STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)

FILED
HORRY COUNTY
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RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

Louis Michael Winkler, Jr., #6027,) C/A No. 2011-CP-26-3907
) ***Capital PCR Action***
Applicant,)
v.)
)
The State of South Carolina,) **ORDER OF DISMISSAL**
)
Respondent.)
)

The captioned matter is a post-conviction relief (PCR) action filed by Applicant, Louis Michael Winkler, Jr. Applicant is a death-sentenced inmate presently confined in the Secure Facility at the Broad River Correctional Institution. Applicant filed his initial application on May 2, 2011. This Court conducted an evidentiary hearing on June 18-21, 2012, and issued an order granting relief, filed August 15, 2012. On appeal, our Supreme Court reversed the relief granted on one claim and vacated the portion of the order granting a directed verdict in Respondent's favor on another claim.[1] *Winkler v. State*, 418 S.C. 643, 795 S.E.2d 686 (2016). On the claim from the vacated portion of the ruling, the Court remanded the matter to this Court to receive additional evidence and for consideration and ruling. *Id.* The precise claim to be decided—as framed by Applicant— is as follows:

> 10 and 11(b) Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3- 20 - during the sentencing phase of his capital trial - when trial counsel:

[1] Specifically, our Supreme Court found an abuse of discretion in denying a continuance for Applicant to obtain and present evidence based upon neuroimaging, thus, the Court reversed the directed verdict ruling and the resulting denial of relief. 418 S.C. at 663, 795 S.E.2d at 679.

/ MAC

(1) failed to investigate and present evidence of Applicant's neurological and cognitive impairments and/or dysfunction;

(Second Amended PCR Application, p. 2).

This Court held a hearing on January 29, 2020, in the Horry County Courthouse to receive evidence on that issue. Applicant was not present[2] but was represented by counsel, Emily C. Paavola, Esq., and Hannah L. Freedman, Esq.,[3] attorneys with Justice 360 in Columbia, South Carolina. Respondent was represented by Senior Assistant Deputy Attorney General Melody J. Brown and Senior Assistant Attorney General William Edgar Salter, III.[4] Applicant presented one witness at the 2020 hearing, Dr. Ruben C. Gur, PhD. At the conclusion of the hearing, this Court allowed post-hearing briefing on the application of *Strickland v. Washington*, 466 U.S. 668 (1984), to the issue presented. The parties have submitted their briefs, and this Court has considered the arguments for and against the granting of relief. Along with the post-hearing briefing submissions, this Court has also considered the testimony, exhibits, the transcripts, and all other filings and matters relevant to this remand action.

After careful consideration of the evidence and arguments, and having observed the witness and passed on his credibility, this Court finds that Applicant has failed to show he is entitled to any relief. The Court begins with a recitation of the procedural history.

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[2] Applicant's formal, signed, waiver of the right to be present was filed with the Clerk of Court, and the waiver was confirmed by counsel at the hearing.

[3] Petitioner moved for substitution of counsel by motion filed June 6, 2024, because Ms. Freedman no longer works with Justice 360. This Court granted the motion by order filed March 6, 2025, and appointed Allison Franz, Esq., who currently works with Justice 360, to be the second chair for the completion of the circuit court proceedings.

[4] Mr. Salter has retired from the Attorney General's Office. However, Ms. Brown remains as counsel for the State.

PROCEDURAL HISTORY

Applicant was indicted in May 2006 for murder, burglary first degree, assault and battery of a high and aggravated nature, and escape. (R. 3458-60).[5] The State had filed its Notice of Intent to Seek the Death Penalty on March 12, 2007. (R. 1976). In the notice, the State asserted the following statutory aggravating circumstances: (1) that the murder was committed during the commission of a burglary, S.C. Code Ann. Section 16-3-20(C)(a)(8); and (2) that the murder was of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime under S.C. Code Ann. Section 16-3-20(C)(a)(11). (R. 1977). Ralph J. Wilson, Esq., and Assistant Public Defender Paul Elbert Rathbun represented Applicant in the capital proceedings.

Applicant was tried by a jury on January 28 – February 8, 2008. The Honorable James E. Lockemy presided. The State called the charges of murder, first-degree burglary, and assault and battery of a high and aggravated nature.[6] On February 2, 2008, Applicant was convicted on all three of the charges as indicted. (R. 1903). After a separate sentencing proceeding, the jury returned its sentencing verdict on February 8, 2008. The jury found the State had proven beyond a reasonable doubt both of the aggravating circumstances submitted. (R. 2940). The jury also determined that death was the appropriate sentence. (R. 2940). Judge Lockemy imposed the death sentence for murder, and also sentenced Applicant to concurrent terms of thirty years for burglary, and ten for ABHAN. (R. 2949).

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[5] Citations to "R." are to the Record on Appeal from the direct appeal. The eight-volume record, along with other documents, was provided to the Court by way of an attachment to the State's initial return.

[6] The State withdrew the Escape charge before trial. (*See* R. 130).

A timely notice of appeal was filed and served on Applicant's behalf on February 11, 2008. Robert M. Dudek, Chief Appellate Defender and Elizabeth A. Franklin-Best, Assistant Appellate Defender, with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Applicant on appeal. On April 5, 2010, counsel filed a final brief raising seven issues:

1. Whether the trial court erred by admitting the audio tape recording as a prior consistent statement under Rule 801(b)(1)(B), SCRE, when defense counsel implicitly and explicitly asserted that Jonathan G. fabricated his testimony when he stated he told Officer Knochs that it was his stepfather who shot his mother?

2. Whether the trial court erred in allowing the jury to review the transcript of the 911 tape when the jury was only allowed to see the transcript in the courtroom with the defendant and counsel present and only when the audio tape was played as requested by the jury?

3. Whether the trial court correctly held that it was within the court's discretion to grant or deny Appellant's Motion to proceed pro se when the motion was not timely made?

4. Whether the trial court abused its discretion when it denied Appellant's Motion to proceed pro se when the court determined that granting the motion would cause undue delay, the court had concerns regarding Appellant's ability to represent himself as the result of his preparedness and his anxiety condition, and there was the potential of jury confusion caused by the change in Appellant's representation?

5. Whether the trial court erred in not conducting a full Faretta inquiry when Appellant's request to proceed pro se was not governed by Faretta?

6. Whether the trial court erred in allowing defense counsel to present mitigation evidence to which Appellant objected when no timely objection to the testimony was made, and no argument regarding the allegation was presented on the record?

7. Whether the trial court erred in denying Appellant's motion for a directed verdict on the aggravating circumstance outlined in S.C. Code Ann. § 16-3-20(C)(a)(11) when there was substantial circumstantial evidence supporting the charge?

