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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County
Capital Action
Honorable R. Keith Kelly, Circuit Court Judge

JAMES ROBERTSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000505

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WILLIAM HARRY EHLIES, II
S.C. BAR # 1857
P.O. Box 605
Belton, SC 29627
hank@ehlieslaw.com
(864) 232-3503

ALLISON KRAUSE ELDER
S.C. BAR # 104123
P.O. Box 615
Taylors, SC 29687
aelder@tsscnow.org
(864) 520-5631

ATTORNEYS FOR PETITIONER

ALAN WILSON
Attorney General

MELODY J. BROWN
S.C. BAR # 14244
Senior Assistant Deputy Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201
mbrown@scag.gov
(803)734-3727

ATTORNEYS FOR RESPONDENT

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THE COURT: BUT DO YOU DISAGREE WITH THAT?

MR. BROWN: NO SIR, I DO NOT.

THE COURT: WELL, LET ME---

MR. BROWN: I DON'T KNOW IF COLUMBIA MAY WANT TO SEE THEM.

THE COURT: AS FAR AS THE VISITATION RECORDS, FRANKLY, THOSE ARE NOT GOING TO AFFECT MY RULING ON THE CLAIM REGARDING FAILURE TO VISIT WITH MR. ROBERTSON LONG ENOUGH BEFORE TRIAL. BUT YOU MIGHT WANT TO-- AND I-- REALLY--

LET ME JUST ASK THIS QUESTION: WHAT EVIDENCE REGARDING THAT CLAIM-- YOU MADE THE CLAIM THAT MR. BOYD AND MR. HANCOCK DID NOT SPEND ENOUGH TIME VISITING WITH MR. ROBERTSON BEFORE TRIAL IN ORDER TO FULLY AND COMPLETELY PREPARE FOR TRIAL.

NOW, MR. HANCOCK TESTIFIED THAT THEY ACCOMPLISHED THAT-- THAT THEY SAW THIS CASE AS A MITIGATION CASE. AND THAT THEY FELT THAT THE WAY TO GAIN ALL OF THE INFORMATION THAT THEY SHOULD GAIN FROM MR. ROBERTSON WAS THROUGH THE EXPERTS. AND THAT IF YOU ADD IN THE TIME THE EXPERTS SPENT WITH HIM TO THE TIME THAT THE LAWYERS SPENT WITH HIM, THAT THAT WOULD BE AMPLE AMOUNT OF TIME.

THAT'S ONE RESPONSE. THAT'S ON THE FIRST PRONG OF STRICKLAND. BUT ON THE SECOND PRONG OF STRICKLAND WHAT EVIDENCE IS THERE IN THIS RECORD, IN THIS PCR TRIAL, THAT COUNSEL COULD HAVE DONE ANYTHING DIFFERENT DURING EITHER

THE GUILT OR PENALTY PHASE OF THE TRIAL, IF THEY HAD SPENT MORE TIME WITH MR. ROBERTSON BEFOREHAND?

MR. BROWN: YOUR HONOR, THE ONLY EVIDENCE IS FROM THE APPLICANT HIMSELF.

THE COURT: AND WHAT IS THAT?

MR. BROWN: I WAS ASKED TO RAISE THAT. THERE IS NOT ENOUGH TIME. WE HAVE NOT HAD ENOUGH TIME TO MAKE A FORMAL DECISION ABOUT WHAT ROUTE TO TAKE ON HIS DEFENSE, ET CETERA; WHAT ISSUES TO RAISE, THE GUILTY BUT MENTALLY ILL. AND THAT WOULD JUST BE SOLELY ON PROFFER BY THE APPLICANT, YOUR HONOR.

THE COURT: WAIT A MINUTE, NOW.

MR. BROWN: AND YOUR HONOR, I DON'T REMEMBER WHAT THE EXACT TESTIMONY WAS, BUT THAT WOULD BE THE SOLE PROFFER, IF IT DID EXIST. I UNDERSTAND WHAT THE COURT---

THE COURT: WAS IT THEY WOULD HAVE LEARNED MORE ABOUT HIS MENTAL CONDITION?

MR. BROWN: NO SIR. HE WOULD HAVE HAD MORE INPUT INTO THE ROUTE, THE STRATEGY THAT THEY TOOK IN THIS TRIAL, IS MY UNDERSTANDING FROM MR. ROBERTSON.

THE COURT: THAT HE WOULD HAVE HAD MORE?

MR. BROWN: YES SIR. FOR WHAT IT'S WORTH, YOUR HONOR.

THE COURT: SO, THAT'S THE ONLY POSITION THAT THE APPLICANT TAKES HERE AS TO HOW COUNSEL'S PERFORMANCE MEETS THE STRICK--, THE SECOND PRONG OF THE STRICKLAND TEST AS TO

THE FAILURE TO VISIT WITH HIM ENOUGH BEFORE TRIAL. IF THEY DID GET TO VISIT WITH HIM MORE, THEN ROBERTSON WOULD HAVE HAD A BETTER OPPORTUNITY TO WEIGH IN ON THE STRATEGIC DECISIONS THAT THE LAWYERS HAD TO MAKE DURING THE COURSE OF THE TRIAL.

MR. BROWN: AND THE OPTIONS AVAILABLE TO HIM, YOUR HONOR. AND I WOULD PROFFER THAT TESTIMONY FOR WHATEVER THE COURT DEEMS THE VALUE, FOR THE SOLE TESTIMONY PRESENTED IN HIS OWN BEHALF. WE HAVE NO OTHER EVIDENCE.

THE COURT: WELL, Y'ALL COME BACK HERE IN THE HALL JUST A MINUTE, PLEASE, AND LET'S CHAT.

(WHEREUPON A CONFERENCE BETWEEN THE COURT AND COUNSEL TOOK PLACE OUTSIDE OF THE COURTROOM AT 4:25 P.M.)

COURT IN SESSION - 4:30 P.M.

THE COURT: NOW, AS FAR AS-- NOW, AT THE BEGINNING OF THIS TRIAL, I GOT YOU ALL TO LIST THE INDIVIDUAL CLAIMS FOR RELIEF THAT YOU WANTED TO MAKE. AND YOU DID THAT AND WE DISCUSSED IT. AND I'VE MADE NOTES OF THEM; I'VE GOT THEM ALL HERE.

IS THERE ANY WAY IN WHICH YOU WANT TO SUPPLEMENT YOUR CLAIMS BASED ON TESTIMONY WHICH CAME OUT OR ANYTHING THAT HAPPENED DURING THE COURSE OF THE TRIAL?

MR. BROWN: NO SIR.

THE COURT: WHAT I-- OF COURSE, WE DIDN'T WORK MONDAY MORNING OR TUESDAY MORNING OR THIS MORNING. AND DURING

THOSE BREAKS I WAS ABLE TO SPEND A LOT OF TIME REVIEWING THE TRANSCRIPT OF THE TRIAL. AND BETWEEN MY LAW CLERK AND ME, WE HAVE, I BELIEVE, REVIEWED EVERYTHING THAT YOU ALL ASKED ME TO REVIEW, AND EVERYTHING THAT I NEEDED TO REVIEW FROM THE TRIAL TRANSCRIPT. AND I AM PREPARED RIGHT NOW TO RULE ON EVERY ISSUE EXCEPT FOR THE CASCIO ISSUE. AND I WOULD LIKE TO DISCUSS THAT A LITTLE BIT.

AND IF I FEEL PREPARED TO-- I WOULD LIKE TO GO AHEAD AND RULE ON EVERYTHING EXCEPT CASCIO, DISCUSS CASCIO NOW. AND THEN IF I FEEL READY TO RULE, I MAY GO AHEAD AND RULE ON THAT AS WELL.

ANY OBJECTION? DOES EVERYBODY FEEL PREPARED TO DO THAT NOW?

MR. SALTER: YES SIR, YOUR HONOR.

MR. BROWN: YES SIR.

THE COURT: ALL RIGHT. THERE ARE A COUPLE OF THINGS, MAYBE QUESTIONS I WANT TO ASK FIRST.

ONE OF THE THINGS THAT YOU MENTIONED, OR, TWO OF THE THINGS THAT YOU MENTIONED WERE THE, WHEN YOU WERE LISTING YOUR CLAIMS, WERE THE CROSS EXAMINATION OF SKIP MEYER AND THE CROSS EXAMINATION OF MEREDITH MOON.

NOW, I DON'T REALLY RECALL THOSE CLAIMS BEING ADDRESSED DURING THE COURSE OF THIS TRIAL. AND ALSO, I DON'T' RECALL ANYTHING BEING ADDRESSED DURING THE COURSE OF THIS

TRIAL REGARDING HOW THOSE CROSS EXAMINATIONS COULD HAVE BEEN CONDUCTED DIFFERENTLY.

MR. BROWN: YOUR HONOR, IF I MAY?

THE COURT: YES SIR.

MR. BROWN: AS TO MR. MEYER, VERY BRIEFLY, DURING THE LONGER QUESTIONING THAT I HAD FOR MR. HANCOCK AND MR. BOYD, I PULLED OUT THE FACT THAT MR. MEYER HAD COUNSELED EVERYONE IN THIS FAMILY: TERRY, EARL, JIMMY, AND CHIP.

ON CROSS EXAMINATION THE MITIGATION PHASE, MR. HANCOCK CALLED HIM AS A DEFENSE WITNESS. THE ONLY THING HE WENT INTO ON DIRECT WAS ABOUT TERRY'S PSYCHOLOGICAL PROBLEMS. AND IT'S IN THE RECORD, YOUR HONOR. MR. MEYER'S NOTES ARE THE IN RECORD.

HE ALSO COUNSELED EARL AND HE ALSO COUNSELED CHIP. AND I THINK THOSE WOULD HAVE BEEN SALIENT TO THE DEFENSE IN SHOWING, FOR LACK OF A BETTER TERM, HOW DYSFUNCTIONAL THIS FAMILY WAS. AFTER THE GUILT PHASE, THEY BECAME THIS OZZIE AND HARRIET NELSON.

THE COURT: ALL RIGHT.

MR. BROWN: I DIDN'T GO INTO ANY DETAIL ABOUT IT, YOUR HONOR. AND THAT'S WHY I PUT THE RECORDS IN EVIDENCE. BUT THAT WAS TOUCHED ON BY BOTH THE ATTORNEYS.

THE COURT: OKAY.

MR. BROWN: AND THE ONLY THING HE BROUGHT OUT WAS TERRY'S RECORDS. HE DIDN'T TOUCH ON EARL'S AND ALL THE

PROBLEMS HE HAD, MUCH LESS CHIP, AND ALL THE PROBLEMS HE HAD.

THE COURT: OKAY. NOW ABOUT MOON?

MR. BROWN: YOUR HONOR, THE ONLY THING I HAD ON MOON WAS THE NOTES THAT I ASKED MR. BOYD ABOUT WHERE SHE WANTED FIFTY GRAND. OBVIOUSLY, THAT WAS FROM THE NOTES. I DON'T KNOW IF THEY'RE GOING TO BE IN THE NOTES THAT WE FIND. I THINK THAT'S SALIENT. BUT CERTAINLY, WHEN IT'S THE STATE'S STAR WITNESS, THE FACT THAT SHE WANTED FIFTY GRAND TO KEEP HER MOUTH SHUT WOULD GO TO HER CREDIBILITY.

THE COURT: IS THERE ANY EVIDENCE THAT MR. BOYD AND MR. HANCOCK KNEW OF THIS BEFORE, OR DURING THE TRIAL?

MR. BROWN: YOUR HONOR, AGAIN, GOING BACK TO THE PROBLEM WITH MS. CASCIO, OR, DOCTOR CASCIO'S NOTES. I THOUGHT THOSE WERE HER NOTES. THEREFORE, THAT'S WHY I RELIED ON THAT AS LISTING THAT AS ONE OF THE THINGS. BECAUSE IN THOSE NOTES IT SAYS THAT MS. MOON WILL KEEP HER MOUTH SHUT FOR $50,000. WHICH I THINK, CLEARLY, GOES TO HER CREDIBILITY ON CROSS EXAMINATION AND SHE WAS NOT ASKED THAT.

NOW, IF IT'S IN THE NOTES-- THAT'S WHY I THINK THE COURT WILL NEED DOCTOR CASCIO'S NOTES. I THINK THAT WOULD BE AN IMPORTANT FACTOR.

THE COURT: IS THERE EVIDENCE THAT CASCIO TALKED TO MOON?

MR. BROWN: NO SIR.

THE COURT: WELL, THEN HOW WOULD SHE HAVE KNOWN ABOUT THIS?

MR. BROWN: I GUESS BACK DOOR IT THE SAME WAY HE DID ON CROSS EXAMINATION. DID HE TELL YOU THIS, DID HE TELL YOU THIS, DID HE TELL YOU THIS, DID HE TELL YOU THIS? WELL, THEY COULD HAVE BROUGHT OUT DID HE TELL YOU THIS ON RE-DIRECT.

THE COURT: WELL, WAIT A MINUTE. HOW WOULD MS. CASCIO HAVE KNOWN THAT MS. MOON SAID THIS IF SHE NEVER MET WITH MS. MOON?

MR. BROWN: SHE DIDN'T, YOUR HONOR.

THE COURT: WELL, HOW WOULD SHE... ?

MR. BROWN: I DON'T KNOW IF SHE COULD HAVE. I DON'T IF IT COULD HAVE COME IN EVIDENCE. I'M NOT SAYING IT'S A STRONG----

THE COURT: SO, YOU'VE GOT AN ENTRY IN THAT APPLICANT'S EXHIBIT SEVEN THAT SAYS SOMETHING IN REFERENCE TO MS. MOON WILL KEEP HER MOUTH SHUT FOR $50,000?

MR. BROWN: YES SIR.

THE COURT: AND AT THIS POINT IN TIME YOU HAVE NO IDEA WHERE THAT CAME FROM?

MR. BROWN: NO SIR.

THE COURT: OR HOW THAT COULD HAVE BEEN BASED ON SOMETHING MS. MOON SAID?

MR. BROWN: NO SIR.

THE COURT: OKAY. FOR ALL WE KNOW, THAT COULD BE A STATEMENT THAT ROBERTSON MADE TO HER SAYING SHE'LL PROBABLY KEEP HER MOUTH SHUT IF SOMEBODY GIVES HER $50,000?

MR. BROWN: IT COULD HAVE VERY WELL BEEN, YOUR HONOR. BUT I FELT THE NECESSITY TO RAISE IT JUST IN CASE THERE'S SOME VALIDITY TO IT.

THE COURT: OKAY.

MR. BROWN: THAT'S WHY I DIDN'T BELABOR THE POINT WITH MR.-- I THINK I HAD TWO QUESTIONS IN THE WHOLE THING. I ASKED MR. BOYD TWO QUESTIONS ABOUT THAT.

THE COURT: OKAY. NOW, YOU MENTIONED AT THE BEGINNING THAT THERE WAS, THAT YOU MIGHT BRING UP SOMETHING REGARDING A JUROR THAT YOU BELIEVE SHOULD HAVE BEEN INSTRUCTED.

MR. BROWN: THAT DID NOT PAN OUT, YOUR HONOR.

THE COURT: ALL RIGHT. SO, YOU'VE ABANDONED THAT?

MR. BROWN: I'VE ABANDONED THAT.

THE COURT: AND ONE OTHER CLAIM THAT I DID NOT SEE. WELL, ACTUALLY I WANT YOU TO EXPLAIN THIS: YOU MENTIONED THAT YOU DIDN'T THINK DEFENSE COUNSEL PROPERLY HANDLED THE STATE'S MENTAL EVALUATION OF MR. ROBERTSON. EXPLAIN THAT.

MR. BROWN: BASED ON WHAT MR. ROBERTSON TOLD ME, AND AS HE TESTIFIED HERE TODAY, THIS IS MY RECOLLECTION OF THE TESTIMONY AT ISSUE, YOUR HONOR: HE WAS TOLD TO TELL THEM ALL. MR. BOYD, I BELIEVE, TESTIFIED TODAY THAT HE TOLD HIM -

AND I'M PARAPHRASING HERE - HE TOLD MR. ROBERTSON IN HIS INTERVIEW NOT TO DISCUSS THE CRIME. AND THAT WOULD BE THE EVIDENCE ON THAT, YOUR HONOR.

THE COURT: SAY THAT AGAIN, PLEASE.

MR. BROWN: MR. ROBERTSON TESTIFIED AND INFORMED ME THAT HE WAS NOT TOLD, HE WAS JUST TOLD TO TELL THEM EVERYTHING. MR. BOYD TESTIFIED TODAY THAT HE TOLD HIM WHEN HE MET WITH DOCTOR McKEE NOT TO DISCUSS THE CRIME.

THE COURT: DID HE TELL DOCTOR McKEE ANYTHING ABOUT THE CRIME?

MR. BROWN: NOT NEAR AS MUCH AS CASCIO, AND MY MEMORY'S VAGUE ON THAT, YOUR HONOR. THAT'S VERY SHORT TESTIMONY. I'M NOT GOING TO SIT HERE AND TELL THE COURT WHAT HE TOLD HIM. WHATEVER IS THERE IS THERE. IT'S VERY SHORT TESTIMONY, YOUR HONOR. HE WASN'T ON THE STAND VERY LONG.

MR. SALTER: IT DOESN'T COME OUT IN THE RECORD, YOUR HONOR, WHAT WAS TOLD TO DOCTOR McKEE. HE, IN FACT, LEFT A FEW NOTES, WHICH HIS NOTES ARE FAIRLY SIMPLE IN TERMS OF INFORMATION PROVIDED. THE ONLY THING THAT CAME OUT IN COURT WAS THAT DOCTOR McKEE RELIED IN PART ON HIS ASSERTION OF HIS MIRANDA RIGHTS IN SUPPORT OF HIS EXPERT OPINION. WHICH, AT THAT POINT THERE WAS AN OBJECTION MADE AND A MOTION FOR A MISTRIAL. THE MISTRIAL WAS DENIED AND CURATIVE INSTRUCTIONS WERE GIVEN. BUT THE JURY NEVER HEARD ANYTHING IN TERMS OF ANY INFORMATION PROVIDED TO DOCTOR McKEE.

THE COURT: OKAY. TAKING SOME OF THESE ISSUES THAT YOU RAISED AND GOING AHEAD AND RULING ON THEM. YOU SAID THAT COUNSEL ERRED IN FAILING TO CALL DOCTOR McMEEKIN.

MR. BROWN: I STAND BY THAT ONE, YOUR HONOR. HIS RECORDS ARE IN EVIDENCE AND I STAND BY THAT ONE, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. BROWN: THE RECORD SPEAKS FOR ITSELF.

THE COURT: ALL RIGHT. WELL, I THINK I'VE ASKED ALL THE QUESTIONS I'M GOING TO ASK. AND I THINK I'M JUST GOING TO GO AHEAD AND RULE ON ALL THINGS NOW.

MR. BROWN: YES SIR.

THE COURT: ALL RIGHT. SO, AS FAR AS DOCTOR McMEEKIN IS CONCERNED, I FIND THAT THE APPLICANT HAS FAILED TO PROVE BOTH PRONGS OF THE STRICKLAND TEST. THE DECISION TO ALLOW THAT EVIDENCE REGARDING McMEEKIN'S OVER-PRESCRIPTION OF RITALIN AND DISCIPLINARY ISSUES TO COME IN THROUGH DOCTOR MORTON WAS A VALID STRATEGIC DECISION. AND THAT IF THEY HAD PUT DOCTOR McMEEKIN ON THE STAND HE PROBABLY COULD HAVE EXPLAINED ALL OF THAT AWAY.

MOREOVER, THE FACT THAT DOCTOR McMEEKIN DID NOT TESTIFY HERE IN THIS TRIAL MEANS THAT APPLICANT HAS FAILED TO CARRY ITS BURDEN OF PROOF ON THE SECOND PRONG OF STRICKLAND. AND THAT THERE'S NO EVIDENCE FROM WHICH I COULD BASE A DECISION THAT THE OUTCOME OF THE CASE COULD HAVE BEEN ANY DIFFERENT IF McMEEKIN HAD TESTIFIED.

NOW, AS FAR AS-- AND I'M JUST TAKING THEM IN THE ORDER THAT I HAVE THEM IN MY NOTES. YOU CONTEND THAT FAILURE TO CALL CHIP ROBERTSON WAS INEFFECTIVE. AND YOU CONTEND THAT, I THINK, IN TWO RESPECTS. FIRST OF ALL YOU CONTEND THAT IF THEY HAD CALLED CHIP ROBERTSON, THEY COULD HAVE PROVEN HIS INVOLVEMENT IN THE CRIME.

FIRST OF ALL-- THERE'S SEVERAL REASONS WHY COUNSEL'S DECISION NOT TO CALL CHIP ROBERTSON WAS NOT INEFFECTIVE. FIRST OF ALL, I DON'T THINK THAT EVIDENCE WOULD HAVE BEEN ADMISSIBLE IN THE FIRST PLACE. BECAUSE, IN ORDER FOR EVIDENCE OF THIRD PARTY GUILT TO BE ADMISSIBLE, IT WOULD HAVE TO BE EVIDENCE THAT TENDS TO EXONERATE THE DEFENDANT.

NOW, HOLMES VERSUS SOUTH CAROLINA CAME OUT THIS CIRCUIT. RIGHT? HOLMES VERSUS SOUTH CAROLINA DOES NOT CHANGE THAT RULE OF LAW. HOLMES SIMPLY SAYS THAT THAT RULE CONTINUES TO BE EFFECTIVE EVEN IN THE FACE OF STRONG FORENSIC EVIDENCE OF THE DEFENDANT'S GUILT.

SO, I DON'T THINK THE EVIDENCE WOULD HAVE BEEN ADMISSIBLE IN THE FIRST PLACE. SECONDLY, I THINK IT WOULD HAVE BEEN AS MR. BOYD POINTED OUT IN HIS TESTIMONY, BY PUTTING CHIP ON THE STAND TO TESTIFY THAT HE AND JIMMY HAD CONSPIRED TO DO THIS, THE DEFENSE WOULD BASICALLY HAVE BEEN PROVING A MORE SOLID CASE OF PREMEDITATION ON THE PART OF JIMMY. AND IT WOULD HAVE BEEN DETRIMENTAL TO HAVE DONE THAT.

AND THIRD: THERE IS EVEN AS WE SIT HERE NOW NO EVIDENCE THAT JIMMY'S - I MEAN - THAT CHIP WAS INVOLVED IN THE CRIME. SO, IN ADDITION TO HAVING FAILED TO PROVE THAT THE DECISION NOT TO CALL CHIP WAS INEFFECTIVE, THERE'S NO EVIDENCE ON WHICH IC COULD BASE A DECISION THAT IT WOULD HAVE MADE A DIFFERENCE UNDER THE SECOND PRONG. BECAUSE, EVEN TO THIS DAY, CHIP HAS NOT TESTIFIED.

NOW, AS FAR AS-- YOU ALSO CONTEND THAT THE DEFENSE COUNSEL SHOULD HAVE PROVEN CHIP'S MENTAL ILLNESS HISTORY. AND ACTUALLY, YOU MAKE THAT CONTENTION WITH REGARD TO THE DAD AND I THINK TO SOME EXTENT, MAYBE THE MOTHER. BUT CERTAINLY WITH REGARD TO THE FATHER AND TO CHIP YOU CONTEND THAT DEFENSE COUNSEL SHOULD HAVE GIVEN THE JURY A MORE COMPLETE PICTURE OF THE MENTAL HEALTH OF THE ENTIRE FAMILY. SO, I'M GOING TO ADDRESS ALL THOSE THINGS AT ONCE IN JUST A FEW MINUTES.

THE NEXT THING WOULD BE YOU CONTEND THAT DEFENSE COUNSEL SHOULD HAVE OFFERED A PLEA OF GUILTY BUT MENTALLY ILL. I DON'T BELIEVE THEY COULD HAVE DONE THAT. AND SO, I THINK THE DECISION NOT TO DO THAT WAS NOT INEFFECTIVE. FIRST OF ALL, AS MR. BOYD POINTED OUT TODAY, AND MR. HANCOCK MAY HAVE POINTED IT OUT AS WELL - I BELIEVE HE DID - THAT THAT WOULD HAVE TAKEN SENTENCING OUT OF THE JURY'S HANDS AND PUT IT INTO THE HANDS OF THE JUDGE.

AND MR. ROBERTSON TESTIFIED HIMSELF TODAY THAT HE WOULD NOT HAVE DONE THAT. WHY WOULD ONE ALLOW A JUDGE TO MAKE THAT DECISION. HE WOULD HAVE RATHER, I THINK HE SAID, CRANK UP TWELVE JURORS AND ALLOW THEM TO DO IT. SO, COUNSEL'S DECISION NOT TO DO THAT IS A VALID DECISION.

AND THEN,-- WELL, IN ADDITION TO THAT, THOUGH, I THINK THAT BEFORE THAT COULD BE DONE THE STATE WOULD HAVE TO AGREE. THE STATE WOULD HAVE TO WAIVE ITS RIGHT TO A TRIAL BY JURY ON THE QUESTION OF WHETHER OR NOT, UNDER 17-24-20, SUBPARAGRAPH A, MR. ROBERTSON HAD A MENTAL DISEASE OR DEFECT, SUCH THAT HE LACKED SUFFICIENT CAPACITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW.

I BELIEVE THE TESTIMONY HERE IS THAT THE STATE WOULD NOT HAVE CONCEDED THAT FACT. AND THE STATE HAS A RIGHT TO A TRIAL BY JURY ON THAT FACT. AND SO, IT COULD NOT HAVE HAPPENED AS THE CASE UNFOLDED.

NOW, IN TERMS OF THE DECISION NOT TO SEEK A VERDICT OF GUILTY BUT MENTALLY ILL, I THINK THE DECISION NOT TO DO THAT WAS A VALID DECISION. BECAUSE, AS A PRACTICAL MATTER, IT DOESN'T SEEM TO ME LIKE IT MAKES A WHOLE LOT OF DIFFERENCE. THE FOCUS OF THE CASE WAS ON MENTAL ILLNESS. IT WAS A STRATEGIC DECISION THAT COUNSEL HAD MADE TO MAKE THAT PUSH DURING THE SENTENCING PHASE. IF THEY HAD SOUGHT A VERDICT OF GUILTY BUT MENTALLY ILL THEY WOULD HAVE HAD TO DO THAT DURING THE GUILTY PHASE. THAT'S CONTRARY TO THE STRATEGY

THAT THEY TESTIFIED THEY EMPLOYED. AND SO, I THINK THE DECISION NOT TO DO THAT WAS A VALID ONE.

BUT EVEN IN ADDITION TO-- SO, THAT IS APPLICABLE TO THE FIRST PRONG OF STRICKLAND. ON THE SECOND PRONG, THERE IS NO EVIDENCE THAT I'M AWARE OF-- I'M GOING TO GIVE YOU A CHANCE TO CORRECT ME RIGHT NOW IF I'M WRONG. THERE IS NO EVIDENCE THAT I'M AWARE OF THAT'S IN THIS RECORD THAT MR. ROBERTSON LACKED THE CAPACITY TO CONFORM HIS CONDUCT TO THE LAW. IS THERE?

MR. BROWN: YOUR HONOR, I DO DISAGREE WITH THAT. THERE IS DOCTOR McMEEKIN'S REPORT, THE MEDICAL RECORDS. IN MY OPINION THERE'S EVIDENCE IN THE TRANSCRIPT OF RECORD, AND THE QUESTIONS ASKED OF MR. BOYD, AND THE RECORDS OF DOCTOR MORTON AND DOCTOR EVANS.

THE COURT: I HAVE CONSIDERED THAT EVIDENCE, AND I FIND THAT THE EVIDENCE THAT HAS BEEN SUBMITTED IS INSUFFICIENT TO PROVE THAT MR. ROBERTSON LACKED THE CAPACITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW. SO, THEREFORE, THE APPLICANT HAS FAILED ON THE SECOND PRONG OF THE STRICKLAND TEST AS TO THE CLAIM THAT COUNSEL SHOULD HAVE PURSUED A GUILTY BUT MENTALLY ILL VERDICT.

