

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from the Spartanburg County
Court of Common Pleas

Lower Court Case No. 2018-CP-42-00928

RICKY LEE BLACKWELL PETITIONER,

v.

STATE OF SOUTH CAROLINA RESPONDENT.

NOTICE OF APPEAL

Petitioner, Ricky Lee Blackwell, appeals the Honorable Judge Daniel D. Hall's order dismissing his capital post-conviction relief action filed on April 7, 2025, and the order denying Petitioner's motion to alter or amend judgment, which had been timely filed on April 17, 2025. The order denying Petitioner's motion to alter or amend judgment was signed and received by counsel for Petitioner on June 10, 2025, and filed with the Spartanburg County Clerk of Court on June 16, 2025. A copy of the orders on appeal are attached to this notice.

Respectfully submitted,

/s/ Lindsey S. Vann

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July 10, 2025.

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

Ricky Lee Blackwell, #6033)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

C/A No.: 2018-CP-42-00928
(Capital PCR)

ORDER

(DENYING POST-CONVICTION RELIEF)

CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX

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This matter is before the Court for consideration of the application for post-conviction relief (PCR) filed by Applicant, Ricky Lee Blackwell. Applicant is a death-sentenced inmate presently confined in the Secure Facility at the Broad River Correctional Institution. Applicant filed his initial application on March 15, 2018, beginning the capital proceedings in circuit court. On March 29, 2018, the Supreme Court of South Carolina assigned the undersigned to preside over the case. With the assistance of his appointed counsel, Applicant filed a second application on February 22, 2019, and a third and final amended application on November 12, 2021.

An evidentiary hearing was held in three parts beginning on March 27-31, 2023, with another hearing on July 31- August 2, 2023, and concluding with testimony taken on December 15, 2023. Applicant attended a portion of the hearing during the March 2023 segment, then waived his presence at the remaining portions. Applicant remained represented at all times by appointed counsel, Charles E. Grose, Esq., and Lindsey S. Vann, Esq. The State was represented by Senior Assistant Deputy Attorney General Melody J. Brown, Senior Assistant Attorney General Anthony Mabry and Assistant Attorney General Tommy Evans, Jr.

At the conclusion of the hearing, the court set a schedule to receive post-hearing briefing. The parties have submitted their briefs, and this Court has considered the arguments for and against

the granting of relief. Along with the post-hearing briefing submissions, this Court has also considered the testimony, exhibits, the transcripts, and all other filings and matters relevant to this action. After careful consideration of the evidence and arguments and having observed the witnesses and passed on their credibility, this Court finds that Applicant has failed to show he is entitled to any relief.¹ The Court begins with a recitation of the procedural history in relevant part.

PROCEDURAL HISTORY

I. *Indictment and Trial*

Applicant was indicted by a Spartanburg County Grand Jury in July 2009 for the kidnapping and murder of eight-year-old Heather Brooke Center. (R. 4829 - 4832 [indictments 2009-GS-42-3609 and 3610]). The State served and filed its notice of intent to seek the death penalty on August 11, 2011. The State subsequently served and filed its notice of statutory aggravating circumstances on June 8, 2012. William Sean McGuire, Esq., of the South Carolina Commission on Indigent Defense, Capital Trial Division, along with Clay T. Allen, Public Defender for the Seventh Judicial Circuit, represented Applicant on the charges. S. Boyd Young, Esq., also of the South Carolina Commission on Indigent Defense, Capital Trial Division, assisted during trial. The Honorable Barry J. Barnette, Solicitor of the Seventh Judicial Circuit, along with

¹ The Court's decision was incorporated into a short order and announced to the parties on January 28, 2025. That order, filed on January 31, 2025, expressly noted that a formal order would follow. The Court notes that Applicant's counsel submitted a Rule 59 motion on February 6, 2025. However, that motion was premature as the final order had not yet been issued. Applicant may re-file his motion or file an amended motion at the appropriate time.

Further, in the same order, the Court, having agreed with the State's arguments in these matters in relevant and substantial part, also called for a proposed order from the State. Applicant has been provided a copy of the proposed order drafted by the State for this Court's review and has been encouraged to carefully review the order pursuant to *Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019), particularly to bring to the Court's attention any argument or issue that Applicant believes was not addressed.

Deputy Solicitor Derick B. Balsa, and Assistant Solicitor Russell Ghent represented the State. The South Carolina Supreme Court assigned the Honorable Roger L. Couch exclusive jurisdiction over the capital proceedings.

On February 19, 2014, a hearing began pursuant to *Franklin v. Maynard*, 356 S.C. 276, 279, 588 S.E.2d 604, 606 (2003), on Applicant's claim of intellectual disability. Judge Couch heard competing opinions and arguments over three days. After detailed questions of his own, Judge Couch found Applicant had failed to carry his burden of proof of showing intellectual disability by a preponderance of the evidence. (Supp. R. 1-14 [February 25, 2014 Order]).²

Because Judge Couch's ruling allowed the capital trial to proceed, capital *voir dire* proceedings began thereafter, and a jury was selected. The guilty phase began on March 11, 2014, and sent to the jury on March 12, 2014. The jury began deliberations at 4:08 pm and returned a guilty verdict at 4:29 pm. (R. 2600, lines 18-20; 2602, lines 1-8). Applicant waived the statutory twenty-four (24) hour break afforded between phases, and the penalty phase began at 1:30 pm on the afternoon of March 13, 2014. (R. 2603, line 15 – 2604, line 18; 2606, line 21 – 2607, line 13). At the conclusion of penalty phase deliberations on March 16, 2014, the jury found (1) that Applicant failed to show by a preponderance of the evidence he was intellectually disabled, (R. 3257, lines 16-22); then found (2) that the State had proven beyond a reasonable doubt, two statutory aggravating circumstances in aggravation: The murder of a child eleven years of age or under and the murder was committed while in the commission of the crime of kidnapping. (R. 3257, l. 23 – 3258, l. 11) (*See* S.C. Code Ann. § 16-3-20 (C)(a)(10) and (C)(a)(1)(b)). The jury concluded that death was the appropriate sentence. (R. 3258, lines 12-25). Judge Couch followed

² The prior records have been provided to the Court and in some cases referenced through the direct appeal filings available on our Supreme Court's website through c-track, Appellate Case No. 2014-000610.

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the mandatory resolution and sentenced Applicant to death. (R. 3262, line 14 –3263, line 5; 4823 & 4825).³

II. *Direct Appeal*

Applicant, represented by appellate defenders Robert M. Dudek and David Alexander, of the Office of Indigent Defense, Division of Appellate Defense, raised multiple issues in the direct appeal including two issues regarding privileged medical information of a witness. The witness records issues were redacted in light of the nature of the information. The appeal issues, not including the redacted ones, were:

3. Whether the trial court erred in finding that appellant was not mentally retarded at the pretrial hearing pursuant to *Atkins v. Virginia* and *Franklin v. Maynard*, and therefore sentencing appellant to death violates his rights under the Eighth Amendment?

4. Whether the trial court erred in refusing to charge the jury that the state had the burden to prove appellant was not mentally retarded beyond a reasonable doubt and, alternatively, charging the jury that it was required to find appellant was mentally retarded by a preponderance of the evidence, all of which impermissibly shifted the burden of proof to appellant and resulted in verdict forms that were hopelessly confusing in violation of his rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution?

5. Whether the trial court erred in refusing to admit evidence of appellant's remorse contained in the records of a hospital chaplain pursuant to Rule 803(6), SCRE, in mitigation, and in response to testimony from a police officer who claimed appellant said "the only thing that I'm sorry about is that I didn't do a better, job on myself," since the exclusion of this relevant evidence violated appellant's Eighth Amendment rights?

³ The sentence for kidnapping was subsumed by the murder sentence in accordance with the prior provisions of S.C. Code Ann. § 16-3-910. The statute was amended, effective July 2, 2024, to strike the provision that a kidnapping sentence would not be imposed where the defendant was sentenced for murder. However, that prior provision was controlling at the time of sentencing in this case.

6. Whether the court erred by ruling the state presented racially neutral reasons for striking black male jurors Cheeks and Fullenwider where the state did not strike similarly situated white jurors who also had a criminal record, or had pending criminal charges in the same county, and the treatment of alleged “pro-life” black and white jurors by the solicitor was also disparate?

7. Whether the court erred by qualifying Juror #43, Donna Champion, because her position that the defense had to prove appellant deserved a life sentence rather the death penalty was burden shifting, inconsistent with the law, and her entire voir dire showed she would not consider certain categories of mitigating evidence?

(Return Attachment 2, pp. 7-8).

In an opinion issued on May 31, 2017, the Supreme Court of South Carolina affirmed the convictions and death sentence. *State v. Blackwell*, 420 S.C. 127, 801 S.E.2d 713 (2017). Applicant did not seek rehearing but filed a petition in the Supreme Court of the United States seeking review of the intellectual disability claim determination, and treatment of the privileged mental health records. Applicant’s petition was denied February 20, 2018. (Return Attachment 10).

FACTS OF THE CRIME

Our Supreme Court set out a succinct summary of the facts, which this Court relies upon for context in addressing the issues that follow:

After twenty-six years of marriage, Blackwell’s wife, Angela, entered into an adulterous relationship with Bobby Center in 2008. By all accounts, Blackwell was devastated when Angela left him. Following the breakup, Blackwell attempted suicide, suffered financial problems, and was forced to turn to his parents for support.

According to Angela, on July 8, 2009, Blackwell came to her parents’ house to discuss insurance matters. While there, Blackwell chastised her about not visiting their grandsons and urged her to go see them that day. Angela testified she was going to take Brooke swimming at Center’s house that day and intended to pick up her grandsons to take them along. When she arrived at her daughter’s

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home, she did not see her daughter's car. Assuming that her daughter was not home, Angela began to drive away. As she was leaving, Blackwell flagged her down and informed her that their daughter went to the store but that their son-in-law had the children. Angela testified she got out of the car to secure a dog in order that it would not bite Brooke. When Angela turned around, she saw that Blackwell had grabbed Brooke and was holding a gun to the child. Blackwell ignored Angela's pleas for him to release Brooke. Instead, Blackwell stated that Angela had "pushed this too far," that she "did this," and that she could let him know "what Bobby thinks of this." Blackwell then fatally shot Brooke. Following the shooting, Blackwell fled into the woods behind his daughter's home. When law enforcement surrounded him, Blackwell shot himself in the stomach and was taken to the hospital. While being transported to the hospital and waiting for treatment, Blackwell gave inculpatory statements to the law enforcement officers who questioned him.

Blackwell, 420 S.C. at 135, 801 S.E.2d at 717.

POST CONVICTION RELIEF ALLEGATIONS

In his third and final application filed on November 12, 2021, Applicant presented the following allegations for relief:

10(a) Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that Applicant is a person with intellectual disability. *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).

11(a) **Supporting Facts:** Because Applicant has significantly subaverage intellectual functioning, existing concurrently with deficits in adaptive functioning, both of which manifested during the developmental period, he is ineligible for capital punishment. *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003); S.C. Code § 16-3-20(C)(b)(10). Specific facts supporting this claim, include, but are not limited to, the following:

(1) Material facts not previously presented and heard, S.C. Code § 17-27-45(C), that Applicant is a person with intellectual disability that results from a genetic abnormality of his *CAMTA1* gene, which he inherited from his mother.

10(b) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during his pre-trial and sentencing phase *Atkins* (intellectual disability) hearings.

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11(b) **Supporting Facts:** Counsel failed to investigate, develop, and present a constitutionally adequate case that Applicant was a person with intellectual disability who could not be executed pursuant to the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Counsel's performance was both unreasonable and prejudicial, see *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions, include, but are not necessarily limited to, the following:

(1) Counsel failed to investigate and present all relevant evidence on the issue of intellectual disability including evidence of Applicant's significantly subaverage intellectual functioning, deficits in adaptive functioning, and onset before the age of 18, *Atkins v. Virginia*, 536 U.S. 304 (2002); *Wiggins v. Smith*, 583, U.S. 510 (2003);

(2) Counsel failed to object to the trial judge's reliance on stereotype and deviation from clinical consensus and practice in the determination that Applicant was not a person with intellectual disability, see *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 572 U.S. 701 (2014);

(3) Counsel failed to investigate and present evidence that some of Applicant's purported IQ test scores in the developmental period were not legitimate, individualized measures of general intellectual functioning and thus were not inconsistent with intellectual disability, *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 572 U.S. 701 (2014); *Wiggins v. Smith*, 583, U.S. 510 (2003);

(4) Counsel failed to investigate and present circumstances under which Applicant obtained a commercial driver's license and other certifications to refute the trial judge and jury's reliance on the certifications in finding Applicant was not a person with intellectual disability, see *Wiggins v. Smith*, 583, U.S. 510 (2003);

(5) Counsel failed to investigate and present evidence to the trial judge and jury that Applicant's depression and cancer treatment (including chemotherapy) had no demonstrable effect on IQ scores establishing significantly subaverage intellectual functioning;

(6) Counsel failed to investigate and present evidence that Applicant is a person with intellectual disability as a result of a genetic abnormality of his *CAMTA1* gene, which he inherited from his mother

(7) Counsel failed to adequately inform and educate the trial judge and jury about potentially prejudicial and preconceived misconceptions and stereotypes related to intellectual disability, see *Moore v. Texas*, 137 S.Ct. 1039 (2017);

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(8) Counsel failed to object to the Solicitor's sentencing phase closing argument endorsing improper stereotypes toward people with intellectual disability when the Solicitor stated: "I mean it's an insult to people that had truly – have a mental disability for them to bring this kind of defense up to try to spare his life trying to use that excuse," Tr. 3169, and "He's not disabled, and, like I say, it's an insult to people that's mentally—I mean that truly has that kind of condition." Tr. 3171. *See Moore v. Texas*, 137 S. Ct. 1039 (2017); *Brown v. State*, 383 S.C. 506, 680 S.E.2d 909 (2009); *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007); *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2007), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d (2004).

10(c) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20— during pre-trial proceedings.

11(c) Supporting Facts: Counsel failed to adequately question prospective jurors in voir dire to identify prospective jurors with pre-formed beliefs about and stereotypes and biases against a defendant with an intellectual disability. Trial counsel's performance during pre-trial proceedings was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984).

10(d) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20— during the penalty phase of the proceedings.

11(d) Supporting Facts: Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are

(1) Counsel failed to adequately investigate and present the full range of mitigating evidence concerning Applicant's social and life history, *see Wiggins v. Smith*, 583 U.S. 510 (2003);

(2) Counsel failed to adequately investigate and present all available mitigating evidence concerning Applicant's mental health prior to and at the time of the capital offense, *see Wiggins v. Smith*, 583 U.S. 510 (2003);

(3) Counsel failed to investigate and present mitigating evidence concerning Applicant's lack of future dangerousness, adaptability to confinement, and good character, *Skipper v. South Carolina*, 476 U.S. 1 (1986);

(4) Counsel failed to adequately investigate and present scientific evidence demonstrating that the fact the victim urinated on herself was a natural result of death as opposed to resulting from fear while alive during the incident;

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(5) Counsel failed to object to misleading jury instructions, in violation of the Sixth and Eighth Amendments to the United States Constitution, which did not properly advise the jurors that whatever sentence they recommended would be the sentence imposed by the court rather than a recommendation to the court about the sentence to be imposed, *see Hurst v. Florida*, 572 U.S. 701 (2016); *Ring v. Arizona*, 536 U.S. 584 (2002); *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985); *see also State v. Bellamy*, 293 S.C. 103, 259 S.E.2d 63 (1987), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991);

(6) Counsel failed to investigate and present evidence of remorse and acceptance of responsibility including, but not limited to, failure to call a hospital chaplain to testify regarding Applicant's remorse shortly after the crime when the chaplain's records documenting the remorse were excluded by the trial judge as inadmissible hearsay;

(7) Counsel failed to object to Solicitor's closing argument that Applicant did not have any remorse for killing Brooke Center, including but not limited to Tr. 3169 ("not once did he cry about Brooke. Not once did he show any remorse for Brooke. Doesn't even show one concern for Brooke."), Tr. 3180-81, under circumstances where the Solicitor successfully objected to trial counsel introducing evidence of Applicant's remorse. *See Simmons v. South Carolina*, 512 U.S. 154 (1994); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *State v. Blurton*, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000), *reversed on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002);

(8) Counsel failed to object to the Solicitor's improper closing arguments, including but not limited to the following:

"Everything they rolled out yesterday, I mean, I got mad. I tried to keep my composure over there, but here he is, he's saying he mentally retarded." Tr. 3168.

"He's not mentally retarded, and the reason why I'm going so much over this, and the judge is going to charge you about mental retardation, that if you make a finding that he is mentally retarded from there, it's a bar to the death penalty if it's by a preponderance of the evidence. They have to show it by that amount. Preponderance means by the greater weight of the evidence." Tr. 3171-72.

See, e.g., *Brown v. State*, 383 S.C. 506, 680 S.E.2d 909 (2009); *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007); *State v. Reese*, 370 S.C. 90, 633 S.E.2d 898 (2007), *overruled on other grounds by State v. Belcher*, 383 S.C. 1, 680 S.E.2d 909 (2009).

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385 S.C. 597, 685 S.E.2d 802 (2009); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d (2004).

(9) Counsel failed to adequately raise and argue all legal and factual grounds for finding Applicant's death sentence was not "warranted under the evidence of the case" pursuant to S.C. Code § 16-3-20, and is "disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" pursuant to S.C. Code § 16-3-25 (C)(3), *see State v. Dickerson*, 395 S.C. 101, 125 n. 8, 716 S.E.2d 895, 908 n. 8 (2011).

10(e) Applicant's right to due process of law—guaranteed by the Fourteenth Amendment to the United States Constitution—was violated as a result of the knowing presentation of false or misleading information by a state agent. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Napue v. People of State of Ill.*, 360 U.S. 264 (1959); *see also Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); *Alcorta v. State of Texas*, 355 U.S. 28, 78 (1957).

11(e) Supporting Facts: Spartanburg County Sheriff Office Investigator Lorin Williams testified Mr. Blackwell did not have remorse for killing Brooke Center. R. 2679-86. During closing argument, the Solicitor relied on the testimony of Investigator Williams to argue Mr. Blackwell "[d]idn't show any remorse" for Brooke Center's death, R. 3180-81, despite evidence from hospital chaplains and others present that Applicant did show remorse. Investigator William's testimony was false, and even if the Solicitor did not knowingly solicit such false evidence, the Solicitor allowed it to go uncorrected. *See Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995); *Napue v. People of State of Ill.*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed 1217 (1959); *see also Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); *Alcorta v. State of Texas*, 355 U.S. 28, 78 (1957).

10(f) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the appellate proceedings.

11(f) Supporting Facts: Appellate counsel's performance during the appellate phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984); *see also Evitts v. Lucey*, 469 U.S. 387 (1985); *Southerland v. State*, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Counsel's specific unreasonable and prejudicial acts or omissions are:

(1) Appellate counsel failed to adequately raise and brief all legal and factual grounds for challenging the trial court's ruling that Applicant was not intellectually disabled, *see Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 572 U.S. 701 (2014); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002);

(2) Appellate counsel failed to raise the issue that the trial court erred in admitting prejudicial autopsy photographs and close-up photographs from the crime scene, including a photograph of the victim after she [sic] her body was moved, U.S. Const. amends. V, VIII; Rule 403 SCRE;

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(3) Appellate counsel failed to raise the issue that the trial court erred in allowing Reggie Frye to testify during the penalty phase of Applicant's trial when Frye's testimony was not relevant and impermissible hearsay, Rule 401, SCRE; Rule 613(b), SCRE; Rule 802, SCRE.

(4) Appellate counsel failed to adequately raise and brief all legal and factual grounds for finding Applicant's death sentence disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, pursuant to S.C. Code § 16-3-25 (C)(3), *see State v. Dickerson*, 395 S.C. 101, 125 n.8, 716 S.E.2d 895, 908 n. 8 (2011).

Third Amended Application for Post-Conviction
Relief, filed November 12, 2021, pp. 2-6.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the filings in this case and has heard the testimony and considered the evidence presented. This Court specifically notes that it has had the opportunity to observe the witnesses presented at the evidentiary hearing, and closely pass upon their credibility, weighing their testimony accordingly. After considering Applicant's and Respondent's positions, the testimony at the evidentiary hearing, and after having carefully reviewed the Record, I find that I must deny the application for postconviction relief. Set forth below are the relevant findings of fact and conclusions of law as required under S.C. Code Ann. § 17-27-80 and S.C. Code Ann. § 17-27-160(D).