The State filed its Final Brief of Respondent on April 14, 2010, and Applicant filed a reply on April 4, 2010. The Supreme Court of South Carolina affirmed the convictions and sentence on August 16, 2010. *State v. Winkler*, 388 S.C. 574, 698 S.E.2d 596 (2010). Applicant's timely petition for rehearing was denied on September 22, 2010, and the remittitur was issued that same day. Applicant also sought review in the Supreme Court of the United States.[7] Applicant's petition was denied on April 25, 2011.

By order filed May 25, 2011, our Supreme Court granted Applicant a stay of execution in order to pursue his PCR remedies. In that same order, the Court assigned the undersigned to hear Applicant's action. As noted above, this Court previously issued an order in this matter, but that order was modified on appeal and the action remanded for this Court to receive additional evidence and consider Applicant's Claim 11(b)(1). *Winkler, supra.*

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the filings in this case and has heard the testimony and considered the evidence and arguments presented. This Court specifically notes that it has had the opportunity to observe Applicant's witness on remand, and the witnesses presented at the prior PCR evidentiary hearing. This Court has closely passed upon their credibility, weighing their testimony accordingly. After considering Applicant's and Respondent's positions, and the testimony and other relevant evidence, I find that I must deny the application for

[7] The petition was limited to one question: Does a defendant charged with a capital crime who proceeds with appointed counsel during the guilt phase of trial and is convicted have a Sixth Amendment right under *Faretta v. California*, 422 U.S. 806 (1975) to represent himself during the penalty phase? (Return Attachment 9, at 1).

postconviction relief. Set forth below are the relevant findings of fact and conclusions of law as required under S.C. Code Ann. § 17-27-80 and S.C. Code Ann. § 17-27-160(D).

Relevant Law

Criminal defendants have a recognized right to counsel, and that right guarantees "the effective assistance of counsel." *Strickland*, 466 U.S. at 686. To obtain relief on a claim of ineffective assistance, a convicted defendant must show (1) counsel's acts or omissions fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.*, at 687–88, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 668. However, "[t]he object of an ineffectiveness claim is not to grade counsel's performance." *Id.*, at 697. The Supreme Court has reasoned: "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*, at 697. "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* The PCR applicant, though, must prove both deficient performance and prejudice by a preponderance of the evidence to be entitled to relief. *Strickland*, 466 U.S. at 700; Rule 71.1, SCRCP.

Strickland dictates that in preparing for capital sentencing proceedings, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins v. Smith*, 539 U.S. 510, 522 (2009) (quoting *Strickland*, 466 U.S. at 691). The relevant inquiry is not whether a particular type of mitigation should have been presented, but whether counsel conducted an adequate investigation under prevailing professional standards." *Id.*, at 522-23. Proper review "includes a context-dependent consideration of the

challenged conduct as seen " ' from counsel's perspective at the time.' " *Id.*, at 523 (quoting *Strickland*, 466 U.S. at 688-89).

When a question is posed whether trial counsel should have presented evidence, the actual inquiry a reviewing court makes is whether trial counsel's investigation was reasonable under the *Strickland* standard. *Stone v. State*, 419 S.C. 370, 397, 798 S.E.2d 561, 575 (2017) (in considering whether evidence of brain damage should have been presented, framing the relevant question as "whether trial counsel's investigation was reasonable under the Sixth Amendment even though trial counsel did not discover" evidence of "brain damage"). *See also Owens v. Stirling*, 967 F.3d 396, 413 (4th Cir. 2020) ("the Court's cases indicate that the investigation need only be *reasonably* thorough" under the *Strickland* standard). Moreover, an applicant must show *Strickland* prejudice from the deficiency. *Stone, supra.* Simply showing that additional presentations could be made at a capital sentencing proceeding is insufficient to find counsel was deficient and a defendant was prejudiced. *Id. Thornell v. Jones*, 602 U.S. 154, 165 (2024) (rejecting argument that *Strickland* relief is warranted "whenever [the defendant] 'presents substantial evidence of the kind that a reasonable sentencer might deem relevant to the defendant's moral culpability'").

The standard of "prejudice" differs depending upon whether it is related to guilt phase issues or penalty phase issues. In *Jones v. State,* 332 S.C. 329, 504 S.E.2d 822 (1998), our Supreme Court set out the proper standard according to *Strickland* and instructed that prejudice may be found in a capital sentencing proceeding "when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' " 332 S.C. at 333, 504 S.E.2d at 823 (quoting *Strickland*, 466 U.S. at 695). Again, "[a] reasonable probability is a probability sufficient to undermine

confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694). Notably, the "standard does not require a defendant to show that it is more likely than not that adequate representation would have led to a better result, but '[t]he difference' should matter 'only in the rarest case.'" *Thornell,* 602 U.S. at 163–64 (quoting *Strickland*, 466 U.S. at 697).

In conducting a prejudice analysis, a court must consider "*all* the relevant evidence that the jury would have had before" to determine whether there is a "a reasonable probability that the jury would have rejected a capital sentence...." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009); *see also Sears v. Upton*, 561 U.S. 945, 956 (2010) ("A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence ... along with the mitigation evidence introduced during [the] penalty phase trial, to assess whether there is a reasonable probability that [the applicant] would have received a different sentence..."). In South Carolina, a capital case is not more or less "aggravated" based merely on the number of statutory aggravating circumstances found.[8] It is the evidence as a whole that must be considered when applying the *Strickland* prejudice test in a capital sentencing proceeding issue. *See Plath v. Moore*, 130 F.3d 595, 602 (4th Cir. 1997) (applying *Strickland* to allegation that counsel should have a made a better investigation

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[8] South Carolina is not a "weighing" state (as the old term goes). Essentially this means we do not have a system where the sentencer is obliged to weigh statutory aggravating circumstances and mitigating circumstances one against the other. *State v. Bellamy,* 293 S.C. 103, 107, 359 S.E.2d 63, 65 (1987), *overruled by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) ("A jury should not be instructed to 'weigh' the aggravating circumstances against the mitigating circumstances.") (citing *State v. Plath,* 281 S.C. 1, 313 S.E.2d 619 (1984)). Rather, "[t]he jury should be instructed to 'consider' any mitigating circumstances as well as any aggravating circumstances." *Id.,* citing S.C. Code Ann. § 16-3-20(C) (1976). *See also State v. Shaw*, 255 S.E.2d 799, 804 (1979), *overruled on other grounds by State v. Torrence*, 406 S.E.2d 315 (1991) (rejecting the argument that numerical values must be assigned to the aggravating and mitigating circumstances and a weighing conducted). Thus, in South Carolina, once at least one aggravating circumstance is found, the sentencer must consider *all* evidence in making the sentencing determination.

into personal history and mental status: "... when considered against the sheer magnitude of the ***aggravating evidence*** against Plath, it is difficult to see the allegedly unreasonable omission of this ***mitigating evidence*** as prejudicial.").

