presented, based on accurate references to the record and the applicable law. Petitioner may serve and file a new notice of appeal following the issuance of the amended order, or upon receipt of written notice of entry of an order ruling on any motion to alter or amend the judgment.

Marion Lindsey v. State, Appellate Case 2012-206087, Order (S.Ct.S.C September 30, 2014).

EARLIER PROCEEDINGS RELATED TO THE 2015 ORDER

On February 26, 2015, Judge Burch, though his law clerk made a request to both parties Petitioner and Respondent's counsel (each side) to provide him in the Microsoft WORD word processing format with the proposed orders that each side had previously submitted in 2011 to the hearing judge.

For reasons that remain unclear to Respondent, Petitioner asserts that this act of requesting the previously submitted orders from each side mandates Judge Burch's recusal from the responsibility in carrying out this Court's mandate from its order in Marion Lindsey v. State, Appellate Case 2012-206087, Order (S.Ct.S.C September 30, 2014) and the remittitur issued on October 16, 2014.

Respondent respectfully submit that the initial act of requesting **both parties** to submit in

WORD format prior orders, matters that are also matters of public record in this Court and the lower court's record, that each side submitted in 2011 does not violate this Court's mandate to Judge Burch. Marion Lindsey v. State, Appellate Case 2012-206087, Order (S.Ct.S.C September 30, 2014).

Judge Burch's subsequent action do not suggest that the mandate was "flagrantly disobeyed" as Petitioner suggests. He has merely requested both parties to submit matters that he had previously considered in a word processing format. Nothing in the mandate precluded the receipt of material already on file with the lower court and this Court, albeit in a Word processing format. Further, as Judge Burch's law clerk immediately stated upon receipt of appellate counsel Dudek's objection –

> **Counsel,**
> **Judge Burch was in no way requesting new proposed orders and I apologize if that was misunderstood from my communications with you. However, Judge Burch was requesting Word versions of the proposed orders previously filed and relating to the hearing that took place in July of 2010 for his review.**

Email from Law Clerk Samuel Thomas to Counsel – February 26, 2015 at 1:44 PM. (Exhibit 9 attached).

I.

Certain salient factors and communications are missing from the Petitioner's recitation from the proceedings. These additional matters undermine the impression of his current complaint and should have resolved Petitioner's anticipated concern and this Court's concern.

1. **October 10, 2014 email from Zelenka to Judge Burch and copy to Counsel Dudek]**

In the original Return to the first Petition for Extraordinary Writ , the Respondent included the parties' first email correspondence with Judge Burch on October 10, 2014 after this Court's September 30, 2014 Order. It was submitted the same day as and after Mr. Dudek's earlier emailed letter to below-signed counsel and after a personal discussion between both

counsel (but not the court) on the same date about their different interpretations of the Court's order and limitations on whether anything could be submitted to the hearing judge. This October 10, 2014 email to Judge Burch reads:

> Dear Judge Burch –
>
> Attached is an order from the South Carolina Supreme Court remanding the matter for issuance of an amended order? As you may be aware, the Petitioner raised an issue in the PCR appeal concerning the fact that the Respondent submitted a requested proposed order in the matter and asserted the failure of the Court to make corrections to my clerical and grammatical errors in the my submission suggested the order was not reviewed by you. Lindsey's Reply to Return to Petition for Writ of Certiorari, p. 2 ("The State Failed to Rebut the Assertion that the PCR Court did not review the State's Proposed Order Before Signing It.").
>
> In light of the issues presented before the Supreme Court, it has taken the action to remand for an amended [order]. **I would suggest a status conference with Mr. Lindsey's counsel concerning how to most efficiently resolve your needs in getting materials.**
>
> ***One of the Petitioner's counsel, Robert Dudek sent a letter to me that I received and discussed with him today which states his opinion that the Supreme Court's order forbids the submission or a solicitation of a proposed order from the parties.*** **I think the Supreme Court's order speaks plainly on the issue with its references to Pruitt v. State and Hall v. Catoe and directions to the court on remand.**
>
> - By copy of this email, I am advising opposing counsel of this contact.

October 10, 2014 4:39 PM Email – Zelenka to Judge Burch. Exhibit 1. (emphasis not in original and added).

2. October 10, 2014 Email from Robert Dudek to Judge Burch.

Shortly after the above email, on the same date, counsel Dudek emailed Judge Burch stating: "Judge Burch: I have attached the letter that Don referenced in his email below. We look forward to meeting with you in person at the status conference." In that email, counsel Dudek attached the October 9, 2009 letter. *October 10, 2014 4:58 PM Email – Dudek to Judge Burch. Exhibit 2.*

3. October 20, 2014 Email from Judge Burch's Law Clerk to Parties.

On October 20, 2014, Judge Burch's law clerk, Samuel Thomas emailed both parties stating the following in its pertinent part:

> Judge Burch has asked me to send you both this email stating that we have not yet received anything formal from the Supreme Court on this matter. We will, however, be reviewing the file and will be back in touch with you both in order to set up a game plan on how we should proceed from here in a few weeks.

October 20, 2014 Law Clerk Thomas Email to Counsel Exhibit 3.

4. October 20, 2014 – Follow-up emails concerning Remittitur from Counsel Zelenka and Clerk.

Following the law clerk's email that Judge Burch had not received anything formal from the Court, below-signed counsel emailed the law clerk a copy of the remittitur. Subsequently, Clerk of Court Daniel Shearouse emailed the Judge Burch a copy of the remittitur and order. *Exhibit 4*

5. January 23, 2015 Request from Law Clerk for Copy of Petitioner Lindsey's Proposed Order Granting Relief.

On January 23, 2015, counsel was contacted by Judge Burch's law clerk requesting a copy of the Proposed Order Granting Post-Conviction Relief submitted ***by Applicant's counsel Rick Vieth*** to Judge Burch on July 29, 2011. Below-signed counsel provided the Applicant's Proposed Order Granting Relief by mail on January 23, 2015. A copy of that was provided to appellate counsel at the same time. *There was no request made for Respondent's prior proposed order of dismissal and it was not provided at that time.* Respondent's below-signed counsel is not aware of any objection to the January 23, 2015 submission of their proposed order to Judge Burch or this Court pursuant to his request. *January 23, 2015 Cover Letter to Judge Burch for enclosures of Applicant's July*

29, 2011 Proposed Order Granting Post-conviction Relief. Exhibit 5.

6. February 26, 2015 Email Requesting Microsoft Word Versions of Both Side Proposed Orders submitted after the 2010 PCR Hearing.

Subsequent to the submission of the Applicant's earlier July 2011 Proposed Order Granting Relief to Judge Burch on January 23, 2015, Respondent's did not have any contact from the hearing judge or Lindsey's counsel about the case until February 26, 2015. At that time, Respondent received an email from Judge Burch's law clerk, Samuel Thomas to counsel Dudek, PCR counsel Rick Vieth and below-signed counsel requesting a Microsoft Word version of the proposed orders submitted after the 2010 PCR hearing. *February 26, 2015 Email Requesting Microsoft Word Versions of Both Side Proposed Orders submitted after the 2010 PCR Hearing. Exhibit 6*

7. February 26, 2015 12:36 Email with Respondent's June 2011 Proposed Order in Word (with at least one earlier made correction on page 153).

Below-signed counsel became aware of the hearing judge's request prior to lunch on February 26. Prior to leaving for lunch, counsel reviewed the document management system and found the Word version of Respondent's June 2011 Proposed Order of Dismissal in two locations in the office system and emailed it to Judge Burch and counsel with an explanatory email and copy of the petitioner's Reply to the Return to the Petition for Writ of Certiorari which documented early asserted grammatical and spellings errors in the public document pointed out to this Court by Petitioner previously concerning Respondent's below-signed counsel's earlier proposed order. In light of Judge Burch's request, Respondent would have provided the Court with a WORD version of Applicant's Proposed Order Granting Relief, if it had such a version that that proposal. However, it did advise Judge Burch's law clerk and counsel Dudek and Vieth that it did not have one. *February 26, 2015 12:36 Email with Respondent's June 2011*

Proposed Order in Word (with at least one earlier made correction on page 153) (Exhibit 7)

8. February 26, 2015 Email from Appellate Counsel Dudek to Judge Burch's Law Clerk at 12:39 PM.

Subsequent to Respondent' submission, appellate counsel Dudek objected to the submission of any proposed orders and asserted that it was "in violation of the Supreme Court's order. Appellate counsel reminded Judge Burch that he had earlier asserted in a letter to counsel (which he had copied Judge Burch) that his opinion was that the remand order "prohibits the submission or solicitation of proposed orders in any format." He further expressed their intent to file a formal motion that afternoon consistent with the position. *February 26, 2015 Email from Appellate Counsel Dudek to Judge Burch's Law Clerk at 12:39 PM. (Exhibit 8).*

9. February 26, 2015 Email from Judge Burch's Law Clerk Clarifying that He Was Not Requesting New Proposed Orders at 1:44 PM.