NOW, ON THE QUESTION OF SPENDING TIME WITH MR. ROBERTSON BEFORE TRIAL, WE ALREADY DISCUSSED THAT JUST A SECOND AGO. BUT TO GO BACK OVER IT, COUNSEL TESTIFIED THAT THEY HAVE MADE THE DECISION WHICH IS PATENTLY REASONABLE

ON THE FACTS OF THIS CASE TO MAKE THEIR FOCUS ON MITIGATION. AND THAT THEY HAD DECIDED THAT THEY WOULD GATHER THE INFORMATION THAT THEY NEEDED RELATING TO MITIGATION BY USING EXPERTS AND MITIGATION INVESTIGATORS. AND THAT IS, IN MY VIEW, A COMPLETELY REASONABLE APPROACH TO TAKE SINCE IT IS THE EXPERTS WHO ARE GOING TO HAVE TO LAY THE FACTUAL FOUNDATION BEFORE THE JURY FOR THE JURY TO UNDERSTAND THIS MENTAL ILLNESS, NOT ONLY OF MR. ROBERTSON, BUT ALSO THROUGHOUT HIS FAMILY.

SO, I THINK THE DECISION TO STRUCTURE THEIR PRE-TRIAL INVESTIGATION OF THOSE ISSUES BY PRIMARILY RELYING ON EXERTS TO GATHER THAT INFORMATION WAS A REASONABLE DECISION AND WAS NOT INEFFECTIVE.

BUT SECONDLY, THERE IS NO EVIDENCE THAT I'M AWARE OF THAT-- THERE'S NO EVIDENCE IN THIS RECORD THAT SHOWS ME THAT THERE'S ANYTHING ELSE THE LAWYERS COULD HAVE DONE IN GATHERING INFORMATION ABOUT MR. ROBERTSON OR ANYTHING ELSE THAT HE MIGHT HAVE KNOWN THAT THEY FAILED TO DO BY FOLLOWING THE STRATEGY THAT THEY FOLLOWED, WHICH WAS TO USE EXPERTS. SO, THERE'S NO EVIDENCE AT ALL THAT THE OUTCOME OF THE CASE COULD HAVE BEEN ANY DIFFERENT IF THEY HAD SPENT MORE TIME WITH HIM. AND I THINK THE CLAIM THAT BY SPENDING MORE TIME WITH HIM THEY WOULD HAVE GIVEN MR. ROBERTSON A CHANCE TO WEIGH IN ON THE STRATEGIC DECISIONS THAT THE LAWYERS HAD TO MAKE IS AN INTERESTING SUGGESTION, BUT IT

DOESN'T HAVE ANY SIGNIFICANCE AT ALL IN TERMS OF THE INEFFECTIVENESS OF COUNSEL. BECAUSE THE DECISIONS THAT YOU'RE TALKING ABOUT BEING MADE ARE NOT TO BE MADE BY MR. ROBERTSON, THEY'RE TO BE MADE BY COUNSEL. AND SO, I THINK THAT THE APPLICANT HAS FAILED ON BOTH PRONGS OF THE STRICKLAND TEST IN THAT RESPECT.

NOW, THE NEXT TO LAST POINT THAT I JUST MADE, THAT THERE'S EVIDENCE THAT HAS COME OUT IN THIS TRIAL THAT THEY COULD HAVE LEARNED HAD THEY SPENT MORE TIME WITH MR. ROBERTSON ALSO GOES BACK TO RELATING TO THE FIRST PRONG. BECAUSE, IF THERE WAS NOTHING MORE TO DO, THEN THE DECISION TO DO NOTHING MORE WAS REASONABLE. SO, THAT'S MY RULING ON THAT POINT.

NOW, AS FAR AS THE SUGGESTION THAT COUNSEL SHOULD HAVE PURSUED THIS PLEA BARGAIN, I THINK THAT COUNSEL DID EVERYTHING THEY COULD TO TRY TO BRING ABOUT A PLEA BARGAIN. AS A FACT, I FIND THAT THE STATE WAS NOT WILLING UNDER ANY CIRCUMSTANCES TO TAKE THE NOTICE OF DEATH PENALTY OFF THE TABLE. AND SO, THEREFORE, THERE WAS NOTHING THAT COUNSEL COULD HAVE DONE THAT COULD HAVE TAKEN THE QUESTION OF THE DEATH PENALTY AWAY FROM THE JURY AND GIVEN MR. ROBERTSON A CHANCE TO PLEAD GUILTY TO LIFE WITHOUT PAROLE. SO, ON BOTH PRONGS OF THE STRICKLAND TEST, THERE IS A FAILURE TO PROVE.

THE NEXT POINT IS REGARDING MR. ROBERTSON'S DECISION NOT TO TESTIFY. I SUPPOSE THERE ARE TWO COMPONENTS TO YOUR

CLAIM ON THAT POINT. THE FIRST IS THAT YOU CONTEND THAT COUNSEL WAS INEFFECTIVE IN ADVISING MR. ROBERTSON ABOUT WHETHER OR NOT HE SHOULD TESTIFY. AND THE RECORD IS CLEAR HERE THAT THE ADVICE OF COUNSEL WAS THAT HE SHOULD NOT TESTIFY. AND AFTER HAVING LISTENED TO ALL THE TESTIMONY, PARTICULARLY THE FACT THAT MR. ROBERTSON HAD TOLD THE LAWYERS THAT HE HAD COMMITTED THE CRIMES AND HAD GIVEN THEM THE DETAILS OF THE CRIMES, THAT THE DECISION TO GIVE HIM THAT ADVICE WAS REASONABLE BECAUSE IT WOULD HAVE BEEN A BAD IDEA FOR HIM TO TESTIFY.

AND SO, THE DECISION – I MEAN – THE ADVICE THAT COUNSEL GAVE TO MR. ROBERTSON NOT TO TESTIFY, EVEN IN THE CONTEXT OF THE HEATED DISCUSSION THAT OCCURRED AFTER DOCTOR CASCIO HAD TESTIFIED, IN MY OPINION, WAS CORRECT AND REASONABLE AND VALID ADVICE.

SO, THERE'S A FAILURE TO PROVE THE FIRST PRONG OF THE STRICKLAND TEST. BUT ALSO, VERY IMPORTANTLY, MR. ROBERTSON HAS DECLINED IN THE TRIAL OF THIS PCR, BY EXERCISING HIS RIGHT TO REMAIN SILENT, TO SHARE WITH THIS COURT THE FACTS THAT HE WOULD HAVE TESTIFIED TO IN FRONT OF THAT JURY.

SO, THERE'S NO WAY THAT I CAN DETERMINE WHETHER HIS TESTIFYING COULD POSSIBLY HAVE MADE A DIFFERENCE IN THE OUTCOME OF THE TRIAL. SO, THERE'S A FAILURE OF PROOF ON THE SECOND PRONG AS WELL.

THE OTHER COMPONENT OF YOUR CLAIM, I THINK, IS THAT MR. ROBERTSON PERHAPS WAS NOT ALLOWED TO MAKE HIS OWN DECISION. IN MY OPINION, THAT IS AN APPELLATE ISSUE. JUDGE HAYES, ON THE RECORD, - AND I'M LOOKING IN THE PENALTY PHASE WHERE HE CONDUCTED THIS INQUIRY AT ABOUT PAGE 3041 THROUGH 3044, 3043. AND JUDGE HAYES INDICATES THERE THAT HE HAD DONE IT THREE PREVIOUSLY TIMES, I BELIEVE. JUDGE HAYES MAKES A LEGAL AND FACTUAL FINDING THAT MR. ROBERTSON HAS FREELY, VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY, UNDERSTANDING HIS RIGHT TO TESTIFY AND HIS RIGHT TO REMAIN SILENT, HE WAIVES HIS RIGHT TO TESTIFY AND EXERCISES HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT.

IF THAT IS AN INCORRECT DECISION, IN MY VIEW, THAT'S AN APPELLATE-- THAT'S A DECISION TO BE ATTACKED ON DIRECT APPEAL. BECAUSE COUNSEL HAD NOTHING TO DO WITH JUDGE HAYES MAKING THAT DECISION OTHER THAN TO PRESENT TO HIM THE EVIDENCE HE NEEDS TO MAKE THAT DECISION.

BUT, NEVERTHELESS, EVEN TO THE EXTENT THAT IT IS A, SOMETHING THAT CAN BE ADDRESSED ON POST CONVICTION RELIEF, I FIND ABSOLUTELY NO REASON TO DISAGREE WITH THE FINDING THAT JUDGE HAYES MADE THAT IT WAS MR. ROBERTSON WHO MADE THIS DECISION AND NOT HIS LAWYERS.

I NEED TO ALSO POINT OUT-- AND I CAN'T REMEMBER IF IT WAS MR. HANCOCK OR MR. BOYD WHO TESTIFIED TO THIS. BUT IN ADDITION TO THE FACT THAT MR. ROBERTSON HAD ADMITTED HIS

GUILT TO THEM, THEY HAD MADE AN ASSESSMENT OF HIM. AND WE SORT OF SEMI-JOKED ABOUT A LITTLE EARLIER, HIS INABILITY TO KEEP HIS MOUTH SHUT. THEY HAD MADE AN ASSESSMENT ABOUT HIM THAT HE WOULD BE A BAD WITNESS AND THAT IT WOULD BE A BAD IDEA TO PUT HIM ON THE STAND, JUST FROM HIS STANDPOINT FROM HIS INABILITY TO CONTROL HIMSELF AND WHAT HE MIGHT SAY. SO, THAT'S ANOTHER REASON WHY THEIR DECISION TO ADVISE HIM NOT TO TESTIFY, IN MY OPINION, WAS A VALID DECISION.

NOW, ONE MORE CLAIM IS THAT YOU CONTEND THAT COUNSEL SHOULD HAVE OFFERED SOME EVIDENCE OF MR. ROBERTSON'S ADAPTABILITY, HIS FUTURE ADAPTABILITY IN PRISON. AND, FIRST OF ALL, I FIND NOTHING SUSPECT OR NOTHING UNREASONABLE NOT TO OFFER THAT TESTIMONY.

I'M JUST OF THE OPINION THAT THAT IS NOT ALL THAT VALUABLE EVIDENCE. NOW, I REALIZE THAT IS SOMETHING THAT OTHER FOLKS MIGHT DISAGREE WITH. BUT I DON'T THINK THAT-- IN ORDER FOR ME TO SAY THAT IT SATISFIED THE STRICKLAND PRONG, THE FIRST PRONG OF STRICKLAND, TO FAIL TO PUT THAT FORWARD, THAT TYPE OF EVIDENCE, I WOULD HAVE TO SAY THAT IT IS MANIFESTLY UNREASONABLE IN ALL CIRCUMSTANCES NOT TO OFFER EVIDENCE OF FUTURE ADAPTABILITY. AND THAT'S NOT TRUE. THERE ARE PLENTY OF LAWYERS WHO MIGHT MAKE A DECISION ON A VARIETY OF DIFFERENT BASES NOT TO OFFER THAT TYPE OF EVIDENCE. MY OWN OPINION IS THAT IT'S NOT A VERY EFFECTIVE

FORM OF EVIDENCE. SO, I FIND THE DECISION NOT TO OFFER IT IS NOT UNREASONABLE.

BUT ALSO, IMPORTANTLY, IS THAT ON THE SECOND PRONG OF STRICKLAND, THERE'S NO EVIDENCE OF FUTURE ADAPTABILITY IN THE RECORD BEFORE ME RIGHT NOW. AND EVEN IF I WERE TO DECIDE THAT COUNSEL'S DECISION NOT TO OFFER THAT EVIDENCE IN THE TRIAL WAS INEFFECTIVE, THERE WOULD BE NO BASIS ON WHICH I COULD CONCLUDE THAT THE OUTCOME OF THE TRIAL COULD HAVE BEEN ANY DIFFERENT BECAUSE THERE'S NO EVIDENCE OF IT OFFERED HERE. THE TIMES THAT I HAVE HEARD WITNESSES OFFER THIS EVIDENCE BEFORE, IT BASICALLY IS SIMPLY THAT THE DEPARTMENT OF CORRECTIONS IS CHARGED WITH THE RESPONSIBILITY OF TAKING CARE OF ALL INMATES, REGARDLESS OF THEIR INDIVIDUAL CHARACTERISTICS, AND THEY CAN DO THAT. THAT'S ESSENTIALLY WHAT FUTURE ADAPTABILITY IS. I DON'T THINK THERE'S ANY EVIDENCE IN THIS RECORD THAT EVIDENCE OF FUTURE ADAPTABILITY COULD HAVE CHANGED THE OUTCOME OF THIS TRIAL.

NOW, I THINK THAT I HAVE COVERED EVERYTHING EXCEPT FOR- - WAIT A MINUTE. I NEED TO--

NOW, REGARDING THE ALLEGED ERRORS IN THE CROSS EXAMINATION OF MEREDITH MOON. THAT WOULD BE THAT COUNSEL SHOULD HAVE CONFRONTED HER WITH THIS SUPPOSED PRIOR STATEMENT THAT SHE WOULD KEEP QUIET FOR FIFTY THOUSAND DOLLARS.

THERE'S NO EVIDENCE BEFORE ME THAT THE LAWYERS KNEW SHE-- FIRST OF ALL, THERE'S NO EVIDENCE BEFORE ME THAT SHE EVER MADE THAT STATEMENT. THERE'S NO EVIDENCE BEFORE ME THAT THE LAWYERS KNEW SHE MADE THAT STATEMENT. SO, THE DECISION NOT TO CROSS EXAMINE HER ON THAT STATEMENT, TO ME, IS A REASONABLE DECISION.

IF THE LAWYERS HAD KNOWN THAT SHE HAD MADE THAT STATEMENT AT THE TIME THEY CROSS EXAMINED HER, THEN THAT WOULD RAISE THE QUESTION OF WHETHER OR NOT IT WAS STILL A GOOD IDEA TO DO THAT. AND YOU'RE TALKING ABOUT A LOT OF UNKNOWNS RIGHT THERE, BECAUSE THERE'S NO EVIDENCE THAT I KNOW OF THAT MR. ROBERTSON COULD HAVE DONE IT, COULD HAVE PAID HER FIFTY THOUSAND DOLLARS. THERE'S NO EVIDENCE THAT CHIP WAS INTERESTED IN DOING IT. IT'S ILLEGAL. AND THERE ARE JUST A LOT OF PROBLEMS, I THINK, WITH RAISING THAT SPECTER. THAT DOESN'T MEAN THAT IT MIGHT NOT BE REASONABLE TO DO IT BECAUSE IF IT WERE A STATEMENT BY HER, IT WOULD AFFECT HER CREDIBILITY. IT WOULD JUST BE A JUDGMENT CALL BY THE LAWYER ABOUT WHETHER OR NOT IT WOULD BE APPROPRIATE TO DO IT. AND I DON'T FIND THAT THERE'S ENOUGH PROOF IN THIS RECORD THAT IT WAS INEFFECTIVE NOT TO DO IT FOR THOSE REASONS THAT I JUST STATED.

SINCE THERE'S NO EVIDENCE IN THE RECORD THAT THE STATEMENT WAS MADE BY HER IN THE FIRST PLACE IN THIS TRIAL, THEN THERE'S NO EVIDENCE THAT HER HAVING BEEN ASKED THAT

QUESTION-- FIRST OF ALL, THERE'S NO EVIDENCE AS TO WHAT HER ANSWER WOULD HAVE BEEN. SHE MIGHT HAVE HAD AN EXPLANATION FOR THAT THAT TOTALLY NEUTRALIZED ANY PREJUDICIAL EFFECT THAT MAY HAVE AGAINST HER CREDIBILITY. WE DON'T KNOW THAT. AND SO, THERE'S NO BASIS ON WHICH I COULD CONCLUDE THAT THE OUTCOME OF THE TRIAL COULD HAVE BEEN ANY DIFFERENT.

THAT LEAVES-- OKAY. THE ONE ADDITIONAL THING YOU SAID WAS THAT COUNSEL DID NOT PROPERLY ADVISE MR. ROBERTSON BEFORE HE WENT DOWN TO THE STATE'S MENTAL EVALUATION. AND THAT WAS DOCTOR WHO?

MR. BROWN: DOCTOR McKEE, YOUR HONOR.

THE COURT: DOCTOR McKEE. AND DOCTOR McKEE IS THE ONE THAT Y'ALL JUST TOLD ME WHEN HE TESTIFIED, HE DID NOT TESTIFY CONCERNING THE SUBSTANCE OF WHAT MR. ROBERTSON TOLD HIM ABOUT THE DETAILS OF THE CRIME. CORRECT?

MR. BROWN: THAT'S CORRECT, YOU HONOR.

THE COURT: SO, EVEN IF-- AND, YOU KNOW, I DON'T KNOW WHAT COUNSEL TOLD HIM, EXCEPT THAT THEY TOLD ME. WELL, THAT ALLEGATION HAS SEVERAL LEVELS ON IT. FIRST OF ALL, COUNSEL SHOULD HAVE ADVISED HIM NOT TO DISCUSS THE FACTS OF THE CASE WITH THE STATE'S DOCTOR. THEY DID THAT. I FIND THAT AS A FACT THAT THEY DID THAT.

SECOND OF ALL, COUNSEL SHOULD HAVE DONE EVERYTHING THEY COULD TO MAKE SURE THAT THIS OVER-TALKATIVE

DEFENDANT DIDN'T DISOBEY THEIR INSTRUCTIONS WHEN HE WENT DOWN THERE. THERE'S NO EVIDENCE THAT THEY DID THAT. AND THAT, UNDER SOME CERTAIN CIRCUMSTANCES COULD HAVE BEEN INEFFECTIVE. BUT AS I UNDERSTAND IT, THEY WERE NOT ALLOWED INTO THE MEETING WITH DOCTOR McKEE. AND THAT, THEREFORE, BECOMES AN APPELLATE ISSUE RATHER THAN A PCR ISSUE.

IF JUDGE HAYES WAS INCORRECT IN RULING THAT BOYD AND HANCOCK WERE NOT TO BE ALLOWED IN THAT MEETING IN ORDER TO CONTROL WHAT MR. ROBERTSON MIGHT SAY CONCERNING THE FACTS OF THE CASE, THAT'S AN APPELLATE ISSUE, NOT AN INEFFECTIVENESS ISSUE. BUT EVEN TO THE EXTENT IT IS AN INEFFECTIVENESS ISSUE, THERE'S NO EVIDENCE THAT IT COULD HAVE MADE ANY DIFFERENCE BECAUSE McKEE DID NOT TESTIFY TO THOSE PREJUDICIAL FACTS. THEY DIDN'T COME OUT AT TRIAL. THEY DIDN'T AFFECT WHAT THE JURY'S DECISION WAS.

SO, THAT LEAVES US WITH TWO CATEGORIES OF CLAIMS. I THINK I HAVE RULED ON EVERYTHING EXCEPT THESE TWO CATEGORIES OF CLAIMS. ONE IS THE FAILURE TO DEVELOP THE MENTAL HEALTH HISTORY OF THE ENTIRE FAMILY, WHICH WOULD INCLUDE THE FAILURE TO PROPERLY CROSS EXAMINE SKIP MEYER, AND THE ISSUES SURROUNDING DOCTOR CASCIO.

NOW, I THINK THOSE ARE INTERTWINED BECAUSE DOCTOR CASCIO'S TESTIMONY IS THE VEHICLE BY WHICH COUNSEL WENT ABOUT DEVELOPING THE FAMILY'S MENTAL HEALTH HISTORY, OR AT LEAST, IT'S THE MAJOR VEHICLE BY WHICH THEY DID THAT.

AND SO, TO THAT EXTENT, YOU KNOW, YOUR CLAIMS ARE A LITTLE CONTRADICTORY. SO, CLEARLY, I THINK THE LAWYERS COULD HAVE DEVELOPED THE FAMILY MENTAL HEALTH HISTORY MORE COMPLETELY. THERE'S NO DOUBT ABOUT THAT. BUT I CAN'T SIT HERE AND SAY THAT THERE ISN'T A POINT AT WHICH YOU REACH ENOUGH. AND WHERE THAT POINT IS IN A FAMILY LIKE THIS IS A JUDGMENT CALL THAT HAS TO BE MADE DURING THE COURSE OF THE TRIAL. AND I FIND NO REASON TO BELIEVE THAT THE DECISION TO PRESENT NO MORE OF THE FAMILY'S MENTAL HEALTH HISTORY THAN THEY DID WAS UNREASONABLE.

AND, SECONDLY, I FIND THAT BASED ON THAT I HAVE HEARD, BASICALLY WHAT YOU HAVE PRESENTED IN ADDITIONAL MENTAL HEALTH EVIDENCE REGARDING THE FAMILY ARE THESE RECORDS THAT YOU PUT IN. YOU HAVEN'T PUT IN ANY ADDITIONAL TESTIMONY, THE RECORDS. AND I WILL SAY THAT THAT IS AN INSUFFICIENT BASIS, IN MY OPINION, ON WHICH FOR ME TO CONCLUDE, UNDER THE SECOND PRONG OF STRICKLAND, THAT THE OUTCOME OF THE TRIAL COULD HAVE BEEN ANY DIFFERENT.

SO, ON THE GROUP OF CLAIMS THAT RELATE TO THE AMOUNT OF MENTAL HISTORY THAT COUNSEL CHOSE TO PRESENT TO THE JURY, I FIND THAT THE APPLICANT HAS FAILED ON BOTH PRONGS OF THE STRICKLAND TEST.

AND SO, THAT GETS US DOWN TO CASCIO. BEFORE I GET INTO CASCIO, IS THERE ANYTHING THAT YOU WOULD LIKE TO POINT OUT TO ME NOW WHERE I MIGHT HAVE MISSED SOMETHING, OR WHERE I

MIGHT HAVE MIS-REMEMBERED SOMETHING OR OVERLOOKED SOMETHING? ANYTHING I SAID THAT YOU THINK IS WRONG, BASED ON THE EVIDENCE?

I MEAN, OBVIOUSLY, YOU DISAGREE WITH WHAT I'VE SAID. BUT IF YOU THINK I HAVE NOT CONSIDERED SOMETHING THAT IS IMPORTANT, OR IF I HAVE MISUNDERSTOOD SOMETHING, THEN PLEASE POINT THAT OUT TO ME NOW.

MR. BROWN: NO SIR, YOUR HONOR. IF YOU DON'T FIND ON STRICKLAND, THE FIRST PRONG OF STRICKLAND, THE ONLY EVIDENCE I FORGOT TO OFFER, AND THE BEST EVIDENCE FROM MY PERSPECTIVE OF THIS TRIAL, IS NOT BECAUSE OF THE DOCTORS, AS MR. BOYD POINTED OUT, THAT EXPLAIN IT AWAY. THE RECORDS SPEAK FOR THEMSELVES, YOUR HONOR.

THE COURT: ALL RIGHT. NOW, REGARDING CASCIO, YOU'VE GOT WHAT I THINK ARE FOUR BASIC CLAIMS. FIRST OF ALL, YOU CLAIM THAT BECAUSE SHE HAD NEVER TESTIFIED IN A DEATH PENALTY CASE BEFORE; IN FACT, NEVER TESTIFIED AT ALL BEFORE, THAT THE DECISION TO USE HER AS A CONSULTANT AND A WITNESS IN THE FIRST PLACE WAS AN UNREASONABLE DECISION, AND I DISAGREE WITH THAT.

I THINK THAT VARIOUS-- THERE ARE PROS AND CONS TO HAVING EXPERIENCED, EXPERT WITNESSES. SOME WITNESSES WHO HAVE TESTIFIED IN A LOT OF DEATH PENALTY CASES ARE OPEN TO EFFECTIVE CROSS EXAMINATION ABOUT THE BIASES AND THE PREJUDICES THAT THOSE WITNESSES BRING INTO A TRIAL OF THIS

NATURE. AND SO, THE FACT THAT SHE WAS INEXPERIENCED IN TESTIFYING, IN MY OPINION, IS NOT A VALID REASON TO REJECT HER AS A WITNESS. SO, ON THAT PARTICULAR POINT, I FIND YOU'VE FAILED TO PROVE THE FIRST PRONG.

AND I THINK IN ORDER TO PROVE THE SECOND PRONG ON THAT, YOU'VE GOT TO BRING IN ANOTHER WITNESS TO SHOW ME THE DIFFERENCE IT WOULD HAVE MADE TO HAVE AN EXPERIENCED WITNESS DO THIS.

NOW, I'LL GET AROUND TO WHAT YOU CONTEND IS THE BIG DIFFERENCE IN A MINUTE, AND THAT IS AN EXPERIENCED WITNESS WOULD NEVER HAVE ALLOWED ROBERTSON TO TELL HER THE SPECIFIC FACTS OF THE CASE. I'LL GET INTO THAT IN A MINUTE.

MR. BROWN: YOUR HONOR, THERE'S ONE OTHER THING I DIDN'T BRING UP. NOT ONLY HAD SHE NOT TESTIFIED BEFORE, AND I BROUGHT THIS UP TODAY, SHE HAD ONLY WORKED ON ONE OTHER CASE AND DID NOT END UP TESTIFYING ON THAT ONE PRIOR TO THIS CASE. SO, HER TOTAL EXPERIENCE WAS ONE OTHER.

THE COURT: RIGHT. BUT YOU KNOW, MY VIEW OF EXPERTS IS THAT EXPERTS ARE NOT ADVOCATES. AND EXPERTS ARE THERE TO PRESENT TECHNICAL, SCIENTIFIC OPINIONS. AND IT'S AN INCORRECT SUGGESTION THAT A TECHNICALLY QUALIFIED, BUT LEGALLY INEXPERIENCED WITNESS IS NOT A GOOD CHOICE FOR SOMEONE TO USE AS A WITNESS. SO, I'VE RULED ON THAT POINT.

THEN, THE SECOND POINT IS THAT COUNSEL SHOULD NEVER HAVE AGREED TO PROVIDE THE NOTES. AND AS I SAID DURING THE

COURSE OF THE TRIAL, IN MY VIEW, IF THE WITNESS TESTIFIES, THE NOTES GET PRODUCED. NO EXCEPTIONS. SO, I THINK THE QUESTION, THEN, THAT JUST PUTS THE QUESTION TO NUMBER THREE, WHICH IS WHETHER OR NOT THEY SHOULD HAVE PUT HER ON THE STAND. THE DECISION TO AGREE, IF THEY DID THAT, TO TURN OVER THE NOTES IS A REASONABLE DECISION ONCE THEY DECIDED TO PUT HER ON THE STAND.

NOW, THAT LEAVES WHAT I THINK ARE TWO IMPORTANT QUESTIONS. FIRST OF ALL, WHY DIDN'T THEY FIND ANOTHER WITNESS WHEN THEY DISCOVERED THAT THESE NOTES WERE GOING TO BE SO DAMNING?

NOW, TELL ME IF I'M WRONG. AND YOU WILL RECALL, THIS IS A QUESTION I ASKED. THERE'S NO EVIDENCE THAT I HAVE BEFORE ME THAT EITHER OF THESE LAWYERS KNEW ABOUT THESE NOTES MORE THAN A WEEK BEFORE TRIAL.

MR. BROWN: YOUR HONOR, I DISAGREE TOTALLY WITH THAT, WITH ALL DUE RESPECT TO THE COURT. THE EVIDENCE, APPLICANT'S EXHIBITS NUMBER FIVE AND NUMBER SIX, YOUR HONOR. THESE NOTES ARE WHERE THE VAST MAJORITY OF WHERE MR. POPE'S CROSS EXAMINATION CAME FROM. THE DECEMBER 7 NOTES WERE FAXED AND MAILED TO MR. HANCOCK ON MARCH 1, 1999.