Relevant Evidence

Because the claim at issue rests on an allegation that trial counsel was ineffective in the development and presentation of mental health evidence, this Court has carefully considered the trial record in this matter. Further, in addition to the evidence received at the January 29, 2020, hearing, I have also considered trial counsel's testimony at the first PCR proceeding presented during the June 2012 evidentiary hearing, particularly that testimony regarding the mental health and mental functioning investigation. Multiple portions of the prior records are relevant, but the Court notes the following as particularly relevant and persuasive in considering the present allegation.

The Sentencing Evidence Presented at Trial

The defense presented testimony at sentencing from forensic psychiatrist Dr. Richard Frierson. Dr. Frierson had evaluated Applicant for criminal responsibility. As a result of the evaluation, Dr. Frierson diagnosed Applicant with depressive disorder not otherwise specified (a form of depression); paranoid personality traits; and noted a history of anxiety and alcohol abuse. (R. pp. 2343-44). Dr. Frierson testified that the personality trait diagnosis could explain "chronic" suspicion that his romantic partners were not faithful, or other paranoid interpretations of the actions of others. (R. pp. 2344-45). He testified that Applicant would always have those tendencies as a personality trait "is not really amenable to treatment" (R. p. 2345). Dr. Frierson testified that alcohol and drugs (especially cocaine) would worsen that condition. (R. pp. 2345-46).

The defense also presented another forensic psychiatrist, Dr. Rikki Halanovich. Dr.

Halanovich testified that she met with Applicant "[m]ultiple times for a total of approximately twenty hours... probably eight or nine times, different occasions." (R. p. 2658). She testified that she was asked not only to "perform a psychiatric evaluation," but also "to monitor[] his progress and ... how he was doing between then and when he came to court." (R. p. 2658). Dr. Halavonich diagnosed Applicant with borderline personality disorder, major depressive disorder, alcohol dependence and cocaine abuse. (R. pp. 2655-57; 2658-60). She explained, in detail, that she followed the Diagnostic and Statistical Manual of Mental Disorders in diagnosing Applicant, describing the manual as one used by mental health professionals in making a diagnosis. (See R. p. 2662).

Dr. Halavonich also testified to structural correlations with function, and noted the particular correlation – to the prefrontal cortex and amygdala – to borderline personality disorder. (*See* R. pp. 2672-74). She testified: "In general, the prefrontal cortex is associated with suppressing urges and suppressing impulses." (R. p. 2672). She testified the area is also associated with planning, exercising judgment, personality and "appropriate social interactions," attention, and decision making. (R. pp. 2672-73). Dr. Halavonich testified the amygdala "we associate with arousal and fear" and that the amygdala "controls physical symptoms of fear." (R. p. 2673). She testified further that the amygdala "has been associated with kind of processing the emotional significance of stimuli," such as "reading nonverbal signs of other people" to interpret signs of aggression or threats from others. (R. p. 2673). She testified in caution, though, that "these are just correlations that have been identified" with borderline personality disorder, and noted "[s]ome studies have shown... a smaller pre-frontal cortex in men that had committed violent crimes. Others are ... doing PET scans or doing scans to look at activity in certain areas of the brain and how they differ between different groups of people." (R. p. 2673-74). Dr. Halavonich then

described how the medical community has established treatments for borderline personality disorder. (R. p. 2674). She testified that the personality disorder would likely not affect Applicant's adjustment to prison because "usually where a problem arises is in stormy, intense interpersonal relationships," and noted that Applicant was ingesting both alcohol and cocaine "and those things were not going to help: not going to help the anxiety, not going to help the personality disorder, not going to help the depression, not going to help his judgment or his impulse control." (R. pp. 2681-82). However, a controlled environment where access to the substances is curtailed would "lower his chances of acting out violently in prison." (R. p. 2682).

On cross-examination, Dr. Halanovich was asked if she had any brain imaging test results "that would indicate some sort of physical problem with the defendant's frontal brain that you might attribute to this problem?" (R. p. 2690). Dr. Halanovich responded:

> No. He meets the criteria for the diagnosis and those are, are research studies that have shown a correlation between the two, but I didn't do any kind of tests like that on him, ***and they are not used for that at this point.***

(R. pp. 2690-91) (emphasis added).

The defense also presented Dr. Alex Morton, an expert in psychopharmacology and substances of addiction, who testified that Applicant was "treating basically his anxiety and depression" by drinking and using cocaine. He began drinking at around age 13, and had a history of using various drugs. (See R. pp. 2717-20). Dr. Morton described the problem with drugs and alcohol as " a full-blown biological disorder. It is a disease." (R. p. 2721). Dr. Morton summed up his opinion that treatment and a controlled environment would be beneficial:

> I think his disorders can be treated. I think there are pharmacologic treatments. And just as Dr. Halavonich said, there's various therapies that can be done, whether it's in a, a structured setting that people give him information, or whether he does it on his own if he so chooses. I think a controlled setting, he will continue to get better.

> I think without access to alcohol and drugs, his brain will continue to improve over time. I think with right amount and the right kind of medication, his anxiety and depression will improve. I think his borderline symptoms will improve over a long period of time. ...

(R. pp. 2741-42).

Te Anne Oehler, a social worker, testified to Applicant's background. She testified that Applicant's father was controlling of his mother; that when Applicant's parents were first married, they moved in with his father's parents; that Applicant's father's insisted Applicant's mother quit her job; and, that Applicant's father, who worked at a family owned bar, would not allow Applicant's mother to have her own money but that Applicant's mother eventually insisted that the family move into their own home. (R. p. 2752). She testified Applicant's mother was the primary caregiver at home, and Applicant's father was active in coaching the boys sports teams. (R. p. 2753). Applicant's father was known to frequently drink to excess, and was often absent after dinner until early the next morning. (R. p. 2753).

Oehler further testified that while Applicant denied his father ever beat him, his older siblings informed her that their father had beaten them. (R. p. 2754). An exception was noted – that when Applicant's mother found marijuana in Applicant's bathroom and told Applicant's father, the father grabbed Applicant by the throat and choked him. (R. p. 2754). Oehler also testified that Applicant got his first drink from his father on a camping trip when Applicant was 13 years old. (R. p. 2755). By the time Applicant graduated from high school, Applicant had tried cocaine, and was using alcohol and marijuana "quite frequently." (R. p. 2755).