At 1:44 PM, Judge Burch's law clerk responded to counsel with the following Clarification that he was not requesting new proposed orders:

> **Judge Burch was in no way requesting new proposed orders and I apologize if that was misunderstood from my communications with you. However, Judge Burch was requesting Word versions of the proposed orders previously filed and relating to the hearing that took place in July of 2010 for his review.**

February 26, 2015 Email from Judge Burch's Law Clerk Clarifying that He Was Not Requesting New Proposed Orders at 1:44 PM. (Exhibit 9).

10. February 26, 2015 2:11 PM Email From Zelenka to Judge Burch's Law Clerk and Counsel

Respondent's below-signed counsel responded to Judge Burch's law clerk and the opposing counsel with the following response:

> Thank you for the clarification. I did not think the request was for new proposed orders either as stated in my intervening email after receiving Mr.

Dudek's.

> As noted previously subsequent to Mr. Dudek's letter to me, upon the Judge Burch's request in January, I had earlier provided the Court a copy of Petitioner Lindsey's Proposed Order Granting PCR - albeit in a pdf - without the same controversy or concerns expressed. (Copy of letter attached).

February 26, 2015 2:11 PM Email from Zelenka to Judge Burch's Law Clerk and Counsel (Exhibit 10).

Analysis

In his pleading and at the hearing, the Petitioner concedes that numerous changes were made by Judge Burch in the Amended Order from the Proposed Order, but suggests the changes, even the substantive changes, were not significant enough to comply with the Court's mandate. He complains that the mandate was not to correct the frequency and severity of the original drafting errors in the state's initial proposed order, but implicitly that it could not agree and adopt findings and conclusions made in the original order, but somehow was required to make different findings and conclusions in the matters before him; albeit on the same issues. In other words it had to be a complete re-write bearing no similarity (or consistency) to the initial order. Under Applicant's theory, if the Judge Burch agreed with those findings and conclusions, he had violated the Court's mandate, apparently even if the conclusions were consistent with his own findings.

Respondent respectfully submits that the logic of Applicant's assertion about the order is in error. The mere fact that the hearing judge on remand requested a copy of proposed orders that had been submitted by both sides in 2011 does not evidence a "violation" of the Supreme Court's remand order. If fact, the hearing judge had previously requested a copy of **Applicant's** proposed order granting relief in January 2015. Neither of these acts were in violation of the

order of remand. To the contrary, it suggests that the hearing judge was gathering material to comply with the order of remand.

Similarly, the act of entering an amended order with numerous changes, albeit maintaining consistency with his original order's conclusions does not suggest either non-compliance with the Court mandate or violate the precepts of Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). In Hall, the Court did not forbid the action Applicant suggests was in violation of it:

> **Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases,** we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency. **In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it.**

Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004).

The Petitioner's suggestion that this requires the removal of Judge Burch and for a new evidentiary hearing to be held *de novo* is simply misreading those actions of Judge Burch and the effect of this Court's remand according to Respondent's review of the Court's order of remand, the decision in Hall and Pruitt and the subsequent order denying the initial Petition for an extraordinary writ.

Further, the fact that Judge Burch requested proposed orders from each side in 2011 - without objection from either side in 2011 - was not a basis for the Judge Burch (or the Supreme Court) to disqualify Judge Burch nor were other actions which occurred during the original PCR proceedings. What is initially extraordinary, is that - again in this Motion before Judge Burch as he did in his certiorari Petition for the first time - the Petitioner makes assertions challenging his impartiality at the PCR hearing. *Petition for Extraordinary Relief*, p. 5, citing

App.p. 2714[1]; *Renewed Petition for Extraordinary Relief*, p. 8.

The direction by the Supreme Court to Judge Burch was clear and unambiguous - "the issuance of an amended order that complies with Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992),] and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004),, and with S.C. Code Ann. § 17-27-80 (2003), to include specific findings of fact and conclusions of law on each issue presented, based on accurate references to the record and the applicable law." The actions of Judge Burch in requesting prior pleadings made in the Court of Common Pleas during the original proceedings previously by each side and preparing his own order with a series of changes different from the initial proposed order and original order should not be deemed in direct violation of the Supreme Court's remand order nor suggest it was "flagrantly disobeyed" or in violation of the mandate of Hall v. Catoe.

1 Lindsey's appellate PCR counsel suggested a brief reference during one witness's testimony in overruling the State's objection to the relevance of testimony, suggested some bias against the Petitioner in favor of the State. This was a parsed and isolated comment in the context of the lengthy proceeding where fifteen (15) witnesses testified, 32 exhibits were submitted by the Petitioner and 14 exhibits submitted by the Respondent. Subsequent to the hearing, Judge Burch allowed counsel to wait for a transcript of the PCR hearing before post-hearing memorandum were received. App. 2933-2934. At conclusion of the hearing, the Court suggested briefing in 30 days after receipt of the transcript which was provided to Petitioner's counsel by August 24, 2010 and the Petitioner's post-hearing brief was filed October 26, 2010. Subsequent to request and the filing of requested proposed order from the Respondents on May 2, 2011, Judge Burch allowed Petitioner until July 27, 2011 to submit his proposed order. To characterize Judge Burch's handling of the case as "impatience" flies in the face of any reasonable reading of this record.

Applicant's complaint toward Judge Burch about his impatience with the case [suggesting an attitude against the Petitioner] is more extraordinary and incorrect when considered in light of what occurred prior to the case. Judge Burch appointed counsel Vieth and Collins on July 31, 2008 (after relieving prior appointments). An initial scheduling order was set on July 23, 2009 allowing for an amendment to be filed by August 1, 2009 (over one year after initial appointment) and setting January 1, 2010 for the hearing. Lindsey v. State, Scheduling Order, June 23, 2009. The Amended Application was filed August 6, 2009. App. 2210. On June 17, 2010, Respondents made a Return to the Amended Application and Second Rule 12(e) Motion for specificity. App. 2217. The hearing was convened July 19, 2010, nearly two years after counsel was appointed to represent the Petitioner. This is a far cry from impatience from Judge Burch.

Receiving a "fair trial in a fair tribunal is a basic requirement of due process." Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 876 (2009) (internal quotations and citations omitted). However, not all claims of judicial impartiality or bias rise to a constitutional level. Id. "In order to prevail in a deprivation of due process claim, a defendant must show a level of bias that made 'fair judgment impossible.'" Rowsey v. Lee, 327 F.3d 335, 341 (4th Cir. 2003) (citing Liteky v. United States, 510 U.S. 540, 555 (1994)).

Petitioner now asserts that the Supreme Court of the United States requires that a judge recuse himself where he has been involved in controversy with a litigant. Applicant's assertion is a mischaracterization of Supreme Court precedent. See Mayberry v. Pennsylvania, 400 U.S. 455, 465-66 (1971) (holding that a trial judge should not have continued to preside over a criminal trial after holding the pro se litigant in contempt for disruptive behavior and insulting remarks towards the trial judge); but see Ungar v. Sarafite, 376 U.S. 575 (1964) (holding that although a lawyer's challenge to the judge was disruptive, the insult did not carry such a potential for bias as to require disqualification). The Supreme Court has indicated that in determining whether a judge should recuse himself, a court must consider the specific circumstances in each case. Caperton, 556 U.S. at 881. The inquiry is an objective inquiry that requires a court to determine whether the "average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" Id.

The Applicant relies upon Anderson v. City of Bessemer, N.C., 470 U.S. 564 (1985) and Jefferson v. Upton, 560 U.S. 284 (2010) to support his conclusion. First, Jefferson concerns a far different situation than Lindsey's case. In Jefferson, the Court applied the pre-AEDPA version of § 2254, holding that the state court had denied the death-penalty petitioner a full, fair, and adequate hearing, because: (1) the state court had adopted factual findings drafted exclusively by

the state's attorneys, pursuant to an *ex parte* request from the state court judge; (2) the state court did not notify the petitioner of the request made to opposing counsel; and (3) the findings proposed by the state recounted evidence from a non-existent witness. See 560 U.S. at 292. Lindsey's case is both legally and factually distinguishable from Jefferson.

