STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2010CP2309792

Charles Christopher Williams *vs.* South Carolina State Of

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.

☐ 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: _____

☐ 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; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this 24th day of July, 2013.

Court Reporter:

PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the 24th day of July, 2013, and a copy mailed first class this 24th day of July, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

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ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Charles Christopher Williams,	)	C.A. No. 2010-CP-23-9792
	)	
Petitioner,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Before the Court is Petitioner's Application for Post-Conviction Relief. Petitioner was convicted of murder, kidnapping, and possession of a weapon during the commission of a violent crime, and was sentenced to death. On November 17, 2010, the South Carolina Supreme Court granted a stay of execution and assigned jurisdiction over the matter to this Court. Having carefully considered the evidence and testimony presented, the record before the Court, and the erudite arguments and briefs of counsel, and for the reasons set forth below, this Court denies the Petitioner's request for relief and dismisses this application with prejudice.

FACTS

This matter arises from the murder of Maranda Williams ("Victim") by Charles Christopher Williams ("Petitioner"). On the morning of September 3, 2003, the Petitioner, armed with a shotgun, entered the Bi-Lo grocery store where his former girlfriend, the Victim, was working. Petitioner accosted the Victim and forced her into an office in the bakery/deli area. The Victim called 911 from her cell phone. During the ninety-minute phone call, hostage negotiators tried to convince Petitioner to release the Victim. When the Victim attempted to

escape, Petitioner chased, shot, and killed her. Hearing the shots, law enforcement entered the store and apprehended Petitioner. Shortly after his arrest, Petitioner gave a statement in which he confessed to the crimes for which he was later charged.

PROCEDURAL HISTORY

The Petitioner was indicted on March 23, 2004, for murder, possession of a weapon during the commission of a violent crime, and kidnapping. A jury trial was held before the Honorable J.C. "Buddy" Nicholson beginning on February 7, 2005. Thirteenth Judicial Circuit Solicitor Robert Ariail and Deputy Solicitor Betty Strom prosecuted the case for the State. The Petitioner was represented by Attorneys John Mauldin and William Nettles of the South Carolina Bar and Attorneys Mark MacDougall and Colleen Coyle of the Washington D.C. law firm Akin Gump Strauss Hauer & Feld. On February 15, 2005, the jury found the Petitioner guilty of murder, kidnapping, and possession of a firearm during a violent crime.

The penalty phase of the trial began on February 17, 2005. The jury was charged to consider the existence of one aggravating factor: "Murder was committed while in the commission of kidnapping." Record on Appeal ("ROA") at 2399. The jury was also charged to consider two statutory mitigating circumstances:

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

ROA at 2403. The jury was also charged to consider five non-statutory mitigating circumstances:

1. Any testimony regarding the defendant's mental illness is treatable with medication.
2. Any testimony regarding the defendant's adaptability to prison.
3. Any testimony regarding the defendant's future violence in prison.

4. Any testimony the defendant is loved and supported by his sister, Maureen, and her family that have and will continue to encourage, sustain, and assist him in the future.
5. Any other testimony or any other reason or reasons which the jury may consider.

ROA at 2404-05.

On February 19, 2005, the jury returned a verdict finding the existence of the statutory aggravating circumstance "murder was committed while in the commission of kidnapping." ROA at 2417. The jury recommended a sentence of death. Judge Nicholson then sentenced the Petitioner to death.

The Petitioner filed an appeal and was represented by Attorney Robert M. Dudek of the South Carolina Office of Indigent Defense. The South Carolina Supreme Court affirmed the convictions and sentence on February 8, 2010. *See State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010) (petition for rehearing denied, Mar. 25, 2010). On October 4, 2010, the United States Supreme Court denied the Petitioner's request for a writ of certiorari. *Williams v. South Carolina*, 131 S.Ct. 230 (2010). On November 17, 2010, the South Carolina Supreme Court granted the Petitioner's request for a stay of execution so that he could pursue state post-conviction relief.

Petitioner filed his Application for Post-Conviction Relief on November 30, 2010, arguing that both trial counsel and appellate counsel were ineffective. On September 30, 2011, the Petitioner filed his First Addendum to Application for Post-Conviction Relief. On November 20, 2012, the Petitioner filed his Second Addendum to Application for Post-Conviction Relief. The State filed a Return to Application for Post-Conviction Relief on January 13, 2011, and a Return to Amended Application for Post-Conviction Relief on November 20, 2011. A hearing was held before this Court from January 28, to January 31, 2013, at the Greenville County Courthouse. The Petitioner was present at the hearing and was represented by Attorneys Derek

J. Enderlin and Richard W. Vieth. Attorney Donald Zalenka of the South Carolina Office of the Attorney General represented the Respondent, State of South Carolina.

The following testified at the PCR hearing: Petitioner's trial counsel and defense team members, Attorney John Mauldin, Attorney Bill Nettles, and Jan Vogelsang; Petitioner's appellate counsel, Attorney Robert Dudek; Petitioner's mother, Daisy Huckaby, and father, Dwight Williams; Petitioner's experts, Dr. Paul D. Connor, Dr. Richard S. Adler, and Dr. Natalie Novick Brown. The Court had before it the record on appeal from the guilt and penalty phases of Petitioner's trial ("ROA"), the Greenville County Clerk of Court records, the PCR application and addenda, the State's return, the parties' briefs, and the parties' exhibits.

STANDARD OF REVIEW – INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668 (1984); *Vasquez v. State*, 388 S.C. 447, 456, 698 S.E.2d 561, 565 (2010). In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief by a preponderance of the evidence. *Council v. State*, 380 S.C. 159, 169, 670 S.E.2d 356, 361 (2008); *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). In order to prevail on a claim for ineffective assistance of counsel, a PCR applicant must satisfy a two prong test. The applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland, supra*; *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). The PCR applicant

must satisfy both the deficiency prong and the prejudice prong of this test. *Franklin v. Catoe*, 346 S.C. 563, 570-71, 552 S.E.2d 718, 722-23 (2001).

"Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland,* 466 U.S. at 690; *Morris v. State,* 371 S.C. 278, 639 S.E.2d 53 (2006); *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989). "The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application." *Von Dohlen v. State,* 360 S.C. 598, 603, 602 S.E.2d 738, 741 (2004). "'[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.' *Watson v. State,* 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006). . . . Counsel's strategy will be reviewed under 'an objective standard of reasonableness.' *Ingle v. State,* 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)." *Brown v. State*, 375 S.C. 464, 481, 652 S.E.2d 765, 774 (Ct. App. 2007).

Furthermore, a defendant is constitutionally entitled to effective assistance of appellate counsel. *Southerland v. State,* 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999); *Evitts v. Lucey,* 469 U.S. 387 (1985) (to be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair). Effective assistance of appellate counsel does not require the presentation of all issues on appeal that may have merit; appellate counsel is presumed to have decided which issues were most likely to afford relief on appeal. *Bell v. Jarvis,* 236 F.3d 149, 164 (4th Cir. 2000). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Lawrence v. Branker*, 517 F.3d 700, 709 (4th Cir. 2008); *Thrift v. State,* 302 S.C. 535, 397 S.E.2d 523 (1990) (appellate counsel must provide effective assistance but need not raise every nonfrivolous issue presented by the record). "For judges to second-guess reasonable professional judgments and

impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citations omitted).

The standard established by *Strickland* is that the defendant must establish by a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Smith v. State,* 309 S.C. 413, 424 S.E.2d 480, 481 (1992); *Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (noting "defendant who contends appellate counsel rendered ineffective assistance, e.g., by failing to argue issue, must show that failure to raise issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have reversed").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner raised fifteen issues in his Application for Post-Conviction Relief and subsequent Addenda. This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented by counsel at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Dr. Crawford's Testimony

In Petitioner's first three grounds for relief, he alleges that trial counsel failed to properly respond to testimony offered during the penalty phase of the trial by State's witness, Dr. Pamela Crawford. Petitioner alleges that trial counsel was ineffective (1) for waiving various objections

to the confession given by the Petitioner to Dr. Pamela Crawford, (2) for waiving the objection to Dr. Crawford being allowed to testify before the jury, and (3) for failing to effectively move for a mistrial based on Dr. Crawford's cumulative testimony.

Dr. Crawford was employed as a forensic psychiatrist with the South Carolina Department of Health and as a consultant for the South Carolina Law Enforcement Division. ROA at 2150-51. Soon after the Petitioner was taken into custody, Dr. Crawford interviewed the Petitioner at the Solicitor's request to help assess the case. ROA at 2153. During the penalty phase of the trial, the Solicitor called Dr. Crawford as a lay fact witness. Defense counsel moved to suppress Dr. Crawford's testimony and Petitioner's confession to her, made numerous objections during her testimony, requested curative instructions, and moved for a mistrial. ROA at 2694-2756, 2103-09, 2153-69, 2861-63. The trial court instructed the Solicitor to treat Dr. Crawford "as if she was an investigating officer that took a confession" and to limit questioning of the witness to those permitted by Rule 701, SCRE. ROA at 2165.

Petitioner has failed to demonstrate that trial counsel was ineffective in handling Dr. Crawford's testimony. At his PCR hearing, Petitioner did not provide further evidence to support the allegations in his PCR application related to Dr. Crawford's testimony. To the contrary, at the PCR hearing, Attorney Nettles stated "we tried everything we could to keep [Dr. Crawford's testimony] out[, b]ut given the fact that it came in, I felt the best we could do is utilize [it]." PCR Transcript of Record at 123. The trial transcript supports Attorney Nettles' assertion. Trial counsel made pre-trial motions to exclude Dr. Crawford's testimony; trial counsel strenuously objected numerous times[1] during Dr. Crawford's testimony; trial counsel requested curative

[1] Mr. Nettles objected to Dr. Crawford's testimony, emphatically stating "[m]y legal objection is that this testimony has been ruled on repeatedly," and noted people "mocked John Mauldin for how many times he stands up and gets this clear." ROA at 2152-53. Mr. Mauldin later affirmed this, stating "we done everything . . . pretrial motions, hearings, I been reserving it until I'm blue in the face." ROA at 2163.

instructions and drafted a charge that the judge read to the jury; trial counsel moved for a mistrial; and, during a post-verdict motions hearing, trial counsel moved for a new sentence, based on the previous objections to Dr. Crawford's testimony.[2] ROA at 2150-87. Petitioner has not met his burden of showing that trial counsel's performance fell below an objective standard of reasonableness.

