VOLUME I OF II

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

George M. McFaddin, Jr., Circuit Court Judge

Case No. 2025-000136

Weldon W. Stewart, Jr., #295095 Petitioner,

v.

State of South Carolina, Respondent.

SUPPLEMENTAL APPENDIX

Weldon W. Stewart, Jr. #295095
Trenton Correctional Institution
84 Greenhouse Road
Trenton, South Carolina 29847
(803) 275-3301
Pro Se Petitioner

Other Counsel of Record:
D. Russell Barlow, II
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3970
Attorney for Respondent

[PP. 001-221]

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Stewart v. S.C. - 2025-000136 **Supplemental Appendix 001**

MOTION UNDER 28 U.S.C. § 2244 FOR ORDER AUTHORIZING DISTRICT COURT TO CONSIDER SECOND OR SUCCESSIVE APPLICATION FOR RELIEF UNDER 28 U.S.C. §§ 2254 OR 2255

United States Court of Appeals for the Fourth Circuit

Name of Movant	Prisoner Number	Case Number (leave blank)
Weldon W. Stewart, Jr.	295095	
Place of Confinement: Evans Correctional Institution		

IN RE: Weldon W. Stewart, Jr. , MOVANT

RECEIVED
2021 OCT 18 PM 2:27
U.S. COURT OF APPEALS
FOURTH CIRCUIT

1. Name and location of court which entered the judgment of conviction from which relief is sought:
Court of General Sessions, Marlboro County, Bennettsville, South Carolina

2. Parties' Names: State of South Carolina vs. Weldon W. Stewart, Jr.

3. Docket Number: Case No: 02-GS-34-1918,1919 4. Date Filed: 10/10/2002

5. Date of judgment of conviction: 08/01/2003 6. Length of sentence: 39 years

7. Nature of offense(s) involved (all counts):
Voluntary manslaughter and desecration of human remains.
Pled: Murder, not guilty. Desecration of human remains guilty.

8. What was your plea? (Check one) ☑ Not Guilty ☐ Guilty ☐ Nolo Contendere

9. If you pleaded not guilty, what kind of trial did you have? (Check one) ☑ Jury ☐ Judge only

10. Did you testify at your trial? (Check one) ☑ Yes ☐ No

11. Did you appeal from the judgment of conviction? (Check one) ☑ Yes ☐ No

12. If you did appeal, what was the

Name of court appealed to: The South Carolina Court of Appeals

Parties' names on appeal: State of South Carolina vs. Weldon W. Stewart, Jr.

Docket number of appeal: Op. No. 2005-UP-284 Date of decision: 04/20/2005

Result of appeal: Dismissed by unpublished opinion

13. Other than a direct appeal from the judgment of conviction and sentence, have you filed any other petitions, applications for relief, or other motions regarding this judgment in any federal court? ☑ Yes ☐ No

14. If you answered "Yes" to question 13, answer the following

questions: A. FIRST PETITION, APPLICATION, OR MOTION

(1) In what court did you file the petition, application, or motion? United States District Court

(2) What were the parties' names? Stewart vs. Warden of Lieber Correctional Institution

(3) What was the docket number of the case? 8:09-842-SB

(4) What relief did you seek? Vacate sentence

(5) What grounds for relief did you state in your petition, application, or motion?

Ground One: Did the trial court deprive me of my constitutional right to due process by failing to instruct the jury on involuntary manslaughter?

Ground Two: Did appellate counsel deprive me of my constitutional right to effective assistance of counsel?

(6) Did the court hold an evidentiary hearing on your petition, application or motion? ☐ Yes ☑ No

(7) What was the result? ☐ Relief granted ☑ Relief denied on the merits ☐ Relief denied for failure to exhaust ☐ Relief denied for procedural default

(8) Date of court's decision: 03/26/2010

B. SECOND PETITION, APPLICATION, OR MOTION

(1) In what court did you file the petition, application, or motion? N/A

(2) What were the parties' names? _____ vs. _____

(3) What was the docket number of the case? N/A

(4) What relief did you seek? N/A

(5) What grounds for relief did you state in your petition, application, or motion?

N/A

(6) Did the court hold an evidentiary hearing on your petition, application or motion? ☐ Yes ☐ No

(7) What was the result? ☐ Relief granted ☐ Relief denied on the merits ☐ Relief denied for failure to exhaust ☐ Relief denied for procedural default

(8) Date of court's decision: N/A

C. THIRD AND SUBSEQUENT PETITIONS, APPLICATIONS, OR MOTIONS
For any third or subsequent petition, application, or motion, attach a separate page providing the information required in items (1) through (8) above for first and second petitions, applications, or motions.

D. PRIOR APPELLATE REVIEW(S)
Did you appeal the results of your petitions, applications, or motions to a federal court of appeals having jurisdiction over your case? If so, list the docket numbers and dates of final disposition for all subsequent petitions, applications, or motions filed in a federal court of appeals.

First petition, application, or motion	☑ Yes	Appeal No. 10-6750	☐ No
Second petition, application, or motion	☐ Yes	Appeal No.	☐ No
Subsequent petitions, applications or motions	☐ Yes	Appeal No.	☐ No
Subsequent petitions, applications or motions	☐ Yes	Appeal No.	☐ No
Subsequent petitions, applications or motions	☐ Yes	Appeal No.	☐ No
Subsequent petitions, applications or motions	☐ Yes	Appeal No.	☐ No

If you did not appeal from the denial of relief on **any** of your prior petitions, applications, or motions, state which denials you did not appeal and explain why you did not.

N/A

15. Did you present any of the claims in this application in any previous petition, application, or motion for relief under 28 U.S.C. § 2254 or § 2255? (Check one) ☐ Yes ☑ No

16. If your answer to question 15 is "Yes," give the docket number(s) and court(s) in which such claims were raised and state the basis on which relief was denied.

N/A

17. If your answer to question 15 is "No," why not? This Court will grant you authority to file in the district court only if you show that you could not have presented your present claims in your previous § 2254 or § 2255 application because . . .

A. (For § 2255 motions only) the claims involve "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [you] guilty"; or,

B. (For § 2254 petitions only) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [you] guilty of the offense"; or,

C. (For both § 2254 and § 2255 applicants) the claims involve "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court [of the United States], that was previously unavailable."

I did not present the following claims in any previous petition, application, or motion for relief under 28 U.S.C. § 2254:

See attached Memorandum of Facts and Law in support of this motion.

I did not present the claims listed above in any previous petition, application, or motion because

"the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found Movant guilty of the offense".
See attached Memorandum of Facts and Law in support of this motion.

Movant prays that the United States Court of Appeals for the Fourth Circuit grant an Order Authorizing the District Court to Consider Movant's Second or Successive Application for Relief Under 28 U.S.C. §§ 2254 or 2255.

Welden W. Stewart Jr.
Movant's Signature

I declare under Penalty of Perjury that my answers to all questions in this Motion are true and correct. Executed on 10/12/2021 [date]

Welden W. Stewart Jr.
Movant's Signature

PROOF OF SERVICE

A copy of this motion and all attachments must be sent to the state attorney general (§ 2254 cases) or the United States Attorney for the United States judicial district in which you were convicted (§ 2255 cases).

I certify that on 10/14/2021 [date] I mailed a copy of this motion and all attachments to Melody Brown At Office of the Attorney General at the following address:

[redacted], Columbia, SC 29211

Welden W. Stewart Jr.
Movant's Signature

*Stewart submits with this motion the court rulings from his original federal proceedings, but he doesn't have the documents he filed in these proceedings in his possession. *

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No.

In re: WELDON W. STEWART, JR. #295095,

Movant.

Memorandum of Facts and Law in Support of Motion for Authorization to File a Second or Successive Petition for a Writ of Habeas Corpus, Under 28 U.S.C. § 2244.

STATEMENT OF GROUNDS

Weldon Stewart moves this Court to grant him authorization to file a § 2254 petition for federal habeas relief on the grounds that he is detained in violation of the United States Constitution based on the following:

1) Newly discovered *Brady* violation committed by the State by concealing evidence establishing that the injury alleged by the State to have caused Victim's death was an injury created after death.

2) Newly discovered evidence establishing that the State failed to correct false testimony given by the State's pathologist and that the State suppressed evidence proving that this testimony was false.

3) Newly discovered *Brady* violation committed by the State by withholding notes written by the State's crime scene investigator detailing observations made by the investigator while on the scene which contradicted the State's case against Stewart at trial.

Stewart asserts that these constitutional errors resulted in the conviction of a person who is innocent. Stewart further asserts that the evidence as a whole clearly and convincingly establishes his innocence on the basis that Victim's death resulted from suicide.

This memorandum contains factual and legal support for Stewart's motion requesting that this Court grant him authorization. These factual and legal arguments were submitted to the state courts in a brief with supporting documentation which Stewart filed along with his PCR application.

CASE BACKGROUND

On December 6, 2000, Stewart was arrested in connection with the death of Victim. Stewart and Victim were both teenagers at this time. From the onset of the case, there has been no dispute that (1) Stewart

was present at the time of Victim's death, and (2) Stewart set Victim's body on fire a few hours after death. The sole dispute in this case from the beginning revolved around how Victim died.

The State's pathologist ruled that Victim died from blunt force trauma to the head in the manner of homicide. The State built its murder theory based on the conclusions of the pathologist. Specifically, the State alleged that Stewart killed Victim by striking her in the head with a blunt object and then set her body on fire to cover up this alleged crime.

Initially, Stewart claimed that he was carrying Victim in his arms and that Stewart tripped and fell on top of Victim, killing her.[1] Stewart maintained that Victim's death was an accident and that Stewart had burned the body afterwards due to extreme panic. Stewart, a teenager at the time, claimed that his panic was due to his fear that his parents would discover that (1) Stewart had snuck Victim into his parents' home, and (2) Victim had ended up dead in Stewart's parents' backyard. Stewart was adamant that he burned Victim's body to conceal Victim's death from his parents, not from law enforcement. [2]

Stewart represented himself at his trial for murder. At the conclusion of the trial, the State requested that the trial judge instruct the jury on the lesser- included offense of voluntary manslaughter. The State argued that it was requesting the manslaughter jury instruction based on the testimonies of two witnesses, Stanton Wright and Anthony Watson. The trial judge, over Stewart's objection, granted the State's request that the court instruct the jury on manslaughter. The jury ultimately returned a verdict of guilty for voluntary manslaughter.

---

[1] Stewart later revealed that Victim committed suicide and that at the time he made the statement about "tripping" he had repressed the memory of how Victim died. Stewart still maintains that the actions after death were due to panic.

[2] Once Stewart realized that the fire didn't completely conceal the body, Stewart immediately called 911. This call brought law enforcement to the scene. "I wanted the police to get me away from my parents' house before my parents got home from work", Stewart confided in Ms. Stewart about his rationale at this time.

Stewart was sentenced to 30 years for manslaughter. Stewart received a consecutive 9-year sentence for desecration of human remains for the burning, an offense to which Stewart pled guilty.

Stewart had exhausted all his state and federal remedies by the year 2011.

In 2014 Stewart met [redacted] "Lori" Stewart, formerly [redacted] Ms. Stewart, at the time a 24-year FBI employee in Washington, D.C., had no prior connection to Stewart.[3] A few months after meeting Ms. Stewart, Stewart confided in her that he was convicted of killing someone who committed suicide.

It was while following up on Stewart's claim of innocence that Ms. Stewart uncovered the evidence withheld by the State, as well as other evidence which supported Stewart's claim that Victim died from suicide.

This evidence, given rise to Stewart's federal claims, will be discussed in this memorandum.

LEGAL STANDARD

Stewart filed his first application for federal habeas relief in 2009. The district court denied his application. *Stewart v. Warden of Lieber Correctional Institution*, 701 F.Supp.2d 785 (2010)(unpublished). A panel of the Fourth Circuit dismissed Stewart's appeal. *Stewart v. Bodison,* 412 Fed. Appx. 633 (4th Cir. 2011)(unpublished).

In 2014, Stewart met Ms. Stewart. A few months after meeting Ms. Stewart, Stewart revealed to her that Victim committed suicide. Stewart further confided in Ms. Stewart that he hadn't remembered Victim's suicide prior to sharing this fact with her.[4]

---

[3] Ms. Stewart married Stewart in 2019. Prior to marrying him, she was firmly convinced of his innocence based on the evidence she reviewed while working on his case.

[4] Stewart had another prior instance of repressing a traumatic childhood incident in which neighborhood bullies tried to drown him. Stewart, ten years old at the time, survived this encounter by pretending to be dead.

While investigating Stewart's suicide claim, Ms. Stewart discovered that the State withheld exculpatory evidence from Stewart and that a juror had committed misconduct:

> The juror concealed his prior conflict with Stewart over the fact that it was questionable whether Stewart impregnated the juror's ex-girlfriend. Stewart had only heard of the juror through the ex-girlfriend, who always referred to the juror by the name Tyrone Alford. At Stewart's trial the juror was called a different name, William Alford. Stewart was not aware that the man sitting on the jury at his murder trial was the scorned former lover of a girl Stewart had dated and possibly impregnated. Once Stewart discovered this fact, he filed a post-trial motion for a new trial based on juror misconduct. A hearing was held on May 26, 2016, before the trial judge. Testimony was presented at the hearing establishing that the juror had attempted to run Stewart over with a car due to the juror's jealousy over Stewart's relationship with the juror's ex-girlfriend. Despite this evidence, the trial judge made an oral ruling denying the motion for a new trial. Stewart has not been able to exhaust his state remedies for this claim due to the trial judge's failure to file a written order, though more than 5 years have elapsed since the judge made his oral ruling.

Stewart sought post-conviction relief on the state level alleging newly discovered evidence of *Brady* and due process violations committed by the State. Stewart further requested discovery for purposes of fully establishing scientific evidence in support of two of his claims, which involve the science of forensic pathology. The PCR judge denied Stewart's request for discovery and summarily dismissed Stewart's PCR application without holding an evidentiary hearing. The state supreme court dismissed Stewart's appeal without review.

Stewart now comes before this Court, seeking authorization under 28 U.S.C. § 2244 to file a successive § 2254 application for federal habeas relief. In his proposed application, Stewart presents three claims of constitutional error:

1) The State concealed evidence establishing that the injuries the State claimed killed Victim were not produced until after Victim's death.

2) The State knowingly presented false testimony from the State's pathologist, Dr. Russell Harley, that Victim's injuries conclusively established death by blunt force trauma, and that the State suppressed evidence showing the testimony was false.

3) The State concealed evidence found in the crime scene notes written by SLED Agent Al Stuckey containing observations made by the crime scene investigator, while on the scene, which strongly contradicted the State's case against Stewart.

Stewart asserts that these constitutional errors resulted in the conviction of a person who is innocent.

The first gate-keeping provision for successive applications is § 2244(b)(3)'s pre-filing authorization requirement: A successive applicant must "move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A); see *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003). The court of appeals may grant authorization only if the applicant has made a prima facie showing that his claim (1) was not presented in a prior federal habeas application and (2) falls within one of two narrow paths set forth in § 2244(b)(2) to challenge his conviction. 28 U.S.C. §§ 2244(b)(2), (b)(3).

The first path, provided in § 2244(b)(2)(A), requires that a claim rely on a new and retroactive constitutional rule that was previously unavailable. The second path, set forthin § 2244(b)(2)(B), demands that "(i) the factual predicate of the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient toestablish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

Stewart chose the second path. To obtain authorization, Stewart relies on new factual predicates to satisfy § 2244(b)(2)(B). At this stage, he need not convince this Court that he will ultimately satisfy this provision's strict dictates. All he must do is make a prima facie showing that he can do so. *See In re Stevens,* 956 F.3d 229, 233 (4th Cir. 2020). *In re Hubbard*, 825 F.3d 225, 229, 231 (4th Cir. 2016); *In re Williams*, 330 F.3d 277, 281–82 (4th Cir. 2003).

Though Stewart will ultimately have to satisfy all the requirements in § 2244 and § 2254 in order to succeed on his successive habeas, this Court's review for purposes of granting authorization only requires Stewart to make a prima facie showing of the "three essential components" of § 2244(b)(2)(B).

> First, the claim must rely on a 'factual predicate [that] could not have been discovered previously through the exercise of due diligence.' 28 U.S.C.A. § 2244(b)(2)(B)(i). Second, the claim must describe constitutional error. See Id. § 2244(b)(2)(B)(ii). Third, the newly discovered facts upon which the claim is based, when viewed in conjunction with 'the evidence as a whole,' must 'be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.' Id.

See In re Stevens, 956 F.3d 229, 234 - 235 (4th Cir. 2020).

I.

The factual predicates for Stewart's claims could not have been discovered previously through the exercise of due diligence, as Stewart's claims allege that the State withheld information which is exculpatory or favorable to Stewart. As the information was within the possession or knowledge of the State, Stewart could have only obtained the information by the State disclosing it to him. Stewart raised his claims in the state courts within one year of discovering the withheld information and filed the current request for authorization within one year of the final disposition in the state courts.

Stewart has exercised diligence in attempting to obtain scientific evidence in support of his first two constitutional claims, as well as his innocence claim.[5] Specifically, Stewart has been seeking to obtain copies of the autopsy photographs for purposes of proving through science that the injury the State claimed caused Victim's death was not created until after death. Stewart's efforts have been thwarted by State officials.

Ms. Stewart initially spoke with Dr. J.C. Upshaw Downs, the retained forensic pathologist, in 2017.[6] Dr. Downs refused to allow Ms. Stewart to retain him until he reviewed the available autopsy data in this case. " I don't want to waste your money if there's nothing there", the pathologist explained to Ms. Stewart.

Ms. Stewart provided the pathologist with the autopsy information she had in her possession. Dr. Downs reviewed this information and informed Ms. Stewart that the location of the skull fracture, as documented in the autopsy report, is more consistent with a post-mortem (after death) thermal injury than an ante-mortem (before death) blunt force trauma injury. However, the pathologist hesitated to offer a more definitive conclusion until he reviewed further evidence from this case, particularly the autopsy photographs and scene photographs. Dr. Downs also allowed Ms. Stewart to retain him.

For the next several months, Ms. Stewart and Stewart attempted to obtain the evidence requested by Dr. Downs for purposes of completing his analysis.

Stewart submitted a request to the South Carolina Law Enforcement Division (SLED) for his case file, hoping that the scene and autopsy photographs would be included in the file. Ms. Stewart communicated with SLED officials regarding Stewart's request and all parties agreed that CD's containing the requested information would be mailed to Ms. Stewart. (It was while reviewing this

[5] Stewart has already obtained all the evidence necessary to prove his third constitutional claim.
[6] Dr. Down was previously retained by the prosecution, in a case for the US Army, to clear up a misdiagnosis made by Dr. Harley, the State's pathologist in Stewart's case.

information that Ms. Stewart discovered the withheld crime scene notes written by SLED Agent, Al Stuckey.)

Ms. Stewart provided all pertinent information from the case file to Dr. Downs, including the scene photographs. The autopsy photographs were not included in the SLED case file and Dr. Downs informed Ms. Stewart that he would not be able to complete his analysis until he reviewed these photographs.

Stewart sent a written request to officials at the Medical University of South Carolina (MUSC), the place where the autopsy was conducted, for copies of the autopsy photographs. Stewart made this request, and all other requests discussed below, pursuant to SC Code Section § 17-5-535 (4)(b)(d). MUSC officials refused to grant Stewart's request without a court order. Stewart's request for a court order was denied by the trial judge.

Stewart then requested copies of the photographs from the Marlboro County Solicitor's Office. The solicitor refused Stewart's request.

Stewart made the same request to the Marlboro County Coroner's Office. The coroner denied having the autopsy photographs in his possession.

Stewart then requested his case file from the Marlboro County Clerk of Court's Office. The clerk sent Stewart his entire case file, but the autopsy photographs, which were Court's Exhibits at trial, were excluded from the file. When Stewart specifically requested the autopsy photographs the clerk stated that she would not provide the photographs to Stewart without a court order.

Stewart then filed his PCR application and requested discovery to obtain the autopsy photographs. The PCR judge summarily dismissed Stewart's PCR application and denied Stewart's request for discovery.

Finally, Dr. Downs directly contacted MUSC officials and requested to be granted access to the autopsy data in Stewart's case. MUSC officials referred Dr. Downs to the Marlboro County Coroner's Office.

When Dr. Downs contacted the coroner's office, the coroner initially agreed to provide Dr. Downs with copies of the autopsy photographs.[7] However, a few days later, the coroner informed Dr. Downs that the autopsy photographs would not be provided to the pathologist without a court order.

When raising Brady claim in the postconviction context, "a defendant cannot conduct the reasonable and diligent investigation . . . to preclude a finding of procedural default when the evidence is in the hands of the State." *Strickler v. Greene*, 527 U.S. 263, 287-88 (1999) (internal quotation marks omitted). In the context of the materially indistinguishable diligence provision of § 2254(e)(2)(A)(ii), "[d]iligence . . . depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Williams v. Taylor*, 529 U.S. 420, 435 (2000); see id. at 432, (in discussing due diligence requirement, explaining, "a person is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another[;] [f]ault lies, in those circumstances, . . . with the person who interfered with the accomplishment of the act"). "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Banks v. Dretke*, 540 U.S. 668, 675-76 (2004).

Prior to trial, Stewart requested that the State disclose all exculpatory or impeaching evidence. Stewart made this request pursuant to *Brady v. Maryland*. The State assured Stewart that the State had disclosed all *Brady* material to Stewart. Therefore, it was reasonable for Stewart, who represented himself, to accept the State's claim that it had fulfilled its duty to disclose under *Brady*.

[7] The coroner had previously denied having the autopsy photographs in his possession.

Stewart discovered, after his state court and federal habeas proceedings had concluded, that the State had potentially withheld exculpatory evidence. Stewart pursued this information by again requesting disclosure of evidence within the State's possession. The State provided some of Stewart's requested information. However, the State refused to grant Stewart's request for disclosure of the autopsy photographs.

Stewart asserts that it is highly probable the autopsy photographs contain proof that the skull fracture, claimed by the State to have killed Victim, was not created until after Victim's death. The State has put forth every effort to prevent Stewart from obtaining the autopsy photographs. Thus, Stewart has been prevented from fully developing the scientific component of his first two constitutional claims as a direct result of the State's conduct.

The State continues to withhold the autopsy photographs from Stewart despite Stewart's repeated request for disclosure of this evidence. This fact makes it evident that any earlier attempt by Stewart to obtain this evidence would have been futile.

Stewart believes that the totality of these facts is sufficient as a prima facie showing that he has acted with the requisite diligence as to his constitutional claims and his claim of innocence.

II.

A.

For his first claim of constitutional error Stewart asserts that the State withheld evidence which tends to establish that the skull fracture, claimed by the State to have killed Victim, was not created until after Victim's death. Stewart further asserts that the withheld evidence is exculpatory. Thus, Stewart argues the State's failure to disclose this evidence violated *Brady*.

The State's pathologist, Dr. Harley, concluded that Victim died from blunt force trauma to the head. The pathologist testified at trial that this conclusion was based solely upon the pathologist's

observation of a "right parietal skull fracture", which the pathologist claimed was created before death by blunt force. The pathologist further testified that this injury caused death within "seconds or minutes" after it was inflicted.

The State based its theory of murder upon the conclusions of the State's pathologist. Specifically, the State alleged at Stewart's murder trial that Stewart killed Victim by striking her in the head with a blunt object. The jury accepted this allegation as being true, to some degree, as evident by the guilty verdict for voluntary manslaughter.

After his original state and federal habeas proceedings Stewart discovered the possibility that the jury convicted him based on a false allegation. Specifically, Stewart discovered the strong possibility that the injury the State alleged killed Victim was created after Victim's death by the fire. The State withheld this information from Stewart.

As the State's case against Stewart was based on an allegation that Stewart killed Victim by inflicting a skull fracture to her head, any evidence tending to establish that this injury was not present until after death is clearly exculpatory. Thus, the State's withholding of this evidence violated Brady.

Pursuant to *Brady*, "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87. *Brady* extends to impeachment evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985), and to the failure to disclose favorable evidence that is only known to the police, *see Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995).

Evidence is material if it would reasonably "put the whole case in such a different light as to undermine confidence in the verdict," *id.* at 435, and materiality must be assessed collectively, *see id.* at 436 n.10.

If considered as true for purposes of this review, Stewart's allegation that the State withheld exculpatory evidence undermines confidence in the verdict as this evidence proves that the jury convicted Stewart based on a false allegation. In addition, evidence establishing that the conclusions of the State's pathologist were not accurate greatly strengthens Stewart's claim of innocence.

As mentioned in the previous section, Stewart has been prevented from fully developing the scientific component of this constitutional claim due to the State's refusal to disclose the autopsy photographs. Stewart believes that the autopsy photographs are also relevant to his claim of actual innocence.

Since the State persists in withholding this evidence, Stewart believes the above allegations are more than sufficient to make a prima facie showing of constitutional error.

B.

For his second claim of constitutional error Stewart asserts that the State knowingly presented false testimony to the jury with the testimony of the State's pathologist. Stewart alleges that, prior to trial, the pathologist informed the prosecutor of the possibility that the skull fracture was created after death. Stewart further alleges that the State concealed this admission from Stewart with misinformation and the State failed to correct the Pathologist's false testimony in reference to this injury causing death.

Prior to trial, the State amended Stewart's murder indictment to include the allegation that Stewart killed Victim by burning her body. The State reasoned that:

> And the autopsy report basically has some conjecture. And after talking with the pathologist whether the cause of death was a blow to the head or it was the actual burning of the body. The problem being that when a body is burned, the skull bursts and so there is some question. In fact, when the State amends the murder

> indictment, we intend to include alternative possibilities as to the actual cause of death.
>
> July 16, 2002- Pre-trial Hearing, p 13 lls 20 – p 14 lls 2.

Stewart, who admitted to the burning, vehemently challenged the State's new claim that this act caused death, as the State had previously claimed that death was caused by blunt force trauma. Stewart argued in relevant part:

> Your Honor, I wish to object to some of the terminology and the murder indictment. It says that "striking, pushing and or burning to cause death." According to the autopsy report, which I have here, death was caused by blunt trauma to the head…And I ask that this indictment not be allowed to be brought in the courtroom including burning as a possible cause of death because this contradicts the autopsy report. There was no factual evidence like that, and as I said before, according to the autopsy report death occurring by the burning of the body is not proper.
>
> October 17, 2002- Pre-trial Hearing, p 6 lls 21-25; p 7 lls 7-12.

The State met this challenge by arguing to the court that the new allegation in the amended murder indictment was based on the following:

> Your Honor, I have talked to the pathologist. I think [Stewart] is referring to -- at the bottom of the summary page, probable cause of death was blunt force trauma to the head. The pathologist, Dr. Harley, says that it is a possibility that the death was caused by burning.
>
> October 17, 2002- Pre-trial Hearing, p 7 lls 13-17.

It must be noted that the prosecutor persisted with his claim of death by burning during several pre-trial hearings. In response to this claim, Stewart moved before the court to be granted funds to obtain a forensic pathologist for the defense. The judge denied this motion, as the judge reasoned that

Stewart should first be allowed to interview the pathologist in reference to the prosecutor's claim. The judge further stated that Stewart could renew his request to obtain a pathologist for the defense if any further grounds arose after Stewart interviewed the State's pathologist.

The prosecutor's recollection of the conversation with the pathologist, regarding the possibility that death was caused by burning, was denied by the pathologist during a pre-trial interview with Stewart. Directly following this interview, the State removed the allegation of death by burning from the murder indictment and returned to its original allegation of death by blunt force trauma. Thus, Stewart believed that the matter for which he had requested a forensic pathologist had been resolved. More significantly, because the state withheld information regarding the possibility that the skull fracture was created after death, Stewart was left with no grounds upon which to renew his request to obtain a forensic pathologist for the defense.

Many years later Stewart discovered that the prosecutor, while making his false claim of death by burning, inadvertently shed light on the fact that he received information, during a pre-trial conversation with the pathologist, which was favorable to Stewart. The prosecutor stated, in relevant part:

> The problem being that <u>when a body is burned, the skull burst</u> and so there is some question.
>
> July 16, 2002- Pretrial Hearing, p 13 lls 24-25.

Ms. Stewart, while conducting research online about how thermal injuries (particularly skull fractures) were created after death, found the following forensic pathology facts:

> <u>The skull bursts due to the formation of steam within the skull cavity as a result of intense heat</u>. Such explosive post-mortem fractures are accompanied by gaping defects and separation of non-united sutures and protrusion of brain matter. Intense heat can lead to desiccation of skull, with the production of post-mortem thermal linear fracture, commonly located on either side of the skull, above the temples.

> They usually consist of several lines which radiate from a common centre. If the appearance is not typical, distinction from an ante-mortem skull fracture may be difficult.
>
> Forensic Pathology Online E-Book - Thermal Injuries by Dr. D. Rao

If the underlined section of the prosecutor's statement is compared to the underlying section of the scientific facts, it can be reasonably deduced that the prosecutor's statement is describing the process by which a skull fracture is created after death by fire. It can further be deduced, by the prosecutor's own admission, that the prosecutor received this information from the State's pathologist during a pre-trial discussion in reference to Victim's cause of death.

The totality of these facts supports a reasonable conclusion that the pathologist at some point prior to trial revealed to the prosecutor that the pathologist was uncertain about the cause of death due to the possibility that the skull fracture was created after death by the fire. The prosecutor concealed the exculpatory nature of this admission by claiming he had been told by the pathologist it was possible that burning caused the death. The prosecutor then used this false claim as the basis for amending Stewart's murder indictment.

As demonstrated above, an isolated portion of the prosecutor's pre-trial statement tends to reveal the prosecutor's knowledge of information which was favorable to Stewart. However, it must be noted that the prosecutor's statement was made in the context that this information was not favorable to Stewart. The prosecutor directly stated that the information supported the State's amended murder theory of death by burning. The prosecutor did not make this statement in the context of disclosing favorable evidence. Thus, the isolated portion of the prosecutor's statement, which was presented to Stewart under the guise of inculpatory evidence, did not satisfy the State's duty to disclose favorable evidence pursuant to *Brady*.

Additionally, the prosecutor failed to correct the false testimony of the pathologist at trial, as the pathologist made no mention to the jury that the alleged fatal skull fracture could have been created after death. This omission left the jury with the false impression that the State's pathologist conclusively determined that death resulted from this skull fracture, when the omitted information revealed that the pathologist was uncertain as to whether the injury was present at the time of death.

The Supreme Court has held "knowingly us[ing] false evidence, including false testimony, to obtain a tainted conviction" is a due process violation. Naupe v. People of State of Ill., 360 U.S. 264, 269 (1959); see also United States v. Basham, 789 F.3d 358, 376 (4th Cir. 2015) ("[T]he Due Process Clause obliges the government not [to] use false evidence, including false testimony." (internal quotation marks omitted)). And this Court has held "[e]vidence may be false either because it is perjured, or, though not itself factually inaccurate, because it creates a false impression of facts which are known not to be true." Hamric v. Bailey, 386 F.2d 390, 394 (4th Cir. 1967).

Stewart's second claim is that the prosecution knew Dr. Harley's testimony about the cause of death was false, failed to correct it, and used it to "create[] a false impression of facts which are known not to be true." See Hamric, 386 F.2d at 394. Because it is a constitutional violation to allow false testimony to go uncorrected, Naupe, 360 U.S. at 269, and to knowingly use the testimony to create a false impression of a material fact, Hamric, 386 F.2d at 394, Stewart's claims create at least a prima facie showing of constitutional error. See in re Stevens 956 F.3d 229, 236 (4th Cir. 2020).

C.

For his third claim of constitutional error Stewart asserts that the State withheld the crime scene notes of the State's forensic crime scene investigator, SLED Agent Al Stuckey. Stewart alleges that the withheld notes contain information, which is favorable to Stewart, as these notes detail observations made on the scene by the investigator which contradict key aspects of the State's case against Stewart at trial. Thus, Stewart argues the State's failure to disclose this evidence violated *Brady*.

As mentioned earlier, Ms. Stewart found the crime scene notes in 2017 while looking through the SLED files in search of other evidence to provide to Dr. Downs. Stewart had no prior knowledge of the investigative notes, and he provided the state courts with documented proof showing that this evidence had never been disclosed to him. Specifically, Stewart provided a letter from the prosecutor listing all the "*Brady* material" that was disclosed to Stewart by the State and the above-mentioned crime scene notes were not included on that list. This letter from the prosecutor was dated less than a month before Stewart's trial.

As for the withheld evidence being favorable to Stewart, the State alleged at trial that Stewart violently killed Victim. The State relied entirely upon circumstantial evidence as support for its case against Stewart. The case was based upon three main circumstantial factors: (1) statements Stewart allegedly made to witnesses after Victim's death, (2) the fact that Stewart admittedly burned Victim's body after death, which the State claimed was for purposes of covering up a crime, and (3) the State's claim that the lack of direct evidence against Stewart was due to Stewart's actions after Victim's death.

The State made its circumstantial case against Stewart far more compelling by withholding evidence which contradicted its theory of a violent death, a fact established throughout this memorandum. Regarding this constitutional claim, the State withheld the crime scene notes of SLED Agent Al Stuckey, the State's crime scene investigator who processed the scene of Victim's death. The withheld notes establish that observations made on the scene by the investigator contradicted key aspects of the State's case against Stewart.

The State presented testimony from a witness who claimed he was told by Stewart that Stewart "flipped" and killed Victim. Stewart was adamant that he never made this statement to the witness. In the withheld crime scene notes the State's investigator noted his observation that there was no

evidence of a violent struggle on the scene. Thus, the crime scene notes contradicted the claim of the witness and supported Stewart's claim.

The State claimed that Stewart burned Victim's body to cover up evidence that he killed Victim. Stewart claimed that his actions after Victim's death was due to panic and was not an attempt to cover up a crime as no crime had been committed. In the withheld crime scene notes the State's investigator indicated that he meticulously searched the scene for any evidence tending to establish that Stewart was attempting to cover up a crime (i.e., by cleaning up blood), and found none. Thus, the crime scene notes contradicted the State's claim and supported Stewart's claim.

Finally, the State claimed that the lack of direct evidence to support its case against Stewart (i.e., a murder weapon) was because Stewart destroyed the scene with fire. During his closing argument the prosecutor stressed to the jury, in relevant part:

> Now, this is probably the mystery of all. [The] place [in] the path where the fall occurred. And why is it a mystery? Why can't I just tell you exactly where? Cause he moved the body. He messed up the crime scene. --[Stewart] said we didn't do an investigation or we didn't prove it. That's cause he did a very good job of destroying evidence. Where is that stick that hit her? I don't know. There was a big bond fire. No, I don't have the DNA on it....But the Judge will tell you that you can infer the mental state required for the crime by that covering up.
>
> Trial Transcript - p 718 lls 7-11; 21-22.

Stewart was brought back to the scene to show law enforcement the path where Victim died. The crime scene investigator noted that drops of blood were found on leaves in this path. The crime scene investigator's notes reflect that he collected this evidence from the scene. However, as mentioned earlier, the State never tested this evidence for DNA. Additionally, the crime scene investigator made a specific notation revealing that he was instructed not to collect other potential evidence from

this path. These facts, revealed in the crime scene notes, clearly contradict the State's claim that Stewart destroyed all the evidence from the death scene.

Contrary to the prosecutor's closing argument, the crime scene notes reveal that the body was moved over 100 feet from the path where the death occurred prior to the burning. Thus, the scene of death was not destroyed by the fire. As further contradiction, the crime scene investigator indicated in his notes that he tested multiple objects (not just one stick) which had been identified to him as potential weapons. The investigator noted that these objects were ruled out as weapons since they tested negative for blood.

Though the crime scene investigator testified at Stewart's trial, the State crafted its questioning of the investigator so that none of the information contained in the crime scene notes was presented to the jury. If the crime scene notes had been disclosed to Stewart, he would have been able to illicit highly favorable testimony from the State's crime scene investigator during cross-examination. As demonstrated above, information contained in the crime scene notes contradicted key aspects of the State's case against Stewart and supported key aspects of Stewart's defense. Thus, the State's failure to disclose the crime scene notes made the State's case appear far stronger and Stewart's case appear far weaker than the full facts would have suggested.

Pursuant to *Brady*, "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87. *Brady* extends to impeachment evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985), and to the failure to disclose favorable evidence that is only known to the police, *see Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995).

Evidence is material if it would reasonably "put the whole case in such a different light as to undermine confidence in the verdict," *id.* at 435, and materiality must be assessed collectively, *see id.* at 436 n.10.

It is beyond dispute that the State failed to disclose the crime scene investigator's notes. The record clearly establishes the materiality of this evidence, as disclosure of the evidence would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense.

The State's strongest evidence against Stewart was the portion of Wright's testimony alleging that Stewart said, "he flipped". The State used this testimony to establish an essential element of voluntary manslaughter, heat of passion. The observations made on the scene by the crime scene investigator contradicted Wright's testimony and supported Stewart's claim that he never made the statement to Wright, as the lack of evidence of a violent struggle makes it highly unlikely that Stewart "flipped".

Damage to the State's case from disclosure of the investigator's notes would not have been confined to witness testimony. The observations made on the scene by the crime scene investigator could have given the jury reasonable doubt about the State's allegation of a violent death based on the rationale that if Stewart had, in fact, "flipped" and violently killed Victim then there would have undoubtedly been evidence of violence found on the scene. In addition, the jury could have reasoned that there would have been much more than a few drops of blood found in the path where Victim died, as it is common knowledge that head wounds are extremely bloody.

The strongest claims made by the prosecutor during his closing argument would have been far less compelling if the information contained in the crime scene notes had been presented to the jury during the trial. For instance, the jury would have trouble accepting the State's claim that Stewart destroyed all the evidence if it had known that law enforcement left some evidence on the scene and

failed to test other crucial evidence for DNA. This conduct could have been viewed as police negligence which could have led the jury to question the good faith of the investigation.

The observations made on the scene by the State's crime scene investigator would have cast serious doubt upon key aspects of the State's case against Stewart at trial. The jury obviously had some doubt about the State's theory of murder, which the jury resolved by finding Stewart guilty of the lesser-included offense of voluntary manslaughter. It is highly probable that the introduction of credible evidence favorable to Stewart, presented by the State's own forensic crime scene investigator, would have tipped the scales in favor of Stewart, resulting in a verdict of acquittal. Thus, the suppression by the State of the crime scene investigator's notes "undermines confidence in the outcome of the trial".

Stewart asserts that these facts, if considered as true for purposes of this review, are sufficient as a prima facie showing of constitutional error.

D.

In his proposed § 2254 application, Stewart argues that his claims of constitutional errors should be exempt from the statute of limitations and/or procedural default based on actual innocence. The Supreme Court held that actual innocence "serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar…or…expiration of the statute of limitations." See *McQuiggin v. Perkins* 569 U.S. 383, 386, 133 S.Ct. 1924 (2013).