THE COURT: ALL RIGHT. THAT'S---

MR. BROWN: WHICH WAS TWO WEEKS' PRIOR TO TRIAL.

THE COURT: ALL RIGHT. TWO WEEKS. NOW, HELP ME RECALL THE TESTIMONY, BECAUSE THE REPORT INDICATES THAT IT WAS FAXED ON MARCH 1 BECAUSE IT HAD THAT---

MR. BROWN: ATTACHED TO IT WAS THE NOTES, YOUR HONOR.

THE COURT: WELL, THE REPORT HAS THIS LINE AT THE TOP THAT SAYS COLLEGE OF SOCIAL WORK, DA-DA-DA, 99-3-1, SO AND SO, PAGE TWO OF FIVE. THE NOTES DON'T HAVE THAT ON THERE. IF THERE ARE FOUR PAGES TO THE REPORT AND YOU ADD IN THE COVER SHEET THAT MAKES FIVE PAGES.

MR. BROWN: I CAN'T DISPUTE THAT, YOUR HONOR.

THE COURT: MY RECOLLECTION OF THE TESTIMONY IS THAT THE LAWYERS DIDN'T KNOW ABOUT THIS UNTIL BASICALLY THE EVE OF TRIAL, ABOUT THE NOTES.

MR. BROWN: I HAVE A PROBLEM WITH THAT, YOUR HONOR.

THE COURT: I'LL GO BACK. I'LL SAY THAT THE EVIDENCE IS THAT THEY KNEW ABOUT THIS SOMETIME, LESS THAN TWO WEEKS BEFORE TRIAL, MORE OR LESS.

MR. BROWN: AND THAT BEGS THE QUESTION, YOUR HONOR, IF THEY MET WITH HER ON---

THE COURT: WELL, THAT'S A DIFFERENT QUESTION. I'M GONNA GET TO THAT.

MR. BROWN: OKAY.

THE COURT: THAT'S A DIFFERENT QUESTION. I'LL ADDRESS THAT. I THINK IT IS. THE QUESTION IS WHETHER OR NOT THEY

SHOULD HAVE GONE OUT AND FOUND OUT MONTHS BEFORE TRIAL WHAT IT IS THAT ROBERTSON TOLD HER.

MR. BROWN: BECAUSE THE DATES ARE JULY 17, JULY 22, NOVEMBER 30 AND DECEMBER 2. SO, THE LAST ONE WAS THREE MONTHS' PRIOR TO TRIAL.

THE COURT: RIGHT, RIGHT.

MR. BROWN: AND THE FIRST ONE IS EIGHT MONTHS BEFORE TRIAL.

THE COURT: SO, WE'LL DIVIDE THIS UP INTO TWO COMPONENTS. SO, THE CLAIM IS THEY SHOULD HAVE GONE OUT AND GOTTEN ANOTHER WITNESS INSTEAD OF DOCTOR CASCIO TO DO THE WORK THEY HAD INITIALLY HIRED DOCTOR CASCIO TO DO.

MR. BROWN: OR, IN THE ALTERNATIVE, NOT USED HER.

THE COURT: WELL, I KNOW, BUT THAT'S THE LAST POINT.

MR. BROWN: YES SIR.

THE COURT: RIGHT NOW, I'VE GOT TWO POINTS LEFT. THEY SHOULD HAVE GONE AND GOTTEN ANOTHER WITNESS; THAT'S ONE. THEY SHOULDN'T HAVE CALLED HER TO TESTIFY; THAT'S TWO. THE FIRST ONE, SHOULD HAVE GOTTEN ANOTHER WITNESS, HAS TWO COMPONENTS. FIRST OF ALL, YOU CLAIM THEY SHOULD HAVE SOUGHT OUT INFORMATION FROM DOCTOR CASCIO AS TO WHAT ROBERTSON TOLD HER. AND THE SECOND ONE IS THAT ONCE THEY ACTUALLY HAD INFORMATION ABOUT WHAT ROBERTSON TOLD HER AND REALIZED IT WAS SO DAMAGING, THEY SHOULD HAVE DONE

SOMETHING TO AVOID, SOMETHING TO ALLOW THEM TO PUT A DIFFERENT WITNESS ON THE STAND.

MR. BROWN: IT GOES DEEPER THAN THAT, YOUR HONOR. ONE OF THE LAST QUESTIONS I ASKED MR. BOYD IS-- I MADE A POINT OF ASKING MR. BOYD IS, WHAT WAS SHE HIRED FOR. TO DO A SOCIAL HISTORY OF THIS FAMILY. SHE WAS NOT HIRED TO GET THE WHO, WHAT, WHY, WHERE OF THE ACTUAL FACTS OF THIS CRIME. SO, IN MY HUMBLE OPINION, WHAT SHE WAS HIRED FOR, SHE EXCEEDED HER AUTHORITY, WHICH TIES BACK TO MY OPINION ABOUT HER INEXPERIENCE THAT SHE HAD IN DOING THIS. SHE WAS NOT HIRED TO GET AT THE WHO, WHAT, WHY, WHERE OF THE CRIME. SHE WAS HIRED TO DO A SOCIAL HISTORY OF THIS FAMILY.

THE COURT: I THINK THE EVIDENCE WAS SHE WAS INSTRUCTED TO DO A SOCIAL HISTORY. SHE WAS NOT INSTRUCTED TO DO AN INQUIRY INTO THE FACTS OF THE CASE. I UNDERSTAND YOUR CLAIM. I'M READY TO RULE ON IT.

MR. BROWN: YES SIR.

THE COURT: SO, AS FAR AS THE SUGGESTION THAT THE WITNESS' INEXPERIENCE CAUSED HER TO GO BEYOND THE SCOPE OF WORK THAT SHE HAD BEEN EMPLOYED TO PERFORM; THAT COUNSEL SHOULD HAVE SOUGHT HER OUT AND ASKED HER, NOW, WAIT A MINUTE, LET'S MAKE SURE THAT MR. ROBERTSON DIDN'T TELL YOU ANYTHING ON A SUBJECT THAT WE DIDN'T ASK YOU TO INQUIRE INTO. YOU KNOW, THOSE ARE CERTAINLY THINGS THAT LAWYERS COULD DO. BUT, I MEAN, A LAWYER IS NOT EXPECTED TO ANTICIPATE EVERY

POSSIBLE THING THAT COULD GO WRONG IN THE MONTHS LEADING UP TO TRIAL.

AND THE REASON THAT I THINK THIS OCCURRED IS BECAUSE EVEN THOUGH THE LAWYERS HAD HIRED HER FOR A PURPOSE THAT DID NOT REQUIRE HER TO INQUIRE THE FACTS OF THE CASE; AND EVEN THOUGH THEY HAD TOLD ROBERTSON TO KEEP HIS MOUTH SHUT WHEN HE TALKS TO THE EXPERTS, IT'S ROBERTSON'S INABILITY TO KEEP HIS MOUTH SHUT THAT CAUSED THAT CONVERSATION TO TAKE PLACE AND CAUSED DOCTOR CASCIO TO BE GIVEN THIS INFORMATION WHICH SHE, I'M CERTAIN, WAS ETHICALLY REQUIRED TO RECORD.

AND SO, THAT'S WHY THE INFORMATION ENDS UP IN HER NOTES. IT'S NOT AS A RESULT OF ANYTHING THE LAWYERS DID THAT WAS UNREASONABLE. WHILE, CERTAINLY THE LAWYERS COULD HAVE DONE MORE; THEY COULD HAVE HAD A CRYSTAL BALL OUT AND BEEN ABLE TO DETERMINE THAT ROBERTSON IS CERTAINLY GOING TO RUN HIS MOUTH DESPITE OUR INSTRUCTIONS NOT TO; AND CERTAINLY THIS CONVERSATION WITH THE EXPERT IS GOING TO GO INTO AREAS THAT WE DIDN'T HIRE HER TO WORK IN.

THE FACT THAT THEY DID NOT ANTICIPATE THAT AND DID NOT ACTUALLY GO OUT AND INTERROGATE HER MONTHS AND WEEKS BEFORE TRIAL AS TO WHAT ROBERTSON MIGHT HAVE TOLD HER, IN MY OPINION, IS NOT INEFFECTIVE, NOT UNREASONABLE. SO, ON THAT PARTICULAR PRONG, YOU HAVE FAILED TO SATISFY THE STRICKLAND TEST, THE FIRST PRONG OF THE STRICKLAND TEST.

NOW, ON THE SECOND CLAIM-- THE SECOND COMPONENT OF THAT FIRST ONE IS THAT ONCE THEY FOUND OUT THE INFORMATION THEY SHOULD HAVE TAKEN STEPS TO GET ANOTHER WITNESS TO TAKE THE PLACE OF MS. CASCIO.

MR. BROWN: YOUR HONOR, I DON'T MEAN TO INTERRUPT. BUT, REGARDING THAT, I WOULD TAKE THAT A STEP FURTHER AS ANOTHER PRONG. SHE WAS HIRED TO GIVE AN OPINION AS TO THE SOCIAL HISTORY OF THIS FAMILY. THAT WAS THE LIMITS OF WHAT THEY WANTED HER TO DO. I WAS ALSO QUESTIONING FOR THE RECORD, AND ASKED MR. BOYD THIS, THE LAST QUESTION I ASKED MR. BOYD THIS, THE DECISION TO TURN THOSE NOTES OVER TO RELATE TO THE CRIME. BECAUSE IN REACHING HER OPINION AS TO UNDERLYING SOCIAL VALUES AND THE SOCIAL HISTORY OF THIS FAMILY, THOSE NOTES IN NO WAY RELATED TO WHAT SHE NEEDED TO DO TO REACH THAT DECISION AS TO THE PSYCHOLOGICAL HISTORY OF THIS FAMILY. SO, I QUESTION THAT DECISION, TOO, YOUR HONOR.

THE COURT: WELL, AS TO--

MR. BROWN: WHAT THEY COULD HAVE DONE WAS ASK FOR A SUPPLEMENTAL IN-CAMERA HEARING IN FRONT OF JUDGE HAYES AT THAT POINT IN TIME AND SAY, LOOK, JUDGE, THIS IS WHAT WE'VE GOT, THIS IS WE'RE PUTTING HER UP HERE FOR; DO I HAVE TO GIVE THESE NOTES AND CAN THEY USE THEM.

THE COURT: ALL RIGHT. I'LL ADDRESS THAT.

MR. BROWN: THE DAMNING EFFECT OF THAT TESTIMONY, IT'S MY HUMBLE OPINION, YOUR HONOR, IF THERE WAS ANY WAY TO KEEP

THAT OUT, I WOULD HAVE KEPT IT OUT. AND, THEN, WHEN YOU'RE TALKING ABOUT---

THE COURT: I UNDERSTAND YOUR CLAIM. THIS ALL BOILS DOWN TO THE QUESTION OF THE DECISION OF WHETHER OR NOT TO CALL HER AS A WITNESS. YOU'RE RIGHT. I AGREE THAT ONCE THE NOTES WERE MADE AWARE TO THE LAWYERS THEY SHOULD HAVE DONE EVERYTHING THEY COULD TO KEEP THOSE NOTES FROM BEING TURNED OVER TO THE STATE. BUT THE ONLY THING THEY COULD DO, IF THEY'D MADE THE DECISION TO CALL HER AS A WITNESS, THE ONLY THING THEY COULD DO WOULD BE TO PUT IT IN THE HANDS OF THE JUDGE. IF THEY HAD SAID TO THEMSELVES, NO, WE THINK WE'RE GONNA GIVE UP THE NOTES THAT RELATE TO THE SOCIAL AND MENTAL HISTORY, BUT NOT GIVE UP THE NOTES THAT RELATE TO THE CRIME, THEN ONE OF THOSE LAWYERS WOULD ULTIMATELY HAVE ENDED UP SPENDING SOME TIME IN JAIL.

MR. BROWN: AND I AGREE WITH THAT, YOUR HONOR, BUT---

THE COURT: I'VE HEARD ALL THE ARGUMENTS I NEED. I THINK I'M READY.

MR. BROWN: JUST ONE MORE STATEMENT, JUDGE. I THINK THEY SHOULD HAVE HAD AN IN-CAMERA---

THE COURT: I KNOW. I FULLY UNDERSTAND, MR. BROWN. I'M READY TO ADDRESS THAT RIGHT NOW. IN MY OPINION, ONCE THEY MAKE THE DECISION TO CALL HER AS A WITNESS, THEY GIVE THE NOTES TO JUDGE HAYES AND ASK JUDGE HAYES NOT TO MAKE THEM TURN OVER THE NOTES RELATING TO WHAT MR. ROBERTSON'S SAID,

JUDGE HAYES' ANSWER WOULD HAVE BEEN NO. IF SHE'S GONNA TESTIFY, ALL THE NOTES GET TURNED OVER.

SO, THAT BRINGS IT ALL AROUND TO THE ONE POINT: WAS IT A REASONABLE DECISION TO CALL HER AS A WITNESS, WHICH I'LL GET TO IN A MINUTE. WELL, ACTUALLY, I'LL GET TO IT RIGHT NOW. IN ANSWERING THAT QUESTION, I THINK YOU HAVE TO LOOK AT-- THAT QUESTION HAS TO BE ANSWERED IN COMBINATION WITH THE SECOND PRONG OF STRICKLAND. BECAUSE WHAT COUNSEL HAS TO DO IS THEY HAVE TO LOOK AT THE SITUATION THAT THEY'RE IN. AND THERE THEY ARE IN TRIAL AND THEY HAVE TO GIVE OVER THESE NOTES IF SHE'S GONNA TESTIFY. THE TRIAL'S ALMOST OVER. SHE IS THE ONLY VEHICLE LEFT TO TIE ALL THIS MENTAL HEALTH HISTORY TOGETHER.

IF THEY ARE GOING TO CALL HER AS A WITNESS AND ACCOMPLISH THE GOAL THAT THEY SET OUT AT THE WHOLE BEGINNING OF THE TRIAL, WHICH IS TO LAY IT ALL OUT IN THE FIRST PLACE, TIE IT ALL TOGETHER IN THE LAST. IF THEY'RE GONNA DO THAT, THEY'VE GOT TO CALL HER AS A WITNESS.

SO, THEY'VE GOT A WEIGH THE VALUE THAT THEY GET FROM PUTTING HER ON THE STAND AND LETTING HER TIE IT ALL TOGETHER AGAINST THE CLEAR DETRIMENT THAT THEY WILL SUFFER FROM THOSE NOTES COMING OUT THROUGH THE EFFECTIVE CROSS EXAMINATION OF SOLICITOR POPE. AND THE DECISION THAT COUNSEL HAS TO MAKE AT THE CRUCIBLE THERE IN THE MIDDLE OF THE TRIAL IS VERY SIMILAR TO THE DECISION THAT I HAVE TO MAKE

ON THE SECOND PRONG OF STRICKLAND: WOULD IT HAVE MADE ANY DIFFERENCE.

NOW, I'VE SPENT A LOT OF TIME DURING THE COURSE OF THIS TRIAL READING THE TESTIMONY OF OTHER WITNESSES. SO, COUNSEL'S GOT TO LOOK AT SEVERAL THINGS. THEY'VE GOT TO LOOK AT THE TESTIMONY OF WHAT WAS MEREDITH MOON. THEY'VE GOT TO LOOK AT WHAT IS THE OTHER EVIDENCE THAT IS IN THE RECORD REGARDING THE WAY THIS CRIME UNFOLDED. THAT INCLUDES DOCTOR SEXTON. THAT INCLUDES OTHER WITNESSES AS WELL.

MEREDITH MOON HAS ALREADY TESTIFIED ABOUT A LOT OF THINGS THAT DOCTOR CASCIO QUOTES ROBERTSON AS HAVING SAID. UNDOUBTEDLY, THE WAY THAT ROBERTSON PRESENTS IT TO CASCIO, THE WAY IT COMES OUT THROUGH CASCIO IS SIGNIFICANTLY MORE DAMAGING THAN IT WAS COMING THROUGH MEREDITH MOON. BUT, NEVERTHELESS, A LOT OF THAT TESTIMONY IS ALREADY IN THE RECORD TO SOME EXTENT.

THEN YOU TAKE DOCTOR SEXTON. SO, I'VE GOT A LITTLE OUTLINE TO WHAT DOCTOR SEXTON TESTIFIED TO REGARDING THE BLOWS THAT HAD BEEN ADMINISTERED TO THE HEAD TO EARL ROBERTSON WITH HAMMER TINES. HE DISCUSSED BLOWS TO THE HEAD ON PAGE 2258, LINES 14 TO 16; BLOWS TO THE LEFT SIDE OF THE HEAD, TWO PAIRS ON PAGE 2259, LINES 20 TO 24; IN THE TEMPLE, 2260, LINES 6 TO 7; IN THE RIGHT SHOULDER, PAGE 2262, LINES 11 AND 19; RIGHT SIDE OF THE NECK, 2263, LINES 13 TO 15; BACK OF THE LEFT

HAND, 2265, LINES 11 AND 15; BACK OF THE RIGHT HAND, 2265, LINES 18 TO 23.

SO, JUST RIGHT THERE, YOU'VE GOT AT LEAST EIGHT BLOWS WITH THE TINES OF THE HAMMER ADMINISTERED BY WHOEVER COMMITTED THIS CRIME TO THE VICTIM, TESTIFIED TO BY A MEDICAL DOCTOR USING A CHART, SHOWING A JURY, AS I UNDERSTAND, PHOTOGRAPHS OF THE BODY SHOWING WHERE THESE MARKS ARE ON THE BODY. THAT IS A LEVEL OF DETAIL REGARDING THAT PARTICULAR TYPE OF ASSAULT THAT IN MY OPINION HAS A GREATER IMPACT BEFORE THE JURY BECAUSE OF ITS LEVEL OF DETAIL, IT'S SCIENTIFIC AND MEDICAL ACCURACY, THAT IS MORE EFFECTIVE AND MORE DAMAGING TO THE DEFENDANT THAN HIS OWN ADMISSION THAT CAME OUT THROUGH DOCTOR CASCIO.

THEN WE GO ON TO THE BASEBALL BAT, STILL REGARDING EARL ROBERTSON. BASEBALL BAT BLOWS TO THE TOP OF THE SPINE, 2253, LINES 22 TO 24; LEFT SIDE OF THE BACK, 2254, LINES 7 TO 10; UPPER RIGHT BACK, 2254, LINES 21 TO 22.

OTHER PARTS OF THE HAMMER. HE WAS HIT IN THE EAR, PAGE 2260, LINES 7 TO 10. HE WAS CUT WITH A KNIFE, 2252, LINE 17, AND THAT WAS IN THE HAND. ON THE BACK OF THE NECK HE WAS CUT WITH A KNIFE.

I'M GONNA GO AHEAD AND PUT ALL THIS IN THE RECORD. 2252, LINES 18 AND 19. CUT IN THE LEFT KNEE; 2264, LINES 3 TO 9; RIGHT SIDE OF THE NECK WITH A KNIFE, 2263, LINES 15 TO 16.

UNDERSTANDING THAT MY SUMMARY OF THESE THINGS PROBABLY HAS SOME ERRORS IN IT. AND I DON'T MEAN TO GIVE THESE PAGE NUMBERS AND LINE NUMBERS AND I DON'T WANT SOMEBODY TO GO BACK AND SAY, NO, YOU MISSED ONE POINT, BECAUSE I GUARANTEE YOU I MISSED A COUPLE OF POINTS. I'M SURE I LEFT OUT SOME. I'M SURE I INCLUDED SOME THAT WERE NOT ACTUALLY TESTIFIED TO AS CORRECTLY AS I SAID THEY WERE. THEN DOCTOR SEXTON GOES BACK ON 2269 AND 70 AND HE SUMMARIZES ALL THAT.

THEN YOU'VE GOT THE EXHIBITS. I THINK I'VE GOT WHAT MUST BE A REDUCED SIZE COPY OF 267. DO YOU HAVE A BLOW-UP OF THAT?

MR. SALTER: I'LL CHECK.

THE COURT: SEE IF THIS IS THE ACTUAL EXHIBIT OR THIS IS A COPY.

MR. POPE: THIS IS THE COPY THAT WAS USED, YOUR HONOR, WHICH WAS USED WITH A PRESENTER TO PRESENT IT. WE ALSO SUPPLEMENTED IT WITH THIS.

THE COURT: OKAY. NOW, THAT IS THE TESTIMONY FROM DOCTOR SEXTON REGARDING EARL ROBERTSON. I'VE GOT A SIMILAR BREAK-DOWN OF TESTIMONY REGARDING THE BLOWS THAT WERE ADMINISTERED TO TERRY ROBERTSON. AT LEAST-- I MEAN, I GUESS I'M GONNA JUST GO AHEAD AND READ ALL THIS INTO TO THE RECORD. BECAUSE, IN MY OPINION, AFTER LOOKING AT THE GRAPHIC NATURE OF DOCTOR SEXTON'S TESTIMONY, THE ABILITY BY DOCTOR SEXTON TO IDENTIFY SO MANY DIFFERENT BLOWS. AND NOT ONLY TO

IDENTIFY THEM, BUT TO EXPLAIN HOW HE IDENTIFIES THEM, AS SHOWING PICTURES AND DIAGRAMS, TO BOTH THESE VICTIMS, COMBINED WITH THE TESTIMONY OF MEREDITH MOON, AND ALSO COMBINED WITH THE OTHER TESTIMONY REGARDING THE CIRCUMSTANCES, THE DNA, THE BLOOD, THE BROKEN WINDOW, THE DROPPING OF THE CLOTHES IN MARYLAND, ALL THIS STUFF.

EVEN BEFORE DOCTOR CASCIO GETS ON THE STAND, THERE IS A VIVID AND GRAPHIC AND OVERWHELMING PICTURE PAINTED BEFORE THAT JURY OF THE HEINOUS NATURE, NOT ONLY OF THE CRIME, BUT OF THE DEFENDANT THAT COMMITTED IT.

SO, IN MY OPINION, THE EFFECT OF THE ADMISSIONS MADE BY ROBERTSON AS TESTIFIED THROUGH CASCIO, WHILE SIGNIFICANT, ARE NOT SO STRONG THAT I COULD SAY WITH CONFIDENCE THAT THERE IS A REASONABLE PROBABILITY THAT IF THOSE ADMISSIONS HAD NOT BEEN ENTERED INTO EVIDENCE, THE OUTCOME OF THE PROCEEDING WOULD HAVE BEEN ANY DIFFERENT. BECAUSE I BELIEVE, IN THIS RESPECT, EVEN THOUGH YOU HAVE DONE AN OUTSTANDING JOB OF EXPLAINING ALL THIS TO ME, IN THE END, IT'S MY OPINION THAT YOU HAVE FAILED TO MEET YOUR BURDEN OF PROOF ON THE SECOND PRONG OF STRICKLAND REGARDING THE TESTIMONY OF CASCIO.

AND BECAUSE COUNSEL IS CHARGED WITH THE STRATEGIC DECISION IN THE CRUCIBLE OF THE TRIAL OF DECIDING WHETHER OR NOT TO PUT THIS WITNESS ON THE STAND WHO IS GOING TO HELP THEM AND HURT THEM BECAUSE THE BALANCE COMES OUT SO EVEN,

AS I HAVE JUST DESCRIBED, COUNSEL'S DECISION TO PUT HER ON THE STAND WAS NOT UNREASONABLE.

AND SO, I THINK YOU HAVE FAILED ALSO TO PROVE THE FIRST PRONG OF STRICKLAND WITH REGARD TO THE DECISION TO PUT HER ON THE STAND. AND THEN JUST LIKE I SAID, AND I'VE BEEN SAYING THIS ALL THROUGH THE TRIAL, EVERYTHING REGARDING CASCIO FLOWS FROM THE DECISION TO PUT HER ON THE STAND. ONCE THAT DECISION IS MADE, THE NOTES HAVE TO BE TURNED OVER AND THE DAMAGE IS GONNA COME. UNLESS, PERHAPS, YOU KNOW, YOU'VE GOT A GLEEFUL, OVER-CONFIDENT PROSECUTOR WHO GOES HOME AND HAS A COUPLE OF DRINKS THE NIGHT BEFORE HE CROSS EXAMINES CASCIO INSTEAD OF READING THE NOTES THAT HAVE JUST BEEN TURNED OVER TO THEM, PERHAPS HE MIGHT HAVE THEN OVER LOOKED IT. BUT WE ALL KNOW THAT SOLICITOR POPE DIDN'T DO THAT.

NOW, WHAT I'M GONNA DO, IS I'M GONNA JUST TAKE THIS SUMMARY AND MAKE IT A COURT'S EXHIBIT.

(WHEREUPON COURT'S EXHIBIT NUMBER ONE WAS MARKED AND MADE A PART OF THE RECORD)

THESE ARE PART OF THE RECORD. THESE ARE THE PLAINTIFF'S AND DOCTOR SEXTON'S TESTIMONY REGARDING THE REPEATED BLOWS TO TERRY ROBERTSON WITH HAMMER TINES, LATERAL EDGE OF HAMMER, KNIFE. I'M COUNTING TWENTY-EIGHT. NOW, THERE MAY BE SOME OVERLAP IN THE ONES THAT I HAVE IDENTIFIED. I'M SURE THERE IS. FOR EXAMPLE, HE'S GOT HAMMER TINES BLOWS AND HE'S

ALSO LACERATIONS. HE MAY BE COUNTING THE LACERATIONS AS HAVING BEEN MADE BY THE HAMMER TINES.

BUT WHETHER IT'S TWENTY-EIGHT, EIGHTEEN OR THIRTY-EIGHT, IT'S A SIGNIFICANT NUMBER. THE TESTIMONY REGARDING HOW THOSE BLOWS WERE ADMINISTERED, THE ABILITY TO SHOW THE DIAGRAMS AND THE PHOTOGRAPHS TO THE JURY, AS I HAVE SAID, IN MY OPINION IS MUCH MORE EFFECTIVE AND DAMAGING THAN THE ADMISSIONS GIVEN BY ROBERTSON.

SO, THAT'S MY RULING, AND I WOULD LIKE FOR THE STATE TO PREPARE AN ORDER.

MR. SALTER: YES, YOUR HONOR.

THE COURT: AND WE'LL MAKE THIS A COURT'S EXHIBIT AS WELL.

(WHEREON COURT'S EXHIBIT NUMBER TWO WAS MARKED AND MADE A PART OF THE RECORD)

AND BEFORE WE GO OFF THE RECORD LET ME SAY THAT OBVIOUSLY THERE'S AN EXTENSIVE FACTUAL RECORD IN THIS CASE. I HAVE, FOR EXAMPLE, IN DISCUSSING THE EFFECT OF MEREDITH MOON'S TESTIMONY ON ME IN DECIDING WHETHER OR NOT THE SECOND PRONG OF STRICKLAND WAS MET REGARDING THE DECISION TO CALL CASCIO, YOU'RE GONNA HAVE TO TAKE THAT TESTIMONY AND PUT IN THE ORDER THOSE DETAILS THAT ARE PERTINENT TO THE POINT THAT I JUST MADE.

MR. SALTER: YES SIR.

THE COURT: NOT ONLY THOSE DETAILS IN THEIR IMPORTANCE TO MY DECISION ON THE SECOND PRONG, BUT THOSE DETAILS IN THEIR IMPORTANCE TO COUNSEL WHEN THEY'RE MAKING THAT DIFFICULT DECISION RIGHT THERE IN THE MIDDLE OF TRIAL.

MR. SALTER: YES SIR.

THE COURT: AND ON OTHER POINTS, TOO. OBVIOUSLY, THERE'S NO WAY THAT I COULD HAVE GONE THROUGH THE DETAIL OF TESTIMONY IN MY RULING THAT, EVEN THOUGH I ADMIT WAS LONG-WINDED, THAT NEEDS TO BE DONE IN THE ORDER ITSELF.