Jurisdiction

The scope of this Court's jurisdiction for PCR matters is set out in S.C. Code Ann. § 17-27-20 (A). In addition to the listing of claims that may be raised in Section (A), there is a limitation. Section (B) provides: "This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(B). Because a PCR action is not a substitute for those proceedings, a PCR applicant cannot assert any issues in his PCR action that could have been raised at trial and on

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direct appeal. This prohibition has long been recognized. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (“Errors in a petitioner’s trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings.”); *see also Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (“The Simmons rule gives effect to the Legislature’s clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.”).

Standard of Review for Ineffective Assistance of Counsel Claim

While previously heard or unheard freestanding trial or direct appeal issues are not cognizable, the general factual basis for the previously unheard issues may be reached by and through an allegation of ineffective assistance of counsel. *Drayton*, 312 S.C. at 9, 430 S.E.2d at 520 (“Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel.”). Ineffective assistance of counsel claims constitute the general nature of issues appropriate for post-conviction relief actions. *See, e.g., Al-Shabazz v. State*, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000) (discussing jurisdiction pursuant to S.C. Code § 17-27-20(A), and finding “A typical PCR claim of ineffective assistance of counsel falls into this category....”).

To establish that Sixth Amendment counsel was ineffective, a PCR applicant must show that counsel’s representation fell below an objective standard of reasonableness, and if not for counsel’s error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Simpson v. Moore*, 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). “A reasonable probability is a probability sufficient to

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undermine confidence in the outcome” of the trial. *Strickland*, *supra*. Relief will not be granted on a showing of mere error—prejudice must also be shown. *Id.*

The standard of “prejudice” differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove “prejudice” in the guilt phase, an applicant must show that but for counsel’s errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). In *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998), the court instructed that prejudice may be found in a capital sentencing proceeding “when ‘there is a reasonable probability that, absent [counsel’s] errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.’” 332 S.C. at 333, 504 S.E.2d at 823 (quoting *Strickland*, 466 U.S. at 695). Again, “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (quoting *Strickland*, 466 U.S. at 694).

To conduct a fair review of counsel’s performance, a reviewing court must “eliminate the distorting effects of hindsight” and attempt “to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689.

When reviewing Applicant’s issues under the above jurisdictional limitations and the standard for review of ineffective assistance of counsel claims, the Record and PCR presentations – including testimony, other evidence, and arguments – together show that Applicant is not entitled to any relief on the claims presented.

This court will address the claims in detail below.

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11(a)(1) *Applicant is barred from relitigating his claim of exemption under Atkins; Additionally, Applicant failed to prove that his death sentence violates the Eighth Amendment to the United States Constitution based on allegedly new, material evidence that shows he suffers from intellectual disability.*

11(b)(6) *Applicant failed to show ineffective assistance of trial counsel in failing to investigate and present evidence of a genetic abnormality that correlates in some individuals with intellectual disability, but not all, and where genetic testing is not required for an evaluation of suspected intellectual disability.*

Revisiting the Claim is Barred under the Simmons Doctrine.

Though Applicant's claim of intellectual disability was rejected at trial by *both* the trial judge and subsequently by the jury, and the process and evidence reviewed again in the direct appeal, Applicant, nevertheless, attempts to make the same claim again. This Court has already announced its conclusion finding the issue may not be heard because "the Atkins issue has been answered by our Supreme Court" through its direct appeal review of the findings and procedures from the trial. (PCR Tr. Vol. 1, p. 597). *See* S.C. Code Ann. § 17-27-20(B); *see also Simmons, supra; Drayton, supra*. The Court reiterates and affirms that ruling here. Further, to the extent Applicant seeks review based on his disagreement with Judge Couch's conclusion, this Court does not have authority to exercise appellate review of Judge Couch's decision.⁴ That review has

⁴ Applicant argues that this Court should revisit this ruling to 1) consider "new" evidence related to a genetic abnormality; and 2) because Dr. Brown had changed his opinion about Applicant's intellectual disability and Judge Couch relied in part on the contrary opinion. As far as "new" evidence, this Court will address the specific "new" evidence allegation raised in the application -- the genetic evidence -- which is addressed below. As far as the change in opinion, this Court finds that the change is based in large measure, according to Dr. Brown's own testimony, on the review of Dr. Knight's report and opinion. This Court finds that Dr. Knight's report and opinion suffers from selective omission of data of the kind that should be considered in an intellectual disability assessment, even if it is ultimately discounted for specific reasons. Such information should not, however, be ignored. As such, the Court assigns little weight to the conclusions supporting the diagnosis and does not find the opinion credible or persuasive. It follows that Dr. Brown's change of opinion based on Dr. Knight's opinion also carries little weight. Moreover, Applicant cannot deny that *two* fact-finders at trial have passed on the lack of intellectual disability. Notably, though, Dr. Brown was not called at sentencing, thus, his opinion could not have affected or influence the jury determination rejecting the diagnosis. This Court does

already been conducted by our Supreme Court. Moreover, this Court does not have the authority to override or revisit the Supreme Court's decision after its direct appeal review of the claim. Therefore, the Eighth Amendment claim,⁵ standing alone, is procedurally barred here.⁶

Our Supreme Court has consistently and repeatedly held that issues that have been raised at trial and on direct appeal may not be raised in PCR. Applicant's trial occurred after the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 306 (2002) and after the South Carolina Supreme Court's decision in *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). That precedent was timely followed by presentation of the claim of intellectual disability at trial. Indeed, Applicant's case was the first to have both the pre-trial determination *and* the jury determination as set out in *Franklin*. 356 S.C. at 279, 588 S.E.2d at 605. There is no further review available absent an ineffective assistance of counsel claim – a separate claim with a separate review standard.⁷

not review the jury verdict for error. Again, the intellectual disability question was determined at trial and should not be revisited in PCR.

⁵ Though Applicant includes in his claim certain language concerning “the corresponding provision of the South Carolina Constitution,” there is no issue before the Court to determine or apply a state constitutional provision for exemption. Rather, the parties have relied on the Eighth Amendment exemption under *Atkins* and the claim is considered solely under federal law regarding the exemption, and state law on the provisions to determine those actually falling under the exemption. As *Atkins* indicates, it is left to the States to determine this class of individuals. *See Atkins*, 539 U.S. at 317.

⁶ Likewise, the Court acknowledges that Respondent submitted and argued that the intellectual disability exemption recognized under the Eighth Amendment in *Atkins v. Virginia* should be revisited. (*See* Respondent's Post-hearing Brief, at pp. 46-56). Whether this Court agrees or not, the Court lacks the authority to overrule Supreme Court precedent and will decline the invitation to review and reconsider *Atkins*.

⁷ Applicant's reference to other “freestanding claim” cases needs little addressing. His roster of cases lacks the similarity to make the exceptions persuasive. (*See* Applicant's Post-hearing Brief, at 29). Not one—not one—shows the adherence to the *Franklin* process and our Supreme

This Court has considered Applicant's arguments in briefing. He relies in great part on the mere fact that three opinions on intellectual disability have been offered. (See Applicant's Post-Hearing Brief, at 11). As a matter of law, he is wrong: "Courts are not required to credit expert testimony." *Ybarra v. Gittere*, 69 F.4th 1077, 1092 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 2582, 219 L. Ed. 2d 1241 (2024). Further, "[a] court's intellectual disability determination must be informed by clinical guidance, but" expert opinion alone will "not 'dictate' the outcome." *Id.*, at 1092 (citing *Moore v. Texas (Moore I)*, 581 U.S. 1, 13 (2017) (quotation omitted)). The facts do not support him either. Applicant does not take into account, as this Court has, the sufficiency, credibility and persuasiveness of those opinions.

For instance, Applicant relies on Dr. Calloway's opinion; however, the trial judge did not give significant weight to her opinion (nor did the jury apparently) and looked behind the opinion

Court's review of same on direct appeal. Applicant's case stands in stark contrast and falls squarely within the bar to re-litigation.

Further, I agreed with the State that re-litigation is barred by a number of separate theories, each equally applicable, each underscoring the necessary principle that litigants simply cannot continue to litigate a claim that has been presented and ruled upon, particularly when the ruling was on the merits. See also *State v. Hewins*, 409 S.C. 93, 106 and 111-12, 760 S.E.2d 814, 821 and 823 (2014) ("Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same," and, though it is a civil doctrine, collateral estoppel may even be applied in general sessions matters in discrete circumstances)(quoting *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct.App.2009)); *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) ("Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." (emphasis added)); *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court."); *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) ("The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case."). For all these reasons in addition to the statutory and case law limitations as referenced above, the allegation Applicant is intellectually disabled cannot be re-litigated.

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to the facts relied upon. Some things were persuasive, some were not. *Blackwell*, 420 S.C. at 141–42, 801 S.E.2d at 720 (affirming the trial court’s ruling finding Blackwell had not carried his burden of proof to show intellectual disability under *Atkins* observing that the trial court “discounted some of Dr. Calloway’s findings as it questioned whether ‘adequate information’ was used and believed Dr. Calloway improperly ‘made subjective determinations concerning the results obtained and weighted responses of various informants differently.’”).⁸ Likewise, this Court finds significant errors in disregarding facts, or relying on incorrect facts, in Dr. Knight’s opinion,⁹ which, in turn, influenced Dr. Brown to change his opinion to a diagnosis of intellectual disability.¹⁰ Because of these infirmities, both fail to be credible or persuasive. Other courts, as well, have likewise considered whether the information on adaptive functioning deficits is corroborated, *Bourgeois v. Watson*, 977 F.3d 620, 635 (7th Cir. 2020), the depth, or lack thereof,

⁸ Moreover, the trial court, in an even-handed and thoughtful fashion, credited other portions of her testimony. See *Blackwell*, 420 S.C. at 142, 801 S.E.2d at 721 (“[t]he court accepted the testimony of Dr. Calloway that Blackwell’s major depressive episodes after the separation were the cause of Blackwell’s inability to function normally”). If this Court could review the trial court’s findings and conclusions again, which it cannot, in this Court’s opinion, that careful, unbiased review of the details of the testimony adds even greater weight to its ultimate conclusion.

⁹ Specific examples are reviewed *infra*. For the purpose of the analysis in this section, however, acknowledging that this Court has made credibility findings against Dr. Knight’s opinion is sufficient.

¹⁰ Applicant again reviews, in great detail, the general standards and selective facts that went into Dr. Knight’s opinion, (see Applicant’s Post-hearing Brief, at 12-28), but it is actually what is not in this recitation that the Court found most telling. The State’s cross-examination, as a whole, demonstrated the significant gaps in the information (especially in the area of adaptive functioning) and highlighted what this Court determined was more narrative than unbiased opinion. This, of course, is the purpose of cross-examination, and allowed the Court to critically consider the testimony on this especially subjective area. See *United States v. Candelario-Santana*, 916 F. Supp. 2d 191, 211 (D.P.R. 2013) (“[B]ecause of the relative subjectivity of the adaptive behavior analysis, the importance of clinical judgment becomes greater under prong two than under prong one. When assessing adaptive behaviors, therefore, courts must make their own independent determinations of the clinicians’ judgment and credibility.”).

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of critical review, *Bryant v. State*, C/A 2016-CP-43-828 (Sumter County, filed Jan. 4, 2019); or even if opposition to the death penalty generally has clouded the expert's judgment, *Commonwealth v. Flor*, 259 A.3d 891, 917 (Pa. 2021). Our Supreme Court has underscored trial courts tasked with considering a claim of intellectual disability will be "the sole judge[s] of the credibility of the witnesses and the weight to be given their testimony...." *State v. Blackwell*, 420 S.C. 127, 140, 801 S.E.2d 713, 720 (2017). Thus, credibility is crucial. This Court, after careful consideration, finds the new opinions do not warrant the credibility to render them of sufficient weight to support a finding of intellectual disability. *See Commonwealth v. Flor*, at 917 ("The PCRA court, as with Appellant's earlier expert witnesses, found Dr. Martell lacking in credibility by essentially cherry-picking information to support a predetermined conclusion" and "[t]he shortcomings perceived by the PCRA court were compounded by the mutual reliance by the experts upon one another's reports").¹¹

Thus, this Court finds Applicant's argument that these three (rejected) opinions conclusively demonstrate Applicant is intellectually disabled lacks merit. *Cf. Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998) ("[H]aving just determined that none of counsel's actions could be considered constitutional error, it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial.") (cleaned up). As the *Atkins*

¹¹ Very similar to the instant case, in the Supreme Court of Pennsylvania's summary of the holdings in this matter, it found that the *Atkins* claim should not be reached on the merits unless presented through a challenge to counsel's representation: "Absent ineffectiveness of counsel, we conclude Appellant's *Atkins* claim was waived and is not reviewable on its merits independently from his ineffectiveness of counsel claim absent an applicable waiver exception. Alternatively, we conclude the PCRA court committed no abuse of discretion or error of law in its factual findings, credibility determinations and conclusion that Appellant failed to meet his burden to prove he was intellectually disabled as to be ineligible for the death penalty." *Commonwealth v. Flor*, at 937. Again, *Atkins* does not offer a guarantee of serial litigation.

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Court observed, “Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.” *Atkins*, 536 U.S. at 317. Applicant failed to carry his burden of proof (either in his new evidence allegation or his ineffective assistance claim), thus, still does not fall under the *Atkins* exemption from capital punishment.

Allegation of “Material Facts” Not Previously Considered.

Applicant additionally asserts there is a specific “material” fact not previously considered that affects the intellectual disability determination. He alleges that he has a “genetic abnormality of his *CAMTA1* gene....” Applicant has not shown a material fact under S.C. Code Ann. § 17-27-20(A)(4) because, contrary to his argument, he cannot demonstrate a causation element that would shift the evidence one way or the other. In short, Applicant greatly overstates the potential value of this genetic evidence.

Material Facts Not Heard Standard

The allowance of additional facts in PCR going to the crime or sentence (absent a claim of ineffective assistance) is limited to those that are **material** but were “not previously presented and heard,” and, critically, that such facts would “**require[]** vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20 (A)(4) (emphasis added). The statute does not define material. In other areas of the law, material facts are generally those that create a “reasonable probability” of a different result. *See generally Riddle v. Ozmint*, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006) (in context of *Brady v. Maryland*, 373 U.S. 83 (1963)); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (in context of evaluating a summary judgment motion, a fact is “material” if it “might affect the outcome of the suit under the governing law”). The statute requires more. The PCR statute restricts such presentation to those facts that, if proven, **requires**

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the sentence or conviction be set aside. In sum, while qualifying the type of facts as material, the true measure of the materiality appears to rest in whether certain new facts alleged, if true, *require* reversal of conviction or sentence. With that definition, the Record shows that Applicant fails to meet this heightened standard with his offered evidence regarding genetic testing because he has not shown any fact that *requires* finding he suffers from intellectual disability (again, a condition rejected by the trial judge and his jury), and the setting aside of his death sentence.

Relevant Context

The Record shows that an intellectual disability argument was presented to the judge before trial, and to the jury at sentencing. Both fact-finders determined Applicant had failed to carry his burden of proof. The trial Record shows specific and detailed presentations to both fact-finders and reliance on a credentialed expert in making the case for intellectual disability.

Further, during the PCR hearing, this Court heard evidence demonstrating the reasonableness of the investigation. Notably, the defense team mitigation investigator, Kara Richards-Baker testified that she, along with others, scoured Applicant's background to discover anything to support a sentence other than death. (PCR Tr. Vol. 1, p. 34). She described her role as follows:

So, I investigate the defendant's background by interviewing as many people as I can who have known him throughout ... his life from birth to the event. And also gather background information about the family looking to see if there's any genetic issues, if there's mental illness, if there's a history of substance abuse, there's trauma. I also interview witnesses and I collect records related to the client and his family members.

(PCR Tr. Vol. 1, pp. 34-35).

Additionally, Defense Counsel testified at the PCR hearing that he relied on his qualified expert, Dr. "Calloway to address the issue of the familial component because, as you can see

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through the records, intellectual disabilities ran deep in this family.” (PCR Tr. Vol. 1, p. 285; *see also* p. 293, counsel referencing “genetic issues” in the Blackwell children; and p. 382 and 434, Dr. Maddox’s testimony similarly referencing records from Greenwood Genetic Center for a family member). Counsel confirmed that Dr. Calloway did not request a genetic study. (PCR Tr. Vol. 1, p. 285).

Genetics Evidence

As referenced above, Applicant submits that he has new evidence of an abnormal gene which was not discovered by trial counsel. He asserts, specifically, that the abnormality has *resulted* in intellectual disability. (*See* Allegation 11(a)(1)). However, the allegation fails as the abnormality cannot bear the weight Applicant submits that it should.¹² Genetic evidence alone does not prove a person is intellectually disabled. It is a medical principle, and one that Applicant has not rebutted or denied, that a diagnosis of intellectual disability should not be assumed because of a particular genetic or medical condition. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 39-40 (5th ed. 2013) (“A diagnosis of intellectual disability should not be assumed because of a particular genetic or medical condition.”).

For the PCR presentation, Applicant obtained the services of pediatrician and medical geneticist Dr. Christopher Cunniff. (PCR Tr. Vol. 1, p. 449). He was qualified, without objection, as an expert in medical genetics. (PCR Tr. Vol. 1, pp. 452-453). Dr. Cunniff testified that based on Applicant’s PCR counsel’s representations, he made a recommendation for genetic testing. (PCR Tr. Vol. 1, p. 453). Three tests were eventually ordered. (PCR Tr. Vol. 1, p. 454). The

¹² In his reply in post-hearing briefing, Applicant agrees the abnormality is not dispositive, but instead goes to having the condition in the developmental period. (*See* Applicant’s Post-hearing Brief, at 32 and Reply, at 21). However, this only further shows the problem with his evidence. There is no specific causation and no credible diagnosis of intellectual disability in the first instance.

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testing was done at the Greenwood Genetics Center. (PCR Tr. Vol. 1, p. 455-456 and 458). The first tests found no abnormalities: "Each of those tests returned normal, meaning there were no missing or extra pieces of DNA that were found in Mr. Blackwell. And the Fragile X test was normal, meaning that he did not have a disease-causing change of the Fragile X gene." (PCR Tr. Vol. 1, p. 456). Another test – "the whole Exome sequency" – was ordered. (PCR Tr. Vol. 1, p. 456). That test required samples from Applicant's parents, as well, and resulted in this finding:

... there were abnormalities of two genes that were detected and those abnormalities were present in his mother also. One of those genes, which is a gene that has the name, if you will, CAMTA1 had an abnormality in it.

And there was a second gene called VPS13B. And there was also an abnormality of that gene. And in both circumstances each of those abnormalities was inherited from his mother, Mildred.

(PCR Tr. Vol. 1, pp. 458-459).

Dr. Cunniff testified that the CAMTA1 gene was "known to cause a variety of problems" and that "intellectual disability is a very common finding when someone has an abnormality of CAMTA1." (PCR Tr. Vol. 1, p. 459, *see also* p. 460, referencing studies that show "abnormalities of CAMTA1 are very commonly *associated* with intellectual disability" (emphasis added)). He testified when asked "*if there's been a diagnosis of intellectual disability,*" then "the genetic change is causative of intellectual disability." (PCR Tr. Vol. 1, p. 460). Dr. Cunniff testified that "at times" the CAMTA1 abnormality can cause "ataxia" which would result in an individual being unsteady on his or her feet, and would become worse over time, but an intellectual disability is generally found in the early school years. (PCR Tr. Vol. 1, pp. 467-468). The other noted gene abnormality was not likely to cause any issues. (PCR Tr. Vol. 1, p. 460-461). Dr. Cunniff also noted, after prompting, that his testing showed additional

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genetical material of “uncertain significance, meaning that they’re just not sure that - - whether it is contributing or causing the symptoms described or not.” (PCR Tr. Vol. 1, p. 470).

Dr. Cuniff further testified that he did not diagnosis intellectual disability in his practice, and only would test to determine if a “cause” could be identified. (PCR Tr. Vol. 1, p. 472). Dr. Cuniff testified that his reference to “intellectual disability” in the testimony was not limited to the actual diagnosis but may also refer to the general neurodevelopmental disorders. (PCR Tr. Vol. 1, p. 473). Dr. Cuniff was not diagnosing intellectual disability in his review; rather, he premised his opinion on being told that a diagnosis of intellectual disability (which required a functional component to be proven) had already been made. (PCR Tr. Vol. 1, p. 475). He testified that the gene abnormality is not a causation for the condition, but if the condition is found, the etiological diagnosis may be linked to the abnormality, and that the gene abnormality had a high correlation. (PCR Tr. Vol. 1, pp. 474-475).