Furthermore, even if trial counsel's handling of Dr. Crawford's testimony was in some way defective, Petitioner has not shown prejudice. The admissibility of Dr. Crawford's testimony was one of Petitioner's key arguments on appeal. The Supreme Court addressed the merits of that argument and found no error:

> We find that there was nothing improper about the solicitor's examination of Dr. Crawford as a lay witness. Furthermore, to the extent there was any confusion among the jurors regarding Dr. Crawford's role as a lay witness, such confusion was effectively cured by the trial court's instruction to the jury. ... There is no indication in the record that the jury's responsibility for determining Appellant's fate was diminished in any way by the solicitor's questioning of Dr. Crawford. Even if Dr. Crawford's testimony was improper, any prejudice was cured by the jury instruction.

State v. Willliams, 386 S.C. 503, 516, 690 S.E.2d 62, 69 (2010). Accordingly, Petitioner has failed to show either deficient performance or prejudice regarding his claims for ineffective assistance of counsel related to Dr. Crawford's testimony.

Mitigation Evidence

Petitioner alleges that trial counsel failed to present available mitigation evidence regarding Petitioner's extremely troubled childhood. Petitioner has failed to support these

[2] The Supreme Court analyzed trial counsel's performance, to determine whether the matter was properly preserved for appeal, and noted: "Appellant objected to Dr. Crawford's testimony before it was given and renewed this objection both during and after her testimony. Appellant moved for mistrial on these grounds, and the judge denied the motion. Appellant then sought to introduce a curative instruction, which the trial judge accepted." *Williams*, 386 S.C. at 516, FN 8, 690 S.E.2d at 68, FN 8.

allegations with any evidence. Furthermore, a review of the record shows that, contrary to Petitioner's allegations, trial counsel presented an array of mitigation evidence at Petitioner's trial.

For example, Attorney Nettles developed mitigation testimony regarding Petitioner's troubled childhood in his cross-examination of Dr. Crawford, who testified that Petitioner had difficulty with his parent's divorce, feeling like he was an "evil child" after the divorce; that his mother's multiple failed marriages had a negative impact on him; that his mother was an alcoholic for 30 years and was intoxicated for much of his childhood; that he had difficulty in school; that he had ADD, but was never medicated for it; among other difficulties. ROA at 2173-86. Dwight Williams, Petitioner's father, testified about the impact of the divorce on Petitioner, the violence and disturbances within the home, Daisy's drinking problem, and his own (Dwight's) mental health issues. ROA at 2208-17. Ann Wilson, a teacher at Taylors Elementary School, testified that Petitioner was very weak academically and that he was referred to special education classes, but his mother had negative attitudes towards helping him. ROA at 2220-2232. Rebecca Owens, who worked with Petitioner's mother, testified that Daisy drank heavily and had a volatile relationship with Petitioner. ROA at 2234-40. Additionally, trial counsel called numerous other experts and family members, who provided strong mitigation evidence: Professor Margorie Hammock, a clinical social worker, who testified as an expert in sociology; James Tollison, a retired Mauldin police officer who testified concerning domestic violence calls involving Petitioner's mother; Dr. Eric Elbogen, an assistant professor in clinical forensic psychology who testified as an expert in the field of violence risk assessment; James Aiken, a former warden in the South Carolina correctional system, who testified as an expert regarding Petitioner's prison adaptability; Dr. Seymour Halleck, a forensic psychiatrist, who testified

extensively about his findings regarding Petitioner's troubled childhood; and Maureen Bangcuyo, the Petitioner's sister, who gave a first-hand account about Petitioner's troubled childhood. ROA at 2241-2351.

Notably absent from Petitioner's list of mitigation witnesses was Petitioner's mother, Daisy Huckaby. At the PCR hearing, Attorney Nettles testified that the reason for not calling Daisy Huckaby to testify was trial counsel's "concerns about her willingness to tell the truth." PCR Transcript at 130. Trial counsel concluded that "as a matter of strategy, based upon those concerns . . . we felt the best thing to do is not call her." *Id.* Here, trial counsel articulated a valid strategic reason for not calling Petitioner's mother. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992); *Whitehead v. State,* 308 S.C. 119, 417 S.E.2d 529 (1992). Furthermore, any information that Daisy Huckaby could have offered regarding mitigation had already been elicited through the testimony of other witnesses, including Petitioner's father and sister.

Finally, trial counsel hired Jan Vogelsang, a well-respected clinical social worker, to work as the defense team's mitigation expert. Ms. Vogelsang testified at the PCR hearing regarding the thoroughness of her investigation and the collection of mitigation evidence. PCR Transcript of Record at 12-84. Further, Attorney Mauldin testified that he had full confidence in Ms. Vogelsang's expertise, noting "[s]he's an extraordinary investigator.". PCR Transcript of Record at 153.

Accordingly, Petitioner has not shown that trial counsel was ineffective in failing to present mitigation evidence of Petitioner's troubled childhood. Inasmuch as this claim for relief also relates to mitigation testimony regarding Fetal Alcohol Syndrome, that issue will be discussed in detail below.

Jury Disclosure of Vote Division

Petitioner alleges that trial counsel was ineffective for failing to move for a mistrial and request a life sentence on the ground that the trial judge introduced an arbitrary factor when he distinguished between a judge inquiring into a jury's division and a jury's reporting its division on its own. During deliberations in the penalty phase of Petitioner's trial, the jury sent a note to the judge explaining that it was divided nine to three in favor of death. ROA at 2410. Trial counsel moved for a mistrial and asked that the judge impose a life sentence on the grounds that the jury had revealed its split.[3] The judge explained that the jury revealed the split on its own and that the court did not ask for it; the judge further noted the jury requested "instruction about what procedure to follow in resolve." ROA at 2411. The judge denied the motion for a mistrial and instead concluded the proper "procedure is to give an *Allen* charge and let them continue deliberation." ROA at 2411. Trial counsel then objected to the *Allen* charge. ROA at 2416.

Petitioner contends that trial counsel made the wrong argument and should have argued that the trial judge's distinction injected arbitrariness into the jury deliberations. This assertion is without merit. During Petitioner's direct appeal, the South Carolina Supreme Court reviewed the *Allen* charge issue and concluded that "the trial judge's issuance of an *Allen* charge was not improper" and held that "the trial judge committed no error in not declaring a mistrial and giving an *Allen* charge after the jury revealed it was divided nine to three in favor of death." *Williams*, 386 S.C. at 510, 690 S.E.2d at 65. Additionally, the Supreme Court reviewed the applicable case law and confirmed that the judge's distinction was ***not*** improper:

> Initially, we agree with Appellant that it is improper for a trial judge to inquire into the numerical division of a jury. [Citations omitted.] However, these decisions are inapplicable in the instant case because the jury here voluntarily

[3] Counselor Mauldin explained: "We believe the disclosure . . . does now require that this court end deliberations and impose a life without parole sentence. We believe that the law requires that." ROA at 2411.

> disclosed its numerical division and requested further instructions on how to proceed. The judge then promptly informed the attorneys of the jurors' numerical division and indicated that he could give an Allen charge. Unlike other cases, the trial judge did not inquire about the specifics of the jury's impasse. Therefore, we hold the trial judge committed no error.

Williams, 386 S.C. at 510, 690 S.E.2d at 65. Furthermore, the Supreme Court conducted a proportionality review and concluded that "the death sentence was not the result of passion, prejudice, or ***any other arbitrary factor***." *Id.* (emphasis added). Accordingly, the Petitioner's contention that the judge introduced an arbitrary factor is without merit. Petitioner has failed to show either deficient performance or prejudice by trial or appellate counsel.

Admissibility of Petitioner's Journal

Petitioner alleges that trial counsel was ineffective in failing to argue that certain portions of Petitioner's journal should have been excluded under Rule 403, SCRE. Petitioner has failed to support this allegation with any evidence. Furthermore, a review of the record shows that trial counsel moved to suppress the journal, which the trial judge denied. ROA at 6. Additionally, during the course of the trial, trial counsel used the journal in Petitioner's defense. ROA at 1878-88. Importantly, defense expert Dr. Robert Richards relied, in part, on the journal in making his diagnosis that Petitioner had bipolar disorder, a diagnosis Petitioner used in his mitigation argument. ROA at 1971-77. Accordingly, Petitioner has not shown that counsel was ineffective.

Death Penalty Not Appropriate/ Arbitrary Manner

Petitioner alleges trial counsel and appellate counsel failed to argue that the death penalty was not appropriate and that the death penalty was used in an arbitrary manner. Petitioner asserts that South Carolina's death penalty statute is unconstitutional under *Furman v. Georgia*,

408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976). Specifically, Petitioner argues that the death penalty statute does not narrow the circumstances for which a person can be subject to the death penalty for murder. Petitioner contends that in South Carolina, "virtually every murder case can qualify for the death penalty," due to South Carolina's broad statutory definitions of kidnapping and physical torture. Petitioner's Post-Trial Brief at 25-27. Petitioner asserts that "it is almost impossible to commit murder without committing the offense of kidnapping under these definitions," violating the principle that the death penalty should only be available in limited circumstances. *Id.* at 27 (citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008)).

Contrary to Petitioner's argument, trial counsel and appellate counsel were not ineffective for failing to argue that South Carolina's death penalty statute is unconstitutional. The Eighth Amendment to the United States Constitution requires capital punishment to be limited to "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)); U.S. Const. Amend. VIII; S.C. Const. Art. I, § 15. The South Carolina Supreme Court has ruled that our State's current death penalty sentencing scheme is constitutional pursuant to the limitations mandated by *Furman* and *Gregg*. *See State v. Shaw*, 273 S.C. 194, 211, 255 S.E.2d 799, 807 (1979). Our Supreme Court has consistently upheld the death penalty statute as constitutional. *See, e.g., State v. Linder,* 276 S.C. 304, 278 S.E.2d 335 (1981); *State v. Goolsby,* 275 S.C. 110, 268 S.E.2d 31 (1980), cert. denied, 449 U.S. 1037 (1981); *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982).