MR. SALTER: YES SIR.

THE COURT: I ENJOYED BEING WITH Y'ALL.

MR. SALTER: THANK YOU, YOUR HONOR.

MR. BROWN: THANK YOU, YOUR HONOR.

THE COURT: ANYTHING FURTHER?

MR. BROWN: I FORGOT HOW YOU FILE A VOUCHER.

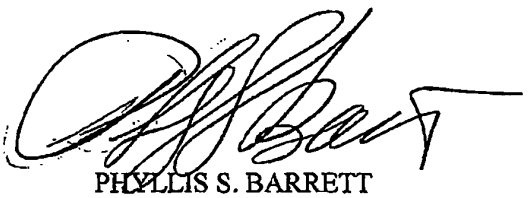
THE COURT: I'M HAPPY TO SAY THAT YOU NOW SEND IT STRAIGHT TO OID. IT DOES NOT HAVE TO COME TO ME.

MR. BROWN: OKAY. THANK YOU.

CERTIFICATE

I, THE UNDERSIGNED PHYLLIS S. BARRETT, OFFICIAL COURT REPORTER FOR THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE HEARING HELD IN THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT, YORK COUNTY, SOUTH CAROLINA, ON THE 29TH, 30TH AND 31ST DAYS OF JANUARY, 2007.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.



PHYLLIS S. BARRETT

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

James D. Robertson, #5067,)
)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS

C. A. No. 06-CP-46-532

ORDER OF DISMISSAL

This matter is before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed on March 1, 2006. Respondent submitted its Return on October 20, 2006. The Court held an evidentiary hearing on January 29-31, 2007 at the Moss Judicial Center in York, South Carolina.

Applicant testified on his own behalf at the hearing. He also presented testimony from his trial counsel, James William Hancock, Jr. and James W. Boyd. The State presented testimony from the current Sixteenth Circuit Solicitor, Kevin S. Brackett; the former Sixteenth Circuit Solicitor, Thomas E. Pope; Michael Stobbe, the Branch Chief of Inmate Records at the South Carolina Department of Corrections (SCDC); and Ms. Merry Collins, an Investigator with the Sixteenth Circuit Solicitor's Office. The Court also had before it: the trial transcript (including pre-trial motions hearings); the records from Applicant's direct appeal to the South Carolina Supreme Court and the waiver of his appeal; the June 16, 2005 letter requesting a stay of execution; Respondent's June 21, 2005 letter opposing the request for a stay of execution; the July 7, 2005 Order of the South Carolina Supreme Court granting the stay; the Order Appointing Counsel for Post-Conviction Relief; the York County Clerk of Court's records; and the Post-

Robertson v. State: C/A 2011-CP-46-00072, Capital PCR Action

8 messages

Kelly, R. Keith Law Clerk (Sarah Shugars) <kkellylc@sccourts.org> Tue, Jul 12, 2022 at 2:04 PM
To: Melody Brown <MBrown@scag.gov>, Ed Salter <ESalter@scag.gov>
Cc: Derek Enderlin <derek@rossenderlin.com>, Hank Ehlies <hank@ehlieslaw.com>, "Maio, Timothy M." <timothy.m.maio@gmail.com>

Good afternoon,

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

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

After careful review of all materials, including but not limited to, Judge Few's order, transcripts, memorandums, statutes, live testimony and exhibits, the Court finds Petitioner failed to show that a reasonable probability exists that but for PCR counsels' error, the result of the proceeding would be different.

Ms. Brown or Mr. Salter, please prepare an order that reflects the above, share it with opposing counsel, and then email me the order for Judge Kelly review and signature.

Best,

Sarah D. Shugars

Law Clerk to the Honorable R. Keith Kelly

125 E. Floyd Baker Blvd.

Gaffney, South Carolina 29340

(864) 596-2400

Ed Salter <ESalter@scag.gov> Tue, Jul 12, 2022 at 2:14 PM
To: "Kelly, R. Keith Law Clerk (Sarah Shugars)" <kkellylc@sccourts.org>, Melody Brown <MBrown@scag.gov>

THIS PAGE REMOVED BY CONSENT ORDER DATED APRIL 1, 2024

THIS SECTION REMOVED BY CONSENT ORDER DATED APRIL 1, 2024

Kelly, R. Keith Law Clerk (Sarah Shugars) <kkellylc@sccourts.org> Tue, Jul 19, 2022 at 9:33 AM
To: Melody Brown <MBrown@scag.gov>, Hank Ehlies <hank@ehlieslaw.com>
Cc: Derek Enderlin <derek@rossenderlin.com>, Ed Salter <ESalter@scag.gov>, "Maio, Timothy M." <timothy.m.maio@gmail.com>

Mr. Ehlies, please prepare a proposed order as well that reflects the Court's ruling.

Best,

Sarah D. Shugars

Law Clerk to the Honorable R. Keith Kelly

125 E. Floyd Baker Blvd.

Gaffney, South Carolina 29340

(864) 596-2400

From: Kelly, R. Keith Law Clerk (Sarah Shugars) <>
Sent: Tuesday, July 12, 2022 2:04 PM
To: 'Melody Brown' <MBrown@scag.gov>; 'Ed Salter' <ESalter@scag.gov>
Cc: 'Derek Enderlin' <derek@rossenderlin.com>; 'Hank Ehlies' <hank@ehlieslaw.com>; 'Maio, Timothy M.' <timothy.m.maio@gmail.com>
Subject: Robertson v. State: C/A 2011-CP-46-00072, Capital PCR Action

Good afternoon,

[Quoted text hidden]
[Quoted text hidden]

Hank Ehlies <hank@ehlieslaw.com> Thu, Jul 21, 2022 at 6:50 AM
To: Melody Brown <MBrown@scag.gov>, "Kelly, R. Keith Law Clerk (Sarah Shugars)" <kkellylc@sccourts.org>
Cc: Derek Enderlin <derek@rossenderlin.com>, Ed Salter <ESalter@scag.gov>, "Maio, Timothy M." <timothy.m.maio@gmail.com>

Best to all on this email thread. Ms. Shugars, please know that, for a host of reasons, I will not file a proposed order. Respectfully, Hank Ehlies

[Quoted text hidden]

Robertson v. State: 2011-CP-46-00072, Capital PCR Action

4 messages

Kelly, R. Keith Law Clerk (Sarah Shugars) <kkellylc@sccourts.org> Tue, Jul 19, 2022 at 2:37 PM
To: Ed Salter <ESalter@scag.gov>, Derek Enderlin <derek@rossenderlin.com>, "Maio, Timothy M." <timothy.m.maio@gmail.com>, Hank Ehlies <hank@ehlieslaw.com>, Melody Brown <MBrown@scag.gov>

Good afternoon,

By order dated January 28, 2022, the Supreme Court of South Carolina extended the June 15, 2021 Order permitting a trial judge to "elect not to hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers." (see paragraph (d) Minimizing Hearings on Motions).

The Motion to Disallow Attorney General to Draft a Proposed Order is **denied**. The Court is permitted to ask counsel to prepare a *proposed* order. Judge Kelly will closely review the proposed order to make sure it accurately reflects the ruling, and he would make any changes as needed.

Both sides may prepare proposed orders for Judge Kelly's review. The orders must be submitted no later than July 27, 2022.

Best,

Sarah D. Shugars

Law Clerk to the Honorable R. Keith Kelly

125 E. Floyd Baker Blvd.

Gaffney, South Carolina 29340

(864) 596-2400

Ltr Motion To Disallow AG to Prepare Proposed Order.pdf
1977K

Melody Brown <MBrown@scag.gov> Tue, Jul 26, 2022 at 11:26 AM
To: "Kelly, R. Keith Law Clerk (Sarah Shugars)" <kkellylc@sccourts.org>, Ed Salter <ESalter@scag.gov>, Derek Enderlin <derek@rossenderlin.com>, "Maio, Timothy M." <timothy.m.maio@gmail.com>, Hank Ehlies <hank@ehlieslaw.com>
Cc: Angela Brown <abennett@scag.gov>

Dear Ms. Shugars:

Respondent would respectfully request a 10 day extension of time in which to submit the proposed order. Essentially, though we have been working on a draft, it is not yet complete. We offer the following in support of this request:

Judge Kelly announced his decision by email of July 12, 2022. Then, by email of July 19, 2022, the Judge requested a proposed order be submitted by July 27, 2022. Regrettably, counsel for Respondent were in the midst of finishing other projects and were not able to immediately begin work on the proposed order. For example, Mr. Salter was finishing a brief in a non-capital murder direct appeal that had been previously extended by the South Carolina Court of Appeals (Jason Lee). The 41 page brief was filed on Friday, July 22nd. Mr. Salter is also chairman of the internal appellate review committee which met that same Friday. That meeting required preparation to discuss issues regarding criminal case matters that are currently on appeal. Ms. Brown was completing supplemental briefing in the Fourth Circuit Court of Appeals in a capital case on remand from the Supreme Court of the United States (Sammie Stokes). The supplemental brief was filed on the 19th. Further, Ms. Brown, as supervisor of the unit, had been asked to provide information to the Legislature as part of the Legislative Oversight review which requires significant time in data preparation.

Even so, counsel for Respondent have a working draft and have been working on completing that draft for submission to the Court. While counsel will continue to work on the draft, Ms. Brown is slated to attend a pre-arranged out-of-state conference the remainder of this week. And, in addition to working on data collection for the Legislature, is also preparing a reply to objections in a capital federal habeas action currently due to be filed August 1, 2022 in the District Court. (Stephen Bryant).

Therefore, for all these reasons, counsel for Respondent respectfully requests a 10 day extension of time in which to complete and submit a proposed order.

Thank you for your consideration of this request.

Sincerely,

Ed Salter and Melody Brown

Counsel for Respondent

MELODY J. BROWN, Senior Assistant Deputy Attorney General
Office of the South Carolina Attorney General

Capital and Collateral Litigation Section | Office 803-734-6305 | mbrown@scag.gov

P.O. Box 11549 | Columbia, SC 29211

scag.gov

[Quoted text hidden]

Kelly, R. Keith Law Clerk (Sarah Shugars) <kkellylc@sccourts.org> Wed, Jul 27, 2022 at 2:20 PM
To: Melody Brown <MBrown@scag.gov>, Ed Salter <ESalter@scag.gov>, Derek Enderlin <derek@rossenderlin.com>, "Maio, Timothy M." <timothy.m.maio@gmail.com>, Hank Ehlies <hank@ehlieslaw.com>
Cc: Angela Brown <abennett@scag.gov>

Good afternoon,

Thank you for your email.

Judge Kelly is granting a 20 day extension.

Best,

Sarah D. Shugars

Law Clerk to the Honorable R. Keith Kelly

125 E. Floyd Baker Blvd.

Gaffney, South Carolina 29340

(864) 596-2400

From: Melody Brown <MBrown@scag.gov>
Sent: Tuesday, July 26, 2022 11:27 AM
To: Kelly, R. Keith Law Clerk (Sarah Shugars) <kkellylc@sccourts.org>; Ed Salter <ESalter@scag.gov>; 'Derek Enderlin' <derek@rossenderlin.com>; 'Maio, Timothy M.' <timothy.m.maio@gmail.com>; Hank Ehlies <hank@ehlieslaw.com>
Cc: Angela Brown <abennett@scag.gov>
Subject: RE: Robertson v. State: 2011-CP-46-00072, Capital PCR Action

[Quoted text hidden]

Ed Salter <ESalter@scag.gov> Wed, Jul 27, 2022 at 2:21 PM

To: "Kelly, R. Keith Law Clerk (Sarah Shugars)" <kkellylc@sccourts.org>, Melody Brown <MBrown@scag.gov>, Derek Enderlin <derek@rossenderlin.com>, "Maio, Timothy M." <timothy.m.maio@gmail.com>, Hank Ehlies <hank@ehlieslaw.com>
Cc: Angela Brown <abennett@scag.gov>

Thank you very much.

Ed Salter

[Quoted text hidden]

WILLIAM H. EHLIES, P.A.
ATTORNEY-AT-LAW
BUILDING A, SUITE 201
310 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605
864-232-3503
FACSIMILE NUMBER 864-232-4854
EIN: 57-0703576

July 13, 2022

VIA ELECTRONIC MAIL ONLY

Honorable R. Keith Kelly
Circuit Court Judge
125 East Floyd Baker Boulevard
Gafney, South Carolina 29340

Re: *James Dejarnette Robertson v. State of South Carolina*
C. A. No.: 2011-CP-46-0072

Dear Judge Kelly:

In response to your email indicating your decision to deny Mr. Robertson any successive post-conviction relief, Mr. Robertson respectfully objects to your request that the Attorney General's Office prepare a proposed order for your review and signature. The Supreme Court of South Carolina does not approve of this practice and "strongly encourages" judges presiding in capital cases to "draft their own findings of fact and conclusions of law." *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). This admonition is consistent with South Carolina law, which requires that courts, not parties, perform the critical function of objectively assessing the evidence and law in PCR cases, and formulating even-handed conclusions based on the exercise of sound, independent judgment. *See* S.C. Code §17-27-80 (governing post-conviction relief cases generally) ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented"); S.C. Code §17-27-160(D) (governing capital post-conviction relief cases) ("the hearing judge in writing shall make specific findings of fact and state expressly the judge's conclusions of law relating to each issue").

The Supreme Court's disapproval of this practice is consistent with a nationwide consensus. Verbatim adoption of a party's proposed findings is widely condemned because it represents "an abandonment of the duty and the trust that has been placed in the judge," *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 n.4 (1964) (quoting Judge J. Skelly Wright in *Seminars for Newly Appointed United States District Judges* 166 (1963)), and leads instead to judgments that are self-evidently "not the original product of a disinterested mind." *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977); *see also, e.g.*, *Shaw v. Martin*, 733 F.2d 304, 309 n.7 (4th Cir. 1984) ("The adoption of one party's proposed findings and conclusions is a practice with which we have expressed disapproval on a number of occasions.").

Adoption of an order drafted by the Attorney General's Office would be particularly susceptible to the criticisms described above given that the Court has not provided any of its own reasoning—factual findings or legal conclusions—supporting its denial of Mr. Robertson's claims for relief.

Mr. Robertson, therefore, respectfully requests that this Court draft its own order laying out its "own findings of fact and conclusions of law." *See Hall*, *supra*.

I will be filing this letter as an exhibit to a formal motion filed with the Clerk of Court to the same effect. An unfiled copy of that motion is included with this letter.

Sincerely yours,

WILLIAM HARRY EHLIES, II

/he
Enclosure
cc: Ed Salter, Senior Assistant Attorney General
Derek Enderlin, Esq.
Timothy M. Maio, Esq.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	
	)	
James D. Robertson,	)	CASE NO.
☐ Plaintiff	)	2011-CP-46-0072
	)	
v.	)	MOTION AND ORDER INFORMATION
	)	FORM AND COVER SHEET
State Of South Carolina	)	
☐ Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
William Ehlies, Bar No. 1857	William Salter, Bar No.
Address:	Address:
310 Mills Avenue Suite 201 Greenville SC 29605	POB 11549
phone: 864-232-3503 fax: 864-232-4854	phone: 803-734-3734 fax:
e-mail: hank@ehlieslaw.com other:	e-mail: esalter@scag.gov other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: To Prohibit AG From Preparing an Order
Estimated Time Needed:1 hour Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ July 13, 2022
Signature of Attorney for ☒ Plaintiff / ☐ Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	_____
☐ Other:	JUDGE
	CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

James D. Robertson, #5067

Applicant,

v.

C. A. No. 2011-CP-46-0072

State of South Carolina,

Respondent.

MOTION TO DISALLOW ATTORNEY GENERAL TO DRAFT A PROPOSED ORDER

On July 12, 2022 the undersigned received a copy of an original electronic mail issued by the Court directing the Attorney General's Office to "prepare an order" denying any relief to Mr. Robertson. That email is attached as an exhibit. Mr. Robertson served upon the Court and the Office of the Attorney General a responsive letter objecting to the directive that the Attorney General prepare an order and that letter is attached as an exhibit.

APPLICANT'S POSITION

The Court intends to deny Mr. Robertson any successive post-conviction relief, and directs the Attorney General to "prepare an order." Mr. Robertson objects to this procedure. The Supreme Court of South Carolina does not approve of this practice and "strongly encourages" judges presiding in capital cases to "draft their own findings of fact and conclusions of law." *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). This admonition is consistent with South Carolina law, which requires that courts, not parties, perform the critical function of objectively

assessing the evidence and law in PCR cases, and formulating even-handed conclusions based on the exercise of sound, independent judgment. *See* S.C. Code §17-27-80 (governing post-conviction relief cases generally) ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented"); S.C. Code §17-27-160(D) (governing capital post-conviction relief cases) ("the hearing judge in writing shall make specific findings of fact and state expressly the judge's conclusions of law relating to each issue").

The Supreme Court's disapproval of this practice is consistent with a nationwide consensus. Verbatim adoption of a party's proposed findings is widely condemned because it represents "an abandonment of the duty and the trust that has been placed in the judge," *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 n.4 (1964) (quoting Judge J. Skelly Wright in *Seminars for Newly Appointed United States District Judges* 166 (1963)), and leads instead to judgments that are self-evidently "not the original product of a disinterested mind." *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977); *see also, e.g., Shaw v. Martin*, 733 F.2d 304, 309 n.7 (4th Cir. 1984) ("The adoption of one party's proposed findings and conclusions is a practice with which we have expressed disapproval on a number of occasions.").

Adoption of an order drafted by the Attorney General's Office would be particularly susceptible to the criticisms described above given that the Court has not provided any of its own reasoning— factual findings or legal conclusions— supporting its denial of Mr. Robertson's claims for relief.

CONCLUSION

Mr. Robertson, therefore, respectfully requests that this Court draft its own order laying out its "own findings of fact and conclusions of law." *See Hall, supra.*

July 13, 2022.

ATTORNEY FOR THE APPLICANT
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
(o) 864-232-3503 (f) 864-232-4854
hank@ehlieslaw.com

State of South Carolina

In the Court of Common Pleas

County of York

James D. Robertson,

Applicant,

-vs-

C. A. No. 2011-CP-46-0072

State of South Carolina,

Respondent.

Certificate of Mailing

The undersigned certifies that he placed the coversheet, Motion to Disallow the Attorney General from preparing an order and exhibits in the USPS addressed as follows:

William Edgar Salter, III
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
esalter@scag.gov

July 13, 2022.

WILLIAM ~~HARRY~~ EHLIES, II
ATTORNEY FOR THE APPLICANT
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
864-232-3503
hank@ehlieslaw.com

Case Information

File# Robertson 2 CASE ID: 8721 SCCID# R-2005-00244

State of SC vs. James D. Robertson

Case Type: PCR (Capital)

County of Indictment: York

Appointed: 11/30/2005 Registered: 10/4/2007

County of Appointment: York

pro_bono: No Fees: Expenses: contract_case: Attorney County: York

Prior Attorney: Representing: Court:

Appointing Judge: John C. Few Trial Judge: John C. Few

Attorney:
Joseph D Matlock
P.o. Box 11101
Rock Hill, SC 29731
matlocklaw@comporium.net

Payee:
Joseph D Matlock
P.o. Box 11101
Rock Hill, SC 29731

Client(s):
James D. Robertson

8039853989

Disposition: PCR Disposition Outcome: Denied

Docket/Ticket/Warrant/Indictment	CDR	Description	cdr_other
//1997-GS-46-1020, /			
//1997-GS-46-1021/			
//1997-GS-46-1022/			
//1997-GS-46-1023/			

Voucher Information

State of SC vs. James D. Robertson

CID_ID: 6466 Atty Submitted 10/4/2007 Atty Resubmitted:

Type: Final Voucher Status Paid Submitted to CG 10/16/2007

Fees: Total Requested: $8,112.50

In Court Rate: $75.00 ic_hours: 13.5 contract_fee:

Out of Court Rate: $50.00 oc_hours: 142 **Total Fees: $8,112.50**

Expenses: Total Requested: $0.00

Professionals:
Investigator:
Translator:
Expert Witness:
Polygraph:
Psychiatric:

Total Prof: $0.00

Attorney:
Other Hrly Total:
LD Calls:
Mileage:
Transcripts:
Westlaw:
Other Amt:

Total Atty:

Total Expenses: $0.00

Voucher Total $8,112.50
- Other Contribution: $0.00
Total Paid: **$8,112.50**

DV#: DV2329 GLAcct:
Chck# 128883464 Fund:
Date Paid: 10/18/2007 FunctionalArea:

Payee comments:

SCCID comments

Printed: 3/21/2017 10:32:22 AM

Attorney: Joseph D Matlock PCR (Capital)

State of SC vs. James D. Robertson Representing:

A-2005-GS-46-R-00244 cid_id: 6466 cases_id: 8721

		Out of Court:	In Court:
12/2/2005	Travel 380 miles, prepare for trial, review transcript and case material, met with client	9	0
12/6/2005	Travel 380 miles, Prep fro trial, review transcript and case material, Met with client	6	0
1/19/2006	Prep for trial, review transcript and case material	5	0
11/18/2006	Prep for trial, reveiw transcript and case	3	0
11/24/2006	Prep for trial, reveiw transcript and case material	3	0
11/25/2006	Prep for trial, review transcript and case material	2	0
12/2/2006	Prep for trial, review transcript and case material	2	0
12/8/2006	Prep for trial, review transcript and case material	2	0
12/9/2006	Prep for trial, review transcript and case material	3	0
12/14/2006	Prep for trial, review transcript and case material	2	0
12/15/2006	Prep for trial, review transcript and case material	2	0
12/18/2006	Prep for trial, review transcript and case material	2	0
12/20/2006	PRep for trail, review transcript and case material	2	0
12/21/2006	Prep for trial, review transcript and case material	2	0
12/27/2006	Prep for trial, review transcript and case material	3	0
12/28/2006	Prep for trail, review transcript and case material	4	0
1/2/2007	Travel 214 miles, prep for trial, review transcript and case material, met with client, Court apprearance	7	1
1/6/2007	Prep for trial, review transcript and case materials	2	0
1/12/2007	Prep for trial, review transcript and case material	4	0
1/15/2007	Prep for trial, review transcript and case material	2	0
1/17/2007	Prep for trial, review transcript and case material	3	0
1/18/2007	Prep for trial, review transcript and case material	2	0
1/20/2007	Prep for trial, review transcript and case material	6	0
1/21/2007	Prep for trial, review transcript and case material	6	0
1/23/2007	Travel 190 miles, Prep for trial, reveiw transcript and case materials, Met with client	10	0
1/24/2007	Prep for trial, review transcript and case material	3	0
1/25/2007	Prep for trial, review transcript and case material. Met with client	10	0
1/26/2007	Prep for trial, review transcript and case material	12	0

Printed: 3/21/2017 10:32:23 AM

1/27/2007	Prep for trial, review transcript and case material		10	0
1/28/2007	Prep for trial, reveiw transcript and case material		2	0
1/29/2007	Prep for trial, reveiw transcript and case material		4	0
1/29/2007	Court		0	5
1/30/2007	Prep for trial, reveiw transcript and case material. Court		4	3.5
1/31/2007	Prep for trial, review transcript and case material. Court		3	4
		Total:	142	13.5

All Vouchers in this Case

CID_ID	Flag	status	Fees	Expenses	Total Paid	Date to CG	DVNumber	CheckNumber
6466	Paid	Paid	$8,112.50	$0.00	$8,112.50	10/16/2007	DV2329	128883464

All Professionals in this Case

All Attorney Expenses in this case

Case Information

File# Robertson 2 CASE ID: 4656 SCCID# R-2005-00068

STATE VS. JAMES ROBERTSON

Case Type: PCR (Capital)

County of Indictment: York

Appointed: 9/22/2005 Registered: 5/16/2007

County of Appointment: York

pro_bono: No Fees: Expenses: contract_case: Attorney County: York

Prior Attorney: Representing: Court:

Appointing Judge: John C. Few Trial Judge: John C. Few

Attorney:
Michael L. Brown
Po Box 1025
Rock Hill, SC 29731
lmrwmlb@yahoo.com
7000074550
803-328-8822

Payee:
Michael L. Brown Jr.
223 Main St Ste 500
Rock Hill, SC 29731

Client(s):
James D. Robertson

Disposition: PCR Disposition Outcome: Denied

Docket/Ticket/Warrant/Indictment	CDR	Description	cdr_other
//97-GS-461023/	116	Murder	
//97-GS-461021/	446	Checks/Fraudulent	
//97-GS-461020/	139	Robbery/Armed	

Voucher Information

STATE VS. JAMES ROBERTSON

CID_ID: 3037 Atty Submitted 5/17/2007 Atty Resubmitted:

Type: Final Voucher Status Paid Submitted to CG 6/1/2007

Fees: Total Requested: $8,112.50

In Court Rate: $75.00 ic_hours: 13.5 contract_fee:

Out of Court Rate: $50.00 oc_hours: 142 **Total Fees: $8,112.50**

Expenses: Total Requested: $0.00

Professionals:
Investigator:
Translator:
Expert Witness:
Polygraph:
Psychiatric:

Total Prof: $0.00

Attorney:
Other Hrly Total:
LD Calls:
Mileage:
Transcripts:
Westlaw:
Other Amt:

Total Atty:

Total Expenses: $0.00

Voucher Total $8,112.50
- Other Contribution: $0.00
Total Paid: **$8,112.50**

DV#: DV5679 GLAcct:
Chck# 128495019 Fund:
Date Paid: 6/4/2007 FunctionalArea:

Payee comments:

SCCID comments

Printed: 3/21/2017 10:34:54 AM

Attorney: Michael L. Brown PCR (Capital)

STATE VS. JAMES ROBERTSON Representing:

A-2005-CP-46-R-00068 cid_id: 3037 cases_id: 4656

		Out of Court:	In Court:
12/2/2005	Travel 380 miles, prep fpr trial,review transcript and case material. Met with client	9	0
12/6/2005	Travel 380 miles. Prep for trial, review transcript and case material. Met with client	6	0
11/18/2006	Prep for trial,review transcript,and case material	3	0
11/24/2006	Prep for trial,review transcript,and case material.	3	0
11/25/2006	Prep for trial,review transcript,and case material.	2	0
12/2/2006	Prep for trial,review transcript,and case material.	2	0
12/8/2006	Prep for trial,review transcript,and case material.	2	0
12/9/2006	Prep for trial,review transcript,and case material.	3	0
12/14/2006	Prep for trial,review transcript,and case material.	2	0
12/15/2006	Prep for trial,review transcript,and case material.	2	0
12/18/2006	Prep for trial,review transcript,and case material.	2	0
12/20/2006	Prep for trial,review transcript,and case material.	2	0
12/21/2006	Prep for trial,review transcript,and case material.	2	0
12/27/2006	Prep for trial,review transcript,and case material.	3	0
12/28/2006	Prep for trial,review transcript,and case material.	4	0
1/2/2007	Travel 214 miles. Prep for trial,review transcript,and case material. Met with client. Court	7	1
1/6/2007	Prep for trial,review transcript,and case material.	2	0
1/12/2007	Prep for trial,review transcript,and case material.	4	0
1/15/2007	Prep for trial,review transcript,and case material.	2	0
1/17/2007	Prep for trial,review transcript,and case material.	3	0
1/18/2007	Prep for trial,review transcript,and case material.	2	0
1/19/2007	Prep for trial,review transcript,and case material.	5	0
1/20/2007	Prep for trial,review transcript,and case material.	6	0
1/21/2007	Prep for trial,review transcript,and case material.	6	0
1/23/2007	Travel 190 miles.Prep for trial,review transcript,and case material. Met with client.	10	0
1/24/2007	Prep for trial,review transcript,and case material.	3	0
1/25/2007	Prep for trial,review transcript,and case material. Met with client.	10	0
1/26/2007	Prep for trial,review transcript,and case material.	12	0

Printed: 3/21/2017 10:34:54 AM

1/27/2007	Prep for trial,review transcript,and case material.		10	0
1/28/2007	Prep for trial,review transcript,and case material.		2	0
1/29/2007	Prep for trial,review transcript,and case material.		4	0
1/29/2007	Court		0	5
1/30/2007	Prep for trial,review transcript,and case material. Court		4	3.5
1/31/2007	Prep for trial,review transcript,and case material. Court		3	4
		Total:	142	13.5

All Vouchers in this Case

CID_ID	Flag	status	Fees	Expenses	Total Paid	Date to CG	DVNumber	CheckNumber
3037	Paid	Paid	$8,112.50	$0.00	$8,112.50	6/1/2007	DV5679	128495019

All Professionals in this Case

All Attorney Expenses in this case

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP4600072

James D Robertson		South Carolina State Of	
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by: The Court

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/R. Keith Kelly — 2165 — 11/21/2017

Circuit Court Judge — **Judge Code** — **Date**

For Clerk of Court Office Use Only

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)

This judgment was entered on **November 28, 2017,** and a copy mailed first class or placed in the appropriate attorney's box on **November 28, 2017,** to attorneys of record or to parties (when appearing pro se) as follows:

Emily C Paavola Death Penalty Resource & Defense Center P O Box 11311 Columbia, SC 29211
Keir M. Weyble 158-B Myron Taylor Hall Cornell Law School Ithaca, NY 14850

W. Edgar Salter III PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)
JAMES D. ROBERSTON, # 5067) Case No.: 2011-CP-46-00072
Applicant,)
vs.) **ORDER GRANTING**
State of South Carolina,) **PARTIAL SUMMARY JUDGMENT**
Respondent.)