Dr. Cuniff also agreed with the controlling medical literature (specifically, the DSM-5),¹³ that “[a] diagnosis of intellectual disability should not be assumed because of a particular genetic or medical condition,” noting also that diagnosis “requires functional deficits, and that’s different from an etiologic or a causal diagnosis.” (PCR Tr. Vol. 1, p. 476). In other words, the genetic diagnosis is “a concurrent diagnosis” which may be made only when the diagnosis of intellectual disability is made under standard medical diagnostic measures. (PCR Tr. Vol. 1, pp. 476-477). At bottom, it may be a correlation, but it is not causation. (PCR Tr. Vol. 1, p. 477; *see also* p. 481, opining “that is the cause of his intellectual disability if one accepts that that is truly a symptom that he has.”). Dr. Cuniff also testified, “that practically everyone who has a certain

¹³ The American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013), *supra*.

type of Fragile X Syndrome change” issue “will have an intellectual disability” but that was not found to be an abnormality in Applicant. (PCR Tr. Vol. 1, p. 480). Further, he confirmed Applicant was not reported to have any of the associated physical manifestations of the CAMTA1 abnormality. (PCR Tr. Vol. 1, p. 483). Dr. Cuniff candidly noted the limits of the genetic evidence: the abnormality may indicate a predisposition or “propensity,” but does not assure that the condition will exist. (PCR Tr. Vol. 1, p. 486).

This Court finds that Applicant failed to show a material fact that would require his sentence be vacated. Applicant overstates the significance of the abnormality detected. Further, the evidence is not viewed in isolation. As demonstrated above, Dr. Cuniff admitted that there was no evidence of the also associated ataxia provided to him, and that many individuals with the genetic abnormality never have intellectual disability. Further still, Applicant’s apparent assertion that the genetic abnormality could “prove” that he has intellectual disability would be against the medical literature – a position that the Supreme Court has instructed should be avoided. *See Hall v. Fla.*, 572 U.S. 701, 710 (2014) (“In determining who qualifies as intellectually disabled, it is proper to consult the medical community’s opinions.”); American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 39-40 (5th ed. 2013) (“A diagnosis of intellectual disability should not be assumed because of a particular genetic or medical condition.”). Applicant failed in his burden of showing a new “material” fact not heard that requires the sentence of death be vacated. He is due no relief.

Further, Applicant has not shown either *Strickland* deficient performance or prejudice which he argues in the alternative. (See Applicant’s Post-Hearing Brief, at 37). Applicant also conceded genetic testing was not generally done for such a diagnosis before the time of trial. (Applicant’s Post-hearing Brief, at 33) Applicant also conceded in briefing that Defense Counsel

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“confirmed that none of the experts they worked with prior to trial recommended they obtain genetic testing prior to” the trial proceedings. (Appellant’s Post-hearing Brief, at 34). There is nothing to show that counsel conducted an unreasonable investigation. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (using the term “reasonably available” in describing mitigation investigation efforts); *Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir. 1998) (“counsel was not required to second-guess” expert); *Rubio v. Lumpkin*, 729 F. Supp. 3d 616, 668 (S.D. Tex. 2024) (“The fact that other experts can review the record in hindsight and identify additional areas of inquiry does not in itself reflect that trial counsel’s representation fell below an objective standard of reasonableness.”); *Terry v. Stirling*, No. CV 4:12-1798-RMG, 2019 WL 4723345, at *14 (D.S.C. Sept. 26, 2019), *aff’d*, 854 F. App’x 475 (4th Cir. 2021) (“Trial counsel had every right to rely on their expert’s informed assessment.”).

Further still, though there is no Sixth Amendment “ineffective assistance of expert” guarantee, *Wilson, supra*, there was no evidence presented that genetic testing is required for an intellectual disability diagnosis. There has been no showing that counsel failed to obtain funding in light of a specific request, or a rejection of a specific request for more information on genetics. Notably, Dr. George Corvin, an expert for Applicant at the PCR hearing, testified that in “most cases of intellectual disability [he has] diagnosed or work with, have never had genetic testing” and, specifically, not only was there “nothing wrong with” not requesting a test, but also that “there’s not a step for that.” (PCR Tr. Vol. 1, 1025). And, as noted, the uncontested evidence was that the gene abnormality can exist with or without intellectual disability. At any rate, trial counsel could clearly rely on their qualified expert to direct what testing was necessary for the expert’s opinion. No relief could be due on this point.

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In sum, the Record shows counsel adequately investigated and obtained a qualified expert to aid in the evaluation and presentation of evidence on intellectual disability. Even so, as *Strickland* teaches, “The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” *Id.*, at 697. Because the genetic abnormality is not dispositive – again, under uncontested medical opinion – Applicant fails to show a reasonable probability of a different result. An analysis of either *Strickland* prong shows Applicant’s allegation fails.

Applicant is not entitled to any relief, and this Court grants none.

11(b)(1) *Trial counsel was not ineffective in the investigation and presentation of the intellectual disability claim in either the pre-trial presentation or in sentencing. Trial counsel properly investigated, developed, and presented a case for intellectual disability even though it was ultimately unsuccessful.*

Applicant claims that Defense Counsel was ineffective for failing to investigate and present an adequate case of Applicant’s intellectual disability. In particular, he alleges counsel failed to *present all evidence* regarding possible intellectual disability. (See Allegation 11(b)(1)). Applicant’s allegation fails to show relief is warranted.

First, this claim is little more than a request to review the intellectual disability determination which this Court has already declined to do. *See 11(a) discussion, supra*. Applicant has shown very little that could be considered different, and nothing that this Court would assign any significant weight. Second, Applicant has labeled his issues as a “more general claim” following the specific genetic issue. (Applicant’s Post-hearing Brief, at 48). It is general indeed. This Court finds that Applicant’s allegation is insufficient as a matter of law as he conceives of a standard of representation that is not required by any state or federal law. However, while counsel

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is not obligated to present *all* evidence (however that would ultimately be determined), counsel is required to conduct a constitutionally adequate investigation.¹⁴

The Supreme Court has instructed that trial counsel has the “obligation to conduct a thorough investigation of the defendant’s background,” *Williams v. Taylor*, 529 U.S. 362, 396 (2000), but also has used the term “reasonably available” in describing mitigation investigation efforts, *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Consequently, the Sixth Amendment does not task counsel with discovering “everything” possible – that is even possible to define the universe of such criteria. *Id.*, at 533 (“*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence”). “[T]he issue turns on *how* ‘thorough’ the mitigation investigation must be” and the Supreme “Court’s cases indicate that the investigation need only be *reasonably* thorough.” *Owens v. Stirling*, 967 F.3d 396, 413–14 (4th Cir. 2020) (citing *Strickland*, 466 U.S. at 690–91 (equating capital sentencing counsel’s duty of “thorough investigation” to “a duty to make reasonable investigations” and noting that “[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances”).

Applicant has not shown a deficiency under *Strickland*. The Record supports that trial counsel reasonably investigated and adequately presented an intellectual disability claim. Moreover, the proper evaluation of counsel’s conduct is from the perspective at the time trial, not

¹⁴ In Applicant’s post-hearing reply brief, Applicant acknowledges the problem with this claim as alleged and asserts the Court should allow amendment of the claim to “failed to exercise reasonable professional judgment” in investigation. (See Reply, at 22-23). This Court declines to allow the late amendment that was only offered well-after the hearing and after extensive briefing. However, this Court does review the investigation in considering the strategic decisions on presentation. Thus, by implication, where relief is denied as it is here, counsel’s investigation was not professionally unreasonable. There could be no significant prejudice to Applicant in not allowing the late amendment, and the request for amendment is denied.

in hindsight. *See Rompilla v. Beard*, 545 U.S. 374, 381 (2005) (“[I]n applying *Strickland*, hindsight is discounted by pegging adequacy to counsel’s perspective at the time investigative decisions are made and by giving a heavy measure of deference to counsel’s judgments.” (citation omitted) (quoting *Strickland*, 466 U.S. at 689) (internal quotation marks omitted)) This guidance is most crucial given the dismissal of Applicant’s intellectual disability claim at trial.

Rather uniquely, Applicant’s counsel pursued a theory of intellectual disability and had the opportunity to *twice* convince a fact-finder. That he ultimately received *two determinations that he had failed to show he was intellectually disabled* does not speak to representation – it speaks to the absence of the condition. *See generally United States v. Mason*, 774 F.3d 824, 828 (4th Cir. 2014) (“It is ‘all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.’”) (quoting *Strickland*, at 689).

At any rate, the potential of this claim was recognized early in the representation and counsel investigated and presented a claim twice that Applicant was intellectually disabled and, therefore, ineligible to receive the death penalty pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002). Those claims were based on the fruit of a more than adequate investigation.

Counsel acquired the services of forensic psychologist Dr. Ginger Calloway to assist in supporting Applicant’s intellectual disability claim. (R. 3827-3828). Dr. Calloway received her doctorate in psychology from North Carolina State University. (R. 3828). She had practiced primarily as a forensic psychologist for the 15-20 years prior to the hearing. (R. 3829). She had

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testified on numerous other *Atkins* hearings prior to Applicant's trial.¹⁵ (R. 3966). Applicant's PCR hearing witness Dr. George Corvin expressed high praise for Dr. Calloway's abilities in the field of intellectual disability assessment. During his PCR testimony Dr. Corvin stated that Dr. Calloway was the "best in the U.S. in terms of intellectual assessment." (PCR Tr. Vol. 1 p. 960). Dr. Corvin stated that he calls Dr. Calloway for advice and that she is "quite qualified." (PCR Tr. Vol. 1 p. 961).

At trial, Dr. Calloway opined that Applicant was intellectually disabled, and issued a forty-page report and eight-page supplemental report in support of her determination. (R. 4358-4405). She reviewed Applicant's medical records, school records, and testing done on both Applicant and members of his family. (R. 4362 – 4363). She conducted her own testing for intellectual functioning and adaptive behaviors on both Applicant and the people she could find who were the most familiar with him, including members of his family, employers, and associates. (R. 4362 – 4363). For her assessments on deficiency in adaptive behavior Dr. Calloway interviewed people like the Applicant's parents, his daughter, his pastor, and his former co-workers and supervisors.

As a result of the *Atkins* claim, a pre-trial hearing was held pursuant to *Franklin v. Maynard*. (R. 3772). During the hearing, Defense Counsel called Dr. Calloway to present her findings and professional opinion that Applicant was intellectually disabled. Dr. Calloway defined intellectual disability as (1) "significantly subaverage general intellectual functioning;" (2) "the presence of adaptive deficits in two of ten areas identified by the DSM-IV-TR;" and (3) "onset of the disability before the age of 18." (R. 3834). She testified that Applicant's I.Q. placed him with

¹⁵ See Ginger C. Calloway, Ph.D., 2011 WL 5927498 (curriculum vitae submitted to Federal District Court for the Eastern District of North Carolina during *Walton v. N. Carolina Dep't of Agric. & Consumer Servs.*, No. 5:09-CV-302-FL, 2011 WL 883579, at *1 (E.D.N.C. Mar. 11, 2011)).

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the range of subaverage intellectual functioning. When confronted with the higher I.Q. scores originating from a test administered to Applicant during grade school, Dr. Calloway testified that they were not true I.Q. scores in that they required no specialized expertise to administer. (R. 3891). She further testified that the test measured achievement and was “not so much an individually administered IQ test.” (R. 4004). In regard to deficits in adaptive functioning, Dr. Calloway detailed her approach in reaching her determination, and presented her conclusion that Applicant displayed deficits in six of the ten areas of adaptive functioning (R. 3843-3937). Lastly, as to the final intellectual disability prong, Dr. Calloway testified that “a number of different sources” showed that Applicant’s intellectual functioning was subaverage before the age of 18. (R. 3852). Dr. Calloway partly relied on the school information to determine that Applicant’s mental retardation onset was before age 18. (R. 3961- 3962).¹⁶

Defense Counsel also called Dr. Calloway to testify during the penalty phase of the trial (the second opportunity under *Franklin*). (R. 2799). Her testimony there was largely repetitive of the testimony offered during the *Atkins* hearing. However, Dr. Calloway adapted her testimony in order to address several issues that arose in the prior hearing. Dr. Calloway first testified to the

¹⁶ This Court acknowledges that Dr. Greg Olley was also called at the PCR hearing generally regarding the facts relevant to the ineffective assistance claim. (See PCR Tr. Vol. 1, p. 597-599). Dr. Olley spent much time going over a standard procedure for evaluations and information gathering. Notably, Dr. Olley candidly admitted in attempting to determine intellectual functioning and adaptive behavior “[t]here’s a lot of described procedures for doing that, but they are not perfect.” (PCR Tr. Vol. I, p. 619). He agreed that a mitigation expert and a credentialed expert for guidance was essential, (See PCR Tr. Vol. I, pp. 642-643 and 654). Applicant’s defense counsel retained both in their representation of Applicant. Further, he testified that experts should look at all information available. (See PCR Tr. Vol. I, p. 655, 657 and 663). This further supports this Court’s findings in determining the lack of credibility assigned Dr. Knight’s opinion in this matter. Dr. Olley did not, however, give any testimony as to Dr. Calloway’s performance (though he admitted knowing Dr. Calloway), and did not have any opinion or information on this particular case. (PCR Tr. Vol. I, p. 666). Dr. Olley’s testimony is referenced very lightly in the post-hearing briefing, which is consistent with this Court’s treatment of the testimony here.

necessity of interviewing multiple individuals for the purpose of determining social adaptability rather than confining the investigation to an interview with the defendant. (R. 2825-2826). This was in notable response to Dr. Gordon Brown's *Atkins* testimony (Dr. Brown's trial testimony is more fully referenced below) regarding the social adaptability investigation which was shaped by Applicant's disclosures. The examination then transitioned into Dr. Calloway's intellectual disability determination. In support of her conclusion, the defense presented the results of a recent WAIS-IV IQ test that was administered to Applicant by Dr. Calloway in which he scored a 63. Dr. Calloway opined that this placed Applicant in the range of mild mental retardation. (R. 2847-2848). Dr. Calloway also testified to Applicant's school records reflecting Applicant's poor academic performance. These included "IQ tests" administered during grade school. (R. 2846-2867). She also offered the results of a recently administered Wide Range Achievement Test which placed Applicant's current math, reading and comprehension level between a fourth and seventh grade level. (R. 2868-2869). Dr. Calloway later presented her findings in regard to Applicant's adaptive functioning as determined through the use of the Adaptive Behavioral Assessment System (ABAS). She addressed the purpose of adaptive functioning, how the ABAS was performed, and the results she attained and scored, reflecting significant deficits in adaptability. (R. 2882-2915). Dr. Calloway concluded her testimony to the jury by offering her opinion that Applicant was intellectually disabled under the clinical definition. (R. 2916). Even though the defense was not successful, the Record clearly supports that Defense Counsel investigated, developed, and presented a well-prepared case of intellectual disability with reliance on a credentialed expert. *See generally Atkins*, 536 U.S. at 317 ("Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.").

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Further, the Record also makes clear that Defense Counsel recognized the possible *Atkins* defense, gathered voluminous records, and interviewed numerous witnesses in support of the intellectual disability finding. They obtained the services of a social worker and an accomplished mental-health expert who also conducted multiple interviews with Applicant and his family, performed psychological evaluations, and reviewed medical records. (R. 3779; 3780-3781; 3816).¹⁷

Applicant's assertion that additional individuals to interview regarding school generally and the impressions of his classmates were not available or provided to Dr. Calloway but were made available to Dr. Knight does not persuade the Court of deficiency. (See Applicant's Post-hearing Brief, at 48). Defense Counsel testified that the defense secured assistance from Kara Richards-Baker, a qualified mitigation investigator, who attempted to find any individual who could assist in shaping the defense's case. (See PCR Tr. Vol. 1, pp. 34-35).¹⁸ Indeed, our Supreme Court has recognized the importance of relying on qualified mitigation specialists. See *Council v. State*, 380 S.C. 159, 173–74, 670 S.E.2d 356, 363 (2008) (in finding counsel ineffective, the Court observed that “counsel chose not to hire a social history investigator. Instead, he relied on his law partner and private investigator to collect potentially relevant information. However, neither of these individuals was qualified, in terms of social work experience, to evaluate the information to assess Respondent's background.”). Of no little note, Applicant similarly relies on experts – the

¹⁷ Notably, the trial investigation netted information from interviews that either the collateral investigation missed or failed to share with Dr. Knight.

¹⁸ Based on counsel's testimony, Applicant asserts the defense failed to “develop evidence” available evidence and present that evidence. (See Applicant's Post-hearing Brief, at p. 51). This is incorrect. Applicant misconstrues counsel's testimony. The very fact that counsel testified he should have “presented more,” (see Applicant's Post-hearing Brief, at 51), is a classic hindsight evaluation prompted by the rejection of the defense. It would offend the mandated *Strickland* contemporaneous-to-trial evaluation of the claim to accept Applicant's interpretation.

same Dr. Corvin and another mitigation witness, Dr. Andrews, assisted counsel in attempting to challenge trial counsel's same method. (See Applicant' Post-hearing Reply Brief, at 34-35). In essence, the same, consistent investigation pattern has been followed by both teams. At most, Applicant has shown a different strategy, and different experts, but not deficient performance by trial counsel.

Thus, Defense Counsel competently relied on their expert's findings and conclusions in formulating and presenting their case for Applicant's intellectual disability. *Smith v. Cockrell*, 311 F.3d 661, 676–77 (5th Cir. 2002), overruled on other grounds by *Tennard v. Dretke*, 542 U.S. 274 (2004) ("Counsel should be permitted to rely upon the objectively reasonable evaluations and opinions of expert witnesses without worrying that a reviewing court will substitute its own judgment, with the inevitable hindsight that a bad outcome creates, and rule that his performance was substandard for doing so."); see also *Turner v. Epps*, 412 Fed.Appx. 696, 704 (5th Cir. 2011) ("While counsel cannot completely abdicate a responsibility to conduct a pre-trial investigation simply by hiring an expert, counsel should be able to rely on that expert to alert counsel to additional needed information....").

Applicant, however, cites to *Wiggins v. Smith*, 539 U.S. 510 (2003), for support of finding error. Applicant's argument is unavailing.

The Court in *Wiggins* held:

Counsel did not conduct a reasonable investigation. Their decision not to expand their investigation beyond a presentence investigation (PSI) report and Baltimore City Department of Social Services (DSS) records fell short of the professional standards prevailing in Maryland in 1989. Standard practice in Maryland capital cases at that time included the preparation of a social history report. Although there were funds to retain a forensic social worker, counsel chose not to commission a report.

Wiggins, 539 U.S. at 519. 2025 APR - 7 12:21 PM L - 884 3202

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Wiggins goes to reasonableness in investigation – not presentation as Applicant challenges – and it also touches on the unreasonable limitations on the investigation in that case. As far as the investigation, the circumstances of Applicant’s trial are distinct from those presented in *Wiggins*. As noted above, Defense Counsel in Applicant’s trial acquired the services of both a social worker and forensic psychologist. These two experts (along with others according to Ms. Richards-Baker) conducted an extensive investigation into potential intellectual disability. Given Defense Counsel’s investigation and reliance on reasonable expert evaluation, Applicant cannot overcome the strong presumption that Counsel’s representation fell within the wide range of reasonable professional assistance. *Strickland*, at 689.

During his PCR testimony, Applicant’s trial counsel William McGuire testified that he was prepared to go forward. He stated that he might have been “overconfident,” (PCR Tr. Vol. 1 p. 196), however, being overconfident cannot be considered ineffective. It can be, and this Court considers it to be, confidence in the reasonable investigation; after all the defense collected numerous records and had the assistance of a qualified expert in the field of intellectual disability – as stated by Dr. Corvin, one of Applicant’s witnesses at PCR, an expert who was one of the best in the United States in this field. Applicant has shown an unsuccessful defense, but not an inadequate one. Again, both fact-finders determined the evidence did not support intellectual disability. Further, Applicant’s new expert in PCR gave an opinion this Court finds not credible or persuasive. As such, Applicant has not shown *Strickland* prejudice.