First, Jefferson never could have held, nor did it presume to hold, that this kind of adopted order is not entitled to deference. There, the state court adopted a proposed order that it had obtained *ex parte* from the State, *without notice to Jefferson*. Here, notably, the Court requested to be provided the prior proposed orders submitted by the parties prior to remand with notice to both parties. The Court then took a year after remand to consider the party's prior submissions and issued its order denying habeas relief in October 2015. In stark contrast to Jefferson, the circumstances here demonstrate that Lindsey received a full and fair hearing on all of his habeas claims.[2]

The Petitioner apparently asserts that the decision in Hall v. Catoe by the Supreme Court precludes assigned judges in post-conviction cases from either soliciting proposed orders from either party or adopting the order in full or part after aa review. Hall does not stand for that proposition. Rather, Hall states: "**we *strongly encourage PCR judges to draft their own findings of fact and conclusions of law* in death penalty cases,**" the opinion did not preclude it. Rather, in Hall, the Court pointed to the fact that "the evidence sufficiently indicates that the PCR judge

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2 Respondents would also note that the adoption of the proposed order by a state court has been held to not deny due process of law in many similar situations. Subsequent to Jefferson, the Missouri Court upheld the practice in Prince v. State, 390 S.W.2d 225 (Mo. App. 2013). Similarly in Miller v. State, 99 So.3d 349 (Ala.Crim.App. 2011), The Alabama Court found no due process violation in the submission and adoption of the proposed order. Groover v. State, 640 So.2d 1077 (Fla. 1994)(same – trial judge signs order three days after submission by prosecutor); Remsen v. State, 495 N.E.2d 184 (Ind. 1986) (same); . State v. Combs , 100 Ohio App.3d 90, 652 N.E.2d 205 (1994) ("In the absence of demonstrated prejudice, it is not erroneous for the trial court to adopt, in verbatim form, findings of fact and conclusions of law which are submitted by the state.").

spent an adequate amount of time reviewing the order before adopting it." Here, as in Hall, the prior proposed orders were provided to Judge Burch after remand in February 2015 and the order was not entered until October 2015 reflects evidence that the PCR judge "spent an adequate amount of time reviewing the order before signing it.

Here, nothing in the remand order prohibited the Court from re-soliciting the previously submitted orders from either or both counsel. To the contrary, the Court could already take judicial notice of its records. Although Applicant's counsel indicated its position to Respondent's counsel that the PCR court should not have been allowed to receive or review any previously submitted proposed order from the parties (which Respondent disagreed) did not prohibit the Court from requesting the original proposed orders of both parties. There was no prohibition in the remand order of the Supreme Court by any reasonable reading. Further, any assertion that the ultimate Order was so-called "ghost-written" by the Attorney General's office is a misstatement and mischaracterization. The prior proposed orders by each side were provided to the Court upon a specific request by the Court's law clerk. As stated in Pruitt v. State, each side had been given an opportunity to oppose the positions within the submissions prior to and after the orders were signed.

Here, Judge Burch noted at the September 22, 2016 hearing on the motion that at the time of the submission of the earlier orders in 2011, he reviewed them too hastily and did not pick up the typographical errors. However, and importantly, the Court stated "but the base order was exactly as I saw the case that was presented to me." September 22, 2016 Hearing Tr. p. 19, l.10-11. Judge Burch further declared there was a number of hours that he spent with his law clerk going over the order after remand and instructed his law clerk not to make corrections on purpose to prove to everyone that could be concerned "that I was involved in redrafting that

order and there were many changes made." Hearing Tr. p. 19, l. 16-19. Judge Burch declared he then initialed the pages that errors had purposely been left in to prove his point and advised the Supreme Court. Hearing Tr. 19-20. See for example Order, p. 21, 28, 84. Simply put, Judge Burch was not in flagrant disregard" of the Supreme Court's remand order as Applicant suggests..

Respondent submits that the decision to deny the motion to recuse was well-founded. To justify recusal, "the alleged bias must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." See Berry v. State, 267 Ga. 605, 607–608(3), 481 S.E.2d 203 (1997). Thus, "[s]imply because the judge had approved the [disputed previous] order in this case would not show bias or prejudice so as to prevent his reviewing his action fairly and impartially. Otherwise, no judge could ever rule on a motion to reconsider a previous order. Here the only bias alleged was that the judge, based on what he learned in the first evidentiary hearing and submission of an earlier proposed order, had previously ruled adversely to appellants' interests. As this was legally insufficient, the judge correctly denied the motion to recuse. To accept this proposition, the use of Rule 59 would be a nullity in PCR actions.

In an analogous situation, 28 U.S.C. § 455(a) requires a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. 455(a). A judge's partiality is to be evaluated on an objective basis and recusal is required where there is an appearance of bias or prejudice. Liteky v. United States, 510 U.S. 540, 548, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Recusal is required where "an objective, disinterested observer fully informed of the underlying facts [would] entertain significant doubt that justice would be done absent recusal." Diamondstone v. Macaluso, 148 F.3d 113, 120–21 (2d Cir.1998). Despite the

broad wording of the recusal statute, the decision of whether or not to recuse is a matter that falls within the court's discretion. See United States v. Yousef, 327 F.3d 56, 169 (2d Cir.2003) (review of district court denial of recusal motion is for abuse of discretion). Certain scenarios require an exercise of that discretion while others do not. Recusal is required, for example, where a judge has a personal bias or prejudice against a party. Diamondstone, 148 F.3d at 120. Where, however, the motion to recuse is based upon the argument that the judge is ill equipped to review his own rulings in the case in which the motion is made, there is generally no basis to grant the motion to recuse. United States v. Arena, 180 F.3d 380, 398 (2d Cir.1999); see Liteky, 510 U.S. at 555, 114 S.Ct. 1147 ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"). Here, the motion to recuse is based not upon an allegation of personal bias against Lindsey. Instead, it is argued that this court's impartiality is to be questioned because the remand motion specifically required the court to review its prior conduct. As a motion that calls upon the court to review its own ruling, it does not constitute a sufficient basis for automatic recusal. See Arena, 180 F.3d at 398.

REMAINING ISSUES

Ordinarily, a Rule 59 motion is necessary when the trial court overlooks an issue raised and presented, and fails to rule upon it. However, the motion is also required where the trial court does rule upon an issue which was not raised. The failure to bring a motion to alter and amend the judgment precludes complaining about the error on appeal. See Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993) (where an appellant learns for the first time when the appellant receives the order that the respondent would be granted certain relief, the appellant must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment to "preserve the record for appeal."); Godfrey v. Heller, 311 S.C. 516, 429

S.E.2d 859 (Ct. App. 1993) (following the rule in Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton). The reason is that if the party injured by the ruling makes the motion, the trial court may agree and change the ruling, obviating the need to appeal. If the trial judge does not agree and abides by the ruling based upon an issue not raised, the party may raise the issue on appeal. This is another example of the general rule of appellate practice that a trial court will not be reversed on a ground not ruled upon by the trial judge. Ness v. Eckerd Corp., 350 S.C. 399, 566 S.E.2d 193 (Ct. App. 2002) (if a trial judge grants relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal).It is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also a vehicle to seek "reconsideration" of issues and arguments. Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). A motion under Rule 59(e) long has been viewed as a "motion for reconsideration" despite the absence of those words from the Rule. Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). The Supreme Court expressed the view that there is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity. Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004).As the Supreme Court noted in Elam, a great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring

that all issues and arguments are presented to the lower court for its consideration. Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004).

Issues and arguments are preserved for appellate review only when they are raised to and ruled upon by the lower court. Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). Hence, our rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion:(1) a party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider to rule on it; and (2) a party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). South Carolina appellate courts do not recognize the "plain error rule," under which a court in certain circumstances is allowed to reconsider and rectify an error not raised below by a party. Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). As the Supreme Court noted, "Our mandatory preservation requirements make it doubly important that litigants generally be freely allowed to file a first, written Rule 59(e) motion without concern a later appeal will be deemed untimely." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004).

A.

In the motion hearing before the Court, Applicant focused on issues related to the introduction of mitigating evidence about Social Worker Jan Vogelsang's testimony, James Aiken's prison adaptability testimony and Dr. Melikian's expressed concerned about being adequately prepared. He also contends that the Court ignored the precedent of the U. S. Supreme Court in Wiggins v. Smith, 539 U.S. 510 (2003) asserting counsel failed to do an adequate

mitigation investigation. As related to correctional expert Aiken's testimony at the PCR hearing, counsel pointed out that the South Carolina Supreme Court has granted certiorari in the case of Marion Bowman v. State addressing a similar prison conditions issue arising from James Sligh's testimony. Hearing Transcript, p. 20-22. He claimed that evidence of good prison conditions to contrast with PCR expert Aiken's testimony that Lindsey could adapt to prison was never heard and that deceased counsel Bartosh never consulted a prison adaptability expert. These will be addressed within the arguments below

In his earlier written motion on February 29, 2016, counsel for the Applicant counsel set forth specific objections on the four general grounds for relief. Respondent will address these briefly in the order presented:

1. **Trial counsel rendered ineffective assistance, in derogation of the Sixth. Eighth. and Fourteenth Amendments to the United States Constitution by failing to conduct an adequate mitigation investigation and failing to prepare and present an adequate mitigation case at trial. (Motion, p. 4-10.)**

In his motion, he set forth rearguing his factual claims in items (a) through (g). Denial of the Rule 59 is appropriate because the Circuit Court reasonably addressed his arguments in its final order which he raised in his post-hearing memorandum prior to the Amended Order.

a.

In particular, concerning whether Mr. Bartosh waited too long to begin preparations for the trial and sentencing proceeding (a), the Court addressed the claim at Order at pages 171-176. The brief conclusory statement in the motion does not address and specific reason, other than a request for reconsideration. Motion, p. 4 – 5. Upon review of the order the reconsideration request should be denied. 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)); "[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.

b.