This matter comes before me following the South Carolina Supreme Court's decision in *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016), in which the Court held "Petitioner's allegation that he was denied a state-created right to qualified counsel constitutes a 'sufficient reason' to permit a successive PCR application under section 17-27-90." *Id.* at 516, 795 S.E.2d at 35. The Court remanded this matter for a determination of whether Petitioner's initial PCR counsel, Michael L. Brown, Jr., and Joseph D. Matlock, both of Rock Hill, South Carolina, were statutorily qualified to represent a death-sentenced inmate in state post-conviction proceedings under S.C. Code § 17-27-160(B). As relevant here, the Supreme Court held that § 17-27-160(B) requires at least one attorney "must have either (1) prior experience in capital PCR proceedings, or (2) capital trial experience and capital PCR training or education." *Id.* at 518, 795 S.E.2d at 36. The Court further held that "non-compliance with section 17-27-160(B) constitutes deficient performance per se." *Id.* at 521, 795 S.E.2d at 37.

It is therefore incumbent upon this Court to determine whether Petitioner's initial PCR counsel failed to meet the statutory qualification requirements and, if so, whether he suffered prejudice. To address the first of these issues, this Court scheduled an evidentiary hearing for December 1, 2017, to take place in Spartanburg, South Carolina, at which the parties could offer evidence and argument regarding the qualification issue.

1
RKK

On September 13, 2017, Petitioner filed a motion for partial summary judgment, asserting that all of the available evidence demonstrates that neither Brown nor Matlock was statutorily qualified. Petitioner noted that there is no transcript, court order or other documentation from Petitioner's initial PCR proceeding which suggests that either attorney was qualified.[1] Petitioner offered an affidavit from Matlock, dated September 28, 2011, in which he swore that at the time of Petitioner's PCR proceedings, Matlock had never previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings, nor had he attended a CLE or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense. Petitioner asserted that Mr. Matlock died in April of 2014, and attached a copy of his obituary. Regarding Mr. Brown, Petitioner offered two affidavits from attorney John Blume (one dated September 28, 2011 and another dated August 17, 2017) detailing two separate conversations in which Mr. Brown reported that he likewise had never represented a death-sentenced inmate in PCR proceedings and had not attended any training primarily involving capital appellate and/or post-conviction defense at the time he represented Petitioner.

On October 13, 2017, Respondent filed a response to Petitioner's motion for partial summary judgment. Respondent did not offer any evidence or argument that either Brown or Matlock was qualified. On the contrary, counsel for Respondent asserted that he, too, had spoken with Brown "on Wednesday, October 11, 2017, and Mr. Brown has stated that he did not satisfy the requirements of § 17-27-160(B)." Response to Petitioner's Motion for Partial

[1]Then-Judge Few entered an order appointing Brown as PCR counsel on September 22, 2005, but the order only stated that Petitioner "contends that he is indigent and in need of services of an attorney as contemplated by law. Therefore, Michael Brown, Attorney-at-law is appointed as counsel for Defendant." App. 4517. There is no mention of whether or not Brown was statutorily qualified. Moreover, there is no record of Matlock's appointment to the case. He simply appeared with Brown at Petitioner's evidentiary hearing.

RKK

Summary Judgment at 12. Respondent conceded "it appears that there is no evidence that either of the attorneys appointed to represent Robertson in his original (2006) Post-Conviction Relief (PCR) action met the statutorily required qualifications of § 17-27-160(B)." *Id.*

Accordingly, this Court concludes that partial summary judgment on the issue of initial PCR counsel's lack of qualifications is appropriate because "there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." Rule 56(c), S.C.R.C.P. No evidentiary hearing is necessary to address this issue because all of the available evidence demonstrates that neither Brown nor Matlock was qualified under the requirements of § 17-27-160(B). This Court finds that neither Brown nor Matlock met the mandatory criteria. In accordance with *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016), their performance was therefore deficient. *Id.* at 521, 795 S.E.2d at 37.

AND IT IS SO ORDERED.

R. Keith Kelly

Hon. R. Keith Kelly
Presiding Judge

November 21, 2017.
Spartanburg, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
	)	
STATE OF SOUTH CAROLINA	)	
	)	ORDER FOR EVALUATION AS TO
-vs-	)	COMPETENCY AND CRIMINAL
	)	RESPONSIBILITY
JAMES D. ROBERTSON,	)	
	)	98-GS46-1020, 1021, 1022, 1023
DEFENDANT.	)	

This matter comes before the court on the state's Motion to Reconsider its earlier order denying the state's request for an independent mental evaluation of the defendant. The state asks the court to determine that the Defendant, James D. Robertson, charged with two counts of Murder, one count of Armed Robbery and one count of Financial Transaction Card Fraud, should submit to an independent psychiatric and/or psychological and/or neurological examination.

This court has, since its earlier order, reviewed the defendant's William S. Hall Psychiatric Institute reports relating to the defendant's involuntary commitment in August of 1995. In addition, counsel for the defendant has indicated they may present testimony relevant to the mental status of the defendant through a neurologist, Dr. Jonathon Pincus, a psychologist, Dr. Jim Evans and a psycho/social history expert, Toni Cascio. This testimony may be offered in either the guilt or penalty phase of the trial. The defendant has indicated to the court that he does not intend to assert the defense of insanity or enter a plea of guilty but mentally ill "*at this time*" (emphasis added).

JCH #1

Fundamental fairness dictates that the State be afforded the opportunity to verify or rebut evidence presented by the defense through expert testimony regarding the defendants mental status. Adequate rebuttal cannot be had without an independent examination. Estelle v. Smith, 451 U.S. 454 (1981); United States v. Albright, 388 F.2d 719 (4th Cir. 1968); State v. Sloan, 298 S.E. 2d 92.

An independent psychiatric examination under these circumstances is warranted and is a distinct aid in the determination and the administration of justice in order to confirm a claim of mental illness, discover fraudulent claims, or to rebut psychiatric testimony which can only reasonably be accomplished by the presentation of expert testimony. See State v. Myers, 67 S.E. 2d 506 (1951); State v. Jackson, 335 S.E. 2d 903 (N.C. Ct. App., 1985). It is therefore, under the circumstances of this case, within the inherent power of this court to require an independent psychiatric evaluation of the defendant where he may offer such evidence in this case.

NOW, THEREFORE, IT IS ORDERED that the Defendant shall be:

1. Examined and observed by independent examiners designated by the State for a period not to exceed fifteen (15) days, relative to his mental capacity. Prior to any examination the defendant shall be re-advised of his Constitutional privilege against self-incrimination, however he shall not be entitled to have counsel present during the examination. U.S. v. Albright, 388 F.2d 719 at 726 (4th Cir. 1968).

2. The report of the examination shall be made to the Court and the state

JCH #2

within five (5) days of the completion date of the examination. The report shall contain at minimum the following:

A. A diagnosis of the Defendant's mental condition; and

B. Clinical findings bearing on the issues of:

(1)(a) whether or not the defendant is capable of understanding the proceedings against him/her and assisting with his/her own defense; and

(b) if there is a substantial probability that he/she will attain such capacity in the foreseeable future;

and (2) whether or not, under the M'Naughten standard, the Defendant is criminally responsible for his actions on or about November 25, 1997;

and (3) if the Defendant is found responsible under the M'Naughten standard, whether or not, because of mental disease or defect, the Defendant lacked sufficient capacity to conform his conduct to the requirements of the law on or about November 25, 1997.

This examination is to take place immediately. Within Five (5) days of the examination or at the conclusion of the observation period by the independent agency, a written report shall be made to the Court.

IT IS FURTHER ORDERED that neither the results of the examinations, nor any communications made by the defendant during the examinations, shall be admissible in any criminal proceeding against the defendant unless:

JCH #3

1. The defense first interjects the mental status of the defendant as an issue in either the guilt or the penalty phase of the trial; or

2. To rebut testimony or evidence offered by the defendant.

Nothing in this order shall be construed to abridge the defendant's Fifth Amendment right to remain silent.

AND IT IS SO ORDERED.

York, South Carolina
February 17th 1999

John C. Hayes III
Presiding Judge
Sixteenth Judicial Circuit #4

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

JAMES D. ROBERTSON,

Defendant.

ORDER FOR EVALUATION AS TO COMPETENCY AND CRIMINAL RESPONSIBILITY

#98-GS-46-1020, 1021, 1022, 1023

The Court issued its's order dated February 17, 1999, wherein Defendant was ordered to undergo an independent mental evaluation. Defendant filed a motion seeking reconsideration of said order by the Court. This order disposes of Defendant's motion for reconsideration.

In addition to the well drafted briefs of counsel for Defendant and counsel for the State the Court had before for review and has again reviewed the following.

1. Psychological Final Summary from William S. Hall Institute by Dr. Ronald E. Prier for admission dates of August 24-31, 1995.

2. Psychological Evaluation of Dr. William Rothstein, Chief Psychology Service, William S. Hall Institute, dated August 25, 1998.

3. November 12, 1998, letter from Dr. Jonathan H. Pincus, M. D. to Ms. Drucy Glass.

Each of the three noted documents addressed Defendant and were proper for the Court's review. I find nothing prohibiting the Court's review of or use of these documents in ruling on the

JC#1

State's motion. I find the third document was submitted by Defendant pursuant to discovery. I find documents one and two were obtained by the State and do not appear to be covered by 42 U.S.C.A. § 290 dd-2 and thus not considered confidential under this Federal enactment. As to this section there is no showing it would apply to William S. Hall Institute (William S. Hall has not been shown to be or to be assisted by any department or agency of the United States). Also the submitted documents are not considered by the Court for the purpose of initiating or sustaining any criminal charges against a patient or as part of any investigation of a patient. Additionally, the admission in question was an involuntary admission based on potential dangerousness to defendant or others based at least in part on a threat. Admittedly the reports include matters dealing with substance abuse and a partial diagnosis of Axis I is alcohol dependence.

In any event, if any confidentiality was breached it was not a function of this Court and having been presented to the Court the Court can not ignore the records as they pertain to the issues before it. Also, even without the William S. Hall records, Dr. Pincus' letter to Ms. Glass, warrants and supports, alone, the Court's ruling herein and the February 17, 1999 order.

The Court has the inherent authority in appropriate circumstances, as the Court here finds exists, to order a Defendant to undergo an independent mental evaluation. U.S. v. Albright, 385 F2d 719 (4th Cir. 1968). Albright deals with a situation in which

JE #42

the Defendant asserted an insanity defense, not the case here. However, I find the rationale of Albright equally applicable here where mental issues are being explored by Defendant (Dr. Pincus' letter, Dr. Pincus named as potential witness; naming mental expert witnesses, Dr. Evans and Toni Cascio), and where, has here the current record reveals the presence of myriad mental issues which may be relevant as to issues which arise in a case wherein the death penalty is sought.

Defendant must be afforded his Fifth Amendment rights and be advised of same and specifically warned that he has a right to remain silent and that anything he says can and will be used against him in Court. Estelle v. Smith, 45 U.S. 454 (1981).

Defendant has been afforded his Sixth Amendment right to counsel, but this right does not grant him the right to have counsel present during the psychiatric evaluations ordered in this Court's February 17, 1999 order. Defendant can be afforded the "guiding hand of counsel" prior to the examination and make his decisions regarding the evaluation accordingly. Albright, supra.

Defendant's Motion to Reconsider the Court's order of February 17, 1999, is Denied and said February 17, 1999 order remains in full force and effect.

IT IS SO ORDERED!

John C. Hayes III

JOHN C. HAYES, III
Resident Judge
Sixteenth Judicial Circuit

#3

March 1, 1999
Spartanburg, S. C.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	
James D. Robertson,	)	CASE NO.
☐ Plaintiff	)	2011-CP-46-0072
v.	)	MOTION AND ORDER INFORMATION FORM AND COVER SHEET
State Of South Carolina	)	
☐ Defendant.	)	

FILED-RECEIVED
2021 JUL 20 PM 12:30
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

Plaintiff's Attorney:	Defendant's Attorney:
William Ehlies, Bar No. 1857 Address: 310 Mills Avenue Suite 201 Greenville SC 29605 phone: 864-232-3503 fax: 864-232-4854 e-mail: hank@ehlieslaw.com other:	William Salter, Bar No. Address: POB 11549 phone: 803-734-3734 fax: e-mail: esalter@scag.gov other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: To prohibit restraints while in Court
Estimated Time Needed:1 hour Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ July 20, 2021
Signature of Attorney for ☒Plaintiff / ☐Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:
Collected by: _____
☐ MOTION FEE COLLECTED: _____

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF YORK	)	
James Dejarnette Robertson, # 5067,	)	Civil Action No.: 2011-CP-46-0072
Applicant,	)	
vs.	)	**MOTION FOR APPLICANT TO BE PRESENT AT HEARING FREE OF PHYSICAL RESTRAINTS**
State of South Carolina,	)	
Respondent.	)	

Applicant, James Robertson, by and through undersigned counsel, moves the Court to prohibit the use of restraint devices during the merits hearing commencing August 9, 2021.

There has been no showing nor evidence produced that the Applicant is a flight risk, a danger to the public, or to Court personnel. Both Common Law and Constitutional law forbid the use of shackles and restraints absent an evidentiary finding by the Court that there is a substantial flight risk or a danger to the Court. Deck v. Missouri, 544 U.S. 622, 626 (2005) ("it is laid down in our ancient books, that, though under an indictment of the highest nature, a defendant must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape") (quoting 4 W. Blackstone, Commentaries on the Laws of England 317 (1769)) (internal quotation marks omitted).

One of the common justifications for this ancient common law rule is that restraints can negatively affect a person's mental and physical ability to defend himself. Id. ("If felons come in judgement to answer, ... they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will") (quoting 3 E. Coke, Institutes of the Laws of England); People v. Harrington, 42 Cal. 165, 168 (1871) ("any

order or action of the Court which, without evident necessity, imposes physical burdens, pains, and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense").

American courts have abided by this ancient common law rule, holding that only "in extreme and exceptional cases, where the safe custody of the prisoner and the peace of the tribunal imperatively demand, the manacles may be retained." Deck, 544 U.S. at 626-27 (quoting 1 J. Bishop, New Criminal Procedure § 955, p. 572-573 (4th ed. 1895)).

In *Deck*, the Supreme Court of the United States held that the use of physical restraints burdens one's constitutional right to counsel. Id. at 631. The Court held that shackles "can interfere with the accused's ability to communicate with his lawyer" and "can interfere with a defendant's ability to participate in his own defense." Id.

Because the Applicant is not a flight risk or a danger to the Court, binding him in shackles would needlessly burden his Fifth Amendment right to due process, his Sixth Amendment right to counsel and chill his right to participate in his own defense. Accordingly, Applicant moves this Honorable Court to prohibit the use of restraints while the Applicant is present during his post-conviction relief hearing.

July 20, 2021.

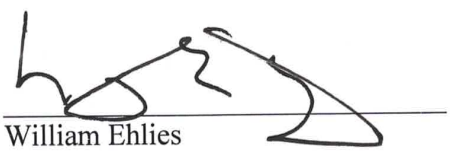
William Harry Ehlies, II
Joseph Bradley Bennett
Attorneys for the Applicant
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
(o) (864) 232-3503 (f) (864)232-4854
hank@ehlieslaw.com

The Applicant's attorneys affirm pursuant to Rule 11, SCRCP, that they have raised this issue with the Respondent and the Court during the informal virtual pretrial conference held Tuesday, July6, 2021.

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF YORK	)	
James Dejarnette Robertson, # 5067,	)	Civil Action No.: 2011-CP-46-0072
Applicant,	)	
vs.	)	**CERTIFICATE OF SERVICE**
State of South Carolina,	)	
Respondent.	)	

The undersigned certifies that a copy of the foregoing Motion for Applicant to be Present at Hearing Free of Physical Restraints was served by first class United States mail, postage prepaid, this 19th day of July 2021, upon the following:

William Edgar Salter
Assistant Attorney General
P.O Box 11549
Columbia, SC 29211



William Ehlies
Law Office of William Ehlies
310 Mills Ave, Unit 201
Greenville, SC 29605
(864) 232-3503
Attorney for Applicant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	
James D. Robertson, #5067,	)	C/A 2011-CP-46-00076
Applicant,	)	
v.	)	RESPONDENT'S POST-HEARING MEMORANDUM
State of South Carolina,	)	
Respondent.	)	

Applicant is a death-sentenced inmate. The captioned action is Applicant's second post-conviction relief action. The action was previously dismissed as successive and untimely, but on appeal, the Supreme Court of South Carolina remanded to this Court for a hearing to determine if prior PCR counsel met the statutory qualification for appointment, and, if not, did that "deficiency" result in prejudice to Applicant. *Robertson v. State*, 418 S.C. 505, 522, 795 S.E.2d 29, 38 (2016). This Court held the remand hearing on Monday, August 9, 2021 through Wednesday, August 11, 2021, and, at the conclusion of the hearing, directed the parties to submit concise post-hearing memoranda while the transcript of the hearing is being produced. Respondent submits this memorandum which presents the essence of its position on the issues as plead and as maintained at the hearing.

Summary of Argument

This is Robertson's second PCR action. A prior court determined summary dismissal of all grounds on procedural bars was appropriate. However, on appeal, our Supreme Court disagreed in part and remanded to allow Robertson a restricted opportunity for further litigation. The Court found summary dismissal was proper on all grounds except one: the Court found that the allegation that PCR counsel was not statutorily qualified for appointment in a capital PCR pursuant to S.C.

§ 17-27-160. *Robertson*, 418 S.C. at 522, 795 S.E.2d at 38. The Court specifically rejected all other possible allegations of deficient performance. *Id.* By Order dated November 21, 2017, this Court granted summary judgment in Robertson's favor, finding prior PCR counsel did not meet the statutory qualifications. Consequently, the only remaining issue left to be resolved is possible prejudice from the established deficiency.[1]

In this action, Robertson has the burden of showing prior PCR counsel missed an allegation of merit during the litigation of his first PCR action. Further, Robertson must show that had prior PCR counsel pursued that allegation during the litigation of his first PCR action, there is a reasonable probability of a different result, *i.e.,* Robertson would have been entitled to post-conviction relief, whether a new trial or new sentencing proceeding. *Id.,* at 520-21 (embracing the "Strickland test" placing the burden on applicant to show "non-compliance with section 17-27-160(B)" and prejudice).

Respondent submits that Robertson has failed in his burden. Robertson failed to show any allegation of merit that was not raised that would have secured relief under the reasonable probability standard. Robertson has failed in his burden to show prejudice. Respondent will address the allegations of trial counsel error and prejudice individually below:

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[1] Respondent acknowledges this Court initially denied its motion to dismiss claims of deficient performance of PCR counsel in 10 (m), and also the allegation in 10(n) complaining that Judge Few's Order reflected an unreasonable determination of facts based on alleged deficiencies in 10 (m). The motion was based upon the restriction of the remand order. Respondent submitted a memorandum concerning the scope of the remand on August 5, 2021, filed August 10, 2021. In essence, Respondent submitted: "a trial court has no authority to exceed the mandate of the appellate court on remand." *Prince v. Beaufort Memorial Hosp.*, 392 S.C. 599, 605, 709 S.E.2d 122, 125 (2011) (quoting *S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 250–51, 551 S.E.2d 274, 279 (Ct.App.2001)) (citing 5 Am.Jur.2d *Appellate Review* § 784, at 453 (1995)). Thus, the remand limited the scope and jurisdiction of the remand proceedings. Respondent renews its motion within the briefing. Respondent submits that this Court, having heard the entirety of Robertson's evidence, could still dismiss as outside the scope of the remand.

Allegations

Allegations of trial counsel error are evaluated under the familiar test found in *Strickland v. Washington.* 466 U.S. 668 (1984). To be entitled to relief on an ineffective assistance claim, Petitioner had to have shown in state court that (1) trial counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that but for counsel's error, the result of the proceeding would have been different. *Id.*, at 694.

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

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

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

The record shows nothing improper in the State's closing argument. The Solicitor's argument merely commented on the strength of the prosecution's case. At trial, Robertson's attorneys attacked Meredith Moon's credibility and the State's failure to prove Robertson's guilt beyond a reasonable doubt. ***App. 1920-40.*** The prosecutor's comments were merely to the effect that – even though there had been numerous exhibits and lengthy testimony in the guilt phase – the State had conclusively proven Robertson's guilt of the brutally malicious murders beyond any *reasonable* doubt. As such, it should not take the jurors long to arrive at their verdict. A fair reading of the contemporaneous record shows the argument was fairly based upon facts in evidence and was proper. *See, e.g., Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002)

("A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony") (citing *State v. Cooper*, 334 S.C. 540, 514 S.E.2d 584 (1999)). Further, this construction of Mr. Brackett's comments is supported by his testimony and that of Mr. Boyd at the hearing before this Court.

Further still, Robertson's reliance on *Simmons v. State* is misplaced. In *Simmons*, "[t]he solicitor misstated the law in his closing argument by improperly injecting parole considerations into the jury's sentencing decision and equating a finding of guilty with a recommendation of mercy with a much lighter sentence or an acquittal." 331 S.C. at 338–39, 503 S.E.2d at 167. Our Supreme Court found that because the jury could either recommend mercy or not in the burglary conviction, even though the evidence against Simmons was "overwhelming," the comment "prevented the jury from fairly considering the guilty with a recommendation of mercy" thus was still prejudicial. First, for the reasons asserted above, the argument went to an opinion on weight of the evidence and was not improper or incorrect. Second, consideration of "mercy" in capital proceedings rests in the sentencing phase, not guilt phase. Third, the judge correctly charged that the jury was to make its determination on the evidence and "not ... based on passion, prejudice, sympathy, sentiment, public feeling, public opinion, conjecture, speculation or any matters outside the record in this case." *See App. 1958*. Moreover, any alleged impropriety could not have deprived Robertson of a fair determination of his guilt or innocence in light of the overwhelming evidence of Robertson's guilt of the charged offenses, which included evidence of express against his parents, the extensive testimony of Meredith Moon, and copious forensic evidence not the least of which was Robertson's t-shirt bearing his own picture framed with his parents' blood. *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166 (" The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due

process."). As a result, Robertson cannot prove any prejudice under *Strickland* arising from the failure of his original PCR attorneys to raise this claim.

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

Robertson failed to directly present any specific evidence on this claim. However, to the extent he intends to blend the argument into his other allegation of a "battered child syndrome" element to the crime, that is addressed in the specific allegation of the same. To the extent Robertson makes a separate argument, Respondent relies upon the forensic evidence at trial including Robertson's own statements of what he wanted to do with his parents' money; the use of his father's card immediately after the murder; and the testimony showing Robertson and his brother stood to inherit the substantial estate, which was valued at over $2,000,000.00. *See* ***App. 1527-28; 1533.***

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

Robertson presented evidence from Dr. Charles P. Ewing, PhD, on evidence of abuse in Robertson's background, Robertson's mental health diagnoses, and availability of a defense centered around abuse by parents. Several things were initially apparent. First, the background information was taken from a review of records that were not only available at trial, but were obtained and reviewed during trial counsel's investigation. Dr. Ewing, in fact, agreed with the mental health diagnosis of record. Second, Dr. Ewing was terribly imprecise in his testimony regarding instances of abuse – at one point estimating a thousand or more times, then reducing that

greatly.[2] Of note, the record reflect as trial counsel noted in his PCR testimony, only a few instances.

Third, while Dr. Ewing seem to think South Carolina recognized "battered child syndrome," he was simply wrong. His reliance on *State v. Lopez*, 306 S.C. 362, 412 S.E.2d 390 (1991) is misplaced for the reasons stated. The trial judge in *Lopez* admitted testimony of the pathologist who performed the autopsy that based on the injuries he observed the victim was a " 'battered child' and this was the cause of the child's death," as well as testimony by the neurosurgeon that the injuries found were consistent with shaken baby syndrome. *Id.* at 365, 412 S.E.2d at 391-92. In affirming the trial judge's ruling and holding that the evidence is admissible, the Court observed that behavior based syndromes are generally held to be insufficiently "reliable as scientific evidence to justify their use to prove a crime occurred." *Id.* at 367, 412 S.E.2d at 393 (citing *People v. Pullins*, 145 Mich.App. 414, 378 N.W.2d 502 (1985)).[3] The Court found, however

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

[3] Dr. Ewing was quite clear that his theory was separate and apart thus not to be confused with the recognized "battered spouse syndrome" which may be admitted in support of claims of self-defense, necessity or duress. *State v. Hill*, 287 S.C. 398, 400, 339 S.E.2d 121, 122 (1986); S.C. Code § 17-23-170(A). There is no similar recognition for parricide or battered child syndrome. Moreover, to the extent Robertson craved reference to the *Menendez* case, the mere fact that he reaches to one California case from 1995 pushes to remote the viability of finding counsel ineffective for failing to consider parricide evidence as a way to self-defense. It is of no little note that, though the media reports focus on the brother's allegations, the case law shows the California courts denied (and the federal courts found no error in the denial of) a charge for imperfect self-defense, and limitation of the evidence received to prevent confusion and/or misleading of the jury. *See Menendez v. Terhune*, 422 F.3d 1012, 1030-34 (9th Cir. 2005). At any rate, even since that trial, the concept has had little acceptance as a defense. See Kristi Baldwin, *Battered Child Syndrome As A Sword and A Shield*, 29 Am. J. Crim. L. 59, 79–80 (2001)

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

In sum, trial counsel could not be *Strickland* deficient in failing to present a novel theory of defense that had not been accepted by the South Carolina appellate courts at the time of Robertson's trial, and has, even today, very little acceptance. Requiring counsel to anticipate changes in the law would hold trial counsel ineffective based upon counsel's failure to utilize a crystal ball, which is inconsistent with *Strickland*, which unerringly admonishes that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *See also Burger v. Kemp*, 483 U.S. 776, 789 (1987) (quoting *Strickland*); *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) ("*Skipper* was on appeal to the Supreme Court at the time of Kornahrens's trial, and Runyon testified that he was aware of that fact. Nevertheless, the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law").

("While courts have allowed the prosecuting attorney in Courtroom A to introduce battered child syndrome to prove a caretaker's intent to kill his child, they have largely prohibited the defense attorney in Courtroom B from introducing battered child syndrome to prove a child's justification for killing his abuser."); *see also* F. Lee Bailey and Kenneth J. Fishman, *1 Criminal Trial Techniques § 36:3. Battered child syndrome*, (May 2021 Update)("One court has held that battered child syndrome is the functional and legal equivalent of battered woman syndrome and the same reasons which justify the admission of battered woman syndrome apply equally to the battered child syndrome.").