For instance, in Judge Couch’s order finding Applicant had not carried his burden of showing intellectual disability, the trial court set out, “I make this finding because of the fact that in reviewing the results of Dr. Calloway’s ABAS-II it is clear that she has made subjective determinations concerning the results obtained and weighted the responses of various informants

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differently.” Yet, during the PCR hearing Applicant’s witness Dr. Susan Knight did the identical thing in her determination of the Applicant being intellectually disabled. Dr. Knight stated that due to the Applicant’s shyness, being bullied, being afraid to jump in the deep end of a lake when he cannot swim, *shows* deficits in adaptive functioning. (PCR Tr. Vol. 1 p. 826). That is vastly overstated and goes to bias. Shyness is not a phenomenon unique to intellectual disability, and being bullied is likewise not limited to the intellectually disabled. Not wanting to drown is evidence of prudent self-care and self-preservation. That does not appear to be a negative in cognitive ability or adaptive functioning. None of these factors prove any type of intellectual disability. However, the expert’s reference to these items does show a different problem – that appears to be stereotyping, but in favor of intellectual disability instead of against it. It is the details that make the difference and those were sorely lacking, and worse, at times simply ignored. Based on the Court’s observations of the witness and consideration of the facts of the case at trial and those presented and discussed in PCR, the new opinion suffers greatly from confirmation bias.¹⁹

For example, Dr. Knight listed numerous jobs held by the Applicant during his lifetime. She stated that the Applicant’s jobs were simple manual labor. However, individuals with only a tenth-grade education will for the most part only be qualified for the type of jobs held by the Applicant. Even so, Dr. Knight simply discarded that which did not fit the narrative – Applicant was able to pass his commercial driver’s license exam including the test on hauling hazardous materials only getting 17 out of 145 questions incorrect. (PCR Tr. p. 796). That was a large part

¹⁹ In this Court’s opinion having observed closely Dr. Knight, Dr. Knight during cross-examination appeared closed to any new information or at least would quickly discount its potential impact. One would think that some careful evaluation would be necessary to fairly respond but that appeared lacking.

of the "jobs held" and a significant responsibility that he successfully maintained. Further, the facts presented at the PCR hearing revealed that Dr. Knight misjudged the actual CDL test that Applicant took. In her report she listed a test that was taken on July 9, 1984, as a "Commercial Driver Written Examination," however, this was not a test to obtain his Commercial Driver's License. The results of the actual test for his commercial driver's license, hazmat test, and tanker test in which he was asked the 145 questions noted above, missing only 17. (PCR Tr. Vol. 1 pp. 793-796). In an attempt to show some error, Applicant suggested that perhaps someone helped him with the test or helped him with his duties. That is not evidence. That is speculation. That cannot carry his burden of proof, and to rely on such speculation further undermines the opinion.

Dr. Gordon Brown, retired psychologist from the South Carolina Department of Disabilities and Special Needs, examined Applicant prior to trial and determined that he was not intellectually disabled. It was his testimony that the trial court relied upon in great measure and was the apparently catalyst for Dr. Calloway to adjust her presentation at sentencing. During the PCR hearing Dr. Brown testified that he changed his mind concerning his previous diagnoses, stating that he believes the Applicant is intellectually disabled. Dr. Brown came to this conclusion solely from review of the Knight report. (PCR Tr. Vol. 2 p. 25). Dr. Brown stated that he was not aware of the amount of the Applicant's diminished adaptive functioning, which, he contended, was made clear by the report of Dr. Knight. (PCR Tr. Vol. 1 pp. 1035, 1036, 1037). However, in this Court's opinion Dr. Knight's report is not complete because there are some critical interviews in Applicant's possession that were inexplicably not made available to Dr. Knight. (PCR Tr. Vol. 1 pp. 756, 757, 758, 768, 790, 840).

Dr. Robert Nelson, a psychologist, was called to testify during PCR. He had worked in many schools, and was notably employed by the Greenville County School District to assist their

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psychologist to “better understand compliance with the IDEA Special Education Law related to emotional and behaviorally disturbed children.” (PCR Tr. Vol. 4 p. 6). Dr. Nelson explained the three different categories of special education classes: inclusion, resource, and all-inclusive. (PCR Tr. Vol. 4 p. 38) The “adjunct” classes at the time Applicant was in school would fall in the area of “resource classes,” meaning additional “one-on-one training or group training.” (PCR Tr. Vol. 4 pp. 38-37). That is different than “all-inclusive” or “[s]elf-contained classes ... that are totally separate ... and typically populated by individuals with intellectual disability ... at various levels of severity.” (PCR Tr. Vol. 4 p. 39). Similarly, Ms. Judy Shields, a teacher that once taught Applicant, explained that special education classes were different than adjunct classes. Special education students had to be tested by the school psychologist they were not a part of her adjunct students. (PCR Tr. Vol. 3 p. 8). This Court finds Dr. Nelson testimony and Ms. Shields’ testimony credible in light of their knowledge and careful explanation of terms.²⁰

²⁰ Though in post-trial briefing Applicant urged this Court not to credit Dr. Nelson’s testimony on intellectual disability, because he does not work with *Atkins* claims and because another court discounted his testimony in another, separate case based on not personally evaluating the individual for intellectual disability, (*see* Applicant’s Post-hearing Reply Brief, at 7 n. 6), this Court disagrees. This Court finds a heightened credibility of Dr. Nelson’s testimony precisely because the great majority of his work is based in non-*Atkins*, *i.e.*, non-death penalty cases. These cases require a backwards looking review, attempting to assess school record and other development period information mostly without much guidance from the creator of those records, and the outcome affects a criminal sentence, not treatment or benefits. Dr. Nelson’s credentials, on the other hand, demonstrate significant, relevant education and school psychologist experience. (PCR Tr. Vol. 4 p. 5-6). Thus, his work and opinions have affected actual treatment and/or placement of children with special needs or “mental health disorders” in the developmental period. (PCR Tr. Vol. 4 p. 6). Dr. Nelson is uniquely qualified to consider school records and testing. Further, he testified that he has done “several hundred” psychological assessments. (PCR Tr. Vol. 4 pp. 8-9). This Court finds his testimony credible and interprets his testimony with a focus on the area in which he has specialization – educational and developmental evaluations. He also has a wealth of educational knowledge and experience, not only in school focused practice, but also psychopharmacology and criminal forensic psychology. (PCR Tr. Vol. 4 at 13). This, too, bears on the credibility of his opinions.

There were also numerous important factors related to diminishing cognitive functioning of Applicant's mental state that occurred during and after the developmental period causing a lowering of Applicant's I.Q. score. An overwhelming majority of the people referenced in Dr. Knight's report were interviewed at the trial level, and the identical statements regarding adaptive functioning can be found in Dr. Calloway's report. There were also individuals that spoke to Ms. Richards-Baker or Dr. Calloway *not made available* to Dr. Knight for her examination. Applicant has argued that these witnesses offered cumulative or irrelevant evidence. However, in reviewing the trial testimony and affidavits submitted, the Court finds that many of these witnesses had firsthand knowledge Applicant's mental abilities and could have given Dr. Knight great insight into Applicant's adaptive functioning, the second prong that must be satisfied in order to determine intellectual disability according to the DSM-5.

During her PCR testimony Dr. Knight testified that she never spoke to Shirley Wofford, Norm Hooper, James Hatter, or Mary Unis, all witnesses for the Applicant during the penalty phase of his trial. (PCR Tr. Vol. 1 pp. 756, 757, 758). Dr. Knight was never given the interview memo of Mr. Rick Bagwell, who worked with the Applicant and who stated in his memo, "Ricky was plenty smart enough to function." "That Ricky wasn't' pretty much different from any other truckers." (PCR Tr. Vol. 1 p. 768). Dr. Knight was not given the interview memo of Neal Walters an individual who worked with Applicant at Jacobson. In the memo, Mr. Walters stated, "he did not see Ricky as slow." He stated that "Ricky had to read the order and match it to the merchandize and then pulled that merchandise," and he did well. Notably, this was in a chemical warehouse requiring care. (See PCR Tr. Vol. 1 p. 790).

Dr. Knight also contacted doctors in an attempt to address potential arguments regarding the effects of chemotherapy drugs or concussions on his intellectual abilities. However, she never

addressed the chronic marijuana abuse that Applicant admitted to smoking daily for over a decade, the alcohol abuse, nor the Hodgkins disease. (PCR Tr. Vol. 1 pp. 810, 815).

Dr. Knight also did not address the COPD the Applicant was suffering from. Applicant argues that there was no evidence that COPD or adolescent drug use decreases cognitive function. However, even witnesses called by Applicant disagree. Dr. Corvin and Schwartz-Maddox testified COPD could cause some effect in brain functioning. (PCR Tr. Vol. 1 pp. 838, 819, 391, 972).

There was evidence presented that the amount of damage that the Applicant did to his body during and after the developmental period led to a substantive decline in his cognitive functioning. Respondent's expert witness Dr. Robert Nelson testified that an I.Q. test conducted after the developmental period should not be considered, because too many things that Applicant did to himself that can affect the brain during its development and after it has been developed that will lower I.Q. scores. (PCR Tr. Vol. 4 pp. 49-50). Dr. Nelson also discussed how the chronic use of drugs can be an intervening factor in an I.Q. test when those drugs are taken during the developmental period. And smoking marijuana everyday would have been considered chronic. (PCR Tr. Vol. 4 p. 49). This is consistent with the fact the DSM-5 does not allow I.Q. scores to be the only measure to determine deficits in intellectual functioning.

In sum, this Court does not find credible or persuasive Dr. Knight's opinion, or Dr. Brown's opinion based on the infirm Knight opinion and report. During the Applicant's trial as well as during this PCR hearing, Applicant failed to present sufficient evidence to satisfy the burden of proof to be determined intellectually disabled.

Thus, this Court finds and concludes that trial counsel was not ineffective in the presentation of their *Alford* claim during the initial trial. Further, could counsel be deemed

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deficient in their investigation, Applicant has not shown a reasonable probability of a different result by virtue of his PCR presentation. Applicant has failed in his burden of proof.

Applicant is due no relief and this Court grants none.

11(b)(2) and (7)

As found by the Supreme Court in the direct appeal, the trial judge did not rely on stereotypes nor deviated from clinical consensus and practice to determine that Applicant was not a person with intellectual disability; Applicant has shown no basis on which counsel should or even could object.

Applicant is unable to meet his burden under *Strickland*, as the Record does not support that the trial judge relied on stereotypes. Stated differently, Applicant has failed to show a basis for objection. The trial judge made a detailed consideration of the evidence, guided by the facts and the medical standards. Further, the allegation of trial court error was raised – and rejected – in the direct appeal based on a review of that detailed ruling:

Initially, we note the trial court correctly identified and made its determination applying the statutory definition of “mental retardation.” Moreover, contrary to Blackwell’s claim, the trial court did not base its decision solely on the fact that Blackwell was able to successfully obtain a commercial driver’s license and be employed as a truck driver. The court relied on other factors, including Blackwell’s school performance and full employment history. Additionally, the court explained why it gave greater weight to Dr. Brown’s report, noting that the report was directed at an evaluation of Blackwell’s “formative years” and was consistent with the “functional adaptations” required by the statutory definition of “mental retardation.” The court also discounted some of Dr. Calloway’s findings as it questioned whether “adequate information” was used and believed Dr. Calloway improperly “made subjective determinations concerning the results obtained and weighted responses of various informants differently.”

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We also find the trial court’s factual determinations are supported by evidence in the record. Admittedly, it is concerning that Blackwell, at 54 years old, scored 63 and 68 on the I.Q. tests given in preparation of the *Atkins* hearing. However, in terms of

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“significantly sub-average general intellectual functioning,” the trial court readily acknowledged the recent I.Q. scores but was persuaded by evidence that: (1) Blackwell, *prior to the age of 18*, scored between 68 and 87 on standard school I.Q. tests; (2) Blackwell made “reasonably sufficient grades during his school career”; (3) at the age of 18, Blackwell was found to read at the 5.8 grade level, completed arithmetic problem solving at the 6.6 level, and completed arithmetic computation at the 5.2 level; and (4) Blackwell dropped out of high school in the eleventh grade despite having earned significant credits toward graduation.

The court also recognized that Blackwell’s recent I.Q. scores may have been caused by events in his adult life that adversely affected his current cognitive ability. For example, the court accurately referenced the fact that Blackwell received chemotherapy for Hodgkin’s Lymphoma in 1986, had an accident in 2003 or 2004 while riding a four-wheeler which rendered him unconscious for approximately 15 to 20 minutes, had several major depressive episodes that resulted in involuntary commitments in 1990 and 2008, and was taking Thorazine, an anti-psychotic medication, at the time of his *Atkins* evaluation.

With respect to Blackwell’s adaptive behavior, the court found “no evidence that he was unable to function at his home during the time before his eighteenth birthday.” Although the court acknowledged evidence that Blackwell had difficulty living independently after the dissolution of his marriage, the court declined to find this translated into deficits in Blackwell’s adaptive behavior. Rather, the court accepted the testimony of Dr. Calloway that Blackwell’s major depressive episodes after the separation were the cause of Blackwell’s inability to function normally. The court also found that Blackwell adapted to life well as he was able to achieve his goal of becoming a commercial truck driver, maintain employment with consistent increases in his earnings, and raise two children during his twenty-six-year marriage. Additionally, the court found significant the fact that Blackwell was never diagnosed with mental retardation until the *Atkins* issue was raised and also noted that Dr. Harrison, who evaluated Blackwell as to his competency to stand trial, reported no finding of mental retardation.

After thoroughly reviewing the record, we conclude Blackwell has not shown the trial court committed an error of law or that its decision is unsupported by the evidence or against its preponderance. Accordingly, we find the case properly proceeded as a capital trial.

Blackwell, 420 S.C. at 141–43, 801 S.E.2d at 720–22.

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Further, the Court found the trial judge “correctly identified and made its determination applying the statutory definition of ‘mental retardation’” and “correctly considered Blackwell’s adaptive functioning using the current clinical standards presented by the medical experts.” *Id.*, at n. 11., 420 S.C. at 141, 801 S.E.2d at 720 and n. 11.

Applicant argues again that the use of the fact that he passed the test to obtain his CDL license demonstrated an opinion based on stereotypes. As our Supreme Court has already found, the analysis was much fuller. The trial judge properly reviewed the evidence presented as shown in his comprehensive, 14 page order issued on February 25, 2014. (Return Attachment, Supp. R. 1-14). As to the licensing issue, Applicant’s work history was not even mentioned until page 8 of the 14-page Order. (Return Attachment, Supp. R. 1-14). That reference was not simply to driving a truck, but consideration of Applicant’s stated goal of becoming a truck driver and his accomplishment:

... Within five years of leaving school he had achieved his vocational goal of getting his commercial driver’s license and gotten a job driving trucks. He seems to have realized that goal in the early 1980’s. In doing so, Blackwell was required to take and pass the exam for a Commercial Driver’s License. Also, he took and passed the additional exam to obtain his license to drive tankers of hazardous materials. Those exams require extensive reading writing and practical skills. A commercial driver must be able to not only operate a truck, but is responsible for being able to perform inspections of his vehicle and recognize defects in the vehicle for safety purposes.

14. Mr. Blackwell drove trucks for KNS Trucking, Hess Corporation, and Belue Trucking. The record related by Dr. Brown indicates that Blackwell was cited for such work-related problems as failing to keep proper logs, letting family members ride in a leased truck and failing to come to work on one occasion. Also, it appears that he may have been terminated by Hess and Belue for accidents, but it was not shown to this Court that they were at-fault accidents of Mr. Blackwell. Also, those employers later rehired Blackwell. Blackwell reported that he traveled while driving a commercial truck as far west as El Paso, Texas and as far north as Canada. In a

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job application, Blackwell wrote that he had experience in driving semi-tractor-trailers, and tanker trucks in several other states which included Texas, Oklahoma, New York and New Jersey.

15. His work history was interrupted by a diagnosis of cancer. As a result of the disease and its treatment he was out of work from 1987 to 1997.

16. Blackwell returned to work in 1998 with Springs Industries as a forklift driver.

(Supp. R. 8-9).²¹

The trial judge went on to describe income reported during Applicant's work history, and his family relationships, noting his former wife, Angie Davis,²² "handled the management of the household by paying all the bills and writing all the checks." (Supp. R. 10).²³

The trial judge also considered evidence of school performance ("made reasonably sufficient grades during his school career")²⁴; though ranked 113 out of 113 in his class, Applicant had dropped out and may have received a succession of zeros; had four I.Q. tests before age

²¹ See *Com. v. Hackett*, 99 A.3d 11, 34-35 (Pa. 2014) (criticizing evaluation failing to consider work skills); *United States v. Williams*, 1 F.Supp.3d 1124, 1164-67 (D. Hawai'i 2014) (finding credible an expert's testimony crediting defendant's work and accomplishments, including being able to drive long distances, as evidence of adaptive functioning not consistent with mental retardation and criticizing another expert's failure to consider "real world functioning").

²² Ms. Davis declined to speak with defendant's expert, (see R. 4051, lines 13-22), and the Court's expert considered contact with Ms. Davis but cited concern over "ethical issues" of reaching out to her, (R. 4218- 4219). At any rate, neither expert spoke to Ms. Davis as a person who possibly could have "provided some really useful information." (R. 4218).

²³ The defense admitted that they failed to turn over all evidence to Dr. Brown as they were ordered to do. (R. 4256- 4258). This shows more material was gathered than what Counsel wished to share with the State. One may reasonably assume that such evidence was not supportive of Applicant's intellectual disability claim.

²⁴ See R. 4047, lines 3-14 (Dr. Brown's testimony that appellant had the required unit numbers needed to be on track for graduation).

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eighteen, which reflected 68 (first grade); 87 (third grade); 86 (sixth grade); and 72 (ninth grade)²⁵; and, that after the age of eighteen he had had a head injury from an accident and had been treated for cancer and depression with strong drugs which may have impacted intellectual functioning (later testing near time of trial showing 63 and 68). (Supp. R. 6-7). Accordingly, the Records support that the trial judge's assessment of Applicant's intellectual capacity did not deviate from the clinical consensus. When a trial court's determination is properly based on the weight and validity of two competing expert opinions, what possible grounds did Defense Counsel have to object?

The thoroughness of Judge Couch's order, supplemented by the conclusion reached by our Supreme Court in the direct appeal, leaves little doubt that the evidence supported the determination that Applicant failed in his burden of proof. The decision was not based on stereotypes but was instead based on facts in evidence *and* clinical standards. *See Commonwealth v. Flor*, 259 A.3d 891, 923–24 (Pa. 2021) (“The examples of Appellant’s abilities cited by the PCRA court were not offered to discount or offset scientific conclusions of Appellant’s deficits, but to illustrate that the experts often neglected to consider all sources of information in forming their opinions. The court did not offer examples of adaptive strengths to offset established adaptive deficits, but to illustrate the credibility issues with some of the information relied on by Appellant’s experts in determining the existence of a particular deficit in the first place.”). Applicant has failed to show either deficient performance or prejudice regarding an objection to these matters.

²⁵ Though the witnesses and the parties referred to these as I.Q. tests, there was some question as to whether they were more general scholastic tests. Dr. Calloway did not discount these scores entirely as Applicant would argue should be done; rather, both Dr. Calloway and Dr. Brown indicated they could be considered as broad indicators. (See R. 3874; 4183). In fact, Dr. Calloway depended on school testing in opining family members had indicators of mental retardation. (See R. 3872– p. 3875, appellant’s father’s I.Q. test from school scores indicated as 60; appellant’s brother school test scores indicated 73 and 74; appellant’s daughter’s school scores at 57 and 71).

Applicant attempts to rely upon *Moore v. Texas* in a strained attempt to cast doubt on the conclusions reached by the trial court. See *Moore v. Texas*, 581 U.S. 1 (2017) (*Moore I*); and *Moore v. Texas*, 586 U.S. 133 (2019) (*Moore II*). *Moore I* was an opinion specifically targeted toward Texas's use of non-clinical, court created tests, for determining intellectual disability in capital cases. See *Moore I*, at 5-6 (holding that the *Briseno* factors adopted by Texas Court of Criminal Appeals, for evaluating an *Atkins* claim, are based largely on superseded non-medical standards that create an unacceptable risk that a person with intellectual disabilities will be executed). There the Court held that "adjudications of intellectual disability should be 'informed by the views of medical experts.'" *Id.* (citing *Hall v. Fla.*, 572 U.S. 701, 721 (2014)). *Moore II* was an error correction again targeted to Texas's continued use of arbitrary factors in intellectual disability determinations and an overall disregard of the Court's opinion in *Moore I*. See *Moore*, at 138-139. This does not readily translate to precedent that is directly on point here. But even so, our Supreme Court considered the more general teachings of *Moore* and determined there was no error by the trial court:

Here, the trial court made no reference to the impermissible *Briseno* factors. Furthermore, given the fact that Blackwell's I.Q. scores were at the lower end of the spectrum, the court correctly considered Blackwell's adaptive functioning using the current clinical standards presented by the medical experts. The court, as required by *Moore*, carefully considered and weighed Blackwell's adaptive strengths against his adaptive deficits. While the dissent may believe the trial court overemphasized Blackwell's adaptive strengths, any significance assigned to these adaptive strengths was based on the court's assessment and credibility determination of the expert testimony.