In this portion, Applicant contends that counsel failed to adequately prepare Dr. Melikian and failed to request a continuance so that she would be ready for trial. Motion, p. 5. This issue was addressed in the Order, p. 64 -86. As noted in the conclusion of that portion of the Order concerning the preparation of Dr. Melikian:

> 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. 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). This allegation must be denied.

Order, p. 82 – 84. Respondent submits that further fact-finding or reconsideration is not necessary.

Further, his request to reconsider whether counsel should have sought a continuance so

that Dr. Melikian could have been better prepared. The Court addressed this also in §IV of the Order at pages 84 – 86. As the Court found "[T]he Applicant has only shown that she wanted more time, but not that counsel was deficient in failing to make the request nor any likelihood that it would have been granted." Order, p. 85. The Court found that even with the period of time since the trial Dr. Melikian's opinion of the particular diagnosis did not change, only an opinion – "driven in part by a revelation that Lindsey was intentionally feigning mental illness in 2003 and 2004 - the it suggested the severity of his depression was more severe in 2002" - the Applicant has made no probative showing that there was a reasonable probability that the result of the proceeding would have been a life sentence - nor even that Judge Few would have granted a continuance. To the contrary, the evidence was that he would have likely denied it - through her own testimony - and that she was directed by Mr. Bartosh to get the job done." These conclusions and finding do not require reconsideration in light of the record support.

c.

In this subsection, Applicant re-asserts that counsel "allowed" Lindsey to take the advice of a jailhouse lawyer to feign mental illness. Motion, p. 5. This issue was addressed in Order at pages 34-57 as allegation I (A). The Court reasonably found that the Applicant had failed in his burden of showing counsel's deficiency in failing to thwart these actions. Under a Strickland analysis, the matter must be viewed from trial counsel's perspective at the time of the trial in 2004. The Court reasonably found that the fiction of Jimmy was imbedded into the meetings between counsel and Lindsey throughout the relationship from 2002 through the trial, as revealed through counsel Brannon and Lenora Topp's credible testimony. As revealed in the trial testimony and questioning of Dr. Melikian and the pretrial testimony of Dr. Narayan (ROA 133-135), there was evidence of malingering and evidence from testing done by Dr. Brawley and

the state hospital that reflected he was not malingering - other than the vision of Jimmy. In fact, at that pretrial competency hearing, Dr. Narayan stated that morning: "we didn't find any evidence of his malingering symptoms today. There's no evidence of that . But we did find evidence of that on the three occasions that Mr. Lindsey came to our institution." ROA 137, l. 13-16. Although Lindsey has now recanted, 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. Order, p. 55-58. Reconsideration of the Court's well founded conclusion is without merit because Applicant failed in his burden of proof of any deficiency by his defense counsel in failing to make Applicant reveal to them that he had recently concocted his imaginary friend "Jimmy" to feign mental illness in the hopes of avoiding a death sentence at the suggestion of other jail inmates.

d.

In his motion section I. (d), he again contends that counsel failed to spend sufficient time to learn of Lindsey's intent to feign mental illness. Motion, p. 5. This issue was addressed by facts and conclusions set forth in the Order, p. 55-57. As noted above, there is factual support for the legal conclusions made previously. Reconsideration should be denied.

e.

In subsection (e), Applicant asserts that trial counsel failed to respond to the issue of whether Lindsey was malingering during the penalty phase, specifically related to forensic psychologist Brawley's evaluation and testimony. Motion, p. 5-6. This issue was addressed by the Court within the Order, pages 57-60. Applicant has not asserted how the conclusion reached previously requires reconsideration. His complaint that Dr. Brawley was not called as a

witness on the issue of malingering cannot be deemed to be ineffective. Her results were presented to the jury on the testing that was done and relied upon by Dr. Melikian. 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. Similarly the failure to present the cumulative evidence from Dr. Brawley cannot be deemed prejudicial under the Sixth Amendment and Strickland v. Washington. The request is without merit to alter or amend.

f.

In subsection (f), Lindsey contends that counsel failed to preserve evidence or call Rod Tullis at trial. Motion, p. 6. The Court addressed Mr. Tullis's testimony in the Order at pages 140-145. Applicant asserts that former counsel Tullis had collected suicide notes and that Applicant's trial counsel Bartosh allegedly lost a tape received from Tullis containing a telephone message from Lindsey hours before the shooting. He complains that this reflected his state of mind before the killing and would have been useful if disclosed to his mental health experts as reflecting Lindsey was distressed and distraught and emotionally down on the message. PCR Tr. 169-170. Tullis testified that he had provided the tape and some suicide notes to the Public Defender's office and advised the prosecution of it. PCR TR. 172-173, 187-189. Tullis stated he had not given the tape or copy to the prosecution. Hearing Tr.p. 189-190. Dr. Melikian testified that she was aware of suicide notes, but had not seen them. Similarly, she

stated she was not aware of the telephone call message to Rod Tullis and claimed it would have been useful to understand his mental state close to the time of the offense. PCR Tr. 621-22. Evidence also was present that Lindsey had told Dr. Brawley of suicide attempts which she shared with Dr. Melikian prior to the trial. PCR 87- 88. Importantly, Doug Brannon testified that he did not have a tape from Tullis when he handled the case. PCR Tr.p. 66. As noted within the Order evidence of the Petitioner's mental state was being evaluated prior to the trial. In making a conclusion concerning Dr. Melikian, the Court concluded:

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

Order, p. 83. This implicitly suggests that no one had heard the telephone message other than Rod Tullis or that Lindsey had ever confirmed making such a call. Nevertheless, the diagnosis remained the same. Respondent do not assert that the Court needs to resolve the factual conflict between Mr. Tullis who claimed he received a phone message and cassette tape of the message and counsel Brannon who stated that they did not have such a tape during his representation. Since evidence that Lindsey was on suicidal several weeks before the incident was presented to the jury was presented, even if such a cassette tape existed at some point, it was not presented at the proceeding or to any evaluators either at the time of the trial or since.

Respondent submits that failure to call Tullis was not ineffective where 6th Amendment prejudice cannot be shown. Similar evidence was presented through Dr. Melikian and other lay witnesses about the Petitioner's mental state surrounding the incident and the basis for it arising from the separation from his children. She further testified about his expressed intent to commit

suicide that date. App.p. 2012-2013. Evidence was also presented that Petitioner was in a suicidal state due to the events around the time of the incident. During the guilt phase, it was developed through Celeste Nesbitt about the relationship between the Petitioner and the victim and her intent to divorce Lindsey. ROA. 1540, 1557-61. Further, it was developed that Nell was not allowing for Lindsey to see the children and that she had blocked his telephone calls. ROA App.p. 1675-76. Counsel developed that there was a head injury to Lindsey at the incident and he had declared that he had shot himself in the head. ROA App.p. 1674. Respondent submits that the jury had a reasonable understanding from expert and lay witnesses about the Petitioner's mental state at the time. Although there is a factual issue concerning the existence and receipt of an answering machine tape, evidence supports that Tullis indicated to counsel Bartosh that Lindsey had called his office at some point and threatened to commit suicide. In light of the other evidence presented, including the evidence of his self-inflicted head wound on that date, the absence of Tullis's testimony does not undermine confidence in the verdict, applying the Strickland standard.

The Applicant failed in his burden of proof of showing its existence and the impact, if any of its value. To suggest otherwise is pure speculation. Reconsideration must be denied.

g.

In his motion at (g), he makes a contention that the reconsideration is proper because Judge Burch erred in concluding that the counsel adequately presented the history of mental illness and impairment in Lindsey's own family, by not adequately interviewing them to learn of their own illnesses and failing to present them with a basis for admission of the evidence in mitigation. Motion, p. 6-7. This issue was addressed fully in the Order at pages 86-87, 99-168. Other than conclusory statements, Applicant has failed to state with specificity any matter

missed or mistaken fact relied upon. There is record evidence to support the Court's conclusions 163-168. This portion of the motion must be denied.

h.

In this portion of the motion (h), Applicants reasserts a claim related to failing to prepare witnesses to testify. Motion, p. 7. In particular, he claims it relates to a failure to present witnesses to request mercy and present arguments related to such a request. Id. Initially, he asserts it related to paramedic Vincent Bell. The Court addressed his testimony at Order, p. 168-171. Apparently, he contends that he wanted the jury to hear a comments he made to Bell at the scene about the crime because his wife was fooling around with somebody, the fact he shot himself and to let him die. PCR Tr. 168-169. The Court reasonably concluded it was not deficient or prejudicial. Order, p. 170-171.