In South Carolina, a murder is death-eligible if it occurs during the commission of a kidnapping. S.C. Code Ann. § 16-3-20(C)(a)(1)(b). South Carolina's kidnapping statute provides that "[w]hoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry

away any other person by any means whatsoever without authority of law" is guilty of kidnapping. S.C. Code Ann. § 16-3-910. The South Carolina Supreme Court has consistently held the kidnapping statute is constitutional, and not overbroad or ambiguous. *See, e.g., State v. Smith*, 275 S.C. 164, 166, 268 S.E.2d 276, 277 (1980) (holding the statute's terms were not unconstitutionally vague and defendant's conduct fell squarely within the language of the statute); *State v. Plath,* 277 S.C. 126, 284 S.E.2d 221 (1981); *State v. Copeland*, 278 S.C. 572, 577, 300 S.E.2d 63, 66 (1982). In *State v. Tucker,* our Supreme Court affirmed the statutory definition of kidnapping when used as an aggravating circumstance of murder. *State v. Tucker,* 334 S.C. 1, 8, 13, 512 S.E.2d 99, 102, 105 (1999) (citing *State v. Hall*, 280 S.C. 74, 310 S.E.2d 429 (1983)). The Supreme Court has repeatedly upheld cases where kidnapping was used as an aggravating circumstance for a death-eligible murder. *See, e.g., State v. Vasquez*, 364 S.C. 293, 613 S.E.2d 359 (2005); *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001), *reversed on other grounds by Kelly v. South Carolina*, 534 U.S. 246 (2002); *State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001). Likewise, the Supreme Court has consistently upheld kidnapping as an aggravating circumstance in capital cases against constitutional challenges. *See, e.g., State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981), *overruled on other grounds by State v. Short*, 333 S.C. 473, 511 S.E.2d 358 (1999), (kidnapping statute in death penalty case was not unconstitutionally vague or overbroad); *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982) (death sentence for murder in the commission of a kidnapping does not violate the Eighth Amendment; the statutory definition of kidnapping is not overbroad or ambiguous); *State v. Koon*, 278 S.C. 528, 537, 298 S.E.2d 769, 774 (1982) (kidnapping statute, as used in defining statutory aggravating circumstance, is not so overly broad that it virtually encompasses all cases of murder); *State v. Davis*, 309 S.C. 326, 348, 422 S.E.2d 133, 147 (1992); *State v. Ray*, 310 S.C.

431, 437, 427 S.E.2d 171, 174 (1993). Based on all the foregoing, Petitioner's argument that South Carolina's death penalty statute is unconstitutional is without merit.

Additionally, the facts of this case clearly support the jury's finding of the aggravating circumstance of kidnapping. The State provided overwhelming evidence that Petitioner kidnapped his Victim. *See, e.g.*, ROA at 1565, 1579-81, 1597-1602, 1669, 1748-49, 1914-20. Petitioner held Victim at gunpoint against her will for over ninety minutes. Petitioner confined the Victim primarily to the bakery/deli office area of the Bi-Lo store, although they did at certain times move to other parts of the store. The Victim, as well as hostage negotiators, pleaded with Petitioner to let her go. When the Victim attempted to escape, Petitioner chased her and shot her in the back.

Furthermore, the record shows that trial counsel objected to the judge's kidnapping charge and requested additional instruction. During the guilt phase of trial, the trial judge instructed the jury with the standard jury charge on the law of kidnapping. *See* ROA at 2056. Petitioner's trial counsel requested an additional charge relating to kidnapping and requested a question regarding the kidnapping, which the judge denied. ROA at 2067. During the penalty phase, while the trial judge did not redefine kidnapping, he instructed the jury that an aggravating circumstance, kidnapping, must be found. ROA at 2399-2400. Accordingly, Petitioner has not shown that trial counsel's performance was deficient.

Similarly, Petitioner's argument that the Supreme Court's proportionality review was inadequate is without merit. South Carolina's death penalty statute mandates that the South Carolina Supreme Court review all death sentences to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." S.C. Code Ann. § 16-3-25(C)(3). This review is intended to serve as

"[a]n additional check against the random imposition of the death penalty." *State v. Shaw*, 273 S.C. 194, 211, 255 S.E.2d 799, 807 (1979); *State v. Copeland*, 278 S.C. 572, 591, 300 S.E.2d 63, 75 (1982). The Supreme Court conducted a proportionality review in Petitioner's case:

> Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate. *See, e.g., State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996).

State v. Williams, 386 S.C. 503, 517, 690 S.E.2d 62, 69 (2010). This review was consistent with the Supreme Court's mandates regarding its death sentence proportionality reviews. *See State v. Harrison*, 402 S.C. 288, 741 S.E.2d 727 (2013); *State v. Passaro*, 350 S.C. 499, 567 S.E.2d 862 (2002). Accordingly, Petitioner has not shown that trial counsel or appellate counsel were ineffective.

Solicitor's Improper Argument

Petitioner alleges that trial counsel was ineffective in failing to object to various comments made by the Solicitor during the opening and closing statements of the penalty phase of his trial. Petitioner contends that the Solicitor strayed from the record and failed to limit his arguments to the circumstances of the crime and character of the defendant, thereby lessening the jury's responsibility and injecting arbitrary factors into the jury's deliberation process. Specifically, Petitioner alleges that the Solicitor improperly referred to his personal decision to seek the death penalty, told the jury that the legislature had limited the times when the State could seek the death penalty, and commented on prison conditions.

Law

"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." *State v. Cooper*, 334 S.C. 540, 514

S.E.2d 584 (1999). The State's closing arguments must be confined to the evidence in the record and the reasonable inferences that may be drawn from the evidence. *State v. Copeland,* 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996); *State v. Woomer*, 277 S.C. 170, 284 S.E.2d 357 (1981). "[The] evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime. . . . The jury's sole function is to make a sentencing determination based on these factors." *State v. Burkhart*, 371 S.C. 482, 487-88, 640 S.E.2d 450, 453 (2007). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Randall v. State,* 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). However, a solicitor is bound to rules of fairness; a closing argument must therefore be "carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice." *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010).

This Court must "view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *Simmons v. State,* 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). The relevant question is whether, in light of the context of the entire record, the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Smith v. State,* 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007); *State v. Hornsby,* 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice."). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant." *Humphries v. State,* 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

The Petitioner has the burden of proving he did not receive a fair trial because of the alleged inappropriate comments. *Simmons,* 331 S.C. at 338, 503 S.E.2d at 166. "To establish prejudice, Petitioner must show a reasonable probability the result of the proceeding would have been different but for trial counsel's deficiency. *Cherry v. State,* 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). Therefore, to demonstrate prejudice . . . Petitioner must prove a reasonable probability exists that a jury would not have sentenced him to death if trial counsel had objected to the solicitor's comments." *Vasquez*, 388 S.C. at 466-67, 698 S.E.2d at 571.

Solicitor's Personal Opinion and Legislative Determinations/Limitations

Petitioner contends that trial counsel failed to object when the Solicitor improperly injected his personal opinion and his decision to seek the death penalty into the jury deliberations. He argues that the Solicitor repeatedly told the jury that the legislature had limited the cases where the solicitor could seek the death penalty and that he also had made the difficult decision to seek the death penalty. *See* Petitioner's Post-Trial Brief at 3. He further alleges that the Solicitor improperly invoked Dr. Crawford's opinion in arguing for the death penalty.

The Solicitor made the following statements in his closing argument during the penalty phase of Petitioner's trial:

> They have said earlier the solicitor is not satisfied with a life sentence. And I agree, I am not. They told you he's going to want the death penalty, and I do. Why is the death penalty the appropriate sentence in this case? And that is a fair question for you to ask, ask of us, the State of South Carolina. And I submit to you that this is the reason, is that there are mean and evil people who live in this world who do not deserve to continue to live with the rest of us regardless of how confined they may be.
>
> The law limits the State's right to seek the death penalty to a very few murders. We seek the death penalty in only a few cases. But the circumstances where it's available are for mean and evil people. The worst of the worst. Christopher Williams and this murder are one of those cases. The worst of the worst.

ROA at 2370. Petitioner argues that the Solicitor's comments are similar to those made in *State v. Woomer*, 277 S.C. 170, 284 S.E.2d 357 (1981). However, this Court finds that the Solicitor's comments are distinguishable from those made in *Woomer*. Instead, the Solicitor's comments in the instant case are nearly identical to the comments made by Solicitor Ariail in a different trial that the Supreme Court recently reviewed and upheld in *Sigmon v. State*:

> Now, when we asked for the death penalty, it's a fair and appropriate question for you to say back to me, *Solicitor Ariail, why do you think that the death penalty is an appropriate punishment in this case? And I can best summarize it by a response that I got from a juror in another case on voir dire, and that juror said, as to her response in her argument for the death penalty, that they're* [sic] *are mean and evil people who live in this world, who do not deserve to continue to live with the rest of us, regardless of how confined they are.* And that's what the basis of our request for the death penalty is. There are certain mean and evil people that live in this world that do not deserve to continue to live with us.
>
> ....
>
> And there are people, there are people who will argue that the death penalty is not a deterrent. But *my response as the solicitor of this circuit is, it is a deterrent to this individual and that is what we are asking, is to deter Brad Sigmon and send the message that this type of conduct will not be tolerated in Greenville County, or anywhere in this State.* And let that decision that you reach ring like a bell from this courthouse, that people will understand that we will not accept brutal behavior such as this. Thank you.

Sigmon v. State, 403 S.C. 120, 128-29, 742 S.E.2d 394, 399 (2013) (emphasis by the Supreme Court). In *Sigmon*, the Court concluded that the solicitor's comments were distinguishable from those in *Woomer*[4] because the comments did not diminish the role of the jury in sentencing Sigmon to death. *See Sigmon*, 403 S.C. at 130, 742 S.E.2d at 399 ("Although the solicitor mentioned his own considerations, he did not go so far as to compare his undertaking in

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[4] In *Woomer*, the Court concluded the solicitor's statements were improper because he repeatedly stated that he himself had undertaken the same difficult process of deciding to impose the death penalty: "[T]he initial burden in this case was not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried for his life or not. . . . I had to make this same decision, so I have had to go through the same identical thing that you all do. It is not easy." *Woomer*, 277 S.C. at 175, 284 S.E.2d at 359.

requesting the death penalty to the jury's decision to ultimately impose a death sentence."). Similarly, in the instant case, the Solicitor's comments did not diminish the role of the jury in determining the appropriate sentence, even though the Solicitor referenced his role in choosing to request the death penalty.