Stewart claims that the constitutional errors committed by the State, as discussed earlier, resulted in the conviction of a man who is innocent. Stewart further asserts his actual innocence claim on the basis that the evidence overwhelmingly establishes that Victim's death resulted from suicide.

Stewart relies upon several factors to support his claim of death by suicide. These factors include:

1. Stewart's regained memories of Victim's death

2. The timing of Victim's death
3. A suicidal letter written by Victim
4. Victim's state of mind leading up to death
5. Stewart's demeanor following Victim's death
6. Evidence presented at trial and evidence withheld
7. History of Stewart's interaction with Victim

1. Repressed Memories

For many years, Stewart didn't remember how Victim died. As mentioned earlier, Stewart had a prior history of repressing the memory of a traumatic childhood event during which he was almost drowned by neighborhood bullies. Stewart didn't remember this childhood event until several years later while undergoing counseling. A mere two years later Stewart was again traumatized by witnessing Victim's suicide.

Victim's death severely traumatized Stewart for several reasons. The main reason is the fact that Victim died in Stewart's arms. Stewart had his mouth on Victim's mouth, trying to revive her through CPR, when Victim took her last breath.[8]

In addition to these factors, Stewart's strict Christian upbringing instilled in Stewart that the penalty for suicide is eternal damnation. Stewart, who was already in an extreme state of shock from Victim's unexpected death, couldn't handle thoughts about the eternal state of Victim's soul. "These thoughts were way too painful", Stewart told Ms. Stewart in reference to the reason he believed his mind repressed the memory that Victim committed suicide.

2. Timing of Victim's Death

The timing of Victim's death is a very significant factor of Stewart's claim of death by suicide. Victim's death occurred on the approximate one-year anniversary of a traumatic abortion she had been forced to undergo by her parents. According to forensic science:

[8] The forensic evidence tends to support this claim, as will be discussed later.

> Occasionally, there may be a significant anniversary date of a significant other's death chronologically proximal to the date the decedent was found…as an indicator of suicidal intent.
>
> Medscape Forensic Investigation by Renee M. Robinson, MD.

While questioning Victim's father at Stewart's trial, the prosecutor referred to Victim's abortion as a "tragic event that was a year ago". Victim's father testified that Victim's abortion occurred "the last year before her death".

Additionally, less than 3 months before her death Victim learned that Stewart was acknowledging that he was the father of a newborn baby conceived when Stewart cheated on Victim with another girl. Victim made several references to Stewart's newborn child in a suicidal letter Victim wrote shortly after finding out this information.

3. Suicidal Letter

The most significantly compelling factor to Stewart's suicide claim is Victim's own words, as found in a suicidal letter Victim wrote to Stewart shortly before her death. This letter, dated September 09, 2000,[9] states, in relevant part:

> I know I can't accept the baby now your mom is about to claim it now... I always thought we would learn our parent experience together, but now that is out the question... I'm so hurt, so pissed off... If it is your baby over me, I think I need to leave I hurt so bad. I feel like I want to kill myself... I can't cope with the pain anymore. If I'm at the point thinkin[g] about killing myself it is not good... This pain hurts so much. I will always love [yo]u no matter what, but this pain is nothing I can handle anymore.[10]

[9] This date is less than three months prior to Victim's death, which occurred on December 06, 2000.
[10] Stewart submitted this letter in its entirety as a supporting document with his PCR application.

Stewart had cheated on Victim resulting in him impregnating another girl with the newborn child repeatedly referred to by Victim in her letter. Victim and the other girl were both pregnant by Stewart at the same time. Victim was forced to abort her child, and a few months later the other girl bore Stewart's child. The birth of Stewart's child with the other girl was a painful reminder to Victim of the child she had loss due to her abortion. These factors triggered Victim's suicidal thoughts, which she expressed to Stewart in the above-mentioned letter.

Victim killed herself less than three months after writing this letter.

4. Victim's State of Mind

Victim's state of mind during the last year of her life is a clear indicator of suicidal intent. Victim's words in the above-mentioned letter make evident her mental anguish during the months leading up to her death. In addition, Victim was attending mental health counseling trying to cope with depression from her abortion. Stewart's efforts to obtain Victim's mental health records from the last year of her life, as evidence of prior suicidal intent, was met with the same resistance from State Official's as his efforts to obtain the autopsy photographs.

5. Stewart's Demeanor

The evidence presented by the State at Stewart's trial, in reference to eyewitness observations of Stewart's demeanor after Victim's death, is clearly consistent with Stewart's claim that he was scared and traumatized.

Stewart's demeanor after Victim's death was established by four different witnesses for the State, including two law enforcement officers, who testified at Stewart's trial. Immediately after Victim's death Stewart went and found his best friend, Stanton Wright. Wright testified that when he encountered Stewart Wright observed that Stewart looked "scared" and "afraid". Robert Moore, who encountered Stewart immediately after the fire, testified that Stewart was " nervous acting". Officer

Sammy Crossland and Officer Alvin Worsley, the initial responding officers, testified that when they arrived on the scene, they observed that Stewart was in "a confused state" and in "a daze".

Officer Crossland made observations of Stewart's demeanor at the scene which shed insight into Stewart's state of mind after Victim's death. Officer Crossland testified, in relevant part:

> [Stewart] looked more or less like something happened. It looked like [Stewart] didn't know what to do. I mean people don't normally stick around after they do a crime. It had something to the affect [Stewart] did something that [Stewart] didn't mean to do.
>
> Trial Transcript – p 358 lls 13-17.

6. Evidence Presented at Trial

Ironically, a significant amount of the evidence presented by the State at Stewart's trial tends to support Stewart's claim of death by suicide.[11] This evidence includes (1) an eyewitness description of the condition of Victim's body immediately after death, (2) observations made a police detective while interrogating Stewart, and (3) DNA evidence collected and analyzed by the State's forensic experts. Additionally, evidence contained in the withheld crime scene notes tends to support Stewart's suicide claim.

As mentioned earlier, Stewart went and found Wright immediately following Victim's death. Stewart then took Wright and showed him Victim's body. It must be noted that Wright, who learned of Victim's death shortly after it occurred, had the exact same reaction as Stewart by failing to notify anyone about Victim's death. However, Wright's actions were regarded by the prosecution as being typical of a scared teenager, while Stewart's actions were considered as an attempt to cover up a murder.

[11] The unreliability of the circumstantial evidence presented at trial by the State will be discussed in a later section.

Wright's testimony during cross-examination provided the only available insight into the condition of Victim's body immediately after her death, and before the fire. This testimony, in relevant part, is as follows:

> Q. When you-- when I - when we walked around to the path and you saw the body, was-- did it look like she had been treated roughly or?
> A. No, not that I can recall.
> Q. Did the clothes look like they had been ruffled up or?
> A. No.
> Q. Did she look like she'd been beat up?
> A. No.
>
> Trial Transcript- p 211 lls 5-12.

Wright's observations of the condition of Victim's body were consistent with observations made on the scene by the State's forensic crime scene investigator, SLED Agent Al Stuckey. Agent Stuckey noted that the scene was devoid of any signs of a violent struggle. As mentioned previously, this observation is documented in the crime scene notes which were withheld from Stewart by the State.

Detective Dallas Gurley, of the Bennettsville Police Department, took part in interrogating Stewart after his arrest. Detective Gurley testified that Stewart did not have any injuries on the parts of his body (i.e., hands, face, arms) that would normally be present to indicate a person had been involved in a violent struggle. Though another officer testified that he observed a small scratch on Stewart's face or neck during Stewart's interrogation, Detective Gurley clarified that she was sitting closer to Stewart during the interrogation, and she did not see any scratches on Stewart's face or neck. (In addition, Stewart's mugshot shows he did not have any scratches on his face or neck).

The State's forensic experts testified at Stewart's trial testified in reference to three tiny bloodstains that were found on Stewart's clothing. One small bloodstain was found on the sleeve of Stewart's jacket. Two other small bloodstains were found at the bottom and on the inside of Stewart's undershirt. DNA

analysis revealed that the stain found on the jacket sleeve contained only Victim's DNA, and that the stains found on the undershirt contained a mixture of Stewart's and Victim's DNA.

The State offered no explanation for the perplexity of the forensic evidence presented by the State's experts at Stewart's trial.

However, an explanation was provided for the forensic evidence during Stewart's trial testimony. Stewart testified that he was cradling Victim in his arms as she died. Stewart noticed that Victim was bleeding slightly from her mouth, which is how the tiny bloodstain got on Stewart's jacket sleeve. Stewart further testified that the blood from Victim's mouth got into Stewart's mouth while Stewart was attempting to give Victim CPR. Stewart cuffed the bottom of his undershirt with his free hand and wiped Victim's blood from his mouth with his shirt, which is how the DNA mixture got on the inside bottom of his undershirt.

The State offered its only response to Stewart's explanation during the State's closing argument:

> Direct evidence is the DNA. He explained it away like he explained everything away. The DNA, her DNA, was on his shirt. He wore this shirt at the time that this killing occurred, admitted by the Defendant. So what's the problem?
>
> Trial Transcript- p 711 lls 15-18.

The State's forensic experts further testified that they ruled out all objects identified as potential weapons since these objects tested negative for blood. As mentioned earlier, the withheld notes of the forensic crime scene investigator reveal that no blood was found anywhere on the scene, except for the few drops found on Stewart's clothing and on the leaves in the spot identified as the place where Victim

died.[12] The withheld notes further establish that the forensic investigator found no indication of a struggle on the scene.

7. History of Social Interaction

Evidence was presented at Stewart's trial establishing that Stewart and Victim were romantically involved for two years prior to Victim's death. Several witnesses, both for the State and the defense, testified in reference to Stewart's interaction with Victim during that period. These witnesses included Victim's father and brother, who both testified for the State. Victim's father testified during cross-examination, in relevant part:

> Q. Please tell me in the time that you knew that your daughter was involved in a relationship with me, please tell me of a time, when she's ever come home injured, harmed, bruised?
> A. Never.
> Q. Never?
> A. Never.
>
> Trial Transcript- p 124 lls 8-14.

Every witness, both state and defense, who testified on this matter stated with absolute certainty that Stewart had never harmed Victim during their two-year relationship. Witnesses who had observed Stewart and Victim during arguments testified that Stewart's reaction in response to Victim becoming really upset with Stewart would always be to "hold her" and to "try to calm her down". One witness for the State further testified that Stewart never reacted violently towards Victim, even when "she was swinging at him".

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[12] The few drops of blood found on the leaves were not tested for DNA. Stewart believes the drops of blood on the leaves also came from Victim's mouth when Stewart left Victim laying on the ground while Stewart ran to go get his best friend, Wright. The State's failure to test the leaves for DNA allowed the State to make the claim to the jury that it was unknown exactly where Victim died, as discussed in the previous section. Victim's DNA on the leaves would have conclusively established the exact location of death.

The evidence establishing that Stewart never harmed Victim during their two-year relationship is a significant factor in Stewart's claim of innocence, as it supports Stewart's claim that he did not harm Victim on the morning of her death.

The Supreme Court held that a petitioner's claim of actual innocence meets the threshold requirement to overcome procedural default or the statute of limitations if he persuades the court that "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *McQuiggin,* 569 U.S., at 329 quoting *Schulp v. Delo*, 513 U.S., at 329; *House v. Bell,* 547 U.S. at 538.

Stewart's asserts actual innocence on the basis that he is convicted of killing someone who took her own life. This claim is supported by overwhelming evidence, old and new. Stewart believes he has demonstrated that "no juror, acting reasonably, could have voted to find him guilty beyond a reasonable doubt", as guilt beyond a reasonable doubt cannot be reached for voluntary manslaughter when a person's death resulted from suicide. Thus, Stewart has met the threshold requirement to overcome procedural default or the statute of limitations.

III.

Pursuant to 28 U.S.C. § 2244(b)(2)(B)(ii), the third "essential component" of Stewart's claim is a prima facie showing that "the newly discovered facts . . . when viewed in conjunction with 'the evidence as a whole,'" are "sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *In re Stephens*, 956 F.3d 229, 237 (4th Cir. 2020).

The evidence as a whole is important here because it is "all the evidence put before the court at the time of its § 2244(b)(2)(B)(ii) . . . evaluation." *United States v. MacDonald*, 641 F.3d 596, 610 (4th Cir. 2011). The Court must make "its § 2244(b)(2)(B)(ii) . . . determination—unbounded 'by the

rules of admissibility that would govern at trial'— based on 'all the evidence, including that alleged to have been illegally admitted [and that] tenably claimed to have been wrongly excluded or to have become available only after the trial.'" Id. at 612 (alteration in original) (quoting Schlup v. Delo, 513 U.S. 298, 327–28 (1995)). In other words, "the court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under [evidentiary rules]." Id. (internal quotation marks omitted) (alteration in original).

Thus, the 'evidence as a whole' includes all new developments in Stewart's case, regardless of whether those developments are part of his § 2254 claims.

The record as a whole overwhelmingly establishes that no reasonable juror would convict Stewart of voluntary manslaughter. Firstly, the State's case against Stewart was completely circumstantial. Secondly, the circumstantial evidence presented by the state at trial was unreliable. Thirdly, as discussed in the previous section, there is clear and convincing evidence which firmly establishes Stewart's actual innocence on the basis that Victim died from suicide.

The State's claim at trial was that Stewart violently killed Victim by striking her in the head with a blunt object. The State presented no direct evidence to support its theory. There was no weapon and no forensic or physical evidence of violence found on the scene. Additionally, Stewart had no injuries on his body to indicate that he had been involved in a violent struggle.

Due to the lack of direct evidence to support its trial theory of a violent death, the State relied heavily upon the testimonies of two witnesses, Stanton Wright and Anthony Watson. These witnesses claimed that Stewart made incriminating statements to them after Victim's death.

Wright's Testimony

At Stewart's trial, Stanton Wright was reluctant to testify about allegations included in a written statement he gave police on the date of the incident. So, the prosecutor had Wright read his written statement to the jury. Wright alleged in his written statement in relevant part:

> As we walked towards the path, [Stewart] told me that [Victim] said that she had sex with another dude before she had sex with [Stewart] and didn't shower. And then [Stewart] said that he flipped.
>
> Trial Transcript- p 196 lls 15-18.

There are several factors which bring into question the reliability of this statement.

First, Wright refused to testify to this allegation and had to be forced by the prosecutor to read it from his statement.

Second, Wright provided testimony during cross-examination which clearly contradicted his written statement. Wright testified that (1) he had known Victim for two years and knew that Victim wasn't the type of person to do the things alleged in his written statement, (2) during the two years Stewart and Victim had been involved in a relationship, Stewart had never acted violently towards Victim, and (3) when Wright observed the condition of Victim's body shortly after death, it didn't appear to him that any violence had been committed against her.

Third, Wright seriously undermined the veracity of his written statement by admitting that when he gave police this statement, he was just telling them what they wanted to hear so he "wouldn't get in trouble" and could "go home".

Fourth, the State provided evidence in contradiction of Wright's written statement with the testimony of Victim's brother, who established Victim's specific whereabouts prior to her meeting with Stewart on the night in question. Victim's brother testified that on the night of Victim's death he and Victim attended a high school basketball game that went into overtime and that following this game he

dropped Victim off at their parents' home (where she was picked up by Stewart shortly afterwards). This testimony established that Victim was spending time with her brother, not having sex with "another dude" as alleged in Wright's written statement, prior to meeting with Stewart.

Lastly, it is highly unlikely that Stewart "flipped", as there was no evidence of violence found on the scene and no injuries consistent with violent conduct were found on Stewart's body. In addition, the locations of the few drops of blood found on Stewart's clothing is undeniably consistent with Stewart attempting to give Victim CPR at the time of her death, a lifesaving effort Stewart would never have attempted if he had just violently killed Victim.

Watson's Testimony

At Stewart's trial, Anthony Watson testified that he had been intimate with Victim a month prior to her death.[13] While there was no way to prove or disprove this claim, the witness further testified that after Victim's death Stewart made repeated collect calls to the witness from the county jail and that Stewart threatened the witness during these calls by saying "you're next". The witness testified that he did not accept these calls and that the phone to which the alleged threatening collect calls were received had a feature on it which blocked collect calls.

During cross-examination, Stewart questioned the witness as to how it was possible the witness received multiple collect calls to a phone which blocked collect calls. Watson explained, in relevant part:

> I don't know how directly. It said something about accepting the call. I didn't say yes or no. I just had the phone. I didn't really hear no name. I just hang on…We had a block on the phone. We're not

[13] Watson's claim that he had been intimate with Victim a month prior to her death was not consistent with Wright's written statement, which alleged that Victim had been intimate with "another dude" on the night of her death.

> supposed to make collect calls, so I don't know how [Stewart] got through.
>
> Trial Transcript- p 311 lls 12-14; p 311 ll 25 - p 312 ll 1.

Watson's claim that he received multiple collect calls to a phone which blocked collect calls, in and of itself, is highly unlikely. Additionally, the state possessed evidence which clearly proved this claim was false.

The State had in its possession the phone records from the county jail.[14] These records reflect that every collect call made from the jail was automatically logged into the phone records, regardless of whether the call was accepted. If the witness was being truthful about receiving threatening collect calls from the county jail, then the phone number to which these calls were made would have been listed in the phone records. There also would have been a recording of the conversation, as it is common knowledge that all collect calls made from jails and prisons are recorded. The State could have then settled the dispute about this matter by simply showing the jury Watson's phone number in the county jail phone records, or by playing the recording of the threatening calls to the jury.

The State never mentioned the phone records during Stewart's trial. Instead, the State attempted to support Watson's claim with the testimony of his mother who testified that she overheard the conversations and recognized Petition's voice. However, during cross-examination Watson's mother admitted that she had never seen Stewart in person or held a conversation with him prior to trial. This admission established that Watson's mother did not possess the personal knowledge to be able to recognize Stewart's voice, as the witness claimed during direct examination.

[14] The state did not disclose these records to Stewart until the first day of trial. This last-minute disclosure prevented Stewart, who was representing himself, from having adequate time to review the phone records prior to Watson's testimony.

Though Stewart's cross-examinations cast serious doubt upon the veracity of the above-mentioned testimonies, the State never attempted to enter the phone records into evidence. The fact that the State withheld the phone records from the jury is a strong indicator that the information contained in the phone records was not favorable to the State. Specifically, it can be reasonably inferred that Watson's phone number was not listed in the phone records which would prove that he never received a collect call from the county jail, threatening or otherwise.

In addition, other information contained in the phone records contradicted Watson's testimony. Watson testified that an automated voice "said something about accepting a call" and that the collect calls were connected without his approval, or without him saying "yes or no". The phone records reflect that a collect call from the county jail would not be connected unless the receiving party accepted the call by pressing the number three, not by saying "yes or no" as claimed by Watson. Thus, the phone records prove that Watson could not have received collect calls from the county jail in the manner which he claimed.

These facts could clearly support a claim that the state knowingly presented false testimony, as the state had evidence in its possession which established that Watson was not being truthful about receiving threatening collect calls from the jail. However, the state's last-minute disclosure of the phone records bars Stewart from raising this constitutional claim. It does not, however, prevent this Court from considering this fact as a part of its "evidence as a whole" evaluation.

Evidence As a Whole

The State relied upon the testimonies of Watson and Wright as the basis for its request that the judge instruct the jury on voluntary manslaughter. Stewart was ultimately convicted of this offense.

The State's case against Stewart at trial was based entirely upon circumstantial factors with little or no evidentiary support. There is also a reasonable probability the conclusion of the State's pathologist, in reference to Victim's cause of death, will be proven through science to be false.

Conversely, Stewart's claim of innocence is overwhelmingly supported by the totality of the evidence, both old and new.

The trial testimony of Victim's father established that Victim's death occurred on the approximate one-year anniversary of the death of her child by a traumatic abortion she was forced to undergo.

Less than three months prior to her death, Victim wrote a letter to Stewart stating her intention to kill herself.

Historically, witnesses unanimously testified that Stewart had never acted violently towards Victim during their two-year relationship. This includes witnesses that testified for the state.

Forensically, the DNA evidence was consistent with Stewart attempting to save Victim's life by giving her CPR.

The withheld crime scene notes reveal that the crime scene investigator observed that no evidence of violence was found on the scene. An eyewitness who observed Victim's body shortly after death testified that from the condition of her body it did not appear that violence had been committed against Victim. A police detective testified that on the day of Victim's death Stewart did not have any injuries on his body to indicate that he had been involved in a violent struggle.

Stewart's actions after Victim's death would raise some degree of suspicion. However, this suspicion would be mitigated by the evidence reasonably establishing that Stewart's actions, though highly inappropriate, were motivated by the irrationality in the mind of a panicked teenager. This evidence

includes the testimony of four different witnesses who gave descriptions of Stewart's demeanor, both before and after the fire.

At this point, Stewart believes it is relevant to put this matter into perspective. Though the record clearly establishes that Stewart didn't kill Victim, Stewart deeply regrets his actions after Victim's death. He realizes these actions denied closure for Victim's family. Stewart displayed his remorse for this mistake by being honest about his actions and by pleading guilty to desecration of human remains at the first opportunity. He was sentenced to 9 years and would have served a total of 5 years for this offense. Stewart has been incarcerated for almost 21 years because he is also convicted of a crime he didn't commit. This conviction is based upon false allegations about the circumstances which led to Victim's death, which is the overall focus of the claims Stewart brings before this Court.

The evidence as a whole overwhelmingly establishes that no reasonable juror would vote to convict Stewart of voluntary manslaughter based on the following:

1) The State's case against Stewart was based entirely upon circumstantial evidence.
2) The State concealed evidence which contradicted its case.
3) The evidence as a whole clearly and convincingly establishes that Victim died from suicide.

Thus, Stewart believes that he has made a prima facie showing that his claims satisfy the requirements of § 2244 (b)(2)(B)(ii) for purposes of this Court granting authorization.

IV.

As additional matters, Stewart respectfully requests that this Court extend no deference under AEDPA to the state court, as the state court's denial of discovery and an evidentiary hearing produce an adjudication of "a claim that was materially incomplete". See *Winston v. Kelly* 592 F.3d 535, 537 (4th Cir. 2010).

Stewart further respectfully requests that the Court grant him discovery and an evidentiary hearing, which he was denied in his state proceedings. The dispute over material facts clearly warranted discovery and an evidentiary hearing on the state level. Stewart believes that the totality of the circumstances is sufficient to establish that the denial of discovery and an evidentiary hearing on the federal level would result in a gross miscarriage of justice.

Lastly, Stewart respectfully requests that the Court grant him leave to exhaust his state remedies on the juror misconduct claim.

In conclusion, Stewart's wrongful incarceration has not only adversely impacted Stewart, but it has also deeply hurt his family. Stewart's immediate family members were ostracized, harassed, and even received death threats. Stewart's 21-year-old daughter had to grow up without her father in her life. Stewart's 3-year-old grandson has never seen Stewart in person.

Stewart has an outpouring of community support, and he has taken positive steps towards returning to society. Stewart was married 2 years ago, and his wife adopted Ranger, a dog Stewart trained in a special prison program. While in prison, Stewart also completed Work Keys, participated in numerous programs and has been awarded several achievements as a member of Toastmasters International. Additionally, Stewart has a strong network of family and friends who will assist him with the tools and resources necessary for him to succeed once he is released.

Weldon Stewart is an innocent man who prays that this Court will grant him a fair opportunity for justice.

Dated: October 14, 2021

Respectfully submitted,

Weldon W. Stewart Jr.

Weldon W. Stewart, Jr., #295095
Evans Correctional Institution
[redacted]
Bennettsville, SC 29512

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PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District: South Carolina
Name (under which you were convicted): Weldon W. Stewart, Jr.	Docket or Case No.:
Place of Confinement : Evans Correctional Institution	Prisoner No.: 295095
Petitioner (include the name under which you were convicted) Weldon W. Stewart, Jr. 295095 v.	Respondent (authorized person having custody of petitioner) Warden Donnie Stonebreaker, Jr. Evans Correctional Institution
The Attorney General of the State of: South Carolina	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
Court of General Sessions, Marlboro County, Bennettsville, South Carolina

(b) Criminal docket or case number (if you know): Case No.:02-GS-34-1918, Case No.:02-GS-34-1919

2. (a) Date of the judgment of conviction (if you know): 08/01/2003

(b) Date of sentencing: 08/01/2003

3. Length of sentence: 39 years

4. In this case, were you convicted on more than one count or of more than one crime? ☑ Yes ☐ No

5. Identify all crimes of which you were convicted and sentenced in this case: Voluntary manslaughter and desecration of human remains.

6. (a) What was your plea? (Check one)

☑ (1) Not guilty ☐ (3) Nolo contendere (no contest)

☐ (2) Guilty ☐ (4) Insanity plea

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(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? Murder, not guilty. Desecration of human remains, guilty.

(c) If you went to trial, what kind of trial did you have? (Check one)

☑ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☑ Yes ☐ No

8. Did you appeal from the judgment of conviction?

☑ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: The South Carolina Court of Appeals

(b) Docket or case number (if you know):

(c) Result: Dismissed by unpublished opinion

(d) Date of result (if you know): 04/20/2005

(e) Citation to the case (if you know): State v. Stewart, Op. No. 2005-UP-284

(f) Grounds raised: Trial court erred by failing to instruct the jury on involuntary manslaughter.

(g) Did you seek further review by a higher state court? ☐ Yes ☑ No

If yes, answer the following:

(1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Result: N/A

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(4) Date of result (if you know):

(5) Citation to the case (if you know): N/A

(6) Grounds raised: N/A

(h) Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes ☑ No

If yes, answer the following:

(1) Docket or case number (if you know): N/A

(2) Result: N/A

(3) Date of result (if you know):

(4) Citation to the case (if you know): N/A

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☑ Yes ☐ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: South Carolina Court of Common Pleas

(2) Docket or case number (if you know): 2006-CP-34-00125

(3) Date of filing (if you know): 04/18/2006

(4) Nature of the proceeding: Post Conviction Relief

(5) Grounds raised: Ineffective assistance of appellate counsel.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☑ Yes ☐ No

(7) Result: Application was denied and dismissed.

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(8) Date of result (if you know): 01/08/2007

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: South Carolina Court of Common Pleas

(2) Docket or case number (if you know): 2018-CP-34-00121

(3) Date of filing (if you know): 06/05/2018

(4) Nature of the proceeding: Post Conviction Relief

(5) Grounds raised: (1) Newly discovered evidence that State concealed evidence, in violation of Brady and due process, revealing that injury State alleged killed Victim was actually produced after Victim's death. (2) Newly discovered evidence that State failed to correct the false/misleading testimony of State's expert witness regarding cause and manner of death, in violation of Brady and due process. (3) Newly discovered evidence that State withheld notes written by crime scene investigator, when the notes contradicted the State's theory at trial.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☑ No

(7) Result: Application was summarily dismissed

(8) Date of result (if you know): 10/05/2019

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know):

(4) Nature of the proceeding: N/A

(5) Grounds raised: N/A

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(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result: N/A

(8) Date of result (if you know):

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: ☑ Yes ☐ No

(2) Second petition: ☑ Yes ☐ No

(3) Third petition: ☐ Yes ☐ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

N/A

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Newly discovered evidence that State concealed evidence, in violation of Brady and due process, revealing that injury State alleged killed Victim was actually produced after Victim's death.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Petitioner was tried for murder and convicted of voluntary manslaugther based on the State's allegation that he inflicted a fatal injury to the Victim's head. Specifically, the State's pathologist concluded that Victim died as a result of blunt force trauma to the head in the manner of homicide. The conclusions of the State's pathologist formed a basis for the State's case against Petitioner.

Petitioner, after his state appeals and first Federal habeas corpus application, discovered that the State concealed evidence tending to establish that the supposed fatal blunt force trauma (continued on next page)

(b) If you did not exhaust your state remedies on Ground One, explain why: N/A

GROUND ONE:

(a) Supporting facts: (continuation of previous page)

injury was produced after Victim's death and therefore, was not the cause of death, as claimed by the State at Petitioner's trial.

As this discovery involves the science of forensic pathology, Petitioner retained an expert in this field to assist him with this matter. The retained forensic pathologist, after reviewing the autopsy report and other autopsy data in Petitioner's possession, reached a tentative conclusion, based in part on the location of the injury, that it was possible the injury in question was a postmortem thermal injury, or an injury produced after death by fire. However, the retained pathologist stated that he would need to review all the autopsy data, especially the autopsy photographs, before he would be able to make a definitive conclusion regarding this injury.

Based on this information, Petitioner filed a petition for post-conviction relief in the state court. Petitioner alleged that he had obtained newly discovered evidence that the State committed a Brady violation by concealing evidence establishing that the injury the State claimed killed Victim was produced after Victim's death. Petitioner further requested discovery to obtain the autopsy data necessary for the retained pathologist to complete his autopsy review. Petitioner made this request for the expressed purpose of gathering scientific evidence in support of his claim that the State violated Brady.

For purposes of making prima facie showing of constitutional error entitling Petitioner to relief, Petitioner submitted a Supporting Brief and Supporting Documentation with his PCR application.

The PCR court denied Petitioner's request for discovery and summarily dismissed Petitioner's PCR application without holding an evidentiary hearing. The state supreme Court dismissed Petitioner's appeal without review. After exhausting his state remedies, Petitioner raises this constitutional claim in the current application.

See Memorandum of Facts and Law in Support of Motion for Authorization, pages 10-12.

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(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☑ No

(2) If you did not raise this issue in your direct appeal, explain why: This issue was not discovered until after trial and original post-trial proceedings.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☑ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Application for Post Conviction Relief

Name and location of the court where the motion or petition was filed: In the Court of Common Pleas for the Fourth Judicial Circuit, Marlboro County, South Carolina.

Docket or case number (if you know): 2018-CP-34-00121

Date of the court's decision: 10/05/2019

Result (attach a copy of the court's opinion or order, if available): Application was summarily dismissed without an evidence hearing being held.

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☑ No

(4) Did you appeal from the denial of your motion or petition? ☑ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☑ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: South Carolina Supreme Court

Docket or case number (if you know): 2020-000900

Date of the court's decision: 10/19/2020

Result (attach a copy of the court's opinion or order, if available): The South Carolina Supreme Court summarily dismissed this appeal without allowing petitoner to file a petition for writ of cetiorari.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

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(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: N/A

GROUND TWO: Newly discovered evidence that State failed to correct the false/misleading testimony of State's expert witness regarding cause and manner of death, in violation of Brady and due process.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

At Petitioner's trial, the State's pathologist testified that Victim died from blunt force trauma to the head. The pathologist testified that this conclusion was based on the presence of a skull fracture which the pathologist concluded was inflicted prior to death. The pathologist further testified that this injury caused death within seconds or minutes after it was inflicted. After his first state and federal proceedings had concluded, Petitioner discovered evidence tending to establish that (1) the skull fracture, claimed by the State to have caused death, was not created until after Victim's death (2) prior to trial, the pathologist informed the prosecutor of the possibility that this skull fracture was not present until after death and (3) the prosecutor failed to disclose this information to Petitioner and failed to correct the testimony (continued on next page)

(b) If you did not exhaust your state remedies on Ground Two, explain why: N/A

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☑ No

(2) If you did not raise this issue in your direct appeal, explain why: This issue was not discovered until after trial and original post-trial proceedings.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☑ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Application for Post Conviction Relief

Name and location of the court where the motion or petition was filed: In the Court of Common Pleas for the Fourth Judicial Circuit, Marlboro County, South Carolina.

Docket or case number (if you know): 2018-CP-34-00121

GROUND TWO:

(a) Supporting facts: (continuation of previous page)

of the pathologist giving the false impression that the skull fracture caused death.

See Memorandum of Facts and Law in Support of Motion for Authorization, pages 12-16.

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Date of the court's decision: 10/05/2019

Result (attach a copy of the court's opinion or order, if available): Application was summarily dismissed without an evidence hearing being held.

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☑ No

(4) Did you appeal from the denial of your motion or petition? ☑ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☑ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: South Carolina Supreme Court

Docket or case number (if you know): 2020-000900

Date of the court's decision: 10/19/2020

Result (attach a copy of the court's opinion or order, if available): The South Carolina Supreme Court summarily dismissed this appeal without allowing petitioner to file a petition for writ of certiorari.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two : N/A

GROUND THREE: Newly discovered evidence that State withheld notes written by State's crime scene investigator, when the notes contradicted the State's theory at trial.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Petitioner and Ms. Stewart were working on gathering evidence from Petitioner's case requested by the retained pathologist for purposes of his autopsy review. Petitioner submitted a Freedom of Information Act (FOIA) request to the South Carolina Law Enforcement Division (SLED) for this purpose. SLED complied with this request, in June of 2017, by mailing CDs containing the requested information to Ms. Stewart.

While looking through the SLED files, Ms. Stewart came across previously undisclosed crime scene notes written by SLED crime scence investigator, Al Stuckey. The notes revealed that the (continued on next page)

GROUND THREE:

(a) Supporting facts: (continuation of previous page)

SLED agent had meticulously searched the scene looking for blood on potential weapons, as well as in places that would indicate Petitioner had tried to clean up blood (i.e., off a weapon or his clothing), and had found none. The scene investigator noted that Victim's body had been moved over 100 feet from the identified site of death prior to the fire, thus indicating that the scene of death remained unharmed by the fire. Most significantly, the SLED crime scene investigator specifically mentioned in his notes that he found absolutely no evidence of a struggle on the scene.

SLED Agent Stuckey testified at Petitioner's trial, but the focus of the agent's testimony was his role in examining latent prints. The State crafted its direct examination of Agent Stuckey so that his investigation of the scene was barely mentioned, and the aforementioned information contained in the crime scene investigator's notes was not mentioned at all during his trial testimony.

The observations made on the scene by the SLED crime scene investigator, as documented in the crime scene notes withheld by the State, strongly contradicted essential parts of the State's theory of a violent death and completely contradicted many claims made by the State during its closing argument. In essence, the exclusion of the evidence contained in the withheld crime scene notes made the State's case against Petitioner appear much stronger, and Petitioner's defense appear much weaker, than the full facts would have suggested.

Based on these facts, Petitioner petitioned the state court for post-conviction relief. Petitioner alleged that the State committed a Brady violation by withholding the crime scene notes written by SLED Agent Al Stuckey, as these notes contained evidence which was exculpatory or favorable to Petitioner. For purposes of making a prima facie showing of constitutional error entitling Petitioner to relief, Petitioner submitted a Supporting Brief and the following Supporting Documentation with his PCR application: (1). The withheld crime scene notes written by Agent Stuckey, and (2). A letter from the prosecutor (dated less than a month before Petitioner's trial) listing all the Brady material that had been disclosed to Petitioner and showing that the crime scene notes had not been disclosed to Petitioner.

The PCR court summarily dismissed Petitioner's PCR application without holding an evidentiary hearing. The state supreme court denied Petitioner's appeal without review. After exhausting his state remedies, Petitioner raises this constitutional claim in the current application.

See Memorandum of Facts and Law in Support of Motion for Authorization, pages 16-20.

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(b) If you did not exhaust your state remedies on Ground Three, explain why: N/A

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☑ No

(2) If you did not raise this issue in your direct appeal, explain why: This issue was not discovered until after trial and original post-trial proceedings.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☑ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Application for Post Conviction Relief

Name and location of the court where the motion or petition was filed: In the Court of Common Pleas for the Fourth Judicial Circuit, Marlboro County, South Carolina.

Docket or case number (if you know): 2018-CP-34-00121

Date of the court's decision: 10/05/2019

Result (attach a copy of the court's opinion or order, if available): Application was summarily dismissed without an evidence hearing being held.

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☑ No

(4) Did you appeal from the denial of your motion or petition? ☑ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☑ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: South Carolina Supreme Court

Docket or case number (if you know): 2020-000900

Date of the court's decision: 10/19/2020

Result (attach a copy of the court's opinion or order, if available): The South Carolina Supreme Court summarily dimissed this appeal without allowing petitioner to file a petition for writ of cetiorari.

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(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: N/A

GROUND FOUR: Petitioner was deprived of a fair and impartial trial due to a juror committing misconduct.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The juror concealed his prior conflict with Petitioner over the fact that it was questionable whether Petitioner impregnated juror's ex-girlfriend. Petitioner had only heard of the juror through the ex-girlfriend, who always referred to the juror by the name Tyrone Alford. At Petitioner's trial the juror was called a different name. Petitioner was not aware that the man sitting on the jury at his murder trial was a scorned former lover of a girl Petitioner had dated and possibly impregnated. The juror had also previously attempted to run Petitioner over with a car. Once Petitioner discovered that the juror was the same man who despised Petitioner over Petitioner's relationship with the juror's ex-girlfriend, Petitioner filed a post-trial motion for a new trial.

(b) If you did not exhaust your state remedies on Ground Four, explain why: A motion hearing was held on May 26, 2016 before the trial judge. At the conclusion of the hearing, the trial judge made an oral ruling denying the motion. Petitoner has been unable to exhaust his state remedies due to the trial judge's failure to file a written order, though more than 5 years have elapsed since the judge made his oral ruling, and Petitioner cannot appeal the judge's decision until a written order is filed.

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☑ No

(2) If you did not raise this issue in your direct appeal, explain why: This information was discovered after direct appeal.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☑ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post-trial motion.

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Name and location of the court where the motion or petition was filed: Marlboro County Court of General Sessions

Docket or case number (if you know): 02-GS-34-1919

Date of the court's decision: 05/26/2016

Result (attach a copy of the court's opinion or order, if available): The trial judge made an oral ruling denying the motion. No written order has been filed.

(3) Did you receive a hearing on your motion or petition? ☑ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☑ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

Petitioner was not able to appeal the trial judge's ruling due to the fact that the trial judge has not filed a written order and Petitioner cannot appeal the judge's decision until a written order has been filed.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: N/A

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13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☐ Yes ☑ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: The first three grounds have been presented to the highest state court. The fourth ground was not raised to the highest state court due to the fact that the trial judge has not filed a written order though more than five years has elapsed since the judge made his oral ruling.

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

N/A

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☑ Yes ☐ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. United States District Court; Docket No. 8:09-842-SB. Federal Habeas Corpus, Ground One: "Did the trial court deprive me of my constitutional right to due process by failing to instruct the jury on involuntary manslaughter?" Ground Two: "Did appellate counsel deprive me of my constitutional right to effective assistance of counsel?" Petition denied on 3/26/2010. United States Court of Appeals, Fourth Circuit; Case No. 10-6750, Docket No. 13. Appeal denied on 2/17/2011.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? ☑ Yes ☐ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. Post-trial motion for ground four which the judge made an oral ruling but failed to file a written order.

AO 241 (Rev. 09/17)

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: N/A

(b) At arraignment and plea: N/A

(c) At trial: Pro Se

(d) At sentencing: Pro Se

(e) On appeal: Joseph L. Savitz III, South Carolina Office of Appellate Defense

(f) In any post-conviction proceeding: Delton Powers (first post-conviction); Tommy Thomas, [redacted] Irmo, SC 29063 (second post-conviction).