Oehler also testified that there was conflict in Applicant's first marriage "because of [his] drug use, and then he abused his wife." (R. p. 2756). His second marriage also saw drug and alcohol use and "conflict" between Applicant and his wife. (R. p. 2757). Oehler testified to Applicant's "history of chemical dependency... his addiction" and "history of depression, anxiety

and his sexual history, and also ... his psychiatric history," in determining "that he had characteristics of or traits of a borderline personality disorder." (R. p. 2758). (*See also* R. pp. 2759-61). She underscored that he was "an A and B student until he was about a junior in high school, which was when he started using pot and drinking alcohol, and then his grades dropped to D's, C's and F's." (R. p. 2764). While testifying that Applicant continued to drink, and that Applicant did not "hold a job for very long at any time," the exception was his "last job, where... he was with them approximately eleven years... making about $40,000 a year." (R. p. 2768).

Oehler then testified that she had been "evaluating his mental status" during their interviews, and ultimately concluded his background and experiences "impacted him or his addictions" in this way:

> ... the combination of his early alcohol use, the rigid family structure that he was raised in, the alcohol use of his father, the tension, the relationships that his father had outside the home with other women, the controlling nature of his father's relationship with his wife, ... those early role models set the stage for his later continued use of alcohol, his use of cocaine, his marijuana use, early marijuana use, and then later the instability of the pattern of the relationships that he had.
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> He moved from one unstable relationship to another. He had difficulties with the feelings that he had that he was able to pull from all of those, that combination of alcohol, marijuana use, cocaine use. And those contributed to the feelings he had of paranoia, of jealously, of frustration, of restlessness. And after being convicted of the, the rape and/or after the rape and kidnapping in 2005, he was beginning to spiral down, and he was fired from his job. And the combination of all those things brought him to this point.

(R. pp. 2770-71).

On cross-examination, Oehler testified that she had, for sources, "interviews with the family, interviews with one of his friends and a former co-worker, the therapist who saw him in 2003, the psychiatrist who evaluated him, Dr. Halavonich ... Dr. Morton, and also the review of

records, which included his mental health records" referencing records from "Grand Strand Memorial ER...." (R. pp. 2775-76).

June 2012 PCR Hearing: Counsel's Testimony

Trial counsel Ralph Wilson, Esq., testified that he had previous experience trying capital cases when he was appointed to represent Applicant at trial. The first action he took was to consult with recognized and experienced capital defense attorneys for advice on who to employ, "effective people to use as, as investigators...." (2012 PCR Tr. p. 260). He worked with at least four investigators (one who transitioned off the team), including one investigator in Ohio, Applicant's home state. (2012 PCR Tr. pp. 260-61). Counsel was aware of the state evaluations from (Dr. Frierson and Dr. Dwyer) but also sent Applicant to Dr. Wade (a forensic psychologist), for evaluation to determine what other medical professionals should be consulted. (2012 PCR Tr. p. 262). Counsel then hired, among other investigators and experts, a psychiatrist (Dr. Halavonich) and psychopharmacologist (Dr. Morton), and another mental health expert to help Applicant during the trial process, (Dr. Ellison from Waccamaw Mental Health). (2012 PCR Tr. pp. 261-62). Mr. Wilson testified to multiple team meetings and explained his policy – and what he instructed the team do – was to share all information among all the defense team. (2012 PCR Tr. p. 265-66).

On cross-examination, Mr. Wilson was asked "assuming brain injury was present is that something you would have wanted an expert to be able to testify about?" to which he responded, "Not only did we want that we actually hired experts to examine him for that very purpose...." (2012 PCR Tr. p. 367). When asked if Dr. Wade "conduct[ed] neuro psychological testing," counsel replied, "Not that I'm aware of *[be]cause no doctor felt that it was appropriate*." (2012 PCR Tr. pp. 367-368) (emphasis added). Trial counsel agreed with PCR counsel's question that if trial counsel had evidence of *brain damage that affected*

Applicant's behavior, so that he could "link Mr. Winkler's change in behavior at work to brain damage or to a major mental health problem," that he would not have had a strategic reason not to present that evidence. (2012 PCR Tr. p. 375).[9]

Analysis

This Court has focused, as the case law mandates, on the reasonableness of counsel's actions in investigating the possibility of neurological and cognitive impairment or dysfunction. Of particular note here, our Supreme Court has observed there is no mandate to obtain "neuropsychological testing and neuroimaging such as MRI and PET scans" to provide effective assistance under the Sixth Amendment. *Stone,* at 397, S.E.2d at 575. Thus, a reviewing court must center evaluation on "whether the investigation supporting counsel's decision not to introduce mitigating evidence...*was itself reasonable.*" *Id.*, at 398, 798 S.E.2d at 576 (quoting *Wiggins,* 539 U.S. at 523 (2003) (cleaned up)). That is precisely how this Court has analyzed Applicant's claim.

This Court finds that trial counsel's investigation, particularly his retaining and reliance on mental health and mitigation experts to guide his investigation, made reasonable investigation into these areas. Critically, Applicant has not carried his burden of proof to show otherwise. But even if he had shown some deficiency (and this Court finds he has not), Applicant has also failed to show that viable and persuasive evidence of impairment or dysfunction was actually missed. There are three factual points that are uncontested and will largely control in the disposition of this

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[9] Applicant also claimed that trial counsel failed to present evidence in mitigation reflecting a "change" in Applicant's "demeanor and mental state before the crime" as a result of the victim "taunting" him while Applicant was on house arrest. (Order of August 15, 2012 at p. 7). This Court previously found that Applicant failed to show the victim "taunted" him while he was on house arrest, and "Winkler's attorneys did not have any mitigating evidence to present to show a change in demeanor or mental state ..." *Id.* Post-conviction relief was denied on the "change in demeanor evidence" ground. *Id.* It cannot be revisited here, nor should it be. That ruling stands. The Court only mentions the testimony because of the reference to brain damage and/or major mental health problem(s).

matter– (1) Dr. Gur testified that he did not diagnosis Applicant with any neurocognitive dysfunction under the elements required by the DSM-5; (2) Dr. Gur testified that a head injury, even an injury that resulted in a concussion, does not invariably lead to brain injury; and (3) Dr. Gur has written and confirmed in his testimony to this Court that anatomical anomalies do not equate to behavioral dysfunction. Further, this Court has compared and considered the sentencing phase record, the PCR testimony from the first hearing, and the testimony at issue here, and also observed the witnesses in both PCR hearing to assess credibility. In light of Dr. Gur's noted concessions, and the weight this Court has assigned the evidence and given the arguments in this matter, this Court determines that Applicant has failed in his burden of proof.