Furthermore, throughout his closing argument, the Solicitor emphasized the important role the jury played in determining the appropriate sentence:

> So, this is a legal process, a legal penalty enacted by our legislators; and it is a function of government *carried out by you*, the citizens. . . . *This is a function of you as citizens* carrying out part of our government process. *You are shaping* a lawful punishment to an unlawful act. So, *the responsibility is given to you* to decide what the appropriate punishment is.
> . . .
>
> *[Y]ou are the judge.* The judge does not sentence, *you sentence.* And that's what this process is about. And it is a process which *we have entrusted to you* as our citizens to carry it out fairly . . . .
> . . .
>
> *The process makes you responsible* for this difficult decision; but we can't run and hide from our responsibilities. The law places it on our shoulders, the law *entrusted it to you* and it means we'll do it, just like any other tough decision that we make; that is, you will apply common sense, you will consider the facts and you will consider the alternative solution, just like you do when you make your decisions on your jobs, with your family, otherwise. If you imagine yourself making a tough decision and handling it in the same way you would handle it with your job or with your family, we trust you would make the right decision.

ROA at 2366-68 (emphasis added). Similarly, the trial judge carefully instructed the jury regarding its role in determining the appropriate sentence. ROA at 2397-2405.

The Solicitor did not inject his own personal opinion concerning the death penalty into the proceedings, and he did not diminish the role of the jury in determining the appropriate sentence. Instead, the Solicitor merely explained his involvement in the State's decision to seek the death penalty and explained that the State does not choose to pursue the death penalty for every murder charge. The Solicitor's comments, without more, were not improper. *See State v.*

Bell, 302 S.C. 18, 34, 393 S.E.2d 364, 373 (1990); *Sigmon*, 403 S.C. at 130, 742 S.E.2d at 400 ("[T]he solicitor has some leeway in referencing the State's decision to request death, provided he does not go so far as to equate his initial determination with the jury's ultimate task of sentencing the defendant. Although the solicitor here articulated why he chose to request the death penalty, he did not equate his role with that of the jury."); *Williams v. Ozmint*, 380 S.C. 473, 479, 671 S.E.2d 600, 602 (2008) (a solicitor's comments are not improper where he states that he is asking for the death penalty or even expecting the death penalty, as long as he does not attempt to minimize the jurors' own sense of responsibility). Accordingly, Petitioner has not shown deficient performance.

Conditions of Prison

Petitioner also alleges trial counsel was ineffective for failing to object to the Solicitor's improper statements about prison conditions, which allowed the jury to return a death sentence based on arbitrary factors. *See* Petitioner's Post-Trial Brief at 6. In particular, Petitioner claims the following statements by the Solicitor were improper:

> So, what is the appropriate sentence to fit this crime and hold him responsible? Life in prison is not appropriate. You can't put him in prison for life and expect him to suffer. You can't do it. Because he is not going to think about it every day, because there's not going to be anybody there to remind him of the damage that's done to Mandy's family or to his family. No one is going to do that. Nobody is going to constantly remind him. So, he's not going to think about it.
>
> Sure you and I may think going to prison for life is a serious sentence, but what about Chris Williams? Being in prison is like a small city, allow all things of life. Places, restaurant, places to exercise, recreation when he wants. Doctors, hospital take care of him, clothing provided, TV. Contact with family and loved ones. He'll have freedom of movement, a social structure. He'll play cards and games. Go to work if he wants, go to school if he wants. Watch ball games on TV.
>
> Sure, he doesn't have a car and his travel is limited, but it's not really much more than a serious change of address. He will have his family to visit him but Mandy's family won't, and her daughter won't.

ROA at 2377-78.

It is well-settled that "evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime," and that "[t]he jury's sole function is to make a sentencing determination based on these factors and not to legislate a plan of punishment." *State v. Burkhart*, 371 S.C. 482, 487-88, 640 S.E.2d 450, 453 (2007); *see also State v. Copeland,* 278 S.C. 572, 300 S.E.2d 63 (1982); *State v. Johnson,* 293 S.C. 321, 360 S.E.2d 317 (1987). Furthermore, "[s]uch determinations as the time, place, manner, and conditions of execution or incarceration ... are reserved ... to agencies other than the jury." *State v. Plath*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984). In *State v. Bowman*, our Supreme Court cautioned that evidence regarding general prison conditions is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment. *State v. Bowman,* 366 S.C. 485, 498-99, 623 S.E.2d 378, 387 (2005).[5]

However, our Supreme Court has recognized a "tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life *in general*." *State v. Burkhart*, 371 S.C. 482, 488-89, 640 S.E.2d 450, 453 (2007). The Supreme Court has emphasized that "evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions." *Id.* When considering whether a solicitor's arguments were improper, a reviewing court must examine the comments in light of the entire record, including the overwhelming evidence of the defendant's guilt. *Vasquez v. State*, 388 S.C.

[5] "[T]he evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant." *State v. Bowman*, 366 S.C. 485, 498-99, 623 S.E.2d 378, 385 (2005) *abrogated by State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006).

447, 698 S.E.2d 561 (2010); *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). A solicitor's comments are grounds for reversal only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

Here, given the context of the entire closing argument, even if the Solicitor's statements were improper, the improper statements do not warrant reversal. While the Solicitor did briefly address prison conditions, he did so in the context of whether a prison sentence would be appropriate for the Petitioner under the facts of this particular case. The Solicitor noted

> It's not really much more than a serious change of address. [Chris Williams] will have his family to visit him. But Mandy's family won't, and her daughter won't. The death penalty is the appropriate punishment.

ROA at 2378. The Solicitor went on to contrast the grievous nature and "extent of ***this crime*** and the culpability of ***this defendant***" with a life versus a death sentence. ROA at 2378 (emphasis added).

> Maybe one shot, maybe one shot we could say he deserved life; but not three, not three shots to her back as she was running away. Maybe one, but three? The extent of the culpability after she had begged for her life, "Please, please, please don't kill me."

ROA at 2378-79. The Solicitor also highlighted the following facts as demonstrated by the evidence at trial: Petitioner stole a work schedule and meticulously planned the killing; he drew a diagram of the scene and planned what clothes he would wear; he kidnapped and emotionally and mentally tortured the Victim for nearly two hours; he ordered her to call her mother to tell her she was going to die; he made the Victim choose how she was going to die; he carried out the crime in a public supermarket where he endangered the safety of others; the hostage negotiator begged for the Victim's life; after firing the first non-fatal shot that paralyzed the Victim,

Petitioner walked up to her and shot her two more times in the back at point blank range. ROA at 2372-80.

Furthermore, based on a reading of the trial transcript and in considering trial counsel's testimony at the PCR hearing, this Court finds that trial counsel's failure to object to the Solicitor's improper comments was a valid strategic decision. At the PCR hearing, Attorney Nettles stated that he objected to everything in the Solicitor's statements that he thought was objectionable. PCR Transcript of Record at 117. He stated that at the time of the trial, he felt the Solicitor's statements were improper, irresponsible, and prejudicial to his client. *Id.* at 112-13, 128. However, he explained that he believed the Solicitor's comments were "so improper and so irresponsible that by mocking him" he could "begin to undermine [the Solicitor's] credibility." *Id.* at 125. Attorney Nettles further explained that the jury responded to the Solicitor's improper comments by snickering because it was so irresponsible and ridiculous. *Id.* at 109. Ultimately, Attorney Nettles believed that while the Solicitor's comments were improper, it would be "more powerful" to mock the Solicitor, erode his credibility, and explain away his comments. *Id.* at 110. Thus, Attorney Nettles began his closing statement with the following rebuttal:

> Did he say restaurants? Did he say Chris Williams is going to a place in prison with restaurants there? Because I didn't hear anything about restaurants. What I heard about where Chris Williams is going at the end of this trial is a place where it's men and he's in a cell by himself. What I heard Jim Aiken talk about was a place where if you don't do what they tell you to do, they'll kill you.
>
> He said restaurants. Restaurants in prison? Do any of you all really believe your tax dollars are paying for restaurants in prison? They're not. Prison is a very serious place. And what you are being asked is to decide between whether Chris Williams dies on God's time or your time.
>
> What you're being asked to decide is whether Chris Williams spends the rest of his life until he's dead in prison or whether that, however they want to word it to try to make it seem okay, whether the government either electrocutes him or straps him to a gurney and kills him. That's where we are. Let's make no doubt about that. Let's not try to do anything to make that seem less severe. That's what we're talking about.

ROA at 2380-81. Failing to make an objection does not render trial counsel ineffective where counsel articulates a valid trial strategy. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (counsel's conduct not ineffective where counsel articulates a valid reason for employing certain strategy); *Whitehead v. State,* 308 S.C. 119, 417 S.E.2d 529 (1992). Here, trial counsel articulated a legitimate trial strategy—rather than objecting to the Solicitor's improper statements, he responded by emphasizing to the jury the absurdity and ridiculousness of those statements. Accordingly, trial counsel was not deficient.

Finally, even if trial counsel's performance was deficient, Petitioner has not proven prejudice. The allegedly improper statements were only a small part of the Solicitor's closing argument. *See State v. Tucker*, 324 S.C. 155, 169, 478 S.E.2d 260, 268 (1996) (noting solicitor's improper comment "was one isolated event in the entire argument"). Also, the trial judge gave clear instructions to the jury that they were to decide what verdict to return and that they were not required to return a death sentence. *See* ROA at 2397-2405. Therefore, considering the closing statement in its entirety within the context of the full record and the careful instructions by the trial judge, and given the overwhelming evidence of guilt and the egregious circumstances of the crime, Petitioner has failed to prove that there is a reasonable probability that the jury would have returned a different verdict had the Solicitor not made these comments.

Furthermore, the South Carolina Supreme Court conducted a review of the trial record pursuant to S.C. Code Ann. § 16-3-25 and concluded that "the death sentence was not the result of passion, prejudice, or any other arbitrary factor." *See State v. Williams*, 386 S.C. 503, 517, 690 S.E.2d 62, 69 (2010). Accordingly, Petitioner's argument that he was prejudiced by counsel's failure to object to the solicitor's improper statements and injection of arbitrary factors into the jury's deliberation is without merit.

Recommendation Instruction

Petitioner alleges that trial and appellate counsel were ineffective in failing to object to or argue that the trial judge erred in his instructions to the jury that their decision concerning the sentence was a recommendation. At a pretrial motions hearing on January 13, 2005, trial counsel raised the issue of the judge using the term "recommendation" in his jury charge, after which the following exchange took place:

> The Court: Well, in my charge, I say it is a recommendation. It says it in the statute; however, it is mandatory on the court. And I tell them that in my charge.
>
> Mr. Mauldin: All right, sir. So you say the word, but you tell them that you're going to do what they say?
>
> The Court: Right. It doesn't mean what it says. It means that I am obligated to follow what the jury does, okay, and I do that in my charge.