(g) On appeal from any ruling against you in a post-conviction proceeding: Katherine H. Hudgins, South Carolina Office of Appellate Defense, (first post-conviction); Tommy Thomas, [redacted] Irmo, SC 29063 (second post-conviction).

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☑ Yes ☐ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

Marlboro County Court of General Sessions, Bennettsville, SC.

(b) Give the date the other sentence was imposed: 08/03/2003

(c) Give the length of the other sentence: 9 years (consecutive sentence)

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☑ No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

Petitioner should be exempt from procedural bars and/or the statute of limitations due to Petitioner's actual innocence. Petitioner asserts his actual innocence on the basis that the evidence as a whole overwhelmingly establishes that Victim's death resulted from suicide. See Memorandum of Facts and Law in Support of Motion for Authorization, pages 20-35.

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* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

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(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: Vacate sentence.

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 10/14/2021 (month, date, year).

Executed (signed) on 10/14/2021 (date).

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

Stewart v. Warden of Lieber Correctional Institution

Opinion

Civil Action No. 8:09-842-SB.

March 26, 2010

ORDER

SOL BLATT JR., Senior District Judge

This matter is before the Court upon Petitioner Weldon Stewart, Jr.'s *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The record contains the report and recommendation ("R R") of a United States Magistrate Judge, which was made in accordance with 28 U.S.C. § 636(b)(1) and the local rules of this district. The Petitioner filed timely objections to the R R, and the matter is ripe for review. See 28 U.S.C. § 636(b)(1) (providing that a party may object, in writing, to an R Rwithin fourteen days after being served with a copy of that report).

Because the Petitioner proceeds *pro se,* the Court holds his pleadings to a less stringent standard than those drafted by attorneys and accords them liberal construction. See Estelle v. Gamble. 429 U.S. 97 (1976); Haines v. Kerner, 401 U.S. 519 (1972).

BACKGROUND

The Petitioner is incarcerated at the McCormick Correctional Institution pursuant to orders of commitment of the Marlboro County Clerk of Court. In October of 2002, the Marlboro County Grand Jury indicted the Petitioner, who was 19 at the time of the underlying incident, for the murder of his 15 year-old girlfriend and the desecration of her remains. The Petitioner pleaded guilty to desecration of human remains but proceeded to trial on the murder charge before the Honorable Paul M. Burch from July 28 to August 1, 2003. At trial, the Petitioner represented himself with public defender Wade R. Crow acting as standby counsel. On August 1, 2003, the jury convicted the Petitioner of the lesser-included offense of voluntary manslaughter, and Judge Burch sentenced him to thirty years of imprisonment for voluntary manslaughter and nine

years of imprisonment for the desecration of human remains, to be served consecutively.

The Petitioner filed a timely appeal, and acting Chief Appellate Defender Joseph L. Savitz, III, represented the Petitioner on appeal. On October 21, 2004, Savitz filed with the South Carolina Court of Appeals a petition to be relieved as counsel and an Anders brief, raising the following issue: "The judge erred by refusing to instruct the jury on involuntary manslaughter." (Entry 15-2 at 223.) Despite being granted an extension of time, the Petitioner did not timely submit a *pro se* brief, and on April 20, 2005, the court dismissed the Petitioner's appeal in an unpublished opinion. State v. Stewart, No. 05-UP-284 (S.C. Ct. App. 2005); (Entry 15-2 at 231). The court sent down the remittitur on May 23, 2005.

On April 18, 2006, the Petitioner filed an application for post-conviction relief ("PCR"), alleging that his appellate counsel was ineffective. (Entry 15-2 at 234.) The Honorable John M. Milling held an evidentiary hearing on November 15, 2006. The Petitioner appeared with counsel, Delton W. Powers, Jr., and testified. On January 8, 2007, Judge Milling issued an order denying the PCR application and dismissing it with prejudice. (Entry 15-2 at 278-87.) The Petitioner timely filed a notice of appeal.

Assistant Appellate Defender Katherine H. Hudgins of the South Carolina Office of Appellate Defense represented the Petitioner on his PCR appeal. On October 25, 2007, Hudgins filed a petition to be relieved as counsel and a Johnson petition for a writ of certiorari raising the following issue: "Did the PCR judge err in refusing to find appellate counsel ineffective for failing to argue that the trial judge erred in admitting two unauthorized documents into evidence?" (Entry 15-6 at 3.) On March 13, 2008, the Petitioner filed a *pro se* response to the Johnson petition, raising the following issues:

Did the PCR court err in failing to find appellate counsel ineffective for failing to argue the trial judge erred in giving a jury instruction on voluntary manslaughter?

Did the PCR court err in failing to find appellate counsel ineffective for failing to argue that trial judge erred in admitting a photograph of the decedent's body into evidence?

Did the PCR court err in failing to find appellate counsel ineffective for failing to argue that the trial judge erred in allowing Stanton Wright to provide hearsay testimony?

(Entry 15-7 at 3, 8, and 14.)

On June 23, 2008, the Petitioner filed a supplemental *pro se* response in which he further discussed the voluntary manslaughter issue. On March 18, 2009, the South Carolina Supreme Court denied the petition and granted counsel's motion to be relieved; the court sent down the remittitur on April 3, 2009.

The Petitioner filed the instant § 2254 petition on March 31, 2009, raising the following grounds, quoted verbatim:

Ground One: Did the trial court deprive me of my constitutional right to due process by failing to instruct the jury on involuntary manslaughter?

Supporting facts: The trial court failed to instruct the jury on the requested jury instruction on involuntary manslaughter. There was evidence presented during the trial which supported the jury instruction and the trial court's failure to instruct the jury on this instruction deprived me of a fair trial.

Ground Two: Did appellate counsel deprive me of my constitutional right to effective assistance of counsel?

Supporting Facts: Appellate counsel was ineffective for failing to argue on my appeal: 1) the trial judge erred by charging the jury on voluntary manslaughter when there was no evidence to support the charge, 2) the trial judge admitted two documents that were not authenticated, 3) the trial judge admitted photographs that were irrelevant and prejudicial, and 4) the trial judge allowed hearsay testimony.

(Entry 1 at 5-7.)

On July 13, 2009, the Respondent filed a motion for summary judgment. The Magistrate Judge issued an order on July 15, 2009, pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), advising the Petitioner of the summary judgment procedure and the possible consequences of failing to adequately respond to the motion. On September 17, 2009, the Petitioner filed a response in opposition to the Respondent's motion. On December 10, 2009, the Magistrate Judge issued an R R, recommending that the Court grant the Respondent's motion for summary judgment. The Petitioner filed written objections to the R R on December 28, 2009.

STANDARDS OF REVIEW

I. Legal Standard for Summary Judgment

To grant a motion for summary judgment, the Court must find that "there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c). The court is not to weigh the evidence, but rather to determine if there is a genuine issue of fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If no material factual disputes remain, then summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party bears the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). All evidence should be viewed in the light most favorable to the non-moving party. See Perini Corp. v. Perini Constr. Inc., 915 F.2d 121, 123-24 (4th Cir. 1990).

II. The Magistrate Judge's R R

This Court is charged with conducting a *de novo* review of any portion of the R R to which a specific objection is registered and may accept, reject, or modify, in whole or in part, the recommendations contained in that R R. 28 U.S.C. § 636(b)(1). Any written objection must specifically identify the portion of the R R to which the objection is made and the basis for the objection. Id.

DISCUSSION

I. Exhaustion of Remedies Pursuant to 28 U.S.C. § 2254

Relief under § 2254 may be had only after a habeas petitioner has exhausted his state court remedies. "To satisfy the exhaustion requirement, a habeas petitioner must present his claims to the state's highest court." Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997), cert. denied, 522 U.S. 833 (1997). Stated plainly, in the interest of giving state courts the first opportunity to consider alleged constitutional errors in state proceedings, a § 2254 petitioner is required to "exhaust" all state remedies before a federal district court can entertain his claims. Thus, a federal habeas court may consider only those issues that have been properly presented to the highest state courts with jurisdiction to decide them.

To exhaust a claim in state court, a person in custody has two primary means of attacking his conviction: filing a direct appeal and/or filing an application for relief under the South Carolina Post Conviction Procedure Act, S.C. Code Ann. §§ 17-27-10-160. "[W]hen the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies." In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 321 S.C. 563, 564 (1990).

II. Procedural Default

When a federal habeas petitioner has failed to raise a claim at the appropriate time in state court and has no further means of bringing that issue before the state courts, the claim will be considered procedurally defaulted, and he will be procedurally barred from raising the issue in his federal habeas petition.Smith v. Murray, 477 U.S. 527, 533 (1986). Procedural default can occur at any level of the state proceedings if a state has procedural rules that bar its courts from considering claims not raised in a timely fashion.

III. Relationship Between Exhaustion and Procedural Default

If a federal habeas petitioner has procedurally defaulted his opportunity for relief in the state courts, the exhaustion requirement is technically met and the rules of procedural bar apply. See Matthews, 105 F.3d 907 (citing Coleman v. Thompson, 501 U.S. 722, 735 n. 1 (1991), Teague v. Lane, 489 U.S. 288, 297-98 (1989), and George v. Angelone, 100 F.3d 353, 363 (4th Cir. 1996)). Thus, where the state court has not had the opportunity to apply its own procedural bar, the federal court will nevertheless bar the claim where application of the bar is clear. Teague, 489 U.S. at 297-98.

IV. Excusing Procedural Default

Notwithstanding the foregoing, a federal court may consider claims that have not been presented to the highest South Carolina court with jurisdiction in very limited circumstances. Granberry v. Greer, 481 U.S. 129, 131 (1989). First, a federal court will

review a procedurally defaulted claim if the petitioner can demonstrate cause for the default and actual prejudice therefrom, and second, a petitioner can rely on the doctrine of actual innocence. Coleman, 501 U.S. at 750.

"Cause" is defined as "some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule." Strickler v. Greene, 527 U.S. 263, 283 n. 24 (1999) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). A petitioner must show reasonable diligence in pursuing his claim to establish cause. Moreover, the claim of cause itself must be exhausted. See Edwards v. Carpenter, 529 U.S. 466 (2000). To establish "actual prejudice," a petitioner generally must show some error. In addition, a petitioner must show an actual and substantive disadvantage as a result of the error, not merely the possibility of harm. Lastly, "actual innocence" is not an independent claim, but a method of excusing default. To prevail under this theory, a petitioner must produce new evidence that was not available at trial to establish his factual innocence.Royal v. Taylor, 188 F.3d 239 (4th Cir. 1999).

V. Habeas Corpus Relief

For those claims adjudicated on the merits, habeas relief is warranted only if a petitioner can demonstrate that the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

In Williams v. Taylor, 529 U.S. 362 (2000), the Supreme Court explained that § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses have independent meaning. Id. at 404-05. A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in controlling cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. Id. at 405-06. A federal habeas court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from Supreme Court decisions but unreasonably applies it to the facts of the particular case. Id. at 407-08. Factual determinations made by the state "shall be presumed to be correct," and "[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

VI. Analysis

In his motion for summary judgment, the Respondent asserts that the Petitioner's first ground for relief (that the trial court deprived him of his right to due process by failing to instruct the jury on involuntary manslaughter) is (1) procedurally defaulted, (2) not cognizable on federal habeas review, and (3) without merit. Next, the Respondent asserts that the claims asserted in the Petitioner's second ground (that appellate counsel was ineffective for failing to raise several issues on appeal), are all procedurally defaulted and/or without merit. The Petitioner filed a response to the Respondent's motion for summary judgment, opposing all of the Respondent's arguments.

After review, the Magistrate Judge agreed with the Respondent that ground one is procedurally defaulted and that the claim fails on the merits. In addition, the Magistrate Judge agreed with the Respondent that the Petitioner's second ground for relief failed on the merits.

The Petitioner filed timely objections to the R R, essentially objecting to the R R "in its entirety." (Entry 27 at 20). Specifically, the Petitioner asserts that none of his claims are procedurally defaulted and that even if they were, he can establish cause and prejudice, as well as actual innocence, to excuse the procedural default. The Petitioner also asserts that all of his claims succeed on the merits in light of the overwhelming evidence in the record and the applicable law.

A. Ground One

As previously mentioned, the Petitioner asserts that the trial court deprived him of due process by failing to instruct the jury on involuntary manslaughter. After a review of the record, including the Petitioner's filings and the R R, the Court agrees with the Magistrate Judge that this claim is without merit.

As an initial matter, the Court is not persuaded by the Respondent's argument that the Petitioner's claims are procedurally defaulted pursuant to the South Carolina Supreme Court's decision in State v. Lyles, 381 S.C. 442, 443, 673 S.E.2d 811, 812 (S.C. 2009). In Lyles, the court noted that "a decision of the Court of Appeals after conducting a review pursuant toAnders is not a decision on the merits of the appeal, but simply reflects that the appellate court was unable to ascertain a non-frivolous issue which would require counsel to file a merits brief." Id. At 444-45, 673 S.E.2d at 813. Based on this language, the Respondent seems to argue that in denying Anders and/orJohnson petitions, an appellate courts does not consider the merits of a petitioner's claims, resulting in those claims being procedurally defaulted. After consideration, the Court disagrees with the Respondent's attempt to apply Lyles in this manner and finds that the denial by an appellate court of discretionary review of a PCR action does not by itself result in procedural default under Coleman. See also McCoy v. Cartledge, 2010 WL 680258 (D.S.C. Feb. 24, 2010).

First, as noted by the Magistrate Judge, the Petitioner did not present this issue on appeal in the context of a federal constitutional claim. Nevertheless, even if the Petitioner did properly raise this claim, it still fails on the merits.

In Beck v. Alabama, the United States Supreme Court held that capital defendants have the due process right to receive a jury instruction on a lesser-included offense "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense." 447 U.S. 625 (1980). "But [a] defendant is not entitled to have the jury instructed as to lesser degrees of the crime simply because the crime charged is murder." Bates v. Lee, 308 F.3d 411, 418 (4th Cir. 2002) (internal quotation omitted). Instead, "due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction." Hopper v. Evans, 456 U.S. 605 (1982).

The Fourth Circuit has not, in a published opinion, addressed the question of whether due process requires that a trial court instruct a jury on lesser included offenses in non-capital cases. But in an unpublished decision, Robinson v. North Carolina Attorney Gen., the Fourth Circuit explained:

the Supreme Court has never held that due process requires lesser-included instructions in non-capital state trials . . . [and] a review of decisions from other courts of appeals establishes that there is no consensus on this question. Consequently, a decision in [the Petitioner's favor] would require the enunciation and retroactive application of a new rule, in violation of § 2254(d)(1) and Teague v. Lane, 489 U.S. 288 (1989).

238 F.3d 414 (4th Cir. 2000) (table) (unpublished).
Accordingly, this Court declines to find that due process requires an involuntary manslaughter instruction in this case. Thus, the Court finds that the state court's decision not to charge on the lesser offense of involuntary manslaughter was not contrary to nor an unreasonable application of clearly established Federal law as decided by the United States Supreme Court, and the Court rejects the Petitioner's claim. See Cobbs v. Michael McCall, 2010 WL 936782 (D.S.C. March 16, 2010); Epps v. Bodison, 2009 WL 960792 (D.S.C. April 8, 2009); Bates v. Bodison, 2009 WL 2423766 (D.S.C. Aug. 5, 2009).

B. Ground Two

In ground two, the Petitioner contends that his appellate counsel was ineffective for failing to raise the following issues on appeal (1) that the trial court erred in charging the jury on voluntary manslaughter; (2) that the trial court erred in admitting two unauthenticated documents and an irrelevant, prejudicial photograph; and (3) that the trial court erred in allowing hearsay testimony. After a thorough review of the entire record, the Court agrees with the Magistrate Judge that the Plaintiff's claims fail.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that a meritorious ineffective assistance claim must demonstrate two things: first, that counsel's performance was deficient and, second, that counsel's deficient performance prejudiced the defense. Id. at 687-98. The first part of the test, a court's evaluation of counsel's performance, must be "highly deferential" under this standard, so as not to "second-guess" the performance. Strickland, 466 U.S. at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. (internal quotation marks and citation omitted); see also Fields v. Attorney Gen. of Maryland, 956 F.2d 1290, 1297-99 (4th Cir. 1992); Roach v. Martin, 757 F.2d 1463, 1476 (4th Cir. 1985). To establish prejudice and thereby fulfill the second prong of the ineffective assistance test, the challenging defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694-95.

1. Voluntary Manslaughter Charge

The Petitioner claims that appellate counsel was ineffective for failing to argue that the trial court's voluntary manslaughter instruction was unsupported by the record. During the charge hearing, the Petitioner requested a charge on accidents and involuntary manslaughter. (Entry 15-2 at 129.) The State responded that it did not understand the request for an involuntary manslaughter charge. Specifically, Mr. Blake stated:

I don't see that the Defendant [has] in any way claimed criminal negligence. He says it was an accident. That would be a complete defense to the case. That would be a not guilty verdict. Involuntary manslaughter would mean that the Defendant had acted in a reckless manner causing the death, and there has been no evidence come forward of that.

(Entry 15-2 at 131.) The Court then asked the Petitioner whether he preferred an instruction on accident. The Petitioner responded, "Yes, sir." (Entry 15-2 at 131.) The Court later acknowledged the Petitioner's request for a charge on involuntary manslaughter, but stated that it was "out" because "he agreed to go with accidents." (Entry 15-2 at 143.) Next, the State requested a charge on voluntary manslaughter, stating:

There is evidence of heat of passion. One of the witnesses gave testimony and a written statement that Mr. Steward said he got mad at his girlfriend and he flipped. Furthermore, there is extensive evidence of relationship with the — the victim's relationship with another boy. And Mr. Stewart's continued aggravation of that, both before he was in jail and after he committed the crime.

(Entry 15-2 at 136.) The Petitioner objected to the Court charging both voluntary manslaughter and murder, stating, "The state is trying to prove voluntary manslaughter. That only that be submitted to the jury. And the state is trying to prove murder and only that be submitted. I'd like to object to both of them being submitted." (Entry 15-2 at 136.) Importantly, the Petitioner did not object to the inclusion of a voluntary manslaughter charge on the basis that the evidence in the record did not support the charge. Thus, this issue was not preserved for appellate review.

Nevertheless, the Petitioner raised this claim on PCR, asserting that there was no evidence of legal provocation to support the charge. The PCR court rejected the claim, finding that the Petitioner's statements to police that the victim pulled a knife or razorblade constituted sufficient legal provocation to support the voluntary manslaughter charge.

After a thorough review of the record, the Court agrees with the Magistrate Judge that the record contained sufficient evidence to support the voluntary manslaughter charge. Although the Petitioner now disagrees and asserts that he knew the victim did not intend to harm him when she pulled the box cutter on him, the evidence presented at trial (including but not limited to the Petitioner's differing versions of how the victim died) created a number of factual issues for the jury. And ultimately, the Court has no difficulty

finding that the voluntary manslaughter charge was appropriate based on all of the evidence presented. Therefore, the Court agrees with the PCR court that appellate counsel did not err in failing to argue on appeal that the voluntary manslaughter charge was not supported by the record. Moreover, the court agrees with the PCR court that the Petitioner has not shown prejudice.

Based on the foregoing, the Court does not find that the PCR court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Accordingly, this claim is denied.

2. Admissibility of Evidence

The Petitioner next contends that appellate counsel was ineffective for failing to raise on appeal an issue regarding the admission of two allegedly unauthenticated documents: (1) the "motive" letter and (2) a letter to the victim's mother. The Petitioner also alleges that appellate counsel was ineffective for failing to argue on appeal that the trial judge admitted an irrelevant and unduly prejudicial photograph.

a. The Letters

At trial, Detective Gurley testified that the Petitioner personally handed her the "motive" letter (which, *inter alia,* described various theories on who killed the victim) and that she assumed the Petitioner wrote it since the handwriting resembled the Petitioner's. The trial court admitted the "motive" letter into evidence despite the Petitioner's objections that he had not given Detective Gurley the letter and that the letter had not been analyzed by an expert for a handwriting match.

Next, with respect to the letter to the victim's mother, the Petitioner testified at trial that he had not written the letter, and the Petitioner objected to its admission, asserting that there was no envelope or evidence showing that it was mailed to the victim's mother's house. The trial court overruled the Petitioner's objection and admitted the letter, finding that the Petitioner's objection went to the weight of the evidence and not its admissibility.

The victim's mother later testified that she had received the letter.

The PCR court rejected the Petitioner's claims, finding that the letters were admissible and that it was for the jury to decide whether the handwriting was, in fact, the Petitioner's. Moreover, the PCR court found that even if the letters were inadmissible, their admission was not prejudicial in light of the other statements and documents written by the Petitioner and presented at trial. The PCR court found that the Petitioner failed to prove that his appellate counsel was ineffective in this respect or that he was prejudiced by counsel's failure to raise this issue on appeal.

After a thorough review of the record, the Court agrees with the Magistrate Judge that this claim is without merit. First, as noted by the Magistrate Judge, authenticity of documents may be established by indirect or circumstantial evidence. State v. Wilson, 145 S.E.2d 20 (S.C. 1965). And alleged deficiencies in authentication testimony go to weight, not admissibility. Here, the Petitioner admitted writing other documents that were in evidence, so the jury could compare the handwriting in the documents. Moreover, Detective Gurley testified that the Petitioner personally handed her the "motive" letter, and the victim's mother testified that she received the other letter in the mail.

Moreover, even if the letters were inadmissible, the Court agrees with the Magistrate Judge that the Petitioner has failed to show any prejudice, particularly in light of all of the evidence presented at trial. Based on all of the foregoing, the Court finds that the Petitioner has failed to show that the PCR court's adjudication of this issue "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Accordingly, this claim is denied.

b. The Photograph of the Victim

At trial, the State offered two photographs of the victim's burned body to show the Petitioner's state of mind and his actions after the death. The Petitioner objected on the ground that the prejudicial value of the photographs outweighed their probative value. The State countered that the photographs were the least gruesome of the fifty photographs and that they were relevant to show the Petitioner's state of mind as he had acknowledged burning the body and had pleaded guilty to the desecration of human remains. The court allowed one of the photographs into evidence, noting that its probative value outweighed its prejudicial effect, that it was relevant to show the Petitioner's state of mind, and that it appeared from the photograph that the body had been placed on a platform in a "ritualistic" manner. (Entry 15-1 at 346.)

The PCR court denied this issue, noting that the relevance and admissibility of photographs as evidence are matters left to the sound discretion of the trial court. The PCR court found that the Petitionerfailed to show (1) that appellate counsel was ineffective for failing to brief this issue or (2) that the Petitioner was prejudiced as a result.

After review, the Court agrees with the Magistrate Judge that the photograph was admissible and that appellate counsel was not deficient for failing to raise this issue on appeal. Accordingly, this claim is denied.

3. Admission of Hearsay

Finally, the Petitioner alleges that appellate counsel was ineffective for failing to raise a hearsay issue on appeal. At trial, one of the Petitioner's friends, Stanton Wright, was asked to read a passage of the statement that he had given to police. The trial court

overruled the Petitioner's objection and denied the Petitioner's request to approach the bench. Wright then read his statement, which stated: "As we walked towards the path, he told me that [the victim] said that she had sex with another dude before she had sex with him and she didn't shower. And then he — and then he said that he flipped." (Entry 15-1 at 198.) When Wright became upset, the court sent the jury out and asked the Petitioner what he wished to put on the record. The Petitioner complained that Wright was being coerced or intimidated. The court later asked Wright whether he was being threatened or intimidated, to which Wright responded, no.

The PCR court addressed this issue, noting that the Petitioner did not lodge a contemporaneous hearsay objection when Wright testified, and that appellate counsel therefore could not have been deficient for failing to raise the issue on appeal. The Magistrate Judge determined that the PCR Court's adjudication of this issue was not contrary to, nor an unreasonable application of, clearly established federal law. Moreover, the Magistrate Judge determined that the PCR court's adjudication of this issue was not based upon an unreasonable determination of facts in light of the state court record. After review, the Court agrees with the Magistrate Judge, and accordingly, this claim is denied.

Additionally, the Court agrees with the Respondent that the statement was admissible. First, the Petitioner's own statement would not constitute hearsay pursuant to Rule 801(d)(2) of the Federal Rules of Evidence. Moreover, what the victim told the Petitioner would not constitute (a second layer of) hearsay because it was not offered to prove the truth of the matter asserted but was instead offered to show the effect on the listener. See Fed.R.Evid. 801(c); United States v. Guerrero-Damian, 241 F. App'x 171, 173 (4th Cir. 2007) (unpublished) (citation omitted) ("A statement is not hearsay if it is offered to prove knowledge, or show the effect on the listener or listener's state of mind.").

CONCLUSION

After a review of the entire record, including the R R and the Petitioner's objections, the Court finds that the Magistrate Judge fairly and accurately summarized the facts and applied the correct principles of law. Accordingly, the Court adopts the Magistrate Judge's R R (Entry 25); overrules the Petitioner's objections (Entry 27); and grants the Respondent's motion for summary judgment (Entry 14).

IT IS SO ORDERED.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-6750

WELDON W. STEWART, JR., a/k/a Weldon Stewart,

Petitioner - Appellant,

v.

MCKITHER BODISON, Warden Lieber Correctional Institution,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Anderson. Sol Blatt, Jr., Senior District Judge. (8:09-cv-00842-SB)

Submitted: February 10, 2011 Decided: February 17, 2011

Before WILKINSON and DAVIS, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Weldon W. Stewart, Jr., Appellant Pro Se. Samuel Creighton Waters, Assistant Attorney General, Donald John Zelenka, Deputy Assistant Attorney General, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

PER CURIAM:

Weldon W. Stewart, Jr., seeks to appeal the district court's order adopting the report and recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2254 (2006) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. See 28 U.S.C. § 2253(c)(1) (2006). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2006). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000); see Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. Slack, 529 U.S. at 484-85. We have independently reviewed the record and conclude that Stewart has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials

before the court and argument would not aid the decisional process.

DISMISSED

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IN RE: Weldon Stewart, Jr., Movant

No. 21-278

Response to Motion Under 28 U.S.C. § 2244 For Order Authorizing District Court To Consider Second or Successive Application for Relief under 28 U.S.C. § 2254.

ISSUES PRESENTED

In his pleading before this Court, Stewart claims he is seeking a second federal habeas corpus proceeding to raise the following:

1) Alleged newly discovered evidence of a Brady violation that the State concealed evidence establishing that the injuries the State claimed killed Victim were not produced until after Victim's death.

2) The State knowingly presented false testimony from the State's pathologist, Dr. Russell Harley, that Victim's injuries conclusively established death by blunt force trauma, which he alleges the State failed to correct and that the State suppressed evidence showing the testimony of the pathologist was false.

3) The State concealed evidence found in the crime scene notes written by SLED Agent Al Stuckey containing observations made by the crime scene investigator, while on the scene, which strongly contradicted the State's case against Stewart.

ARGUMENT

I. Stewart has not established the prima facie existence of any Brady violation by the suppression of favorable information.

"[A]n applicant cannot show that he would not have been convicted 'but for constitutional error' without adequately alleging some constitutional violation." Williams, 330 F.3d at 282. Because the record demonstrates that the information contained in the autopsy report, pathologist's testimony and police notes were (a) not withheld; (b) not material; and (c) not even favorable, Stewart has not made a prima facie showing of any constitutional violation. By "prima facie showing" we understand ... simply a sufficient showing of possible merit to warrant a fuller exploration by the district court.... If in light of the documents submitted with the [PFA motion] it appears reasonably likely that the [motion] satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the [motion]. In re Williams, 330 F.3d 277, 281–82 (4th Cir. 2003).

We must ask if he states a "'plausible' claim for relief." In re Irby, 858 F.3d at 233 (quoting In re Hubbard, 825 F.3d at 230). But the Court need not blind itself to reality. A claim is not plausible if it would clearly fail, as authorizing such a claim would be "an exercise in futility." In re Vassell, 751 F.3d 267, 271 (4th Cir. 2014); *see also* In re Williams, 330 F.3d 277, 284 (4th Cir. 2003). For that reason, the Court has declined to authorize successive applications under both §§ 2254 and

2255 on procedural grounds, for example, when the application would be untimely. In re Vassell, 751 F.3d at 272; *see also* In re Phillips, 879 F.3d 542, 546–47 (4th Cir. 2018) (application for authorization under § 2254 raised claim presented in a prior application in violation of § 2244(b)(1)).

Not Timely, Not Prejudicial and not Plausible

First, the habeas corpus petition is not timely, particularly related to the pathologist assertions. In re Vassell., Stewart's first two assertions rest upon the belated speculation that the pathologist's testimony that the victim died as a result of blunt force trauma to the head, particularly the right parietal area, trial was wrong and therefore was a Brady violation because he was not told at trial that it was wrong. Stewart mischaracterizes this speculation as a constitutional violation. Contrary to the claim, the trial record reveals the opinion of the state pathologist was not suppressed. These same assertions were available to the *pro se* defendant at the time of his trial, appeal, or during his first PCR proceeding, and certainly his first habeas corpus action.

A fair reading of the record reveals the following. Stewart chose to represent himself at trial. From the time of his arrest throughout the trial, he claimed that the death of the victim was accidental as a result of a fall during an altercation between the two. The trial evidence revealed he gave various versions of the fall,

including falling on top of her, tripping, and flipping but never deviated from the fact that she was dead prior to the burning. In fact, he had already pled guilty to desecration of the body at the earlier arraignment.

During the December 11, 2002 pretrial motion hearing, the state judge ordered that Stewart be provided an opportunity to personally interview the state's pathologist prior to the trial concerning his opinion about the cause of death and some confusion made by comments of the prosecutor concerning the burning. 12/11/2002 Tr.p. p.12-13, 17. During that proceeding, the judge inquired why the *pro se* movant had not requested a pathologist. Tr.p. 11. Stewart had indicated he had reviewed the autopsy report about the stated cause of death as blunt force trauma and it did not indicate anything about a possibility that the cause of death was burning, yet the prosecutor had indicated it in an indictment and he had indicated to him it was from discussions with the pathologist. Id, p. 7-17.

After initially refusing to request an independent pathologist to review the autopsy, he moved that trial court to appoint an independent pathologist. Motion Hearing, June 26, 2003, Tr. p. 22-25. Stewart stated that he had reviewed the autopsy report about the stated opinion of blunt force trauma, but that the indictment still included burning, claiming the report stated one thing and the State indicated that the pathologist said something different. The prosecution noted that death could have been caused by burning and that Stewart will have an opportunity to talk with the

pathologist when he is taken to Charleston to interview him. Id, p. 22-25.[1] Stewart declared at that time that the victim's death was unintentional was the defense. In denying the request for a pathologist, the hearing judge held:

> I am at this time going to deny your request for an independent pathologist. I am not going to contend that you cannot bring it back up but you have not yet interviewed the pathologist who did this - - who prepared the report, rather. You have not had a chance to ask that pathologist, you know, "Are you going to testify that you think I burned this person as a manner of causing death or are you going to testify like the indictment I pled to that she was dead at the time that I burned her?" Depending on what response you get may depend on what needs to be done thereafter. So I would ask the State to go ahead and make those arrangements to get him down to talk to the people who performed the pathology or performed the autopsy, rather, so that this issue can be cleared up. It may be that Mr. Blake's understanding of what was going to be testified to or what the pathologist meant by his findings was in error, and so you may - - you will find out after you interview the pathologist as to, you know, "Why would the State be trying to contend that I burned the person as a manner of causing death? The State's already had me plead to burning her as a manner of desecration." . . . And once you get your answer there, it may or may not leave you needing to come back and renew your motion but at this point in time, I'm going to deny it.

Id, p. 29-30.

[1] During the July 16, 2002 hearing, Judge Burch declared that Stewart had a right to see all photographs including autopsy photographs that the state intended to use at trial. July 16, 2002 Motion Tr.p. 16-18.During the December 11, 2002 hearing , the state again declared there was no problem in providing Stewart with copies of photographs. Dec. 11, 2002, Tr.p. 3-4, 6. Stewart also made a motion at that time to exclude photographs of the victim's body, which was deferred to the trial. See State PCR App. p. 341-347. (court hearing on movant's motion to exclude photographs of the crime scene and victim, and autopsy photographs).

Subsequently, during the trial, Dr. Russell Harley, a forensic pathologist testified. State PCR App. p. 159-172. He reviewed the autopsy photographs (State Exhibit 26 for identification - not introduced – 22 autopsy photographs).[2] State PCR App. p. 161. He concluded that he found internal bleeding in the skull and on right hand side under the parietal bone was a fracture with epidermal hemorrhage and found subdural hemorrhage as well with a big blood clot in the ear. Id., p. 163-164. He declared this contributed to his finding of blunt force trauma, but could not say what it was that hit her head or that her head hit. Id., p. 164-165. Because her body was totally charred from the fire, he declared they could not tell if she had bruises or defensive wounds. He confirmed all we had was the skull and bleeding underneath. He did find the hyoid bone was intact so there was no evidence of strangling. Id, p. 165. He concluded that his opinion of cause of death was blunt force trauma to the right parietal. He declined to say how long it took her to die, but with the considerable size of the blood clot, it was hard to say but it could have been very quickly or it could have taken a matter of hours as a possibility. Id., p. 166.

However, on cross-examination by Stewart, he confirmed that report stated "interval – seconds, minutes" and clarified that it was much more likely that she

[2] These photographs had been available to Stewart prior to trial pursuant to the court's prior orders. In fact, Stewart made a motion, Court Exhibit 2 at trial to exclude the photographs.

within a matter of less than an hour, in a matter of minutes, but could not be precise. Id., p. 167. Dr. Harley confirmed that it was possible that the skull fracture could have occurred as a result of a fall. He noted due to the fact that the body was totally burned, they could not see the surface, but did see a fairly sizable skull fracture, which may have been enlarged because of the heat, and was caused by something hitting the skull. Id., p. 168, l. 1-8. When asked again if it could have resulted from a fall, he declared that it could have if it involved her skull hitting something hard. Id., p. 168, l. 14-17.

On redirect, the pathologist stated she would have had to fall on something hard enough like a root or a rock, but did not think ordinary turf would have caused it. He thought a branch may hay be able to cause that type of injury depending on the nature of the branch because it was a small thin skull and would not take much force to fracture it. Id., p. 169, l. 10-18.

On re-cross by Stewart, he confirmed that she had to fall hard. He stated it was unlikely, but possible, that it would be caused if she fell by herself, However, Dr. Harley acknowledged that it would be more probable if she were to fall and Stewart fell on top of her. He opined that she would have had to hit something fairly large to give a fracture the size of a lemon and would likely be three by six inches or something in that range. Id., p. 170-171.

During the trial, the movant's statements were consistent with death being caused as a result of the fall. In his wide-ranging opening statement, Stewart declared during his altercation with the victim, he had picked her up from behind, he tripped and fell with her in his arms and she fell face first and he fell on top of her. PCR App, p. 114-115. Stanton Wright testified that Stewart told him after showing him her body that he flipped her. Id.p. 193-197. In his statement to Bennettsville Police officer John Boston, he claimed they began arguing around 4 a.m. and while walking through the path, she pulled a knife on him, he grabbed her and held her from behind, she fell and hit her head on something and he heard a popping sound like something broke. He told him that he fell on her, tried to pick her up, but she was limp, not moving or responding. PCR App. p. 375-376. In another statement, he stated she pulled a razor blade, which he then grabbed her, one of his arms wrapped around her to hold the blade still, and then tripped and he fell on top of her and she fell on her face. He stated he heard a sound like her neck had popped. She was limp when he tried to pull her up and he tried to revive her, but she would not respond. He stated that after he went home and got a flashlight, he assumed she was dead by now because "when I checked her heartbeat and pulse before I left where she was lying. He stated he did not know how she died, but that she was moving when she was in his arms, but when she fell and I tried to pick her up, she wasn't. PCR App. p. 381-384, 386. In the initial statement at the crime scene to Officer John Valdaleso,

Stewart declared that they had an argument, she fell and made "funny sounds" or "strange sounds." He said he walked to his house and then returned and she was no longer breathing. He then told him he panicked and tried to dispose of the body. App.p. 404-405, 411.

In his trial testimony, Stewart testified that while walking down the path arguing, she pulled out a box cutter and swung it towards him a couple of times. He grabbed her arm and spun around behind her and picked her up. Supp. App. 524-525. He stated he was trying to carry her to get her home but she was not calming down and twisting. Id., p. 525-526. He claimed his foot got caught on something and then she fell from his arms and he fell on top of her. Id., p. 527. She did not get up and then he claims that she turns over and sits up, but does not stand. He claimed she called his name, but her voice was low and scared and said: " I'm back to my baby, I'm happy and fell over." He said strange sounds came from her and he looked at her face and saw blood coming from her mouth. He stated he picked her up and went through the path and then he smelled urine and a bowel movement. He laid her back down. Id., p. 528-529. He said he started shaking her and noticed more blood coming out of her mouth. Id., 530-31. He left and had a beer. He met Bo (Stanton Wright) and showed him the body. He left and later returned again and saw her still on the ground and tried to sit her up and "slid up under her." Id., p. 539-541.He claimed he was out there with her 4-5 hours. Id.

The issue concerning the denial of the request for an independent pathologist was not specifically presented in the direct appeal. It was also not presented in any manner in the first state PCR proceedings under any theory, including a failure of appellate counsel to present the denial of the request as a ground for relief. It was plainly not presented in the initial federal habeas proceedings in any manner.

Stewart suggests now that it could not have been presented before and has mischaracterized the pathologist claim as a Brady violation. It is instead a lack of due diligence on his part to pursue the request for an independent pathologist after he met with Dr. Harley prior to the trial to seek a second opinion as the court offered and failed to pursue the claims in the first PCR or federal habeas corpus proceeding. It is difficult to establish non-disclosure of matters when it is based upon the disclosure of the prosecutor in open court about the pathologist's opinions during pretrial. "[I]nformation is not deemed 'material' if the defense discovers the information in time to adequately use it at trial." State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct.App.1998).

However, there is no evidence, certainly no new evidence, that Dr. Hawley's opinion was suppressed – only that Stewart now disagrees with the opinion and is seeking to have an expert witness consider a second opinion. There is no Brady violation if the evidence was available to the defense from other sources or the defense already possessed the evidence at trial. See Fullwood v. Lee, 290 F.3d 663,

686 (4th Cir.2002) ("The Brady rule does not compel the disclosure of evidence available to the defendant from other sources, including diligent investigation by the defense."). This is something he could have pursued with due diligence in the earlier federal habeas proceeding or first PCR proceeding. Simply put, the Movant had access to the autopsy photographs, had the autopsy report, was aware of the prosecutors comments, and had the opportunity to interview the pathologist to address those comment and was given an opportunity to seek an independent pathologist after meeting with the state pathologist prior to the trial. See Lovitt v. True, 403 F.3d 171, 185 (4th Cir. 2005) ("Brady only applies when evidence is known to the prosecution but unknown to the defense.").