In the next portion of witnesses, he points to Bill and Patsy Burton. Motion, p. 7. These witnesses were addressed in the Order at pages 25-26, 60-64, 99-102,107, 136-140, 145, 147-149, 151, 157, 161-162. As to Bill Burton, he testified before the jury and requested: "please have mercy on him." ROA 2076. Concerning Patsy Burton who was not called and would have testified similarly, the Court's earlier conclusions support a finding that deficient performance was not shown by the failure to call her as a witness. The Court concluded that "As in Sapp, there is cumulative evidence of family and friends requesting mercy. He has failed to establish Sixth Amendment prejudice. 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)." Order, p. 64. See also, Order, p. 164. Respondent submits any request to alter in reconsideration must be denied.

Concerning his mother, Virginia Lindsey, her trial testimony and post-conviction testimony was addressed in the Order at pages 22-24, 62, n. 11, 63, 86, 103-105, 108-109, 110-126, 144-146, 158-159. Virginia Lindsey testified to the 2004 jury that: "Marion 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. 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. 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 Court reasonably denied this allegation in its Order, p. 62-63. See also, Order, p. 86. The Court reasonably also concluded that "a review of the trial testimony of Virginia Lindsey (guilt and penalty), cousin Chris Wilkens (guilt and penalty) and the penalty phase testimony of friend Bill Burton, Leon McDowell and Steve Pilgrim reveal that the essential family background was revealed to the jury. Importantly, concerning the depth of the investigation, the summaries of the interviews that Ms. Topp had with Marion Lindsey and Marion Lindsey's mother in 2004, buttressed by Ms. Topp's own PCR testimony about what she learned in 2004 are virtually in the same detail that the post-conviction evidence from the family members and Jan Vogelsang's testimony in the PCR hearings." Order, p. 157-158. The request for reconsideration should be denied.

In his next specification, he makes the same assertions about Bessie Smith's trial and

PCR testimony. The Court earlier addressed Ms. Smith, the Applicant's aunt, in the Order at pages 27, 62-63, n.17, 86-87, 99-100, 104, 108, 109-110,116-118, 120-127, 129-130, 132-134, 145, 149-150, 153, 159, 163-164. The Court found "that the investigation concerning the social history of the family was constitutionally adequate. In addition to this information, the 2004 defense team was aware that there had been mental health concerns for Bessie Smith who had tried to commit suicide, and Steve Pilgrim who at least had nerve and anxiety problems." And that 6th Amendment prejudice had not been proven. Order, p. 163-164. The Court had also held that "at the PCR hearing, the Applicant present a series of family members and friends who testified concerning the family history and their knowledge of Lindsey's life and worth. Implicitly, the Applicant was claiming that such evidence would assist in presenting a background to a social historian and could have been presented in more detail or in a more persuasive manner. However, contrasted with the information that counsel had in 2004 and what was used at trial; it reflects a reasonable decision not to use 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." Order, p. 109-110. Respondent submits that the Court properly applied Strickland to the facts of the case. The motion for reconsideration and altering judgment must be denied.

In the next specification, he makes similar assertions about Steve Pilgrim and Timothy Sims. The Order addressed Pilgrim's trial and PCR testimony at pages 23, 33, 63, 63, n. 16, 86, 111, 116, 122, 126-131, 145-146, 150, 155, 157, 163-164. The Order addressed Timothy Sims at pages 33, 105, 113, 118-119, 131-136, 145, 149, 160. As with the other family members, the Court concluded "that the essential family background was revealed to the jury. Importantly,

concerning the depth of the investigation, the summaries of the interviews that Ms. Topp had with Marion Lindsey and Marion Lindsey's mother in 2004, buttressed by Ms. Topp's own PCR testimony about what she learned in 2004 are virtually in the same detail that the post-conviction evidence from the family members and Jan Vogelsang's testimony in the PCR hearings." Order, p. 117-118. See also Order, p. 163 (finding investigation concerning the family history was adequate where it revealed nerve and anxiety problems of Pilgrim). Reconsideration is not warranted where the record supports that Strickland was properly applied to find neither deficient performance or prejudice.

Finally on this assertion, Applicant notes generally that the counsel failed to adequately argue or preserve the record concerning mercy. Motion, p. 7 (h). This issue was specifically addressed in the Order at pages 60-64. The Applicant has failed to show how reconsideration is appropriate or required. It must be denied.

i.

In allegation (i), he contends that the counsel failed to adequately prepare or present EMS workers related to Lindsey's state of mind after the shooting. Motion, p. 7-8. The Court specifically addressed this issue at Order, pages 168-171. The Court found that neither deficient performance or prejudice was shown under Strickland. Order, p. 170-171. Applicant has not suggested in any manner why reconsideration or altering the judge is required. It must be denied.

j.

In specification (j), Applicant contends the Court erred in concluding the argument only concerned the amount of time counsel spent in investigating and preparing a mitigation defense, where it was related to the evidence the jury never heard or the manner the witnesses testified.

Motion, p. 8. First, the Applicant ignores that the portion of the Order Applicant appears to be complaining about Order, p. 171-178, was a judicial response to the briefing in the Post-Hearing Memorandum of Law by the Applicant's PCR counsel, at Applicant's October 26, 2011 Post-Trial Memorandum, pages 54-58, which was limited to an argument concerning "time-spent." Further, the Applicant neglects that his concerns in his present motion were actually addressed in the Order at pages 157-167 which also addressed investigative preparation and presentation of the witnesses and whether deficient performance and prejudice had been shown. Reconsideration need not be required where it appears that the matters were addressed in other portions of the Order from a reasonable reading rather than a parsed reading.

k.

In item (k), Applicant contends the Court ignored the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. Motion, p. 8-9. To the contrary, the Court specifically addressed the guidelines in the Order, p. 14-16, 176. The Applicant continues to assert that the guidelines are a mandatory checklist rather than a guide. Motion, p. 8-9. The Court concluded that the investigation was not deficient. Order, p. 176-177. The United States Supreme Court has "explicitly approved" using the ABA Guidelines "on attorney performance in effect at the time of a defendant's trial as 'guides to determining what is reasonable' performance by counsel." Padilla v. Kentucky, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). The Court has also clarified that " '[ABA] standards and the like' are 'only guides' to what reasonableness means, not its definition." Bobby v. Van Hook, 558 U.S. 4, 8, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009), quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052, 80 L.Ed.2d 674. It is clear that this Court was aware of the guidelines as a guide cited by Applicant during the presentation. In assessing whether counsel's performance was deficient,

courts look to such factors as what counsel did to prepare for sentencing, what mitigation evidence he had accumulated, what additional "leads" he had, and what results he might reasonably have expected from those leads. The reasonableness of counsel's investigation involves "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins v. Smith, 539 U.S. 510, 527 (2003). "[C]ounsel should consider presenting...[the defendant's] medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." Id. at 524 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 11.8.6, at 133 (1989)). The Supreme Court stated in Wiggins that the "investigation into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence." Id. However, it is also clear the Court determined its application of Strickland based upon the totality of the evidence. Reconsideration is not required.[3]

l.

In item (l), he makes a broad contention that the Court erred in concluding that Applicant had failed to show prejudice under Strickland, Motion, p. 9-10. He contends that the Court's determination was based upon a claim that the Court found that because counsel presented some evidence it was ipso facto not prejudicial. Motion , p. 9. However, Applicant fails to point to any portion of the Order where the Court made that simplistic assessment. The reason for that deficiency is because the Court did not apply that erroneous test. To the contrary, it clear that Court weighed the evidence, where any deficiency was found or asserted, the evidence that was actually presented to the jury with the evidence that was shown that it could have

3 This issue was also briefed in the Applicant's Post-Hearing Supplemental Memorandum (October 21, 2016), p. 6-8.

been presented to the jury and whether or not if the evidence have been presented whether there was a reasonable probability the result would have been different. Applicant's generalized characterization of the Court's conclusion is not supported by a reading of the Order.

2. **Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a social work expert who could testify regarding Marion Lindsey's horrible upbringing, his awful family history, and the effect this had on his mental state at the time of the shooting. Had trial counsel called an expert like Jan Vogelsang, the result of the proceeding would have been different. [Motion, p. 10-12]**

In this portion of the Motion, Applicant contends that counsel was ineffective in failing to hire a social worker who could have testified at trial about Lindsey's life and development. He asserts that the Court's emphasis about Lenora Topp was misplaced concerning her investigation because she did not testify at the sentencing. He further contends that the concern about Vogelsang's potential testimony in hindsight is a red herring because the State was already allowed to present evidence in aggravation in the penalty phase. Motion, p. 11. The Court addressed this issue in its Order at pages 99-168. In particular, the Court found that "the PCR testimony of Social Worker Vogelsang presented the particular dangers of presenting family background testimony" and revealed why the Applicant had failed to satisfy the prejudice prong of Strickland. Order, p. 145. Simply put, the plethora of negative information revealed by Vogelsang's PCR testimony. This was emphasized in the portion of the Order set forth at pages 164-168 where the Court determined that the prejudice prong had not been satisfied. New PCR counsel representing Lindsey may not have been sensitive to the probative power of this finding by the Court who heard the testimony of Ms. Vogelsang and how it undermined the value of her testimony in this particular case:

> Further, as pointed out in the cross-examination, the danger of using a social worker who relies frequently on anecdotal hearsay risks making a difficult

> case even worse. It would have presented an additional opportunity to focus upon certain errors in her presentation and negative factors related to Lindsey that would make a death sentence even more likely. In the questioning concerning her expertise in child custody matters, she admitted that a person with the characteristics of Lindsey should not have been allowed to have visitation without court supervision, if at all, even though he had to be reminded that there was evidence that Lindsey had feed beer to his baby son in a baby bottle. PCR Tr. 563. See ROA 1820 (Lindsey gave son a beer in a baby bottle). PCR Tr. 565, ll. 7-20. She was inconsistent on what family members - uncles or cousins - he was running drugs. PCR Tr. 578. She also reiterated Lindsey had a record of violence, not only toward Nell, but toward other females, including those he claimed to love. PCR Tr. 589. In confirming that his risk factors made it a high risk that he would end up committing the very act he committed, she also admitted that the risk factors she found are not treated in the prison system. PCR Tr. 593-94.