ROA at 2607-08. Again, at the beginning of the sentencing phase of Petitioner's trial, Attorney Mauldin objected to the use of the term "recommendation." ROA at 2085. Judge Nicholson overruled the objection, explaining:

> It's the state law. The form was provided by the state law. I got to go into it and I will explain it to the jury. I will explain to the jury it is not a recommendation, the court is obligated to follow – the statute needs to be amended, the word recommendation needs to be taken out.

ROA at 2085. Judge Nicholson gave the following charge to the jury:

> Mr. Foreman, members of the Jury, it now becomes your duty to decide what sentence you recommend this Court impose upon the Defendant. . . . Please understand your sentence recommendation will be followed by this Court. . . . And even though the form says "recommendation," I charge you that the Court is obligated to follow that recommendation.

ROA at 2397-99. *See also* ROA at 26-27.

At the PCR hearing, appellate counsel, Robert Dudek, testified that based on his understanding of the law and his prior experience with the issue, "as long as the jury was made

known that their sentence would be binding, that that solved any problem." PCR Transcript of Record at 223. He further testified that he did not believe he could prevail on this issue because the trial judge clearly instructed the jury "that this is not a recommendation. Whatever verdict you come back with, death or life, that's going to be the verdict and that's going to be the sentence that I'm going to impose." *Id.* at 222. Citing Justice Toal's book, Mr. Dudek also stated that standard appellate practice is to raise only those issues most likely to succeed, not every possible issue. *Id.* at 221-22. Petitioner has not shown that trial or appellate counsel were deficient.

Further, Petitioner has not shown prejudice. Notwithstanding the imprecise use of the word "recommendation" in the statute, the case law in this state is well-settled that there is no error where a judge uses the word "recommendation" in his jury charge, if he also explains the binding nature of the jury's decision. "The idea should be conveyed to the jury that its sentencing recommendation will be followed. *See State v. Linder,* 276 S.C. 304, 278 S.E.2d 335 (1981)." *State v. Bellamy*, 293 S.C. 103, 107, 359 S.E.2d 63, 65 (1987) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *see also State v. Smith*, 286 S.C. 406, 409, 334 S.E.2d 277, 279 (1985) (approving "the judge's sentencing phase charge concerning the jury's responsibility to recommend a sentence and the finality of their recommendation"). Here, the trial judge properly instructed the jury that its sentencing recommendation would be followed. Accordingly, Petitioner's allegations are without merit.

Adequacy of Voir Dire/ Exclusion of Jurors/ Venue Preservation

Petitioner alleges that trial counsel was ineffective for failing to conduct an adequate jury voir dire, exclude certain jurors, and request a change of venue. At a pretrial motions hearing on

January 13, 2005, trial counsel made a motion for ten additional peremptory challenges, which the trial judge denied. ROA at 2564-66. Similarly, at the same hearing, trial counsel moved for a change of venue, stating that the "case is a highly publicized, very well-known case." ROA at 2570, 18-20. The trial judge took this matter under advisement stating that they could revisit the issue, if necessary, during the jury voir dire process. Trial counsel made numerous other motions related to jury selection, some of which the trial judge granted and others he denied. ROA at 28-39, 2570-2606.

"[T]he process of jury selection inherently falls within the expertise and experience of trial counsel. *Palacio v. State,* 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). . . . [J]ury selection is within the ambit of trial strategy. . . . '[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury.' *Id.* at 516, 511 S.E.2d at 68." *Magazine v. State*, 361 S.C. 610, 617, 606 S.E.2d 761, 764-65 (2004). "A motion to change venue is addressed to the sound discretion of the trial judge . . . *Sheppard v. State,* 357 S.C. 646, 654, 594 S.E.2d 462, 467 (2004). . . . A denial of a change of venue is not error if the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial. *State v. Tucker,* 334 S.C. 1, 14, 512 S.E.2d 99, 106 (1999)." *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013).

Petitioner has not provided any explanation or put forward any evidence to support his bald assertions regarding ineffective assistance on the issues of jury selection and change of venue. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington,* 466 U.S. 668, 690 (1984); *Morris v. State,* 371 S.C. 278, 639 S.E.2d 53 (2006); *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the applicant bears

the burden of establishing that he is entitled to relief. *Edwards v. State,* 372 S.C. 493, 494, 642 S.E.2d 738, 739 (2007); *Caprood v. State,* 338 S.C. 103, 525 S.E.2d 514 (2000). In light of the foregoing, Petitioner has not met his burden of showing ineffective assistance of counsel.

Guilty Plea and Jury Sentencing

Petitioner alleges that trial counsel and appellate counsel were ineffective for failing to argue that Petitioner should have the right to plead guilty and still receive a jury trial for sentencing. Petitioner contends that he desired to plead guilty to the murder charge in order to show acceptance of responsibility, and that he wanted to be sentenced by a jury.

The law in this state is well-settled regarding the right to a jury sentencing after a guilty plea in a death penalty case. State statute mandates that in all capital cases in which the defendant pleads guilty, "the sentencing proceeding must be conducted before the judge." S.C. Code Ann. § 16-3-20(B). Our Supreme Court has repeatedly upheld this statute, finding that a defendant does not have a constitutional right to plead guilty and receive a sentencing hearing by a jury. *See State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004); *State v. Crisp*, 362 S.C. 412, 608 S.E. 2d 429 (2005); *State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009); *State v. Inman*, 359 S.C. 539, 720 S.E.2d 31 (2011). Petitioner concedes that his position—that he should have the right to plead guilty and still receive a jury sentencing—is contrary to the overwhelming case law in South Carolina. *See* Petitioner's Post-Trial Brief at 76-77.

Furthermore, at a pre-trial motions hearing, trial counsel moved to quash the death penalty, arguing that if Petitioner pled guilty to murder, he would be deprived of a jury sentencing and the ability of using his guilty plea as evidence of remorse. ROA at 2432. Trial counsel renewed this motion at the beginning of Petitioner's trial and again subsequent to the verdict and sentence.

ROA at 7-9, 2085, 2844-45. The trial judge appropriately denied these motions. At the PCR hearing, appellate counsel, Robert Dudek, testified that he did not raise this issue on appeal because the South Carolina Supreme Court has not shown "any interest" in the issue, and because he did not believe it would be a "winning" issue based on the applicable case law and his past experiences with this issue. PCR Transcript of Record at 212-14, 225-28; *see Lawrence v. Branker*, 517 F.3d 700, 713 (4th Cir. 2008) (noting appellate counsel has wide discretion in deciding which issues are most likely to afford relief on appeal and cannot be ineffective for failing to assign error to an issue that is without merit). Accordingly, Petitioner has not shown that trial counsel or appellate counsel were ineffective on this issue.

Aggravators in the Indictment

Petitioner argues that trial counsel or appellate counsel failed to argue that the circumstances of aggravation should have been included in the indictment. The law in this state is well-settled regarding the inclusion of circumstances of aggravation in an indictment. Our Supreme Court has repeatedly affirmed that the State is not constitutionally required to allege aggravating circumstances in the indictment for capital murder cases. *See State v. Laney*, 367 S.C. 639, 649-650, 627 S.E.2d 726, 732 (2006); *State v. Crisp*, 362 S.C. 412, 419-20, 608 S.E.2d 429, 433-34 (2005); *State v. Downs*, 361 S.C. 141, 147-48, 604 S.E.2d 377, 380-81 (2004) ("aggravating circumstances need not be alleged in an indictment for murder"). Petitioner concedes that his position—that circumstances of aggravation should be included in the indictment—is contrary to the overwhelming case law in South Carolina. *See* Petitioner's Post-Trial Brief at 77-78.

Furthermore, at the beginning of Petitioner's trial, trial counsel objected to the fact that the circumstances of aggravation were not included in the indictment. ROA at 9-12. Also, trial counsel made a motion to reconsider this issue subsequent to the verdict and sentence. ROA at 2845-49. The trial judge appropriately denied these motions. ROA at 12, 2849. At the PCR hearing, appellate counsel, Robert Dudek, testified that he did not raise this issue on appeal because he had raised the issue before and lost, and because he did not believe he would prevail on that issue based on the applicable case law and his past experiences with the issue. PCR Transcript of Record at 223-25; *see Lawrence v. Branker*, 517 F.3d 700, 713 (4th Cir. 2008) (noting appellate counsel has wide discretion in deciding which issues are most likely to afford relief on appeal and cannot be ineffective for failing to assign error to an issue that is without merit). Accordingly, Petitioner has not shown that trial counsel or appellate counsel were ineffective on this issue.

Foreign National

Petitioner alleges that his trial counsel was ineffective for failing to recognize that Petitioner was a German citizen and for failing to notify the Petitioner of his rights as a foreign national. The Federal Republic of Germany submitted an *amicus curiae* brief to this Court, making arguments on Petitioner's behalf. Also, representatives from the German Consulate were present throughout Petitioner's PCR hearing held before this Court.

The Petitioner's mother, Daisy Huckaby, is a German citizen; she was born in Germany and immigrated to the United States in 1978 after meeting and marrying the Petitioner's father, Dwight Williams. By virtue of his mother's German citizenship, Petitioner apparently is also a

German citizen.[6] *See* Plaintiff's Exhibit 26, Citizenship Certification. Petitioner contends that because of his German citizenship, he was entitled to consultation rights and protections as a foreign national as outlined in Article 36 of the Vienna Convention on Consular Relations.

Contrary to Petitioner's arguments, he is not a "foreign national." Instead, he is a United States citizen and was not entitled to any of the rights of consultation under the Vienna Convention. The Petitioner was born in Greenville, South Carolina, to an American father and is therefore a United States citizen by birth. *See* United States Const., Amend. XIV ("All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."); 8 U.S.C. § 1401 ("[t]he following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof").