Dr. Gur's Testimony

Dr. Gur did not give a diagnosis; rather, Dr. Gur opined only that according to his algorithm, the structure of Applicant's brain in certain areas was below the average when compared to a control group. However, Dr. Gur conceded that the measure of difference from the norm could change according to the control group used for comparison. Dr. Gur describes the difference as simply the nature of comparing data to different normative grounds. Yet the difference can be dramatic. In the capital PCR action for *Steven Bixby*,[10] Dr. Gur had compared his findings to two different control groups and the difference varied from nearly 7 standard deviations to a little over 2 deviations. That itself significantly impacts credibility and/or persuasiveness of the reported results. Dr. Gur did not specifically share the data of the control

[10] *Steven Bixby v. State*, Order of Dismissal, 2011-CP-01-110, filed January 13, 2015 (no prejudice in *Strickland* claim finding Dr. Gur's methodology was questionable). *See also Kamell Delshawn Evans v. State*, Order of Dismissal, 2006-CP-23-7719, issued February 24, 2011 (finding counsel not deficient in failing to call Dr. Gur for similar reasons). Notably, the federal district court did not find cause to hold that the rulings by the state court regarding Dr. Gur which underscored the "vulnerability of the opinion" were unreasonable. *See Bixby v. Stirling*, No. 4:17-CV-954-BHH, 2021 WL 783660, at *10 (D.S.C. Mar. 1, 2021).

group used for the information presented to this Court, but conceded Applicant was in his 50s at the time of scans at issue and was not compared to a group of other 50-year-old men.

Further, Dr. Gur's opinion was rendered on information, *i.e.*, scans, performed well-after the original defense investigation. Further still, there appears to be no evidence presented as to whether other contemporaneous scans or pre-trial scans were obtained to show the average or norm specific to Applicant.

In sum, Dr. Gur's testimony is simply too speculative to satisfy Applicant's burden of proof. These issues, though significant, are not the only problem with Dr. Gur's testimony. Other testimony demonstrates the limits of what Dr. Gur's calculations and opinion can actually show.

First, multiple factors were not accounted for in Dr. Gur's opinion. For example, Dr. Gur agreed that anxiety, movement, and a high glucose level can all affect the readings he relied upon. Dr. Gur was unaware that Applicant had been diagnosed with, and had been treated for, anxiety. (*See* R. pp. 2677-78, Dr. Halavonich explaining Applicant's history of anxiety; p. 2700, Dr. Morton explaining history of anxiety). Dr. Gur did not take this into account as to sufficiency or reliability of the information obtained by the scans. *See Smith v. State*, 170 So. 3d 745, 753 (Fla. 2015) (noting testimony from "a board certified neurologist" that "a PET scan can be influenced by the level of anxiety present at the time of testing"). Further, Dr. Gur agreed that chronic alcohol abuse may lead to reduced volume but also agreed that certain areas can regenerate after a few years. Dr. Gur was unaware that Applicant had been diagnosed with alcohol abuse and alcohol dependence. He did not take this into account in his calculation or opinion in regard to an issue of the possibility of damage from a head injury. Further still, Dr. Gur testified that the DSM-5, the professional manual relied upon by mental health practitioners – and the manual he helped to develop in regard to information on diagnostic instruments – required that "[t]he cognitive deficits

are not better explained by another mental disorder" before diagnosing neurocognitive disorder; yet, Dr. Gur did not rule out the prior diagnosis of major depressive disorder. He admitted he would have to do so in order to diagnose Applicant under the requirements of the DSM-5. However, Dr. Gur plainly testified that he was not diagnosing Applicant, and had not been asked to diagnose Applicant.

Second, Dr. Gur admitted that neuroimaging analysis is not currently accepted as necessary to determine neurocognitive dysfunction, though the DSM-5 cautions that such tests may become "more important" as research continues. At trial, forensic psychiatrist Dr. Halavonich was asked if she had "anything on the physiological side, PET scans, any other tests that you ran or someone else ran on your behalf that would indicate some sort of physical problem with the defendant's frontal brain" to which she answered, "No. He, he meets the criteria for the diagnosis" and while acknowledging "research studies that have shown a correlation between the two," she "didn't do any kind of tests like that on him, and they are not used for that at this point." (R. pp. 2690-91). Dr. Gur agreed that Dr. Halavonich was correct on that point in her testimony and could render a diagnosis without using his algorithm program.

Third, Dr. Gur admitted that his algorithm program is primarily a research program, and not an accepted diagnostic tool.[11] Further, he testified his program was created in the 1980's, yet it is still not an accepted diagnostic tool. *See Eichinger v. Wetzel*, No. CV 07-4434, 2019 WL 248977, at *23 (E.D. Pa. Jan. 16, 2019) (noting similarly limiting concessions "that behavioral imaging methodology is primarily a research tool and not a clinical one, and the behavioral image

[11] Dr. Gur, does, however, testify in a great many criminal cases, mostly for the defense and the majority of times were in capital cases: "Gur has probably conducted between 70 and 100 forensic evaluations in criminal cases with about two-thirds of the evaluations in capital cases and all but one evaluation being completed for the defense." *Cone v. Carpenter*, No. 97-2312-JPM, 2016 WL 1274599, at *41 (W.D. Tenn. Mar. 31, 2016).

methodology, which was patented in 1986, has not been updated" in ultimately concluding the state court's resolution that applicant did not have cognitive limitations was reasonable). Moreover, Dr. Gur also admitted he was part of a multidisciplinary consensus conference on "Use and Abuse of Neuroimaging in the Courtroom" held at Emory University in Atlanta, Georgia December 7-8, 2012, and that the conference resulted in published guidelines that did not fully embrace the analysis here. Dr. Gur agreed that one consensus reached and included in the guidelines was that "there is still substantial debate as to whether brain imagining can contribute value to the behavior approach that courts have traditionally used to comprehend" concepts such as culpability or mitigation. Dr. Gur did not offer, recognize or explain this limitation within his opinion or in his testimony on direct.

Fourth, Dr. Gur testified he is a qualified, licensed psychologist, and that he could have tested Applicant with recognized testing instruments to determine indication of damage or actual dysfunction. However, Dr. Gur did not. Further, he relied upon testing from another doctor, who did not testify. Dr. Gur candidly admitted he did not know anything from his own personal knowledge as to the conditions of testing or the accuracy of the results. Though an expert may rely on certain hearsay in forming an opinion, *see* Rule 703, SCRE, the expert's reliance on that statement does not transform the hearsay into evidence that may be independently accepted for the truth of the matter asserted. *See Williams v. Illinois*, 567 U.S. 50, 78 (2012) ("The purpose of disclosing the facts on which the expert relied is to allay these fears—to show that the expert's reasoning was not illogical, and that the weight of the expert's opinion does not depend on factual premises unsupported by other evidence in the record—not to prove the truth of the underlying facts."); *State v. Slocumb*, 336 S.C. 619, 641, 521 S.E.2d 507, 519 (Ct. App. 1999) (noting report relied upon in an opinion "was not admitted for the truth of the matter asserted" but "as a basis of

their opinions as permitted under Rule 703, SCRE"). There is *no* evidence presented within Dr. Gur's testimony establishing any level of dysfunction.[12]

Fifth, Dr. Gur also admitted that the hospital radiologist's reading of the MRI he had worked with reflected it was within normal limits, *i.e.*, no acute abnormality; however, that was due, according to Dr. Gur, to the fact that his testing shows much more subtle signs of structural irregularities. Dr. Gur admitted that though he considers his results "to show abnormalities indicating moderate to severe brain dysfunction," that description still refers to his observations on subtleties, not gross abnormalities. Further, Dr. Gur admitted that under the principle of "brain reserves," an individual can lose a portion of volume and the brain would adjust so that there was no negative impact on day to day living at all.