Order, p. 166-167. The Court then applied the appropriate standard that Applicant asked to be applied for prejudice. "To assess the probability [of a different outcome under Strickland], we consider the totality of the available mitigation evidence both that adduced at trial, and the evidence adduced in the habeas proceeding and reweigh it against the evidence in aggravation." Sears v. Upton, U.S. , 130 S.Ct. 3259, 3266, 177 L.Ed.2d 1025 (2010). As the Court concluded: " Here, the sentencing profile was not altered by the additional testimony of Ms. Vogelsang. Although she presented a social history of known poverty and lack of a father-figure - **known to the sentencing jury**, she also confirmed that he had become a controlling and violent person. Against the trial backdrop including the evidence in aggravation, as well as the family mitigation the jury actually heard, the burden of proof has not been met by Applicant." Order, p. 167-168. This ignores the fact that power of that negative evidence by Ms. Vogelsang was not presented to a jury at the trial – not that it could have otherwise been presented as Applicant suggests.4 Simply put, Strickland confidence in the verdict was not undermined by the failure to present Vogelsang at the sentencing hearing. Her testimony would

4 Applicant also complains about the lengthy presentation about Lenora Topp's investigation and questions it relevance. This issue was addressing investigation of mitigating factors as well as presentation of the factors at the sentencing proceeding.

have made a death verdict more likely. Reconsideration must be denied.

3. Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by hiring an inexperienced forensic psychiatrist one month before trial and failing to prepare her to testify. Margaret Melikian was ill-prepared in all respects for this trial. Trial counsel's decision to hire her and failure to prepare her was constitutionally deficient and prejudiced Lindsey. [Motion, p. 12-15].

In his motion, he initially contends that counsel was deficient in retaining Dr. Melikian only a month before trial and failed to give her complete records and violate the ABA guidelines concerning her late retention and limited preparation. As noted above at pages 21-22, this issue was generally raised in Section IV of the order at pages 64-87. The Applicant complains specifically the Court's conclusion that Applicant failed to show deficient performance because of a lack of specificity concerning the information she received and the lack of preparation as not being supported by the record. Motion, p. 13. Applicant claims that Dr. Melikian did not see the suicide notes written three weeks before,[5] did not know about the purported call to Mr. Tullis,[6] did not see photographs or pictures and had incomplete incident reports about Lindsey's self-inflicted injuries at the Detention Center.[7] Motion, p. 13.

In the order the Court addressed the limited as follows:

> . It is apparent that there was a difference in the quantity of material that Dr. Melikian reviewed in 2004 contrasted with this hearing. PCR 603. ***However, she was unable to state with any clarity what particular information she lacked in 2004 was critical to a revision in her assessment.*** In 2004, she had his medical records, the records from a psychiatric hospitalization when he was a teenager, the records from a head injury when he was an infant, his neurological records, and his school records. ROA 2003. She also had the reports from Hall Institute. PCR

5 See Order, p. 39, citing PCR Tr. 607-608 about suicide note.

6 See Order, p. 43, citing PCR Tr. p. 621-22 where Dr. Melikian testified that she was not aware of a telephone call to Tullis and opined that it would have been useful to understand his mental state close to the crime.

7 See Order, p. 42, citing PCR Tr. 615 concerning her testimony that she learned of the injury in the Detention Center from Lindsey, but did not see photographs.

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. 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). This allegation must be denied.

Order, p. 82-83 (emphasis added).

As with some of the earlier assertions in the Motion, this Order was in response to the earlier Applicant's October 26, 2011 Post-Trial Memorandum, page 49, wherein Applicant limited his argument in the following conclusory fashion

> Dr. Melikian needed information and documents related to Marion Lindsey's history in order to properly evaluate him and present her testimony during the sentencing phase of the trial. The defense team failed to perform a proper investigation to identify and locate the information needed by Dr. Melikian.
>
> Further, the failed to provide Dr. Melikian with the limited information they did have available to them. The defense team's failure to investigate Mr. Lindsey's background and to provide the information obtained to Dr. Melikian constituted ineffective assistance of counsel. There is a reasonable probability that the outcome of the sentencing phase of the trial would have been different if the defense team had not committed this error.

Applicant's October 26, 2011 *Post-Trial Memorandum*, page 49, As noted, the Applicant therein did not identify with any specificity any particular item of information or document. Further, during her trial testimony, Dr. Melikian identified the materials that she had reviewed which allowed her to give an opinion to a reasonable degree of medical certainty. ROA 2003, See Order, p. 76-77. Within the Order, the Court summarized Dr. Melikian's PCR and trial testimony. Order, p. 66-82. The Court fully considered the evidence and the Order was in context to the manner the allegation was raised in the post-PCR hearing briefing. Reconsideration and alteration is not required.

In this portion, the Applicant re-asserts that the defense team failed to prepare Dr. Melikian concerning "Jimmy" and accusations of malingering and allegedly failed to provide

Dr. Melikian with prison record's that "Jimmy had taken over his body and was responsible for the shooting,"[8] among other things concerning his interaction with counsel about "Jimmy."[9] Motion, p. 13-14, The Court specifically addressed this "Jimmy" and malingering issue in the Order at pages 34-60. This same assertion was essentially addressed above at pages 23-24., The proper assessment was fully addressed in the analysis of Dr. Melikian and the Applicant's malingering in the creation of "Jimmy." Order, p. 55-57. Since these matters were inherently addressed and considered by the Court in the Order, Respondent submits that reconsideration and alteration of the original judgment was not required.

Further, Applicant seeks reconsideration of the Court's "double-edge sword" assessment. Motion, p. 14. This appears to be a reference to the Order at page 65-66. The Court order addressed the fact that Dr. Melikian's restructured testimony at the PCR hearing additionally presented evidence that was more aggravating about the Applicant's character. Although at the sentencing, the State was able to impeach and mitigate the effect of her testimony, the restructured PCR testimony still presented significant opportunity to again challenge her findings and conclusions as addressed within the Order. The Applicant's current speculation that delay would have allowed her to better withstand cross-examination is not the test where her ultimate diagnosis remained the same. As stated earlier, at the time, Jimmy existed from counsel's and Dr. Melikian's perspective and was part of that diagnosis that the defense had. The suggestion to recast the facts as Applicant wants to do is not what counsel was dealing with in the sentencing proceeding. The Court's assessment properly applied the mandates of Strickland in denying relief where prejudice was not proven by the Applicant by

8 This was noted in the Order at page 41-42 in summarizing Dr. Melikian's testimony at PCR Tr.p. 615, ll. 6-16.

9 This was addressed in the Order, p. 41 and particular p. 41, n.7 summarizing Dr. Melikian's testimony at 614-615 and Doug Brannon's testimony at PCR Tr.p. 343-36, 613.

their retrospective assertion Reconsideration and alteration of the Order and judgment is not necessary.

4 Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a prison adaptability expert who could dispute the State's aggravation evidence. Trial counsel presented nothing to counter the State's evidence that Lindsey posed a future danger.

In the final portion of the Motion, page 15-17, the Applicant contends that counsel was ineffective in failing to present a prison adaptability expert. The Applicant contends that the Court erred in concluding that there was "no showing" that Lindsey would have been adaptable to prison, claiming the Court disregarded James Aiken's testimony and speculated regarding the existence of a trial strategy in failing to put up such evidence. Motion, p. 16, ¶ 1. The Court addressed the issue in the Order at pages 87 through 99. Applicant claims that Aiken's opinion – standing alone – that Lindsey was adaptable to prison – was sufficient to demonstrate prejudice. He claims that because his case which involved the shooting of his wife in a public place "met only the bare minimum of qualification under the statutory aggravator" and therefore the evidence could have made a difference. Motion, p. 17.