Evidently, Petitioner is a dual citizen of the United States and German. *See* Plaintiff's Exhibit 26, Citizenship Certification. However, this dual citizenship does not confer upon the Petitioner the status of a "foreign national" for purposes of consular protection in a criminal proceeding in South Carolina. *See, e.g., Commonwealth v. Baumhammers*, 599 Pa. 1, 63-4, 960 A.2d 59, 97-8 (2008) (finding a dual national detained by authorities in his own country and state is not a foreign national and is not entitled to consular protections); *Cauthern v. State*, 145 S.W.3d 571, 628 (Tenn. Crim. App. 2004) (finding a dual national born in the U.S. is not entitled to consular protections under the Vienna Convention and, furthermore, the Vienna Convention does not create a judicially enforceable individual right); *State v. Ahmed*, 103 Ohio St.3d 27 35-6, 813 N.E.2d 637, 651 (2004). The Code of Federal Regulation defines the term "foreign

[6] At Petitioner's PCR hearing, Gerrit Morking, a representative from the German consulate, posited that a person born to a German citizen is also a German citizen, regardless of place of birth. In fact, Mr. Morking suggested that German citizenship inherited by birth could be passed on from generation to generation such that "if my great, great, great, great grandfather was a German Citizen, I'm still a German Citizen also." *See* PCR Transcript of Record at 801-02.

national" as "any individual *other than* a U.S. national," 31 C.F.R. § 800.215 (emphasis added); while a "national" means a "citizen of the United States," 22 C.F.R. § 50.1. Similarly, the U.S. Department of State's "Consular Notification and Access" instruction manual—which, incidentally, is cited in Germany's *amicus* brief—defines a foreign national as "any person who is not a U.S. citizen." *See* Consular Notification and Access, U.S. Department of State, at 12.[7] Additionally, the State Department manual explains that "consular notification is not required if the detainee has U.S. citizenship, regardless of whether he or she has another country's citizenship or nationality as well." *Id.* at 14.

While our courts have recognized the right of foreign nationals to receive consular protection during criminal proceedings in state courts, those cases presume that the person being charged with the crime is a foreign national and not a U.S. citizen. *See, e.g., State v. Banda*, 371 S.C. 245, 639 S.E.2d 36 (2006) (defendant was a citizen of Zimbabwe and was in the U.S. on a basketball scholarship); *State v. Lopez*, 352 S.C. 373, 574 S.E.2d 210 (2002) (defendant was a Mexican national residing legally in the U.S. as a resident alien). Here, Petitioner is a United States citizen, born in South Carolina, and is therefore not a foreign national. Accordingly, Petitioner has failed to show that he was entitled to the consular protections under the Vienna Convention, and has failed to meet his burden of showing that trial counsel was ineffective for failing to enlist the resources of the German consulate.[8]

Even assuming that the Petitioner was entitled to consular advice and that his trial counsel was deficient in failing to notify him of his rights, the Petitioner has not demonstrated that he suffered any prejudice. *State v. Lopez*, 352 S.C. 373, 574 S.E.2d 210 (2002). Petitioner

[7] The Consular Notification and Access manual is available at http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf.

[8] Additionally, this Court notes that courts disagree about whether trial counsel's failure to notify a criminal defendant of his rights to consular protection rise to the level of ineffective assistance.

argues that if the German consulate had become involved in the case prior to his trial, the German government would have provided financial and legal assistance and the outcome of the trial would have been different. Specifically, Petitioner asserts that the German consulate would have helped uncover the fetal alcohol syndrome issue and would have objected to the Solicitor's improper statements. However, beyond mere speculation, Petitioner has not shown any evidence that assistance from the German consulate would have changed the outcome of his trial. Trial counsel stated that while defense attorneys in death penalty cases always desire more time to prepare, in this particular case, the attorneys felt they were sufficiently prepared. PCR Transcript of Record at 148-49. Further, there is no evidence that the defense team lacked adequate resources. The defense team was composed of highly-qualified, experienced attorneys, including the Public Defender for the Thirteenth Judicial Circuit, John Mauldin, and attorney Bill Nettles, who now serves as United States Attorney for the District of South Carolina. Attorneys Mark MacDougall and Colleen Coyle of the Washington D.C. law firm Akin Gump Strauss Hauer & Feld also aided in the Petitioner's defense. The defense team relied on the skills and resources of its mitigation investigator, Jan Vogelsang, a well-respected and experienced social case worker who has worked with numerous capital defense teams,[9] and a team of highly-qualified experts who met with the Petitioner and his defense team on numerous occasions and testified at trial. Using the resources at its disposal, the defense team developed a comprehensive trial strategy, even though the Petitioner was ultimately convicted and sentenced to death.

Petitioner contends that the German consulate could have helped collect information about Daisy's family history, including mental health issues and alcohol consumption. PCR Transcript of Record at 67, 80-81. Jan Vogelsang testified that she felt that she could not

[9] Jan Vogelsang's expertise gained national attention in 2006 when she was enlisted by the defense team for September 11 conspirator, Zacarias Moussaoui.

provide a complete genogram without the opportunity to travel to Germany. *Id.* at 64-65, 67-68. However, in spite of the defense team's lack of ability to travel to Germany to investigate Daisy's family history, the team did in fact collect information and evidence regarding Daisy's family history, mental health history, and alcohol addiction.

While this Court understands the sentiments of trial counsel that additional time and resources are always desirable in a death penalty case, here, Petitioner has failed to show that he was prejudiced in not having the assistance of the German Consulate at his trial. Accordingly, trial counsel was not ineffective for failing to advise the Petitioner of his rights as a foreign national or failing to enlist the help of the German government in the Petitioner's defense.

Sex Offender Registry

Petitioner alleges that trial counsel was ineffective for failing to ask the judge to make a finding that he did not have to register as a sex offender.[10] In South Carolina, a person guilty of kidnapping is required to register as a sex offender unless the court "makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense." S.C. Code Ann. § 23-3-430(15); *Lozada v. S.C. Law Enforcement Div.*, 395 S.C. 509, 514, 719 S.E.2d 258, 260-61 (2011).

The trial record shows that Judge Nicholson sentenced the Petitioner to death after the jury found the existence of a statutory aggravating factor for murder; however, no sentence was given for the kidnapping conviction, consistent with S.C. Code Ann. § 16-3-910 (mandating

[10] This Court notes that Petitioner was not convicted of any kind of sexual offense. While investigators initially considered whether there was a sexual aspect to the crimes, due in part to the Petitioner's prior relationship with the victim and the fact that the victim's shirt had been torn from her during her struggle to get away from the Petitioner, there was no other evidence suggesting Petitioner had committed any crimes of a sexual nature.

imprisonment for a period not to exceed thirty years for kidnapping, *unless* sentenced for murder as provided in § 16-3-20). *See* ROA at 2420.

At the PCR hearing, attorney John Mauldin testified that he could not recall any discussions about Petitioner being required to register as a sex offender as a result of a kidnaping conviction. PCR Transcript of Record at 176. Notwithstanding trial counsel's concession, Petitioner has failed to show counsel's representation fell below an objective standard of reasonableness. *See Williams v. State*, 378 S.C. 511, 515-16, 662 S.E.2d 615, 617-18 (Ct. App. 2008) (finding defendant's trial counsel was not ineffective for failing to request the trial court to make a determination as to whether the kidnapping was sexual in nature).

Additionally, Petitioner has not shown that he was prejudiced by his trial counsel's failure to ask the judge to make a finding that the defendant did not have to register as a sex offender. Petitioner was convicted of murder and sentenced to death. Petitioner's death sentence essentially voids the practical effect and requirements of the sex offender registry act. Accordingly, the Petitioner has not suffered any prejudice as a result of trial counsel's failure to request a finding that the Petitioner did not have to register as a sex offender.

Fetal Alcohol Syndrome

Petitioner alleges trial counsel was ineffective in failing to adequately investigate Petitioner's prenatal exposure to alcohol and the resulting complications of that exposure, including a diagnosis of Fetal Alcohol Syndrome (FAS) or some other type of Alcohol Related Neurodevelopmental Disorder (ARND). Petitioner contends that evidence of prenatal exposure to alcohol and a diagnosis of FAS or ARND would have been powerful mitigation that a jury could have considered in determining an appropriate sentence. Petitioner also contends that such

evidence may have been used to prove Petitioner, because of mental disease or defect, lacked sufficient capacity to conform his conduct to the requirements of the law.

At the outset, this Court recognizes that we are just beginning to understand the role that Fetal Alcohol Syndrome (FAS) plays in human behavior in general and criminal activity in particular. As Petitioner's PCR counsel astutely noted, "we are just now at the tip of the iceberg of what we know about the brain."[11] PCR Transcript of Record at 10. With that understanding, this Court has fully considered the testimony of Petitioner's experts on the issue of FAS, has thoroughly studied the exhibits and information provided to the Court by Petitioner's counsel and experts, and has carefully reviewed the relevant cases involving FAS or comparable organic brain damage.

"Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. *Strickland,* 466 U.S. at 691. Thus, '[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.' *McKnight v. State,* 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (citation omitted). In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation '*was*

[11] It is noteworthy that each member of the FASD Experts team acknowledged that the state of the art for FASD forensic assessment was "hit or miss" and lacked "a protocolized structured assessment process in the forensic context" prior to 2007 when the FASD Experts team began working together, which was nearly two years after the Petitioner's trial in February 2005. *See* PCR Transcript of Record at 396 (Dr. Connor testifying that the team gave a presentation at a seminar in March 2009, during which they noted that the science of forensic assessment for FASD prior to 2007 was "hit or miss," and that the FASD Experts team developed the current structured, multi-disciplinary team approach in 2007 to better evaluate and assess FASD); 449-50 (Dr. Adler explaining the 2009 "presentation really was the first public scientific, professional presentation about our proposed model for the evaluation," prior to which "there was no . . . protocolized approach"); 636-37, 733-34 (Dr. Brown testifying that during the 1990s and up to 2005, there were people testifying in trials who were not qualified and did not know what they were doing, and thus, the "hit or miss" idea emphasized that "for the forensic context you needed a higher level of protocol and approach that would ensure that . . . the diagnostic criteria, were met and that the individuals working in the context were trained and experienced in the field").

itself reasonable.' *Wiggins v. Smith,* 539 U.S. 510, 522–23, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (emphasis in original) (citation omitted). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. *Simpson v. Moore,* 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006)." *Taylor v. State*, 2009-123871, 2013 WL 3048636 (S.C. June 19, 2013); *see also Council v. State*, 380 S.C. 159, 171-72, 670 S.E.2d 356, 362-63 (2008) (noting our Supreme Court has adhered to the principles and analysis in *Wiggins* in determining whether counsel was ineffective in failing to thoroughly investigate potential guilt and penalty phase evidence).