When this similar claim was belatedly presented in the recent state PCR proceedings, the state court hearing judge concluded as follows:

> The Court finds that Applicant has failed to allege facts sufficient to support his claim of newly discovered evidence. Each of Applicant's allegations involve "facts" that were, *or could have been*, discovered before his trial, and are founded in part upon speculation as to what further investigation might produce. Concordantly, Applicant's motion or discovery must be denied.
>
> As to the pathologist's findings, Applicant himself concedes that *more than a year* prior to trial, the State moved to amend the indictment on the basis that the autopsy report included some conjecture and could not definitively conclude whether [redacted] Allen was killed by a blow to the head or by the burning of the body. As the State *explicitly stated* the potential grounds for impeachment of the autopsy in a pre-trial hearing with Applicant present, Applicant needed only exercise the barest minimum of diligence to discover that issue: he only had to

listen. Applicant did listen, as he indicates again in his own application that he pled guilty to desecration of human remains by burning Allen's body, then sought to quash the amended murder indictment on the basis that the autopsy report stated Allen was killed by blunt force trauma, not burning, at which time the State *again* stated in no uncertain terms that Victim could have died from blunt force trauma *or* burning.

Applicant moved for funding prior to trial to have an independent pathologist review the autopsy photographs, and potentially challenge the findings of the State's pathologist at trial, and was denied by Judge Burch, a denial which could have thereafter been raised on appeal. See State v. Matthews, 291 S.C. 339, 345, 353 S.E.2d 444, 448 (1986) ("Authorization for expenditure of funds for expert witnesses is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of that discretion."). Applicant contends any attempt to appeal that denial would be subject to the same deficiency of which the State now complains: that the denial forecloses any realistic possibility of proffering the evidence necessary to prevail on appeal. No doubt the standard of review to challenge the trial court's ruling would have presented a high bar on appeal, but Applicant misapprehends the question immediately before the Court. This Court, in determining the applicability of procedural bars and the *prima facie* validity of a claim of after-discovered evidence, is first concerned with whether the "evidence" relied upon for the claim was known or knowable at the time of trial. The answer in the present matter is indisputably that the potential ambiguity in the pathologist's findings was known to Applicant at the time of trial, and he attempted to pursue it. That the trial court denied him the funding is a direct appeal issue, and Applicant cannot circumvent the direct appeal process and the challenge it may present through an application for post-conviction relief nearly two decades later. . .

Furthermore, Applicant concedes he does not actually possess at this time the evidence relied upon for the after-discovered evidence claim. Rather, Applicant speculates as to the conclusions that a different pathologist might reach, and asserts that discovery is necessary to ascertain the nature of the evidence. Applicant explained to this Court that a private pathologist had already indicated his availability and willingness to review the evidence, a Dr. J.C. Upshaw Downs, and that he only needed authorization from the Court to access

the easily accessible autopsy records still housed at the Medical University of South Carolina in order to conduct a complete evaluation. Applicant further noted that he filed his motion before Respondent's motion to dismiss, that dismissing the action was premature without first granting the discovery motion, and that Applicant should be permitted to explore further investigation of the evidence as a matter of fundamental fairness. Applicant argues that denial of the motion for discovery and dismissal of the action would be fundamentally unfair without conclusively determining if the original pathologist erred.

While Applicant's argument in support of his motion for discovery is understandable—that a grant of discovery is now necessary to obtain the evidentiary review he would rely upon to support his claim of after-discovered evidence that is the heart of his application—it also betrays that the claim is ultimately a fishing expedition. Applicant could have sought this relief long ago, prior to trial, by the exercise of diligence. The current application is not supported by actual new evidence, but is predicated upon speculation as to what conclusions a different expert might reach if permitted to review evidence long known to have existed. Further, the Court disagrees with Applicant's contentions that denying him discovery is fundamentally unfair when Applicant enjoyed innumerable opportunities prior to the filing of the present action, and prior to trial, to pursue the relief he now seeks. To the contrary, it would be fundamentally unfair to the State and victims, and contrary to the interests of justice and finality to permit Applicant, or any other convicted person, to file any number of applications for post-conviction relief at any time in order to then avail themselves of discovery tools which *may* be available in such matters. The availability of PCR discovery is limited to the availability of PCR at all, and the mechanisms of PCR discovery cannot be relied upon to circumvent the procedural bars which serve to foreclose the action in the first place.

Further, the Court finds the purportedly new evidence would not change the outcome of trial. Assuming *ad arguendo* that another pathologist would rule the factures to the side of the skull were thermal injuries and not the result of blunt force trauma, other substantial evidence existed in the record to show that Allen perished from such trauma. Indeed, Applicant's own testimony at trial insisted that her passing was the result of accidental blunt force trauma. A pathological

> finding to the contrary would arguably impeach *Applicant* as much as the State's case against him. That Applicant now seeks to change his story and assert that Allen perished from suicide, and not in the fashion testified to at trial, is inconsequential. Whether newly-discovered evidence is material, and whether it would change the outcome at trial, is considered in the context of the other evidence presented *at trial*, and not in the context of the self-serving, unsupported, and vague "alternative facts" presented by the convicted individual long after trial. Given Applicant's conspicuous lack of detail, it is evident to this Court that he seeks to secure a different pathological finding, and amend his memory to fit it, so many years beyond the original killing that the State would struggle to disprove him.
>
> As to the pathologist's testimony, the testimony was known to Applicant when it was given, and as set forth above, the question of whether Allen's injuries were the result of blunt force trauma or the burning was known to Applicant more than a year before trial. Any issues Applicant may have had with the accuracy or credibility of the pathologist's testimony could have and should have been raised at trial. Furthermore, there is no indication of deception in the pathologist's testimony: he observed epidermal hemorrhage and subdural hemorrhage those observations contributed to a finding of blunt force trauma. That the same observations could support an alternative theory as to how Allen died does not cast the pall of deception upon the pathologist's testimony, such that the State had any obligation to "correct" it. Furthermore, Applicant's "discovery" of other instances where the pathologist misdiagnosed the cause of death of a person is merely impeaching.

Stewart v. State, 2018-CP-34-00121, Order (Goldsmith, October 5, 2019).

Stewart could not show that "the factual predicate for [any such] claims could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i).

II. The Notes of SLED Agent Stuckey, if undisclosed, would not require the grant of habeas nor allow for authorization since it is not a plausible claim.

Even accepting Stewart's suggestion that the report is impeaching and exculpatory, we do not think it reasonably likely that no reasonable juror knowing of the report would have convicted Stewart. Simply put, the report does not "clearly and convincingly outweigh the ... untainted evidence." In re Williams, 330 F.3d at 284.

In addressing this matter in the recent state PCR proceedings, the PCR court found:

> As to the purported notes of SLED investigators, Applicant asserts without basis that the notes were wrongfully withheld from him. To the contrary, correspondence from Assistant Solicitor Dan Blake to Applicant shows he was provided the officer's notes in 2003. Additionally, the notes do not reveal anything which would either change the result if a new trial were conducted, nor anything material to the question of guilt or innocence, nor anything beyond the thinnest possible basis for impeachment. Applicant protests the notes show certain articles and refuse identified at the crime scene were not collected. Such protest is merely impeaching at best, and Applicant primarily emphasizes the value of the evidence for its possible use to damage "the credibility of Agent Elvington[.]" (Applicant's PCR Brief at 19). Put another way, Applicant presents only purported evidence of lack of evidence, which has never been sufficient to secure so much as a hearing, let alone a new trial. Furthermore, Applicant did argue and argumentatively question the inadequacy of the investigation in his lengthy closing argument at trial. (See, e.g. Appx. 135-36; Appx. 390-91; Appx. 708, ll. 1-3). Applicant can hardly contend he was not aware, or could not have been aware, of what the State's case against him lacked. Consequently, the State argued any deficiencies in the investigation were the consequence of Applicant's own efforts to

> destroy evidence and mess up the crime scene. (Appx. 718, ll. 3-15). Given Allen's corpse was immolated, the argument was well enough made.

Stewart v. State, 2018-CP-34-00121, Order (Goldsmith, October 5, 2019).

In his pleadings, Stewart has acknowledged that he was disclosed the notes of Agent Bobby Elvington from the prosecution. In those notes, it revealed that Stewart showed them the path where the fall occurred and in the path they found red stains that appeared to be blood. Further, it revealed that they processed the scene and took pictures. He claims that SLED Al Stuckey's handwritten notes were not provided to him which he claims revealed no evidence of a violent struggle at the scene or at the house, that Stewart took them on the path. Although Stewart claims there was a notation that he was instructed not to collect other potential evidence, the handwritten note actually states there were "no further requests."

It is not clear how the handwritten notes show any exculpatory material. It merely reflects, that all areas except the jacket in the house and leaves tested positive for blood and that leaves were collected. Although the notes indicated that in no parts of the house was they a sign of a struggle, no one claimed that there was a struggle in the house.

More importantly, the testimony at trial revealed that Elvington and Stuckey took crime scene photographs when they arrived at the scene. PCR App. 132, 145. John Boston also took photographs on the later disclosure about finding the victim's

glasses and of the path. He acknowledged that there were a lot of leaves on the ground. Id., p. 399.

Most importantly, Stewart utilized the admitted photos of the crime scene to support his claim about the scene being covered with leaves, the existence of bloodstains and areas where they were located, and other items in the scene including boards ion the path, a pack of cigarettes, a limb and a strip of metal and a stick, a number of roots near what he called a bloodstain. App.p. 551-555.

The evidence contained in the report was not material to conviction

The evidence in the report, not the movant's characterizations of the report, is neither exculpatory nor impeaching. Finally, even assuming - that the evidence in question was both withheld and favorable to Stewart, he would still need to show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682. He has failed to do that.

Prima Facie Case not Shown

Stewart has not made a prima facie case that he could show by clear and convincing evidence that no reasonable fact finder would have found him guilty of the offense in light of the allegedly withheld report. If Stewart cannot show that the

evidence in the report was material for purposes of Brady, he has even less chance for success in satisfying the higher standard under Section 2244(b)(2)(B)(ii).

Stewart cannot meet even a *prima facie* burden on this score. This Court has emphasized that "latter-day evidence brought forward to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of the [the witness'] account." Williams, 330 F.3d at 283.

Here, however, we focus on the higher showing necessary to satisfy § 2244(b)(2)'s prejudice prong—whether, viewing the evidence as a whole, there is clear and convincing evidence that no reasonable juror would have convicted Stewart had the report been disclosed. *See* In re Williams, 330 F.3d at 282. Simply put, the report does not "clearly and convincingly outweigh the ... untainted evidence." In re Williams, 330 F.3d at 284.

Stewart has not made the necessary *prima facie* showing as to prejudice.

CONCLUSION

The motion for authorization to file a second or successive petition for habeas corpus should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

S/Donald J. Zelenka
By: _____

December 1, 2021 DONALD J. ZELENKA

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 21-278 **Caption:** In Re: Weldon Stewart

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(s) Donald J. Zelenka

Party Name Respondent

Dated: December 1, 2021

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Case No. 21-278 Case Caption In Re: Weldon Stewart, Jr.

I certify that on 12/1/21 (date), the Response to Motion Under 28 U.S.C. 2244 etc. (document title) was served by [ ] personal delivery; [X] mail; [ ] third-party commercial carrier; or [ ] email

(with written consent) on the following persons at the addresses or email addresses shown:

(Name and Address or Email Address)

Weldon Stewart, #295095
Evans Correctional Institution
1A-0180A
[redacted]
Bennettsville, South Carolina 29512

s/ Donald J. Zelenka
Signature

December 1, 2021
Date

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-278

In RE: WELDON W. STEWART, JR.,

Movant.

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Motion to Enlarge Record in Support of Motion for Authorization to File a Second or Successive Petition for a Writ of Habeas Corpus, Under 28 U.S.C. § 2244 For Order Authorizing District Court To Consider Second Or Successive Application for Relief under 28 U.S.C. § 2254.

Weldon Stewart, Movant, has reviewed Respondent's "Motion for an Extension to file a Response" ("Response") dated November 22, 2021. Respondent stated in its Response that it has "not been able to locate in the closed files of the office of Attorney General matters from the 2003 proceeding cited in the Movant's motion, including pretrial hearing transcripts on July 16, 2002, October 17, 2002, December 11, 2002, June 26, 2003, and July 15, 2003".

Stewart filed the pertinent sections of the above-mentioned transcripts with the state court as Supporting Documents with his PCR Brief, which was filed along with his PCR application. Stewart inquired about this matter and was informed that his PCR Brief and Supporting Documents were not included as a part of the online records of his PCR proceedings.[1]

Stewart is not an attorney and is not familiar with the procedures for establishing the record before this Court. However, Stewart wants to ensure that the record before this Court includes documentation

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[1] [redacted] "Lori" Stewart contacted the Marlboro County Clerk's Office regarding this matter on November 30, 2021. The Clerk's Office has now added Stewart's PCR Brief and Supporting Documents to the online record.

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showing the constitutional claims Stewart raised with the state courts, as well as the proof Stewart submitted to the state courts in support of his claims.

On the above grounds, Stewart moves this Court to enlarge the record with filed copies of the following:

1. Stewart's PCR Brief
2. Supporting Documents for the PCR Brief
3. Stewart's Motion to Amend Oral Ruling
4. Supporting Documents for the Motion to Amend Oral Ruling

Item 1 contains the constitutional claims Stewart raised in his Motion for Authorization currently before this Court, as presented to the state PCR court.

Item 2 contains the proof Stewart submitted to the state PCR court in support of his constitutional claims and which Stewart referenced in his Motion for Authorization before this Court.

Item 3 contains the allegations raised before the trial judge regarding juror misconduct and mentioned by Stewart in his Motion for Authorization before this Court.

Item 4 contains the proof Stewart submitted to the trial judge in support of his claim of juror misconduct. This proof includes a thumb drive containing a recorded conversation between Loretta "Lori" Stewart and the juror in question.

Stewart is not sure if these items are already a part of the record before this Court. However, in an abundance of caution, Stewart wants to make sure this Court has an opportunity to review the evidence which supports his Motion for Authorization, for purposes of making a prima facie showing of constitutional error.

For these reasons, Stewart respectfully requests that the Court enlarge the record with the above listed items.

A copy of this motion and all attachments has been sent to Respondent.

Respectfully submitted,

Weldon W. Stewart, Jr., #295095
Evans Correctional Institution
[redacted]
Bennettsville, SC 29512

Dated: December 1, 2021

By: *s/Weldon W. Stewart, Jr.*

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STATE OF SOUTH CAROLINA COUNTY OF MARLBORO	)	Case No.:02-GS-34-1919
WELDON W. STEWART, JR.	)	PCR BRIEF
V.	)	
STATE OF SOUTH CAROLINA	)	

Petitioner brings this brief before the Court on the basis of newly discovered evidence establishing that the solicitor's office withheld the exculpatory nature of pretrial statements made by an expert witness for the State, and the solicitor's office failed to correct the false testimony of this witness at Petitioner's trial. Petitioner further raises this brief on the basis of newly discovered evidence establishing that the solicitor's office suppressed exculpatory crime scene notes written by a forensic crime scene investigator. As said conduct violates *Brady v. Maryland, 373 U.S. 83 (1963)*, as well as Petitioner's due process rights, Petitioner respectfully submits this brief to the Court hereby requesting that the Court grant him relief.

BACKGROUND

In August of 2003, Petitioner was convicted in Marlboro County of voluntary manslaughter and was sentenced to 30 years for this offense. Petitioner pled guilty to desecration of human remains and received a consecutive 9 year sentence for this offense. Petitioner has exhausted his state and federal appeals, and he brings this matter before the Court on the basis of newly discovered evidence.

Petitioner met [redacted](Lori) Stewart, a 24 year FBI veteran, in March of 2014. Three months later, Petitioner disclosed to Ms. Stewart that [redacted]Allen (Victim), whom Petitioner is convicted of killing, died as a result of suicide. Petitioner confided in Ms. Stewart that he had repressed the memories of Victim's death and that Ms. Stewart questioning him about his case triggered him regaining access to these memories.

Petitioner's mother confirmed to Ms. Stewart that Petitioner had a prior history of repressing the memory of a traumatic childhood event in which Petitioner was almost drowned by neighborhood bullies. Petitioner was ten years old at the time of this incident, and he had no recollection of the incident until several years later when he was reminded of the incident by his counselor during a therapy session. Victim's death occurred less than two years after the therapy session in which Petitioner regained consciousness of this traumatic childhood event.

Ms. Stewart, who was still skeptical about Petitioner's claim of innocence, relentlessly questioned Petitioner concerning the details of his case. Specifically, Ms. Stewart wanted to know how it was possible that a person who committed suicide could die from blunt force trauma to the head, Victim's official cause of death. Petitioner maintained that Victim died from suicide and that she didn't suffer from any blunt force trauma injuries.

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Ms. Stewart reluctantly agreed to look into Petitioner's case to see if she would find any corroborating evidence for Petitioner's claims. Her curiosity was piqued because she felt that Petitioner was too intelligent to believe that he had a realistic chance of deceiving a seasoned FBI employee with such an outrageous story. Thus, she intuitively reasoned that there was a slight possibility that Petitioner was telling her the truth. It was this possibility which convinced her to begin investigating Petitioner's claim of innocence.

The FBI caught wind of Ms. Stewart's activities and initiated an internal investigation into her involvement with Petitioner. Ms. Stewart learned of this investigation in August of 2014 when she was warned that she was at risk of losing her security clearance based on her association with Petitioner, a convicted felon. She was advised that she should immediately sever ties with Petitioner in the interests of saving her career, which had been exemplary throughout her over two decades of service with the Bureau. Ms. Stewart held firm to the position that she could not heed this advice, in good conscience, without first completing her preliminary investigation into Petitioner's claim of innocence.

Between the months of September and December of 2014, Ms. Stewart discovered evidence which added credibility to Petitioner's claims. She conducted professional background checks on the pathologists who performed the "forensic autopsy" on Victim. She discovered that the lead pathologist, Russell Harley (Pathologist), lacked certification in forensic pathology and that the second pathologist was a mere student in training who followed the guidance of Pathologist in conducting the autopsy on Victim.[1] Ms. Stewart also reviewed court documents revealing that Pathologist made pretrial statements to Daniel Blake (Solicitor) expressing Pathologist's uncertainty about the accuracy of his conclusions in reference to Victim's cause of death.

The cumulative impact of this evidence was such that Ms. Stewart was convinced of the strong probability that Petitioner was unlawfully detained in violation of federal laws. She was equally convinced that it would be an extreme disservice to the core principles of her professional oath if she were to knowingly abandon Petitioner to suffer the fate of injustice. In essence, Ms. Stewart had discovered too much corroborating evidence for Petitioner's claim of innocence to allow her to walk away from Petitioner's case with a clear conscience. Thus, she respectfully declined the terms of the offer to rehabilitate her career, and she affirmed her intention to pursue justice on behalf of Petitioner.

Ms. Stewart was dismissed from her role with the FBI in January of 2015, as her decision to continue her unauthorized association with Petitioner posed a potential conflict of interests with her professional duties. Her attorney advised her that Petitioner's exoneration would give her the greatest chance of successfully appealing this dismissal, in that his exoneration would vindicate her position that Petitioner is a victim of a gross miscarriage of justice. Ms. Stewart, having sacrificed her prestigious career in the pursuit of justice, was now fully invested in ascertaining the truth in Petitioner's case.

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[1] Professional background of Pathologist is included in Supporting Documents.

In the months following her dismissal from the FBI, Ms. Stewart continued her investigation into Petitioner's claim that Victim did not die from blunt force trauma to the head. The trial testimony of Pathologist established that his conclusions were based on the presence of a skull fracture and brain hemorrhage. Ms. Stewart's search to comprehend the significance of Pathologist's pretrial statements led to her finding publications from forensic experts on thermal injuries. Through the information found in these publications, she discovered that the pretrial statements of Pathologist revealed that Pathologist could not rule out the possibility that the skull fracture and brain hemorrhage occurred after Victim's death as a result of the fire.

Ms. Stewart presented her findings to Petitioner, who stated that though Solicitor did mention Pathologist's statements during a pretrial hearing, Solicitor never disclosed to Petitioner any information in reference to the possibility that the skull fracture and brain hemorrhage were thermal injuries. Ms. Stewart confirmed, by reviewing Court documents, that Solicitor concealed the exculpatory nature of Pathologist's pretrial statements by claiming that these statements established the possibility that Victim died as a result of burning. She further noted that Solicitor failed to correct the misstatements made by Pathologist at trial indicating that the skull fracture and brain hemorrhage conclusively established that Victim died as a result of blunt force trauma.

Ms. Stewart hired a forensic pathologist to review the autopsy conducted on Victim. The pathologist made a preliminary finding that it was possible the skull fracture and brain hemorrhage were thermal injuries based upon the location of the injuries, the parietal region, which is as common location for thermal injuries. The pathologist further explained that the location of the injuries is not common for blunt force trauma injuries. However, the forensic pathologist informed Ms. Stewart that he would not be able to complete his independent evaluation until he examined the autopsy photographs.

Petitioner submitted an ex parte motion to the trial Court wherein he informed the Court of these circumstances and requested that the Court order the disclosure of the autopsy photographs.[2] The Court refused to order the disclosure of this evidence.[3] Petitioner then submitted a request to the Medical University of South Carolina (MUSC) for disclosure of the autopsy photographs pursuant to SC Code Section 17-5-535.[4] MUSC failed to comply with this request.

In July of 2016, Ms. Stewart discovered a handwritten letter Victim wrote to Petitioner approximately three months prior to Victim's death.[5] Victim expressed in this letter her profound heartache due to the fact that Petitioner had fathered a child with another girl. She also made several references in the letter to a child she had been forced by her parents to abort, an event which left Victim severely traumatized. Victim stated twice in the letter that she was contemplating suicide, and she made several other statements in the letter from which it could be inferred that Victim was expressing suicidal intent.

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[2] Petitioner's ex parte motion and proposed order are included in Supporting Documents.
[3] Email from Marlboro County Clerk of Court to Ms. Stewart is included in Supporting Documents.
[4] Petitioner's letter to MUSC is included in Supporting Documents.
[5] A forensic handwriting expert confirmed that the handwriting found in the letter appeared to be the same handwriting found on the backs of photographs of Victim that she had given to Petitioner and his mother.

Ms. Stewart noted that Victim concluded her letter to Petitioner with a reference to the memory of her aborted child. Ms. Stewart further noted that the date of Victim's death is chronologically proximal to the one year anniversary of Victim's abortion, a fact which was confirmed by Victim's father during his testimony at Petitioner's trial.[6] Thus, Ms. Stewart concluded that her discovery of Victim's letter to Petitioner provided substantial corroboration for Petitioner's claim that Victim died as a result of suicide, and she redoubled her efforts to investigate Petitioner's case.

The contents of Victim's letter led Ms. Stewart to inquire about Victim's mental health history. Petitioner informed her that Victim had been undergoing mental health counseling at Tri County Mental Health Center from shortly after her abortion up until her death. Tri County personnel confirmed that a name matching Victim's name had been found in their database but stated that they could provide no further information without a court order.[7] Petitioner's ex parte motion requesting that the trial Court order the disclosure of Victim's mental health records was denied.[8]

Ms. Stewart shifted the focus of her investigation to the death scene. In June of 2017, the South Carolina Law Enforcement Division (SLED) provided Ms. Stewart with a CD containing the SLED investigative files for Petitioner's case.[9] While reviewing these files, Ms. Stewart noticed that crime scene notes, written by SLED forensic investigator Al Stuckey (Investigator), contained evidence which was favorable to Petitioner. Ms. Stewart further noticed that other SLED investigative files were also favorable to Petitioner. Ms. Stewart shared her findings with Petitioner, who informed her that none of this evidence had been disclosed to him.

PROCEDURAL HISTORY

Brady Motion

Petitioner was originally represented by a court-appointed attorney, Wade Crow. On December 11, 2000, Mr. Crow filed a "Rule 5 and Brady Motion" wherein he requested to be provided with "any and all investigative reports, information or material which tends to establish the Petitioner's innocence, to mitigate punishment, or to impeach, discredit, or contradict the testimony of any witnesses whom the State will or may call at trial".[10] Mr. Crow also requested in the motion disclosure of "all inconsistent statements made by a particular witness or between witnesses, whether written or oral, that are known to the solicitor's office or any other law enforcement agency".

Exculpatory Evidence Motion

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[6] See Trial Transcript page 122 lines 6-24. ***Pertinent sections of all Trial and Pretrial Transcript references are included in Supporting Documents*.**
[7] Petitioner's subpoena and letter in response from Tri County personnel are included in Supporting Documents.
[8] Petitioner's ex parte motion and proposed order are included in Supporting Documents. See also email from Marlboro County Clerk of Court at footnote 3.
[9] SLED also provided Ms. Stewart with a CD containing the scene photographs. Letters from SLED are included in Supporting Documents.
[10] Brady motion and cover letter are included in Supporting Documents.

On May 31, 2002, Mr. Crow filed a "MOTION TO PRODUCE EXCULPATORY EVIDENCE" wherein he requested that the solicitor's office disclose "any and all exculpatory evidence, whether it be oral, written, documented, or photographic, that might aid the Petitioner in exculpating himself of the charges in question".[11] On June 6, 2002, Mr. Crow filed a motion to be relieved as counsel.

Pretrial Hearing Timeline

Petitioner proceeded pro se, with Mr. Crow acting as stand-by counsel, in several pretrial hearings during which discussions were held in reference to the pretrial statements made by Pathologist. The timeline for these pretrial hearings is as follows:

- ***July 16, 2002 Pretrial Hearing***

This pretrial hearing was held before the Trial Court. During this hearing, the Court heard arguments from Petitioner and Solicitor in reference to Petitioner's motion to sever the trials for the murder and desecration of human remains charges. Petitioner argued that the incidents giving rise to these offenses occurred hours apart and that he would be prejudiced if he was not granted separate trials for the offenses. Solicitor argued that these charges arose from a single chain of events and that, according to case precedent, separate trials should not be held for these offenses.

Solicitor, while arguing against Petitioner's motion, stated his intention to amend Petitioner's murder and desecration indictments. While presenting the Court with his reasons for amending Petitioner's murder indictment, Solicitor stated the following:

"[O]ne of the reasons we are going to amend the indictment, it's not 100 percent clear how the death occurred. The autopsy says there was a blow to the head, but the body when it was found was in very bad shape and there is a question even with the pathologist about the cause of death...[T]he autopsy report basically has some conjecture. And after talking with the pathologist whether the cause of death was a blow to the head or it was the actual burning of the body. The problem being that when a body is burned, the skull bursts and so there is some question. In fact when the State amends the murder indictment, we intend to include alternative possibilities as to the actual cause of death."

Pretrial Transcript (July 16, 2002) page 12 line 23 - page 14 line 2.

- ***October 17, 2002 Pretrial Hearing***

This pretrial hearing was also held before the Trial Court for purposes of arraigning Petitioner on the amended murder and desecration indictments. Petitioner pled guilty to the desecration charge and not guilty to the murder charge. Petitioner then made a motion to quash the murder indictment on the basis that the language of the indictment included burning as a possible cause of death. While making his motion to quash the amended murder indictment, Petitioner stated the following:

"Your Honor...I wish to object to the terminology and the murder indictment. It says that 'striking, pushing and or burning to cause death.' According to the autopsy report, which I have here, Heath was caused by blunt trauma to the head...And I ask that this indictment not be allowed to be brought

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[11] Motion and affidavit of service are included in Supporting Documents.

in the courtroom including burning as a possible cause of death because this contradicts the autopsy report."

Pretrial Transcript (October 17, 2002) page 6 line 21 - page 7 line 12.

Solicitor responded to Petitioner's motion by stating the following:

"Your Honor, I have talked to the pathologist. I think Mr. Stewart is referring to--at the bottom of the summary page, probable cause of death was blunt force trauma to the head. The pathologist, Dr. Harley, says that it is a possibility that the death was caused by burning...Dr. Harley does note that there is a skull fracture. He also notes that there is full body charring and heat fractures to the skull. So I have talked with him and the reason for him putting these different alternatives is that the only person we understand was there is Mr. Stewart..."

Pretrial Transcript (October 17, 2002) page 7 line 13 - page 8 line 5.

- ***December 11, 2002 Pretrial Hearing***

This pretrial hearing was held before Honorable James E. Lockemy. The primary focus of this hearing was Petitioner's motion to interview Pathologist. Arguments on this motion led Judge Lockemy to inquire about a possible double jeopardy issue that could arise based on the language of the amended murder indictment.

Petitioner presented his grounds for the motion by stating the following:

"[I]n several hearings...Mr. Blake has indicated that the pathologist will be deviated from the autopsy report in trial. And I haven't received the report to show these deviations. I would just like to know why would the pathologist do an autopsy report then say something totally different from the report at trial...The autopsy report states that the cause of death is blunt force trauma to the head...But when I objected to the terminology in the indictment, I objected to the inclusion of burning being included as a possible cause of death. Because as you know, I have already been convicted of desecration of human remains for the actual burning...So it's already been established that the victim was deceased before the actual burning occurred."

Pretrial Transcript (December 11, 2002) page 7 line 16 - page 8 line 22.

Judge Lockemy, after getting clarification from Petitioner about burning being included in the amended murder indictment, inquired of Solicitor the following:

"Mr. Blake, how are you going--how can you prove he killed a person by burning if he's already been convicted of--are y'all saying that he burned someone after they died?"

Pretrial Transcript (December 11, 2002) page 9 lines 13-16.

Solicitor responded to Judge Lockemy's inquiry by stating the following:

"That is very astute and tricky of Mr. Stewart...And the pathologist said there is a possibility that the death occurred through the burning."

Pretrial Transcript (December 11, 2002) page 9 line 18 - page 10 line 2.

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Judge Lockemy responded to Solicitor's argument as follows:

"Let me ask you this, though...The jury finds that the victim died as a result of burning, then wouldn't that--how are you going to come back to a jeopardy question that he's already pled guilty to burning a deceased person? So therefore, the State has basically come to the conclusion that the person was dead when they were burned. Because you can't be convicted of burning a live person through that statute, it has got to be a deceased person. And if he's already been convicted of that, would that be jeopardy in a way as far as the burning? I mean that's an interesting point that you may better start looking at."

Pretrial Transcript (December 11, 2002) page 10 lines 8-21.

Solicitor responded by stating the following:

"It is certainly an interesting point. Mr. Stewart, I said tricky because we were in the middle of doing an arraignment and Mr. Stewart pled guilty to the charge. The facts haven't yet been determined as to the murder...But we don't know what the cause of death is right now."

Pretrial Transcript (December 11, 2002) page 10 line 25 - page 11 line 7.

Judge Lockemy granted Petitioner's motion to interview Pathologist, which was followed by a brief discussion in which the filing of the Rule 5 and Brady motion was mentioned.

Pretrial Transcript December 11, 2002 page 12 line 20 - page 13 line 24.

- ***June 26, 2003 Pretrial Hearing***

This pretrial hearing was held before Honorable John M. Milling. The primary focus in this hearing was Petitioner's motion for a forensic pathologist. This hearing was the fourth hearing in which the Court heard arguments from Petitioner and Solicitor in reference to Pathologist.

Petitioner presented grounds to the Court for his motion for a forensic pathologist by stating the following:

"Sir..I have this autopsy report...I have the opinion here that says, 'blunt force trauma to the head'. However, on the indictment for murder...it also has burning included as a possible cause of death, and when I objected to the terminology of this indictment in an October 17, 2002, hearing held before Judge Burch, the State did indicate that the pathologist, Dr. Harley says that it is a possibility that the victim died as a result of burning...I do not see this reflected anywhere in the autopsy report. Therefore, I originally made a motion to interview the pathologist during a December 11th hearing held before Judge Lockemy. He granted this motion stating that I do have to interview the pathologist at least 21 days before my trial...Sir, the problem is that the autopsy report says one thing. My indictment says another, and the State has indicated that the pathologist at times has said another thing. So I'm not sure as to the accuracy of the pathologist's opinion. They certainly aren't consistent."

Pretrial Transcript (June 26, 2003) page 23 lines 5-25.

The Court, after hearing Petitioner's argument, questioned Solicitor as follows:

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THE COURT: Well, the only opinion that you know at this point is what is contained in their report. The State has said something about burning. Where do you get that from, Solicitor?

MR. BLAKE: Discussions with the pathologist, Your Honor.

Pretrial Transcript (June 26, 2003) page 24 lines 2-6.

After hearing much discussion on Petitioner's motion for a forensic pathologist, the Court ruled as follows:

"I am at this time going to deny your request for an independent pathologist. I am not going to contend that you cannot bring it back up but you have not yet interviewed the pathologist who did this--who prepared this report, rather. You have not had a chance to ask this pathologist, you know, 'Are you going to testify that I burned this person as a manner of causing death or are you going to testify like the indictment I pled to that she was dead at the time I burned her?' Depending on what response you get may depend on what needs to be done thereafter. So I would ask the State to go ahead and make those arrangements to get him down to talk to the people who performed the pathology or performed the autopsy, rather, so that this issue can be cleared up. It may be that Mr. Blake's understanding of what was going to be testified to or what the pathologist meant by his findings was in error, and so you may--you will find out after you interview the pathologist as to, you know, 'Why would the State be trying to contend that I burned the person as a manner of causing death? The State's already had me plead to burning her as a manner of desecration.' And once you get the answer there, it may or may not leave you needing to come back and renew the motion but at this point in time, I'm going to deny it."

Pretrial Transcript (June 26, 2003) page 29 line 9 - page 30 line 7.

- ***July 15, 2003 Pretrial Hearing***

This pretrial hearing was held before the Trial Court. Petitioner had previously interviewed Pathologist on July 1, 2003, and Pathologist confirmed during this interview that he had never told Solicitor that burning was a possible cause of death. Solicitor's request that the Court amend Petitioner's murder indictment was as follows:

"First thing the State has...I've talked to Mr. Stewart's stand-by counsel, Mr. Crow, about amending the indictment by deleting the words, 'pushing and or burning.' I'm showing this to Mr. Stewart...It's my understanding that this is something that is agreed to by the parties, but I wanted to put that on the record so there is no confusion."

Pretrial Transcript (July 15, 2003) page 4 line 14 - page 5 line 5.

The Court, by agreement of all parties, removed the words "pushing and or burning" from Petitioner's murder indictment.

Pretrial Transcript (July 15, 2003) page 5 lines 6 - 11.

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MARLBORO COUNTY, S.C.

STATEMENT OF GROUNDS

Petitioner moves the Court to grant him a new trial based on the following:

1. Petitioner is entitled to a new trial because the solicitor's office committed a Brady violation when it suppressed the exculpatory nature of pretrial statements made by the pathologist, and the suppressed evidence could have been used to impeach the testimony of the pathologist.

2. Petitioner is entitled to a new trial because the solicitor's office violated Petitioner's due process rights when it failed to correct misstatements made by the pathologist while testifying against Petitioner at trial.

3. Petitioner is entitled to new trial because the solicitor's office committed a Brady violation when it suppressed SLED files that were favorable to Petitioner, and the suppressed evidence could have been used to impeach the testimony of witnesses for the State.

LEGAL ARGUMENT

1. Brady Violation (Pathologist) – PCR QUESTION # 11 (a)

A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to the accused guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419 (1995); Gibson v. State, 344 S.C. 515, 514 S.E.2d 320 (1999).

Petitioner's Brady claim arises from the fact that Solicitor suppressed the exculpatory nature of Pathologist's pretrial revelation to Solicitor that Pathologist questioned the accuracy of his conclusions in reference to Victim's death. Though Solicitor did disclose Pathologist's revelation, while making this disclosure Solicitor distorted the facts in a manner which created the false impression that Pathologist's revelation to Solicitor was not favorable to Petitioner. In essence, Solicitor concealed the exculpatory nature of Pathologist's admission that he was uncertain about Victim's cause of death by Solicitor falsely claiming that Pathologist's uncertainty was based upon factors which were incriminating to Petitioner.

During a July 16, 2002 pretrial hearing, Solicitor stated:

"[O]ne of the reasons we are going to amend the murder indictment, it's not 100 percent clear how the death occurred. The autopsy says there was a blow to the head, but the body when it was found was in very bad shape and there is a question even with the pathologist about the cause of death...[T]he autopsy report basically has some conjecture. And after talking with the pathologist whether the cause of death was a blow to the head or it was the actual burning of the body. The problem being that when a body is burned, the skull bursts and so there is some question.

See Pretrial Hearing Timeline (July 16, 2002 Pretrial Hearing) under Procedural History.

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Solicitor's above-mentioned disclosure revealed Solicitor's knowledge that "there is a question even with the pathologist about the cause of death". However, Solicitor claimed that Pathologist questioned "whether the cause of death was a blow to the head or it was the actual burning of the body". Solicitor further claimed that the reason Pathologist was having a "problem" determining which of these factors caused Victim's death was that "when a body is burned, the skull bursts". Thus, according to Solicitor's disclosure, Pathologist's uncertainty about the cause of Victim's death was due to the possibility that Victim's death could have resulted from the burning of her body.

Solicitor persisted in creating the impression that the aforementioned disclosure was not favorable to Petitioner by repeatedly claiming, during multiple pretrial hearings, that he had been told by Pathologist that it was possible that Victim died as a result of burning. Solicitor further made statements, in support of this claim, which tended to undermine the accuracy of Pathologist's conclusion that Victim died as a result of blunt force trauma to the head. (i.e. "The autopsy says there was a blow to the head, but the body when it was found was in very bad shape"; "the autopsy report basically has some conjecture"; " Dr. Harley does note that there is a skull fracture. He also notes that there is full body charring and heat fractures to the skull"; "we don't know what the cause of death is right now"). *See Pretrial Hearing Timeline under Procedural History.*

Solicitor listed burning as a possible cause of death in Petitioner's murder indictment and told three different judges that the inclusion of burning in the murder indictment was based on "discussions with the pathologist", during which Solicitor claimed he was told by Pathologist that burning was a possible cause of death. The totality of the circumstances surrounding Solicitor's disclosure, in reference to Pathologist's uncertainty about Victim's cause of death, gave every indication that Pathologist's uncertainty was due to factors which would incriminate Petitioner for murder, based on Petitioner's admission that he burned Victim's body.

During a June 26, 2003 pretrial hearing, Petitioner made a motion to obtain a forensic pathologist on the basis that "the autopsy report says one thing. My indictment says another, and the State has indicated that the Pathologist at times has said another thing". The Court denied Petitioner's motion, reasoning that Petitioner needed only to ask Pathologist "Are you going to testify that I burned this person as a matter of causing death or are you going to testify like the indictment I pled to that she was dead at the time I burned her?" *See Pretrial Hearing Timeline (June 26, 2003 Pretrial Hearing) under Procedural History.*

Pathologist, during a July 1, 2003 interview with Petitioner, denied telling Solicitor it was possible Victim died as a result of burning. On July 15, 2003, Solicitor again amended Petitioner's indictment for murder, removing burning from the indictment. As Solicitor's claim, in reference to the possibility that burning caused Victim's death, was proven to be false, it was deduced that the facts Solicitor presented to the Court in support of this claim were equally false.