Blackwell, 420 S.C. at 143, 801 S.E.2d at 721 n. 11.

Notably, though *Moore I* and *Moore II* provide a glimpse into what is permissible under *Atkins*, specifically that courts should rely in large measure on clinical standards, that is not a

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direction that the courts must *accept* all clinical opinions without challenge. *See Moore*, 581 U.S. at 13 (“the views of experts’ do not ‘dictate’ a court’s intellectual-disability determination” however, “the determination must be ‘informed by the medical community’s diagnostic framework’”) (quoting *Hall v. Florida*, 572 U.S. 701, 721 (2014)). At its heart, *Atkins* remains a legal decision.

Additionally, Applicant misuses the concept of “stereotypes” in this context by substituting generality for a proper argument based on a critical assessment of facts. For instance, it would be relying on a general stereotype to reject intellectual disability because a defendant’s records reflect gainful employment. Employment itself neither contributes nor detracts from finding of intellectual disability. What properly supports a determination of intellectual disability would be critical analysis of weaknesses exhibited throughout the defendant’s employment, that below-the-surface analysis, to determine adaptive functioning, *i.e.*, was the individual timely and prompt, was he responsible, did he assert management qualities, etc. In short, generalities neither contribute nor support the finding of intellectual disability. Applicant’s mere reference to “stereotypes” is insufficient to challenge the trial court’s thoughtful consideration of two competing clinical opinions with supporting factual basis. Returning to the licensing issue brings this distinction into sharp focus.

In the appeal, Applicant argued the trial court rested almost entirely on the fact of the driver’s license, *see Blackwell*, 420 S.C. at 141, 801 S.E.2d at 720, but the trial court actually heard this evaluation from Dr. Brown:

“It is difficult for many intellectually disabled persons to pass the examination to get a regular driver’s license, and it would be very difficult for someone who is intellectually disabled to pass the written test or the practical test to obtain a commercial license. Mr. Blackwell passed the examination including additional tests for a

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tanker, for hazardous materials (he said in interview he had to take that part twice to pass), and for combination vehicles.”

(R. 4446-4447).

The trial court did not use a stereotype, rather, the court critically considered the facts. Applicant has failed to show any stereotype dependence, thus, has shown no cause for counsel to object. Consequently, Applicant has failed in his *Strickland* burden of proof.

Applicant is not entitled to any relief and this Court grants none.

11(b)(3) Trial counsel did present through their experts that some of the purported I.Q. scores during the developmental period were not legitimate thus were not ineffective either in investigation or presentation on this point.

Applicant next alleges that counsel was deficient in failing to adequately discredit I.Q. scores that reflected Applicant’s higher intellectual capacity. The Record supports that counsel, utilizing qualified experts, investigated the I.Q. tests administered to Applicant during his grade school years, and attempted to rebut their veracity. Counsel presented evidence to the trial judge, and subsequently to the jury, which Counsel offered as supportive of the claim of intellectual disability. Specifically, Defense Counsel retained Dr. Ginger Calloway. Dr. Calloway, after evaluation, opined Applicant was intellectually disabled. *See Blackwell*, 420 S.C. at 137–38, 801 S.E.2d at 718 (“Ginger Calloway, a forensic psychologist who was offered by the defense, opined that Blackwell met the definition of ‘mental retardation’ because he exhibited: sub-average intellectual ability based on his I.Q. scores; significant deficits in adaptive functioning such as communication, home living, social interaction, self-direction, and functional academics; and that these deficits existed prior to the age of eighteen....”).

During the examination of Dr. Calloway at the *Atkins* hearing, Counsel referenced several tests administered to Applicant during his grade school years which reflected an I.Q. level higher than that required for intellectual disability. Dr. Calloway acknowledged the test but stated, “[i]t’s

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used to go at IQ, but it's a group administered test, and group measures of IQ are typically not as accurate as individually administered measure of IQ." (R. 3872). Later, in regard to another similar test, Dr. Calloway testified "it's considered a measure of general aptitude, but that can include achievement as well. So, no, it's not strictly speaking an intelligence test that you would use for placement purposes." (R. 3891). During cross-examination the State cited these same tests. Dr. Calloway again responded on behalf of the defense, "this is still a measurement of mental maturity, i.e. achievement, not so much an individually administered IQ test." (R. 4003-4004).

She went even further in her assessment of these tests during the States recross examination.

. . . The Short Test of Mental Maturity is a measure of cognitive ability. That is not equal to IQ and intellect despite the fact that an IQ score is reported.

[. . .]

At one point in the development of IQ tests, and the Binet uses a mental age to talk about IQ test or did, mental age - - IQ was calculated as mental age over chronological age.

Okay. That's not how it's calculated any longer because we have more sophisticated statistical way of figuring out IQ scores.

(R. 4118-4119).²⁶

²⁶ Further negating a finding of prejudice, at trial, Dr. Brown, provided a similar assessment to that reached by Dr. Calloway:

Well, again, I think that goes back to what's been discussed in previous testimony regarding the fact that those are not really IQ scores. They're more measures of scholastic aptitude, more measure of achievement. They can be roughly equivalent to an IQ score, but as a psychologist, I can't say that I would trust these scores of I think 86 and 87 as being necessarily an indication that he would not be [intellectually disabled].

(R. 4183).

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Dr. Calloway provided similar testimony to the jury during the penalty phase of trial. She testified that the "I.Q. tests" administered to Applicant and family members during grade school were not clinically accurate I.Q. determinations. (R. 2840-2842). She reiterated this conclusion to the jury during the defense's presentation of Applicant's school records.

The, the — he was given some — many, many measures of, of — there's some measures of mental maturity, which are not the same as individually administered IQ tests, but they do give us some rough idea of where he might fall within these ranges that I've been talking about, the lower two percentile of functioning.

[. . .]

So, we wouldn't give them the weight, those measures that report IQ, we wouldn't give them the kind of weight that we would give to a Wechsler Test or there's another test called the Stanford Binet that's also an individually administered scientifically recognized measure of IQ, but we, but we look at them. We, we look at them and we try to determine, you know, do they give us any indication that he had an impairment in the area of functional academics.

(R. 2847-2850).

Further, she made additional assertions throughout her testimony to the jury. (R. 2861-2862) ("It's a, it's a [sic] - - more like an academic [sic] achievement or mental maturity. Mental maturity tests don't measure the same thing as an individualized IQ test.").

Despite Applicant's claim, the Record supports that Defense Counsel adequately investigated and presented evidence to assert that these particular test scores were not individualized measures of general intellectual functioning equal to formal I.Q. testing. *See Skeen v. State*, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

Applicant also raised an argument in the direct appeal regarding the use of school testing in consideration of the claim of intellectual disability. Applicant overstated that the scores should

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not be considered at all. Again, the details and context were important and considered.

Respondent made the following observation in the Final Brief of Respondent:

Though the witnesses and the parties referred to these as IQ tests, there was some question as to whether they were more general scholastic tests. Dr. Calloway did not discount these scores entirely as appellant would argue should be done; rather, both Dr. Calloway and Dr. Brown indicated they could be considered as broad indicators. (See R. 3874, lines 12-18; 4183, lines 10-17). In fact, Dr. Calloway depended on school testing in opining family members had indicators of mental retardation. (See R. 3872, line 1 - 3873, line 9, appellant's father's IQ test from school scores indicated as 60; 3874, lines 12-18, appellant's brother school test scores indicated 73 and 74; 3875, line 11 - 3876, line 5, appellant's daughter's school scores at 57 and 71). Additionally, Dr. Harrison also considered the school testing scores though she acknowledged that any score could have been incorrect. (R. 3797, lines 15-21; 3800, lines 4-20; 3809, lines 5-11; 3821, line 13 - 3822, line 13). In regard specifically to appellant's testing, Dr. Harrison noted that it would not be unusual to begin school with a depressed IQ if not intellectually stimulated at home, and the following year have a significant leap, which is indicated in appellant's record, and is not indicative of mental retardation. (R. 3786, lines 1-10).

Appellant's attempt to cast the testimony as an agreement of evidence for "prong one" is incorrect, (see FBOA, p. 44), as the relevant determination is not present day, but that manifested before the age of eighteen. Appellant must continually admit that he focuses only on current evidence not conducive to finding agreement in the relevant developmental period. (See, for example, FBOA pp. 44, 49, 64 and 75). As Dr. Brown testified, "[t]he age of onset has to be prior to the age of 18 or in the developmental period," therefore, "we have to go back and look at what records are available, and for most people, it's going to be school records when we can get them. That's going to give us the most useful information in that regard." (R. 4189, lines 10-22).

(Attachment 3, pp. 79-80 n. 29).

This Court finds this argument persuasive. Further, our Supreme Court considered the scores within context of other evidence, concluding the trial court's findings were "supported by the record" at trial:

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...Admittedly, it is concerning that Blackwell, at 54 years old, scored 63 and 68 on the I.Q. tests given in preparation of the *Atkins* hearing. However, in terms of “significantly sub-average general intellectual functioning,” the trial court readily acknowledged the recent I.Q. scores but was persuaded by evidence that: (1) Blackwell, prior to the age of 18, scored between 68 and 87 on standard school I.Q. tests; (2) Blackwell made “reasonably sufficient grades during his school career”; (3) at the age of 18, Blackwell was found to read at the 5.8 grade level, completed arithmetic problem solving at the 6.6 level, and completed arithmetic computation at the 5.2 level; and (4) Blackwell dropped out of high school in the eleventh grade despite having earned significant credits toward graduation.

The court also recognized that Blackwell’s recent I.Q. scores may have been caused by events in his adult life that adversely affected his current cognitive ability. For example, the court accurately referenced the fact that Blackwell received chemotherapy for Hodgkin’s Lymphoma in 1986, had an accident in 2003 or 2004 while riding a four-wheeler which rendered him unconscious for approximately 15 to 20 minutes, had several major depressive episodes that resulted in involuntary commitments in 1990 and 2008, and was taking Thorazine, an anti-psychotic medication, at the time of his *Atkins* evaluation.

Blackwell, 420 S.C. at 142, 801 S.E.2d at 721.

Applicant, though, continued to argue about the use of school testing scores in his petition to the Supreme Court of the United States. In response, the State summarized Applicant’s argument and set out the relevant records citations supporting the error in Applicant’s logic in the following passage from the Brief in Opposition, the contest was on the *value* of the indicators, otherwise:

Petitioner essentially argues the higher scores were misused as IQ tests. (See Petition, p. 8-9). This is an incorrect assertion. The disagreement was over the value of indicators at the relevant time – the developmental period. Both experts agreed the tests could be used for that limited purpose. The defense expert, Dr. Calloway, did not discount these scores entirely; rather, both Dr. Calloway and the court appointed expert, Dr. Brown, indicated they could be considered as broad indicators. (See R. p. 3874, lines 12-18; 4183, lines 10-17). In fact, Dr. Calloway depended on school testing in

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opining family members had indicators of mental retardation. (See R. 3872-3876, (Petitioner's father's IQ test from school scores; his brother school test scores indicated 73 and 74; his daughter's school scores at 57 and 71). Petitioner would have the Court agree they could be used when such indicators are not contrary to his position, (see Petition, p. 15), but not used if contrary. Petitioner cannot be right on both arguments. Even so, as Dr. Brown testified, the age of onset has to be prior to the age of 18 or in the developmental period," therefore, "we have to go back and look at what records are available, and for most people, it's going to be school records when we can get them. That's going to give us the most useful information in that regard." (R. 4189). Such scores are properly considered in that context.

(Return Attachment 9, pp. 13-14 n. 7).

Simply, even had the administrative testing scores been misinterpreted as I.Q. scores, that is not the only determinate for intellectual disability. As stated in the DSM-5, "deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing." *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition 33 (5th ed. 2022). In his determination, the trial judge not only used I.Q. scores but academic scores as well as Applicant's ability to pass the CDL exam with its known difficult requirements, and Applicant's specific work history instead of mere employment.

The trial court acknowledged in its order that Applicant made reasonably sufficient grades during his school career. The trial court noted that Applicant had a 90 average for Family Living for the 1st semester of his 11th grade year, and that he held a goal of being a truck driver and within five years of leaving high school he achieved that goal, correctly considering that these tests required extensive reading, writing and practical skills.

The DSM-5 provides that in order to determine a person is intellectually disabled, you may look at I.Q. scores and also other measures of intellectual functioning. This is not making a

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determination based on stereotypes but a global approach to the evidence to determine true intellectual functioning. Again, here the evidence is particularly difficult because of the backwards looking review in the absence of a finding of intellectual disability at the relevant time. Applicant fails to show a basis for objection. He fails to carry his burden of proof under *Strickland*.

Applicant is not entitled to any relief and this Court grants none.

11(b)(4) *Counsel's alleged failure in not investigating how Applicant obtained his CDL does not show ineffective assistance of counsel because this Court finds that obtaining his commercial driver's license was not the only consideration used to determine Applicant is not intellectually disabled and the evidence offered at PCR to attempt to undermine the test procedure is only speculative.*

Applicant submits a claim of ineffective assistance for failing to adequately investigate and address Applicant's acquisition of a commercial driver's license. As referenced in the above-quoted passage from the direct appeal opinion, the Supreme Court of South Carolina rejected Applicant's position on appeal that his commercial driver's license was the key to finding Applicant failed in his burden of proof. *Blackwell*, at 141, 801 S.E.2d at 72.

In short, the fact that Applicant did obtain a commercial driver's license is not, and never was the only issue or dispositive fact. At any rate, Applicant failed to show that the defense, particularly the mitigation investigator and other experts, failed to reasonably investigate this fact.

That was a large part of the "jobs held" and required significant responsibility and thought. Though Applicant relies heavily on Dr. Knight's testimony and characterizations of "rote repetition," assistance, and that he was "not very successful," (*see* Applicant's Post-hearing Brief, at 47), the facts presented at the PCR hearing revealed that Dr. Knight's characterizations miss the mark. First, she misjudged the actual CDL test that Applicant took. In her report she listed a test that was taken on 07/09/1984 as a "Commercial Driver Written Examination," however, this was not a test to obtain his Commercial Driver's License. Moreover, the requirements and resulting

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obligations belie the dismissiveness of his achievements. The results of the actual test for his commercial driver's license, hazmat test, and tanker test was telling: he was asked 145 questions and only got 17 incorrect. (See PCR Tr. Vol. 1 pp. 793-796). In an attempt to show some error, Applicant suggested that perhaps someone helped him with the test or helped him with his duties. That is not evidence. That is speculation. Further, the "not very successful" characterization is inconsistent with the very fact that she ultimately had to consider his career "a relative strength," though not necessarily inconsistent with intellectual disability. (See PCR Tr. Vol. 1 at 730-31). That cannot carry his burden of proof in this ineffective assistance claim, and, to rely on such speculation further undermines the opinion.

Again, Dr. Knight's opinion suffers from unfairly discounting facts or weighing those facts in biased fashion – a pattern repeated in her report. As this Court has stated before, the details matter. A simple driver's license achievement, this Court agrees, does not move the meter toward or away from the diagnosis much, if at all. A history of a commercial driver's license, and hazmat responsibilities, and long-distance navigation, logically moves it more to strength and ability. This Court finds Dr. Knight's eagerness to discount the information to be a significant showing of confirmation bias, thus, negatively affects her credibility. For purposes of this ineffective claim, this Court has considered the details that could be uncovered (but not the speculation offered) and finds if offered (especially in the manner Dr. Knight did so), there is not a reasonable probability of a different result. The judge and jury could properly consider the details supporting this "strength" (as Dr. Knight concedes it is), and consider those details evidence of intellect and functioning. Stated differently, this Court weighs the details as further support of not finding intellectual disability. Thus, this Court finds that Applicant failed to carry his burden of proof to show *Strickland* deficient performance and prejudice. Applicant's claim that Defense Counsel

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was ineffective for failing to adequately develop and present evidence of his alleged intellectual disability is without merit. Moreover, the general basis for this claim has been thoroughly considered at trial and on appeal.

Applicant is due no relief, and this Court grants none.

11(b)(5) *Applicant failed to prove that his depression and cancer had no demonstrable effect on I.Q. scores.*

Applicant alleges that his trial counsel was ineffective in not managing to discredit that Applicant's depression and cancer treatment resulted in his adult low I.Q. scores. Applicant is unable to show ineffective assistance in this regard as the Record supports that Counsel was aware of these factors and attempted to rebut the State's theory that either treatment was responsible for Applicant's low I.Q.

During the State's cross-examination of Dr. Calloway, during the *Atkins* hearing, the State called attention to a particular antipsychotic medication Applicant was prescribed. It thereafter sought to call into question whether Applicant's low I.Q. was not the result of intellectual disability, but instead caused by the side effects of the prescribed medication. (R. 4017-4024). The State later cited a psychotic incident in which Applicant made suicidal gestures during the time he was undergoing treatment for cancer. (R. 4070-4076). During examination of the State's expert, Dr. Brown, Defense Counsel took the opportunity to counter the questions raised by the State as to the effect depression and cancer treatment could have had on Applicant's intellectual capacity:

- Q Okay. Well, specifically you mentioned a couple of environmental factors, chemotherapy, four-wheeler accident, and alcohol and drug use, and you kind of — you seem to speculate that they could have some cause of Mr. Blackwell's
- A I'm saying they could have.
- Q And you have absolutely no evidence of that though?

- A That's correct.
- Q Okay. For instance, you didn't go and interview anybody to see if there was a change in his personality after the four-wheeler accident?
- A No, I did not.
- Q And that's a — that's common, in head injuries, to see if there's an effect with somebody, see if their, their mood or temperament has changed, for instance?
- A Correct.
- Q You could do, right?
- A Correct.
- Q And, of course, in this case, there is no evidence of any change in Mr. Blackwell after the four-wheeler accident?
- Q Not that I'm aware of, no.
- Q Right.
- And there's no evidence in the record that his IQ was affected or, or affected negatively by chemotherapy?
- A No evidence, no.
- Q Okay, or alcohol and drug use, there's no evidence that we can rely on to say that that negatively affected his IQ?
- A That's correct.
- Q Okay, so, with regard to these environmental factors, we really only have speculation with regard to did it possibly affect his IQ?
- A I would agree with that.

(R. 4195-4196).

During the penalty phase of Applicant's trial, Defense Counsel adapted its intellectual disability presentation to further attempt to discredit this theory. During examination of Dr. Calloway, Defense Counsel specifically questioned her on the possible effect Applicant's

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depression treatment, specifically Thorazine, could have on his IQ. (R. 2933). Dr. Calloway responded:

A [Y]es, he was taking it and I was concerned not because of his behavior because when someone is overdosing on or if they have too much Thorazine, it's very obvious event to a lay person. Their words are slurred. They can't walk very well. They can, they can barely keep their eyes open. You know, they're - - just look not right.

But I was concerned because it is a medication that was popular 30 years, 40 years ago, a lot — some number of years ago, and it's been replaced by earlier medications. So, I, I was concerned about it from that point of view and I wanted to ask his attorneys about it.

I did, after I was here February 19th through the 21st, I went and consulted a forensic psychiatrist about the dosage that he was on at the time and he was actually on a very low dose, according to this forensic psychiatrist, of the Thorazine. So, I looked — a dose actually lower than what children are given in inpatient facilities. So — and this forensic psychiatrist also told me some other ways in which the Thorazine is being used, so, it's not maybe quite as uncommon as I had thought, but I was concerned and I brought it to the attorney's attention.

Q Now, based on what you've been able to do and, and what you know and your consult, do you believe the Thorazine affected his scores on the WAIS-4 or any of these scores?

A I don't think so. He, he did not look overmedicated to me. What I did learn, from the forensic psychiatrist, was that he's at such a low dose that the forensic psychiatrist would of expected, if anything, that dosage of Thorazine would of helped him to be more alert than be less alert.

(R. 2833-2834).

The Record supports that Defense Counsel made a satisfactory attempt to contradict any questions raised by the State as to the effect mental health and cancer treatments had on Applicant's intellectual capacity.

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During the PCR hearing, Applicant submitted an opinion that a CT scan after a four-wheeler accident was “normal,” but that same expert indicated that there were concussion “symptoms” that lasted at least one-year, and noted, in 2020, there were confirmed deficits in executive functioning. (PCR Tr. Vol. 1 pp. 907-910). Dr. Knight testified that she consulted an oncologist on the general “type” of chemotherapy drug Applicant received and generally that would cause “short-term” issues that would clear after approximately one-year. (PCR Tr. Vol. pp. 695-696). She sought to establish that this would not have lowered his I.Q. at the time of trial. However, once again, that is not the relevant time period. It is the I.Q. during the developmental period at issue. Even so, Applicant’s presentation was contradictory and general in nature. Further, Applicant’s presentation consistently overlooked the great evidence of voluntary drug use and use of alcohol.