Sixth, Dr. Gur also admitted that the DSM-5 has a separate caution, which he agreed with, that "a diagnosis does not carry any necessary implication regarding the etiology or causes of the individual's mental disorder or the individual's degree of control over behaviors that may be associated with the disorder." Yet, in sentencing, the fact-finder considers the circumstances of the crime and the characteristics of the defendant. *See, e.g., Bowman v. State*, 422 S.C. 19, 37, 809 S.E.2d 232, 242 (2018). Dr. Gur failed to consider the facts of the crime. This weakness in the testimony is especially telling where Dr. Gur indicated his calculations reflected that the frontal lobe would have been unable to regulate "primitive emotional impulses emanating from the

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[12] Similarly, Dr. Gur cannot himself read and interpret the scans as he is not a radiologist or a neuroradiologist. Dr. Gur admitted that Dr. Newberg read and interpreted the scan, and, though Dr. Gur would "vouch" for Dr. Newberg, Dr. Gur could not tell the Court anything about the accuracy of the reading and/or interpretation based on his own personal knowledge. However, since a scan is not used to diagnose neurocognitive dysfunction, even had Dr. Newberg testified, it would not have changed the analysis here as there would still be no scientifically or medically acceptable evidence of neuropsychological dysfunction from his testimony regarding scan interpretation alone.

amygdala" which he described as having "weak brakes" to control impulses. However, according to the state's evidence, the crime was planned with Applicant arranging transportation to Rebekah Winkler's home, forcing his way into the home, assaulting her son, then shooting Rebekah with a gun that he had lifted from someone else at some point prior to putting his murderous plan in action. Alternatively, to believe Applicant's story, *he did nothing impulsively in the shooting* – the gun discharged in her face at point blank range as he was startled by someone else coming up behind him. Still, there is no evidence of uncontrolled primitive impulse.

The impulse argument has other limitations. Dr. Gur admitted that the control feature that may correlate to the brain structure identified would not be so narrow as to apply only to domestic violence and partner control. Yet, here, there was history. Dr. Gur admitted that he was not aware of Applicant's long history of spousal and partner abuse from his first marriage forward. *See Smith v. State,* 170 So. 3d 745, 753 (Fla. 2015) (noting testimony that "disagreed that Smith had a demonstrated impulse control problem, testifying that brain damage to the frontal lobe affects all aspects of a person's life, as opposed to the very narrow circumstances present in Smith's record"); *Eichinger v. Wetzel*, No. CV 07-4434, 2019 WL 248977, at *23 (E.D. Pa. Jan. 16, 2019) (noting Dr. Gur "conceded that the facts of the case demonstrated impulse control, anticipation of negative consequence to behavior, goal formation, an intent to kill, awareness of right and wrong, and attempts to avoid detection" even while opining the scans could indicate areas that would portend the contrary).

In short, Applicant has produced one witness who could not testify as to any properly diagnosed dysfunction; whose opinion is not well grounded in fact, or sometimes in tension with the known facts; and, whose opinion is based more on research then medicine. Though the research steps identified at the hearing are not necessarily incorrect under research standards, the problem

still remains that they are research based, not diagnostic. Dr. Gur's multiple candid concessions limited the efficacy of the offered testimony. *See generally Cone v. Carpenter*, No. 97-2312-JPM, 2016 WL 1274599, at *67 (W.D. Tenn. Mar. 31, 2016) ("the Court finds that the science used by Gur is somewhat unreliable and has limited probative value" as to proof of injury or affected behavior). For this reason, the Court does not find the evidence credible as to "neurological and cognitive impairments and/or dysfunction," (*see* Claim 11(b)(1)), nor, to the extent that Applicant draws a distinction, does it present credible evidence of general "brain damage" as Applicant has argued, (*see* Applicant's Post-Hearing Brief at 1).

Stone is greatly instructive here. Our Supreme Court acknowledges that "[e]vidence showing a brain injury can constitute 'powerful' evidence in mitigation" but its omission does not necessarily equate with counsel deficiency in representation, *i.e.*, counsel is not *per se* deficient in representation during capital sentencing proceedings "simply because [counsel] did not seek neuropsychological testing or neuroimaging.' " *Stone*, 419 S.C. at 398, 798 S.E.2d at 576. In *Stone*, much like here, counsel assembled a team of experts to aid in preparation of the mitigation case:

> ... trial counsel employed several experts and other consultants, including a licensed clinical social worker, a psychologist, and a forensic psychiatrist. None of these professionals advised trial counsel to investigate brain damage. Stone has shown no specific basis for his argument that trial counsel should have realized further testing was warranted.

Stone, 419 S.C. at 401, 798 S.E.2d at 577–78.

Not only is the pattern of retaining and relying on experts strikingly similar, and should be similarly reasonable for investigative steps, the same experienced clinical social worker who aided the defense in *Stone*, TeAnne Oehler, assisted here. Applicant, though, attempts to draw a difference. The attempt misses the mark.

Applicant offered an affidavit from Ms. Oehler in the June 2012 PCR proceedings indicating that she did advise the attorney to obtain a neuropsychologist to evaluate Applicant. (Petitioner's [sic] Exhibit 14). But this does not help Applicant. Trial counsel reasonably consulted with a psychologist and a neuropsychiatrist to investigate, and *those mental health experts did not indicate that neuropsychological testing should be pursued.* (2012 PCR Tr. pp. 367-368). Even Ms. Oehler concedes herself that brain damage was not her area of expertise. (Petitioner's [sic] Exhibit 14). It is only reasonable that counsel would rely on his mental health experts over the suggestion of an investigator who admits a lack of knowledge in the specialized, medical area.[13]

And, as the Supreme Court reasoned in principle in the *Stone* case, the fact that the defense team expert did not advise that further testing was warranted "supports—not undermines—the reasonableness of counsel's decision not to pursue the testing." *Id.*, 419 S.C. at 401, 798 S.E.2d