It was not until Ms. Stewart was investigating Petitioner's claim of innocence that it was discovered that Solicitor's aforementioned disclosure contained evidence favorable to Petitioner. Solicitor indicated, as a part of his disclosure, that he had been told by Pathologist that the reason for Pathologist's uncertainty about Victim's cause of death was that "when a body is burned, the skull bursts". Ms. Stewart's research into the significance of this portion of Solicitor's disclosure revealed

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that the language, used by Solicitor while presenting the Court with the reason for Pathologist's uncertainty, was descriptive of thermal injuries.

According to forensic science:

"The skull bursts due to the formation of steam within the skull cavity as a result of intense heat. Such explosive post-mortem fractures are accompanied by gaping defects and separation of non-united sutures and protrusion of brain matter. Intense heat can lead to desiccation of the skull, with the production of post-mortem thermal linear fracture, commonly located on either side of the skull, above the temples. They usually consists of several lines which radiate from a common centre. If the appearance is not typical, distinction from an ante-mortem skull fracture may be difficult."

Forensic Pathology (Thermal Injuries) by Dr. Dinesh Rao.

Ms. Stewart's research into thermal injuries shed light on the true implications behind the language used by Solicitor while explaining the reasons Pathologist questioned the accuracy of his conclusions in reference to Victim's cause of death. Solicitor indicated that he had been told by Pathologist "when a body is burned, the skull bursts and so there is some question". If this language is compared to the aforementioned quote on thermal injuries, it is undeniable that Solicitor was describing the factors which produce thermal injuries. In light of the fact that this language was used by Solicitor while giving details about his discussions with Pathologist in reference to Victim's cause of death, it is clear that at some point Pathologist informed Solicitor that the real reason Pathologist was uncertain about Victim's cause of death was that Pathologist could not distinguish whether the skull fracture he concluded caused Victim's death was an antemortem (before death) blunt force trauma injury, or a postmortem (after death) thermal injury. "The problem being that when a body is burned, the skull bursts and so there is some question." *See Pretrial Hearing Timeline (July 16, 2002 Pretrial Hearing) under Procedural History.*

During the July 16, 2002 Pretrial Hearing, following the above-referenced disclosure made by Solicitor, discussion was held concerning Petitioner's motion for disclosure. The Court stated to Solicitor "I'm taking that as an assumption that you're assuring the Court that you've turned over everything that you know to this point". Solicitor responded, "Certainly, Your Honor". Pretrial Transcript (July 16, 2002) page 15 lines 1-21.

The context in which Solicitor disclosed this evidence to Petitioner and the Court was such that it completely concealed the exculpatory nature of Solicitor's conversation with Pathologist in reference to Victim's cause of death. Moreover, Solicitor distorted the details of his discussions with Pathologist to the extent that it appeared that the evidence gained through these conversations was not favorable to Petitioner. Whether Solicitor's concealment of evidence favorable to Petitioner was deliberate or inadvertent is irrelevant to Petitioner's Brady claim, as the end result is that exculpatory evidence was withheld from Petitioner by Solicitor. *"It does not matter whether the prosecutor's misconduct in failing to reveal Brady evidence is due to negligence or intentional act because a court may find a Brady violation irrespective of the good or bad faith of the prosecutor."* Gibson v. State, *supra.*

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In applying the Brady analysis to Petitioner's case, first, the withheld evidence was favorable to Petitioner because it was proof of the possibility that the injury thought to have caused Victim's death was a postmortem injury. Second, this evidence was known to Solicitor, as Solicitor's own statements led Ms. Stewart to the discovery of the evidence. Third, Solicitor suppressed the evidence by failing to reveal the true context in which the evidence was given to him. Thus, Petitioner believes the first three prongs of his Brady claim are firmly established.

Evidence is material under Brady if there is a "reasonable probability" that the result of the proceeding would have been different had the information been disclosed. Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006). The question is not whether Petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence he received a fair trial "resulting in a verdict worthy of confidence". Kyles v. Whitley, supra.

During Petitioner's trial, Solicitor questioned Pathologist as follows:

Q. And it's your professional opinion that she (Victim) died from blunt force trauma to the right parietal?

A. Yes, sir, that's our conclusion.

Trial Transcript page 166 lines 8-10.

The withheld evidence of Solicitor's pretrial conversations with Pathologist was material for impeachment purposes, as Petitioner could have used this evidence to discredit Pathologist's conclusion that Victim "died from blunt force trauma". By demonstrating Solicitor's knowledge of the exculpatory value of Pathologist's pretrial admissions, Petitioner could have laid the foundation for a vigorous argument that Pathologist had been guilty of negligence and that Pathologist's trial testimony, in reference to Victim's cause of death, was false. In essence, it is beyond dispute that the withheld evidence could have been used to impeach the testimony of Pathologist. Thus, Solicitor's failure to disclose this evidence deprived Petitioner of a fair trial.

"When the state does not disclose information in its possession that might reasonably be considered favorable to the defense, it precludes the trier of fact from gaining access to such information and thereby undermines the reliability of the verdict." United States v. Bagley, 473 U.S. 667 (1985).

There is a reasonable probability that the result of the proceeding would have been different had the information been disclosed, as the only matter in dispute at Petitioner's trial, due to Pathologist's conclusions, was the manner by which Victim received blunt force trauma to the head. Solicitor's case at trial was circumstantial, and was based on proving that Victim received blunt force trauma by the intentional conduct of Petitioner. Petitioner, who admitted that he was present when Victim died, was left with no alternative other than to contend that Victim received blunt force trauma by unintentional conduct. Solicitor withheld evidence establishing that the injury alleged to be a blunt force injury could have occurred after Victim's death, and there is a reasonable probability that the disclosure of this information would have damaged the State's case to the extent that it could have created a reasonable doubt in the minds of the jurors, which would have resulted in a verdict of acquittal.

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"Favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, *supra.*

The withheld evidence was material to Petitioner's guilt or innocence because the conclusions of Pathologist was the essence of the State's case against Petitioner, and the entire prosecution's theory of murder was built upon the foundation that Victim died as a result of blunt force trauma. The focus of the investigation SLED conducted into Petitioner's case was guided by Pathologist's conclusions about Victim's cause of death, as the conclusion that Victim died from blunt force trauma is reflected throughout the investigative files produced by SLED.[12] Additionally, the conclusions of Pathologist serve as the basis for Petitioner's murder indictment, and was the vehicle through which the Court was given jurisdiction to try Petitioner for murder.

The circumstances which led to Petitioner's conviction are so interwoven with Pathologist's conclusions about Victim's cause of death, that the impact of Solicitor's Brady violation completely unravels the constitutional fabric of Petitioner's conviction and *"thereby undermines the reliability of the verdict". See* United States v. Bagley, *supra.* The collective impact of the aforementioned Brady violation and the newly discovered evidence that Victim's death may have resulted from suicide raises the issues of subject matter jurisdiction and Petitioner's actual innocence. Thus, Petitioner's trial was rendered fundamentally unfair by Solicitor's failure to disclose favorable evidence.

For the sake of transparency, Petitioner concedes that he did not inform anyone of the possibility that Victim died from suicide prior to his disclosure to Ms. Stewart, due to the fact that he had repressed the memory of Victim's death. However, these facts do not diminish the fact that Petitioner was denied due process by Solicitor's withholding of favorable evidence, as it was Solicitor's *"affirmative duty to turn over to the Petitioner, all information known to the government that might reasonably be considered favorable to the Petitioner's case".* Brady v. Maryland, *supra. "The burden is on the solicitor to disclose material evidence which is exculpatory or impeaching."* Gibson v. State, *supra.*

Petitioner believes that he has demonstrated the four prongs of his Brady claim by the facts in his case. As such, Petitioner believes these facts should be sufficient to convince the Court that Petitioner's Brady claim is complete.

2. Failure to Correct False Testimony (Pathologist) – PCR Question # 11 (b)

As a result of the aforementioned Brady violation, a second Brady claim arises *"where the previously undisclosed evidence revealed that the prosecution introduced trial testimony it knew or should have known was perjured".* United States v. Agurs, *427 U.S. 97, 103 (1976).* A *"prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with the rudimentary demands of justice."* Giglio v. U.S., *405 U.S. 150, 153 (1972).*

In this section of the brief, Petitioner will compare the trial testimony of Pathologist to the information gathered through Ms. Stewart's investigation into Petitioner's case. Petitioner is making

[12] Pertinent sections of Law Enforcement investigative files are included in Supporting Documents.

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this comparison for purposes of demonstrating to the Court the astounding degree of the deception perpetuated upon the Court and jurors by Solicitor knowingly presenting false evidence through Pathologist's testimony concerning how Pathologist reached his conclusions about Victim's cause of death. During Petitioner's trial, Pathologist testified to the following:

Q. When you say "remains", what did they look like?

A. Charred. The - - most of the flesh was gone. You can see the intestines. You can see the brain. The heat had been intense. There had been fractures of a number of bones. All the ribs was broken. The skull had some cracks and fractures in it. The left hand was missing. Both feet were missing.

Q. Given the fact that those bones were broken, could you tell how those bones were broken on the legs, various places on the ribs?

A. My assumption is that this was from fire because the body was so severely charred. Totally black from top to bottom. I couldn't say what might have happened to, for instance, the hands because they weren't there.

Q. And you said the ribs were broken, could they have been broken from some other cause?

A. I don't think so. Even though the body was badly charred on the outside, from the inside, we would see evidence of bleeding had there been any bleeding there. I think it was from the heat.

Q. But you did find evidence of quite a bit of internal bleeding in the skull?

A. In the skull, in the right-hand side under the parietal bone right here where I'm pointing. There was a fracture here that was epidermal hemorrhage, which is hemorrhage on top of the heavy lining of the surface of the brain. And there was subdural hemorrhage as well so there was a big blood clot in the ear.

Q. And you photographed that?

A. Yes.

Q. Is that what contributed to your finding of blunt force trauma?

A. Yes, it did...

Trial Transcript page 163 line 3 - page 164 line 10.

In summary, Pathologist indicated in his trial testimony that he observed thermal injuries while conducting the autopsy on Victim. Specifically, Pathologist testified that he observed "fractures of a number of bones. All the ribs were broken. The skull had some cracks and fractures in it." When Solicitor asked Pathologist could these injuries have occurred "from some other cause" than the fire, Pathologist testified that "I think it was from the heat" due to the fact that "we would have seen evidence of bleeding had there been any bleeding there". Solicitor then asked Pathologist, "but you did find evidence of quite a bit of internal bleeding in the skull?" Pathologist responded that he found evidence of bleeding "in the right-hand side under the parietal bone" and that there was "a fracture here with epidermal hemorrhage". When asked by Solicitor if the skull fracture and hemorrhage "contributed to your finding of blunt force trauma", Pathologist replied that "it did".

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Pathologist clearly indicated in his trial testimony that the methodology he used to distinguish between thermal injuries and blunt force trauma injuries was the presence of hemorrhaging. In fact the testimony of Pathologist established that a "fracture" and "hemorrhage" were the sole factors which "contributed" to his conclusion that Victim died from blunt force trauma. According to Pathologist's trial testimony, a skull fracture accompanied by hemorrhaging could not have been produced by the fire.

"With 4th degree (charring) burns...May see artifactual epidural hematoma (hemorrhage) and skull fractures due to fire-avoid interpretation of this as antemortem (before death) injury." Essentials of Forensic Pathology *by Wendy A. Lavezzi, M.D. "Decedents involved in fires or exposed to high temperatures demonstrate skeletal fractures not indicative of antemortem (before death) injury...Thermal 'hemorrhage': Coagulation and pooling/accumulation of blood due to heat, especially over the dura, may mimic antemortem (before death) hemorrhaging."* Forensic Scene Investigation *by Renee M. Robinson, MD.*

In essence, contrary to the trial testimony of Pathologist, it is a scientific fact that the burning of a deceased body produces "skull fractures" and "hemorrhage" that may appear to be, or "mimic", injuries that were caused before death. And that pathologists are cautioned to "avoid interpretation" of these injuries as injuries that occurred before death. *"There are several pitfalls in the evaluation of blunt force trauma or supposed blunt force trauma. Some involve misinterpreting minor or resuscitative injuries as being severe injuries inflicted in the antemortem (before death) period; others involve diagnosing blunt force trauma when, in fact, there is no trauma at all."* Forensic Autopsy of Blunt Force Trauma *by Nicolas I. Batalis, MD.*

Pathologist, in his trial testimony, described Victim's alleged blunt force trauma injuries as being located "in the right-hand side under the parietal bone". A forensic expert informed Ms. Stewart that this location "is a common location for thermal injuries". Ms. Stewart confirmed through her research that: *"Heat haematoma occurs when the head has been exposed to intense heat, sufficient to cause charring of the skull...The parietotemporal region is the most common site of such hemorrhage...Skull fractures are usually seen on either side of the skull above the temples".* Forensic Pathology (Thermal Injuries) *by Dr. Dinesh Rao.*

If the trial testimony of Pathologist is compared to the above-referenced publications from multiple experts in forensic pathology, it is undeniable that Pathologist provided false testimony regarding Victim's cause of death, as the injuries Pathologist claimed caused her death were just as likely, or even more likely, caused after her death. Moreover, the aforementioned Brady violation revealed Solicitor's prior knowledge that "the autopsy says there was a blow to the head, but the body when it was found was in very bad shape and there is a question even with the pathologist about the cause of death". The aforementioned Brady violation further revealed Solicitor's prior knowledge that "the autopsy report basically has some conjecture". These facts clearly establishes that Solicitor knew or should have known the trial testimony of Pathologist was false, and that Solicitor failed to correct it. *"The failure to correct false evidence is as reprehensible as its presentation."* Riddle v. Ozmint, *supra.*

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As an additional matter, there is a significant amount of evidence which supports Petitioner's claim that Victim committed suicide. Solicitor called Victim's father as a witness, and he confirmed the following:

Q. Okay. Now, in his opening, the Petitioner eluded to this tragic event that was a year ago. I think he's talking about the abortion.

A. Yes, sir.

Q. Do you remember approximately when that was?

A. Probably the last year before her death.

Q. All right. And this was – your daughter had the abortion?

A. Yes, sir.

Trial Transcript p. 122 lines 6-14. See footnote 6.

Evidence establishes that Victim's death occurred on the approximate one year anniversary of her abortion. *"Occasionally, there may be a significant anniversary date of a significant other's death chronologically proximal to the date the decedent was found...as an indicator of suicidal intent". Forensic Scene Investigation, supra.*

The most convincing evidence that Victim committed suicide is Victim's own words, found in a letter Victim wrote to Petitioner three months prior to her death.[13] In this letter Victim stated:

"If that is your baby I don't know what I' m going to do...I always thought we would learn our parent experience together, but now that is out of the question...If it is your baby over me, then I think I need to leave. I hurt so bad. I feel like I want to kill myself...I can't cope with the pain anymore. If I'm at the point thinkin about killing myself, it is not good...I love you so much...I'm sorry for making u chose, but I think I'm doing this for MnMn. Bye In memories of MnMn."[14] *Written by Victim on September 9, 2000.*

It must be noted that Petitioner's case is not the only case in which Pathologist misdiagnosed the cause of death. A few years after

Petitioner's case, Pvt. Isaac Aguigui murdered his pregnant wife, Deirdre Aguigui. Pathologist, along with another pathologist, ruled that Aguigui was not responsible for his wife's death, and as a result the military awarded Aguigui over $500,000 from a life insurance policy for his wife's death. It wasn't until Aguigui murdered two other people that it was discovered that Pathologist had misdiagnosed the cause of death of Deirdre Aguigui, which caused the military to pay her husband a half million dollars from her life insurance policy after he murdered her.[15]

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[13] Letter is included in Supporting Documents.
[14] Victim abbreviated "MnMn" the name she had given to her aborted child "Minika" because she couldn't bear to say, or even write this name after her abortion.
[15] News articles from this case are included in Supporting Documents.

The circumstances under which Pathologist conducted the autopsy on Deirdre Aguigui were identical to the circumstances under which Pathologist conducted the autopsy on Victim. The findings from both autopsies were equally ambiguous, and required great skill in forensic pathology to accurately interpret the causes of death.[16] The main distinction between the facts in these two cases is the effects of Pathologist's errors. In the case of Isaac Aguigui, Pathologist's misdiagnosis of Deirdre Aguigui's cause of death resulted in a guilty man remaining free to murder two more innocent people. The newly discovered evidence in Petitioner's case strongly suggests that Pathologist's misdiagnosis of Victim's cause of death resulted in an innocent man being condemned to serve over seventeen years in prison.

Petitioner believes he is constitutionally entitled to have a properly certified forensic pathologist review the autopsy findings of Pathologist for purposes of establishing Petitioner's actual innocence, just as a properly certified forensic pathologist reviewed Pathologist's autopsy findings in order to establish Aguigui's guilt. Ms. Stewart took the initiative to hire a forensic pathologist for this purpose, and the only obstacle preventing the completion of this review is the Court's refusal to order the disclosure of evidence that is essential to the accuracy of the forensic pathologist's independent evaluation. As the completion of the autopsy review is pertinent to subject matter jurisdiction, the failure to order the disclosure of this evidence, in light of the evidence establishing the strong probability that Pathologist misdiagnosed Victim's cause of death, would amount to a gross miscarriage of justice. Thus, Petitioner renews his motion for the Court to order the disclosure of the autopsy photographs, as well as the disclosure of Victim's mental health records.

3. Brady Violation (SLED Files) – PCR Questions #11 (c)

"To my mind, the Brady decision, the reasoning that underlay it, and the fundamental interests in a fair trial, combine to give the criminal Petitioner the right to receive from the prosecutor, and the prosecutor the affirmative duty to turn over to the Petitioner, all information known to the government that might be reasonably considered favorable to the Petitioner's case...Thus, for purposes of Brady, the prosecutor must abandon his role as advocate, and pore through his files, as objectively as possible, to identify the material that could undermine his case." United States v. Bagley, *supra.*

Solicitor provided Petitioner with discovery material in July in 2003.[17] However, Solicitor suppressed evidence contained in SLED investigative files which described factors that were favorable to Petitioner. *"Because the State withheld evidence, its case was much stronger, and the defense case much weaker, than the full facts would have suggested."* Kyles v. Whitley, *supra.*

Solicitor's case against Petitioner was entirely circumstantial, as this brief has demonstrated that the physical and forensic evidence was either ambiguous or favorable to Petitioner. A major component of Solicitor's case was the claim that Petitioner "did a very good job of destroying evidence" which Solicitor could have used to establish Petitioner's guilt. However, the evidence withheld by Solicitor contradicts this claim.

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[16] Pathologist is not certified in forensic pathology.
[17] Solicitor's letter to Petitioner listing discovery material is included in Supporting Documents.

During Solicitor's closing argument, he stated the following:

"Now, this is probably the mystery of all. Place the path where the fall occurred. And why is it a mystery? Why can't I just tell you exactly where? Cause he moved the body. He messed up the crime scene. I'm being--said we didn't do an investigation or we didn't prove it. That's cause he did a very good job of destroying evidence. Where is that stick that hit her? I don't know. There was a big bond fire. No, I don't have DNA on it. How do we know in the path where it happened? Well, sometime later that day, he led some policemen and SLED people to the path...But the Judge will tell you that you can infer the mental state required for the crime by that covering up."

Trial Transcript page 718 lines 3-22.

Solicitor disclosed to Petitioner the notes written by SLED Agent Robert "Bobby" Elvington. Agent Elvington stated in his notes that:

"We asked Weldon (Petitioner) if he would show us the path used by him and the victim. Officers of the Bennettsville Police Department brought him back to the scene. Located at the rear of the property was a path leading through a small brush area. In this path we found red stains that appeared to be blood. When crime scene arrived they process the house and the path at the rear of the property and photos were taken."[18]

Solicitor withheld from Petitioner the notes written by Investigator as Investigator processed the house and the path. Investigator indicated in his notes that "no part of the house was there any sign of a struggle". Investigator's notes reflect that he thoroughly searched the house and path, tested numerous items for blood, including potential weapons, and that "all areas except jacket and leaves were negative for blood". Investigator also noted that the "jacket and leaves" were collected as evidence but that the "box of Newport cigarettes not collected per Bobby Elvington".[19]

According to the SLED Evidence Inventory Sheet, filled out by Investigator, "Item # 13" is described as "ONE (1) SET OF LEAVES FROM NEAR NEWPORT CIGARETTE PACK".[20] Though Investigator indicated in his notes that this item tested positive for blood, Ms. Stewart obtained written confirmation from SLED stating that this item had not been tested for DNA.[21] Solicitor did not disclose any of this evidence to Petitioner, and Investigator did not mention any of these facts while testifying at Petitioner's trial.

In essence, the SLED investigative reports that were withheld from Petitioner, revealed that all physical evidence from the path was completely disregarded by law enforcement, though one item of evidence collected from the path tested positive for blood. The reason this evidence was disregarded can be inferred from other SLED files that were withheld from Petitioner. Prior to Petitioner's disclosure that Victim died from suicide, Petitioner claimed that Victim's death was an accident caused by her falling in the path. SLED files indicate that "CRIME SCENE ANALYSIS

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[18] Pertinent section of Agent Elvington's notes is included in Supporting Documents.
[19] Investigator's notes are included in Supporting Documents.
[20] SLED Evidence Inventory Sheet is included in Supporting Document.
[21] Email from SLED to Ms. Stewart is included in Supporting Documents.

REQUESTED TO REBUT SUSPECTS CLAIM HOW DEATH OCCURRED".[22] As the physical evidence found in the path did not "REBUT SUSPECTS ACCOUNT" that Victim died from falling in the path, this evidence was disregarded by police.

Brady, for purposes of materiality, requires that *"there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different". United States v. Bagley, supra*. The prosecution focused its entire case on disproving Petitioner's claim that Victim's death was accidental and occurred in the path. An essential part of Solicitor's case against Petitioner was the claim that Petitioner "did a very good job of destroying evidence" from the path, and in Solicitor's closing argument he told the jury "you can infer the mental state required for the crime by that covering up". As the jury could have reached its guilty verdict based on this argument, and the withheld SLED files revealed that physical evidence from the path was actually discarded by law enforcement, the suppression of this evidence "undermines the reliability of the verdict".

Specifically, by demonstrating Investigator's knowledge that physical evidence from the path had been ignored by crime scene investigators, Petitioner could have laid the foundation for a vigorous argument that the investigators had been guilty of negligence in processing the scene, which would have thrown the investigation into doubt and damaged the credibility of Agent Elvington, who directed that physical evidence be left on the scene. Moreover, the admission from Investigator that he found no signs of a struggle on the scene would have greatly diminished Solicitor's claim that Victim's death occurred as the result of a violent struggle with Petitioner. Conversely, the disclosure of the evidence would have strengthened the defense by allowing Petitioner to establish that a few drops of blood was found in only three places on the entire scene: (1) the right sleeve of Petitioner's jacket, (2) the inside of Petitioner's undershirt, and (3) on leaves found on the ground in the path where Petitioner claimed that Victim fell to her death. These facts could have been sufficient to create a reasonable doubt in the minds of the jurors, which would have resulted in a different verdict.

Disclosure of the SLED investigative files would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense. See *Kyles v. Whitley, supra*. By withholding this evidence, Solicitor was able to claim in his closing argument that the lack of physical evidence from the path, "the mystery of all", was due to the fact that Petitioner "messed up the crime scene". Disclosure of the SLED investigative reports would have revealed that the so-called "mystery" of the lack of evidence from the path was actually the result of law enforcement's negligence in processing the scene. As it is beyond dispute that Solicitor's case would have been significantly weakened by the evidence contained in the SLED investigative files, *"there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different". See United States v. Bagley, supra.*

The U.S. Supreme Court ruled that *"once a reviewing court applying Bagley has found constitutional error there is no need for further harmless-error review...a Bagley error could not be treated as harmless, since 'a reasonable probability that, had the evidence been disclosed to the defense the*

[22] SLED Behavioral Science Unit Accomplishment Report is included in Supporting Documents.

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result of the proceeding would have been different,' necessarily entails the conclusion that the suppression must have had 'substantial and injurious effect or influence in determining the jury's verdict'". Kyles v. Whitley, *supra, quoting* Kotteakos v. United States, *328 U.S. 750, 776 (1946).*

Even if Solicitor were to assert that he was not aware of the evidence contained in the SLED investigative files, this would not relieve him of his responsibility to *"make disclosure when the point of reasonable probability is reached. This in turn means that an individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police...the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable."* Kyles v. Whitley, *supra.*

"'When determining whether the suppression of more than one item of evidence is material under Brady, we consider the collective impact of the undisclosed evidence." Riddle v. Ozmint, *supra. "The Constitution requires only that a Petitioner receive a fair trial, not a perfect one."* U.S. Const. Am. VI; State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999). Petitioner believes that the collective impact of the withheld SLED investigative files is such that his trial was rendered fundamentally unfair by prosecutorial misconduct.

CONCLUSION

In conclusion, Ms. Stewart's investigation of Petitioner's case began with one simple statement from Petitioner: "My girlfriend committed suicide". The overwhelmingly irrefutable evidence that was gained through the investigation following up on that statement is a testament to its veracity. Petitioner believes these facts should be sufficient to firmly convince the Court that Petitioner's conviction is the direct result of severe constitutional errors, which can only be remedied by the granting of relief.

Historically, Petitioner chose to represent himself at trial, though he lacked the necessary skills and training to perform this task with competence. Petitioner, a layman to the law, failed to follow the proper trial procedures for preserving issues for appellate review. As a result, reversible errors that were committed during his trial never fell under the scrutiny of the higher courts. The overall effect of these circumstances is that Petitioner remains unlawfully imprisoned only because the grounds, warranting the reversal of his conviction, slipped through the cracks of procedural error.

Petitioner concedes that the Court gave him forewarning of the perils of self-representation. However, this does not negate the fact that the system has failed Petitioner, as it relates to fundamental fairness. *"Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a Petitioner and where to continue the Petitioner's imprisonment without review would amount to a gross miscarriage of justice."* Aice v. State, *305 S.C. 448, 409 S.E.2d 392 (1991).* Though this ruling was specifically addressing successive PCR applications, Petitioner believes the language of the ruling establishes a standard by which this case is qualified as being the "rarest of exceptions".

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This brief contains allegations and proof clearly and convincingly setting forth that Petitioner's conviction was obtained by Solicitor's knowing use of perjured testimony, and by Solicitor's

deliberate suppression of evidence favorable to Petitioner. *"These allegations sufficiently charge deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody."* United States v. Bagley, *supra, quoting* Pyle v. Kansas, *317 U.S. 213, 215-216 (1942).*

Respectfully Submitted,

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May 25, 2018

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-278

In RE: Weldon W. Stewart, Jr., Movant

Movant's Reply to Respondent's Response to Motion Under 28 U.S.C. § 2244 For Order Authorizing District Court To Consider Second or Successive Application for Relief under 28 U.S.C. § 2254.

Weldon Stewart, Movant, hereby replies to the Respondent's Response.

As an initial matter, Respondent's Response relies heavily upon the "findings" of the state court, as reflected in the order summarily dismissing Stewart's PCR application. However, this order does not, necessarily, reflect the independent findings of the state court, as it was prepared by Respondent using language substantially identical to Respondent's motion for summary dismissal.

For the sake of argument, even if the order is deemed to reflect the independent findings of the state court, these findings were made without the benefit of discovery and an evidentiary hearing. Stewart therefore submits that these findings are unreasonable, as the state court resolved the factual dispute between Stewart and Respondent based on a materially incomplete record.

This Court has held that no deference should be extended to the state court under these circumstances. See *Winston v. Kelly*, 592 F.3d 535, 557 (4th Cir. 2010)(finding that the state court's denial of discovery and an evidentiary hearing produced an adjudication "of a claim that was materially incomplete" and then instructing the district court to extend no deference under AEDPA

to the state court.)

Stewart has requested to be granted discovery and an evidentiary hearing on the federal level, as he was denied on the state level. The record reveals that discovery and an evidentiary hearing is clearly warranted in this matter, the denial of which would result in a gross miscarriage of justice.

Regarding the necessity for discovery and an evidentiary hearing, Stewart's first two claims of constitutional error are that (1) The State withheld evidence tending to establish that the injury the State claimed killed Victim was not present at the time of death and (2) As a result of this fact, the State's pathologist provided false testimony regarding Victim's cause of death. These claims are tethered to the underlying factual predicate that the injury the State alleged killed Victim was not created until after death. The factual dispute surrounding this underlying claim is a matter of science which simply cannot be resolved without discovery and an evidentiary hearing. Furthermore, an evidentiary hearing is necessary to ascertain the credibility, and culpability, of the prosecutor and the State's pathologist regarding these claims.

For review purposes, a determination as to whether the alleged fatal injury was present at the time of death is not only essential to evaluating Stewart's first two constitutional claims, but also to the evaluation of Stewart's actual innocence claim. Additionally, the evidence as a whole cannot be fully evaluated until this critical question has been answered. Considering these facts, the denial of discovery and an evidentiary hearing in this matter would result in a gross miscarriage of justice.

I.

This Court has held that, at this stage, Stewart need not convince the Court that he will ultimately satisfy § 2244(b)(2)(B)'s strict dictates. All he must do is make a prima facie showing that he can do so. See *In re Stevens*, 956 F.3d 229, 233 (4th Cir. 2020).

Stewart has made a prima facie showing that the factual basis for his constitutional claims could

not have been previously discovered through the exercise of due diligence, as the information forming the factual basis of these claims was in the possession or knowledge of the State and was withheld from Stewart.

Respondent's contentions in reference to diligence fail for several reasons. First, Respondent mischaracterizes the factual basis for Stewart's claim as being "the denial of the request for an independent pathologist". The record clearly reflects that Stewart made no claim of constitutional error on this basis. Thus, Respondent's arguments on diligence, based upon Respondent's mischaracterization of Stewart's claim rather than the actual claim, are moot.

Second, even if Respondent's contention regarding Stewart's failure to renew his request for an independent pathologist is considered, this argument is not compelling, as Stewart was not aware of the factual basis for his constitutional claim at that time. Specifically, Stewart was not aware at that time that the State's pathologist could not rule out the possibility that the alleged fatal injury was not present at the time of death. Moreover, it is a tall order for Respondent to establish that fault lies with Stewart for failing to raise his claims in previous proceedings, when critical information supporting these claims was in the State's possession and was being withheld from Stewart. See *Strickler v. Greene*, 527 U.S. 263, 287-88 (1999) (finding that "a defendant cannot conduct the reasonable and diligent investigation…to preclude a finding of procedural default when evidence is in the hands of the State"). "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Banks v. Dretke*, 540 U.S. 668, 675-76 (2004).

The same principle applies to Respondent's contention that Stewart had access to the autopsy photographs during trial. While this may be true, Stewart was not aware of the information being concealed by the State at that time. In making the argument that Stewart had access to the autopsy photographs previously, Respondent urges this Court to overlook the fact that the State has refused

to grant Stewart access to the autopsy photographs since his discovery of information strongly suggesting that these photographs are exculpatory. In essence, the record reflects that the State was only willing to grant Stewart access to the autopsy photographs as long as Stewart believed this evidence was incriminating.

Considering these facts, it is reasonable to conclude that the State is continuing to withhold exculpatory evidence from Stewart, in violation of *Brady*. As Stewart was denied discovery on the state level, he believes it is necessary for discovery to be granted at this juncture, for purposes of ascertaining the full extent of the State's *Brady* violations.

As for Respondent's contention regarding the prosecutor's pretrial statements made in "open court", the record clearly reflects that the prosecutor made these statements for purposes of advancing a claim, later proven to be false, in support of the State's amended murder theory. There is no evidence in the record even remotely suggesting that the prosecutor made these statements for purposes of disclosure. As such, Stewart's awareness of the prosecutor's pretrial "comments" does not support Respondent's contention that Stewart failed to act with diligence. Rather, these facts support Stewart's claim that the prosecutor concealed exculpatory evidence with misinformation.

Third, and most importantly, Stewart has professed his innocence for the offense of voluntary manslaughter on the basis that Victim's death resulted from suicide. Stewart has presented overwhelmingly credible evidence, old and new, in support of this claim of innocence. Conversely, Respondent has failed to present any evidence to refute this claim. It is well established that a compelling claim of innocence "serves as a gateway" through which the merits of Stewart's claims can be reached, despite any possible existence of procedural default or expiration of the statue of limitations. See *McQuiggin v. Perkins* 569 U.S. 383, 386, 133 S.Ct. 1924 (2013).

II.

Stewart has made a prima facie showing of constitutional error for all of his claims before this Court.

As for Stewart's first constitutional claim, Stewart has made a prima facie showing that the State violated *Brady* on the basis that (1) the State knew its pathologist could not rule out the possibility that the skull fracture alleged by the State to have killed Victim was not created until after Victim's death, (2) the State withheld this information from Stewart and (3) this evidence was material, as disclosure of the information would have seriously undermined the State's case against Stewart, which was based on an allegation that Victim died from this injury.

Stewart has further made a prima facie showing of his second constitutional claim that, based on the facts supporting the first claim, the State knowingly allowed its pathologist to provide false testimony regarding Victim's cause of death. Specifically, Stewart has made a prima facie showing that the State allowed its pathologist to testify that the skull fracture caused Victim's death, while knowing this testimony was false on the basis that it was just as scientifically plausible this injury was not present at the time of death and, therefore, did not contribute to Victim's death.

Respondent, in its Response, presents no evidence from the record to conclusively establish that these claims are false on the surface. Pertaining to this Court's review of the record for purposes of this 2244 evaluation, this Court has noted:

> As we explained in In re Williams, "[a]lthough § 2244(b)(2)(B)(ii) requires us to consider 'the evidence as a whole,' we will rarely have the full trial record before us. . . . In most cases, therefore, we will be constrained to rely on the description of the trial record provided by the [authorization] motion." 330 F.3d at 282 n.2 (citing In re Boshears, 110 F.3d 1538, 1541 & n. 1 (11th Cir. 1997) (stating that factual allegations in the authorization motion should be accepted as true unless "conclusively foreclose[d]" by the record)).
> In Re Stevens, supra.

Respondent's contentions merely establish the existence of a factual dispute and fall well short of establishing that the factual allegations in Stewart's 2244 motion are "conclusively foreclosed by the record".

Moreover, Respondent does not deny the strong possibility that Stewart will ultimately be able to prove the underlying factual predicate for his first two claims of constitutional error, that the alleged fatal injury was not present at the time of death. Instead, Respondent, quoting the state court's order, seeks to persuade this Court that the impact of such a determination would be minimal:

> Assuming ad arguendo that another pathologist would rule the fractures to the side of the skull were thermal injuries and not the result of blunt force trauma, other substantial evidence existed in the record to show that Allen perished from such trauma. Indeed, Applicant's own testimony at trial insisted that her passing was the result of accidental blunt force trauma. A pathological finding to the contrary would arguably impeach Applicant as much as the State's case against him.

It is inconceivable that this Court will adopt Respondent's view that the impact of credible evidence establishing that the injury the State claimed killed Victim was not present at the time of death would be insignificant, especially considering Stewart's first two constitutional claims and his claim of innocence. Moreover, Respondent's contention that the testimony of a lay witness, Stewart or otherwise, can outweigh a scientific determination that the alleged fatal injury was created after death is a matter which Stewart believes warrants no discussion.

Regarding Stewart's third claim of constitutional error, Stewart has made a prima facie showing that the State violated *Brady* on the basis that (1) handwritten notes of the State's crime scene investigator was in the State's possession, (2) the State withheld this evidence from Stewart and (3)

the evidence was material, as the information contained in the handwritten notes could have been used by Stewart to refute key aspects of the State's case.

Respondent's claim that correspondence from the prosecutor reveals that Stewart was provided this evidence prior to trial is not accurate, and Respondent has provided no proof that said correspondence exists. Conversely, Stewart has submitted correspondence from the prosecutor clearly showing that the handwritten notes were never disclosed. As such, Respondent has failed to demonstrate from the record that this *Brady* claim is false on the surface.

Respondent's contentions regarding the impact of the State's failure to disclose the notes are not compelling, as Respondent focuses primarily on semantics. While it is true the crime scene investigator specifically stated in his notes that no evidence of a struggle was found in the house, the fact that he did not note any evidence of a struggle clearly indicates that no such evidence was found on the scene. It is also true, as Respondent pointed out, that part of Stewart's claim focuses on inferences that can be reached based on omissions rather than the actual language in the notes. However, Respondent fails to acknowledge that Stewart could have used these omissions from the notes to elicit highly favorable testimony from the State's crime scene investigator in order to refute key aspects of the State's case against him, including the testimonies of the State's key witnesses. This favorable testimony would have also drastically reduced the impact of the strongest points made by the State during its closing argument.

Considering these facts, disclosure of the handwritten notes would have had a devastating impact upon the State's tenuous circumstantial case against Stewart. Contrary to Respondent's position, the State's failure to disclose the notes cast serious doubt upon the reliability of the verdict. Thus, Stewart has clearly made a prima facie showing of constitutional error regarding his third claim.

It must be noted that Respondent does not refute Stewart's claim of constitutional error based on

juror misconduct, as it is beyond dispute that a juror who attempted to run Stewart over with a car in a fit of jealous rage, prior to trial, committed misconduct by being on Stewart's jury. While Respondent could contend that Stewart admittedly failed to exhaust his state remedies on this claim, this failure is due to the unreasonable delay of the hearing judge in filing a written order and, therefore, does not establish a sufficient procedural default for this claim. Thus, Stewart moved this Court to grant him leave to exhaust his state remedies for this claim.

III.

Stewart has made a prima facie showing that, based on the evidence as a whole, no reasonable juror would vote to convict him of voluntary manslaughter.

Respondent contends in its Response that the evidence presented at trial, which was left "untainted" by Stewart's claims of constitutional error, still establishes guilt beyond a reasonable doubt. A closer inspection of the "untainted" evidence to which Respondent alludes reveals that this evidence is purely circumstantial, unreliable, primarily based upon supposed inconsistencies in Stewart's trial and pretrial statements, and a far cry from overwhelming evidence of guilt.

Regarding its evaluation as the evidence as a whole, this Court has held:

> The evidence as a whole is important here because it is "all the evidence put before the court at the time of its § 2244(b)(2)(B)(ii) . . . evaluation." United States v. MacDonald, 641 F.3d 596, 610 (4th Cir. 2011). The Court must make "its § 2244(b)(2)(B)(ii) . . . determination—unbounded 'by the rules of admissibility that would govern at trial'— based on 'all the evidence, including that alleged to have been illegally admitted [and that] tenably claimed to have been wrongly excluded or to have become available only after the trial.'" Id. at 612 (alteration in original) (quoting Schlup v. Delo, 513 U.S. 298, 327–28 (1995)). In other words, "the court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under [evidentiary rules]." Id. (internal quotation marks omitted) (alteration in original).
> In Re Stevens, supra.