Accordingly, counsel **cannot** be held ineffective for failing to raise issues based on anticipated changes, *even where there were indications at the time that the issues were questionable and under review by appellate courts. E.g., Id.* at 1357-60; *Jameson v. Coughlin*, 22 F.3d 427 (2nd Cir. 1994); *Lilly v. Gilmore*, 988 F.2d 783 (7th Cir. 1993); *Horne v. Trickey*, 895 F.2d 497, 500 (8th Cir. 1990).

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

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

App. 3434, l. 11-22.

However, the defense had to be careful not to alienate jurors by "trashing" the victims because "you can't go but so far in saying that a mama and daddy had made a son kill them." He also focused on the fact the trial was in York County, as opposed to a big city and he testified that

"we've still got some values that are there and things that people want to think about parents and what their role is." So, the defense presented evidence of the abuse that they uncovered in the manner that was done. ***App. 3434, l. 23 - 3335, l. 11.*** Indeed, the Louisiana Supreme Court has stated that blaming the victim in a capital case is "an offensive argument to the jury." *See State v. Hoffman*, 768 So.2d 577 (La. 2000).

Consequently, for all these reasons, Robertson has failed to show prejudice by PCR counsel not raising a trial counsel error claim based on the same.

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

Robertson failed to directly present any specific evidence on this claim. In fact, he admitted in his video testimony that he had no evidence for this claim. As a result, Robertson has failed to demonstrate any prejudice under *Strickland* from the failure of his original PCR attorneys to raise this claim.

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

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

Robertson fails to show the initial requirement of demonstrating prejudicial error – this allegation was not missed in the prior PCR. Judge Few's Order notes the allegation was presented in Issue 10 of the prior action in that Robertson alleged "Counsel did not adequately advise Robertson before he was evaluated by the prosecution's psychologists, Dr. Geoffrey McKee," (Order p. 7, **App. 3658**). Judge Few ruled on the merits of that allegation. Order pp. 58-69, ***App. 3709-20.***

Further, to the extent Robertson asserted at the hearing that Dr. McKee was actually a court witness, not a state's witness, that assertion is without merit. The contemporaneous record reflects

Dr. McKee was requested and retained by the prosecution. Former Solicitor Pope's testimony at the remand hearing further strengthens the record showing the bill to the solicitor's office and payment by the solicitor's office.

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

Respondent submits that these complaints were addressed in the order of dismissal filed by Judge Few. Ground 12 addressed in that order was "Counsel was ineffective for presenting social worker Toni Cascio as an expert witness because of (a) Cascio's lack of experience; (b) counsel's agreement to provide Ms. Cascio's notes to the State[]; (c) counsel's failure to discover Robertson's admissions about the crime in enough time to permit counsel to employ a different social worker; and (d) Counsel's presentation of Ms. Cascio as a witness." *See* Order p. 8, ***App. 3559***. Judge Few specifically addressed these claims at length and rejected them on the merits (Order pp. 77-106, ***App. 3728-57***). Further, the Supreme Court of South Carolina rejected them on certiorari. Because Robertson has not presented any evidence to this Court that undermines the accuracy of Judge Few's findings,[4] Respondent submits Robertson cannot show prejudice based upon this claim.

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[4] Respondent notes that Robertson's primary complaint in this allegation is that counsel presented Cascio without knowing the damaging nature of Robertson's various admissions contained in her notes. However, the record supports the contrary conclusion. Mr. Hancock testified in 2007 that he and Mr. Boyd knew about the notes when they made the decision to call Cascio, that he had personally read them before turning them over to the State, that he knew she would be cross-examined about the notes, and that the defense balanced the harm from cross-examination on the notes against the benefit of her testimony to the mitigation case in making the decision to call her.

11(b) (iii) Trial Counsel abandoned the client. Counsel did not provide legal assistance during the client's critical interviews with testifying expert witnesses because they did not attend those interviews. (See Hancock November 23, 1998 letter). As a result, experts obtained damning confidential information about the details of the crime otherwise protected by the client's assertion of his Fifth Amendment right not to be a witness against himself. Trial Counsel's failure to be present resulted in testifying experts (Dr. Cascio being only one) asking questions that should not have been asked or answered. The horrendous and damning details, which the State would otherwise have never known, were then published to the jury.

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

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

Issues (11)(b)(iii) through (v) share the same basic complaints and may be addressed together. In essence, Robertson now contends that trial counsel erred in not attending all interviews *with the defense experts and Robertson*, in an effort to prevent disclosure of facts that are unfavorable to his defense. Testimony of former trial counsel, Mr. Boyd before this Court and in the original PCR hearing, is particularly compelling in resolving this issue as he noted in his

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App. 3452-54. Mr. Boyd's 2007 testimony was that counsel felt that it was necessary to present her as a witness because she was able to pull things together to which the other experts had testified. ***App. 3550, lines 2-7.*** (Mr. Hancock testified similarly). Mr. Boyd also testified at that time that he was "sure" he read her notes before presenting her as a witness and before this Court clarified that he had no independent recollection but it has always been his practice to review a document before providing it to opposing counsel.

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

decades of experience, it has never been his practice to instruct an expert he has employed how to practice his or her field of expertise because this is the expert's role. ***App. 3551, lines 1-6.***

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

Issues 11(b)(vi) and (vii) may be treated together as they share the same factual basis. Robertson fails to show prejudice as he fails to show a meritorious issue. First, as established at the remand hearing, Robertson is simply wrong that Dr. McKee was the Court's examiner. This is borne out by the trial record, the State's motion for an independent psychological evaluation, the Return opposing the motion, the trial judge's Order authorizing the independent evaluation, as well as the testimony of Solicitor Brackett, Mr. Pope, and Mr. Boyd. Second, Robertson's position is not supported by clearly established law. See *State v. Sloan*, 278 S.C. 435, 440, 298 S.E.2d 92, 94 (1982); *State v. Locklair*, 341 S.C. 352, 363-65, 535 S.E.2d 420, 426-27 (2000); *State v. Bixby*, 388 S.C. 528, 558-59, 698 S.E.2d 572, 588 (2010).

> (viii) Trial Counsel failed to insist that the State produce the notes of Dr. McKee in advance of his testimony. Because Trial Counsel did not have Dr. McKee's notes, they were unable to effectively cross-examine him and demonstrate that McKee's notes did not include all of the details of the crime to which Dr. McKee testified. Specifically, some of Dr. McKee's testimony came only from the contents within Dr. Cascio's notes.

> Therefore, McKee was not testifying from his own personal knowledge about all of the details of the crime, as represented to the jury, but also from some of Dr. Cascio's notes about the details of the crime which he had just been provided by Respondent and read moments before taking the witness stand. (App. Trans, pps.3046-3083; 3067).

Respondent submits that the uncontroverted evidence is that Mr. Brackett received Dr. McKee's report and notes on the afternoon before the trial began and that he immediately turned over the report and notes to either defense counsel or a member of the defense team. The only portion of this information that he could not remember disclosing was the booklet containing actual test questions, which did not contain information related to Dr. McKee's opinions. Mr. Boyd had no recollection of whether the notes were disclosed. However, the record shows that at one point, Mr. Boyd objected to Dr. McKee reading from his notes, ***App. 3068, line 25- 3069, line 6***, and he testified before this Court that it was reasonable to assume from his objection that he had Dr. McKee's notes.

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

Respondent submits that Robertson cannot show deficient performance or prejudice under *Strickland* because the credible evidence presented at the 2007 hearing and before this Court reflects that trial counsel made an objectively reasonable investigation for and an extensive presentation of evidence of Robertson's mental illness (bipolar disorder and alcohol dependence), the interplay of his mental illness with his use and abuse of Ritalin and alcohol, and the dysfunctional elements within his family. Additionally, the PCR judge relied upon much of this evidence in rejecting original PCR counsel's claims that counsel were ineffective in failing to

present Dr. Hayne McMeekin, a treating psychiatrist who over-prescribed Ritalin (Ground 10(a)(1), Order of Dismissal, ***App. 3659-71***); that trial counsel were ineffective for neither advising Robertson to plead guilty but mentally ill (GBMI) or for not requesting that the trial judge submit a verdict of GBMI to the jury (Ground 10(a)(3), Order of Dismissal, ***App. 3675-88***); that trial counsel were ineffective for not adequately and properly advising Robertson before Dr. Geoffrey McKee, the State's forensic psychologist evaluated him (Ground 10(a)(10), ***App. 3709-20***); that counsel were ineffective for failing to introduce sufficient evidence of the Robertson family's mental health history (Ground 10(a)(11), Order of Dismissal, ***App. 3720-28***); and that counsel were ineffective for presenting their social worker, Ms. Cascio (Ground 10(a)(12), ***App. 3728-57***).

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

This claim lacks merit for the reasons set forth in Ground (xi)(a)(3). Additionally, because counsel's reasonable investigation for evidence revealed only uncovered a small number of acts that constituted physical abuse, it was not unreasonable under *Strickland* for counsel to focus the case in mitigation primarily on Robertson's mental illness (*i.e.*, the diagnosis of bipolar disorder), his drug abuse, both before and on the morning he murdered his parents, and his family history of mental illness and drug abuse. This decision was reasonable even if other attorneys would have focused on physical abuse, instead because *Strickland* recognizes that "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. Further, there clearly cannot be any prejudice from counsel's decision to rely heavily on Robertson's mental illness. In

addition to the previously-stated reasons, Respondent notes that Dr. Ewing testified at the end of cross-examination that the diagnosis of bipolar disorder was "all over the record."

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

Robertson presented no evidence on this ground. Even so, Respondent submits a similar issue was presented and rejected in *State v. Owens*, 378 S.C. 636, 640-41, 664 S.E.2d 80, 82 (2008). *See also State v. Whipple,* 324 S.C. 43, 476 S.E.2d 683 (1996) (holding prison disciplinary records are admissible at the sentencing phase of a capital trial under the Uniform Business Records as Evidence Act, S.C. Code Ann. § 19–5–510). Accordingly, Respondent submits that Robertson has failed to show reasonable probability that relief would have been granted had former PCR counsel pursued the issue.

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

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

> Q. AND IT'S HARD TO BE HERE TODAY FOR YOU, ISN'T IT?
>
> A. YES, SIR.
>
> THE COURT: KEEP YOUR VOICE. LEVEL UP.
>
> Q. YES, SIR. THIS GOES AGAINST THE GRAIN OF EVERYTHING A COUNSELOR IS TAUGHT IN TERMS OF CONFIDENTIALITY AND PRIVACY.
>
> A. THIS IS CORRECT.
>
> Q. AND TERRY ROBERTSON WAS AN EXCEEDINGLY PRIVATE WOMAN, WASN'T SHE?
>
> A. VERY MUCH SO.

Q. SHE WOULD BE MORTIFIED TO KNOW WHAT IS GOING ON IN THIS COURTROOM TODAY, WOULDN'T SHE?

A. YES, PERSONAL APPEARANCES MEANT A GREAT DEAL TO HER.

App. 2792, lines 5-19.

Robertson contends that this evidence should have been excluded under Rule 403, SCRE. Respondent disagrees and submits that this was properly admitted as victim impact evidence under *Payne v. Tennessee*, 501 U.S. 808, 825-27 (1991), where the United States Supreme Court partially overruled *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805, (1989), and held that the Eighth Amendment does not prevent juries in capital cases from hearing evidence and arguments regarding the victim and the impact of the murder on the victim's family.

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

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

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

Nor is there any conceivable prejudice under *Strickland* from counsel's failure to object to this line of cross-examination. This was an extremely brief exchange in the course of an extraordinarily voluminous record. Also, the Solicitor used this evidence to attack the sentencing phase presentation of evidence suggesting that Robertson's parents were responsible for their own murders. *See* ***App. 3141-44***. Further, the challenged line of cross-examination merely elicited testimony that was corroborative of and cumulative to evidence that was already properly before the sentencing jury.

Specifically, Linda Weaver testified that she had known Earl and Terry Robertson since May or June of 1978 and that she was a very close friend of Terry's. They talked daily for years. ***App. 2340; 2346***. Beginning in 1992, Ms. Weaver noticed a change in Terry's personality:

> IT WAS ABOUT 1992, SOMETHING LIKE THAT. I THINK IT WAS ABOUT THE TIME THAT JIMMY HAD GONE OFF TO GEORGIA TECH. .... WE DIDN'T TALK AS MUCH; SHE DIDN'T CALL ME AS MUCH; SHE DIDN'T TELL ME EVERYTHING THAT HAPPENED IN HER LIFE. AND THEN SHE BEGAN TO TELL ME THAT JIMMY WAS HAVING PROBLEMS AT GEORGIA TECH, HE WAS FLUNKING MOST OF HIS COURSES. SHE WAS AFRAID HE WAS GOING TO GET KICKED OUT OF SCHOOL. HE HAD GAMBLING DEBTS. SHE WAS EMBARRASSED BECAUSE OF HER SON. .... SHE WASN'T THE TERRY I KNEW; SHE WASN'T AS TALKATIVE. SHE BEGAN TO GAIN WEIGHT.

App. 2347, line 7 – 2348, line 3.

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

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

> EMBARRASSED. SHE WOULDN'T GO TO THE GROCERY STORE BECAUSE SHE WAS EMBARRASSED. ON OCCASION I'VE BEEN TO THE GROCERY STORE WITH TERRY THAT SHE WOULD ACTUALLY LOOK DOWN THE AISLE TO SEE WHO WAS COMING BECAUSE SHE WAS EMBARRASSED ... ABOUT THE THINGS THAT HER SON HAD DONE THAT OTHER PEOPLE KNEW ABOUT.

App. 2363, lines 5-15.

Also, Mr. Meyer gave similar testimony on direct examination of how Earl was embarrassed by the conduct of his children and in particular by Robertson. ***App. 2761-65.*** Because the State's cross-examination of Mr. Meyer only elicited evidence that corroborated and was cumulative to other evidence already before the sentencing jury, there was no prejudice under *Strickland* in failing to object to it. See *Burgess v. State*, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (holding the petitioner was not prejudiced by improper witness pitting in light of the other evidence presented in the case); *Douglas v. State*, No. 2011-202766, 2016 WL 3511894, at *5 (S.C. Ct.App., June 22, 2016) ("... even assuming *arguendo* that trial counsel was ineffective in failing to argue against the admission of this statement on some other ground than that raised at trial, we find the PCR court erred in determining there is a reasonable probability the outcome of the trial would have been different, as this court already determined in *Douglas I* that "any error in the failure to suppress [Douglas's secretly recorded] statement was harmless given the substance of the conversation was cumulative in nature"); *Forde v. State*, 289 Ga. App. 805, 809, 658 S.E.2d 410, 414 (2008) ("Although Forde's trial counsel performed deficiently in failing to raise a hearsay objection to the admission of B.F.'s statements contained in the videotaped interview, Forde has not shown that counsel's error prejudiced his defense. The statements made by B.F. during the videotaped interview were merely cumulative of the testimony she offered at trial, regarding which she was cross-examined by Forde's trial counsel, and were therefore harmless").

Moreover, this victim impact evidence could not have inflamed the jury more than the brutally malicious facts of the crime did. *See Payne*, 501 U.S. at 832 (O'Connor, J., concurring). This evidence showed how Robertson brutally and maliciously murdered his parents and that the murder was motivated by his greed to obtain money from their estates or life insurance policies. In light of this evidence, including numerous statements by him evincing express malice, "there is [no] reasonable probability that ... the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. *See also Wiggins*, 539 U.S. at 537.

Finally, the trial judge further instructed the sentencing jury that in considering whether to recommend a sentence of death, it must first find the existence of one or more aggravating circumstances beyond a reasonable doubt. He also instructed jurors that they could only consider the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon, larceny with the use of a deadly weapon and physical torture, as well as the aggravating circumstances that the offender committed the murder for himself or another for the purpose of receiving money or a thing of value and that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. ***App. 3203-26***. In light of the sentencing phase instructions, which precluded the jurors from sentencing Robertson to death based upon anything other than proof beyond a reasonable doubt of a **statutory aggravating circumstance**, Respondent submits that the challenged evidence was not prejudicial. See *United States v. Olano*, 507 U.S. 725, 740 (1993) ("[It is] the almost invariable assumption of the law that jurors follow their instructions") (citation omitted); *Old Chief v. United States*, 519 U.S. 172, 196 (1997); *Strickland*, 466 U.S. at 694 ("a court should presume ... that the judge or jury acted according to law").

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

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

Robertson further claims that counsel were ineffective in failing to object to the Solicitor's sentencing phase closing argument, which he contends was improper. Once again, Respondent submits that counsel's performance was not deficient and that there was no prejudice.

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

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

> ... THIS LADY [MS. CASIO] THIS LADY WANTED TO TALK ABOUT ... TERRY, SHE SELF-MUTILATED HERSELF. TERRY, SHE WAS SUICIDAL. TERRY EVEN WENT SO FAR AS TO HAVE TO BE CHECKED IN THE HOSPITAL. AND THEY DRAG TERRY THROUGH THE MUD AND UP AND DOWN AND TALK ABOUT ALL THE MEDICATIONS, ALL THE THINGS THAT ARE HAPPENING PILED TOGETHER, ALL THE MEDICATIONS THAT CAME INTO THE HOUSE. BUT WHEN YOU PULL THEM APART, WHAT IS IT THAT YOU SEE. THREE YEARS. YES, SHE LOST HER MOTHER; SHE LOST HER FATHER; SHE WAS GOING THROUGH A ROUGH TIME. BUT IN THE MEANTIME SHE WAS HAVING TO DEAL WITH HIM; SHE WAS HAVING, TO DEAL WITH CHIP. AND IT WAS CAVING IN ON HER.
>
> MS. CASCIO SPENT A GREAT DEAL OF TIME GOING THROUGH AND TELLING YOU BASICALLY WHAT A HORRIBLE SITUATION WENT ON AT THE ROBERTSON'S HOUSE. AND NO FAMILY IS PERFECT, AND I REALIZE THIS, AND THEY ALL HAVE PROBLEMS, THEY ALL HAVE SITUATIONS. YOU ALL HAVE PRIVATE MATTERS THAT YOU DON'T WISH TO BE PLAYED OUT IN THE COURTROOM. I THINK HE SAID THAT TERRY WOULD HAVE BEEN HORRIFIED IF SHE HAD KNOWN ALL OF HER PRIVATE THOUGHTS WERE LAID OUT HERE.
>
> BUT FROM ALL THAT, WHERE DOES MS. CASCIO GO WITH IT? BECAUSE OF ALL OF THAT AND BECAUSE OF THE PHYSICAL ABUSE AND THE MENTAL ABUSE AND THE DETACHMENT ASA CHILD AND ALL THESE DIFFERENT

THINGS, VIOLENCE WAS HIS ONLY ALTERNATIVE. AND I KEEP SAYING THAT WRONG. SHE SAID HE PERC'EIVED YIOLENCE AS HIS ONLY ALTERNATIVE. AND THEN I THINK SHE SAID HE MAY PERCEIVE VIOLENCE AS HIS ONLY ALTERNATIVE. BECAUSE THE TRUTH OF THE MATTER WAS WHEN I STARTED QUESTIONING MS. CASCIO, AND I APOLOGIZE, I KNOW IT TOOK A LONG TIME, BUT THERE WAS SO MUCH. WHEN YOU SEPARATED THE WHEAT FROM THE CHAFF, IT WAS ONE INCIDENT, ONE INCIDENT OF PHYSICAL ABUSE. TWO INCIDENTS OF FIGHTING WITH THE BOYS. BUT FROM THAT, STUDIES SHOW AND IT'S CLEAR THAT THAT MUST BE THE CASE.

SO EVERY TIME THEY FOUND ONE INCIDENT OR TWO INCIDENTS OVER, WHAT', TWENTY-SOMETHING YEARS OF MARRIAGE, TERRY WAS CRUCIFI'ED OR EARL WAS CRUCIFIED. THAT FAMILY, THAT EXPLAINS IT. BECAUSE AGAIN THEY'RE STARTING AT THE END, THEY'RE STARTING WITH THE BAT, THEY'RE STARTING WITH THE CLAW HAMMER AND TRYING TO WORK BACK AND SAY WHY DID THIS HAPPEN TO POOR JIMMY, WHY DID THIS HAPPEN TO HIM.

WELL, I'LL SUBMIT TO YOU AS I WENT THROUGH WITH MS. CASCIO YOU SAW THAT EVERY SINGLE CARD SHE HAD STACKED WAS JUST THAT, A HOUSE OF CARDS. AND AS I'D POINT OUT ONE, IT WOULD FALL; I'D POINT OUT ANOTHER, IT WOULD FALL. AND WE WENT THROUGH EVERYTHING SHE SAID THAT ULTIMATELY LEADS TO THIS CONCLUSION THAT JIM ONLY HAD THE ALTERNATIVE FOR VIOLENCE. IT'S JUST NOT THERE.

SO, I SUBMIT THAT ALL THAT REALLY HAPPENED -- YOU KNOW, SHE TALKED ABOUT TERRY BEING SEXUALLY ABUSED. TERRY HAS BEEN RAPED. SHE WAS RAPED IN THIS COURTROOM WHEN THEY TAKE HER THROUGH THIS BASED ON HIS ACTIONS.

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

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. .... "[However, a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166. As stated earlier, a criminal defendant is not entitled to relief based upon the closing argument of a prosecutor, unless that argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly*, 416 U.S. at 643. *See also*

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

Applying this standard to the present case, Respondent submits that Robertson cannot show either deficient performance or prejudice under *Strickland* resulting from counsel's failure to object to the Solicitor's sentencing phase closing argument. The Court in *Darden* held that a closing argument considerably more inflammatory than the one at issue here did not warrant habeas relief. *See Darden*, 477 U.S., at 180, n. 11 (prosecutor referred to the defendant as an " 'animal' "); *id.*, at 180, n. 12 ("'I wish I could see [the defendant] with no face, blown away by a shotgun'").

Further, when the Solicitor's argument is placed in proper context, see *Young*, 470 U.S. at 12; *Donnelly*, 416 U.S. at 647, the Solicitor was merely addressing the defense's sentencing phase presentation of evidence through Ms. Casio, which suggested that Robertson's parents were in large part to blame for their own murders and that Robertson may have perceived killing them as his only course of action. The comments were supported by evidence in the record concerning Terry's embarrassment over the behavior of Robertson and his brother. See ***App. 2347, line 7 – 2348, line 3; App. 2363, lines 5-15*** (Ms. Weaver)***; App. 2347, line 7 – 2348, line 3*** (Mr. Meyer). Also, Mr. Meyer gave similar testimony on direct examination of how Earl was embarrassed by the conduct of his children and in particular by Robertson. ***App. 2761-65.***

Additionally and in spite of Robertson's attack on the challenged comments, Respondent submits that the Solicitor's argument fairly characterized Ms. Casio's expert testimony, since she

attributed the murders in large part – if not totally - to Robertson's parents and, more specifically, to Terry Robertson. ***App. 2852-3031***; *see also* Ground 11(b)(v), *infra*. Also, the Solicitor was merely contrasting the defense's presentation with the contrary evidence presented by the State.

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

Moreover, the present claim ignores that the Solicitor's comments were made in anticipation of the closing arguments of trial counsel. Although trial counsel Hancock stated in closing that the defense was not saying that Earl and Terry Robertson were "bad people, he emphasized that "they could not control the lot the Good Lord gave them." ***App. 3174.***

He thereafter argued that jurors needed to ask themselves why the murders occurred. He also contended that Robertson was not a diabolical criminal as the State had contended; he pointed out that Robertson did not suddenly decide one day to be bad or to have bipolar disorder; he responded to the State's suggestion that Dr. Pincus' opinion should not be believed because Dr. Pincus was retained by pointing out that Dr. McKee and many other prosecution witnesses were also paid; he pointed to the evidence supporting a diagnosis of bipolar disorder, explaining that it was a mental disorder; and he emphasized that the defense experts had testified to how the problems associated with bipolar disorder were exacerbated by drug and alcohol use, which was provided to Robertson. ***App. 3175-82.***

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

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

App. 3182, line 15 – 3184, line 6.

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

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

Nor can there be any conceivable prejudice from counsel's failure to object. The State's evidence showed how Robertson brutally and maliciously murdered his parents and that the murder was motivated by his greed to obtain money from their estates or life insurance policies. In light of this evidence, including numerous statements by him evincing express malice, "there is [no] reasonable probability that ... the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695. *See also Wiggins*, 539 U.S. at 537.

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

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

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

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

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

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

Respondent submits that Robertson failed to present any evidence in support of this claim when specifically asked for evidence he may have had to support it. Rather, the only credible evidence is that the persons murdered in the Robertsons' residence were Robertson's parents Terry and Earl.

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

Robertson raises a series of alleged trial errors independent of a claim of ineffective assistance of counsel. He has failed to show prejudice by any error not so alleged by PCR counsel in the first PCR action as free-standing claims of error (apart from undiscovered violations) are not appropriate for PCR. "Under the doctrine enunciated in *Simmons v. State,* 264 S.C. 417, 215 S.E.2d 883 (1975), errors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993). Robertson cannot show prejudice regarding free-standing claim that could not have been properly raised in the prior PCR. While these general considerations may relate to prejudice of his ineffective assistance of counsel claim, they allegations do not show prejudice as the freestanding claims are not appropriate for PCR .

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

At any rate, the testimony from the proper PCR hearing is telling. Robertson testified at the PCR hearing that his attorneys met with him before the evaluation by Dr. McKee. They advised him that he should meet with Dr. McKee and talk with him. Otherwise, they would not have a defense. Robertson later spoke to Dr. McKee. ***App. 3583-85***. It is clear from the testimony of trial counsel that because the investigation revealed overwhelming evidence establishing Robertson's guilt, they decided not to strongly contest guilt and, instead, to focus mitigation. To this end, they made a strategic decision to present a mental health defense and eventually presented extensive evidence concerning the mental health history of Robertson and his family. They explained to him that the State had the right to an evaluation and that the defense could not present a mental health defense if he did not consent to the evaluation. (Mr. Boyd advised him not to make admissions about the crime in the evaluation. ***App. 3545; 3555-56***).Also, Robertson agreed with this decision to present such a defense and to participate in the evaluation. See ***App. 3333-37; 3419-35; 3441-43; 3497-98; 3503; 3506; 3537-38; 3544-45.***

As to Robertson's suggestion of "structural error" in 11(f), Robertson claims a "right to control his defense" concerning "guilt phase defense." (Fifth Amended Application, p. 8. Robertson misconstrues *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018) (holding that the defendant, personally, has the right to determine whether to concede his guilt or maintain his innocence) the ability to decide whether to maintain his innocence), and he ignores both that counsel did not concede his guilt in the guilt phase and that he agreed with counsel's decision to focus primarily on sentencing rather than his guilt or innocence. *See Bell v. Evatt*, 72 F.3d. 421, 429 (4th Cir. 1995) (While "a defendant's consent to trial strategy in itself, [does not vitiate[] all claims of ineffective assistance of counsel ... [his consent is] probative of the reasonableness of the chosen strategy and of trial counsel's performance").

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

10(g) Allegation of Abandonment by Counsel

Robertson complains trial counsel did not "manage and supervise their expert witnesses and" did not attend his "experts' interviews," thus, he was denied counsel and *United States v. Cronic*, 466 U.S. 648, 659 (1984). He further argues that counsel's performance caused a "breakdown in the adversarial process" such that he should be relieved of showing prejudice.

Defendants have the right to counsel at all critical stages of a criminal proceeding. *See, e.g., Iowa v. Tovar*, 541 U.S. 77, 80 (2004). Defendants also have the right to effective assistance of counsel under *Strickland*. Respondent submits that Robertson misconstrues *Cronic*.