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[13] Applicant also spends a significant amount of time in his post-hearing brief discussing his allegation that counsel should have known about the possibility of "brain damage" from reports of head injuries and sought "neuropsychological testing." (*See* Applicant's Post-Hearing Brief, at 6-9). As our Supreme Court has observed, counsel at trial "is not permitted to obtain any testing that requires funding until counsel demonstrates to the trial court that such testing is reasonably necessary under the specific facts of the case," citing S.C. Code Ann. § 17-3-50(B) and (C). *Stone*, at 397–98, 798 S.E.2d at 576. As Applicant concedes, though, counsel testified at the prior PCR hearing "that no neuropsychological testing was completed prior to trial because none of his experts thought it was appropriate." (Applicant's Post-Hearing Brief, at 9). While Applicant urges this Court to find counsel was not credible in this assertion in light of Ms. Oehler's assertion, this Court finds the allegation was directly relevant to the *medical* experts, thus, supported by the record and credible. The Court notes in particular that Dr. Halanovich testified at trial that the scans and analysis as Applicant references here "are not used" in diagnosis "at this point." (R. pp. 2690-91). The Court also credits trial counsel's PCR testimony that: "Not only did we want" experts who could testify of brain damage "assuming brain injury was present," "we actually hired experts to examine him for that very purpose...." (2012 PCR Tr. p. 367). As to the "Grand Strand Hospital" records, if they show a clear indication of damage as Applicant's insists (a point on which this Court is highly skeptical, but accepts for the sake of argument and not otherwise), and even it if Dr. Halanovich did not see that particular record or otherwise have knowledge of it, (*see* Applicant's Post-Hearing Brief, at 9 n.5), that does not change the *professional* standards Dr. Halanovich referenced concerning scans and diagnosis. This Court rejects Applicant's arguments to the contrary.

at 578. Applicant's claim attempts to stretch ineffective assistance of counsel to ineffective assistance of an expert – a stretch that is not allowed under the Constitution. The South Carolina District Court came to a similar conclusion as that in *Stone*, in reviewing an analysis by Dr. Gur as offered in a federal habeas proceeding for a different capital defendant:

> Nothing in the record indicates that any of these experts advised counsel to obtain neuroimaging, and Dr. Brawley's evaluation resulted in her concluding that Owens did not have any significant brain dysfunction. *See* ECF No. 16-4 at 18. Sentencing counsel were not ineffective in failing to pursue neuroimaging when none of their experts believed it to be necessary. *See Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003) ("[A] failure to 'shop around' for a favorable expert opinion after an evaluation yields little in mitigating evidence does not constitute ineffective assistance."); *Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir. 1998) ("To be reasonably effective, counsel was not required to second-guess the contents of [their expert's] report. ... [C]ounsel understandably decided not to spend valuable time pursuing what appeared to be an unfruitful line of investigation.") (citation omitted).

Owens v. Stirling, No. 0:16-CV-02512-TLW, 2018 WL 2410641, at *34 (D.S.C. May 29, 2018), *affirmed by Owens v. Stirling*, 967 F.3d 396 (4th Cir. 2020), *cert. denied*, 141 S.Ct. 2513 (2021).

But even if considered "ineffective assistance of expert," and that could somehow blend into ineffective assistance of counsel (which it cannot), Applicant has still not shown the experts were wrong. Again, there seems to be across the board agreement that neuroimaging scans such as those relied upon here are outside the necessary requirements for medical diagnosis. (*See* R. pp. 2690-91). Further, the record before the Court supports that trial counsel enlisted appropriate investigators to provide information to his team, that his team shared information, and that trial counsel depended on his qualified, knowledgeable experts to determine the necessary and proper medically approved diagnostic tests. This Court notes social worker Oehler testified at trial that she had received information, including documents from Grand Strand ER. (R. pp. 2775-76). Carolyn Graham, the mitigation specialist for the defense, averred in an affidavit for the first PCR

hearing that she, with Dorian Hall, "were responsible for working with TeAnne Oehler." (Petitioner's [sic] 10). This supports a sharing of information. Further, Dr. Halanovich's testimony at trial that brain imaging was not used to identify the mental health conditions "at this point," (see R. p. 2691), shows a reason for not requesting scanning, and is in complement to trial counsel's PCR testimony that he relied on the doctors and their professional opinion(s) to direct the tests and steps to take evaluating Applicant.

Further still, Applicant failed to produce any evidence from any of the mental health professionals – Dr. Wade, Dr. Halanovich, in particular – as to their opinions on brain injury or the reason they did not seek imagining and neuropsychological testing. Applicant has the burden of proof and cannot rely on an absence of evidence to suppose or speculate as to what the Drs. Wade and Halanovich found important or not important in their professional opinions. Not of little note is Dr. Halanovich's trial testimony that underscored her reliance on the diagnostic manual – and her testimony *which Dr. Gur agrees was correct* – that professional norms did not require the imagining as presented by Dr. Gur in PCR. In fact, Dr. Gur conceded that the current manual, the DSM-5, that was published *after* trial *still does not* require such imagining. To the contrary, the manual has its own caution against reliance on such imaging at this time.

On careful review, it appears to this Court that Applicant's arguments rest on a melding of concepts. He suggests reports of possible brain injury constitute evidence of brain damage. This is contrary to his expert's own testimony. As noted above, Dr. Gur agreed that head injury – even an injury resulting in a concussion – does not lead inevitably to brain damage. *See also Weisheit v. State*, 109 N.E.3d 978, 987 (Ind. 2018), *reh'g denied* (Jan. 17, 2019), *cert. denied,* 139 S. Ct. 2749, 204 L. Ed. 2d 1139 (2019) (finding "speculative" the offered evidence on injuries where "Dr. Gur admitted that just because someone has hit their head, even multiple times, this does not

necessarily mean they suffer a concussion and further, that even sustaining a concussion does not guarantee permanent brain injury."). *Stone* is illustrative yet again of this additional weakness in Applicant's position.

In *Stone*, our Court reasoned: "The one reference to a head injury—with little evidence as to its severity—is not a sufficient indicator of potential brain damage on the facts of this case to require a finding that trial counsel was deficient in not pursuing further testing." 419 S.C. at 400, 798 S.E.2d at 577. At the January 2020 hearing, Applicant offered another affidavit from former trial mitigation investigator, Carolyn Graham, (the first being Petitioner's [sic] Exhibit 10 from the June 2012 PCR hearing), to establish that a document from Grand Strand General existed and the defense team knew about it. Applicant submitted the affidavit with an attachment of what purportedly, by indication on the documents, were Grand Strand General records. Applicant stated the attachment was only for the purpose of showing the document was obtained and in the defense's possession and not offered for the truth of any matter reflected in the underlying document.[14] Therefore, for its limited use, it is not hearsay. However, if offered simply for the fact of obtaining the documents, that was never in dispute. Reference to such documents was made at trial by the social worker, Oehler. (*See* R. p. 2776). Without more, the document offered in

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[14] This Court had to review the document based on the State's objection and would note that the document obtained is not specific and covers a multitude of general cautions. This logically limits the importance of the information, but, at any rate, Applicant has not shown the document, in and of itself, hearsay or not, would have been important to any of the doctors who testified, or would have led to a difference in the analysis and/or diagnosis or even recommendation of another test. *Compare Von Dohlen v. State,* 360 S.C. 598, 604–05, 602 S.E.2d 738, 741 (2004) (where records available but not shown to expert, and expert "testified that if he had been provided with additional medical and psychiatric records that existed and were available before the trial, he would have diagnosed Petitioner" differently, petitioner was able to show *Strickland* error and prejudice); *State v. Mundt*, 2016 WL 3573169, 2016 Ohio-4082 ("as none of the trial experts were called to testify at the post-conviction hearing, any conclusions regarding what was or was not done, are speculative at best"). *Accord Burt v. Titlow,* 571 U.S. 12, 23 (2013) ("It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.' ") (citing *Strickland,* at 689).