Trial counsel's failure to conduct a reasonable investigation into mitigating circumstances constitutes ineffective assistance. *Simpson v. Moore*, 367 S.C. 587, 605-06, 627 S.E.2d 701, 710-11 (2006) *citing Wiggins v. Smith,* 539 U.S. 510, 511 (2003) (finding counsel's review of a pre-sentence investigation report and DSS records did not constitute a reasonable investigation into defendant's background, and a more in-depth investigation would have revealed the defendant's "abuse in the first six years of his life while in the custody of his alcoholic, absentee mother" and his diminished mental capacity). Similarly, our Supreme Court has found counsel ineffective for failing to adequately investigate and prepare expert testimony about a defendant's mental condition. *Von Dohlen v. State,* 360 S.C. 598, 602 S.E.2d 738 (2004) (holding the absence of crucial medical records and related information which existed at the time of trial prevented experts from conveying an accurate diagnosis and explanation of defendant's mental condition); *see also, Ard v. Catoe,* 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007); *Nance v. Ozmint,* 367 S.C. 547, 557, 626 S.E.2d 878, 883 (2006) (concluding defense counsel in capital murder case should have investigated and presented mitigating social history evidence outlining defendant's troubled childhood and mental illness).

"When determining if want of mitigation evidence resulted in prejudice, we must determine whether the 'mitigating evidence, taken as a whole, "might well have influenced the jury's appraisal" of [the defendant's] culpability.' *Wiggins v. Smith,* 539 U.S. 510, 538 (2003). . . . '[T]he likelihood of a different result if the [mitigation] evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing.' *Rompilla,* 545 U.S. at 393 (quoting *Strickland,* 466 U.S. at 694). Accordingly, if trial counsel's complete failure to present mitigation evidence undermines confidence in the outcome, then [Petitioner] suffered prejudice." *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009) (citations omitted).

The South Carolina Supreme Court has found prejudice where "there was very strong mitigating evidence to be weighed against the . . . aggravating circumstances presented by the State[, and such] . . . evidence may well have influenced the jury's assessment of [a defendant's] culpability." *Council v. State,* 380 S.C. 159, 176, 670 S.E.2d 356, 365 (2008) (granting new sentencing trial where only very limited mitigation testimony was presented and no medical evidence was presented); *see also*, *Gray v. Branker,* 529 F.3d 220, 238 (4th Cir.2008) (concluding if a jury had been able to "place [mental disturbance] on the mitigating side of the scale," but was deprived of such evidence, "there is a reasonable probability that at least one juror would have struck a different balance" (quoting *Wiggins,* 539 U.S. at 537)).

In *Jones v. State*, our Supreme Court addressed a claim for ineffective assistance of counsel very similar to the one at issue here. *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998). While the defendant in that case was not diagnosed with FASD, he did claim that trial counsel was ineffective in failing to present mitigating evidence that he had organic brain damage. The Court found that additional evidence about the defendant's mental impairment would not have revealed anything significantly different than what had been presented to the

jury. *Id.*, 332 S.C. at 339, 504 S.E.2d at 826. The Court noted that the jury had been presented with several mitigating factors regarding the mental condition of the defendant, but that they were also presented with overwhelming evidence of the defendant's guilt along with aggravating factors surrounding the murder. *Id.* The Court explained that the defendant was not entitled to retool his mitigation argument into a "fancier" package:

> At the sentencing hearing, the mentality of Jones was the focus of his mitigation case. His counsel's strategy was not to portray Jones as being under active mental and emotional disturbance, but rather to emphasize his mental retardation, as evidenced by his upbringing. This strategy obviously did not succeed. Just because it was unsuccessful does not mean that Jones can now recharacterize the evidence and claim that counsel did not adequately present mitigation evidence. The "new" evidence is the same as the "old" evidence. At best, it is a fancier mitigation case. If the evidence was not persuasive in the first case, the defendant does not get a second chance. Otherwise, there would never be an end to litigation.

Jones v. State, 332 S.C. 329, 339, 504 S.E.2d 822, 826-27 (1998). Accordingly, the Court held that trial counsel was not ineffective.

Our Supreme Court also considered issues similar to those in the instant case[12] in *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006). In *Moore*, defense counsel called several witnesses, including three experts, to offer mitigating evidence in the sentencing phase of a capital murder trial. The Supreme Court summarized the mitigation testimony from the trial as follows:

> Witnesses testified that Simpson's mother used heroin while pregnant with him, Simpson grew up in a drug environment, he had trouble in school, and he experienced several personal tragedies. One expert, a clinical social worker, testified that Simpson's mother abused drugs while pregnant with Simpson and after, Simpson was often abandoned as a child, he suffered chronic headaches,

[12] The Court notes that whether the defendant suffered organic brain damage was not discussed in *Simpson*. Nevertheless, the issues are analogous to the instant case: mother abused drugs while pregnant; defendant had traumatic childhood; PCR counsel claimed trial counsel failed to investigate and present evidence of these issues sufficiently; PCR counsel offered evidence and experts offered opinions regarding the defendant's mental condition, which the defendant claims could have changed the jury's sentencing decision.

> and had been exposed to traumatic life events. A second expert, a clinical psychologist, testified that Simpson's IQ was at the lower end of the normal range, and that Simpson tested "highly abnormal" on the scales of paranoia, schizophrenia, and mania. Finally, a forensic psychiatrist, Dr. Dupree, testified that Simpson suffered from a mental illness known as dysthymic disorder, which is basically chronic depression that lasts over a period of more than two years. Dr. Dupree also testified that Simpson experienced symptoms associated with attention deficit disorder and post-traumatic stress disorder, but he could not be diagnosed as having these disorders. She also noted his history of drug and alcohol abuse.

Simpson v. Moore, 367 S.C. 587, 606-07, 627 S.E.2d 701, 711-12 (2006). At the PCR hearing, defendant's counsel presented testimony of two experts, who explained the relationship between Simpson's traumatic childhood and the likelihood that he would murder someone. *Id.* Also, Dr. Dupree submitted an affidavit stating her prior opinion was not reliable because she did not know that Simpson's mother had used drugs during her pregnancy with Simpson, among a variety of other facts, and that based on this new information, she was prepared to offer a different opinion. *Id.*

The Court held[13] that defense counsel was not deficient because counsel interviewed a number of witnesses about the defendant's childhood and life; counsel hired a private investigator to gather background information on the defendant; and counsel called several witnesses to offer mitigating evidence, including three experts who were provided the information gathered about the defendant's background. *Simpson v. Moore*, 367 S.C. 587, 606-07, 627 S.E.2d 701, 711-12 (2006). The Court also held that the defendant failed to show that he was prejudiced during the mitigation case because "the jury was aware of the defendant's troubled childhood, traumatic life experiences, and mental condition." Citing *Jones v. State*, the Court concluded that any "additional investigation would have merely resulted in a 'fancier'

[13] The Court reversed the PCR court, which had found that counsel failed to fully investigate the defendant's medical, mental, social, and familial history, and because of this, the jury did not have the opportunity to consider mitigating factors warranting a life sentence as opposed to the death penalty. *See Moore*, 367 S.C. at 607, 627 S.E.2d at 712.

mitigation case, having no effect on the outcome of the trial." *Simpson v. Moore*, 367 S.C. 587, 606-07, 627 S.E.2d 701, 711-12 (2006), *quoting Jones v. State,* 332 S.C. 329, 504 S.E.2d 822 (1998).

This Court finds the instant case analogous to *Jones v. State* and *Simpson v. Moore*. The record shows that trial counsel did not present evidence to the jury that Petitioner suffered from Fetal Alcohol Syndrome or that he had organic brain damage. At Petitioner's PCR hearing, Petitioner's trial counsel and defense mitigation investigator testified that they had evidence that Petitioner's mother, Daisy, drank alcohol during pregnancy and that they were aware of Fetal Alcohol Syndrome and the effects of prenatal exposure to alcohol. However, both Attorney Mauldin and Attorney Nettles stated that they could not identify a reason why they did not develop a mitigation strategy based on Fetal Alcohol Syndrome. PCR Transcript of Record at 93-97, 119, 186-88. Nevertheless, this Court finds that Petitioner has not shown trial counsel was ineffective.

Trial counsel's investigation, preparation, and presentation of defense evidence and mitigation at Petitioner's trial were not deficient. Trial counsel put together a highly qualified defense team, which included experienced capital defense attorneys, mitigation investigators, social workers, and mental health experts. Trial counsel carefully investigated the social, educational, familial, and mental health background of the Petitioner. Trial counsel developed a cogent mitigation defense, offered an array of compelling evidence, and presented the poignant testimony of a number of lay and expert witnesses.

Trial counsel retained Jan Vogelsang as a mitigation expert. Ms. Vogelsang is a highly-regarded clinical social worker with substantial experience in capital litigation, although this was her first trial working as a mitigation investigator. *See* PCR Transcript of Record at 15-19. Ms.

Vogelsang testified that she was familiar with Fetal Alcohol Syndrome, including its symptoms and causes, given her prior experience with working with people affected by FAS. *Id.* at 53-55. During the course of her investigation, Vogelsang investigated and collected information regarding the mother's drinking habits. *Id.* at 50-51. For example, she interviewed family members, including Petitioner's father, Dwight Williams, and Petitioner's sister, Maureen Williams. *Id.* at 55-60. In her testimony at the PCR hearing, Ms. Vogelsang noted that neither Dwight nor Maureen could identify the precise amount of alcohol consumed by the mother. *Id.* at 55-60. Vogelsang also interviewed the mother, Daisy Huckaby, who denied drinking while pregnant. *Id.* at 58. Vogelsang presented the information she collected about the mother's drinking to trial counsel as well as to the defense team's experts. *Id.* at 59-60.

Trial counsel retained Dr. James Evans, a neuropsychologist, who completed a battery of neuropsychological testing that revealed the Petitioner suffered from neuropsychological brain damage affecting the frontal lobes. This information was presented to trial counsel and the other members of the defense team, including Jan Vogelsang, as well as to the defense experts. Also, trial counsel retained Dr. Griesemer who conducted an MRI of the Petitioner's brain and concluded the MRI Report showed a normal brain. This Report was available prior to the start of trial.

Trial counsel retained Dr. Robert Richards who testified during the guilt phase of the trial and diagnosed the Petitioner with bipolar disorder. ROA at 1961. Similarly, trial counsel retained Dr. Seymour Halleck, who testified as a forensic psychiatrist in the penalty phase of the trial. ROA at 2303. At trial, Dr. Halleck testified that Petitioner had a major depressive episode and an obsessive compulsive disorder. ROA at 2309. Dr. Halleck based his diagnosis on an extensive review of Petitioner's background and family history, including defense team's

mitigation notes, school records, police records, incident reports, medical records, as well as a four hour interview with Petitioner. ROA at 2306. Having reviewed all of this information, however, Dr. Halleck concluded that Petitioner knew right from wrong and was able, though with difficulty, to conform his behavior to the requirements of the law. ROA at 2318.