In contrast, Respondent presented Dr. Nelson who was also found qualified to testify as an expert in the field of psychopharmacology, the study of psychotropic medications, *i.e.*, medications prescribed for individuals with a mental health diagnosis. (PCR Tr. Vol. 4 p. 13). Dr. Nelson explained that Applicant was on two medications that were of concern as it relates to cognitive function, Thorazine *and* Benztropine. Dr. Nelson testified that he would like to know about those medications before giving an I.Q. test because it could affect the performance. (PCR Tr. Vol. 4 p. 55). Dr. Calloway considered Thorazine and spoke to another expert, but then relied on her general opinion that he did not look “overmedicated.” (R. 2833-2834). Dr. Nelson’s testimony based on his direct knowledge in psychopharmacology is credible, and there is evidence that drugs could have affected the for-trial I.Q. testing.

Also, from Applicant’s own witness, Dr. Corvin, this Court heard testimony relating to the Hodgkins Lymphoma that Applicant once suffered, and that this form of cancer can be anywhere

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and could spread to the brain. Dr. Corvin testified that though he saw no record of “brain involvement” it was possible, and he further carefully distinguished that from treatment, which he opined, “did change him psychiatrically, but I don’t think it changed him intellectually.” (PCR Tr. Vol. 1 pp. 914-917; 969-970).²⁷ He agreed, though, that the treatment, the head injury and alcohol use would impact functioning, he just considered that Applicant was already intellectually disabled and it disabled him further. (PCR Tr. Vol. 1 918). Further, he admitted that COPD, which Applicant had for approximately 6 years before the 2012 I.Q. test, can impact I.Q., as well as drug use during the development period (at least in some studies), which was also noted. (PCR Tr. Vol. 1, p. 971-972; 986; 993-994). The concession, however, is that these things can have impact. Where on the spectrum and how much is a different matter, but to the extent Applicant claims no impact, that would be contrary to concessions made.

Further, just like several of the witness interviews from the trial investigation were not provided to Dr. Knight, Dr. Corvin was not provided with an interview that reflected a major accident “the trailer jackknifed, swinging the trailer around, hitting the cab” where Applicant had fallen asleep, even though a history of “multiple concussions back to back” is notably detrimental. (PCR Vol. 1, Tr. Vol. 1, pp. 991-992). He also testified that “structural imaging” is broad, detecting “tissue disruption or death,” but does not fully “rule out” neurocognitive issues. (PCR Vol. 1, Tr. 1015). Further, Dr. Corvin admitted that Applicant’s truck accident could well be caused by use of marijuana. (PCR Vol. 1, Tr. 989-990).

²⁷ Of concern is that Dr. Corvin also testified that he did not have the records, did not “know that anybody does,” and did not speak to Applicant’s oncologist, though he also testified that he knew “some” about the treatment. (PCR Tr. Vol. 1, 1023-1024). This leaves a scattered impression that is not persuasive.

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There can be no finding of prejudice in regard to investigation of these areas of fact and potential opinions as Defense Counsel presented vast amounts of evidence in support of the early onset theory. The defense provided during both the *Atkins* hearing and trial examples of Applicant's substandard performance during grade school. (R. 3852-3853; 2812-2918). The defense presented standardized tests from Applicant's school records reflecting low I.Q. scores during cross-examination of DDSN Psychologist Kimberly Harrison. (R. 3795-3802; 3890-3902; 2861-2866). Additionally, Dr. Calloway testified to Applicant's poor performance in grade school, his enrollment in adjunct classes, and his eventual dropping out of school in the eleventh grade. (R. 3871; 3882-3883; 2851-2861). She also made reference to a basic learning exam administered to Applicant when he was seventeen years old, which indicated that he was functioning academically between a fifth and sixth grader. (R. 2855; 2867). She then correlated these to a similar test that she had recently administered which placed Applicant at a similar academic range. (R. 2868-2870). Dr. Calloway also attempted to relate several of the alleged deficits in social adaptability back to Applicant's childhood. She testified that interviews with family and acquaintances indicated that Applicant had difficulty making friends and was often taken advantage of. (R. 3927-3928).

Careful consideration of the Record does not support Applicant's claim that Defense Counsel was ineffective for failing to investigate and present evidence to the trial judge and jury that Applicant's depression and cancer treatment had no demonstrable effect on I.Q. scores. Instead, the Record would support that Counsel, through qualified experts, were aware and attempted to combat the allegation. Furthermore, the Record would does not support a finding of prejudice. Defense Counsel submitted adequate evidence of early onset, in attempt to counter the State's theory. There simply were other factors to consider. The trial judge and jury decided this

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factual matter against the defense, but Applicant shows no deficiency by counsel. Applicant has failed in his *Strickland* burden of proof.

Applicant is not entitled to any relief and this Court grants none.

11(b)(6) *Counsel did adequately inform and educate the trial judge and jury about potentially preconceived misconceptions and stereotypes related to intellectual disability; Applicant's allegation counsel failed to investigate and challenge misconceptions lacks merit.*

Applicant next faults Defense Counsel for failing to educate the judge and jury about intellectual disabilities in general. Nevertheless, the Record would support that Counsel took affirmative measures to educate both the judge and jury in regard to potential misconceptions and stereotypes. During Defense Counsel's extensive examination of Dr. Calloway at Applicant's *Atkin*'s hearing the following testimony was presented:

Q Can somebody be mild mentally retarded and drive a truck?

A Yes .

Q forklift?

A Yes .

Q Be a welder?

A Yes .

Q Get a GED?

A Yes.

Q Read?

A Yes.

Q Write?

A Yes .

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Q Write letters?

A Yes.

Q Use the telephone?

A Yes.

Q Use an ATM machine?

A Yes.

Q Have a child?

A Yes .

Q Marry?

A Yes

Q Do household chores?

A Yes

Q Cook?

A Yes .

Q Shop?

A Yes.

Q Count money?

A Yes .

Q Make change?

A Yes.

Q Buy clothes?

A Yes.

Q Dress themselves?

A Yes.

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Q Maintain hygiene?

A Yes.

Q Work?

A Yes .

Q Be a mechanic?

A Yes.

Q Be a pizza delivery driver?

A Yes.

Q Have a driver's license?

A Yes.

Q Get a CDL?

A Yes.

Q Can you rule out mental retardation by pointing to these skills and say the person's not M.R.?

A No, because that's not the way, in our profession, that we go about assessing adaptive functioning. It's not a rule out. *It's looking at the entire picture of who the person is with regard to strengths and deficits and identifying those deficits in terms of these skill areas.*

(R. 3838-3840) (emphasis added).

Immediately after, Dr. Calloway presented to the trial court a detailed analysis on how mental health professionals investigate and determine intellectual disability. (R. 3840-3845). Dr. Calloway also cautioned the court on the "cloak of competency" exhibited by individuals with mild mental retardation:

For several reasons. People who are suspected of having intellectual disability, particularly people who fall within the mild range of intellectual disability, are people who are — have sufficient awareness to know that they are not as bright, if you want to put it that way, they're not as capable, they don't have as much intellect

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as other people, and this is for — this is a shameful thing in our society not to be bright, not to be capable, it's shameful.

So, there is a — there's a way in which people who have intellectual disability, particularly people with the mild form of it, will want to cover what they, what they don't know and pretend that they do know. There's a book called *The Cloak of Competence* in which this man did a study of a number of people in California with intellectual disability, and he came up with this concept of *The Cloak of Competence*.

So, this describes the way in which, if you will, like somebody would put on a coat to cover themselves, *The Cloak of Competence* is what people with mild M.R. or mild I.D. do in order to pass, in order to look like that they are average normal people.

(R. 3845-3846).

Defense Counsel further endeavored to mitigate the fact that Applicant held a Commercial Driver's License and had a career in trucking. Through Dr. Calloway, Defense Counsel provided a comprehensive assessment of the tribulations Applicant experienced during his driving career. Dr. Calloway detailed during the *Atkins* hearing and trial the accident history and disciplinary records from Applicant's various employers. (R. 3884-3890; 2947-2948). In addition, Dr. Calloway reflected on comments made by one of Applicant's prior employers:

But Mr. Bagwell said if you could drive at all you could drive those trucks, and this is down at the latter part of that paragraph. He said later you don't need a Ph.D. or college degree to drive a truck, and he thought that [Applicant] didn't drive tanker trucks, which required a greater amount of paperwork to be completed by the driver.

(R. 3932).

Defense Counsel also took several more opportunities to educate the jury during the penalty phase about the realities of intellectual disability. Dr. Calloway began her testimony by informing the jury that individuals with mild intellectual disabilities often appear normal. She again explained the "cloak of competence" intellectually disabled individuals often exhibit in order to maintain a

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normal appearance. (R. 2826). Dr. Calloway also expressed the importance of clinical judgment in reaching an intellectual disability determination. (R. 2827-2828). Defense Counsel later offered the question on an intellectually disabled individual's ability to read to which Dr. Calloway affirmed that individuals with mild mental retardation have the capability to both learn and read. (R. 2867-2868). Similarly, Defense Counsel asked during presentation of Applicant's work history, whether the mildly mentally retarded could work. Dr. Calloway responded:

They can be - - they are in educable sorts of classes, educable classes for special ed children, and so they can be taught, and they can be taught through routines and they can be taught through assistance, and they can be - - they can work. There's no reason they shouldn't be able to work.

(R. 2876-2877).

Dr. Calloway further affirmed her belief that a mildly mentally retarded person could be trained to drive a commercial truck, a forklift, attain a commercial driver's license and to keep logs of their activities. (R. 2877). She concluded this line of questioning with the following statement:

Again, I - - you know, the, the distinguishing thing about mildly mentally retarded people is that, just by looking at them and *just by looking at some of their activities*, would not be sufficient - - a sufficient way to diagnose mental retardation because they are capable of doing many things.

(R. 2877) (emphasis added).

Applicant is unable to satisfy his burden under *Strickland*, as the Record wholly contradicts any allegation that Defense Counsel was deficient in their attempts to educate all parties on misconceptions and stereotypes. Defense Counsel took advantage of repeated opportunities to educate both the court and jury on the nature of intellectual disability and to dispel any

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preconceived stereotypes or misconceptions. Applicant has failed in his *Strickland* burden of proof.

Applicant is due no relief and this Court grants none.

11(b)(7), 11(d)(7), & 11(d)(8)

Applicant failed to show deficient performance in counsel's not objecting to the Solicitor's closing arguments regarding Applicant's alleged intellectual disability, or that Applicant did not have any remorse, as Applicant has not shown the argument was improper or that counsel otherwise would have had a basis on which to object.

Applicant claims Defense Counsel was ineffective for not objecting to Solicitor's closing arguments regarding the veracity of Applicant's intellectual disability claim and lack of remorse. Trial counsel was not deficient as the contents of the Solicitor's closing argument was appropriately confined to the Record and not overly prejudicial.

"[I]t is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." *United States v. Robinson*, 485 U.S. 25, 33 (1988). "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "[I]ts content should stay within the record and reasonable inferences that may be drawn therefrom." *Id.* at 609–10, 602 S.E.2d at 744.

In *State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975), our Supreme Court set forth the parameters that attorneys must abide by putting forth permissible closing arguments. Citing the 23A C.J.S. Criminal Law § 1107, the Court found that while closing arguments have been held improper when reliant upon personal bias or arousing passions and prejudices of the jury, there is no error if the attorney stays within the record and the reasonable inferences that can be drawn

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therefrom. *Id.* at 92, 212 S.E.2d at 590. Post-conviction relief will not be granted if an applicant cannot show both deficient performance and prejudice resulting from an alleged improper closing argument. *Brown v. State*, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009).

Applicant is unable to show ineffective assistance for not objecting because the closing argument was carefully tailored to the issues presented at trial and based on either the facts in evidence or the reasonable inferences from the facts in evidence. The defense relied heavily on Applicant's intellectual capacity during mitigation. In response the State pointed to several noted social strengths to reinforce its position that Applicant was not intellectually disabled. The Solicitor's closing argument is a clear expression of that position. In addition, the issue of Applicant's remorse was clearly before the jury.

During the PCR hearing the State called Mr. Barry Barnett, Solicitor of the Seventh Judicial Circuit. Solicitor Barnett prosecuted the case against the Applicant. Solicitor Barnett testified that he was not stereotyping in any way, that, "[I]t was just a showing the kind of defense from that standpoint. So, Dr. Galloway's testimony, all the I.Q. testing, all the evidence, showed that he was not mentally retarded or intellectually disabled." (PCR Tr. Vol. 3 pp. 21-22).

Notably, the defense presented witnesses contradicting testimony regarding Applicant's level of remorse. (*See* R. 2987 (Dr. Maddox: "He has a difficult time dealing with what he's done and he's very sad about it."); R. 3020 (Heather Bryant: "My daddy was pushed to the extinct [sic] to do what he did, and he regrets what he has done. He suffers from that everyday."); R. 3084 (Ken Rice: "The next time I went to see him he said I've - - God's forgiven me, but I can't forgive myself.")). Accordingly, the Solicitor's comments on the topic were appropriate and appropriately

confined to the record.

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Moreover, a criminal defendant is not entitled to relief based upon the closing argument of a prosecutor, unless that argument infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). *See also Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (“Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument”); *State v. Brisbon*, 323 S.C. 324, 474 S.E.2d 433 (1996) (The test of granting a new trial for alleged improper closing argument of counsel is whether the defendant was prejudiced to the extent that he was denied a fair trial). The standard in *Donnelly* is a very high standard for a defendant to meet. “ ‘[I]t is not enough that the remarks were undesirable or even universally condemned.’ ” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). *See also Parker v. Matthews*, 567 U.S. 37, 47-48 (2012); *State v. Tubbs*, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999). “In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor’s remarks but must also take into account defense counsel’s opening salvo.” *United States v. Young*, 470 U.S. 1, 12 (1985).²⁸ Further, the Supreme Court in *Donnelly* admonished that “a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.” *Donnelly*, 416 U.S. at 647.

Applying this standard to the challenged comments, it is clear that Applicant cannot show prejudice under *Strickland* because he has not proven that the challenged remarks were so

²⁸ As the Court explained in *United States v. Robinson*, 485 U.S. 25, 33 n. 5 (1988): “In *United States v. Young* and *Darden v. Wainwright*, we concluded that statements by the prosecutor which inflamed the jury, vouched for the credibility of witnesses, or offered the prosecutor’s personal opinion as to the defendant’s guilt were improper, but we held that, in context, those statements did not necessitate reversal.”

prejudicial that they deprived him of a fair trial under *Donnelly*. See 416 U.S. at 637; *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166. The Solicitor, during his closing simply referenced the fact that Applicant's intellectual and adaptive strengths undermined confidence in the defense's subjective opinion on adaptive deficits, and that the State's evidence negated any finding of remorse. Those considerations were already before the jury. Applicant is unable to meet his *Strickland* burden.

Applicant is not entitled to any relief and this Court grants none.

11(c) Applicant failed to prove that trial counsel did not adequately question prospective jurors in voir dire to identify prospective jurors with pre-formed beliefs about and stereotypes and biases against a defendant with an intellectual disability.

As with Ground 11(d)(4), Applicant has asserted that he wishes to withdraw and/or waive the allegation presented. (See Post-hearing Brief, at 92). Also like Ground 11(d)(4), there is no merit to this allegation.

Applicant alleges that Defense Counsel was deficient in failing to question and identify specific jurors with beliefs and biases against persons with intellectual disability. There can be no finding of ineffective assistance as such questions would have been beyond the permissible scope of *voir dire*. “[V]oir dire is not to be used as a means of pre-educating or indoctrinating a jury or as a means of impaneling a jury with particular predispositions.” *State v. Poindexter*, 314 S.C. 490, 431 S.E.2d 254, n. 2 (1993) (citing *People v. Hundley*, 227 Ill.App.3d 1056, 169 Ill.Dec. 399, 591 N.E.2d 903 (1992)). “While the Sixth and Fourteenth Amendments to the United States Constitution provide a defendant with the constitutional right to a fair and impartial jury of his peers, this right does not entitle a defendant to handpick a jury. The Constitution, after all, does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury.”

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State v. Stanko, 376 S.C. 571, 576, 658 S.E.2d 94, 96–97 (2008) (citing *Morgan v. Illinois*, 504 U.S. 719, 729 (1992)).

A defendant is entitled to question a prospective juror *on the general subject of mitigating circumstances*, in order to determine if such a juror would follow the instructions of the trial judge, *i.e.*, to consider mitigating circumstances. *Morgan v. Illinois*, 504 U.S. 719 (1992). However, a defendant does not have the right to question jurors whether or not they would consider *specific mitigating circumstances*, or what their opinion is of any *specific mitigating circumstance*. *State v. Hill*, 331 S.C. 94, 501 S.E.2d 122 (1998); *State v. Powers*, 331 S.C. 37, 501 S.E.2d 116 (1998); *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996). The underlying rationale for limiting such questioning is that it might cause a juror to believe that he has pledged or committed himself to a future course of action when considering evidence of such mitigating circumstances. *Powers*, 331 S.C. 37, 501 S.E.2d 116, *referencing State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252, *cert. denied* 513 U.S. 1134, 115 S.Ct. 953 (N.C. 1995); *State v. Wilson*, 74 Ohio St.3d 381, 659 N.E.2d 292 (1996); *State v. Drutzer*, 928 S.W.2d 854 (Mo. 1996); *Hill*, 331 S.C. 94, 501 S.E.2d 122; *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760 (1997).

While Applicant characterizes such questions as probing bias, in reality, Applicant would have sought for Defense Counsel to question jurors for the purpose of seeking out those who were predisposed to finding in favor of intellectual disability. This would have been improper questioning during the *voir dire*.

Moreover, the trial record and the direct appeal opinion, and Mr. McGuire's background as presented to this Court, demonstrate that counsel held experience and knowledge for careful participation in the capital *voir dire* process, and had challenged a juror that counsel assessed would not be qualified to sit on the jury. *See Blackwell*, at 144-146, 801 S.E.2d at 722-723. Applicant

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has failed to overcome *Strickland's* “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance....” *Strickland*, at 689. No relief is due.

Whether withdrawn or ruled upon, this allegation cannot support relief. This Court dismisses the claim.

11(d)(1) and 11(d)(2)

Counsel adequately investigated and presented a full range of mitigating evidence concerning Applicant’s social and life history.

Counsel adequately investigated and presented all available mitigating evidence concerning Applicant’s mental health prior to and at the time of the capital offense.

Applicant claimed that counsel’s performance was deficient for failing to investigate and present the full range of mitigating evidence, and Applicant’s mental health prior to and at the time of the capital offense. This Court finds that this is not the correct question, rather the correct question to consider is whether the investigation was reasonable. *Owens, supra*. Even so, the Record shows a broad and far-ranging investigation, not simply on the case for intellectual disability, but also regarding Applicant’s social and life history, as well as his mental health at the time of the murder, and presentation of that evidence. Counsel utilized the services of both a trained social worker and forensic psychologist for the purpose of investigating Applicant’s social and life history. Together they conducted numerous interviews with family members, friends, past employers, grade school teachers, and acquaintances. (R. 3779; 3780-3781; 3816). In addition, they collected grade school, employment, and social security records. (R. 2831-2837). They also collected and reviewed Applicant’s health and psychiatric records, and various school and mental health records for Applicant’s immediate family. (R. 2835-2838). Having gathered that information, Defense Counsel, through its qualified experts, presented a detailed accounting of

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Applicant's social and family history which was presented during both the *Atkins* hearing and at trial. (R. 3871-3890). These findings were further detailed in Dr. Calloway's report. (R. 3871).

During the penalty phase of Applicant's trial, Dr. Calloway detailed Applicant's life history dating from adolescence up until the murder. This included detailed recounting of educational and occupational history. (R. 2848-2868; 2873-2877). Dr. Calloway also listed Applicant's other family members who suffered from various levels of lower intellectual functioning and psychiatric disorders. (R. 2838-2841). As to Applicant's mental health, Dr. Calloway detailed Mr. Blackwell's psychiatric records, including his several diagnoses for depressive disorder, previous suicidal gestures and resulting psychiatric commitments. (R. 2843-2844).