Stewart has made an undeniably compelling prima facie showing that the evidence as a whole – including the evidence presented at trial combined with the factual allegations which support his claims of constitutional error and his claim of innocence – clearly and convincingly establishes that no reasonable factfinder would convict in this case. There was never any reliable physical evidence and now there is no reliable circumstantial evidence, the State's theory that blunt force trauma caused Victim's death is no longer viable, the jury could seriously question the credibility of the State's pathologist based on his false testimony, and the handwritten notes containing observations made on the scene by the State's crime scene investigator at least makes the State's theory of a violent death much more difficult to believe. Moreover, the totality of the evidence strongly suggests that Victim perished from suicide, to the exclusion of any other reasonable possibility.

Thus, at a minimum, Stewart has made a prima facie showing that, based on the evidence as a whole, no reasonable jury would have convicted him of this crime.

CONCLUSION

Based on the foregoing, Respondent has failed to demonstrate in its Response any sufficient reason why this Court should not grant Stewart's Motion for Authorization under § 2244. Therefore, Stewart respectfully requests that this Court grant his motion.

Respectfully submitted,

Weldon W. Stewart, Jr., #295095
Evans Correctional Institution
[redacted]
Bennettsville, SC 29512

Dated: December 7, 2021

By: *s/Weldon W. Stewart, Jr.*

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-278

In RE: Weldon W. Stewart, Jr., Movant

CERTIFICATE OF SERVICE

I, [redacted]L. Stewart, hereby certify that on this date, I served a copy of Movant's Reply to Respondent's Response to Motion dated December 7, 2021, on Donald J. Zelenka by mailing it to him, at his last known address, via U.S.P.S Express Mail, tracking No. EJ 757114199US in an envelope with sufficient postage affixed, addressed as follows:

Donald J. Zelenka, Deputy Attorney General
Office of the Attorney General,
[redacted]
Columbia, SC 29211

Documents:

1) Movant's Reply to Respondent's Response to Motion Under 28 U.S.C. § 2244 For Order Authorizing District Court to Consider Second or Successive Application for Relief under 28 U.S.C § 2254 ("Response")

12/07/2021
Date

[redacted] Stewart
Stewart

U.S. COURT OF APPEALS
FOURTH CIRCUIT
2021 DEC -7 AM 11:55
RECEIVED

FILED: March 9, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-278

In re: WELDON W. STEWART, JR.

Movant

O R D E R

The court appoints Dawinder Sidhu to represent Weldon W. Stewart, Jr. on appeal. Counsel is referred to the **CJA Payment Memorandum** and the **CJA eVoucher Page** for information on appointment terms and procedures.

If preparation of transcript is necessary, CJA authorization for preparation of transcript is obtained by submitting an AUTH-24 request in the district eVoucher system. New appellate counsel must contact district eVoucher staff for appointment to the underlying district court case in order to submit the AUTH-24 request for district judge approval and the CJA 24 voucher for transcript payment. Counsel must also submit a Transcript Order Form to the court reporter and district court and file the same in the court of appeals with the docketing statement. Upon filing of the Transcript Order Form, the Fourth Circuit will set deadlines for

completion of the transcript.

CJA 20 and 21 vouchers are submitted for payment through the Fourth Circuit's CJA eVoucher system. Upon receiving email notification of this appointment from eVoucher, counsel may create CJA 20 and 21 vouchers for use in maintaining time and expense records and paying for expert services.

In light of this appointment, appellate counsel is granted access to sealed district court material, with the exception of ex parte or in camera material. Any transcripts or record material sent to prior counsel shall be provided by prior counsel to newly appointed counsel. If record items are not available from former counsel, new counsel should contact the Fourth Circuit Appointments Deputy for assistance in obtaining these items.

The court having appointed new counsel for purposes of this appeal, any motion for further substitution of counsel shall be disfavored.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
OFFICE OF THE CLERK

1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517
www.ca4.uscourts.gov

Patricia S. Connor
Clerk

Telephone
804-916-2700

March 9, 2022

CJA COUNSEL NOTICE

No. 21-278, In re: Weldon Stewart, Jr.

TO: Dawinder Sidhu
HOPWOOD & SINGHAL PLLC
[redacted]
Potomac, MD 20854
[redacted]

Thank you for accepting appointment on appeal in this case. This office will work with you in any way necessary in connection with the appointment. The case manager for this case is Richard Sewell, and the following information is provided for your use (click on an underlined document to access the document on the court's web site, [redacted]).

Initial Forms: Following forms must be filed within 14 days.

- **Appearance of Counsel** (must be registered for electronic case filing)
- **Docketing Statement** (required for appointments at the beginning of the appeal)
- **Transcript Order Form** (order any necessary transcript)

Appointment and Case Information: Time and expense records must be maintained in accordance with the **CJA Payment Memorandum** to permit payment at the end of the case.

All case filings must be made using the court's Electronic Case Filing system (CM/ECF). Counsel not yet registered for electronic filing should proceed to the court's web site to register as an ECF filer. See **Required Steps for Registration as an ECF Filer**.

Copies of any documents filed on appeal to date are accessible on the court's docket. Documents filed by a party while proceeding pro se will not be considered by the court unless renewed by counsel.

Record: Counsel should use a fee exempt account for all PACER access in CJA cases. If you do not have a fee exempt account, email [redacted] and list the courts in which you serve as CJA counsel. PACER will respond to you with an email updating your PACER credentials to include access as CJA counsel and instructing you on how to use the updated credentials. The district court's PACER docket and electronic documents are accessible through a link to the district court docket from the appellate docket. The "Create Appendix" option enables counsel to combine multiple documents into one PDF record for printing or saving.

Presentence Report, Statement of Reasons, Transcripts: Since the presentence report and statement of reasons are sealed documents and the transcript is restricted from public access during the redaction period, counsel may need to make special arrangements to obtain these documents. If record items are not available from former counsel, new counsel should contact Lisa McFarland, the Fourth Circuit Appointments Deputy, at 804-916-2744, for assistance in obtaining these items. For assistance in ordering preparation of transcript through the district court's eVoucher system, new counsel should contact **District eVoucher Contacts for CJA Authorization and Payment**.

CONTACT INFORMATION:

Defendant:
WELDON W. STEWART, JR
#295095
EVANS CORRECTIONAL INSTITUTION
[redacted]
Bennettsville, SC 29512-5202

Lisa R McFarland, Deputy Clerk
[redacted]

cc: Defendant
Robin L. Blume
Alan Wilson
Donald John Zelenka

SEALED & CONFIDENTIAL MATERIALS

Internet Availability of Docket & Documents

Fourth Circuit case dockets and documents are available on the Internet via the Judiciary's PACER system (Public Access to Court Electronic Records). The Fourth Circuit docket is available on the Internet even if the district court docket was sealed. If a party's name was sealed in the district court, it should be replaced by "Under Seal" or a pseudonym on appeal.

Due to the electronic availability of court documents, the federal rules prohibit including certain personal data identifiers in court filings. In addition, parties should not include any data in their filings that they would not want on the Internet. Counsel should advise their clients on this subject so that an informed decision can be made. Responsibility rests with counsel and the parties, not with the clerk.

Documents filed by the parties in immigration and social security cases are not accessible over the Internet to the public. In immigration and social security cases, public Internet access is limited to the court's docket, orders, and opinions.

Federal Rules of Procedure

The federal rules of procedure require filers to redact any of the following personal data identifiers (PDIs) if included in court filings: (1) social security and tax ID numbers must be limited to last four digits; (2) minor children must be identified by their initials only; (3) dates of birth must show the year only; (4) financial account numbers must be limited to the last four digits only; and (5) home addresses in criminal cases must be limited to city and state only. The federal rules establish limited exceptions to these redaction requirements. See Fed. R. App. P. 25(a)(5); Fed. R. Civ. P. 5.2; Fed. R. Crim. P. 49.1; Fed. R. Bankr. P. 9037

Judicial Conference Privacy Policy

In addition, the judiciary's regulation on Privacy Policy for Electronic Case Files prohibits filers from including any of the following criminal documents in the

public file: (1) unexecuted summonses or warrants; (2) bail or presentence reports; (3) statement of reasons in judgment of conviction; (4) juvenile records; (5) identifying information about jurors or potential jurors; (6) CJA financial affidavits; (7) ex parte requests to authorize CJA services and (8) any sealed documents, such as motions for downward departure for substantial assistance, plea agreements indicating cooperation, or victim statements. Any reference to substantial assistance or cooperation with the government in criminal proceedings should be sealed in the parties' briefs.

Local Rule 25(c)

Local Rule 25(c) limits the sealing of documents by requiring that sealed record material be separated from unsealed material and placed in a sealed volume of the appendix and by requiring the filing of both sealed, highlighted versions and public, redacted versions of briefs and other documents.

Since the ECF events for sealed filings make the documents accessible only to the court, counsel must serve sealed documents on the other parties in paper form.

Sealed Volume of Appendix

If sealed record material needs to be included in the appendix, it must be placed in a **separate, sealed volume** of the appendix and filed with a certificate of confidentiality. In consolidated criminal cases in which presentence reports are being filed for multiple defendants, each presentence report must be placed in a separate, sealed volume served only on Government counsel and counsel for the defendant who is the subject of the report.

- Use ECF event-**SEALED JOINT APPENDIX** and **SEALED SUPPLEMENTAL APPENDIX** to file sealed electronic appendix volume(s). Cover of sealed appendix volume must be marked SEALED, and paper copies must be placed in envelopes marked SEALED. Sealed volume must be served on other parties outside ECF.
- Use ECF event-**Certificate of confidentiality** to identify authority for treating material as sealed and to identify who may have access to sealed material. A paper copy of the certificate of confidentiality must accompany the paper copy of the sealed appendix filed with the court.
- Use ECF event-**JOINT APPENDIX** and **SUPPLEMENTAL APPENDIX** to file public electronic appendix volumes(s).

Sealed Version of Brief

If sealed material needs to be referenced in a brief, counsel must file both a **sealed, highlighted version** of the brief and a **public, redacted version** of the brief, as well as a certificate of confidentiality.

- Use ECF event-**SEALED BRIEF** to file sealed electronic version of brief in which sealed material has been highlighted. Cover of sealed brief must be marked SEALED, and paper copies must be placed in envelopes marked SEALED. Sealed version must be served on other parties outside ECF.
- Use ECF event-**Certificate of confidentiality** to identify authority for treating material as sealed and to identify who may have access to sealed material. A paper copy of the certificate of confidentiality must accompany the paper copy of the sealed brief filed with the court.
- Use ECF event-**BRIEF** to file public electronic version of brief from which sealed material has been redacted.

Sealed Version of Motions and Other Documents

If sealed material needs to be referenced in a motion or other document, counsel must file both a **sealed, highlighted version** and a **public, redacted version**, as well as a certificate of confidentiality.

- Use ECF event-**SEALED DOCUMENT** to file sealed electronic version of document in which sealed material has been highlighted. First page of document must be marked SEALED. Sealed version must be served on other parties outside ECF.
- Use ECF event-**Certificate of confidentiality** to identify authority for treating material as sealed and to identify who may have access to sealed material.
- Use the appropriate ECF event (e.g., **MOTION** or **RESPONSE/ANSWER**) to file public electronic version of document from which sealed material has been redacted.

Motions to Seal

A certificate of confidentiality may be used to request sealing of information protected by the Privacy Policy for Electronic Case Files, or by statute, rule, regulation, or order. To request sealing of other materials, or to request sealing of an entire brief or motion due to inability to create a public, redacted version, counsel must file a motion to seal.

The motion to seal must appear on the public docket for five days. The motion must identify the document or portions thereof for which sealing is requested, the

reasons why sealing is necessary, the reasons a less drastic alternative will not afford adequate protection, and the period of time for which sealing is required. If it is necessary to reference sealed material in the motion, a **sealed, highlighted version** and a **public, redacted version** of the motion must be filed.

Highly Sensitive Documents

The court has adopted Standing Order 21-01 implementing procedures adopted by the Federal Judiciary for the filing of highly sensitive sealed documents in paper form, accompanied by a certificate (for material sealed by the district court or other tribunal) or motion (for requests to file material under seal in the first instance).

Forms: Certificate of Confidentiality & Certificate for Highly Sensitive Document Protection

Instructions: How do I redact items from pleadings? (Marking out text in a word processing document using a highlighter or box tool does not remove sensitive data from the document.)

NO. 21-278

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re

Weldon Stewart, Jr.,

Movant.

MOTION FOR LEAVE TO FILE ATTACHMENTS TO THE OPENING BRIEF

Movant Weldon Stewart, Jr., has sought authorization to file a second or successive habeas petition. ECF #2. In his request for pre-filing authorization, Mr. Stewart referenced that he had recovered repressed memories of the victim's death. *Id*. at *27. This Court then sought briefing on "[w]hether *the movant's* allegation of recovered memory qualifies as newly-discovered evidence warranting authorization to file a successive petition." ECF #12 at *1 (emphasis added).

Movant understands that the Court is not only interested in whether recovered memories generally constitute newly-discovered evidence for purposes of applicable federal habeas law, but whether "the movant's allegation of recovered memories" in

particular are sufficient under such law. In the opening brief, Movant intends to address whether he specifically has made a prima facie showing of possessing repressed memories, *see* 28 U.S.C. § 2244(b)(3)(C), "warrant[ing] a fuller exploration by the district court," *In re Williams*, 330 F.3d 277, 281 (4th Cir. 2003) (internal quotes and citation omitted). Indeed, Movant sought and obtained an extension of the deadline by which to file his opening brief precisely for this reason. ECF #18 (requesting an extension to "identify and confer with a professional with relevant experience and expertise in the context of repressed memories, as Mr. Stewart has asserted in his underlying motion that he has recovered memories of the incident in question."); ECF #19 (granting the request).

Movant respectfully asks this Court for a leave to file seven attachments relevant to the question presented and its specific application to Mr. Stewart: four reports and the credentials of the individuals who prepared these reports. *First*, Movant identified a clinical, forensic, and neuropsychological assessment psychologist, who assessed Movant for dissociative amnesia, the technical disorder that covers repressed memories. *See* ECF #20 at 2. Movant then sought and received an extension to "properly review [the psychologist's] 51-page report and incorporate any relevant information from the report into the [opening] brief." *Id.* at 2-3. The present motion seeks leave to accomplish what already has been expressly contemplated and understood by this Court: that the psychologist's report will be referenced in the opening

brief in support of Movant's specific claims of having repressed memories. Movant maintains that it is essential to properly answering the question presented—and would be consistent with this Court's prior order allowing Movant to consult with a relevant professional—for this report to be considered alongside his opening brief. This report and the psychologist's credentials are attached to this motion. App. A (report); App. B. (credentials).

The second and third batch of documents relate to the contents and consequences of the Movant's recovered memories: that the victim committed suicide and thus that Movant is not legally responsible for her death. *See* ECF #2 at *27. *Second*, a highly experienced and certified forensic document examiner reviewed a document in which the author expresses an interest in and thoughts of suicide. The examiner concluded that there is a "high probability" both that the victim wrote the letter and that the letter is genuine. App. D at *2. These findings support Mr. Stewart's claims, speak to his actual innocence, and undermine the prosecution's theory of the case at trial. As these findings are material to Movant's burden of making a prima facie showing, Movant seeks to reference the report and the examiner's credentials in his opening brief. The initial report, supplemental report, and the examiner's corresponding credentials are attached to this motion. App. C (report); App. D. (supplemental report); App. E. (credentials)

Third, an autopsy review conducted by a highly trained forensic pathologist concluded that suicide cannot be ruled out as a possible manner of the victim's death. This report therefore casts doubt on the prosecution's theory and supports Mr. Stewart's theory stemming from his recovered memories. As the report would support Movant's ability to make his prima facie showing, Movant seeks permission to include the report and the pathologist's credentials in his opening brief. The report and associated credentials are attached to this motion. App. F (report); App. G. (credentials).

Counsel for Movant informed Counsel for Respondent of his intention to ask this Court for leave to file the aforementioned reports. Counsel for Respondent indicated that Respondent opposes this motion.

Despite this opposition, and in consideration of the high degree of relevance of the attachments to Movant's ability to mount a prima facie case in support of prefiling authorization, Movant respectfully moves this Court for leave to file the attachments to the opening brief.

Dawinder S. Sidhu
HOPWOOD & SINGHAL, PLLC
[redacted]
Potomac, MD 20854
[redacted]

By: /s/ Dawinder S. Sidhu
Counsel for Movant

June 14, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IN RE: Weldon Stewart, Jr.,

Movant

No. 21-278

Response in Opposition to Motion
for Leave to File Attachments to the Opening Brief

Petitioner has moved pursuant to 28 U.S.C. § 2244(b) for authorization to file a successive habeas petition in which to challenge once again his 2002 state conviction for voluntary manslaughter. Petitioner admits to filing a prior federal habeas action on the same judgment from his 2002 jury trial. (Doc. 2 at 2). He asserts that he should be allowed a successive action based on § 2244 (b)(2)(B) – essentially arguing that a "factual predicate" for a defense was previously unavailable to him due to his own "repressed memory of how the Victim died," and asserting a belief that the Victim really committed suicide. (*See* Doc. 2 6-7 and n. 1). On March 9, 2022, this Court appointed counsel to brief the following issue:

> Whether the movant's allegation of recovered memory qualifies as newly discovered evidence warranting authorization to file a successive petition

(Doc. 12).

On June 14, 2022, Petitioner moved for permission to file certain documents as attachments to his brief. (Doc. 24). Respondent opposes the motion as the documents Petitioner references in the motion are newly created documents not previously submitted to any state court. Such documents cannot be accepted by the district court in support of the claims proposed, and should not be accepted here to avoid the successive applications bar. The motion should be denied to prevent consideration of alleged (untested) facts that are ultimately prohibited from consideration in the narrow forum of 28 U.S.C. § 2254 review. In support of this position, Respondent would respectfully submit the following:

1. A party may attach to a brief copies of "statutes, rules, regulations, etc.," or "a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database…." Rules 28(f) and 32.1(b), Federal Rules of Appellate Procedure. Otherwise, the local rule provides that a motion be filed and permission granted. Fourth Cir. Rule 28(b). The documents proposed do not qualify under Federal Rules of Appellate Procedure 28 (f) or 32.1(b). Therefore, this Court's permission is necessary. Yet, Petitioner has failed to show a proper reason for inclusion.

2. Petitioner seeks to add new documents. These new documents were obviously not a part of the appendix from the prior district court proceedings, and

have not been a part of the state court record at any time.[1] Further, the documents reflect assertions going to not only mental state generally, but also substantive assertions reflective of a new theory for a defense *contrary to that presented by this Petitioner acting as his own counsel at trial*. It would be inappropriate in habeas review to accept any of these offered documents to show a new factual basis for a new claim where such documents have not been at least offered to the state court. *Shinn v. Martinez Ramirez*, 596 U.S. ___, ___, 142 S. Ct. 1718, 1730 (2022) ("only rarely may a federal habeas court hear a claim or consider evidence that a prisoner did not previously present to the state courts in compliance with state procedural rules"); *see also Williams (Michael) v. Taylor*, 529 U.S. 420, 437 (2000) ("For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the

[1] The documents contain numerous instances of hearsay and irrelevant assertions but significantly, the lead document, a "Confidential Psychological Evaluation," repeatedly notes that the evaluation is admittedly limited – it reflects several references to the failure to give "standard psychological tests" generally necessary for forensic evaluation, and notes malingering tests were not given or testing declined. (Doc. 24-2). This instantly calls into question the reasonableness of relying on the evaluation for any purpose. Further, there are multiple factual allegations on personal background or perceptions reflected in the document that are wholly irrelevant to guilt or innocence.

statute's other stringent requirements are met.").[2] *Accord Shoop v. Twyford*, 596 U.S. ___, ___, No. 21-511, 2022 WL 2203347, at *6 (U.S. June 21, 2022)) ("[r]eviewing Twyford's request for transportation under the proper standard is straightforward, because his motion sheds no light on how he might persuade a court to consider the results of his testing, given the limitations AEDPA imposes on presenting new evidence").

3. Further, the documents do not show any alleged fact – be it impaired memory or another specific cause of death (which remains somewhat elusive other than general allegations of "suicide") – that could not have been discovered in the intervening *twenty years* since his state conviction.[3] Moreover, the allegation of "repressed" memory is rebutted by his own offered new document, which attempts to place a "dissociative state" analysis over allegations of "repressed memory." (*See* Doc. 24-2 at 5). However, such attempt is incompatible with Petitioner's testimony and argument at trial. Petitioner repeatedly told the jury he was the only surviving witness to the event which he described *in detail* to be an *accident.* (Closing Argument at Trial Transcript p, 692; *see also* Trial Transcript pp. 522-31). The jury,

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[2] In contrast, Petitioner also has pending a motion to enlarge the record which requests inclusion of other state court records. (Doc. 11). Respondent has not objected to the inclusion of other state court records in this Court's consideration of Petitioner's request.

[3] Indeed, Petitioner has indicated he first shared the disclosure of the suicide recollection in *2014*. (*See* Doc. 11 at 4).

during deliberations, even requested to rehear Petitioner's detailed opening statement which included statements and assertions such as:

- "I'm going to show you that on the morning of December 6, 2000, my girlfriend's death was accidental";
- That the Victim left her house, avoiding detection, to meet with Petitioner;
- That Petitioner admitted that they "did get into a little argument that night" prior to her death;
- That the Victim resisted leaving him and that "[s]he never wanted to go back home when it was time for her to go back home" but "wanted to stay with" Petitioner;
- That "[t]he evidence will show that I was just trying to convince my girlfriend that she needed to go back home. It was time for her to go back home, but she was upset," and he eventually "picked my girlfriend up to try to carry her where we were going. We were in my parents' backyard, and we were trying to go through a path where we could again access to the next yard over … I was trying to carry my girlfriend in my arms through a path … she was twisting and turning. She wasn't ready to go back home. She was a little upset … I tripped and fell with her in my arms over one of the sticks in the path… [s]he fell. I fell on top of her. This was an accident, ladies and gentlemen."
- That "[w]hat happened, ladies and gentlemen, was an accident occurred. Now, this was not an accident where my girlfriend fell, I fell on top of her and she broke a fingernail or sprained an ankle. Ladies and gentlemen, this is an accident where we fell, and she lost her life as a result of this accident."

(Trial Transcript pp. 746-50).[4]

[4] Part of his trial testimony noted that the Victim pulled a box cutter on him, and "swung it" at him three times. (Trial Transcript pp. 524-25).

In short, Petitioner did not profess at trial an absence of memory; rather, Petitioner pursued at trial a detailed presentation of a different story. This makes the acceptance of the material now offered as possible attachments to the brief even less relevant (in addition to being shown as less reliable) to determine an exception to the successiveness bar. Moreover, Petitioner's proposed "new" defense does not reveal any relevant or material aspect of the precise claims he seeks to pursue.

4. In his pleading before this Court, Petitioner claims he is seeking a second federal habeas corpus proceeding to raise the following claims:

1) Alleged newly discovered evidence of a Brady violation that the State concealed evidence establishing that the injuries the State claimed killed Victim were not produced until after Victim's death.

2) The State knowingly presented false testimony from the State's pathologist, Dr. Russell Harley, that Victim's injuries conclusively established death by blunt force trauma, which he alleges the State failed to correct and that the State suppressed evidence showing the testimony of the pathologist was false.

3) The State concealed evidence found in the crime scene notes written by SLED Agent Al Stuckey containing observations made by the crime scene investigator, while on the scene, which strongly contradicted the State's case against Stewart.

A *Brady* violation, by definition, must be something known and withheld. *See Lovitt v. True*, 403 F.3d 171, 185 (4th Cir. 2005) ('"*Brady* only applies when evidence is 'known to the prosecution but unknown to the defense.'") (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)). Thus, the new material could not illuminate any fact or facet of that claim. As argued in the Response opposing

Petitioner's motion, (Doc. 9 at 10), Petitioner's current position shows, at most, a lack of due diligence on Petitioner's part as Petitioner failed to pursue a request for an independent pathologist after he met with Dr. Harley prior to the trial, and failed to pursue the claims in the first PCR and first federal habeas corpus proceeding.

Petitioner's claim of "false" evidence simply follows the same argument that Petitioner originally attempted at trial – that the cause of death was not clear, and, specifically, was not due to the subsequent burning. [5]

Finally, the crime scene notes must be notes made at the time of investigation and available for discovery since that time. [6] Again, nothing "new" could illuminate any fact or facet of such a claim.

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[5] This was also touched upon in the 2019 Order from the 2018 post-conviction (PCR) action: "Any issues Applicant may have had with the accuracy or credibility of the pathologist's testimony could have and should have been raised at trial. Furthermore, there is no indication of deception in the pathologist's testimony: he observed epidermal hemorrhage and subdural hemorrhage those observations contributed to a finding of blunt force trauma. That the same observations could support an alternative theory as to how Allen died does not cast the pall of deception upon the pathologist's testimony, such that the State had any obligation to 'correct' it." *Stewart v. State*, 2018-CP-34-00121, Order (Goldsmith, October 5, 2019). (*See* Response, Doc. 9 at 14).

[6] In addressing this matter in the 2019 Order, the PCR court found: "As to the purported notes of SLED investigators, Applicant asserts without basis that the notes were wrongfully withheld from him. To the contrary, correspondence from Assistant Solicitor Dan Blake to Applicant shows he was provided the officer's notes in 2003…." *Stewart v. State*, 2018-CP-34-00121, Order (Goldsmith, October 5, 2019) (Response, Doc. 9 at 15-16).

5. Of note, Petitioner chose to represent himself at trial. He made the decisions as to his defense and particularly as to his testimony. The trial record shows the opinion of the state pathologist was not suppressed, and that Petitioner actually questioned the pathologist to elicit testimony that could arguably support his testimony as given at trial. (*See* Closing Argument Trial Transcript p. 693, noting that the pathologist did not disagree that a fall together may have cause death). Petitioner is attempting a *change* in his story – he is not attempting to fill in *blanks* in his story. At any rate, the most recent challenges as reflected in his request for authorization are based on the investigation and the State's case – information that must have been available at the time of trial, appeal, the first PCR proceeding, and, of course, the first habeas corpus action. Petitioner has failed to make the required showing for an additional federal habeas action.

6. The "prima facie showing" required for authorization is that a Petitioner make "a sufficient showing of possible merit to warrant a fuller exploration by the district court…." *See In re Williams*, 330 F.3d 277, 282 (4th Cir. 2003) (quoting *Bennett v. United States*, 119 F.3d 468, 469-70 (7th Cir. 1997)). Petitioner has failed to show the proffered attachments – with the untested allegations, hearsay, and unexhausted claims – should be considered here to meet this showing or in the district court in consideration of the claims. The inclusion cannot affect disposition

of the request for authorization (or ultimately the claims),[7] and would bring only confusion and unfair prejudice, forcing Respondent to address matters not properly before the Court. Even so, as demonstrated, a cursory review shows that the untested documents that are not a part of the state court record do not aid Petitioner. Petitioner simply cannot make the required showing.

CONCLUSION

For all the foregoing reasons, the motion should be denied.

Respectfully submitted,

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s/Melody J. Brown
By: _____.

June 27, 2022 **ATTORNEYS FOR RESPONDENTS**

[7] *Williams*, 330 F.3d at 282 (focus is on meeting the pre-authorization requirements, and only involves at most a "cursory glance at the merits" at this stage).

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 21-278 **Caption:** In re Weldon Stewart, Jr., Movant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

Type-Volume Limit for Briefs if Produced Using a Computer: Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 13,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 15,300 words or 1,500 lines. A Reply or Amicus Brief may not exceed 6,500 words or 650 lines. Amicus Brief in support of an Opening/Response Brief may not exceed 7,650 words. Amicus Brief filed during consideration of petition for rehearing may not exceed 2,600 words. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include headings, footnotes, and quotes in the count. Line count is used only with monospaced type. See Fed. R. App. P. 28.1(e), 29(a)(5), 32(a)(7)(B) & 32(f).

Type-Volume Limit for Other Documents if Produced Using a Computer: Petition for permission to appeal and a motion or response thereto may not exceed 5,200 words. Reply to a motion may not exceed 2,600 words. Petition for writ of mandamus or prohibition or other extraordinary writ may not exceed 7,800 words. Petition for rehearing or rehearing en banc may not exceed 3,900 words. Fed. R. App. P. 5(c)(1), 21(d), 27(d)(2), 35(b)(2) & 40(b)(1).

Typeface and Type Style Requirements: A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch). Fed. R. App. P. 32(a)(5), 32(a)(6).

This brief or other document complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

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(s) Melody J. Brown

Party Name Respondent

Dated: June 27, 2022

NO. 21-278

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re

Weldon Stewart, Jr.,

Movant.

REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE ATTACHMENTS TO THE OPENING BRIEF

Respondent State of South Carolina objects to Movant's motion for leave to file attachments to Movant's opening brief. ECF #28. In what follows, Movant will demonstrate how each of Respondent's arguments falls short and thus that the motion should be granted.

I. Under Local Rule 28(b), the Proposed Attachments to the Opening Brief Are Properly Before the Court to Consider.

Respondent contends that the proposed documents may not be attached to Movant's opening brief because the documents do not qualify under Federal Rules of Appellate Procedure 28(f) (applying to "statutes, rules, regulations, etc.") or

32.1(b) (applying to a "federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database"). ECF #28 at 2. But this Court's Local Rules expressly permit a movant to add documents to a brief beyond the scope of the documents identified by these two rules: "Should a party wish to supplement the brief with matters other than those designated in FRAP 28(f) or FRAP 32.1(b), the additional material must be presented to the Court under separate cover, accompanied by a motion for leave to file such supplemental material as an attachment to the brief." Fourth Cir. Loc. R. 28(b). Seeking leave of court to file these additional materials is precisely what Movant did here. ECF #24.

II. The Documents Satisfy Exhaustion Requirements.

Respondent next argues that Movant did not present the newly discovered evidence or the proposed documents in state court. ECF #28 at 2-3. In what boils down to an exhaustion argument, Respondent contends that the documents cannot be considered by this Court. *See id*. at 3. But Movant's repressed memories and suicide theory—which lie at the heart of the proposed documents—were presented in state court. Moreover, the state court did consider a report from Dr. Downs and each of the documents support claims already in a state record. Finally, any procedural difficulties would be overcome by the fact that the documents speak to Movant's actual innocence.

A. The Repressed Memories and Suicide Theory Were Presented in State Court.

For starters, Mr. Stewart directly raised his repressed memories and the associated theory of suicide at the state level. For example, in a 2018 motion for post-conviction relief filed in state court, Mr. Stewart expressly mentioned the repressed memories and the theory of suicide. *See* ECF #11 at 4 (noting that Movant "regained access" to memories that the Victim "died as a result of suicide").

In state court, Respondent conceded that Mr. Stewart raised both recovered memories and the theory of suicide. *See* Tr. of Record, *Stewart v. South Carolina*, S.C., Ct. of Common Pleas, 18-CP-34-00121, at *19 (Aug. 22, 2019) ("[Movant] raises this new argument that . . . the victim actually committed suicide. . . . And that he didn't remember this at the time of trial and he didn't remember this before because it was a repressed memory[.]"). These admissions in state court cut against Respondent's suggestion that Movant bypassed state court and proceeded directly to federal court on a novel, unexpected claim or theory. *See* ECF #28 at 9.

B. The State Court Foreclosed Consideration of Dr. Downs' Report.

In state court, Mr. Stewart also sought to develop the factual record with the findings of an independent forensic pathologist, Dr. Downs, who conducted a preliminary review of the autopsy and concluded that it was possible Victim died in a manner other than that advanced by the State at trial. *See* Tr. of Record, *Stewart v.*

South Carolina, Ct. of Common Pleas, 18-CP-34-00121, *19 (Aug. 22, 2019). This finding would have supported Movant's recovered memory that Victim committed suicide. Movant requested discovery for Dr. Downs to be granted access to the autopsy materials necessary for him to complete a comprehensive autopsy review report. *Id*. *8-9.

The state court denied this request, categorically refusing to entertain an independent pathologist's report, regardless of what the pathologist concluded. The court explained: "Assuming ad arguendo that another pathologist would rule the fractures to the side of the skull were thermal injuries and not the result of blunt force trauma, other substantial evidence existed in the record to show that [victim] perished from such trauma." *See* Order Granting R's Mot. to Dismiss Appl., *Stewart v. State of South Carolina,* Ct. of Common Pleas, 2018-CP-34-00121, at *12 (Oct. 17, 2019). The court continued: "Indeed [Movant's] own testimony at trial insisted that her passing was the result of accidental blunt force trauma." *Id*.

Rather than allow for Dr. Downs' comprehensive report to be prepared and then weighed against other evidence, the state court pre-determined that any such report would not make any dent in the State's theory—a theory that is flawed because it was predicated on Movant's trial testimony and that testimony was based on his incomplete memories and a distorted understanding of the incident. *See* Closing Arg. By State, South Carolina v. Stewart, S.C., Ct. of Common Pleas, No. 02-GS-

34-1919, at *714, *720 (Aug. 1, 2003) ("[Movant] is your eyewitness…the whole case comes down to [his] credibility."). The state court made this pre-determination, and took Movant's trial testimony as beyond question, despite the fact that Movant claimed that he suffered from dissociative amnesia at the time he gave his trial testimony and thus had a different understanding of the incident. The state court flatly rejected the relevance of Movant's repressed memories and the impact of them on his trial testimony: "That [Movant] now seeks to change his story and assert that [Victim] perished from suicide, and not in the fashion testified to at trial, is inconsequential."). *Id*.

The state court blocked further development of the facts supporting Movant's recovered memory claim. "[W]hen a state court forecloses further development of the factual record, it passes up the opportunity that exhaustion ensures. . . . New, material evidence, introduced for the first time during federal habeas proceedings, may therefore require a de novo review of petitioner's claim." *See Winston v. Pearson*, 683 F.3d 489, 496 (4th Cir. 2012) (internal quotes and citations omitted). It is therefore appropriate for this Court to consider Dr. Downs' report.

C. The Documents Support the Repressed Memories and Suicide Theory Presented in State Court.

This Court has held that federal courts may "consider new evidence if it supports factual allegations for which there is already at least some support in the state

record." *See Winston v. Kelley,* 592 F.3d 535, 550 (4th Cir. 2010). As noted in Part II.A. *supra*, the repressed memories and suicide theory were presented in state court.

The proposed attached documents support factual allegations and substantive arguments already before the state court. The report from Dr. McDaniel addresses whether Movant has dissociative amnesia, the specific question presented by this Court. *See* ECF #24, App. A-B. The report indicates that it is "very possible" Movant was suffering from dissociative amnesia following Victim's death. *Id*. App.B at *48-49. Movant asserts from his repressed memories that Victim committed suicide and the report from the forensic handwriting professional identifies a "highly probability" that Victim wrote a letter expressing interest in and thoughts of suicide. *Id*. App. D at *2. The report from Dr. Downs confirms that "suicide cannot be excluded" as Victim's manner of death. *Id.* App. G at *5. Each of these documents support the repressed memories and theory of suicide that Movant has directly put before state court.[1] Indeed, the documents are essential to Movant's ability to prove

[1] Respondent generally complains that the documents contain hearsay and are untested. *See*, *e.g.*, ECF #28 at 3 n.1. But at this stage the Court must consider "the evidence as a whole . . . unbounded by the rules of admissibility that would govern at trial—based on all the evidence, including that alleged to have been illegally admitted and that tenably claimed to have been wrongly excluded or to have become available only after the trial." *United States v. MacDonald*, 641 F.3d 596, 612 (4th Cir. 2011) (internal quotes, citations, and alterations omitted). "Or, to say it another way, the court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under evidentiary rules." *Id*.

that his specific repressed memories qualify as newly discovered evidence for habeas purposes, and to make a prima facie case contesting the conviction. Put differently, without these documents, Movant's will be unable to support his claims of repressed memories and his hands will be tied.

D. The Documents Speak to Movant's Actual Innocence, Overcoming Any Procedural Difficulties.

To the extent that there are any remaining procedural problems, Movant emphasizes that the repressed memories go to his actual innocence and actual innocence is an exception to any potential procedural deficits. *See McQuiggin v. Perkins*, 569 U.S. 383, 392-93 (2013). As the state's case at trial was based almost entirely on Movant's flawed memories, the connection between the recovered memories and actual innocence is particularly heightened in this case.

III. Respondent's Arguments Stem From an Erroneous Understanding of Repressed Memories.

Respondent misunderstands the nature of repressed memories. Respondent suggests that the factual predicate—the repressed memories—were not pursued with adequate due diligence. Indeed, Respondent emphasizes that "*twenty years* transpired since his state court conviction." ECF #28 at 4 (emphasis in original). But the very nature of dissociative amnesia is such that it may take minutes to years to decades for the relevant memories to arise. *See* Diagnostic & Statistical Manual of Mental Disorders 299 (5th ed. rev. 2013) ("DSM-V-R"); *see also id*. ("Individuals

with dissociative amnesia are frequently unaware (or only partially aware) of their memory problems.").

For Respondent to suggest that dissociative amnesia must be tested for or presented at trial, or else be categorically barred for habeas purposes, is to flout the medical community's understanding of the disorder and to shut the courthouse doors to those who recover memories subsequent to traumatic incidents, such as sexual assaults. *See*, *e.g.*, *Shahzade v. Gregory*, 923 F.Supp. 286, 287 (D. Mass. 1996) (permitting repressed memories of nonconsensual sexual touching over forty-seven years after the filing of the complaint). In short, Movant cannot be faulted for not raising dissociative amnesia at trial or at a time that would be mentally impossible given Movant's individualized circumstances.

Respondent asserts that Movant "did not profess at trial an absence of memory; rather, Petitioner pursued at trial a detailed presentation of a different story." ECF #28 at 6. For an individual to possess dissociative amnesia, the individual may not be unable to recall some and all aspects of a traumatic event; the disorder is not absolute, as Respondent suggests. Instead, dissociative amnesia may be "selective," such that the individual may be unable to recall specific aspects of the event. DSM-V-R at 298. Respondent also lists statements made by Movant at trial to seemingly undercut the existence of dissociative amnesia. *See* ECF #28 at 5. But this testimony, provided by the sole witness of a traumatic event, cannot negate the

existence of dissociative amnesia, as "even under normal conditions, memory distortions, memory failures, and even false memories are routine psychological phenomena." Jelena Radulovic, et al., "State-Dependent Memory: Neurobiological Advances and Prospects for Translation to Dissociative Amnesia," Front. Behav. Neurosci. (Oct. 31, 2018).