The Court's order addressed each of the assertions. First, the Order addressed the lack of proof that Lindsey would have been adaptable specifically at Order, p. 87-88, 93-99. Respondent submits that the Court properly denied this 6th Amendment claim. Deficient performance has not been shown. Respondents do not disagree that evidence concerning prison adaptability by lay or expert witnesses as a response to claims of future dangerousness and the Petitioner'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.[10] While we agree that defense

[10]*See generally Skipper v. South Carolina,* 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)

counsel did not retain an expert in this area, it is clear that the defense team ***considered*** the issue.

The evidence concerning that of the defense team consideration of the prison adaptability issue is shown by the fact that counsel Karen Quimby had included in her notes and summaries that future adaptability to prison life was a statutory mitigating factor. App.p. 2583, PCR 249. (Respondent Exhibit 18). In fact, at some point, the reference to prison adaptability evidence was crossed out, suggesting consideration and rejection. See, App.p. 3071. Also included in the defense team material were the records of SCDC concerning the earlier incarceration and records from the Spartanburg Detention Center concerning his disciplinary history. App.p. 2566 - 67; PCR 282-283. In addition, counsel Quimby noted that evidence of prison adaptability could be introduced from a clinical psychologist. App.p. 2546; PCR 262. 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. App.p. 2335-37; PCR 51, 53. In addition, counsel were aware of the jail disciplinaries that Lindsey had been involved in from the records and his own visits in the jail where he was locked down. App.p. 2336; PCR 52.

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

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

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(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).

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

The Court concluded a trial counsel's not presenting this expert future dangerousness testimony "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Order, p. 95. There is support for the Court's conclusion in the record.

First, the Court concluded that Aiken's opinion that Lindsey would not be an unreasonable risk to harm guards or fellow inmates in prison was based in large part on the fact that prison authorities would classify him as a maximum security inmate based on his murder conviction. Order, p. 96. His opinion did not focus on any mitigating lack of propensity to violence in his character - because as shown he had propensity for violence and anger, but 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). [11] PCR Tr.p. 216- 224 They also serve to emphasize the point, not favorable to Lindsey, that the prison system would classify him as a

[11] Similar testimony may be inadmissible in some other states, including Virginia. See, Morva v. Commonwealth, 278 Va. 329, 351, 683 S.E.2d 553, 565 - 566 (Va.,2009) ("Whether offered by an expert, or anyone else, evidence of prison life and the security measures used in a prison environment are not relevant to future dangerousness unless it connects the specific characteristics of a particular defendant to his future adaptability in the prison environment").

high security inmate because it would consider him to present a potential for violence. PCR Tr. 216-217. Aiken clarified that his opinion was only that Lindsey could be managed not to create an unreasonable risk of harm. PCR Tr. 224. Aiken noted that Lindsey "has issues in controlling his anger" just like many other inmates. PCR Tr.p. 225.

The Court reasonably concluded that a reasonable defense attorney could simply conclude that the adaptability experts' core opinion - that he could be managed and not be an unreasonable risk of harm to inmates, guards and the public - in spite of his having recently violently attacked a jailer and a history of jail incidents -was weak and would not persuade Lindsey's jurors. Additionally, a reasonable lawyer would have known the Aiken adaptability evidence focused more on the prison's ability to control Lindsey and all inmates, rather than Lindsey own character, 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.[12]

Further, the Court correctly determined that Sixth Amendment prejudice was not shown by the failure to present similar testimony by James Aiken in 2004. Order, p. 97. As shown in the cross-examination before the PCR Court, the benefit in mitigation of such testimony was weakened and could have made a death sentence more likely rather than less likely. The risks of this generalized adaptability

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

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). The failure to present similar evidence from Aiken has been found by other courts to not be ineffective assistance of counsel. See Brant v. State, 197 So. 3d 1051, 1070 (Fla. 2016), reh'g denied, No. SC14-2278, 2016 WL 4446453 (Fla. Aug. 23, 2016) (Specific testimony that Brant was generally a nonviolent person and a good prisoner who would likely be able to adapt to prison life without causing any further harm to anyone would have added little to the evidence that was presented).

In his October 21, 2016 Post-Hearing Supplemental Memorandum, Applicant asserts for the first time that prejudice from the failure to call a similar witness to Aiken was present because in the penalty phase of the trial, the State called James Sligh concerning that Lindsey would have had access to the yard, possibly gone to school and other matters. This evidence was summarized by the Court in the Order at pages 32-33, citing ROA p. 1908-1917. He complains that the failure to call Aiken enhanced the potential prejudice from the evidence that he claims was a violation of the post-trial decisions in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005) and State v. Burkhart, 271 S.C. 482, 640 S.E.2d 450 (2007).[13] [See, e.g., Kornahrens v. Evatt, 66 F.3d 1350, 1360 (4th Cir.1995) ("[T]he case law is clear

13 The Applicant's case was tried May 2004. The Applicant now notes that counsel did not object to the testimony in 2004 based upon an argument similar to Burkhart which was decided in 2007. An issue concerning the failure to object to the evidence was not presented at any time prior to this Rule 59 motion. To the extent he is attempting to raise a new ground of ineffective assistance of counsel which was never litigated at the time of the hearing or within any application, it is not properly before this Court. A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but

than an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law."); see also Johnson v. Armontrout, 923 F.2d 107, 108 (8th Cir.1991) (stating that "counsel's failure to anticipate a change in existing law is not ineffective assistance of counsel")].

The Applicant also contends that Aiken's testimony was not seriously challenged at the PCR hearing. This is a misreading of the record. The Court's conclusion's recognized the weakness of the potential Aiken evidence in contrast to what the jury heard and the problems with the opinion. As noted, Aiken unsuccessfully attempted to mitigate the fact of Lindsey being in a prison anger management program and his prior history of violence in the prison, including being gassed to control his behavior which was developed in his testimony. PCR Tr.p. 216 -218. Aiken also based his ultimate opinion on the fact that Lindsey had not previously been in a "security threat group" or "gang" based upon his information before his death sentence. Based upon the fact that he was not in a gang, he thought SCDC could manage him. However, Applicant ignored that Aiken's ability to render an appropriate opinion was impeached when he acknowledged that since his sentence, he had been in two fights with inmates on death row when SCDC was unable to manage Lindsey and prevent violence, contrary to Aiken's mistaken prediction. PCR Tr.p. 223-224. The Court was reasonable in questioning that Lindsey's prior prison violence history equated with an opinion that he would be adaptable to prison in the future when he had not been in the past.

In his recent filing, Applicant equates this case with Weik v. State, 409 S.C. 214, 761 S.E.2d 757 (2014). He claims that the Court created an "invited strategic decision" which is not tolerated by the Court in Weik. This case is not similar to Weik. Available counsel confirmed their awareness of the admissibility of prison adaptability evidence. Counsel also confirmed their knowledge of Lindsey's prison disciplinaries and violent history. Although the precise reasoning why counsel Bartosh did not pursue adaptability evidence, his failure to automatically seek out an expert who would state that the

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was not. Dixon v. Dixon, 362 S.C. 388, 608 S.E.2d 849 (2005)(issue raised for first time in Rule 59, SCRCP, motion is not preserved for review). See Brailsford v.. Brailsford, 380 S.C. 443, 448, 669 S.E.2d 342, 345 (Ct.App.2008) (holding issue is not preserved for appeal where it was never presented to the trial court prior to the filing of the motion to alter or amend); Eaddy v. Oliver, 345 S.C. 39, 44, 545 S.E.2d 830, 833 (Ct.App.2001) (a party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial).

prison system can manage all inmate who are not members of a prison gang, when the client had been involved in prior prison and jail violence, including situations involving being gassed is not surprising.

Respondent submits that the Court reasonably assessed the thorough presentation of the horrific evidence in aggravation with the omission of proffered prison adaptability evidence and determined that it would not have undermined confidence in the death sentence verdict. He has failed to show on this unique record which included a plethora of evidence about his criminal character and incident of violence and misbehavior in a detention setting that there is a reasonable probability that the result of the proceeding would have been different under *Strickland*. Reconsideration and amended under this Motion is not required.

CONCLUSION

WHEREFORE, Respondent submits that the Motion to Alter and Amend dated February 29, 2016 to the Order of the Court filed October 2, 2015 should be denied.

Respectfully submitted,

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Attorney General

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By: _____
ATTORNEYS FOR RESPONDENT

November 10, 2016

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

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Respondent's Rule 59 Hearing Memorandum in the foregoing action by depositing copies in the United States Mail to:

David Alexander
Appellate Defender
Division of Appellate Defense
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Columbia, SC 29211

Richard W. Vieth, Esquire
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This 10th day of November, 2016.

DONALD J. ZELENKA
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Wanda H. Carter, Deputy Chief Appellate Defender

February 8, 2017

VIA EMAIL AND US MAIL
The Honorable Paul M. Burch
PO Box 276
Pageland, SC 29728-0276
pburchj@sccourts.org
PburchLC@sccourts.org

Re: Marion Alexander Lindsey v. State, CA No. 2007-CP-42-2848

Dear Judge Burch:

I represent petitioner Marion Lindsey in the above - referenced capital PCR case. Currently pending before you is petitioner's Rule 59(e) Motion. As part of that motion, petitioner argued that the Amended Order of Dismissal erroneously disregarded the ABA Guidelines.