The Court in *Cronic* held that prejudice is presumed only if the defendant can show (1) a complete denial of counsel at a critical stage of the trial, (2) a constructive denial of counsel, or (3) that "the [circumstances surrounding the case] made it so unlikely that any lawyer could provide

effective assistance," *Cronic*, 466 U.S. at 661. See also *Garza v. Idaho*, 139 S.Ct. 738, 744 (2019); *Nance v. Ozmint*, 367 S.C. 547, 553, 626 S.E.2d 878, 881 (2006) (finding that "the present case represents one of the rare cases where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing"). "[U]nder the third scenario, ... the presumption of prejudice applies only in limited, egregious circumstances...." *United States v. Coleman*, 835 F.3d 606, 612 (6th Cir. 2016) (internal quotation marks omitted). Indeed, the Supreme Court in *Cronic* refused to apply the *per se* prejudice rule where "a young real-estate lawyer ... was allowed only 25 days of pretrial preparation in a complex mail fraud case." *Glover v. Miro*, 262 F.3d 268, 277 (4th Cir. 2001) (citing *Cronic*, 466 U.S. at 649).

Respondent submits that neither the second or third exceptions in Cronic are applicable and that Robertson's claim is fundamentally flawed because it ignores that interviews of a criminal defendant by retained experts and, for that matter, the defendant's participation in that a court ordered psychiatric examination is not a critical stage in the proceedings against a defendant. *See State v. Hardy*, 283 S.C. 590, 592, 325 S.E.2d 320, 322 (1985). The Court in *Hardy* further found that counsel's presence at a court ordered evaluation "is not only unnecessary from a constitutional standpoint, it is also undesirable from a clinical perspective, for it would undoubtedly hinder the psychiatrist from effectively examining the defendant." *Id.*

Further and as previously argued, Robertson did not prove that counsel were ineffective under *Strickland* in failing to attend any interview of him by any of the experts used by trial counsel.

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

At the hearing, the Court sustained Respondent's objection to the amendment of Ground Five to include additional claims of ineffective assistance of appellate counsel (Robertson's

Grounds 11(l)(i)-(ix) and his claim that Robertson did not knowingly and intelligently waive his right to appeal his convictions and sentences because these are matters were conclusively decided by the Supreme Court of South Carolina on direct appeal.

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

However, after the State filed the Initial Brief of Respondent on December 31, 2003, the Supreme Court dismissed and re-instated the direct appeal on several occasions because Robertson failed to comply with the South Carolina Appellate Court Rules (SCACR). Eventually, Robertson indicated to the Court that he wished to abandon his right to a direct appeal and after it was determined in a hearing before Judge Hayes that he was competent to do so,[5] the Supreme Court filed an Order on June 3, 2005, in which it agreed with Judge Hayes' finding that he was competent to waive his right to appellate review, conducted the proportionality review mandated by § 16-3-25, dismissed the appeal, and directed the Clerk of that Court to issue an execution notice pursuant to *In re Stays of Execution, supra*.

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

In light of this history, this Court will not revisit the waiver issue that our Supreme Court heard and decided because it is law of the case. In *Greenwood County v. Watkins*, 196 S.C. 51, 12 S.E.2d 545(1940), the Court stated that it was well settled in South Carolina that the rulings in a case become the law of the case. The doctrine of "the law of the case" prohibits issues which have been decided in a prior appeal from being re-litigated in the trial court in the same case. 5 Am.Jur.2d *Appellate Review* § 605 (1995); *Sheppard v. State*, 357 S.C. 646, 662, 594 S.E.2d 462, 471 (2004) (holding when a ruling goes unchallenged, right or wrong, it becomes the law of the case). The law of the case applies both to those issues explicitly decided and to those issues that were necessarily decided in the former case. *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957) (where Court granted a new trial in first appeal for errors in the charge, it logically determined trial court had not erred in refusing defendant's motion for a directed verdict "for if there had been error in this respect it would have been unnecessary to consider any other questions"); *see also Warren v. Raymond*, 17 S.C. 163 (1882) (all points decided by the Court on appeal, or necessarily involved in what was decided, are res judicata and cannot be considered again in the cause); *Johnson v. Board of Com'rs of Police Ins. & Annuity Fund of State*, 68 S.E.2d 629, 633 (1952) ("[T]he rulings in a case even though admittedly wrong become the law of the case and res judicata between the parties).

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

binding when the record supports the knowing and voluntariness of the waiver.[6] *See, e.g., Pittman v. State,* 337 S.C. 597, 600, 524 S.E.2d 623, 625 (1999) ("A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' "). Further, this Court has disallowed further amend to these claims against appellate counsel as amendment in these circumstances would be futile.

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

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

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

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

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

Robertson, 418 S.C. at 516, 795 S.E.2d at 34–35 (emphasis added).[7]

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

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

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[7] Further, Respondent notes the Court's concept of "permit" was also constrained. The Court noted that a hearing was allowed for the applicant to present evidence to demonstrate non-compliance, and, if so, *then* the opportunity to present evidence in support of prejudice, if any. Stated differently, an applicant who makes a timely, *prima facia* showing of support for the exception is permitted the opportunity for a hearing to prove the limited exception and obtain the opportunity demonstrate prejudice. *Robertson,* 418 S.C. at 519, 795 S.E.2d at 36 (citing *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2014)). It is a stepped process, and one correctly followed by this Court in the instant litigation, first finding Robertson carried his burden of proof in demonstrating non-compliance under Section 17-27-160, then conducting a hearing to allow Robertson the opportunity to demonstrate prejudice.

additional facts. This phrase denotes that something is being considered alone, not with other collected things.").

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

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

surprising. After all, '[t]here are countless ways to provide effective assistance in any given case,' and '[e]ven the best criminal defense attorneys would not defend a particular client in the same way.' ") (quoting *Strickland v. Washington,* 466 U.S. 668, 689 (1984)).

Moreover, and somewhat curiously, Robertson presented some testimony on federal habeas litigation. The Supreme Court – in Robertson own appeal – *rejected* the concept that federal law on default and excuse procedures in federal habeas proceedings should allow an applicant to file a successive PCR. *Robertson*, 418 S.C. at 512, 795 S.E.2d at 32–33. The offered testimony did not center on South Carolina rules or even the facts of this case. Critically, Robertson did not provide a copy of the comprehensive 106 page Order by Judge Few for reference to the scope and decisions in the prior proceedings. Further, comments concerning the scopa and applicability of the AEDPA, or the Antiterrorism and Effective Death Penalty Act of 1996, were likewise irrelevant as AEDPA applies only to federal proceedings.[8] As to the "heightened

[8] The witnesses at times spoke to the purpose and intent of the AEDPA as to having a goal of improving legal representation, and the ABA Guidelines as potential norms. Respondent submitted and relied upon these cases in countering the assertions: *Woodford v. Garceau*, 538 U.S. 202, 206, 123 S. Ct. 1398, 1401, 155 L. Ed. 2d 363 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases"); *Williams v. Taylor*, 529 U.S. 420, 436, 120 S. Ct. 1479, 1490, 146 L. Ed. 2d 435 (2000) ("AEDPA's purpose to further the principles of comity, finality, and federalism"); *Bobby v. Van Hook*, 558 U.S. 4, 8–9, 130 S. Ct. 13, 17, 175 L. Ed. 2d 255 (2009)("*Strickland* stressed, however, that 'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition."); *Wong v. Belmontes*, 558 U.S. 15, 25, 130 S. Ct. 383, 389, 175 L. Ed. 2d 328 (2009) (consideration of Sixth Amendment ineffective assistance claim without addressing ABA Guidelines); *State v. Blakely*, 402 S.C. 650, 664–65, 742 S.E.2d 29, 36–37 (Ct. App. 2013) ("while the ABA standards may be useful or may offer assistance in the analysis of an issue, these standards are not controlling or dispositive"). Respondent submits the witnesses placed far too much emphasis on varied goals and presumed "best practices," which do not control in a Sixth Amendment effective representation analysis. Therefore, even if accepted, the testimony neither aids in determining the only deficiency at issue (qualification under the South Carolina statute), or prejudice, controlled by *Strickland v. Washington*.

requirements" for collateral counsel encouraged by AEDPA, Robertson's offered expert admitted nothing was specifically required such that South Carolina's provision could be contrary. Even so, the provisions regarding heightened qualifications for state collateral attorneys apply to expedited timelines (shortening the statute of limitations from one year to six months), but if not afforded, federal habeas review still proceeds. *See Tucker v. Moore*, 56 F. Supp. 2d 611, 614 (D.S.C. 1999), *aff'd sub nom. Tucker v. Catoe*, 221 F.3d 600 (4th Cir. 2000). Again, the testimony proved its irrelevance.

Therefore, Applicant's claims of deficient representation in 11(m) (i), (ii), (iii) (iv), (v), (vi), (vii), (viii), (ix), (x), (xi), (xii), [and should the Court accepted the Fifth Amendment, the additional subparagraph renumbered (ii), or, stated differently, claims (11(m) (i) through (xiii)] are beyond the jurisdictional limitations of remand.[9]

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

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

Ground 11(m)(vi) and (vii) lack plausible merit for the reasons stated. Ground 11(m)(viii) takes original PCR counsel's remarks out of context and ignores that the statement that Dr. McKee did not testify in as much detail about the facts of the crimes as did Cascio (App. 3618) is correct, since he did not relate any verbatim statement by Robertson (a matter with which counsel for Respondent, Mr. Salter, agreed) and merely stated that the information Robertson provided to him

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

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

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

The only direction from our Supreme Court is that this Court make the determination of prejudice: "If prior PCR counsel are deemed unqualified and, as a result, deficient, the PCR judge must make a determination whether under *Strickland*, Petitioner was prejudiced." *Robertson*, 418 S.C. at 522, 795 S.E.2d at 38. This Court is tasked with making the factual determination of prejudice regarding cognizable PCR claims. That is all. Again, our Supreme Court neither vacated the prior Order of Dismissal, nor ordered a new post-conviction relief proceeding. However, and

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was consistent with that provided to Cascio. This claim likewise ignores that Judge Few was not misled and that the Order of dismissal accurately summarizes Dr. McKee's trial testimony. *See* ***App. 3714-18.*** The other allegations is Ground 11(m) lack merit for the reasons previously discussed in connection with Roberson's other claims.

without doubt, this Court is free to accept the evidence it deems appropriate for the sole purpose of demonstrating prejudice.

At any rate, as a practical matter, if Robertson is successful in carrying his burden of showing prejudice, he will have shown that there was a reasonable probability of a different result. That is a finding for relief. It would be odd, indeed, to fail in his burden but received relief that the prior proceeding was "unfair" and the prior fact-findings "unreasonable." Applicant simply is not entitled to any relief if he fails to show prejudice on a certain claim.

In essence, this claim, if heard and ruled upon, asks this Court to set aside the prior Order without having to show specific prejudice. The Supreme Court directed that Robertson has the burden of showing prejudice. *Robertson, supra.* For the reasons argued above, Robertson has not done so, and is entitled to no relief.

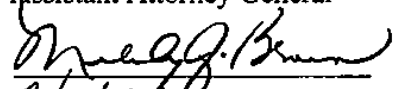
Respectfully submitted,

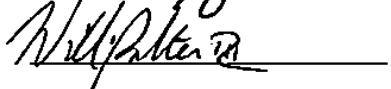
ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY JANE BROWN
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

By: 

By: 

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-6305

August 31, 2021

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA COUNTY OF York	)	IN THE COURT OF COMMON PLEAS IN THE ELEVENTH JUDICIAL CIRCUIT
James D. Robertson, S.C.D.C. No. 5067, Applicant, vs State of South Carolina, Respondent.	)	**Case No. 2011-CP-46-00072** **CERTIFICATE OF SERVICE BY MAIL**

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the *Respondent's Post-Hearing Memorandum* in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

William H. Ehlies, II, Esquire
310 Mills Avenue, Suite 201
Greenville, South Carolina 29605

Joseph Bradley Bennett, Esquire
22 Vintage Avenue
Greenville, South Carolina 29607

DATED this 1st day of September, 2021.

Angela Brown, Legal Assistant for
William Edgar Salter, III, Senior Assistant Attorney General

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

James Dejarnette Robertson,

Applicant,

-vs-

C.A. No, 2011-CP-46-0072

State of South Carolina,

Respondent.

APPLICANT'S MEMORANDUM CONCERNING THE ORDER OF REMAND[1]

The Order remanding this case contains a plurality opinion[2], an opinion by Chief Justice Pleicones concurring in part and dissenting in part, and a dissenting opinion by Acting Justice Toal. Although the plurality opinion controls the result, it includes conflicting and ambiguous positions of the three writers. The order leaves to this Court the task of reconciling the various opinions, make findings of fact, and, if indicated, decide upon a remedy.

When this Court's decision returns to the Supreme Court, it is likely that a majority of the Justices will be new to the case. For that reason, the Applicant will attempt to make a record containing evidence necessary to answer all potential questions.

[1] Robertson v. State, 418 S.C. 505; 795 S.E.2d 29 (2016).
[2] Unless otherwise designated, "opinion", "order" or "court's order" is intended to refer to the plurality decision.

AMBIGUITY IN THE PLURALITY OPINION

The plurality opinion reaffirms that: "All applicants are entitled to a full and fair opportunity to present claims in one PCR application." Odom v. State, 337 S.C. 256, 261; 523 S.E.2d 753, 755 (1999); 418 S.C. 505, 513. The governing statute states that: "All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. S.C.Code Ann.17-27-90 (1976). That section goes on to announce the rule against successive applications. "Any ground finally adjudicated *or not so raised*.....may not be the basis for a subsequent application...." Emphasis added.

Neither PCR counsel were statutorily qualified to be appointed in this case. Neither PCR counsel notified the Court of their lack of statutory qualification. As a result of their lack of qualification they failed to state any ground for relief in their application. Failing to meet that statutory requirement constitutes deficient performance. Their deficiencies resulted in prejudice because many claims became defaulted and, because the Applicant was denied the opportunity to fully challenge trial counsel's performance. Defaulted claims resulting from deficient performance of qualified counsel does not constitute "sufficient reason" for a successive PCR but claims that become defaulted as a result of deficient performance of unqualified counsel does constitute "sufficient reason" to allow a successive PCR. Robertson v. State, 408 S.C. 505, 516.

THE OPINION DEALS WITH EXCEPTIONS TO THE RULE AGAINST SUCCESSIVE APPLICATIONS

The plurality opinion reaffirms the ruling in Aice v. State, 305 S.C. 448, 450; 409 S.E.2d 392, 394 (1991) that deficient performance of PCR counsel which results in defaulted claims "is not *per se* a 'sufficient reason' allowing for a successive PCR application under § 17-27-90." 418 S.C. 505, 514. However, the plurality recognizes that, in this case, there is an additional distinguishing allegation, and that is PCR counsel were not qualified to be appointed in a capital post-conviction case.[3] The plurality opinion states: "We conclude Petitioner's allegation that he was denied a state-created right to qualified counsel constitutes a 'sufficient reason' to permit a successive PCR application under section 17-27-90." 418 S.C. 505, 516. The plurality opinion also states: "Because there is a genuine issue of fact as to whether prior PCR counsel were statutorily qualified, Petitioner should be afforded a hearing on this limited issue." 418 S.C. 505, 522 emphasis added. This ruling adopts the Pleicones view which ultimately became a dissenting view when the plurality later expanded the "limited issue" to include a finding of deficient performance, a prejudice finding, and "decid[ing] the appropriate remedy." 418 S.C. 505, 520.

Applicant asserts that PCR counsel were not qualified to be appointed[4] and pursuant to the plurality opinion and S.C.Code Ann. 17-27-90 they were deficient to the prejudice of the Applicant. The deficiency resulted from not being trained and

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[3] See S.C.Code Ann. 17-27-160(B)

[4] The Applicant filed a motion for partial summary judgment on this point and this Court entered an order granting the motion and finding that PCR counsel were not qualified to be appointed in a capital case.

educated by the experience gained from litigating post-conviction capital cases. The prejudice is that the Applicant was denied the opportunity to challenge trial counsel's performance in a full and complete post-conviction merits hearing. The remedy is to provide a plenary successive post-conviction hearing with qualified counsel.[5]

A RETREAT BY THE PLURALITY FROM HOLDING NON-QUALIFIED COUNSEL IS ITSELF A "SUFFICIENT REASON" TO PERMIT A SUCCESSIVE PCR APPLICATION

The plurality opinion states that appointing counsel who are not qualified is "sufficient reason" to permit a successive PCR. This holding is without caveat. The Court reasons that "...non-compliance with section 17-27-160(B) constitutes deficient performance *per se*", that is, without more. 418 S.C. 505, 520. Yet, later in the opinion, the Court adds an additional requirement stating: "If prior PCR counsel are deemed unqualified and, as a result, deficient...." 418 S.C. 505, 522 emphasis added. "And" is a conjunctive joining two separate requirements; first, being unqualified and second, that being unqualified resulted in discreet incidents of deficient performance. Here the plurality retreats from its earlier ruling that appointing counsel who are not qualified constitutes deficient performance *per se*. In her dissent, Acting Justice Toal cites to *Aice v. State*, 305 S.C. 448, 451: "[T]he contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive PCR application under § 17-27-90." Robertson v. State, 418 S.C. 505, 522. The pluralities' new position, yielding to Acting Justice Toal's view, is that appointing counsel who are not

[5] In his dissent Chief Justice Pleicones states: "I would hold that a capital PCR applicant must be appointed counsel who meet the qualifications set forth in § 17-27-90. If upon remand it is determined that Petitioner was not represented by statutorily qualified counsel, then in my view the appropriate remedy is a new PCR proceeding in which he is represented by such counsel." 418 S.C. 505, 524.

qualified, in and of itself, is not "sufficient reason" to allow a successive PCR. The Applicant must also show that discreet incidents of deficient performance resulted from not being qualified and that deficiency resulted in prejudice.

This Court has ruled that PCR counsel were not qualified to be appointed. The Applicant will prove that as a result of not being qualified specific incidents of deficient performance occurred. Prejudice resulted from the deficient performance because meritorious claims became defaulted and the Applicant was denied an opportunity to challenge trial counsel's performance during a "full and fair opportunity to present claims in one PCR application." Robertson v. State, 418 S.C. 505, 513.

THE PREJUDICE REQUIREMENT

"If prior PCR counsel are deemed unqualified and, as a result, deficient, the PCR judge must make a determination whether under *Strickland*, Petitioner was prejudiced." Robertson v. State, 418 S.C. 505, 522. Taking a strict reading of this statement, the prejudice assessment is limited to PCR counsel's performance. The deficiencies resulting in prejudice are proven by the fact that the Applicant did not receive the statutorily guaranteed right of qualified counsel to conduct a full and fair merits hearing challenging trial counsel performance.

Strickland has never applied to PCR counsel's performance. Strickland is limited to testing trial counsel's performance and the resulting jury recommendation. To make the Order of Remand meaningful when it refers to a "Strickland"

assessment, this Court must determine whether trial counsel were deficient to the prejudice of the Applicant.[6]

If this Court limits its inquiry to whether PCR counsel were deficient to the prejudice of the Applicant then the only remedy available would be to hold that the Applicant is entitled to a successive post-conviction hearing.[7] Only if this Court decides to scrutinize trial counsel performance and assess prejudice under the Strickland standard may it actually conduct a successive post-conviction hearing. The Applicant will prove both PCR counsel and trial counsel were deficient to his prejudice.

July 30, 2021.

WILLIAM HARRY EHLIES, II
JOSEPH BRADLEY BENNETT
ATTORNEYS FOR THE APPLICANT
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
(o) 864-232-3503 (f) 864-232-4854
hank@ehlieslaw.com

[6] The Supreme Court of South Carolina defines prejudice stating: "In order to prove that he was prejudiced by his counsel's deficiency, an applicant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624,625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733,735 (1997)." Bennett v. State, 383 S.C. 303, 308 (2009).

[7] "In the event that prior PCR counsel are deemed unqualified under section 17-27-160(B), the judge must decide the appropriate remedy." Robertson v. State, 418 S.C. 505, 520 emphasis added. The Order of Remand leaves the decision of an appropriate remedy to this Court.

State of South Carolina

In the Court of Common Pleas

County of York

James D. Robertson,

Applicant,

-vs-

C. A. No. 2011-CP-46-0072

State of South Carolina,

Respondent.

Certificate of Mailing

The undersigned certifies that he placed the Applicant's Pre-Merits Hearing Memorandum and Order of Remand Memorandum and Certificate of Mailing in the USPS addressed as follows:

William Edgar Salter, III
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
esalter@scag.gov

July 30, 2021.

WILLIAM HARRY EHLIES, II
ATTORNEY FOR THE APPLICANT
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
864-232-3503
hank@ehlieslaw.com

STATE OF SOUTH CAROLINA

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COUNTY OF YORK

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-vs-

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State of South Carolina,

Respondent.

APPLICANT'S PRE-MERITS HEARING MEMORANDUM

I. Introduction/Summary

This case is on remand from the Supreme Court of South Carolina to determine whether the Applicant can pursue a successive PCR application. In its order of remand, the Supreme Court held that Applicant may do so if this Court determines that 1) initial PCR counsel were statutorily unqualified, thereby rendering their performance deficient *per se,* and 2) this deficient performance prejudiced Applicant. Robertson v. State, 418 S.C. 505, 520-22, 795 S.E.2d 29, 37-38 (2016).

This Court has already determined that initial PCR counsel were not qualified under Section 17-27-160(B), rendering their performance deficient *per se.*[1] Therefore, the matter currently before the Court is whether initial PCR counsel's deficient

[1] "Applying the Strickland test, we conclude that non-compliance with section 17-27-160(B) constitutes deficient performance *per se.*" Robertson v. State, 418 S.C. at 521.

performance prejudiced Applicant. Determining prejudice requires this Court to conduct a plenary successive post-conviction merits hearing.[2]

The appropriate legal standard for determining prejudice in cases like this is the *Strickland* standard. Robertson, 418 S.C. at 520, 795 S.E.2d at 37. Under that standard, to establish prejudice there must be a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 669 (1984). A reasonable probability is "a probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.*

Therefore, to establish prejudice, Applicant must show there is a reasonable probability that if initial PCR counsel had been statutorily qualified, the outcome of the initial PCR hearing would have been different. Applicant intends to meet this burden by demonstrating that potentially meritorious PCR claims exist (*see* Fifth Amended PCR Application) and that there is a reasonable probability that initial PCR counsel would have successfully pursued these claims had initial PCR Counsel been statutorily qualified. At a minimum the Applicant has been prejudiced because he did not get a "full and fair opportunity to present claims in one PCR application"

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[2] The entitlement to a successive post-conviction application hearing is established if this Court finds a ground for relief which for "sufficient reason" (PCR counsel not qualified) was not asserted or was inadequately raised in the original, supplemental or amended application. See Robertson v. State, 418 S.C. 505, 795 S.E.d 29 (2016) at SC 513. Furthermore, the Order of remand holds that "sufficient reason" exists to permit a successive PCR application under section 17-27-90. Robertson, ibid S.C. at 516.

and to challenge trial counsel's performance on the defaulted claims. Robertson v. State, ibid at S.C. 513; Odom v State, 337 S.C. 256, 261, 523 S.E.d 753,755 (1999).

II. Procedural History.

On March 26, 1999, Applicant was convicted and sentenced to death for the murder of his parents, armed robbery, and financial transaction card fraud. Applicant waived his right to a direct appeal.[3]

On July 7, 2005, the Supreme Court of South Carolina granted Applicant's request for a stay of execution to pursue post-conviction relief and appointed, then circuit court Judge, John Few to preside over the PCR proceedings. Judge Few then appointed Michael Langford Brown and Joseph Matlock to represent the Applicant in the PCR proceedings. After a hearing, Judge Few ultimately denied post-conviction relief and issued an order of dismissal on March 24, 2008.

On January 7, 2011 Applicant filed a second PCR application in state court seeking relief due to trial court errors and ineffective assistance of trial counsel, appellate counsel and prior PCR counsel. However, on September 20, 2011, Circuit Court Judge Lee Alford summarily dismissed the application, finding, among other things, that having ineffective PCR counsel was not a cognizable state claim that could justify allowing a successive PCR.

Applicant appealed Judge Alford's order of dismissal to the South Carolina Supreme Court, arguing, among other things, that Applicant should be allowed to pursue his successive PCR application under the principles elucidated in the

[3] This is a point contested in 11(l).

Martinez case, a United States Supreme Court case. The Supreme Court of South Carolina granted *certiorari* and issued a published opinion ordering the case remanded.

III. The Order of Remand.

On appeal, the Supreme Court of South Carolina reaffirmed that *Martinez* applies only to federal habeas corpus review and is not applicable to state post-conviction relief actions. Robertson, 418 S.C. at 515, 795 S.E.2d at 34. Accordingly, the Court held that "*Martinez* does not afford Petitioner a right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel." *Id.* at 516, 795 S.E.2d at 34. However, the Court found that Applicant's "allegation that he was denied a state-created right to qualified counsel constitutes a 'sufficient reason' to permit a successive PCR application under Section 17-27-90." Id. at 516, 795 S.E.2d at 35.

The Court held that because the parties offered conflicting evidence as to whether Applicant's prior PCR counsel met the statutory qualifications required by Section 17-27-160(B), Judge Alford erred in summarily dismissing the 2011 Application without a hearing. Id. at 520, 795 S.E.2d at 36. Consequently, "we remand for a determination of whether prior PCR counsel were statutorily qualified." Id.

The Court continued that in "the event that prior PCR counsel are deemed unqualified under Section 17-27-160(B), the judge must decide the appropriate remedy. Because we have yet to enunciate how this remedy is to be determined, we

take this opportunity to do so." Id. at 520, 795 S.E.2d at 36–37. The Court concluded that "based on our reading of *Martinez*, we find the *Strickland* test is appropriate and should be applied to evaluate this type of case." Id. at 520, 795 S.E.2d at 37.

Applying the *Strickland* test, "we conclude that non-compliance with Section 17-27-160(B) constitutes deficient performance *per se*. Nevertheless, a PCR applicant would still maintain the significant burden of proving that he was prejudiced by counsel's lack of qualification." Id.

IV. Demonstrating Prejudice

This Court has already made the factual finding that initial PCR counsel lacked the statutory qualifications under Section 17-27-160(B). *See Order granting Applicant's Motion for Partial Summary Judgment.* Accordingly, initial PCR counsel's performance is deemed to be deficit *per se*. Id. at 521, 795 S.E.2d at 37. Therefore, the issue now before the Court is to determine whether Applicant was prejudiced by PCR Counsel's deficient performance.

Under the *Strickland* standard, to establish prejudice one must show that there is a reasonable probability that, but for counsel's deficient performance the result of the proceeding would have been different. Strickland, 466 U.S. 668, 669 (1984). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id.

To prove that Applicant was prejudiced by initial PCR counsel's deficit performance, Applicant intends to demonstrate that potentially meritorious PCR

claims exist and that there is a reasonable probability that qualified initial PCR counsel would have successfully pursued these claims.

The Fifth Amended Application sets forth specific instances of deficient performance of trial counsel, appellate counsel and post-conviction counsel.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Applicant charges trial counsel with deficient performance in four particulars during the guilt phase. Fundamentally those deficiencies relate to prosecutorial argument, failing to challenge the State's theory of the case and failing to mitigate the murder with evidence of sufficient provocation to result either in acquittal or a verdict less than murder.