Respondent also finds it puzzling that Movant's repressed memories—recovered after trial—would lead him to a version of events different than those presented at the trial itself. *See* ECF #28 at 3 (stating that the documents are "reflective of a new theory for the defense *contrary to that presented by this Petitioner acting as his own counsel at trial*.") (emphasis in original); *id*. at 8 ("Petitioner is attempting to *change* his story") (emphasis in original). Again, the very nature of repressed memories is that new memories give the individual a new understanding as to what occurred prior; Movant's story changed no more than a victim of sexual assault's story "changed" once recalled memories revealed the sexual assault. *Cf*. *Shahzade*, 923 F.Supp. at 287. [2]

[2] Respondent discusses the three primary grounds for relief pressed by Mr. Stewart in his motion for pre-filing authorization. *See* ECF #28 at 6-7. Counsel has been appointed not to argue these grounds, but to focus only on whether repressed memories permit Mr. Stewart to file a second or successive habeas petition. ECF #12. As the three grounds are beyond the scope of Counsel's appointment, Counsel respectfully declines to address these arguments.

IV. The Documents Are Pertinent to Movant Meeting Requirements of 28 U.S.C. § 2244(b)(3).

The question before this Court presents the novel issue of whether repressed memories qualify as newly discovered evidence for purposes of obtaining authorization to file a second or successive habeas petition. The proposed attachments are critical to Movant's ability to make a prima facie showing under 28 U.S.C. § 2244(b)(3) not only because they substantively support Movant's repressed memories and theory of suicide, *see supra* Part II, but also because they identify additional information that would be material to answering the question presented, and thus whether a fuller examination of the claims is warranted. *See In re Williams*, 330 F.3d 277, 281 (4th Cir. 2003) ("By prima facie showing we understand . . . simply a sufficient showing of possible merit to warrant a fuller exploration by the district court.") (internal quotes and citation omitted); *see also Long v. Hooks*, 972 F.3d 442, 470 (4th Cir. 2020) (remanding the actual innocence question to the district court in the first instance and permitting "Petitioner, at his request, . . . the opportunity to conduct further discovery before the district court makes its final determination on the actual innocence question.").

For example, Dr. Downs indicated in his report that he would be able to reach more definitive conclusions if he was granted access to the autopsy files housed at the Medical University of South Carolina. ECF #24, App. G at *7, 9. Furthermore,

Dr. McDaniel emphasized that a definitive diagnosis of dissociative amnesia was not possible and would require further testing.[3] *Id*. at App. B at *49-50. These documents call for this Court to remand the case to the district court for such an evaluation to be performed and thus for any finding of guilt or innocence to be predicated on complete, accurate information.

CONCLUSION

Movant respectfully urges this Court to grant his motion to include the attachments in his opening brief.

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By: /s/ Dawinder S. Sidhu
Counsel for Movant

July 7, 2022

[3] Respondent challenges the reliability of the report from the psychologist based on the psychologist noting that certain measures were not taken regarding Movant's self- reporting. ECF #28 at 3. However, the psychologist further noted: "Any potential diagnoses or clinical opinions rendered within this report are not based on results of measures alone, without the demonstrated congruence with reliable ancillary sources of evidence. i.e., provided documentation, or eye witness accounts". ECF. #24 App. B at 3. In any case, any such challenge should go to the weight, not admissibility, of the report.

FILED: July 13, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-278

In re: WELDON W. STEWART, JR.

Movant

O R D E R

Upon consideration of submissions relative to the motion for leave to file attachments to the opening brief, the court grants the motion and accepts the attachments as filed. The government is free to argue in its briefing that the attachments should not be considered and/or do not satisfy Weldon's burden.

Judge Diaz and Judge Heytens voted to grant the motion. Judge Agee voted to deny the motion.

For the Court

/s/ Patricia S. Connor, Clerk

NO. 21-278

In The

United States Court Of Appeals
For The Fourth Circuit

In re: WELDON W. STEWART, JR.,

Movant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AT ANDERSON**

MOVANT'S OPENING BRIEF IN SUPPORT OF MOTION FOR AUTHORIZATION PURSUANT TO 28 U.S.C. § 2244

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-278 Caption: In re: Weldon W. Stewart, Jr.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Weldon W. Stewart, Jr.
(name of party/amicus)

who is Movant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Dawinder S. Sidhu Date: 7/25/2022

Counsel for: Movant

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No. 21-278

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re

Weldon Stewart, Jr.,

Movant.

MOVANT'S OPENING BRIEF
IN SUPPORT OF MOTION FOR AUTHORIZATION
PURSUANT TO 28 U.S.C. § 2244

INTRODUCTION

The medical community and other courts have long understood that memories of traumatic events, such as combat, sexual assault, or the death of a loved one, may be repressed and subsequently regained. Movant Weldon Stewart, Jr., respectfully asks this Court to recognize the legal implications of this medical reality: where memories were previously inaccessible and are recovered thereafter, these memories may qualify as newly discovered evidence warranting authorization to file a second or successive petition for a writ of habeas corpus under 28 U.S.C. § 2244. Mr. Stewart's recovered memories are that the victim died by suicide. Whether the

memories were genuinely repressed and recovered would require a comprehensive, fact-intensive inquiry. As explained below, the particular circumstances of Mr. Stewart's repressed memories—among them, a forensic psychologist's assessment that it is "very possible" that Mr. Stewart was suffering from dissociative amnesia following the victim's death—distinguish Mr. Stewart's allegations from mere opportunistic or feigned claims of repressed memories, help constitute a prima facie showing for purposes of Section 2244, point to his actual innocence, and merit further factual development at the district court level. Accordingly, this Court should grant the motion and remand the case for such fuller development to occur and for additional exculpatory information to be considered.

STATEMENT OF JURISDICTION

Mr. Stewart seeks leave to file a second or successive habeas petition under 28 U.S.C. § 2244. This Court has jurisdiction to rule on his motion under 28 U.S.C. § 2244(b)(3)(A).

STATEMENT OF THE ISSUE

Whether Mr. Stewart's allegations of recovered memory qualify as newly discovered evidence warranting authorization to file a second or successive habeas petition?

STATEMENT OF THE CASE

A. Mr. Stewart Is Prosecuted and Challenges Jury Instruction on Appeal.

Following [redacted] Allen's December 6, 2000, death, Mr. Stewart was indicted for violating South Carolina law in two respects. First, he was charged with the desecration of Ms. Allen's remains. J.A. 834-35. Mr. Stewart pled guilty to this offense. J.A. 457. Second, Mr. Stewart was charged with the murder of the victim. J.A. 836-37. He proceeded to trial pro se. J.A. 37. The only eyewitness to the death, J.A. at 191, Mr. Stewart claimed that the death was accidental, J.A. at 227. The State's case lacked a murder weapon and largely relied on Mr. Stewart's statements and writings. J.A. at 789 ("The whole case comes down to [his] credibility.").

In 2003, Movant was convicted by a jury of a lesser-included offense of voluntary manslaughter. J.A. 824. At sentencing, the trial court imposed a maximum sentence of thirty-years' imprisonment for voluntary manslaughter and nine-years' imprisonment for the desecration charge, to be served consecutively. J.A. 827-32.

On appeal, Mr. Stewart, through counsel, challenged the trial court's refusal to instruct the jury on involuntary manslaughter. J.A. 838. Counsel also asked the court to be relieved pursuant to *Anders v. California*, 386 U.S. 738 (1967). J.A. 845. Mr. Stewart did not file a pro se brief. The South Carolina Court of Appeals dismissed the appeal in 2005. J.A. 848.

B. Mr. Stewart Seeks Post-Conviction Relief, Asserting Ineffectiveness of Appellate Counsel.

In 2006, Mr. Stewart sought post-conviction relief before the South Carolina Court of Common Pleas, pointing out that his appellate counsel did not contact him prior to filing the *Anders* brief and arguing that his appellate counsel was ineffective for failing to object to four trial court errors; specifically, the trial court (1) instructed the jury on voluntary manslaughter, though there was no evidence of adequate provocation, an element of the offense, (2) admitted two documents into evidence that were not authenticated and that were not relevant, (3) admitted a photograph into evidence that was prejudicial and that was not relevant, and (4) allowed hearsay testimony into evidence. J.A. 850-860. Following an evidentiary hearing, J.A. 868, the court dismissed the request for post-conviction relief, J.A. 896. Mr. Stewart's appellate counsel filed an appeal to the Supreme Court of South Carolina under a state analogue to *Anders*. Mr. Stewart also filed pro se briefs. The court denied the petition for a writ of certiorari in 2009. J.A. 962-63.

C. Mr. Stewart Files His First Habeas Petition, Contesting the Jury Instruction and the Effectiveness of His Appellate Counsel.

That same year, Mr. Stewart filed a pro se petition for writ of habeas corpus in the U.S. District Court for the District of South Carolina. Mr. Stewart asserted that relief was justified because the trial court deprived him of due process by failing to instruct the jury on involuntary manslaughter, and because his appellate counsel

deprived him of effective counsel by failing to object to the four errors outlined above. J.A. 963-64. The Magistrate Judge recommended that summary judgement be granted in favor of the respondent warden, J.A. 980, and the U.S. District Judge adopted this recommendation, J.A. 998. Continuing pro se, Mr. Stewart filed notice of appeal. J.A. 999. In an unpublished per curiam opinion, this Court denied a certificate of appealability and dismissed the appeal. *Stewart v. Bodison*, 412 Fed. Appx. 633 (4th Cir. 2011).

D. Mr. Stewart Seeks New Trial, Formally Raising Juror Misconduct and Pathologist's Qualifications, and Revealing Repressed Memories.

In 2015, back in South Carolina state court, Mr. Stewart sought to argue that a new trial was appropriate because (1) a juror failed to disclose a prior adverse relationship with Mr. Stewart, specifically that he tried to run over Mr. Stewart for dating the juror's then-ex-girlfriend, (2) the forensic pathologist was not sufficiently qualified to testify, and (3) he has since recovered exculpatory memories of events of the night in question. Appointed counsel advised that he was willing to pursue only the first two arguments, J.A. at 1013, and as such the third argument was not filed with the court, J.A. 999 (filed motion containing the first two arguments); J.A. 1009.1 (draft pro se motion pressing the third argument).

The trial court denied the motion from the bench in 2016, and the court requested that the parties prepare written orders, but written orders were not filed.

J.A. 1051-52. Mr. Stewart filed a pro se brief asking the Court to amend its oral opinion. J.A. 1054.

E. Mr. Stewart Seeks Post-Conviction Relief, Raising Repressed Memories and Suicide Theory, and Asserting That New Evidence Entitles Him to A New Trial.

In 2018, Mr. Stewart filed a pro se motion for post-conviction relief. J.A. 1128. Mr. Stewart expressly mentioned his repressed memories. In particular, he disclosed that he "regained access" to memories of the incident and that the victim "died as a result of suicide." *Id*. In 2018, Mr. Stewart, represented by counsel, applied for post-conviction relief. J.A. at 1227. Mr. Stewart argued that the State had failed its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) in two ways: first, the State did not disclose statements from the pathologist that were both exculpatory and that could have been used to impeach the testimony of the pathologist; and second, the State did not turn over investigative notes that were favorable to the defense. Mr. Stewart also contended that the State violated his due process rights by refusing to make available autopsy photographs and records to the defense that would have enabled the defense to independently evaluate, and adequately question the pathologist about, the manner and cause of Victim's death. J.A. at 1227-28. At bottom, Mr. Stewart contended that the information corresponding with these three issues—exculpatory statements, investigative notes, and autopsy files—constituted new evidence establishing his innocence and entitling

him to a new trial. The court dismissed the application, J.A. 1285, and denied the motion for reconsideration, J.A. 1328. The Supreme Court of South Carolina dismissed the subsequent appeal. J.A. 1366.

F. Mr. Stewart Files the Instant Second Habeas Petition, Asserting New Evidence, Including Recovered Memories.

In 2021, Mr. Stewart, appearing pro se, moved this Court for authorization to file a second or successive petition for a writ of habeas corpus. ECF #2. In his petition, Mr. Stewart formally argues that the aforementioned three categories of information—exculpatory statements, investigative notes, and autopsy files—are new evidence that proves his innocence such that a new trial should be ordered. *Id*. at 6. In the course of his argument, Mr. Stewart again discloses that he has regained memories of the victim's death, specifically that the victim committed suicide. *Id*. at 27.

This Court thereafter requested briefing on the question of whether recovered memories qualify as newly discovered evidence for purposes of obtaining authority to file a second or successive habeas petition.[1] ECF #12.

[1] Mr. Stewart did not list the recovery of his memories as an enumerated basis for relief, and instead styled the recovered memories issue as a "factor" supporting his innocence and justifying a new trial. The Court's consideration of this substantive issue, irrespective of whether it was framed as a specific basis for relief, pays tribute to the Court's independent duty to liberally construe a pro se litigant's pleadings. *See Jehovah v. Clarke*, 798 F.3d 169, 176 (4th Cir. 2015); *see also United States v. Elam*, 930 F.3d 406, 409 (5th Cir. 2019) ("It is the substance of the relief sought by a pro se pleading, not the label that the petitioner has attached to it, that determines the true nature and operative effect of a habeas filing.").

SUMMARY OF ARGUMENT

Mr. Stewart has made a prima facie showing sufficient to satisfy the requirements of 28 U.S.C. § 2244 and that showing establishes his actual innocence. First, the factual predicate, the repressed memories, constitutes "newly discovered evidence" for pre-filing authorization purposes. Mr. Stewart did not have access to the repressed memories at trial or when the first habeas petition was filed, and only regained such access in 2014. J.A. 1009.1. Mr. Stewart's particular circumstances are consistent with the diagnostic criteria for dissociative amnesia—a cognizable mental disorder in which an individual cannot access some or all memories of a traumatic event—and a forensic psychologist who evaluated Mr. Stewart supports this conclusion.

Second, a reasonable jury would not convict Mr. Stewart in light of his recovered memories. Mr. Stewart's repressed memories reveal that the victim died by suicide—and not due to any actions taken by Mr. Stewart. Relevant professional assessments are consistent with Mr. Stewart's repressed memories and the theory that the victim took her own life: (1) according to a forensic psychologist it is "very possible" that Mr. Stewart was suffering from dissociative amnesia following the victim's death, App. B at *48-49, thus casting doubt on Mr. Stewart's post-incident statements and writings, which were the heart of the State's case; (2) according to a forensic handwriting professional there is a "high probability" that the victim wrote

a letter expressing interest in and thoughts of suicide, App. D at *2; and (3) according to a forensic pathologist "suicide cannot be excluded" as the victim's manner of death, App. G at *5. The timing of the suicide also coincides with the one-year anniversary of an abortion that the victim underwent and which left her severely traumatized. J.A. 237. In short, the State's theory is wiped away because it largely stems from Mr. Stewart's pre-recovered, faulty memories of what occurred; at the same time, the alternate suicide theory has support in the form of Mr. Stewart's regained memories, a suicide note attributable to the victim, the forensic pathologist's findings, and the timing of the suicide.

Third, the recovered memories could not have been discovered through the exercise of due diligence. Mr. Stewart only began to regain memories in 2014, he sought to raise these memories in a 2015 pro se motion that substitute appointed counsel did not want to pursue. J.A. 1013. Mr. Stewart reasserted his recovered memory claim in a 2018 pro se motion. J.A. 1130-31.

Fourth, it would be constitutional error for the conviction to stand in light of the newly discovered evidence. At trial, it is very possible that Mr. Stewart suffered from an established mental disorder that precluded him from adequately participating in his trial, conferring with standby counsel, and presenting credible evidence on his behalf. Due process requires that a criminal defendant possess the memories and capacity to meaningfully understand the facts of the case and develop

his defense. Mr. Stewart lacked that ability in being unable to access critical memories about the incident. That Mr. Stewart was tried and convicted, while likely suffering from a mental disorder that impeded his ability to mount an effective defense, violates due process.

Movant respectfully asks this Court to grant pre-filing authorization and remand this case to the district court for a more definitive assessment of Mr. Stewart to be conducted and for all relevant exculpatory information to be considered.

ARGUMENT

I. Standard of Review.

Congress allows a prisoner in state custody to apply for leave to file a second or successive motion if the motion presents a factual predicate that "could not have been discovered previously through the exercise of due diligence" and that, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B). Movant is not required to "definitively" show that he will prevail. *In re Thomas*, 988 F.3d 783, 788 (4th Cir. 2021) (emphasis omitted); *see also In re Stevens*, 956 F.3d 229, 233 (4th Cir. 2020) ("[the movant] need not convince us that he will ultimately satisfy [Section 2244(b)(2)(B).]"). At this stage, Movant need only make a prima facie showing. *Id*. at § 2244(b)(3)(C).

"By prima facie showing we understand . . . simply a sufficient showing of possible merit to warrant a fuller exploration by the district court." *In re Williams*, 330 F.3d 277, 281 (4th Cir. 2003) (quoting *Bennett v. United States*, 119 F.3d 468, 469-70 (7th Cir. 1997) (internal quotes omitted)); *see also In re Williams*, 364 F.3d 235, 238 (4th Cir. 2004) (emphasizing that the Court's role is limited to making an "initial determination of whether a claim satisfies" Section 2244). This Court has described the prima facie standard as setting a "relatively low bar." *In re Hubbard*, 825 F.3d 225 (4th Cir. 2016); *see also In re Lott*, 366 F.3d 431, 433 (7th Cir. 2004) (characterizing the prima facie standard as "lenient"). As described below, Mr. Stewart satisfies this standard.

II. Dissociative Amnesia is a Bona Fide Mental Disorder Exhibited by Mr. Stewart.

A. Dissociative Amnesia Has Been Long Recognized by the Medical Community.

For years, the medical community and courts have recognized that individuals may have repressed memories of a traumatic event that are later recovered or regained. This condition has been studied since at least the 1890's, *see Moriarty v. Garden Sanctuary Church of God*, 511 S.E.2d 699, 702-703 (S.C. 1999), and in 1980 was codified in the Diagnostic & Statistical Manual of Mental Disorders ("DSM"), American Psychiatric Association, Diagnostic & Statistical Manual of Mental Disorders 253-55 (3d ed. 1980). The current DSM terms this disorder

"dissociative amnesia," and defines it as "[a]n inability to recall important autobiographical information, usually of a traumatic or stressful nature, that is inconsistent with ordinary forgetting." American Psychiatric Association, Diagnostic & Statistical Manual of Mental Disorders 298 (5th ed. rev. 2013) ("DSM-V-R").[2] Repressed memories may be reflected in brain processes. In general, the hippocampus and the amygdala work in tandem to encode memory; the hippocampus may better encode especially arousing information through the aid of an active amygdala and other aspects of brain chemistry, such as adrenaline; but when the amygdala is overstressed, such as due to a traumatic event, stress hormones may inhibit the storage of memory in the hippocampus and these memories may be incomplete or inaccessible. *See* Nikolai Axmacher, et al., *Natural Memory Beyond the Storage Model: Repression, Trauma, and the Construction of a Personal Past*, 4 Front. Hum. Neurosc. 211:1 (Nov. 22, 2010); Department of Justice of Canada, The Impact of Trauma on Adult Sexual Assault Victims (last modified Mar. 26, 2019), available: [redacted]

[2] As to terminology, in 1980, the disorder was called "psychogenic amnesia" and was renamed "dissociative amnesia" thereafter; the diagnostic criteria remained essentially the same. *See Clark v. Edison*, 881 F. Supp. 2d 192, 206 (D. Mass. 2012). "Dissociative amnesia" generally captures "repression," or unconscious forgetting, and may be contrasted with "suppression," or intentional forgetting. *See id*. at 202; *Anonymous v. Vella*, No. 8:04CV269, 2006 WL 1401680, at *5 (D. Nev. May 15, 2006).

That the DSM has recognized this condition is significant. The DSM reflects, represents, and memorializes the medical community's understanding of mental disorders. *See* American Psychiatric Association, Diagnostic & Statistical Manual of Mental Disorders xxxvii (5th ed. rev. 2013) (explaining that the DSM's criteria and classifications "reflect a consensus of current formulations of evolving knowledge in our field."); *see also Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017) ("current manuals offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians[.]'") (quoting DSM-5, at xli); *Acevedo Granados v. Garland*, 992 F.3d 755, 760 n.1 (9th Cir. 2021) ("The latest version, DSM-5 . . . reflects the latest medical understandings of mental disorders."). As such, this Court has observed that "[t]he DSM is widely recognized as 'the authoritative reference used in diagnosing mental disorders.'" *United States v. Wooden*, 693 F.3d 440, 452 n.4 (4th Cir. 2012) (quoting *Young v. Murphy*, 615 F.3d 59, 61 n.1 (1st Cir. 2010)); *accord Rasho v. Elyea*, 856 F.3d 469, 472 n.2 (7th Cir. 2017).

B. Dissociative Amnesia Has Been Long Recognized by the Courts.

Due to its authoritative nature, courts have turned to the DSM for guidance in resolving legal issues implicating medical conditions. *See Moore*, 137 S. Ct. at 1053 (citing examples); *see also McGee v. Bartow*, 593 F.3d 556, 575 (7th Cir. 2010) ("the DSM is a highly influential and useful tool."); *United States v. Long*, 562 F.3d

325, 334 n.22 (5th Cir. 2009) (taking judicial notice of the DSM's diagnostic criteria in light of the DSM's "authoritative nature").

Importantly, courts specifically have recognized "dissociative amnesia" in assessing whether testimony on the disorder may be introduced in cases involving traumatic events. *See*, *e.g.*, *Templeton v. Bishop of Charleston*, No. 2:18-cv-02003-DCN, 2021 WL 3419442, at *4 (D.S.C. Aug. 5, 2021) (admitting testimony on dissociative amnesia where expert "presented sufficient evidence that (1) the theory of repressed memory has been the subject of various studies which support its validity; (2) the theory has been subjected to peer review and publication; and (3) the theory has attained general acceptance within the relevant scientific community, namely, that of clinical psychiatrists."); *Doe v. Freeburg Cmty. Consol. Sch. Dist. No. 70*, No. 10-cv-458-JPG, 2012 WL 3996826, at *3 (S.D. Ill. Sept. 12, 2012) ("research methods generally applied in those fields of study . . . . have produced sufficient empirical evidence to include dissociative amnesia as a diagnosis in the DSM–IV–TR (and prior editions of the DSM)" and that inclusion "is strong evidence that the theory has been generally accepted within the relevant scientific community[.]"); *Shahzade v. Gregory*, 923 F. Supp. 286, 290 (D. Mass. 1996) (same); *Isely v. Capuchin Province*, 877 F. Supp. 1055, 1065 (E.D. Mich. 1995) (admitting testimony, crediting expert view that "there is a fair degree of acceptance of the concept of repressed memory in the field" and that "the majority of clinicians

accept the concept.").[3] To the extent that the medical community is not uniform in its views about dissociative amnesia or its presentation in specific individuals, *see* *Moriarty*, 534 S.E.2d at 680 (acknowledging the "disagreement among the psychological and medical communities about the validity of repressed memory syndrome"), courts allow those differences of opinion to be fleshed out in the adversarial process through competing testimony and information, instead of categorically excluding such evidence altogether, *see* *Templeton*, 2021 WL 3419442, at *9 ("where legitimate disagreement exists within the scientific community, it is for the jury, not the judge, to determine which of several competing scientific theories has the best provenance.") (internal quotes and citation omitted); *see also Isley*, 877 F. Supp. at 1067. Mr. Stewart submits that this court, too, should join other courts by recognizing dissociative amnesia as a valid disorder and allowing for competing opinions and testimony to be raised and contested in open court. *See generally Shahzade*, 923 F. Supp. at 290 ("For the law to reject a diagnostic category generally accepted by those who practice the art and science of

[3] Outside of the DSM, leading healthcare institutions similarly recognize dissociative amnesia as a cognizable mental disorder. *See, e.g.*, "Dissociative Disorders," Mayo Clinic, Nov. 17, 2017, available at: [redacted] (last accessed: Apr. 22, 2022); Megan Meah Hosein, M.D. & Glenn Treisman, M.D., Ph.D., "Dissociative Amnesia," Johns Hopkins Medicine, May 2, 2017, available at: [redacted]

psychiatry would be folly. Rules of law are not petrified in the past but flow with the current of expanding knowledge."). Otherwise, victims of sexual assault, for example, may be wholly denied the opportunity to raise regained memories and activate their constitutional and statutory rights and remedies.

C. Mr. Stewart Exhibits Dissociative Amnesia.

In the instant motion, Mr. Stewart reveals that he has been unable to access relevant memories, noting that, "For many years, [he] didn't remember how [the] Victim died." ECF #2 at *22. Mr. Stewart's assertion is consistent with diagnostic indicators of dissociative amnesia. First, dissociative amnesia generally follows a traumatic or stressful event. *See* DSM-V at 298. With respect to the underlying event, Dr. David Spiegel of Stanford University School of Medicine explains that dissociative amnesia may occur when the individual has "experienced or witnessed traumatic events, such as physical or sexual abuse, rape, wars, genocide, accidents, natural disasters, or *death of a loved one*." Dr. David Spiegel, M.D., "Dissociative Amnesia," Merck Manual, Mar. 2021, available at: https://www.merckmanuals.com/home/mental-health-disorders/dissociative-disorders/dissociative-amnesia (emphasis added). The traumatic event here—Mr. Stewart witnessing the suicide of his girlfriend, her dying in his arms, and his attempts to resuscitate her, ECF #2 at *22—falls within one of these established categories. Second, that Mr. Stewart could not recall the particulars of the event for "years" also

is consistent with dissociative amnesia. According to the DSM, onset of dissociative amnesia may be sudden or delayed, and its duration "can range from minutes to decades." DSM-V-R. at 299.

Third, the DSM reports that it is "common" for individuals with dissociative amnesia to themselves have a history of "trauma, child abuse, and victimization[.]" DSM-V-R at 299. Mr. Stewart has such a history. He was "almost drowned by neighborhood bullies." ECF #2 at *22; *see also* J.A. 615. Fourth, and relatedly, the greater the "adverse childhood experiences" and "interpersonal violence," the more common the occurrence of dissociative amnesia. DSM-V-R at 300. In addition to the bullying and near drowning, Mr. Stewart testified that he experienced behavioral problems in grade school and was jumped by ten to fifteen boys. J.A. at 910. Moreover, Mr. Stewart admitted that his then-girlfriend induced a miscarriage by drinking caster oil, had the "baby out on the floor and took pictures of it and sent it to me." J.A. at 616. This "really bothered" Mr. Stewart and his disciplinary problems began thereafter. *Id.* Fifth, dissociative amnesia is associated with suicidal behaviors. DSM-V-R at 300. Mr. Stewart was on suicide watch for approximately two months following Ms. Allen's death, J.A. at 581, 609, and jailhouse staff observed Mr. Stewart cutting his wrist in an apparent suicide attempt, App. A. at *27.

A preliminary assessment of Mr. Stewart by Dr. Andrea McDaniel, a clinical, forensic, and neuropsychological assessment psychologist, supports Mr. Stewart's

claim of dissociative amnesia. From this assessment, Dr. McDaniel concluded that it is "very possible" Mr. Stewart was suffering from dissociative amnesia following the victim's death. *Id*. at *48-49. This conclusion is based on multiple sources, including (1) interviews with Mr. Stewart; (2) a history of "dissociative amnesia" following a traumatic childhood incident in which Mr. Stewart was nearly drowned by boys from his neighborhood, after which Mr. Stewart behaved "as if it never happened" and as though he "did not seem to remember it." *Id*. at *47; (3) another historic incident in which Mr. Stewart discovered a partial fetus in a garbage can while working at Burger King, leading to Mr. Stewart appearing to be "in a trance" similar to the drowning incident. *Id*. at *13; (4) accounts of Mr. Stewart's behavior following the victim's death, consistent with the criteria for "traumatic shock" and "dissociation"—indeed, Mr. Stewart's mother reported that Mr. Stewart appeared to be "distant, like things were happening to him" and was "not talking much, like he just wasn't there," *id*. at *13, and initial responding officers reported at the scene that Mr. Stewart was having difficulty communicating with them and appeared to be "in a daze" and in a "confused state," *id.* at *25-26, 28-29, 42-43, 46-47; *see also* J.A. 465, 470-71; and (5) while in custody, Mr. Stewart cut his wrist in an apparent suicide attempt, App. A at *27. Additionally, Dr. McDaniel notes that Mr. Stewart meets the criteria for PTSD, and possibly meets the criteria for complex PTSD. *Id*. at *44-46.

Importantly, Dr. McDaniel emphasized that a definitive diagnosis of dissociative amnesia was not possible and would require further testing. *Id*. at *49-50. This professional opinion calls for this Court to remand the case to the district court for such an evaluation to be performed, for that evaluation to be tested through the adversarial process, and thus for any finding of guilt or innocence to be predicated on full information.

D. The Recovered Memories Constitute Newly Discovered Evidence Under Section 2244.

Section 2244 requires that the newly discovered evidence—the repressed memories—"could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i). This Court has clarified that the word "previously" refers to Mr. Stewart's last federal proceeding. *See In re Williams,* 364 at 239. Mr. Stewart's first habeas proceeding culminated in 2011. *Stewart*, 412 Fed. Appx. 633. It is undisputed that Mr. Stewart only gained access to the relevant memories in 2014. J.A. 1009.1. Mr. Stewart submits that the recovered memory is necessarily newly discovered evidence, as he could not have discovered this factual predicate at his last federal proceeding due to the memories being repressed.

III. No Reasonable Factfinder Would Convict Mr. Stewart and the Evidence Establishes His Actual Innocence.

The new evidence would "establish by clear and convincing evidence that . . . no reasonable factfinder would have found the applicant guilty of the underlying

offense." 28 U.S.C. § 2244(b)(2)(B)(ii). In making such a determination, the Court must consider "the evidence as a whole . . . unbounded by the rules of admissibility that would govern at trial—based on all the evidence, including that alleged to have been illegally admitted and that tenably claimed to have been wrongly excluded or to have become available only after the trial." *United States v. MacDonald*, 641 F.3d 596, 612 (4th Cir. 2011) (internal quotes, citations, and brackets omitted) "Or, to say it another way, the court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under evidentiary rules." *Id*. internal quotes, citations, and alterations omitted).

A. The Repressed Memories Establish an Alternative Version of Events that Undermines the State's Theory.

Here, Mr. Stewart's recalled memories would provide reasonable doubt as to the State's theory that Mr. Stewart is responsible for the victim's death. First, Mr. Stewart regained memories are that the victim died by suicide. J.A. 999. He made the same assertion in a pro se motion for a new trial. J.A. 1009.1. Dr. McDaniels' report, as noted above, suggests at least preliminarily that it is very possible that the newer access to these memories is the result of a response to a traumatic event and to a mental disorder, and not a mere effort to change his story.

Second, Mr. Stewart's version of the events in question is consistent with a suicide note attributable to the victim. In the letter, the author shares that:

> I feel like I want to kill myself, but why should I and you wouldn't even care if I did. I can't cope with the pain anymore. If I'm at the point [of] thinkin[g] about killing myself, it is not good…. This pain hurts too much…. [T]his pain is nothing I can handle anymore.

App. D at *23-25; *see also* J.A. 1143, 1204-1209.

A highly experienced and certified forensic document examiner, James A. Green, reviewed this letter and concluded that there is a "high probability" both that the victim wrote the letter and that the letter is genuine. App. D at *2.

Third, as to timing, the suicide coincides with the anniversary of an abortion that the victim received and that left her severely traumatized. J.A. 237, 915-16. Indeed, the victim's last words were "I'm happy now because I'm with my baby." J.A. 670. Fourth, DNA evidence supports Mr. Stewart's claim that he was attempting to resuscitate the victim at the time of her death. ECF #2 at *31-32, *see also* J.A. 293-98, 938-40.

Fifth, an autopsy review conducted by a highly trained forensic pathologist, Dr. J.C. Upshaw Downs, concluded that suicide cannot be ruled out as a possible manner of the victim's death. App. F at *4. At the same time, Dr. Downs also identified several flaws in the State's theory that Movant is responsible for the death and in the original autopsy that was a part of the State's case, including that (1) there was no documented evidence of brain injury, as would be expected in a death involving an open head wound resulting in death, *id*. at *6; (2) there was no documented evidence of the changes that would normally occur to the brain surface

in the event of an open head wound, *id*. at *7; (3) there is no indication that the original pathologist reviewed or evaluated the scene, which is standard forensic practice in all death investigations involving a possible crime, *id*. at *8; (4) there was a lack of significant blood on the scene, even though "copious amounts of blood" would be expected on the scene of an allegedly violent struggle involving an open head wound, *id*. at *7-8; and (5) the autopsy found no external injury, no damage to the neck structures, no aspirated blood, and no swallowed blood, *id*. at *8.

Mr. Stewart's recollections of a suicide also align with the observations made at the scene of the victim's death by the State's forensic crime scene investigator, Agent Al Stuckey, as documented in the agent's crime scene notes. J.A. 1219-23. The agent noted that there were no "signs of a struggle" observed at the scene. *Id.* at 1222. Dr. Downs' findings and the agent's observations cast doubt on the State's theory that the victim's death resulted from a violent struggle involving an open head wound.

As with Dr. McDaniels' report, Dr. Downs' findings are preliminary, *id*. at *1, and he indicated that he would be able to reach more definitive conclusions if he was granted access to the autopsy files housed at the Medical University of South Carolina, *id*. at *7, *9. As with Dr. McDaniels' report, Dr. Downs' statements support Movant's argument that further factual development is warranted.

Neither Mr. Stewart's recovered recollections nor Dr. McDaniels' report nor Mr. Green's report nor Mr. Downs' report were presented at trial. This information could establish an alternative version of the incident and could have created reasonable doubt as to whether Mr. Stewart was responsible for the death.

Indeed, the bulk of evidence relied upon by the State to convict Mr. Stewart consisted of his own statements and writings. Those statements and writings may be called into question because they were predicated on a flawed and incomplete understanding of the incident. Mr. Stewart would not have made the same statements or writings if he had access to his regained memories. Without those inherently compromised statements or writings, the State's case would not be viable, and Mr. Stewart would not have been convicted. J.A. 789 (admitting, in the prosecutor's own words, that "the whole case comes down to [Mr. Stewart's] credibility").

The Court may be concerned about potentially opening the door for abuse of the writ through false claims of repressed memories. Here, however, Mr. Stewart's claims are supported by independent corroborating evidence both with respect to him experiencing dissociative amnesia and to the corresponding recovered memory of death by suicide. Such external information helps distinguish between bona fide and opportunistic or false assertions of repressed memories. *Cf. Templeton v. Bishop of Charleston*, No. 2:18-cv-02003-DCN, 2021 WL 4129223, at *9 (D.S.C. Sept. 9, 2021) ("The corroborating evidence requirement is intended to balance a plaintiff's

interest in pursuing a valid claim and a defendant's interest in defending a stale or false claim.").

B. The Repressed Memories Establish Movant's Actual Innocence.

It bears emphasis that the new evidence and related reports support Movant's actual innocence. A claim of actual innocence requires the Movant to prove "that *it is more likely than not* that the totality of the evidence would prevent any reasonable juror from finding him guilty beyond a reasonable doubt." *Finch v. McKoy*, 914 F.3d 292, 299 (4th Cir. 2019) (emphasis added; internal quotes and citation omitted). This showing entails "a holistic judgment about all the evidence and its likely effect on reasonable jurors applying the reasonable-doubt standard." *House v. Bell*, 547 U.S. 518, 539 (2006) (internal quotes and citations omitted). The Court must "make a probabilistic determination about what reasonable, properly instructed jurors would do. The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors." *Id.* at 538 (internal quotes and citations omitted). In *Finch*, this Court found that the movant established actual innocence where there was no physical evidence implicating the movant, and the new evidence both cut against the State's theory at trial and weakened the eyewitness testimony. 914 F.3d at 299-300. Here, there is no direct physical evidence, such as what was used to allegedly inflict the blunt force trauma on the victim, the new evidence identifies a completely

different theory of what occurred, and the words and writings of the only eyewitness (Mr. Stewart) used at trial are undermined by Mr. Stewart's uncovered memories. The totality of the evidence, as in *Finch*, would establish that "it is more likely than not" that a reasonable juror would not find him guilty beyond a reasonable doubt. *See id*. at 301 (internal quotes and citation omitted).

To the extent that the Court is unable to conclude that a prima facie case of actual innocence has been established, Movant respectfully requests this Court to remand the case to the district court. Doing so would allow the district court to consider the newly discovered evidence and conduct further discovery, including information that professionals have expressly stated would be needed to make definitive conclusions. *See Long v. Hooks*, 972 F.3d 442, 470 (4th Cir. 2020) (remanding the actual innocence question to the district court in the first instance and permitting "Petitioner, at his request, . . . the opportunity to conduct further discovery before the district court makes its final determination on the actual innocence question.").

IV. The Newly Discovered Evidence Could Not Have Been Discovered Through the Exercise of Due Diligence.

Section 2244(b)(2)(B)(i) asks whether "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." Here, the newly discovered evidence could not have been discovered with due diligence. In *In re Stevens*, the movant learned of the relevant new evidence in 2016 and sought

authorization to file a second or successive habeas petition in 2019. 956 F.3d at 233; *In re Stevens*, No. 19-305 (4th Cir. Aug. 2, 2019) (ECF #2). This Court held that the movant satisfied the due diligence requirement of Section 2244(b)(2)(B). Similarly here, Mr. Stewart first began revealing repressed memories in 2014, and culminated in his pro se motion for a new trial in 2015. Mr. Stewart filed his motion seeking authorization to file a second or successive habeas petition this year. There is no meaningful difference between the timeline of *In re Stevens* and that which exists here. Indeed, the Court in *In re Stevens* did not specify, and thus Mr. Stewart should not be held against, any timeline.

In addition, in civil cases, courts routinely have tolled the statute of limitations in the context of repressed memories. *See Hoult v. Hoult*, 792 F. Supp. 143, 145 (D. Mass. 1992) (denying summary judgment where plaintiff asserted that she had no memory of sexual abuse until after the otherwise-applicable limitations period); *Nicolette v. Carey*, 751 F. Supp. 695 (W.D. Mich. 1990) (holding daughter's claim against her father was tolled until she filed suit as daughter showed she had repressed memory of alleged sexual abuse); *Moriarty,* 534 S.E.2d at 679 (S.C. 2000) (finding that a "plaintiff may assert the discovery rule . . . in a case involving repressed memories of sexual abuse"). The same logic underlying the tolling of the statute of limitations in these cases—that the repressed memories were not available and thus could not be recovered through the exercise of due diligence—applies to this case as well.

Moreover, the Supreme Court has instructed that, in the context of Section 2244(b), courts should consider whether there is any evidence that the petitioner sought to abuse the writ. *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007). There is nothing to suggest that, in raising repressed memories, Mr. Stewart has sought to abuse the habeas process.

Finally, Movant is asserting his actual innocence. According to the Supreme Court, such claims of actual innocence can overcome procedural deficiencies in the context of habeas petitions, including with respect to second or successive habeas petitions. *See McQuiggin v. Perkins*, 569 U.S. 383, 392-93 (2013). Movant's claim of actual innocence, supported above, provides additional support for surpassing the due diligence requirement.