Today the South Carolina Supreme Court decided the capital PCR case of Bobby Wayne Stone v. State, Appellate Case No. 2013-001986, ___ S.C. ___ (Shearouse Adv. Sheet No. 6 Feb. 8, 2017). A copy of Stone is attached for your review. Stone repeatedly cites the ABA Guidelines as a tool to measure trial counsel's performance. The Court stated, "The Supreme Court of the United States and this Court have relied on the ABA Guidelines to determine whether counsel's performance was reasonable under the first prong of Strickland." Stone at n.6.

The Stone decision makes clear that Your Honor should disregard the State's arguments that the Guidelines bear little relevance when measuring trial counsel's complete failure to prepare Marion Lindsey's mitigation case.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

David Alexander
Appellate Defender

cc. The Hon. M. Hope Blackley
Donald J. Zelenka, Esq.
Alphonso Simon, Jr., Esq.
Barry Joe Barnette, Esq.
Robert M. Dudek, Esq.
Lara M. Caudy, Esq.
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Marion Alexander Lindsey

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May 5, 2017

VIA EMAIL AND US MAIL
The Honorable Paul M. Burch
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PburchLC@sccourts.org

Re: Marion Alexander Lindsey v. State, CA No. 2007-CP-42-2848

Dear Judge Burch:

Along with Robert M. Dudek and Lara M. Caudy, I represent petitioner Marion Lindsey in the above - referenced capital PCR case. Currently pending before you is petitioner's Rule 59(e) Motion. As part of that motion, petitioner argued that the Amended Order does not comply with due process because it is, in all material respects, identical to the proposed order originally submitted by the Attorney General. In support of that argument, petitioner cited the United States Supreme Court's decision in Jefferson v. Upton, 560 U.S. 284 (2010), which remanded a capital case in federal habeas in part because the state post-conviction judge adopted a proposed order without making any changes.

On April 10, 2017, the Honorable Clarence Cooper, United States District Judge, issued his order in Jefferson after the United States Supreme Court's remand. Jefferson v. Sellers, ___ F.Supp.3d ___, 2017 WL 1508985 (N.D. Ga. Apr. 10, 2017). A copy of Judge Cooper's decision is attached for your review. Judge Cooper held that the state post-conviction judge's factual findings were entitled to no deference in federal court because of the circumstances surrounding the adoption of the proposed order. The federal judge compared the state's proposed order and the state judge's order and found identical typographical errors. Judge Cooper held, "These errors and issues invite the reasonable inferences that Judge Newton failed to review the proposed order submitted by Ms. Smith before executing the final order and failed to review the relevant evidence." Id. at *4.

The opinion notes the extensive discovery done in federal court, which included the deposition of the state judge's law clerk. The law clerk testified that he never reviewed the state's proposed order, did no research, and the state judge never asked him about the order. The state judge was deceased and not deposed.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

David Alexander
Appellate Defender

cc. The Hon. M. Hope Blackley
Donald J. Zelenka, Esq.
Alphonso Simon, Jr., Esq.
Barry Joe Barnette, Esq.
Robert M. Dudek, Esq.
Lara M. Caudy, Esq.
Richard W. Vieth, Esq.
David Collins, Esq.
Marion Alexander Lindsey

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	2007-CP-42-2428
MARION A. LINDSEY	)	
APPLICANT	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA	)	
RESPONDENT	)	

February 20, 2019
Darlington, South Carolina

B E F O R E:

THE HONORABLE PAUL M. BURCH, JUDGE.

A P P E A R A N C E S:

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Attorney for the Applicant

DONALD J. ZELENKA, ASSISTANT ATTORNEY GENERAL
Attorney for the State

MICHAEL ROSS, ASSISTANT ATTORNEY GENERAL
Attorney for the State

HATTIE O. GORDON
Circuit Court Reporter

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COLLOQUY

THE COURT: We're here on a motion to reconsider a previously issued order. I believe it's Defendant's motion.

MR. ALEXANDER: Yes, Your Honor. As you recall we had a hearing in September 22nd of 2016 on Marion Lindsey's Rule 59 motion, Motion to Recuse and Motion for a New Order.

I have copies of the transcript of that here if that will be helpful for Your Honor. Can you mark that as a Court's Exhibit?

(WHEREUPON, Court's Exhibit No. 1 was marked for identification and received into evidence.)

MR. ALEXANDER: The primary contention at that hearing, Your Honor, was that the amended order issued did not comply with either the due process or the Supreme Court's order remanding this case because the new order issued was exactly the same as the original order issued with just a -- corrections which came from a list that was initially created by Applicant and ordered to the Court b the Attorney General's Office.

At the conclusion of that hearing Your Honor ruled from the bench denying the motion to recuse yourself, but then asked for supplemental memorandum from both parties regarding remaining issues. Both parties submitted those

supplemental memorandum, and here we are today.

THE COURT: Okay.

MR. ALEXANDER: That's where we are procedurally. Legions of ink have been spilled on this case already. Much paper has been filed. Many briefs have been submitted. In -- if there is something particular that Your Honor wanted to hear today I'm happy to argue it.

THE COURT: No. There is not anything that I specifically would request at this time. Of course, it's been a while since we did this, and I remember spending many hours with Mr. Sam Thomas, who was my law clerk at that time, going back and doing that last order. So I certainly disagree with the contention of the Defense that we just simply copied something here.

That was not the case. So we need to get this finalized, and I guess what we aught to do since it has been some time that's passed. We've had several instances that caused a little bit of -- well, considerable delay here.

The Clerk I had, who was attempting to try to get this finalized, collapsed right here in this very courtroom and spent 28 days fighting for his life over in Florence. Spend 28 days in the very top level of intensive care and then it took him months to get over that. And then, unfortunately, after we got him

straightened out I got sick. So it took several months to get over that bout, but fortunately, we are both well and doing fine now.

So anything y'all want to put on the record or you got any suggestions on how to finalize this then now is the time.

MR. ZELENKA: Your Honor, you have the supplemental memorandum which I filed with the Court after the other hearing. I requested this Court, basically, for denying the Rule 59 order based upon what we believe was affirmative statements from you that this order, all be it similar to the order that was previously entered, was an order that you agreed upon.

And the fact finding that was done in that order and the conclusions of law while it was consistent with that the State had argued was in fact ordered that you actually adopted Based on your review of the materials it was sought to comply with the mandate of the remand to -- under Hall v. Catoe to make sure that the findings and fact and conclusions expressed in the order were in fact your own.

I think the motion to recuse had no basis in fact; that the request that you were making of both parties to supply you with the proposed orders or submitted subsequent to the original post conviction relief hearing,

was an attempt to refresh your recollection about the circumstances of the case as time has passed to assist you in the preparation and conclusion of those orders that you ultimately entered.

I think that would be sufficient. The order that you made; that the amended order that was filed on September 28th 2015, as we represented within our post hearing memorandum was essentially with your affirmation which you made in the September 2016 proceeding.

A confirmation with the order was reviewed by you in full, and that the representation made within the order including intentional corrections which you put throughout the order to ensure the Supreme Court that you had represented and reviewed the material that was being given. I submit complies with that particular rule and was not an attempt or a bias attempt in any manner on your part to suggest impartiality at that particular time with the recognition that you had already made a determination that relief should not be granted in this particular case.

In your Rule 59 memorandum of law we sought to address each of these other portions of the Rule 59 Motion that had been made. And how the order that you entered on September 28th 2015 did not need particular correction. That memorandum that we submitted was about a 47 page memorandum, and in fact some of it was address in the

Motion to Recuse. Some of it was addressing whether you had complied with the memorandum order of the Supreme Court asking you to consider the preparing your order in compliance with Pruitt v. State and Hall v. Catoe.

And we submit that that was correctly done. Now you ask how can we bring this matter to completion. I would submit that to expedite the process, I know he may object, but to ask each side to submit a proposed order. You did not make a final ruling at that time of the September 22, 2016 motion hearing on the merits of the Rule 59 hearing.

You only did so with respect to the merits on the Motion to Recuse. So we would urge that you deny the Rule 59 Motion for the reasons that we have set forth in our memorandum of law that we submitted after the hearing.

THE COURT: Yes, sir. I have those at the office. Yes, sir.

MR. ALEXANDER: Yes, sir, Your Honor. In reply to Mr. Zelenka. It's out position that based on the Supreme Court's remand order the State law, Pruitt and Hall and United States Supreme Court precedent, Jefferson v Upton, 560 US 284 and Anderson v. Bessemer City, 470 US 564; that in capital cases, in capital PCRs, adopting a proposed order does not comply with due process nor does it comply with State law. And, specifically, with our State Supreme Court's order of remand.