PCR simply does not mean that the investigation into neurocognitive function was in any way incomplete. To the contrary, it shows the document was discovered and known. Further, in light of the trial testimony that the defense team consulted, and trial counsel's PCR testimony that he directed the team members share information, the fact that the document was obtained cuts against Applicant's argument that the mitigation investigation was unreasonable and incomplete.

Thus, having failed to show deficiency in representation, Applicant is not entitled to any relief. No further analysis is required. *Strickland,* 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). Out of an abundance of caution, however, this Court further finds that even if deficiency could be wrangled out of the record, Applicant would still fail to show *Strickland* prejudice.

First, considering Dr. Gur's testimony, the limitations identified above greatly lower credibility and/or potential impact of the testimony on any reasonable sentencer's consideration. The Court gives very little weight to the testimony.

Second, the trial evidence was consistent with the established background and facts. For instance, there is a wealth of evidence showing depression, anxiety and substance abuse which could support the diagnoses given by the doctors as presented at trial. Introducing scans neither supports nor diminishes that evidence. Introducing impulse control from a concept of permanent damage, though, would work to undercut the consistency of the defense presented, which would diminish credibility, and raise a heightened concern of continuing dangerousness. These negatives weigh heavily against any perceived benefit.

Third, the impulse theory is factually inconsistent with Applicant's history, the crime, and his own testimony. Applicant's controlling and abusive behavior toward his romantic partners was well-established, and this was not an impulsive crime that could be explained by a deficiency

in impulse control. Again, returning to the trial record, Dr. Halavonich credibly conceded that the crime appeared "more planned than completely impulsive," noting "he took a gun over there and, and carried it out, it looks as if he planned that particular act...." (R. p. 2692). Dr. Morton testified that he "observed his planning and his decisions to do some of the things he did," and to Dr. Morton, "it did not appear ... that it was rationally thought out, and that it was in his best interest and he was using very good judgment" and expressed some concern that perhaps "his drug use was affecting this thinking process." (R. p. 2741). However, not all planned actions are in one's best interest. That does not make them any less planned. Further, Applicant testified at his trial that the shooting was not impulsive. Applicant testified that another person attempted to shoot him at which time Rebekah was shot. (R. pp. 2508-09; p. 2596). He asserted "the bullet was intended for" him. (R. p. 2510). He also testified that he did not kill Rebekah. (R. p. 2536). Applicant also disputed Rebekah's son's testimony that Applicant shot his mother at pointblank range, a fact supported by the forensics. (*See* R. pp. 2599-2600).

When considering the totality of the evidence available, Applicant has failed to show a reasonable probability of a different result if the inconsistent and speculative evidence offered through Dr. Gur would have been presented at trial. Further, the inconsistent and speculative evidence would be in tension with the well-developed and consistent testimony that substance abuse fueled the anxiety and depression that drove the jealously and violence. And, rather than showing a permanently damaged and dangerous individual, the concept that it was the substances which added "fuel to the fire" and they could be cut off in a structured environment, worked to address and calm any fear of continued future dangerousness. Further still, there was solid evidence presented that the crime, in fact, was not impulsive, and the suggestion that the damage shows an inability to control base impulses simply does not work to explain the circumstances of

the crime. Lastly, the evidence of guilt is overwhelming, but even more pointed to the analysis here, the evidence in aggravation was heavy, not the least of which is (1) an intentional killing to prevent Ms. Winkler from testifying against him in legal proceedings, which itself would be an effort to stop the abuse he inflicted upon her; (2) evidence that he did so after a horrible instance of abuse just five months previously; (3) that he murdered the victim in front of the victim's son, and also endangered the son, actually pointing the gun at the son, a direct witness to Applicant's crime; and (4) attempted infliction of great emotional harm on the victim's daughter, who tried to help the victim free herself from his abuse, writing to the daughter that "had [she] not gotten involved, Victim would still be alive." *State v. Winkler*, 388 S.C. at 582, 698 S.E.2d at 600.

In contrast, Applicant argues that "the jury found only two aggravating factors," (Applicant's Post-Hearing Brief, at 15), thus urging in his offered weighing analysis that the case in aggravation was somewhat limited. Applicant's argument fails as a matter of law. A sentencer in South Carolina capital proceedings does not report specific findings of aggravating evidence for a required formal count and weighing process. *See infra.* p. 8 n. 7. Rather, the sentencer when finding a defendant *eligible* for consideration of death by finding any one or more *statutory aggravating circumstance*, then reviews *all* the evidence without restriction for *actual sentencing.* The statutory aggravating circumstances do not automatically determine the strength of the case in aggravation. *See, e.g., Bellamy, supra; see also Simmons v. South Carolina*, 512 U.S. 154, 162 (1994) (discussing South Carolina's capital sentencing structure: "the State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances"). Again, in considering the totality of the circumstances, as this Court has, Applicant has failed to show a reasonable probability of a different result.[15]

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[15] Applicant also urges this Court to consider the trial mitigation case was "not particularly strong." (Applicant's Post-Hearing Brief, at 15). This Court disagrees having reviewed the trial

However, as explained above, because Applicant failed to show deficient representation, this Court need not go further to deny relief. Applicant has failed to show he is entitled to relief and this Court grants none.

CONCLUSION

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

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and

2. The Applicant must be remanded to and remain is the custody of the South Carolina Department of Correction until such time as his death sentence may be carried out.

IT IS SO ORDERED this 15th **day of** May **, 2025**

Benjamin H. Culbertson

Hon. Benjamin H. Culbertson, Circuit Court Judge
By Special Assignment

Conway, South Carolina.

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record carefully and would note the consistency in the presentation at trial among the experts, and the strong showing on background, enhanced the presentation. Again, the new "impulse" theory remains at odds with that presentation and the remaining facts of record as listed above.