V. The Exclusion of the Newly Discovered Evidence is a Constitutional Error.

Section 2244 asks whether the Movant has alleged constitutional error. *See In re Williams*, 330 F.3d at 283. Movant asserts a constitutional error. In particular, Mr. Stewart has made a prima facie showing that he suffered from a cognizable disorder of dissociative amnesia. At trial, he was unable to testify to facts that would have exonerated him or advise his standby counsel. *See Hansford v. United States*, 365 F.2d 920, 922 (D.C. Cir. 1966) ("the defendant's memory and intellectual abilities, which are crucial to the construction and presentation of his defense, must not be substantially impaired by mental disorder."); *United States v. Chisolm*, 149

F. 284, 287 (S.D. Ala. 1906) ("[A] person . . . may be put upon trial in a criminal case if he rightly comprehends his own condition with reference to the proceedings, and has possession and control of his mental powers, including the faculty of memory, as will enable him to testify intelligently and give his counsel all the material facts bearing upon the criminal act charged against him and material to repel the criminating evidence[.]"); *id*. ("[T]here may be circumstances lying in his private knowledge which would prove him innocent or his legal irresponsibility, of which he can have no advantage, because they are not known to persons who undertake his defense."). The conviction of Mr. Stewart under such circumstances, specifically where he possessed a disorder that necessarily impaired his abilities to understand what occurred factually, to defend himself, and to confer with standby counsel, qualify as a due process violation. *See Dusky v. United States*, 362 U.S. 402, 403 (1960) (per curiam) ("[the defendant must have] sufficient present ability to *consult* with his lawyer with a reasonable degree of rational understanding – and whether he has rational as well as *factual understanding* of the proceedings against him.") (emphases added). Movant's inability, due to a cognizable mental disorder, to participate at trial and defend himself against the allegations levied by the State constitute constitutional error for purposes of Section 2244.

CONCLUSION

For the foregoing reasons, the motion for authorization to file a second or successive habeas petition should be granted.

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July 25, 2022

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Dated: July 25, 2022

Respectfully submitted,

/s/ Dawinder S. Sidhu

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Counsel for Movant

NO. 21-278

In The

United States Court Of Appeals
For The Fourth Circuit

In re: WELDON W. STEWART, JR.,

Movant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AT ANDERSON**

ATTACHMENTS TO MOVANT'S OPENING BRIEF IN SUPPORT OF MOTION FOR AUTHORIZATION PURSUANT TO 28 U.S.C. § 2244

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LUCID CLINICAL SERVICES

CONFIDENTIAL PSYCHOLOGICAL EVALUATION

Client Name: Weldon Stewart, Jr.

Date of Evaluation: 05/04/2022; 05/09/2022

Client Age: 41 years old

Sex: Male

Date of Birth: [redacted]

Examiner: Andi McDaniel, PhD; Shea Lott, PhD

Location at Time of Evaluation: Incarcerated at Evans Correction Institution, Bennettsville, SC

Purpose for Evaluation:

At the request of his legal representation for 4th district court appeal, Mr. Weldon Stewart, Jr. presented for a psychological evaluation to explore his likelihood of meeting criteria for dissociative amnesia at the time of the death of Ms. [redacted] Allen, on December 6th, 2000, for which he was subsequently convicted of voluntary manslaughter and incarceration (hereafter known as the "key incident"). Dissociative amnesia can not be diagnosed without a mental health professional observing a dissociative episode in real time. Mr. Weldon Stewart Jr. did not demonstrate dissociative symptoms during the current psychological evaluation, and he was not formally assessed for a dissociative disorder at the time of the key incident. As such, the current report will determine if Mr. Stewart Jr.'s profile matches that of those persons who have been observed and diagnosed with dissociative amnesia. This determination will be based on reported history by Mr. Stewart Jr., ancillary sources witnessing his behavior at the time of the crime, review of provided documentation, and the results of self-report measures used for targeted identification of relevant events and symptoms. For the purposes of legal review and general understanding, the first section of this report provides clarifying diagnostic criteria and information that is contextual to this particular case. The subsequent sections represent the evaluative aspects of the completed psychological evaluation (e.g., presenting problem, reported history, mental status exam, results of self-report measures, any potentially rendered diagnostic conclusions or clinical opinions, and treatment recommendations).

Note: *At the time of consultation for evaluative services, legal counsel reported seeking an evaluation to determine if Weldon Stewart Jr. suffered from "repressed and recovered memories." Following probing by the evaluator (Dr. McDaniel), it was determined that legal counsel and client were referring to the potential presence of dissociative amnesia. Dissociative amnesia is often confused with repressed/recovered memories by non-mental health personnel. The current evaluation sought to determine if Mr. Weldon Stewart Jr.'s profile matches that of those persons who have been observed and diagnosed with dissociative amnesia, with reported symptoms occurring at the time of the key incident.*

Conditions and Methods of Evaluation:

This evaluation was referred to Lucid Clinical Services through Mr. Weldon Stewart Jr.'s attorney, Dawinder "Dave" S. Sidhu. Mr. Sidhu met with Dr. Andrea "Andi" McDaniel via Zoom for a free, brief evaluation consultation to determine goodness-of-fit, to discuss evaluation costs and procedures through Lucid Clinical Services, and to advise of Lucid Clinical Services' policies around providing non-biased evaluative reports that will not be redacted or omitted of relevant information for any purpose, or by any request. Consent to proceed with psychological evaluative services of Mr. Weldon Stewart Jr. was obtained by both Mr. Sidhu and Mrs. [redacted] "Lori" Stewart (wife of the examinee, and his POA), for the purposes of determining if his profile is similar to that of persons who have been diagnosed with dissociative amnesia. The case was accepted by Lucid Clinical Services, with participating psychologists including Dr. Andi McDaniel and Dr. Shea Lott. Clinical interviews of Mr. Weldon Stewart Jr., Mrs. Lori Stewart, and Mrs. Virginia Stewart, and use of evidence-based and non-broadband self-report measures on Mr. Weldon Stewart Jr. were conducted by Dr. McDaniel. Due to distance of all parties from examiners, as well as the Mr. Weldon Stewart Jr.'s incarcerated status, all aspects of the examination were completed via Zoom. Generation of report was completed by Dr. McDaniel. Review of gathered information, data, and resulting report was conducted by Dr. Lott, acting as the supervisory and reviewing clinician. Dr. McDaniel and Dr. Lott consulted on findings to seek convergence of professional opinion, based on gathered information and data.

At the time of testing consultation between Mr. Sidhu and Dr. McDaniel, Dr. McDaniel recommended the use of evidence-based, broadband psychological tests that are appropriate to the forensic setting (such as the Minnesota Multiphasic Personality Inventory), in order to provide the clearest picture of Mr. Weldon Stewart Jr.'s mental state, as well as to rule out any attempts to feign or malinger in his self-report. Mr. Sidhu declined the use of such tests for preliminary evaluation purposes, but he indicated that such testing may be requested at a future date. As such, all opinions rendered in this report are conditional upon the accuracy of reports from those interviewed and ancillary documentation provided. Limitations of the evaluation may hinder clarity of diagnosis and/or clinical opinions rendered herein.

Due to the similar behavioral presentation of confabulated memories and those memories that are distorted or suppressed during dissociative amnestic states, the examiner asked interviewees to describe their experiences and/or what they observed in Weldon Stewart Jr. during his childhood leading up to the death of [redacted] Allen and Mr. Stewart Jr.'s conviction and incarceration for voluntary manslaughter. No leading questions were used. No questions that could be divined as pertaining to dissociative states or other mental health behaviors were used, in order to avoid introducing suggestive bias into interviewee responses. Additionally, no interviewees were advised of what was reported by other interviewees during the interview process, in order to avoid intentional or unintentional syncing of reports by separate interviewees. Furthermore, self-report measures were employed with Mr. Weldon Stewart Jr. following his open-ended reporting of details, in order to avoid the measure items influencing his independent report of events and experiences. Due to the non-diagnostic nature of the measures used, their lack of reliability in the



forensic setting, and their absence of malingering scales, these measures were used solely as a targeted assessment of the history of Mr. Weldon Stewart Jr.'s behaviors at present and around the time of reported past traumas (including the death of [redacted] Allen). These measures are developed to screen or assess for the presence, and tracking of, key symptoms in real-time within patient care settings. It is uncommon for them to be applied retrospectively, thus, they are only considered in this case for their structured ability to identify past and current reported symptoms and events that could then be compared with previously obtained, open-ended and independent self-reports on the past of Mr. Weldon Stewart Jr. Any potential diagnoses or clinical opinions rendered within this report are not based on results of measures alone, without the demonstrated congruence with reliable ancillary sources of evidence (i.e., provided documentation, or eye witness accounts).

Diagnostic Information for Purposes of General Clinical Understanding

This section provides clinical clarity on the main target of the current examination (i.e., the potential presence of dissociative amnesia), as well as on the most likely comorbid or differential diagnoses that tend to exist in cases of suspected and/or apparent clinically diagnosable dissociative amnesia. Subsequent sections will pertain to current evaluation specific details.

Clinical Definition of Dissociative Amnesia:
Dissociative amnesia (a.k.a. "traumatic" amnesia) is one condition in a group of mental health conditions called "dissociative disorders." Dissociative disorders involve the breakdown of mental functions that normally operate smoothly, such as memory, consciousness or awareness, and identity and/or perception. Dissociative amnesia is a condition characterized by an inability to recall important autobiographical memories, where recall would be expected and where forgetting would be atypical. The extent of amnesia experienced is variable across individual cases. However, amnesia most commonly effects memories of recent traumatic or stressful events. [1] Forgetting associated with dissociative amnesia may be limited to certain specific areas (thematic), or may include much of the person's life history and/or identity (general). This disorder is rare, with a prevalence of about 1% in males and 2.6% of females in the general population. Most observed and diagnosed cases involve environmental factors, such as personal experiences of war, natural disasters, abuse, accidents, and other trauma experiences related to overwhelming stress. [2]

Dissociative amnesia has been linked through research to traumatic emotional stress, hippocampal injury, glucocosteroid stress hormones, and memory loss. Research has demonstrated the role of prolonged and high levels of stress, fear, and arousal in the induction of learning deficits and memory loss ranging from minimal to profound. Specifically, as stress and arousal levels increase, learning and memory deficits deteriorate due to disturbances in

[1] Dissociative Amnesia & Fugue. [redacted]
[2] Dissociative Amnesia. (2020). [redacted]



hippocampal activation and arousal, along with corticosteroid secretion that suppresses neural activity associated with learning and memory. In particular, the individual is less capable of encoding information and storing it for retrieval in long-term memory. In severe and prolonged trauma cases, such as those beginning in childhood, this process can even result in hippocampal atrophy. [3]

There are multiple types of patterns of dissociative amnesia: Localized, generalized, selective, systematized, continuous, and fugue. Localized dissociative amnesia involves memory loss of specific areas of knowledge or parts of a person's life, such as a specific trauma event. Generalized dissociative amnesia involves memory loss for major parts of a person's life and/or identity, such as recognition of one's own name, job, family, or friends. Selective dissociative amnesia involves the ability to recall some, but not all parts of a circumscribed period time or traumatic event. Systematized dissociative amnesia involves the loss of memory for a specific category of information. Continuous dissociative amnesia involves loss of memory for each new events that occurs. A dissociative fugue involves forgetting most or all personal information about oneself, and is often accompanied by the person adopting a new identity and life entirely (e.g., moving far away, living under a different name without attempt to hide old identity, etc.). Most types of dissociative amnesia are relatively short in duration. Often, memories return suddenly and completely, and may be triggered by environmental cues or participation in psychotherapy. [4,5]

Diagnostic Criteria for Dissociative Amnesia:

Dissociative Amnesia is classified under the Dissociative Disorders section of the Diagnostic Statistical Manual of Mental Disorders, 5th Edition (DSM-5) and was listed in previous editions as "psychogenic amnesia." It was renamed dissociative amnesia in the DSM-IV. According to the diagnostic criteria under the DSM-5, dissociative amnesia is characterized by an apparent disruption of and/or discontinuity in the normal integration of consciousness, memory, identity, emotion, perception, body representation, motor control, and behavior. The defining feature is the inability to recall important autobiographical information, usually of traumatic or stressful nature, that is inconsistent with ordinary forgetting. Symptoms must not be better explained by the direct effects of substance of medication use, severe exhaustion, a sleep-wake disorder, head trauma, or neurological condition (e.g., temporal lobe epilepsy or stroke). The symptoms must also not be better explained by a conversion disorder, which is defined as the presence of blindness, paralysis, or other nervous system/neurological disorder that cannot be explained by medical evaluation. The symptoms must be sufficiently severe to cause significant distress or impairment in personal, family, social, educational, occupational, or other important areas of functioning. Dissociation-specific symptoms may include having an out-of-body experience,

[3] Joseph R. (1999). The neurology of traumatic "dissociative" amnesia: Commentary and Literature Review. Childhood Abuse & Neglect, *8*, 715-27. doi: 10.1016/s0145-2134(99)00048-4.

[4] Dissociative Amnesia & Fugue. http[redacted]

[5] John Hopkins Medicine. (2017). Psychiatric Guide: Dissociative Amnesia.

[redacted]



feeling like you are a different person sometimes, feeling like your heart is pounding or you are light-headed, feeling numb or detached, feeling little or no pain, having an altered sense of time, not remembering how you got somewhere, having tunnel vision, hearing voices in your head, having intense flashbacks that feel real, becoming immobile, and/or getting absorbed in a fantasy world that seems real.

It is notable that dissociative amnesia is often confused with the term "repressed memory"; however, the two differ in literature and diagnostic acceptance. Dissociation occurs when a memory record or set of autobiographical memory records cannot be retrieved; often due to trauma occurring at the time when the memory was being encoding and the process of encoding and long-term memory storage being disrupted. Under such circumstances, the initial disruption of encoding renders future retrieval of memories or information difficult, and in some cases impossible. Repression is believed to occur where the retrieval of a memory/information is possible because encoding occurred sufficiently, but due to the nature of the memory/information, or to the task specification related to recall, the memory/information is not allowed to enter into one's consciousness. [6] Dissociation is also observed to occur suddenly (often due to a sudden traumatic event), while repression is believed to occur gradually over a long period of time. Dissociative amnesia is a widely accepted mental health diagnosis that appears in the DSM-5, while repression is controversial and remains a divided issue in the field with both substantiating and disconfirming evidence. Given the ongoing debate over repression in research literature, individuals are not typically evaluated for repression. Moreover, most individuals presenting with believed repression experiences are actually describing dissociative amnesia symptoms.

Diagnostic Criteria for Commonly Comorbid Diagnoses:

Like many psychological disorders, dissociative amnesia has been found to be comorbid with other disorders. Other mental health disorders most commonly comorbid with dissociative amnesia include posttraumatic stress disorder (PTSD), obsessive-compulsive disorder (OCD), Cluster B personality disorders (antisocial personality disorder, borderline personality disorder, histrionic personality disorder and narcissistic personality disorder), and Cluster C personality disorders (avoidant personality disorder, dependent personality disorder and obsessive-compulsive personality disorder). [7] Cluster B personality disorders are characterized by dramatic, overly emotional or unpredictable thinking or behavior. Cluster C personality disorders are characterized by anxious, fearful thinking or behavior.

[6] Cambridge University Press. (2005). Differentiating dissociation and repression. [redacted]

[7] Medical & Life Sciences News. (2019). What is Dissociative Amnesia? [redacted]

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Diagnostic Criteria for the aforementioned commonly comorbid diagnoses may be found in the DSM-5 Diagnostic Criteria Chart for Comorbid and Differential Diagnoses of Dissociative Amnesia appearing on the following page.

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DSM-5 DIAGNOSTIC CRITERIA CHART FOR COMORBID AND DIFFERENTIAL DIAGNOSES OF DISSOCIATIVE AMNESIA

DSM-5 CLINICAL DIAGNOSIS	DIAGNOSTIC CRITERIA
Posttraumatic Stress Disorder (PTSD) 309.81 (F43.10) Trauma-related Disorder	Criteria A: Stressor (one required) • The person was exposed to: death, threatened death, actual or threatened serious injury, or actual or threatened sexual violence in the following ways: - Direct exposure - Witnessing the trauma - Learning that a relative or close friend was exposed to trauma - Indirect exposure to aversive details of the trauma, usually in the course of professional duties (e.g., first responders, medics, etc.). Criteria B: Intrusion Symptoms (one required) • The traumatic event is persistently re-experienced in the following ways: - Unwanted upsetting memories - Nightmares - Flashbacks - Emotional distress after exposure to traumatic reminders - Physical reactivity after exposure to traumatic reminders Criteria C: Avoidance (one required) • Avoidance of trauma-related stimuli after the trauma, in the following ways: - Trauma-related thoughts and feelings - Trauma-related external reminders Criteria D: Negative Alterations in Mood (two required) • Negative feelings that began or worsened after the trauma, in the following ways: - Inability to recall key features of the trauma - Overly negative thoughts and assumptions about oneself or the world - Exaggerated blame of self or others for causing the trauma - Negative affect - Decreased interest in activities - Feeling isolated - Difficulty experiencing positive affect Criteria E: Alterations in Arousal and Reactivity • Trauma-related arousal and reactivity that began or worsened after the trauma, in the following ways: - Irritability or aggression - Risky or destructive behavior - Hypervigilance - Heightened startle reaction - Difficulty concentrating difficulty sleeping Criteria F: Duration (required) • Symptoms must last more than one month Criteria G: Functional Significance (required) • Symptoms create distress or functional impairment (e.g., social, occupational, etc.). Criteria H: Exclusion (required) • Symptoms are not due to medication, substance use, or other illness.
Obsessive-Compulsive Disorder (OCD) 300.3 (F42) Anxiety-related disorder	A. The presence of obsessions, compulsions, or both. - Obsessions are defined by (1) and (2): (1) Recurrent and persistent thoughts, urges, or impulses that are experienced, at some time during the disturbance, as intrusive and unwanted, and that in most individuals cause marked anxiety or distress.



	(2) The individual attempts to ignore or suppress such thoughts, urges, or images, or to neutralize them with some other thought or action (i.e., by performing a compulsion) - Compulsions are defined by (1) and (2): (1) Repetitive behaviors (e.g., hand washing, ordering, checking) or mental acts (e.g., praying, counting, repeating words silently) that the individual feels driven to perform in response to an obsession or according to rules that must be applied rigidly. (2) The behaviors or mental acts are aimed at preventing or reducing anxiety or distress, or preventing some dreaded event of situation; however, these behaviors or mental acts are not connected in a realistic way with what they are designed to neutralize or prevent, or are clearly excessive. B. The obsessions or compulsions are time consuming (e.g., take more than 1 hour per day) or cause clinically significant distress of impairment in social, occupational, or other important areas of functioning. C. The obsessive-compulsive symptoms are not attributable to the physiological effects of a substance (e.g., a drug of abuse, a medication) or another medical condition. D. The disturbance is not better explained by the symptoms of another medical disorder (e.g., excessive worries, as in generalized anxiety disorder; preoccupation with appearance, as in body dysmorphic disorder; difficulty discarding or parting with possessions, as in hording disorder; hair pulling, as in trichotillomania; skin picking, as in excoriation disorder; stereotypies, as in stereotypic movement disorder; ritualized eating behavior, as in eating disorders; preoccupation with substances or gambling, as in substance-related and addictive disorders; preoccupation with having an illness, as in illness anxiety disorder; sexual urges or fantasies, as in paraphilic disorders; impulses, as in disruptive, impulse-control, and conduct disorders; guilty ruminations, as in major depressive disorder; thought insertion or delusional preoccupations, as in schizophrenia spectrum and other psychotic disorders; or repetitive patterns of behavior, as in autism spectrum disorder).
Antisocial Personality Disorder 301.7 (F60.2) Cluster B personality disorder	<u>Must meet all four main criteria (A, B, C, and D). Criterion A has seven sub-features.</u> A. Disregard for and violation of others' rights since age 15, as indicated by one of the seven sub features: 1. Failure to obey laws and norms by engaging in behavior which results in criminal arrest, or would warrant criminal arrest 2. Lying, deception, and manipulation, for profit or self-amusement, 3. Impulsive behavior 4. Irritability and aggression, manifested as frequently assaults others, or engages in fighting 5. Blatantly disregards safety of self and others, 6. A pattern of irresponsibility and 7. Lack of remorse for actions (American Psychiatric Association, 2013) B. The person is at least age 18. C. Conduct disorder was present by history before age 15. D. The antisocial behavior does not occur in the context of schizophrenia or bipolar disorder.

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Borderline Personality Disorder 301.83 (F60. 3) Cluster B personality disorder	A pervasive pattern of instability in interpersonal relationships, self-image, and emotion, as well as marked impulsivity beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following: • Chronic feelings of emptiness • Emotional instability in reaction to day-to-day events (e.g., intense episodic sadness, irritability, or anxiety usually lasting a few hours and only rarely more than a few days) • Frantic efforts to avoid real or imagined abandonment • Identity disturbance with markedly or persistently unstable self-image or sense of self • Impulsive behavior in at least two areas that are potentially self-damaging (e.g., spending, sex, substance abuse, reckless driving, binge eating) • Inappropriate, intense anger or difficulty controlling anger (e.g., frequent displays of temper, constant anger, recurrent physical fights) • Pattern of unstable and intense interpersonal relationships characterized by extremes between idealization and devaluation (also known as "splitting") • Recurrent suicidal behavior, gestures, or threats, or self-harming behavior • Transient, stress-related paranoid ideation or severe dissociative symptoms
Histrionic Personality Disorder 301.50 (F60.4) Cluster B personality disorder	A pervasive pattern of attention-seeking, often dramatic behavior to gain the approval of others. This behavior may be flirtatious, emotional, seductive or otherwise in order to capture the attention of onlookers. At least five of the following traits needed to be recorded for a diagnosis to be indicated: • A compulsion to be the center of attention that results in discomfort if unmet • Inappropriate sexual, seductive or provocative behavior when interacting with others • Shallow, rapidly shifting emotions • The use of physical appearance to draw others' attention • Dramatic, impressionistic speech that lacks detail • Exaggerated, theatrical emotional expression • Easily influenced by others or situations • Assumes relationships are more intimate than they are
Narcissistic Personality Disorder 301.81 (F60.81) Cluster B personality disorder	A persistent manner of grandiosity, a continuous desire for admiration, along with a lack of empathy. It starts by early adulthood and occurs in a range of situations, as signified by the existence of any 5 of the next 9 standards: • A grandiose logic of self-importance • A fixation with fantasies of infinite success, control, brilliance, beauty, or idyllic love • A credence that he or she is extraordinary and exceptional and can only be understood by, or should connect with, other extraordinary or important people or institutions • A desire for unwarranted admiration • A sense of entitlement • Interpersonally oppressive behavior • No form of empathy • Resentment of others or a conviction that others are resentful of him or her • A display of egotistical and conceited behaviors or attitudes



Avoidant Personality Disorder 301.82 (F60.6) Cluster C personality disorder	Person suffers from deep feelings of inadequacy and sensitivity to rejection that they tend to choose isolation rather than risk the pain of being negatively evaluated. The person must exhibit at least four to meet the diagnostic threshold. The criteria are: • Avoids occupational activities involving significant interpersonal contact, due to fears of criticism, disapproval, or rejection • Is unwilling to get involved with people unless certain of acceptance • Shows restraint within intimate relationships due to fears of shame or ridicule • Preoccupied with fears of receiving criticism or rejection in social situations • Inhibited in new interpersonal situations due to feelings of inadequacy • Considers self as inferior to others, socially inept, or personally unappealing • Is unusually reluctant to take personal risks or to engage in any new activities because they may prove embarrassing
Dependent Personality Disorder 301.6 (F60. 7) Cluster C personality disorder	Under DSM-5, there is one criteria with eight features for Dependent Personality Disorder: A. An excessive and pervasive need to be taken care of, submissive, clinging, needy behavior due to fear of abandonment. This may be expressed by: 1. Difficulty making routine decisions without input, reassurance, and advice from others. 2. Requires others to assume responsibilities which they should be attending to. 3. Fear of disagreeing with others and risking disapproval. 4. Difficulty starting projects without support from others. 5. Excessive need to obtain nurturance and support from others, even allowing other to impose themselves rather than risk rejection or disapproval. 6. Feels vulnerable and helpless when alone. 7. Desperately seeks another relationship when one ends. 8. Unrealistic preoccupation with being left alone and unable to care for themselves.
Obsessive-Compulsive Personality Disorder 301.4 (F60. 5) Cluster C personality disorder	A persistent pattern of preoccupation with order; perfectionism; and control of self, others, and situations. This pattern is shown by the presence of ≥ 4 of the following: • Preoccupation with details, rules, schedules, organization, and lists • A striving to do something perfectly that interferes with completion of the task • Excessive devotion to work and productivity (not due to financial necessity), resulting in neglect of leisure activities and friends • Excessive conscientiousness, fastidiousness, and inflexibility regarding ethical and moral issues and values • Unwillingness to throw out worn-out or worthless objects, even those with no sentimental value • Reluctance to delegate or work with other people unless those people agree to do things exactly as the patients want • A miserly approach to spending for themselves and others because they see money as something to be saved for future disasters • Rigidity and stubbornness Also, symptoms must have begun by early adulthood.

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PSYCHOLOGICAL EVALUATION

The following sections represent the evaluative aspects of the psychological evaluation completed on Mr. Weldon Stewart Jr. (e.g., presenting problem, reported history, mental status exam, results of self-report measures, and diagnostic conclusions or clinical opinions, and treatment recommendations).

Sources of Information for Psychological Evaluation:

- Clinical interview with Mr. Weldon Stewart Jr., dated 05/04/2022 and 05/09/2022
- Clinical Interview with Mrs. Virginia S. Stewart (biological mother of Weldon), dated 05/12/2022
- Clinical Interview with Mrs [redacted] "Lori" Stewart (spouse of Weldon), dated 05/03/2022
- Review of documentation provided by client:
  - Bennettsville Police Department Juvenile Incident Report, dated 09/25/1997
  - County of Marlboro Family Court Rule to Show Cause, dated 07/29/1997
  - County of Marlboro Family Court Affidavit, dated 09/23/1997
  - Hidden Lake Academy Counselor Report, dated 05/1998
  - Bennettsville Police Department Incident Report, dated 12/06/2000
  - Trial Transcript Excerpt with statements from Mr. Weldon Stewart, Jr., the court, and Mr. Blake
  - Marlboro County Detention Facility Inmate Incident Report, dated 01/22/2001
  - Transcription of Interview with Officer Sammy Crosland, dated 07/03/2003
  - Motion for New Trial, dated 04/06/2015
  - Forensic Document Examination Report, dated 05/16/2022
  - Detailed Case Timeline created by [redacted] "Lori" Stewart
- Diagnostic screening tools completed with Weldon:
  - Oxford Medical Education Mini Mental Status Examination (OME MMSE)
  - Generalized Anxiety Disorder-7 (GAD-7)
  - Patient Health Questionnaire-9 (PHQ-9)
  - Quality of Life Scale (WHO QOLS)
  - Adverse Childhood Experiences Screener (ACE)
  - PTSD Checklist for the DSM 5 (PCL-5)
  - Dissociative Experiences Scale, Second Edition (DES-II) - *conducted from retroactive and current perspectives*
  - Shutdown Dissociation Scale (Shut-D) – *conducted from retroactive and current perspectives*
  - Balanced Inventory of Desirable Responding (BIDR; a.k.a. Paulhus Deception Scale)

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History of Presenting Problem:

Mr. Weldon Stewart Jr. reported concerns related to experiencing delayed recall of details of the events surrounding the key incident. Mr. Weldon Stewart Jr. also stated a belief that this gap in memory for the events surrounding the key incident may be due to a reported personal history of physical, sexual, and psychological/experiential trauma experiences. Reported trauma experiences included alleged corporal punishments in the home that involved being beaten by his parents with various objects (e.g., belts, "switches," extension cords, high heels, 2x4s, and human fists) with resulting visible scars on Mr. Stewart Jr.'s body; allegedly having his genitals groped at church by another male churchgoer described by Mr. Stewart Jr. as being "older" or potentially adolescent in age range; a corroborated incident of being nearly drowned at age 10 by male peers living in his neighborhood, for which the examinee reported providing no provocation; the receipt of pictures of an aborted fetus being sent to him by a former romantic partner when he was 15 years old; a corroborated incident of discovering the remains of a partial fetus in the trash cans outside of Burger King during his shift there; allegedly being robbed at age 16 for marijuana he had in his possession at the time, followed by a corroborated incident of being "jumped" the next day by 10-15 children reportedly told to do so by the person who had robbed Mr. Stewart Jr., resulting in Mr. Stewart Jr. injuring an individual in that group with a knife he "carried that day for protection"; and the key incident that involved the death of his girlfriend ([redacted] Allen), for which he was subsequently convicted and incarcerated. In addition to traumatic events identified by Mr. Weldon Stewart Jr., he reported having a romantic relationship at age 15 with a 27-year-old woman, in which he stated that the woman "played with me and threw me away." It is likely that such an inappropriate relationship involved psychological and emotional manipulation of a minor (Mr. Weldon Stewart Jr.), and may have constituted another type of trauma that Mr. Weldon Stewart Jr. has not yet recognized.

Specific symptoms reported by Mr. Stewart Jr. around the time of the key incident include anxiety, confusion, feeling flustered and frantic, experiencing fear and panic, "not knowing what was going on, like it wasn't real, or like I was watching it happen to someone else, or standing there watching myself as it happened. Like being outside of my body" (depersonalization/derealization); a feeling of "being numb"; transient loss of a sense of passing time; disconnection from others and from events happening in his environment (dissociation); inability to smell otherwise extremely aversive smells during traumatic experiencing (i.e., olfactory dissociation from burning flesh of decedent's body); an inability to formulate thoughts and speech; an inability to interact reciprocally with others attempting to engage with Mr. Stewart Jr. at the time; subsequent experience of auditory and tactile hallucinations (e.g., "hearing something physically in my room that would jump on me and throw me around"), which Mr. Stewart Jr. attributed to religious factors that were reportedly suggested by his mother ("it was maybe spirits or something, my mother would tell me those things."); some potential hallucinations or imagined stimuli at the time of the key incident (i.e. "felt her spirit go through me"; hearing "dogs barking and howling"); onset of nightmares for the key incident and related content following other traumatic incidents (e.g., about being drowned; about dead babies; about



loss and Ms. Allen); onset of insomnia; subsequently reduced appetite and excessive weight loss; onset of hypervigilance to the level of paranoia, particularly after incarceration, and despite being provided reasonable evidence to the contrary ("I wouldn't eat because I thought someone was poisoning my food"); subsequent difficulties with concentration and focus; subsequent withdrawal from others; subsequent experiencing of intrusive unwanted thoughts of decedent "lying there dead"; loss of prior episodic memory related to Ms. Allen being alive ("I can no longer picture her alive); and the onset of suicidal behaviors culminating in one reported suicide attempt by Mr. Weldon Stewart Jr. via wrist cutting with a stapler in 2001 while incarcerated that he reported involved him having "black out" twice during the episode. He reported the onset of marijuana use following being sent photos of an aborted fetus by a former romantic partner, which he defined as a method of coping after that experience. Mr. Stewart Jr. reported use of cannabis ("weed") earlier in the day on which Ms. Allen passed away. He reported feeling no effects of substance use at the time that the death occurred. According to Mr. Weldon Stewart Jr., he experienced a loss of memory for traumatic events and details in relation to the childhood attempted drowning incident, as well as for the key incident. He reported recalling the events of the attempted drowning through his work with a prior therapist during his time at Hidden Lake Academy in 1998, a therapy boarding school that he was court-ordered to attend. Per his report, his mother had informed the therapist of the prior traumatic event and the therapist noted through discussions with Mr. Stewart Jr. that he did not recall the event. Per Mr. Stewart Jr.'s report, he recalled the events after the therapist directly asked "if I remembered almost being drowned." He described the moment as having, "flooding memories of being drowned come back to me." Mr. Stewart Jr. reported recalling the events related to the key incident when he was speaking on the phone to his current wife ([redacted] "Lori" Stewart) in March of 2014 (date reported here differs slightly from date reported by wife and in provided documentation). He reported recalling that Ms. Allen had collapsed suddenly while they were together, followed by him attempting to provide lifesaving interventions (CPR).

In an interview with his mother, Mrs. Virginia S. Stewart, she reported observing Mr. Stewart Jr. at the time of the Ms. [redacted] Allen's death as appearing to be "distant, like things were happening to him," and as "not talking much, like he just wasn't there." She reported observing similar behaviors in Mr. Stewart Jr. following prior traumas of the near drowning and finding the partial fetus in the trash can at his job at Burger King. Mrs. Stewart reported that, following the near drowning, Mr. Stewart Jr. had a change in demeanor, began to internalize his thoughts and feelings and talking less to his parents openly, and began engaging in acting out behaviors. She reported that Mr. Stewart Jr. was, "out of it a bit, and then just went into a state like nothing happened. It was like in his mind that it didn't happen. He just seemed to shut it off, but he was never the same." Mrs. Stewart also independently reported that she had told Mr. Stewart Jr.'s former therapist at Hidden Lake School about the attempted drowning incident, because, "Weldon did not seem to remember it." In regards to the incident in which Mr. Stewart Jr. discovered the partial fetus at work, his mother reported that she was called by Mr. Stewart Jr.'s supervisor at the time to pick him up from work following the incident. His mother reported that, upon her arrival, Mr. Stewart Jr. appear to be, "standing up like a person who had just seen a bad



wreck like he was in a trance." Mrs. Stewart also reported additional and ongoing trauma stressors affecting Mr. Stewart Jr's current state that included the death of his newborn grandson at 4 days old on December 3, 2021, his daughter being placed on life support following pregnancy complications on existing Guillain-Barre syndrome, and his parents having to provide 24-hour care to his daughter due to her ongoing bedridden, paralyzed state and no ability to engage in independent self-care. She reported that the transition into this caretaking role has been difficult for Mrs. Virginia Stewart and her husband, and that "Weldon is taking it very hard because he cannot be here with his daughter and to help us."

In an interview with Mrs. Lori Stewart, dated 05/03/2022, she independently reported that Mr. Stewart Jr. disclosed to her recalling the events of the key incident while they were talking on the phone on July 1st, 2014 (this reported date matches with ancillary provided documentation for the date of Mr. Stewart Jr.'s reported recollection). Per Mrs. Lori Stewart's report, Mr. Stewart Jr. had stated that he recalled the death as being a suicide possibly related to Ms. Allen taking a pill that led to her death. Per Mrs. Stewart's report, Mr. Stewart Jr. told her that Ms. Allen had asked him for some water shortly before her death, which led him to believe that she had consumed a pill. Mrs. Lori Stewart also reported additional and ongoing trauma stressors affecting Mr. Stewart Jr's current state that included being allegedly stabbed and abused by prison staff, the death of his newborn grandson at 4 days old on December 3, 2021, his daughter being paced on life support following pregnancy complications on existing Guillain-Barre syndrome, and his parents having to provide 24-hour care to his daughter due to her ongoing bedridden, paralyzed state and no ability to engage in independent self-care.

Personal History:

Family History

Mr. Weldon Stewart Jr. reported that he grew up living with his father and mother (currently married 44 years), sister (2 years younger), and brother (7-8 years younger). All of these family members are biologically related to Mr. Weldon Stewart Jr. and are still living. He reported getting along with his parents while growing up, "as long as I was doing what I was supposed to be doing." He reported being "very close" with his sister in childhood, however, he noted that some distance was developed following the incident that resulted in Mr. Stewart Jr. being convicted and incarcerated. He stated that he is not close with his brother, as "he was a lot younger than me." Mr. Stewart Jr. reported that there has been "a lot of resentment from family members because how my conviction changed their lives." He also reported some recent conflict with his parents regarding their caring for his daughter. He reported feeling otherwise close with his parents and sister. Mr. Stewart Jr. reported that he spoke with his sister a couple of months prior to this evaluation about the physical abuse by his parents that he reported occurred to himself and his sister in their childhood. Per Mr. Stewart Jr.'s report, his sister did not recall the abuse until he brought it up and they were discussing the topic. His sister was not interviewed for

this psychological evaluation, thus, this report shared alleged abuse cannot be corroborated in this report.

Social Relationship History

Mr. Weldon Stewart Jr. reported that he has been married to his current wife for 2-3 years, but that they have known one another for the past 8 years. The two reportedly met online, and Mr. Stewart Jr. subsequently advised Mrs. Lori Stewart of his incarcerated status. Per Mrs. Lori Stewart's independent report, she met Mr. Weldon Stewart on 03/03/2014 through an online social network site called 'Tango.' Per Mrs. Lori Stewart's report on her provided *Detailed Case Timeline*, Mr. Weldon Stewart Jr. told her at that time that his name was Ben and that he lived in California and worked for a real estate company. Per Mrs. Lori Stewart's recording on the document, Mr. Weldon Stewart Jr. told her his real name and that he was incarcerated two weeks later, on 03/17/2022.

Prior to his relationship with Lori Stewart, Mr. Stewart Jr. was dating Ms. [redacted] Allen, who is the identified decedent from the key incident. Mr. Stewart Jr. reported that his relationship with Ms. Allen was mutually emotionally supportive and caring. He reported that the relationship was not sanctioned by Ms. Allen's parents. He reported that the relationship resulted in one pregnancy. He reported that, due to fears that Ms. Allen's parents would require her to obtain an abortion, Ms. Allen attempted to keep the pregnancy a secret and preserve the pregnancy "until the 4-month mark"; at which point, he reported, that the two believed an abortion would be illegal. Following the discovery of Ms. Allen's pregnancy by her mother, Ms. Allen's parents allegedly took Ms. Allen to a clinic in North Carolina that would allow advanced term abortions, at which Ms. Allen was alleged "forced" to receive an abortion. According to his report, Ms. Allen stated that, at the request of her mother, she was made to hold the aborted fetus following the abortion procedure "as punishment for becoming pregnant." Mr. Stewart Jr. reported that Ms. Allen's mental health declined after the procedure and she reportedly demonstrated low mood, fixation on pregnancy and pregnancy loss following the abortion, and being "out of it." He reported that Ms. Allen stated hearing voices of a baby calling her mother following the abortion, and speaking to her deceased child.

Per Mr. Stewart Jr.'s report, he fathered a daughter with another woman about seven months following Ms. Allen's abortion, and five months prior to her death. He reported that he was in a relationship with Ms. Allen throughout the time of the pregnancy and after the birth. He reported that during this time period he and Ms. Allen ran away together and went to Connecticut. Upon their return home, Ms. Allen's parents reportedly pressed charges against Mr. Stewart Jr. for contributing to the delinquency of a minor ([redacted] Allen was 15 and Mr. Stewart Jr. was 19 years old at the time), and he was incarcerated. He reported that Ms. Allen's parents dropped the charges and he was released from jail the three days after his daughter was born. He reported confirming to Ms. Allen that he was the father of the child while he was living with her in Connecticut. Following this admission, Ms. Allen wrote the letter expressing suicidal ideation, which was three months prior to her death.