Additionally, trial counsel brought in experienced litigation attorneys from the well-regarded Washington D.C. law firm, Akin Gump, to help prepare Petitioner's defense. In particular, these attorneys helped investigate and prepare mitigation experts, including Dr. Seymour Halleck. PCR Transcript of Record at 135-36. Attorney Nettles testified that he was satisfied with the work of these attorneys and that their presentation of the mitigation experts was consistent with the defense's theory of the case. PCR Transcript of Record at 136.

Based on all the foregoing, this Court finds that trial counsel had evidence that Petitioner's mother drank during pregnancy, and that trial counsel was aware of the resulting complications, including brain damage. Trial counsel also had evidence that Petitioner possibly suffered brain damage, based on Dr. Evans' reports. Trial counsel presented this information, along with other mitigation evidence, to the defense experts. Considering all of the information it had available and in consultation with its experts, trial counsel developed a cogent strategy to present mitigation evidence—including evidence of the mother's alcohol addiction—but also made a strategic decision to not present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (though trial counsel was unable to articulate the reasons for that strategic decision). Instead, trial counsel's strategy was to present mitigation evidence regarding Petitioner's troubled childhood and his mental illness, as diagnosed by defense experts.

Trial counsel carefully developed its mitigation evidence. As explained above, trial counsel attempted to fully develop mitigation evidence of Petitioner's troubled childhood. As

part of that strategy, trial counsel presented evidence of mother's alcohol addiction and her consumption of alcohol during pregnancy. Trial counsel attempted—albeit unsuccessfully—to use that evidence, along with other facts in evidence, to persuade the jury to consider the lesser sentence of life. Similarly, as explained above, trial counsel presented evidence of Petitioner's mental illness, again pleading with the jury for a sentence other than death. While it is easy in retrospective to criticize an unsuccessful trial strategy, Petitioner has not shown that trial counsel's investigation and presentation of mitigation evidence fell below the standard required in a PCR action.

Accordingly, counsel's performance was not deficient. *See Johnson v. State*, 333 S.W.3d 459, 466 (Mo. 2011) (failure to present expert testimony specifically related to fetal alcohol syndrome was not ineffective assistance); *Sells v. Thaler*, CIV. SA-08-CA-465-OG, 2012 WL 2562666 (W.D. Tex. June 28, 2012) (concluding no reasonable probability that, but for the failure of petitioner's trial counsel to present evidence of fetal alcohol syndrome, the outcome of the punishment phase of petitioner's capital murder trial would have been any different); *Garza v. Thaler*, 909 F. Supp. 2d 578 (W.D. Tex. 2012) (petitioner's complaints about his trial counsel's failure to investigate whether petitioner suffers from FAS and to present evidence establishing such a diagnosis did not cause the performance of trial counsel to fall below an objective level of reasonableness); *Burgess v. State*, 962 So. 2d 272 (Ala. Crim. App. 2005) (denying defendant's claims of ineffective assistance of counsel that his trial counsel should have called an expert witness on FAS and should have obtained a neuropsychological assessment to investigate possible organic brain impairment, where defendant's counsel conducted a diligent investigation and introduced evidence in support of mitigation); *In re Andrews*, 28 Cal. 4th 1234, 1259, 52 P.3d 656 (Cal. 2002) (concluding counsel's strategic decision to limit the scope of their

investigation of mitigating background evidence and to not present evidence at the penalty phase that included FAS and organic brain damage came within "the wide range of reasonable professional assistance"); *State v. Sullivan*, 1995 WL 465172 (Del. Super. June 29, 1995) *aff'd*, 676 A.2d 908 (Del. 1996) (finding trial counsel's failure to investigate FAS not ineffective where trial counsel was provided conflicting evidence regarding mother's drinking habits during pregnancy); *State v. Murphy*, 91 Ohio St. 3d 516, 542, 747 N.E.2d 765, 797 (2001) (finding trial counsel's failure to present evidence of organic brain damage was not ineffective where record showed that counsel presented mitigating factors, including defendant's neglected childhood in an alcoholic home; and noting trial counsel "need not pursue every conceivable avenue"); *Foell v. Mathes*, 310 F. Supp. 2d 1020, 1049 (N.D. Iowa 2004) (concluding trial counsel was not ineffective for failing to present evidence of FAS where attorney conducted a satisfactory and reasonable investigation into defendant's mental state, but rejecting the viability of using FAS as a defense).

Furthermore, Petitioner has not shown prejudice. Petitioner argues that had trial counsel presented evidence of Petitioner's organic brain damage, resulting from his FAS, it is reasonable that at least one juror would have been persuaded to give a life sentence rather than the death penalty. This Court disagrees. As discussed above, trial counsel presented a well-reasoned mitigation defense, which included compelling evidence of the Petitioner's troubled childhood and evidence of the Petitioner's mental illness based on multiple expert opinions. Petitioner's fetal alcohol argument would have "merely resulted in a 'fancier' mitigation case, having no effect on the outcome of the trial." *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998) (trial counsel not ineffective for failing to thoroughly investigate and present mitigating evidence regarding defendant's metal impairments, including organic brain damage, where trial counsel

focused its mitigation on the mental conditions of the defendant); *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

This Court also notes that a survey of jury verdicts in sister jurisdictions shows that defendants are often sentenced to death in spite of evidence offered in mitigation that the defendant had fetal alcohol syndrome or organic brain damage. *See, e.g., Zack v. State*, 753 So. 2d 9 (Fla. 2000) (affirming death sentence where jury weighed aggravating circumstances against mitigating circumstances, including evidence and diagnosis of FAS) *aff'd Zack v. State*, 911 So. 2d 1190 (Fla. 2005); *State v. Locklear*, 349 N.C. 118, 134, 505 S.E.2d 277, 286 (1998) (affirming sentence of death in capital case where defendant's evidence during the sentencing phase included evidence that defendant suffered from Fetal Alcohol Syndrome); *State v. Timmendequas*, 168 N.J. 20, 33, 773 A.2d 18, 25 (2001) (affirming death sentence where jury found aggravating circumstances outweighed mitigating circumstances, including jury's finding that defendant was born to a mother who was emotionally unfit and unable to meet his physical and emotional needs and caused him to suffer from fetal alcohol effect due to her drinking throughout her pregnancy); *People v. Roybal*, 19 Cal. 4th 481, 522, 966 P.2d 521 (1998) (jury instructed to consider fetal alcohol syndrome as a mitigating factor after expert testimony that defendant had organic brain damage as a result of the FAS; defendant sentenced to death); *Brown v. State*, 659 N.E.2d 671, 675 (Ind. Ct. App. 1995) (affirming trial court sentence in murder case where the court concluded that the aggravating circumstances outweighed the mitigating circumstances, which included evidence of fetal alcohol syndrome); *Davies v. State*, 758 N.E.2d 981, 988 (Ind. Ct. App. 2001) (affirming sentence where the trial court weighed aggravating and mitigating circumstances, including fetal alcohol syndrome); *State v. Sullivan*, 1995 WL 465172 (Del. Super. June 29, 1995) *aff'd*, 676 A.2d 908 (Del. 1996) (concluding that a

diagnosis of FAS would not have affected the outcome of the sentencing phase because the sentencing court relied on mitigation evidence that defendant had limited intelligence and reasoning powers); *State v. Cooper*, 410 N.J. Super. 43, 979 A.2d 792 (N.J. Super. Ct. App. Div. 2009) (alleged deficiency in failing to present mitigation evidence that defendant had brain damage from fetal alcohol syndrome or fetal alcohol spectrum disorder was not prejudicial and thus did not constitute ineffective assistance). Accordingly, Petitioner has not met his burden.

All Other Allegations

As to any and all other allegations that were raised in Petitioner's application or at the hearing in this matter, and have not been specifically addressed in this Order, this Court finds the Petitioner failed to present any evidence regarding such allegations. Accordingly, this Court finds the Petitioner waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all of the foregoing, this Court finds that the Petitioner has not met his burden. Counsel was not deficient in any manner. Further, the Petitioner was not prejudiced by counsel's representation. Accordingly, this Court finds the allegations raised in this Application for Post-Conviction Relief are without merit and dismisses this Application with prejudice.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. That the Petitioner is remanded to the custody of the South Carolina Department of Corrections for the purpose of carrying out his sentence.

IT IS SO ORDERED this 24 day of July, 2013.

The Honorable G. Edward Welmaker
Circuit Court Judge
Thirteenth Judicial Circuit

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2010CP2309792

Charles Christopher Williams *vs.* South Carolina State Of

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.

☐ **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: _____

☐ **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; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this 9th day of August, 2013.

Court Reporter:

PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the 9th day of August, 2013, and a copy mailed first class this 9th day of August, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Derek Joseph Enderlin 330 E. Coffee St. Greenville, SC 29601
Richard W. Vieth 360 E. Henry St. Ste.101 Spartanburg, SC 29302

ATTORNEY(S) FOR THE PLAINTIFF(S)

Donald J. Zelenka PO Box 11549 Columbia, SC 292111549

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Charles Christopher Williams,	)	C.A. No. 2010-CP-23-9792
	)	
Petitioner,	)	
	)	
v.	)	**ORDER**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Before the Court is Petitioner Charles Christopher Williams' Motion to Alter Judgment pursuant to Rule 59, SCRCP. By Order of Dismissal dated July 24, 2013, the Court denied the Petitioner's Application for Post-Conviction Relief. Having had the opportunity to carefully review the Order of Dismissal, the extensive record before the Court, and each and every factor in the Petitioner's Motion to Alter Judgment, this Court finds that its Order of Dismissal adequately addresses each issue raised by the Petitioner, even though many of the Court's findings and conclusions are adverse to Mr. Williams.

This Court has again reviewed the evidence presented in light of the applicable cases, both from federal courts and from South Carolina courts. This Court has exhaustively studied the Fetal Alcohol Syndrome literature presented by the Petitioner. Having carefully considered the credentials, demeanor, and credibility of each witness, this Court has thoroughly evaluated the substance of each witness's testimony. This case, as with others of its nature, presents difficult legal issues, with which all in the legal profession and judiciary must grapple. This Court has digested, studied, and agonized about the issues presented by Mr. Williams, and firmly believes that the law has been properly applied to the evidence in this case. Fortunately, our

judicial system provides appellate courts, which are waiting to review this decision and will have the opportunity, with a deeper insight from an impassive record of trial, to provide wise analysis for this case.

Accordingly, the Petitioner's Motion is respectfully DENIED.

Aug 9, 2013

The Honorable G. Edward Welmaker
Circuit Court Judge
Thirteenth Judicial Circuit