In addition, during trial Defense Counsel called forensic psychiatrist Dr. Donna Schwartz-Watts (now Dr. Maddox) to testify further on Applicant's mental health history. (R. 2973). She provided additional testimony to Applicant's history of depression and prior suicidal gestures. (R. 2976-2977). She detailed how Applicant fired a gun through the roof of his trailer and was subsequently committed to a psychiatric facility. (R. 2976-2977). She also detailed a later psychotic event in which Applicant overdosed on medication in response to his wife leaving him. This resulted in him again being committed. (R. 2977-2978). Dr. Maddox also confirmed Applicant's diagnosis of depression disorder. (R. 2979). In addition, she detailed the difficulties Applicant had experienced with his physical health, including his battle with cancer, and back and blood pressure issues. (R. 2982-2984). In regard to Applicant's mental health at the time the murder, Dr. Maddox testified:

So, the only opinion I'm able to give today would be that, in my opinion, he's had a history of major depression before. He's had two episodes before when he was hospitalized, and it's clear, from looking at Doctor Jackson's records, that he remained depressed before this incident, and it clear that, since I treated him at the jail, he had symptoms of depression as well.

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So, the opinion that I could offer to you-all was that he was suffering from a major depression at that time.

(R. 2985).

Applicant argues, though, that there was not a presentation of mitigating evidence that encompassed the evidence that would have been presented by Dr. Corvin. Applicant misinterprets the reason why Dr. Corvin was not called to testify as is shown and supported by the record.

It is obvious to this Court that trial counsel did not call Dr. Corvin not because they misunderstood or overlooked what he could have said in mitigation, but to prevent the potential for other damaging information to come out – information that, without a doubt, had been shared with them for consideration. Trial counsel decided to use other witnesses such as Dr. Calloway and Dr. Maddox in order to relay identical information without the risk of exposing very damaging information to the jury. Due to the apparent strategy in this decision, Applicant is unable to maintain his burden to show ineffective assistance of counsel.²⁹ The Record supports that Defense Counsel, through its experts, conducted a detailed and adequate investigation into Applicant's history and mental health. Moreover, the Record reflects that this information was adequately utilized during defense's mitigation case.

²⁹ Again, *Strickland* teaches that “a court must indulge in a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance” and it is “the defendant [who] must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689 (quoting *Michel v. State of La.*, 350 U.S. 91, 101 (1955)). See also *Burt v. Titlow*, 571 U.S. 12, 23 (2013) (“It should go without saying that the absence of evidence cannot overcome the *Strickland* presumption). The evidence here shows that trial counsel was not deficient in investigation and was not unaware of the evidence, he just didn’t use it. That reasonably infers strategy. In contrast, “[d]ecisions made in ignorance of relevant, available information cannot be characterized as strategic.” *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014).

During the PCR hearing the Applicant called Dr. Corvin who was found qualified as an expert in the field of general and forensic psychology. During his testimony Dr. Corvin gave the opinion that when this crime was committed the Applicant suffered from an intellectual disability with adaptive functioning which was further worsened by the fact that his major depression was out of control.

While preparing for trial Dr. Corvin was contacted by Kara Richards-Baker who was the mitigating specialist that the defense hired on this case. She was familiar with Dr. Corvin's work and he was hired to evaluate the Applicant. Dr. Corvin went to interview the Applicant on November 20, 2012, in preparation for this case. (PCR Tr. Vol. I p. 975). That examination lasted over three and a half hours. (PCR Tr. Vol. I p. 975). During this examination Dr. Corvin took notes from what was told to him by the Applicant. Within those notes it states that the Applicant told him that he used marijuana from age 18 until 1993 some seventeen years. (PCR Tr. Vol. I p. 985). The Applicant told him that "he loved to smoke marijuana." (PCR Tr. Vol. I p. 985). Applicant also told Dr. Corvin that he used valium, tried powdered cocaine, and used acid once. Applicant also told Dr. Corvin that he and Angie did the bills together and that Applicant was angry because Angie was getting loans from a check cashing place. (PCR R. Vol. I Tr. p. 981-982). Applicant also informed Dr. Corvin that he was following Angie and her new boyfriend around. (PCR Tr. Vol. I p. 984). And on the day of the incident, he actually drove by the house of the child he murdered witnessing her at home with her mother. (PCR Tr. Vol. I p. 984). After this conversation, Dr. Corvin telephoned Ms. Richards and spoke for thirty minutes about this interview. (PCR Tr. Vol. I p. 976). After this conversation Dr. Corvin was not called to testify in this trial.

At the PCR hearing, Dr. Corvin opined, like Dr. Calloway, that Applicant was intellectually disabled. Dr. Corvin also discussed the fact that the Applicant was suffering from major depression

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at the time of the crime due to his break-up with his wife, (PCR Tr. Vol. 1 p. 973), a fact that was relayed to the jury through the testimony of Dr. Schwartz-Watts (now Maddox) during trial, (R. pp. 2981-2982; 2985). Thus, Defense Counsel presented a diagnosis, and the relevant medical information to the jury without the damaging information from Dr. Corvin. The defense not calling Dr. Corvin as a witness was a reasonable trial strategy.

The long-term drug use, the fact that he paid bills with his wife, along with admissions that would show Applicant followed his wife and rode by the victim's house on the day of the murder, would have been damaging to, the defense. Dr. Corvin admitted that if Solicitor Barnett was to ask him about all of the detrimental statements Applicant made to him that he would have to admit he was told all these things. (PCR Tr. Vol. 1 pp. 1005-1006). The fact the defense decided not to use Dr. Corvin when the same basic information was relayed to the jury in other ways revealed a reasonable strategy. Applicant has failed to show ineffective assistance of counsel.

Further, Applicant made a lengthy presentation from yet another mitigation specialist in the PCR hearing, Dr. Andrews – but that was merely recasting the background information and counsel, with their trial experts had already investigated and considered that information. Again, Applicant has failed to show ineffective assistance of counsel.

Alternatively, even if the decision could support deficient representation, there would be no prejudice. Indisputably, there was ample evidence presented in mitigation. The evidence in aggravation, however, was astonishingly heavy. The mere fact that he shot a child to hurt his estranged wife boyfriend is a circumstance that most jurors would find very difficult to weigh any less in face of one or two more points in a vast array of mitigation. *See Wong v. Belmontes*, 558 U.S. 15, 288 (2009) (“Schick’s mitigation strategy failed, but the notion that the result could have

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been different if only Schick had put on more than the nine witnesses he did, or called expert witnesses to bolster his case, is fanciful.”).

Applicant is not entitled to any relief, and this Court grants none.

11(d)(3) *Applicant failed to show that counsel was ineffective in failing to present character witnesses where sufficient mitigating evidence going to lack of future dangerousness, adaptability to confinement, and good character was presented*

Applicant claims that trial counsel was ineffective for failing to adequately investigate and present expert testimony regarding Applicant’s good character generally, and ability to adapt to incarceration. Evidence of adaptability to prison life can be demonstrated in a number of ways, including the provision of evidence and testimony that a defendant has been a well-behaved and disciplined prisoner in jail. *See Skipper v. South Carolina*, 476 U.S. 1, 7 n. 2 (1986). Further, “[a] defendant who alleges a failure to investigate by counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome....” *United States v. Green*, 882 F.2d 999, 1003 (5th Cir.1989).

Defense Counsel presented several character witnesses during the penalty phase of Applicant’s trial, including a pastor, former employer, a church acquaintance, Applicant’s cousin, daughter, father, and mother. These witnesses testified extensively to Applicant’s good character and gentle demeanor. Applicant’s former employer, Gail Shook, testified that Applicant was “the most gentle, humble man that I’ve ever met including my husband.” (R. 2759). Applicant’s cousin, Sherry Wofford offered that Applicant was “a loving man,” and “[j]ust as gentle, always caring about everybody, doing everything he can for anybody.” (R. 2990). Applicant’s daughter testified that Applicant was “kind, gentle, caring man.” (R. 3020). Brittany Fowler, the mother of Applicant’s grandson, described Applicant as “[v]ery kindhearted,” and stated that he “would give you the shirt off his back.” (R. 3026). Norm Uber, an acquaintance from church, described

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Applicant as a "gentle man." (R. 3031). Cletus Blackwell, Applicant's father, testified that Applicant was "a good boy," and no trouble. (R. 3037). He further iterated that Applicant did not fight others as a kid despite being larger. (R. 3038). Applicant's brother-in-law described Applicant as "a really good person," and "[k]ind and gentle." (R. 3057). Applicant's pastor provided the following testimony regarding Applicant:

Well, Ricky is - - I summarize his personality as being phlegmatic maybe, laid back, easy going, did not like to be at any conflicts. He was always smiling, had a little grin all the time, easy going, very cooperative, gentle. Just a lot of good qualities.

(R. 3072).

Moreover, witnesses repeatedly emphasized that in their opinion this murder was directly tied to the breakup of Applicant's marriage. (See R. 3020; 3035; 3060; 3086). Lastly, in regard to testimony provided by the detention officer concerning Applicant's hoarding of detergent and medication, Defense Counsel conducted a thorough cross-examination for the purpose of minimizing any judgment on Applicant's ability to adapt to prison. (See R. 2650-2652). Further, the records referenced at trial sufficiently showed very little prior by way of a prior criminal record and no record of violence. The fact that Defense Counsel did not present specific expert testimony regarding lack of future dangerousness (though, arguably, some came through Dr. Maddox's testimony), simply does not show a reasonable probability of a different result. All in all, the basic substance of the information was presented. Applicant fails in his *Strickland* burden of proof.

In the alternative, if some deficiency in representation could be found, Applicant has failed to show a reasonable probability of a different result. First, the basic facts were admitted, clearly on character, and on ability to a prison environment, even if a corrections "expert" did not tell the jury those basic facts existed. Second, the evidence in aggravation was astonishingly heavy. The mere fact that he shot a child to hurt his estranged wife boyfriend is a circumstance that most jurors

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would find very difficult to weigh any less in face of one or two more points in a vast array of mitigation. *Wong v. Belmontes, supra*.

So again, Applicant is not entitled to relief, and this Court grants none.

11(d)(4) *Applicant wished to withdraw allegations in this section alleging that counsel failed to adequately investigate and present scientific evidence that victim urinated on herself as a natural result of death. This Court grants Respondent's directed verdict motion on this issue.*

Applicant, consistent with an indication he wished to withdraw this allegation, (*see* Post-hearing Brief, at 92), failed to present any evidence in support. Further, Applicant would be unable to show that the result of the proceeding would have been different but for counsel's alleged error. *See Strickland, supra*. Whether the child urinated on herself from fear or as the death process – this Applicant undoubtedly terrorized and murdered a small child. Applicant cannot carry his burden of proof, and no relief is warranted. Whether withdrawn or ruled upon, this allegation cannot support relief. This Court dismisses the claim.

11(d)(5) *Applicant failed to show counsel was ineffective by failing to object to trial courts jury instructions.*

Applicant claims ineffective assistance of counsel for failure to object to the trial court's jury charge, specifically as to the jury's sentencing verdict. However, Applicant cannot show error in the charge given. "A jury instruction must be viewed in the context of the overall charge." *Sigmon v. State*, 403 S.C. 120, 133, 742 S.E.2d 394, 401 (2013) (quoting *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998)). "The test to determine the propriety of the trial judge's charge is what a reasonable juror would have understood the charge to mean." *Id.* (quoting *State v. Bell*, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991)).

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Applicant's reliance on *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633 (1985), and *State v. Davis*, 306 S.C. 246, 411 S.E.2d 220 (1991), to show the statutory language is facially invalid and constitutionally wrong as included in the charge is misplaced. These cases cannot afford relief primarily because it is undisputed that the trial court here plainly instructed the jury that it was the jury's decision on the sentence that was controlling. Indeed, the very reasons identified as supporting reversal in *Caldwell* and *Davis*, which are far removed from the factual basis here, well-demonstrate the flaw in Applicant's allegation of error.

In *Caldwell*, the Supreme Court found "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29, 105 S.Ct. 2633. The prosecution pointedly told the jury its sentencing decision was "not the final decision," that its "job is reviewable" and "the decision you render is automatically reviewable by the Supreme Court." *Id.* at 325-26, 105 S.Ct. 2633. Additionally, the trial judge endorsed and supported those comments in stating, "I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands." *Id.* at 325, 105 S.Ct. 2633. Concluding that "the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death," the Supreme Court vacated the death penalty:

This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its "truly awesome responsibility." In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated.

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Id. 472 U.S. at 341, 105 S. Ct. 2633. *See also California v. Ramos*, 463 U.S. 992, 1011, 103 S. Ct. 3446, 3459, 77 L. Ed. 2d 1171 (1983) (“advising jurors that a death verdict is theoretically modifiable, and thus not ‘final,’ may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers”).

Our State Supreme Court applied the *Caldwell* rule in *Davis*. The Court found reversal necessary based upon: (1) the trial court’s *refusal* to tell the jury “its sentencing recommendation would be accepted by the judge and the sentence imposed accordingly;” and (2) the observance that “nowhere in the record does the trial judge refer to the jury’s sentencing decision as anything more than just a recommendation.” 306 S.C. at 250, 411 S.E.2d at 222. To avoid any misunderstanding, the trial court here, unlike the trial court in *Davis*, actually charged the jury that it would follow the jury’s recommendation and underscored the jury’s duty:

[T]here are two verdicts that you will consider in this case as to the sentencing. One is the death penalty, which, in this state, is by electrocution, electrocution [sic] or by lethal injection, at the option of the defendant, and the other is life imprisonment without the possibility of parole. ***I will advise you that your sentencing recommendation in this case would be followed — will be followed by the Court.***

(R. 3223) (emphasis added). (*See also* R. 3250, “I will tell you now that I’m going to ask you to retire to begin your deliberations, and when a recommendation is submitted to the court, I will advise you that the court will follow that recommendation.”).

It is long been held that juries are presumed to follow the law as given in the instructions.³⁰

Applicant shows no cause to depart from that long standing principle. Critically, the trial judge

³⁰ *See State v. Dunlap*, 346 S.C. 312, 319, 550 S.E.2d 889, 893 (Ct App. 2001), *aff’d as modified on writ of cert.*, 353 S.C. 539, 579 S.E.2d 318 (2003) (*quoting Fove v. State*, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n. 1 (1999) (“A jury is presumed to [have followed the trial

here expressly informed the jury that its sentencing recommendation “will be followed” which is in sharp contrast to *Davis*. It is also completely consistent with established case law on this issue. See *State v. Sims*, 304 S.C. 409, 421-22, 405 S.E.2d 377, 384 (1991) (holding the instruction “whatever you recommend, will be the sentence that will be given to a defendant” informed the jury “that it was to make the ultimate decision as to [the defendant’s] fate.”); *State v. Middleton*, 295 S.C. 318, 325-26, 368 S.E.2d 457, 461(1988) (concluding the instruction, “the ultimate punishment of the defendant will be in your hands if you as a member of the trial jury have found the defendant guilty” told the jury it was vested with making a decision as to the defendant’s fate); *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) (“The idea should be conveyed to the jury that its sentencing recommendation will be followed.”); *State v. Linden*, 276 S.C. 304, 310-11, 278 S.E.2d 335, 338-39 (1981) (“To instruct the jury that it will recommend what sentence the convicted murderer will be given is not improper and does not mask the true nature of the jurors responsibility at this phase of trial”). It is so in other jurisdictions where the statute similarly sets out the jury recommends and the judge imposes the sentence. See, for example, *Brockman v. State*, 739 S.E.2d 332, 358 (Ga. 2013) *cert. denied* 134 S.Ct. 521 (2013) (finding, in the alternative, procedurally barred claim was without merit where “it was clear from the charge that the recommendation would be binding on the trial court”); *Treadway v. State*, 924 N.E.2d 621, 639 (Ind. 2010) (“merely referring to the jury’s determination as a ‘recommendation’—the term used in the statute—did not run afoul of *Caldwell* because there was no intimation to the jury that its recommendation was

judge’s] instructions.”); *State v. Ard*, 332 S.C. 370, 386, 505 S.E.2d 328, 336 (1998) (holding in a capital case that jurors are presumed to follow the trial court’s instructions); *State v. Pierce*, 289 S.C. 430, 346 S.E.2d 707 (1986) (finding jurors are presumed to follow the law as instructed); see also *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (holding in a capital case that “a jury is presumed to follow its instructions.”).

‘only a preliminary step’ and no suggestion that the jury was ‘not responsible’ for the ultimate sentence.”). Applicant’s allegation of ineffective assistance (or any error in regard to the charge) necessarily fails as a matter of law.

Lastly, in regard to Applicant’s reliance on *Hurst v. Florida*, 577 U.S. 92 (2016) (which was decided after the 2014 trial), and *Ring v. Arizona*, 536 U.S. 584 (2002), that reliance is misplaced. *Hurst* applied *Ring* to invalidate a statutory scheme that allowed an advisory opinion by the jury for sentencing. *Hurst*, at 99 (“As with *Ring*, a judge increased Hurst’s authorized punishment based on her own fact-finding. In light of *Ring*, we hold that Hurst’s sentence violates the Sixth Amendment.”). As noted in the parenthetical, this scheme resulted in factual determinations by the trial judge in violation of the right to a jury trial. The statute here, the case law in this jurisdiction, and the charge and sentence in this case specifically show there is no like circumstances here. Again, though the word recommendation is used, it was underscored clearly to the jury that its determination would be followed and was in fact followed in sentencing. There is no Sixth Amendment violation. Nothing demonstrates that counsel not challenging the statutory language and/or charge was “outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. To the contrary, given the established state of the law, counsel had no reason to challenge the constitutionality of Section 16-3-20, either on its face or on these facts. *See, e.g., Maryland v. Kulbicki*, 577 U.S. 1 (2015) (summarily reversing the Court of Appeals of Maryland for failing to view counsel’s representation as of the time of trial); *Harrington v. Richter*, 562 U.S. 86, 107 (2011) (finding error where “the Court of Appeals failed to ‘reconstruct the

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circumstances of counsel's challenged conduct" and "evaluate the conduct from counsel's perspective at the time."³¹ Applicant has failed in his burden of proof.

Applicant is due no relief, and this Court grants none.

11(d)(6) *Applicant failed to show either deficient performance or the required prejudice to support an ineffective assistance claim where counsel investigated and attempted to present evidence of remorse and acceptance of responsibility; however, the witnesses could not remember and this evidence would not have changed the outcome of the trial.*

The factual basis for this claim was developed at trial and addressed in the direct appeal. The Record shows that before the records custodian was called, Defense Counsel advised the trial judge of the State's objection to the substance of the testimony regarding the notes. The trial judge held a hearing on the objection outside the presence of the jury. (R. 2960, lines 18-25). Defense Counsel advised that he would present Ms. Gracie Williams, a record custodian from the Spartanburg Regional Hospital. (R. 2961, lines 4-5). He sought to introduce the notes of two hospital chaplains who spoke with appellant after his self-inflicted wound and relied upon the business records exception for admissibility. (R. 2962, lines 11-18; 2965, lines 3-5). The substance of the notes was described as follows:

... the patient was struggling with guilt, and wanted to tell his grandchildren he loved them...

...He was struggling with his actions and what had been done, and then the second indicates - - second statement . . . was sad, had some

³¹ Indeed, since its 1984 decision in *Strickland*, the Supreme Court has consistently applied the rule of contemporary assessment of counsel's conduct. See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 381, 125 S.Ct. 2456 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527 (2003); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838 (1993); *Burger v. Kemp*, 483 U.S. 776, 789, 107 S.Ct. 3114 (1987); *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S.Ct. 2574 (1986).

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prayers in his heart, asked for prayers for the family. We prayed ...
the Lord's Prayer together.

(R. 2961 , line 25 - 2962, line 2; 2963, line 24 - 2964, line 6).

The State objected noting the information was not in the nature of a diagnosis; the witnesses were available; and, lastly, the notes were more prejudicial than probative. (R. 2962, line 20 - 2963, line 4; 2964, lines 14-23). The State relied upon *State v. Burroughs*, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997), which found statements not necessary to medical treatment or diagnosis were inadmissible hearsay. Defense Counsel offered that "we interviewed the chaplains and ... [t]hey didn't have much memory actually of this event. So, their notes are actually the best evidence of it...." (R. 2963, lines 17-19). The trial judge found that the chaplain's notes were not admissible:

...I assume the pertinent portions are the parts that I discussed earlier that state the patient was struggling with guilt, grandchildren he loved them. He was struggling with his actions and what had been done, and another entry, the next Day, by a different individual said but he was sad, had some prayers in his heart, asked for the family. We prayed the Lord's Prayer together.

The case cited by Mr. Barnette does appear to be on point. Also the exception to the hearsay rule for regularly kept business records states that matters which are in the nature of an opinion will not be admitted as an exception to the hearsay rule from a regularly kept business record.

It appears that the quotes in here that describe the defendant would be in the form of opinions given by the individuals involved, and therefore, I'll grant the State's motion.

(R. 2965, line 15 - 2966, line 6).