In paragraph 11(b) the Applicant sets forth 16 specific deficiencies of trial counsel during the sentencing phase of the case. They may be grouped as issues pertaining to failing to vet the choice of an expert to perform and testify for the defense concerning the internal family system and social history; failing to manage all expert witnesses to guard against disclosure to the jury of details of the crime in violation of the client's right to remain silent; abandoning the client at a critical stage of the proceedings (Maples v. Thomas, 565 U.S. 266 (2021); ABA Guidelines); issues concerning the court's disclosure of its own expert's confidential report to the State and then allowing the State to use the same witness as its reply witness which resulted in the jury hearing testimony about the details of the actual killings; failing to request the State's expert's underlying data including the notes of his interview with the client (Rule 705 SCRE); failing to investigate, develop and

present mitigation evidence concerning internal family systems resulting in parricide.

INEFFECTIVE ASSISTANCE OF DIRECT APPEAL COUNSEL

The allegations pertaining to ineffective assistance of direct appellate counsel are grouped into eleven issues and appear in paragraph 11(l). They pertain to juror *voir dire*; providing the jurors with a definition of mitigating evidence; limiting victim impact testimony; the trial court's order of a psychological evaluation to determine whether the defendant was sane at the time the crime was committed and competent to assist his attorneys when neither of those conditions were in issue; failing to inform the Applicant of the potential grounds for appeal when the Applicant had moved to remove counsel and to be allowed to proceed *pro se*; abandoning the client during the competency proceedings which were ordered during the appellate process; and in failing to argue the S.C.Code Ann. 16-3-25 (1976) mandated both a direct appeal from a conviction and sentence of death and representation by an attorney neither of which can be waived.

INEFFECTIVE ASSISTANCE OF INITIAL POST-CONVICTION COUNSEL

There are thirteen allegations of ineffective assistance of initial post-conviction counsel. They can be grouped in issues pertaining to statutory qualifications; ignorance of the statutory procedures and Strickland v. Washington and its progeny; representing evidence is authentic when it is not yet was relied upon by the Judge in issuing an order denying relief; making representations to the Court about testimony in the trial record that was clearly erroneous; failing to know about, or to challenge trial counsel on the management of defense retained testifying expert

witnesses; failing to understand the record as it pertains to the disclosure of the confidential psychological evaluation performed by a Court's expert followed by trial counsel's failure to object to allowing the State to use the Court's expert witness as its own witness in rebuttal to the client's mitigation case; failing to investigate, develop and present mitigation testimony on internal family systems that result in homicides; failing to challenge trial counsel for abandoning the client during a critical stage of the proceedings.

CONCLUSION

In all, the Applicant will demonstrate that trial counsel were deficient to his prejudice as defined by Strickland v. Washington. Further, that initial post-conviction counsel were deficient to the Applicant's prejudice which is that he did not get a fair and complete opportunity to present all his claims in a single application challenging the performance of trial counsel.

July 30, 2021.

WILLIAM HARRY EHLIES, II
JOSEPH BRADLEY BENNETT
ATTORNEYS FOR THE APPLICANT
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
(o) 864-232-3503 (f) 864-232-4854
hank@ehlieslaw.com

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
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James D. Robertson, #5067,)	C/A 2011-CP-46-00072
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State of South Carolina,)	
Respondent.)	

Applicant is a death-sentenced inmate. The captioned action is Applicant's second post-conviction relief action. The action was previously dismissed as successive and untimely, but on appeal, the Supreme Court of South Carolina remanded to this Court for a hearing to determine if prior PCR counsel met the statutory qualification for appointment, and, if not, did that "deficiency" result in prejudice to Applicant. *Robertson v. State*, 418 S.C. 505, 522, 795 S.E.2d 29, 38 (2016). A remand hearing is set to begin Monday, August 9, 2021. Applicant has submitted a Memorandum Concerning the Order of Remand. Applicant has also filed a "Pre-merits Hearing Memorandum" which also outlines his position on the scope of the remand. Respondent submits its own memorandum to set out the points on which the parties can agree, and discuss the points at which the parties diverge in their opinions:

1. This is Applicant's second PCR action. It was previously dismissed as successive and time-barred. On appeal from the dismissal, the Supreme Court of South Carolina found summary dismissal was proper on all grounds except one: the Court found that the allegation that PCR counsel was not statutorily qualified for appointment in a capital PCR pursuant to S.C. § 17-27-160 was not properly subject to summary dismissal. The Court remanded to this Court for a hearing on deficiency and prejudice:

> Because there is a genuine issue of fact as to whether prior PCR counsel were statutorily qualified, Petitioner should be afforded a hearing on this limited issue. *Cf. McCoy*, 401 S.C. at 370, 737 S.E.2d at 627 ("Although Petitioner's PCR claim may ultimately prove to be untimely, successive, or perhaps unsuccessful on the merits, the PCR judge erred in granting the State's motion for summary dismissal because genuine issues of material fact exist as to whether Petitioner's PCR claim is successive or untimely."). If prior PCR counsel are deemed unqualified and, as a result, deficient, the PCR judge must make a determination whether under *Strickland*, Petitioner was prejudiced. Accordingly, we reverse the PCR judge's order and remand the matter for a hearing.

Robertson, 418 S.C. at 522, 795 S.E.2d at 38.

2. Respondent agrees with Applicant that this Court has previously ruled on the first question to be answered. By Order dated November 21, 2017, this Court granted summary judgment in Applicant's favor, finding counsel did not meet the statutory qualifications. Consequently, Respondent agrees with Applicant that "the matter currently before the Court is whether initial PCR counsel's deficient performance prejudiced Applicant." (Pre-merits memo, pp. 1-2). However, Applicant's concession that we are at the prejudice stage is inconsistent with his pending claims and allegations.

3. Applicant still maintains claims in his Application alleging that former PCR counsel "were deficient to the prejudice of Applicant." (See Fourth Amended Application, pp. 10-13). Respondent disagrees that these claims of deficiency may be litigated. Our Supreme Court has limited cognizable allegations to one – qualification under the statute. *Id.* Of note, the remainder of the opinion specifically *rejects* any other allegations may be raised against PCR counsel. *Id.* Thus, this Court lacks jurisdiction to entertain any allegations of deficiency beyond qualification (which it has already ruled upon). The Supreme Court's opinion provides that once that finding is made, the first prong is met: "...we conclude that non-compliance with section 17-27-160(B) constitutes deficient performance per se." *Robertson,* 418 S.C. at 521. Consequently,

the ability to entertain and rule on allegations of deficiency other than statutory qualification is beyond the jurisdictional limitations of remand.

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

Therefore, Applicant's claims of deficient representation in 11(m) (i), (ii), (iii) (iv), (v), (vi), (vii), (viii), (ix), (x), (xi), (xii), [and should the Court accepted the Fifth Amendment, the additional subparagraph renumbered (ii), or, stated differently, claims (11(m) (i) through (xiii)] are beyond the jurisdictional limitations of remand.[1] Respondent agrees, though, that Applicant

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[1] Applicant has even noticed Respondent that he intends to call "experts" in representation in capital collateral relief matters. Not only is this irrelevant, that is not proper testimony for post-conviction relief. *See McKnight v. State*, 378 S.C. 33, 56, 661 S.E.2d 354, 365–66 (2008) (finding expert testimony properly excluded regarding "prevailing professional standards" when testimony "not designed to assist the PCR court to understand certain facts, but rather, was a legal argument as to why the PCR court should rule that McKnight's trial counsel was ineffective."); *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002) (PCR applicant not entitled to present expert opinion on whether "trial counsel's actions fell below an acceptable legal standard of competence"). *See also Isom v. State*, No. 45S00-1508-PD-508, 2021 WL 2678553, at *24 (Ind. June 30, 2021) ("Although Rule 24 requires trained counsel in death-penalty cases, Isom's conclusion that the effectiveness of such attorneys is beyond the ken of post-conviction courts does not follow from his premise."); *Provenzano v. Singletary*, 148 F.3d 1327, 1331 (11th Cir. 1998) ("Even if the [public defender's] affidavit had said that its author would have insisted on a change of venue, it

may litigate the underlying issue of ineffective assistance of trial counsel as part of his case of showing prejudice, *i.e.*, that a stronger claim was missed or stronger evidence omitted. *See generally Robertson*, at 521, 795 S.E.2d at 37 (providing that to be entitled to any relief, Applicant must carry "the significant burden of proving that he was prejudiced by counsel's lack of qualification").

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

The only direction from our Supreme Court is that this Court make the determination of prejudice: "If prior PCR counsel are deemed unqualified and, as a result, deficient, the PCR judge must make a determination whether under *Strickland*, Petitioner was prejudiced." *Robertson*, 418 S.C. at 522, 795 S.E.2d at 38. This Court is tasked with making the factual determination of prejudice regarding cognizable PCR claims. That is all. Again, our Supreme Court neither vacated the prior Order of Dismissal, nor ordered a new post-conviction relief proceeding. However, and without doubt, this Court is free to accept the evidence it deems

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would establish only that two attorneys disagreed about trial strategy, which is hardly surprising. After all, '[t]here are countless ways to provide effective assistance in any given case,' and '[e]ven the best criminal defense attorneys would not defend a particular client in the same way.' ") (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). Moreover, and somewhat curiously, Applicant suggests that he would present testimony on federal habeas statutes. AEDPA, or the Antiterrorism and Effective Death Penalty Act of 1996, applies only to federal proceedings. Even so, Applicant suggests that he would present testimony on heightened qualifications "obligations" that federal law imposes on the states. However, the provisions regarding heightened qualifications for state collateral attorneys apply to expedited timelines, but if not afforded, federal habeas review still proceeds. *See Tucker v. Moore*, 56 F. Supp. 2d 611, 614 (D.S.C. 1999), *aff'd sub nom. Tucker v. Catoe*, 221 F.3d 600 (4th Cir. 2000). Currently, even with the heighten qualifications of the South Carolina statute, South Carolina cases are not afforded expedited proceedings at this time as they have not been designated an "opt-in" state. Again, such testimony could in no way be relevant to this South Carolina state case.

appropriate for the sole purpose of demonstrating prejudice. Though perhaps a fine point of argument, the difference is substantial. The prior Order of Dismissal is final. At this time, the State is allowed to refer to and rely upon evidence accepted, credibility determinations, and fact-findings. At any rate, as a practical matter, if Applicant is successful in carrying his burden of showing prejudice, he will have shown that there was a reasonable probability of a different result. That is a finding for relief. It would be odd, indeed, to fail in his burden but received relief that the prior proceeding was "unfair" and the prior fact-findings "unreasonable." Applicant simply is not entitled to any relief if he fails to show prejudice on a certain claim.[2]

In that same vein, Respondent disagrees with Applicant's assertion that "[a]t a minimum the Applicant has been prejudiced because he did not get a 'full and fair opportunity to present claims in one PCR application' and to challenge trial counsel's performance on the defaulted claims." (Pre-merits memorandum, pp. 2-3). Applicant still appears to argue for *per se* prejudice. This has been settled against him. *Robertson, supra.* He must show specific prejudice.

CONCLUSION

Respondent maintains, consistent with the Supreme Court's opinion and the limitations of the order of remand, that the only relevant issue properly before the Court currently is whether Applicant can show prejudice.

Respectfully submitted,

ALAN WILSON
Attorney General

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[2] The fact that the majority *rejected* the relief of ordering an entirely new proceeding was recognized in the concurrence: "If upon remand it is determined that Petitioner was not represented by statutorily qualified counsel, then in my view the appropriate remedy is a new PCR proceeding in which he is represented by such counsel." *Robertson,* 418 S.C. at, 524, 795 S.E.2d at, 38–39 (Pleicones, J., dissenting). That view did not prevail. Instead, the majority resolved that Applicant was entitled only to a hearing to determine prejudice if prior counsel did not meet the statutory requirements.

DONALD J. ZELENKA
Deputy Attorney General

MELODY JANE BROWN
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

By: *s/Melody J. Brown* 9-10-2021

By: *s/W. Edgar Salter, III* 9-10-2021

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-6305

August 5, 2021

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)	
James D. Robertson, #5067,)	C/A 2011-CP-46-00072
Applicant,)	
v.)	RESPONSE IN OPPOSITION TO MOTION FOR APPLICANT TO BE PRESENT AT HEARING FREE OF PHYSICAL RESTRAINTS
State of South Carolina,)	
Respondent.)	

Applicant is a death-sentenced inmate. The captioned action is Applicant's second post-conviction relief action. The action was previously dismissed as successive and untimely, but on appeal, the Supreme Court South Carolina remanded to this Court for a hearing to determine if prior PCR counsel met the statutory qualification for appointment, and, if not, did that "deficiency" result in prejudice to Applicant. *Robertson v. State*, 418 S.C. 505, 522, 795 S.E.2d 29, 38 (2016). A remand hearing is set to begin Monday, August 9, 2021. Applicant has moved to appear at his remand hearing "free of physical restraints." (Motion, p. 1). Respondent opposes for these reasons: Applicant is not entitled to the relief he seeks in either fact or law and the South Carolina Department of Corrections – the agency vested with the responsibility to safely and securely maintain custody – opposes the relief. In support of its position, Respondent respectfully submits:

1. Applicant stands convicted for double murder.[1] His convictions and sentence have never been set aside. After trial, Applicant knowingly and voluntarily abandoned his direct

[1] Robertson's capital jury trial was held on March 15-26, 1999. The jury convicted him of two counts of murder, one count of armed robbery, and one counsel of financial transaction card fraud. The jury also found 5 aggravating circumstances: (1) the murder was committed while in the commission of robbery while armed with a deadly weapon; (2) larceny with the use of a deadly weapon; (3) physical torture; (4) the offender committed the murder for himself or another for the purpose of receiving money or a thing of value; and (5) that two or more persons were murdered by one act or pursuant to one scheme or course of conduct. See S.C. Code Ann. §

appeal by directly requesting dismissal of his appeal. Applicant then filed a prior PCR action on June 16, 2005 which was fully litigated to completion but did not afford Applicant any relief. After a multi-day hearing, the Honorable John C. Few, issued his one hundred and six page, detailed Order of Dismissal addressing Applicant's twelve allegations[2] which was filed on March 24, 2008. On October 6, 2010, the Supreme Court of South Carolina denied Applicant's petition for certiorari review of the denial of relief. Applicant then entered federal court for the purpose of seeking federal habeas review.

Applicant filed a federal petition on January 7, 2011, but, at his request, the federal court granted a stay on April 8, 2011 to allow him to return to state court to pursue this action.

On January 7, 2011, Applicant, in addition to his federal filings, also filed this action. The Honorable Lee S. Alford was appointed to preside over the matter. After appointing counsel, and after considering the arguments of the parties, Judge Alford granted the State's motion to dismiss.[3] Applicant appealed. The Supreme Court of South Carolina agreed that the PCR

16-3-20(C)(a)(1)(d), (e), and (h); (4); and (9) (Supp. 2010). Applicant's jury determined the appropriate sentence was death.

[2] Applicant made these allegations: (1) counsel failed to present Dr. Hayne McMeekin as a witness and failed to develop evidence that Dr. McMeekin over-prescribed Ritalin; (2) counsel failed to present Chip Robertson as a defense witness; (3) counsel failed to pursue a verdict of guilty but mentally ill (GBMI), either by advising Applicant to enter such a plea or by requesting a verdict of GBMI at the trial; (4) counsel failed to spend an adequate amount of time with Applicant prior to trial; (5) counsel never pursued a proposed plea bargain allegedly offered by the State; (6) counsel erroneously advised Applicant not to testify in the sentencing phase of his trial; (7) counsel failed to present evidence that Applicant is adaptable to prison; (8) counsel failed to cross-examine Applicant's co-defendant, Meredith Moon about a statement in which she allegedly agreed to "keep quiet" about the murders in exchange for $50,000.00; (9) counsel failed to request removal of a juror where the juror had made statements on voir dire; (10) counsel did not adequately advise Applicant before he was evaluated by the prosecution's psychologist, Dr. Geoffrey McKee; (11) counsel failed to adequately present evidence of the Robertson family's mental health history; and (12) counsel was ineffective for presenting social worker Toni Cascio as an expert witness because (a) of Cascio's lack of experience; (b) counsel's agreement to provide Ms. Cascio's notes to the States; (c) counsel's failure to discover Applicant's admissions about the crime in enough time to permit counsel to employ a different social worker; and (d) Counsel's presentation of Ms. Cascio as a witness. ***App. 3268-73. See also App. 3658-59.***

[3] Judge Alford found that: (1) the application was barred by the one year statute of limitations; (2) the Application was impermissibly successive; (3) Robertson waived his right to challenge whether his original PCR counsel was statutorily qualified by not challenging lead counsel's qualifications during his initial PCR; (4)

statute's successive application prohibition and one-year time limitation barred all the issues, and summary dismissal was proper with one exception: the Court found that the allegation that PCR counsel was not statutorily qualified for appointment in a capital PCR pursuant to S.C. § 17-27-160 was not properly subject to summary dismissal. The Court remanded to this Court for a hearing on deficiency and prejudice:

> Because there is a genuine issue of fact as to whether prior PCR counsel were statutorily qualified, Petitioner should be afforded a hearing on this limited issue. *Cf. McCoy*, 401 S.C. at 370, 737 S.E.2d at 627 ("Although Petitioner's PCR claim may ultimately prove to be untimely, successive, or perhaps unsuccessful on the merits, the PCR judge erred in granting the State's motion for summary dismissal because genuine issues of material fact exist as to whether Petitioner's PCR claim is successive or untimely."). If prior PCR counsel are deemed unqualified and, as a result, deficient, the PCR judge must make a determination whether under *Strickland*, Petitioner was prejudiced. Accordingly, we reverse the PCR judge's order and remand the matter for a hearing.

Robertson v. State, 418 S.C. at 522, 795 S.E.2d at 38.

Of import to this Court's consideration of the instant motion, Applicant's convictions have never been set aside, and Applicant's death sentences have never been set aside or reduced. In addition to the severity of the crimes, and the sentence of death, the prior denial of relief logically places Applicant at high risk of absconding when presented an opportunity. Of note, on January 19, 1988, during his post-conviction relief hearing, death-sentenced inmate Fred H. Kornahrens, III, escaped from custody. He was not returned to the custody of the South Carolina Department of Corrections until February 3, 1988. (See 1995 WL 17056617 (Brief of Respondents, Statement of the Case, Procedural History) (C.A. 4) (Appellate Brief)). Further,

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Robertson had not proven that collateral counsel were not qualified to represent him and he had erroneously construed the statutory requirements for appointment of PCR counsel in a capital case; (5) Robertson had not proven that his original PCR counsel had not performed competently under *Strickland v. Washington*, 466 U.S. 668 (1984), and Robertson had not demonstrated either deficient performance or resulting prejudice merely because new counsel raised different grounds that were not raised in the original action; (6) no due process or equal protection violation occurred during the initial PCR; (7) the United States Supreme Court's granting of certiorari in *Maples v. Thomas*, 132 S.Ct. 912, 914 (2012) and *Martinez v. Ryan*, 131 S.Ct. 2960 (2012), did not require the relief sought; and (8) laches barred relief. ***App. 4412-47.***

the severity of the crimes cannot be understated, nor the fact that Applicant has previously fled the jurisdiction.

2. The crime was brutal. The direct and circumstantial evidence presented at in the guilt phase of Robertson's trial, viewed in the light most favorable to the prosecution, reasonably tended to prove that Robertson stabbed and cut his mother with a knife (State's Exhibits 23 and 27) and beat her in the head with the tines of a claw hammer (State's Exhibit 64). He killed his father in a similar fashion, but he also beat his father with an aluminum baseball bat and stabbed him twice in the neck. Applicant killed his parents in their home early on November 25, 1997. Further, testimony and evidence from trial supports that Robertson shared his plans to kill his parents with Meredith Moon, and she accompanied him in his flight from South Carolina to Philadelphia, where he was eventually arrested.

Ms. Moon, who admitted she was with Applicant around and during the time of the murders, testified that, while sitting alone on the couch in Applicant's bedroom in the family home, she heard a struggle commence several minutes after the alarm clock rang and the shower started. During the struggle, she heard Terry Richardson screaming for Earl, saying, "[N]o, Jimmy; no, Jimmy." This lasted for about a minute or so. She later went upstairs at Robertson's direction and saw him covered with blood. Later in the attack and after the shower had stopped running, she heard a loud thumping noise for about a minute that sounded "like a hand beating on a pillow." Applicant then came downstairs and again was covered in blood. Because "he thought he heard something upstairs," he went back upstairs for about five minutes. Upon his return, he took off his clothes and showered. ***App. 1597-1602; 1616; 1625-27.***

Once he had showered, he put the bloody clothes in a garbage bag that was in front of the fireplace. He also placed other items in the bag. Although Moon did not see what they were, she

remembered seeing Earl's wallet and Terry's purse on the pool table in the basement, and she saw Applicant take Earl's credit card from the wallet. By now, it was between 7:30 and 8:00 a.m. Again following his instructions, Moon grabbed the bag and they went outside through the downstairs door, which he then broke with the end of a rake. They then walked up to the driveway and she put the bag in the trunk of a red Mazda, which another witness testified was registered to Chip Robertson (Applicant's brother). ***App. 1409.*** They waved to a neighbor who saw them. ***App. 1602-04 1615-16; 1635.*** This neighbor, Wayne Langley, Sr., corroborated this portion of Moon's testimony. ***App. 1423-28.***

After the car was loaded, they got on 1-77 and headed north. They stopped at the Peach Stand in Fort Mill, where they bought gasoline, as well as Neosporin and some Band-Aids because Robertson had "cut his finger pretty badly" when he broke the glass on the window to the back door. They used Earl's credit card to pay for these items. Moon called Erin Savage and told her that she was on her way to Philadelphia. ***App. 1594-95; 1657-59.*** Glenda Johnson, the cashier at the Peach Stand corroborated their stop at the store, as did a receipt for their purchases (State's Ex. 90), a surveillance videotape from the store (State's Ex. 89) and still photographs from the tape (State's Exs. 123-124). ***App. 1428-35; 1438-42.***

During their subsequent ten-hour trip to Philadelphia where he was arrested, Applicant and Moon took turns driving. At some point, they stopped at a rest area, where Robertson telephoned work and told his employer that he would not be coming to work. Robertson repeatedly said that Chip (who was living in Philadelphia), was going to be proud of him, and he told her that he had broken off a knife blade in his mother's neck during the course killing her. He said that he was glad that it was over, and that he planned to use the insurance money to buy

a house on the lake and renovate a local club.[4] Finally, he told her the plan was to pick up Chip, return home, discover the bodies, and call 911. ***App. 1659; 1662-69; 1685-56; 1694-95.*** During the drive up, they stopped at a rest area in Virginia and at a rest area called the Chesapeake House in Maryland. While at the Chesapeake House, Robertson got the garbage bag containing the bloody clothes and other items out of the trunk, and he threw the bag in a dumpster. They then went on to Philadelphia, where they were arrested outside of Chip's apartment. ***App. 1607-15; 1632-33; 1641-42.***

3. Further still, even a skimming of Applicant's SCDC records (as disclosed for the prior action) show that he has expressed a desire to "be allowed to enter another inmate's cell so that he can kill him," and SCDC Health Services personnel noted that Applicant "appeared to enjoy his general anger at authority." (See Medical Summary, Record Entry from March 2009 and Record Entry from May 2001).

4. It is against this backdrop that the Court must evaluate Applicant's request to be "free of restraint." Applicant asserts he "is not a flight risk or a danger to the Court" and restraining him with "shackles would needlessly burden his Fifth Amendment right to due process, his Sixth Amendment right to counsel and chill his right to participate in his own defense." (Motion, p. 3). He is wrong on each of these assertions.

5. First, there could be no violation of his Fifth and Sixth Amendment rights. Applicant is presently participating in a civil action – an action he instituted and an action

[4] Pamela Carole testified that Nations Bank was the personal representative of the estates of Earl Robertson and Terry Robertson; that she had completed all the probate filings with the probate court; and that she had filed tax returns for the estate and income tax returns for both individuals. The combined gross worth of the estates was approximately $2,200,000.00, and their children, Applicant and his brother Chip were the beneficiaries. ***App. 1527-28; 1533.*** At the prior PCR hearing, Applicant admitted that his brother had, over the years Applicant had been on death row at that time, provide him with "$45,000, maybe $45,000, $50,000." ***App. 3329.***

maintained at his preference.[5] Further, it is unclear how the Fifth Amendment could be offended. Applicant's custody and resulting restraint stems from his conviction and the Department of Corrections' protocols, and merely being restrained does not compel testimony for use in criminal proceedings. *See Allen v. Illinois*, 478 U.S. 364, 374 (1986) ("This Court has never held that the Due Process Clause of its own force requires application of the privilege against self-incrimination in a noncriminal proceeding, where the privilege claimant is protected against his compelled answers in any subsequent criminal case."). Moreover, the Supreme Court has recently underscored again *in the very case which resulted in the remand proceeding before this Court* that Sixth Amendment guarantees are not applicable in PCR – relief was premised on statutory provisions, not constitutional rights. *Robertson*, 418 S.C. at 516, 795 S.E.2d at 35. *See also Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori,* he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.").

Additionally, Applicant's reliance on *Deck v. Missouri* is sorely misplaced as that case shows the Supreme Court was addressing visible shackles in criminal proceedings, not collateral challenges. 544 U.S. at 635(2005) ("where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation"). Not even a good analogy may be drawn. The Supreme Court in *Deck* expressed concern over "three fundamental legal principles," (1) "the presumption of innocence and the related fairness of the factfinding process," (2)

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[5] The action is not maintained solely at Applicant's pleasure. This Court may dismiss the action for failure to prosecute his cause. *See generally Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983) ("The plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with his cause.").

interference with the Sixth Amendment right to counsel and "ability to participate in his own defense," and (3) the ability "to maintain a judicial process that is a dignified process... which includes the respectful treatment of defendants." *Id.*, at 630-31. The presumption of innocence is gone; the Sixth Amendment does not extend to collateral proceedings; and maintaining the judicial process is a goal shared universally but does not begin and end with the defendant's opinion or preference. Moreover, the Supreme Court did not overlook the reality of danger in the courtroom: "We do not underestimate the need to restrain dangerous defendants to prevent courtroom attacks, or the need to give trial courts latitude in making individualized security determinations. We are mindful of the tragedy that can result if judges are not able to protect themselves and their courtrooms." *Id.*, at 632.[6] Respondent seeks to avoid danger, as much as it can be avoided, by simply adhering to the restraints protocols as established by the South Carolina Department of Corrections.

6. The South Carolina Department of Corrections has a restraints protocol in place expressly for security purposes, and requires heightened security for death-sentenced inmates. Respondent has consulted with General Counsel at the South Carolina Department of Corrections and is authorized to assert that the Department of Corrections opposes Applicant's motion. The Department's position is set out and explained in the attached affidavit of Colie Rushton, Director, Division of Security, which is incorporated by reference into this response. (Attachment 1). Further, the undersigned is authorized to assert that counsel for the Department

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[6] Even at trial, shackles are not prohibited, "[b]ut given their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case." *Deck*, 544 U.S. at 632. Consequently, if this was a criminal trial situation, it would be in the Court's discretion to order use of visible restraints upon consideration of the individual facts and circumstances presented before it. While it does not appear necessary, out of an abundance of caution, and to prevent unnecessary further litigation of this point, Respondent respectfully submits the Court could place on the record an individualized determination of the need for allowing use of restraints. If that is to be addressed, Respondent submits Applicant's singular, bare assertion that he "is not a flight risk or a danger to the Court," (motion, p. 3), should be soundly rejected based on the record before the Court. In particular, it should be found insufficient to support the requested relief in light of the facts and circumstances outlined in this response.

of Corrections would be available to appear at the hearing prior to any order directing its guards to override established restraints protocol, or allowing its guards discretion regarding the established restraints protocol, should the Court prefer to hear directly from counsel. However, the Department has set out the basic position in the attached the affidavit for the Court's consideration.

WHEREFORE, having made this response in opposition to Applicant's motion, Respondent submits, for all the foregoing reasons, Applicant's motion should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY JANE BROWN
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

By: *s/Melody J. Brown* 8-10-2021

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Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-6305

August 5, 2021

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