On appeal, Applicant argued the trial judge erred in not allowing him to present his evidence of remorse. (Return Attachment 2, p. 93). Our Supreme Court disagreed. The Court

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found not only that the trial judge did not err, but even if the ruling had been error, it would only have been harmless in light of other evidence of record:

..we find the trial court correctly excluded the document as it contained inadmissible subjective opinions and judgments, in particular the notations that Blackwell was “struggling with guilt” and “struggling with his actions.”

Nonetheless, even if the trial court erred in excluding the chaplains’ notes, we find the error harmless as the evidence was cumulative to other evidence in the record of Blackwell’s remorse. *See State v. Northcutt*, 372 S.C. 207, 221, 641 S.E.2d 873, 881 (2007) (“Although it was error to exclude the letter written from Appellant to Ms. Northcutt expressing remorse, the error was harmless. The record contains evidence of Appellant’s remorse. Appellant was not prejudiced, nor was the outcome of the trial affected.”).

Specifically, as mitigation evidence, Blackwell presented: (1) Dr. Donna Schwartz-Watts, a psychiatrist who evaluated Blackwell, who testified that “[i]t’s very hard for [Blackwell] to accept what happened and what he’s done,” and “he’s very sad about it”; (2) Heather Bryant, his daughter, who testified that “he regrets what he has done” and “suffers from that every day”; and (3) Ken Rice, his pastor, who testified that Blackwell told him “God’s forgiven me but I can’t forgive myself.”

Blackwell, 420 S.C. at 160, 801 S.E.2d at 730–31.

During the hearing both Reverends Moon and Hesse testified. They both did not remember if the Applicant told them if he was ever sorry for what he done. (PCR Vol 1 T. p. 1238-1239).

In short, whether counsel erred or not, Applicant has failed to show a reasonable probability of a different result. However, the Record supports that Applicant failed to carry his *Strickland* deficient performance burden of proof.³² Defense counsel explained their reason for not calling

³² As noted above, several witnesses were introduced during the penalty phase who testified to Applicant’s remorse. (Dr. Maddox: “He has a difficult time dealing with what he’s done and he’s very sad about it.”); R. 3020 (Heather Bryant: “My daddy was pushed to the extinct [sic] to do what he did, and he regrets what he has done. He suffers from that everyday.”); R. 3084 (Ken

the witnesses – they possessed little to no memory of the counseling they had provided. Thus, counsel had specific, reasonable cause not to present the witnesses. This informed decision does not support any finding of deficient performance. *See Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992) (Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel).

During the PCR hearing trial counsel for the Applicant Mr. William McGuire testified. During his testimony he stated:

“I thought the notations in the record was good – were good. And my recollection, my recollection is in talking to Kara that I got more of a feeling that their memories were a little fuzzier than maybe her memo made out to be. For instance, one of the chaplains said, even though the medical records said they prayed the Lord’s prayer together, I think in the interview she didn’t remember that, but said well, if its on the record, I probably did. So I thought – my recollection is that their memory was fuzzier than maybe Kara’s memos would indicate.”

(PCR vol. 1 Tr. p. 310-311)

Trial counsel made a judgment call (one well supported by his knowledge of the facts) not to put those witnesses on the stand because at the time of trial they had no recollection of the events – as they do not know. Applicant has failed to carry his burden of proof.

Applicant is due no relief and this Court grants none.

Rice: “The next time I went to see him he said I’ve - - God’s forgiven me, but I can’t forgive myself.”).

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11(e) Applicant's allegation of false evidence based on Investigator Williams testimony fails. There has been no showing of any false evidence presented. Further, Investigator Williams was never found to have committed any wrongdoing, and the matter alluded to in Applicant's argument occurred after trial. There is not even sufficient evidence to show some impeachment value. Applicant's right to due process was not violated.

Applicant has failed to show any evidence indicating that the testimony given by Investigator Williams was false, much less that the State was aware of such falsity. The claim, as presented, does not rise beyond mere speculation. See *Glover v. State*, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). During his PCR testimony Solicitor Barnett explained the situation regarding Investigator Williams. Within his testimony Solicitor Barnett stated:

"In 2018, he was let go by the sheriff's department. There was a letter sent out. We received a copy of it. I thought abundance of caution that I needed to let the defense bar know, obviously. From there--there was kind of indication that he may have falsified or gave false information on the search warrant for an affidavit. So, we released the --- I think we sent a copy to the Attorney Generals office so you could forward to them in this case."

"What I did was I referred the case out. There was a SLED investigation done. Basically, the first circuit reviewed this. They didn't find any false information from what I understand from reading this letter. Now I wasn't involved in the investigation, I didn't talk to anybody I just tell you what the findings was on the letter that we received."

Q. They didn't prosecute Mr. Williams for making a false statement on the search warrant in 2018?

A. Right.

(PCR Tr. Vol. 3 pp. 31 l. 24 – p. 32 l. 25).

Simply, on the matter Applicant alludes to, after investigation, Investigator Williams was not prosecuted at all. At any rate, the event referenced as possible impeachment – and it could

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only be impeachment if anything at all since it has no connection whatsoever to the facts and investigation of the murder of the eight-year old victim in this matter – occurred in 2018 well after his testimony in the present case. This allegation has no merit.

Applicant is not entitled to any relief, and this Court grants none.

11(f)(1) The allegation that appellate counsel failed to adequately raise and brief all legal and factual grounds has not been proven by the Applicant, nor has Applicant shown prejudice. Appellate counsel raised all relevant issues pertaining Applicant's trial as determined in Appellate counsel's professional opinion.

Contrary to Applicant's allegation, the records before this Court confirm that Appellate Counsel adequately raised and briefed the issue of Applicant's intellectual disability. "Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel." *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) (citing *Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999)). "Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance." *Id.* In order to show that he was prejudiced by appellate counsel's performance, a PCR applicant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

On direct appeal, Applicant was represented by Chief Appellant Defender Robert Dudek and Assistant Appellate Defender David Alexander. In the Brief of Appellant, counsel raised seven separate and distinct issues spanning one hundred and eleven pages. One of the issues raised was:

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The trial court erred in finding that appellant was not mentally retarded at the pretrial hearing pursuant to *Atkins v. Virginia* and *Franklin v. Maynard*, and therefore sentencing appellant to death violates his rights under the Eighth Amendment.

(Final Brief of Appellant).

Appellate counsel devoted forty-five pages to this particular argument. Counsel thoroughly addressed each prong required for a finding of intellectual disability. See Section 16-3-20(C)(b)(10) (defining mental retardation as: “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.”). Counsel further detailed the strength of Applicant’s case in regard to each prong, as well as the investigation conducted and conclusion reached by Applicant’s expert, Dr. Calloway. Counsel presented a constitutionally sufficient analysis detailing Applicant’s theory that the trial court incorrectly weighed the experts’ testimony and opinions. Further, Mr. Alexander provided supplemental authority to the Court on September 12, 2016, March 29, 2017, and May 4, 2017.³³ (Return Attachment 11).

Despite counsel’s adequate presentation of the issue, Applicant’s direct appeal netted him no relief. Our Supreme Court found that the trial court’s credibility determination in regard to the experts was appropriate and supported by the Record:

After thoroughly reviewing the record, we conclude Blackwell has not shown the trial court committed an error of law or that its decision is unsupported by the evidence or against its preponderance. Accordingly, we find the case properly proceeded as a capital trial.

Blackwell, 420 S.C. at 141–43, 801 S.E.2d at 720–22.

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³³ The supplements provided cited and referenced both *Hall v. Florida*, 134 S.Ct. 1986 (2014) and *Moore v. Texas*, 137 S.Ct. 1039 (2017). (Return Attachment 11).

Applicant cites to *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002), in support of his claim of ineffective assistance of appellate counsel. There, our Supreme Court found ineffective assistance when appellant counsel “devoted three short paragraphs to [the issue on appeal], did not give any useful analysis, and only cited one case.” *Id.*, at 208, 562 S.E.2d at 611.

The appeal argument at issue here clearly does not fit the same mold as that found in *Patrick*. Again, appellate counsel devoted **forty-five pages** of analysis to the intellectual disability issue and cited to **over thirteen different cases**, including *Hall v. Florida*, which Applicant has also cited.

Further, Applicant again cites *Moore v. Texas*, however, that case was clearly not available prior to briefing in the appeal and does not bear on whether counsel was ineffective in his briefing. See *Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (“We have never required an attorney to be clairvoyant or anticipate changes in the law....” (citing *Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993))), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes*, 310 S.C. at 309–10, 426 S.E.2d at 765 (“This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.”). However, as noted above, appellate counsel provided the Court with additional cases, which included *Moore*, and the Court found the holding in *Moore* had no impact on the decision:

Although the trial court did not have the benefit of the USSC’s recent decision in *Moore v. Texas*, — U.S. —, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017), we find the court’s analysis comports with this decision. In *Moore*, the defendant was convicted of capital murder and sentenced to death for fatally shooting a store clerk during a robbery that occurred when the defendant was twenty years old. *Id.* at 1044. Subsequently, the defendant sought state habeas relief. *Id.* Pursuant to *Atkins* and *Hall*, a Texas habeas court determined that the defendant was intellectually disabled and, therefore, recommended to the Texas Court of Criminal Appeals

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("CCA") that the defendant be granted relief. *Id.* at 1045-46. The CCA disagreed with the recommendation and found the habeas court erred by not following the CCA's decision in *Ex Parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), wherein the CCA adopted the definition of and standards for assessing intellectual disability based on a 1992 edition of the American Association on Mental Retardation manual. *Id.* at 1046. The USSC granted certiorari "to determine whether the CCA's adherence to superseded medical standards and its reliance on *Briseno* comply with the Eighth Amendment" and the Court's precedents. *Id.* at 1048. The USSC vacated the CCA's judgment, finding "[t]he CCA's consideration of [the defendant's] adaptive functioning ... deviated from prevailing clinical standards and from the older clinical standards the court claimed to apply." *Id.* at 1050. Further, the USSC rejected the CCA's use of the *Briseno* factors, which the Court deemed an "invention of the CCA untied to any acknowledged source." *Id.* at 1044.

Here, the trial court made no reference to the impermissible *Briseno* factors. Furthermore, given the fact that Blackwell's I.Q. scores were at the lower end of the spectrum, the court correctly considered Blackwell's adaptive functioning using the current clinical standards presented by the medical experts. The court, as required by *Moore*, carefully considered and weighed Blackwell's adaptive strengths against his adaptive deficits. While the dissent may believe the trial court overemphasized Blackwell's adaptive strengths, any significance assigned to these adaptive strengths was based on the court's assessment and credibility determination of the expert testimony.

Blackwell, 420 S.C. at 143, 801 S.E.2d at 721 n. 11.

Consequently, the Record supports that appellate counsel provided constitutionally sufficient representation on direct appeal. Furthermore, the independent assessment reached by our Supreme Court that there was no trial court error in finding Applicant failed in his burden of proving intellectual disability all but forecloses a finding of prejudice. There is no reasonable probability of a different result.

Applicant is due no relief, and this Court grants none.

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11(f)(2)(3) The introduction of autopsy photographs and the testimony of Mr. Reggie Frye were both admissible, thus, appellate counsel was not ineffective in failing to raise these issues on appeal.

When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine “whether appellate counsel failed present significant and obvious issues on appeal.” *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. *Id.*

In regard to the first issue, during the punishment phase of Applicant’s trial, the defense moved pursuant to Rule 403, SCRE to suppress State’s Exhibit No. 60-72, which consisted of photos that depicted the deceased victim. The defense argued that other photos of the victim had already been admitted and the current photos were taken after the body had been moved. (R. 2695-2698; 2704-2705). The trial court granted a part of that motion, and excluded State’s Exhibit No. 61, 62, 63 and 64. However, after identification by a forensic pathologist, the judge admitted remaining photographs. He held that their probative value outweighed their prejudicial effect, and that they were relevant to show the circumstances of the crime. (R. 2709-2711). The trial court further cited *State v. Torres*, 390 S.C. 618, 703 S.E.2d 226 (2010), *State v. Rosemond*, 335 S.C. 593, 597, 518 S.E.2d 588, 590 (1999); *State v. Burkhardt*, 371 S.C. 482, 487, 640 S.E.2d 450, 453 (2007), to support its position that autopsy photographs of victim are admissible in the sentencing phase of a capital murder trial for use by the doctor who performed the autopsy for the purpose of illustrating the nature of the injuries. (R. 2705-2706).

There can be no finding of *Strickland* deficiency or prejudice because admission of the photos under the existing and relevant case law was proper. “The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court.” *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). “If the offered photograph serves

to corroborate testimony, it is not an abuse of discretion to admit it.” *Id.* “A trial judge’s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.” *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 207 (Ct. App. 2008) (internal quotation marks omitted). *See also State v. Collins*, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014) (quoting *Nichols v. State*, 267 Ala. 217, 100 So.2d 750, 756 (1958) (“The mere fact that an item of evidence is gruesome or revolting, if it sheds light on, strengthens or gives character to other evidence sustaining the issues in the case, should not exclude it.”)).

In *State v. Torres* the Supreme Court of South Carolina held that “[i]n the sentencing phase of a capital murder trial, the scope of the probative value is much broader than the guilt phase. *Torres*, 390 S.C. at 623, 703 S.E.2d at 229 (citing *State v. Kornahrens*, 290 S.C. 281, 289, 350 S.E.2d 180, 186 (1986)). In addition, the Court held “that autopsy photographs may be presented to the jury in an effort to show the circumstances of the crime and character of the defendant.” *Torres*, 390 S.C. at 623, 703 S.E.2d at 229 (citing *Rosemond, supra*; *Burkhart, supra*). Here, in compliance with *Torres*, the State introduced the photographs during examination of Dr. Wren illustrating the number of injuries, location of the injuries, and manner in which the injuries were committed. *See id.*, (“If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.”) (quoting *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353(1996)); *see also State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008) (“Admitting photographs which serve to corroborate testimony is not an abuse of discretion.”); *State v. Kelsey*, 331 S.C. 50, 76, 502 S.E.2d 63, 76 (1998) (photographs of various bone and bomb fragments and clothing found at crime scene were admissible in murder prosecution to corroborate testimony concerning condition of victim’s body as first discovered by police at the crime scene, and location of bone and bomb fragments supported testimony that the bomb had been detonated

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in victim's mouth). Mr. Dudek testified during the PCR hearing regarding the crime scene and autopsy photographs. He testified in his assessment that the Court would consider this proper evidence of how Applicant left the victim, and further, case law supported that if a pathologist says the photographs will assist his testimony, they will come in. (PCR Tr. Vol. 2 p. 9). The case law shows that was not a faulty assessment; therefore, there was no deficient performance.

Applicant is also unable to show deficiency for failure to raise the issue of Reggie Frye's testimony. During trial, the defense called Applicant's father to the stand. During cross-examination, the State questioned Applicant's father about whether he knew Reggie Frye and had had a conversation with him regarding the fact that he had involuntarily locked up Applicant's gun in order to prevent Applicant from gaining access to it. Applicant's father denied knowing Reggie Frye and claimed he did not recall having any such conversation with him. (R. 3048-3052). Later, during the punishment phase of Applicant's trial, the defense recalled Applicant's father and asked the same questions. During the State cross-examination, Applicant's father admitted to knowing Mr. Frye, but again denied recalling any conversation about locking up Applicant's gun. (R. 3115-3117). The State then sought to offer testimony from Mr. Frye on the basis of the father's inconsistent statement. The State cited *State v. Stokes*, 381 S.C. 390, 673 S.E.2d 434 (2009) to support its position. (R. 3117-3119). Over the defense's objection, the trial court permitted Reggie Frye to testify as to his conversation. (R. 3119-3120). Mr. Frye testified to a conversation he had had with Applicant's father in which the father admitted that he had seized Applicant's gun because he was afraid that Applicant was going to hurt himself or someone else. He testified further that the father also acknowledged that Applicant had broken into the gun case prior to the murder and retrieved the murder weapon. (R. 3127).

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As to Applicant's allegations of hearsay, under the rules of evidence, a prior inconsistent statement may be admitted when the proper foundation has been laid:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.

Rule 613(b), SCRE.

Further, in *State v. Stokes*, our Supreme Court affirmed under similar circumstances:

Thus, it is the opportunity to cross-examine that is constitutionally protected. In the instant case, appellant had that opportunity. It is undisputed [witness] appeared at trial, was available for cross-examination, and could have been recalled after the statement was admitted.

Stokes, 381 S.C. at 402, 673 S.E.2d at 440.

During Applicant's trial, Mr. Frye was cross-examined by Defense Counsel. (R. 3128-3131). In addition, Mr. Frye's testimony fell under the hearsay exception set forth under Rule 613(b). In regard to relevancy, the State offered, and the trial court accepted premeditation as sufficient reason to introduce the evidence. (R. 3118). The statement supported that Applicant took affirmative steps to acquire his firearm prior the victim's murder.

Therefore, there can be no finding of ineffectiveness of appellate counsel because the testimony of Reggie Frye was both permissible under Rule 613(b) and relevant to the level of applicant's malice and culpability. Further, the admission of the contested photos were proper under the existing and relevant case law. And, there is no prejudice were there is no reasonable probability that relief would be granted based on the then relevant and controlling case law. Applicant's claims to the contrary are without merit.

Applicant is due no relief, and this Court grants none.

11(d)(9) and 11(f)(4)

Trial counsel could not be ineffective in failing to “raise and argue all legal and factual grounds” for a sentence less than death “pursuant to 16-3-20” and proportionality review under 16-3-25(C). Further, appellate counsel is not ineffective for failing to challenge proportionality review as the review is conducted automatically by the Supreme Court of South Carolina on direct appeal review.

Applicant seeks to “reserve[] his proportionality claims for review by the Supreme Court and does not seek a ruling” on those claims in 11(d)(9) and 11(f)(4). Again, whether withdrawn or ruled upon, these allegations cannot support relief. The statutory proportionality review is reserved solely for our Supreme Court. *See* S.C. Code Ann. § 16-3-25(C). Further, the Court already conducted the required review under the statute. *Blackwell*, 420 S.C. at 168, 801 S.E.2d at 735. While there is nothing to indicate that Applicant could be entitled to another review, this Court is neither the place for that review, nor a forum for an appeal of the direct appeal review decision. This Court dismisses the claim.³⁴

³⁴ This Court interprets Applicant's reference to “reserve[ing] the proportionality claims” for later review to be a request to withdraw the claims in this action. Ineffective assistance claims are properly brought in PCR. *See generally Al-Shabazz, supra*. Further, this Court can neither reserve nor allow a party to “reserve” issues not heard. Thus, the Court rules only on waiver and dismissal.

CONCLUSION

For all the foregoing reasons, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that require this Court to grant any relief. This application for post-conviction relief must be denied and dismissed with prejudice.

IT IS THEREFORE ORDERED

1. That this application for post-conviction relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the South Carolina Department of Corrections until such time as his death sentence may be carried out.

IT IS SO ORDERED this 7th day of April, 2025



Daniel D. Hall, Circuit Court Judge
By Special Assignment

York

, South Carolina.

FILED
2025 APR -7 PM 12:09
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Ricky Lee Blackwell, #6033)
Applicant,)

C/A No.: 2018-CP-42-00928
(Capital PCR)

v.)

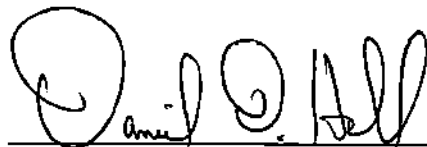
ORDER

State of South Carolina,)
Respondent.)

DENYING APPLICANT'S MOTION TO
ALTER OR AMEND JUDGMENT

After careful consideration, Applicant's Motion to Alter or Amend Judgment is
DENIED.

IT IS SO ORDERED this 10th day of June, 2025



Daniel D. Hall, Circuit Court Judge
By Special Assignment

York

South Carolina.

CLERK OF COURT
SPARTANBURG COUNTY
JUN 14 2025

2025 JUN 16 PM 4:16

FILED



State of South Carolina
The Circuit Court of the Sixteenth Judicial Circuit

Daniel D. Hall
Judge

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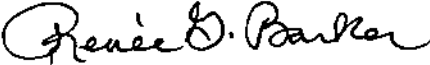
June 10, 2025

Amy W. Cox
Spartanburg County Clerk of Court
P. O. Box 3483
Spartanburg, SC 29304-3483

Dear Ms. Cox:

Please send clocked copies of the enclosed Order to all parties.

Thank you!!


Renee G. Barker
Administrative Assistant
The Sixteenth Judicial Circuit
1675 – 1J York Highway
York, SC 29745

FILED
2025 JUN 16 PM 4:16
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX