

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Greenville County
G. Edward Welmaker, PCR Circuit Court Judge

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CHARLES CHRISTOPHER WILLIAMS,

Petitioner,

S.C. Supreme Court

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2013-001945

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

1. Did the PCR judge commit error by finding trial counsel made a strategic decision not to present evidence of fetal alcohol syndrome, when trial counsel testified they simply failed to realize and investigate the evidence of fetal alcohol syndrome and would have liked to have had such evidence before the jury?
2. Did the PCR court err by using a harmless error analysis when addressing the solicitor's inappropriate argument, and further by failing to address the vast amount of inappropriate comments the solicitor made in his closing argument?
3. Is the South Carolina Death Penalty statute unconstitutional under Furman v. Georgia, and more importantly, was there an adequate proportionality review done in this case?
4. Was trial counsel ineffective in failing to recognize the Petitioner was a German citizen?
5. Did the Petitioner have a constitutional right to plead guilty and still be sentenced by a jury?
6. Are aggravating circumstances required to be in the indictment?

STATEMENT OF THE FACTS

The Crime

This case involves the planned murder of Maranda Williams on September 3, 2003 by the Petitioner. The record revealed that Maranda and the Petitioner met as co-employees at the Bi-Lo where they both worked. They initially had a dating relationship that lasted about three months. However, Maranda broke off the relationship. Evidence revealed he had previously assaulted the victim on July 16, 2003 at the Bi-Lo and had an appointment with a lawyer on September 3.

On September 3, Maranda came to work at the Bi-Lo arriving around 8:15 AM to begin work at the Deli-Bakery. Shortly before 10 AM, the Petitioner arrived at the store, parked in the fire lane wearing camouflage clothing, a toboggan knit hat and entered the store carrying a .12 gauge shotgun under his left arm. He was carrying ten rounds with him. Williams went to the Deli area and went to the back where Maranda had gone. He proceeded through the area, grabbed her and took her into the deli-office. Two other employees arrived, the store manager and another employee. They attempted to intervene. Instead, Williams pointed the shotgun at them and they left. At that point the store was cleared of all people and the SWAT team arrived and surrounded the store.

The victim placed a call to 911 from her cell phone and she spoke with an operator and described where in the store they were located. The call lasted a period of time until around noon. [Attempts to communicate with the victim and negotiation with the Petitioner were made by the Hostage Negotiator Tony Lee of the Greenville County Sheriff Department. He attempted to get Williams to release her for over one and one half hours.] As revealed in the recorded call, the victim attempted to escape around noon fearing she was to be killed. A struggle ensued with

Williams and her blouse and apron are torn from her and she ran through the deli. The defendant followed her and shoots five times at close range (within 5 to 10 feet), striking her three times in the back and severing her spinal cord as shown on the surveillance video. The SWAT team entered at that point and located the deceased on the floor unable to be revived. Williams is immediately located in the store and arrested. He is taken to the law enforcement center where he is interviewed and gives a statement admitting the crime.

ARGUMENT WHY CERTIORARI SHOULD BE DENIED

- I. The PCR Court reasonably concluded that 2005 counsel were not deficient in their reasonable investigation of Petitioner's mental health and medical issues based upon their receipt of conflicting evidence of whether mother drank alcohol during the pregnancy and an MRI report indicated a normal brain. The defense provided the drinking information to most of their mental health expert witnesses who did not recommend further testing particularly for fetal alcohol syndrome. Counsel reasonably presented evidence of mental illnesses and a troubled childhood. The PCR Court further properly concluded that any omission on counsel's part was not prejudicial under Strickland when there is no reasonable probability that but counsel counsel's failure to further investigate fetal alcohol syndrome, the result of the proceeding would not have been different.

The primary issue in the post-conviction relief hearing was whether the defense team was ineffective in failing to more fully investigate whether Petitioner suffered from a form of fetal alcohol syndrome, particularly partial fetal alcohol syndrome (PFASD). The Petitioner claims that had they more fully investigated the matter in 2005, they would have had evidence available to support an assertion of guilty but mentally ill in the guilt phase (S.C. Code Ann. § 17-24-20) and additional mitigating mental health evidence in support of the existence of brain damage. The PCR Court rejected the showing. App.p. 4202-4214. Viewing the probative evidence in the record supporting the fact-finding of the PCR judge, Respondent submits certiorari is not warranted where the Petitioner has failed to prove that counsel's investigation was deficient in

2005 and additionally, that failed to prove 6th Amendment prejudice under Strickland v. Washington, 466 U.S. 664 (1984).

In the Order of Dismissal, Judge Welmaker made several significant findings of fact in deciding that the 2005 defense team was not deficient in failing to further investigate and present evidence in support of evidence of fetal alcohol syndrome and that Petitioner additionally failed to prove prejudice under the standards of Strickland v. Washington, 466 U.S. 668 (1984). App.p. 4202-4215. In particular, Judge Welmaker found as facts (against some conflicting evidence within the defense team):

1. Trial counsel had evidence that Daisy Huckaby, the Petitioner's mother drank during pregnancy, although she denied drinking during pregnancy to the 2005 defense mitigation investigator. App.p. 4209, 4210.
2. Trial counsel was aware in 2005 that alcohol intake during pregnancy can cause brain damage. App.p. 4210.
3. Trial counsel had evidence that Petitioner suffered some neurological frontal lobe brain damage based upon the neuropsychological testing done by Dr. James Evans, a clinical psychologist. App.p. 4209-10. This information was presented to trial counsel, mitigation investigator Vogelsang and the defense experts. App.p. 4209.
4. "Trial counsel presented this information, in addition to other mitigation evidence to their defense experts." App.p. 4210. These experts in 2005 included Jan Vogelsang as a mitigation expert and forensic social worker, Professor Margorie Hammock, a social historian, Dr. Seymour Halleck, a forensic psychiatrist who testified at trial.
5. Mitigation investigator Vogelsang, generally familiar with Fetal Alcohol syndrome, presented the information she collected about the mother's drinking to trial counsel as well as to defense experts. App.p. 4209.
6. Dr. Robert Richards, a clinical psychiatrist, diagnosed Petitioner with bipolar disorder, citing App.p. 1961.
7. Dr. Seymour Halleck opined that Petitioner suffered from major depressive disorder and obsessive compulsive disorder, citing App.p. 2309.
8. "Dr. Halleck based his diagnosis on an extensive review of Petitioner's background and family history, including defense team's mitigation notes, school records, police records, incident reports, medical records, as well as a four hour interview with Petitioner," citing App.p. 2306. App.p. 4209-10.
9. Dr. Halleck concluded that Petitioner knew right from wrong and **was able, though with difficulty, to conform his conduct to the requirements of law,**" citing App.p. 2318. App.p. 4210 (emphasis added).¹

¹ This testimony removed Petitioner from the possibility of a verdict of "guilty but mentally ill" in South

10. Trial counsel presented evidence of mother's alcohol addiction and her consumption of alcohol during pregnancy. App.p. 4211.²
11. Trial counsel had an MRI done (in 2005) and retained (neurology) expert Dr. Griesemer reported prior to trial that it showed a normal brain. App.p. 4209.
12. Trial counsel did not present evidence to the jury that Petitioner suffered from Fetal Alcohol Syndrome or that he had organic brain damage. App.p. 4208.

Judge Welmaker opined that "considering all of the information it had available and in consultation with its experts, trial counsel developed a cogent strategy to present mitigation evidence - including evidence of mother's alcohol addiction - but also made a strategic decision to not present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (though trial counsel was unable to articulate the reasons for that strategic decision)." App.p. 4210. The PCR Court found that "trial counsel's strategy was to present mitigation evidence regarding Petitioner's troubled childhood and his mental illness, as diagnosed by defense experts." In concluding that 2005 defense counsel was not deficient, Judge Welmaker concluded that: while it is easy in retrospective to criticize an unsuccessful trial strategy, Petitioner has not shown that trial counsel's investigation and presentation fell below the standard required in a PCR action. App.p. 4211.

Carolina because the opinion was that he possess the capacity to conform his conduct to the requirements of law. S.C. Code Ann. §17-24-20 (2014) ("defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in [s]ection 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law"). The difference between guilty and GBMI pertains only to post-sentencing medical treatment. See S.C. Code Ann. § 17-24-70 (2003). State v. Downs, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004). Further, a GBMI determination would not preclude a death sentence. State v. Wilson, 306 S.C. 498, 512, 413 S.E.2d 19, 27 (1992).

2 This is an apparent reference to defense counsel Nettles developing during the guilt phase cross-examination of state witness forensic psychiatrist Dr. Pamela Crawford that Petitioner's mother was an alcoholic for thirty years and that she was intoxicated much of the time that he was a child. App.p. 2180, ll. 3-9. See also App.p. 3292, 3298 (Nettles PCR testimony acknowledging that it was not a surprise and mother's drinking was in the Crawford statements). This 30 years of alcoholism encompassed the pregnancy period. In addition, Professor Hammock also testified that there was drinking surrounding the Petitioner's birth. App.p. 2253, l. 12-16.(emphasis added).

3 1. See App.p. 5036. 2005 MRI Report ("normal MRI if the brain"). Also, App.p. 4857 (Dr. Griesemer's January 27, 2005 Report ("Mr. Williams underwent magnetic resonance imaging . . . of the brain. This demonstrated no structural abnormalities upon my review.")).

Judge Welmaker also found that the Petitioner had not shown prejudice by failing to present evidence of brain damage resulting from fetal alcohol syndrome. The hearing judge found that “trial counsel presented a well-reasoned mitigation defense, which included compelling evidence of Petitioner’s troubled childhood and evidence of Petitioner’s mental illness based on multiple expert opinions.” App.p. 4212. He concluded that it was similar to the settings in Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998) and Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006) equating Williams’s fetal alcohol argument a merely resulting in a fancier mitigation case, having no effect on the outcome of the trial. App.p. 4212-13. In support of his conclusion, Judge Welmaker noted a series of cases from other jurisdictions where evidence of fetal alcohol syndrome was presented and a death sentence still resulted. App.p. 4213-14.

In his appeal before this Court, Petitioner claims the PCR judge erred in concluding that counsel was not deficient in failing to more fully investigate the existence of fetal alcohol syndrome (FAS) as a mitigating factor in 2005 because both counsel made admissions at the hearing that although they knew of mother’s drinking they did not consider or discuss FAS. He contends that the failure to acknowledge trial counsels assertions that they did not consider FAS ignores the testimony and brings into question the entire Order.⁴ Petition, pp. 1, 34. He claims that there was undisputed PCR testimony that the petitioner could not conform his actions to the requirements of law where at trial the Solicitor used disagreement between the trial experts on whether Williams could conform his conduct to the requirements of law. Petition, p. 34. He

⁴ The Order of Dismissal was completed without input from either party. The record shows that that closing statements were made on February 6, 2013 after the completion of the evidence. App.p. 3958-4015. The Petitioner submitted a Post-Hearing Memorandum of Law. App.p. 4017-4167. The Order of Dismissal was filed without receipt of a post-hearing memorandum of law by the Respondent. App.p. 4167.

complains that the PCR Order did not factually address particular issues he presented such as PCR testimony about the Gudjonsson test that Williams was “highly suggestible” to suggest an explanation for his inculpatory responses to Dr. Crawford during her interview; evidence that the trial team’s neurologist (Dr. Griesemer) was hired in January and did not evaluate Petitioner until January 27, 2005 with the trial starting with voir dire February 7, 2005 and was not given additional material from the clinical psychologist (Dr. Evans) which in hindsight suggested to him “greater concerns” about Williams neurological functioning, a need to have fetal alcohol effects ruled out and “noted compelling evidence of problems with judgment and cognitive functioning that might be significant in understanding his actions.” App.p. 4852 (Dr. Griesemer’s September 27, 2012 affidavit).⁵ Petition, p. 34.

In addition, he complained that Judge Welmaker’s order did not address the disabilities that FAS causes which he contends undermined whether the Order gave the effects proper consideration on the impact it would have had upon a jury and its verdict. Petition, p. 35. He contends that Judge Welmaker ignored testimony that there were experts in 2005 who could diagnose and testify about FAS when the Court emphasized in its order that the art of forensic assessment was “hit” or “miss” prior to 2007. App.p. 4203. He claims that the PCR Court ignored that Seattle, Washington based expert, Dr. Novick-Brown, the forensic psychologist who testified in this hearing, had testified in 2004 (in New Jersey) about FAS. App.p. 3805, 3808. Petitioner claims that Judge Welmaker failed to recognize that diagnostic criteria for FAS had been accepted prior to 2005 as claimed and it had been recognized as mitigating evidence in

⁵ In Dr. Griesemer’s affidavit, he states that he was not an FAS expert and never testified about FAS and was not aware of 2004 Center for Disease Control *Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis* (July 2004) until speaking with PCR counsel. App.p. 4852. He confirmed that he had patients with FAS that he follows. App.p. 4852.

Wiggins v. Smith, 539 U.S. 510, (2003) (counsel required to do an investigation of “all reasonably available mitigating evidence”) and Rompilla v. Beard, 545 U.S. 374 (2005) (trial counsel ineffective for failing to adequately investigate evidence of organic brain damage caused by FAS).

The Petitioner further asserts that the PCR court additionally failed in its assessment of Sixth Amendment prejudice under Strickland v. Washington. Petition, p. 36. He contends that the new mitigation case of Partial Fetal Alcohol Syndrome Disorder (PFASD) presented in 2005 as FAS would have undermined the State’s case in aggravation and made him more sympathetic because it would have challenged whether he could control his actions. He claims the PCR Court’s reliance on Jones v. State and Simpson v. Moore were misplaced because he contends that the evidence of FAS and its effects is new diagnosis because the new experts gave “uncontradicted opinions that petitioner had severe cognitive deficits, impulse control problems and could not conform his actions to the law.” Petition, p. 37. He further complains that the PCR court based its assessment on a case survey that found many criminal defendants who presented mitigating evidence of FAS still received the death penalty. Petition, p. 39, n. 6, citing App.p. 4213-14. Petitioner found the analysis flawed because there are cases where counsel had been found to be ineffective for failing to present available evidence of FAS and that many of the PCR court’s cited cases are distinguishable. Petition, p. 39.

Respondent submits that certiorari should be denied based upon Judge Welmaker’s reasonable application of the law and facts.

STANDARD OF REVIEW

“This Court gives deference to the PCR judge's findings of fact, and ‘will uphold the

findings of the PCR court when there is any evidence of probative value to support them.’ ”

Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013). “However, we review questions of law de novo, and ‘will reverse the decision of the PCR court when it is controlled by an error of law.’ ” Id. (quoting Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012)).

Upon appellate review, this court gives great deference to the PCR court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). This court also “gives great deference to a PCR [court's] findings where matters of credibility are involved.” Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010).

To establish deficient performance, a person challenging a conviction must show that “counsel’s representation fell below an objective standard of reasonableness.” Strickland v. Washington, 466 U.S. 668, at 688 (1984). A court considering a claim of ineffective assistance must apply a “strong presumption” that counsel’s representation was within the “wide range” of reasonable professional assistance. Id., at 689. The challenger’s burden is to show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id., at 687. Strickland does not guarantee perfect representation, only a “ ‘reasonably competent attorney.’ ” 466 U. S., at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); see also Gentry, *supra*, at 7.

While the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases may indicate otherwise, these are only guides to reasonableness, not its definition. Bobby v. Van Hook, 558 U.S. 4, 8 & n. 1, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009) (citing Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)) (criticizing the Sixth Circuit for treating the ABA Guidelines as inexorable commands).

Courts apply “a ‘strong presumption’ that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than ‘sheer neglect.’” *Id.* at 790 (quoting Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (per curiam)). In particular, “the decision of which witnesses to call is quintessentially a matter of strategy for the trial attorney.” Boyle v. McKune, 544 F.3d 1132, 1139 (10th Cir.2008). This inquiry into the reasonableness of counsel’s decisions is an objective one; even if additional evidence could have supported a defense argument, courts are not supposed to find ineffective assistance on that basis if they “conclude that a competent attorney might elect not to use it.” Harrington, 131 S.Ct. at 789 (emphasis added).

An inadequate investigation of mitigating evidence may cause counsel’s performance to fall below an objective standard of reasonableness. Williams, 529 U.S. at 395–96, 120 S.Ct. 1495. “Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.” Wiggins, 539 U.S. at 533, 123 S.Ct. 2527. Rather, the inquiry focuses on whether “‘reasonable professional judgments support the limitations on investigation.’” *Id.* (quoting Strickland, 466 U.S. at 691, 104 S.Ct. 2052). This includes consideration of “whether the known evidence would lead a reasonable attorney to investigate further.” *Id.* at 527, 123 S.Ct. 2527. In addressing the prejudice caused by the failure to conduct a competent investigation, the fact that counsel employed a reasonable mitigation theory is irrelevant. Sears v. Upton, 130 S.Ct. 3259, 3265, 177 L.Ed.2d 1025 (2010) (per curiam).

With respect to prejudice, a challenger must demonstrate “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.” Id., at 694. It is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding.” Id., at 693. Counsel’s errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id., at 687. Strickland asks whether it is “reasonably likely” the result would have been different. Id., at 696. The likelihood of a different result must be substantial, not just conceivable. Id., at 693. Harrington, supra. The existence of “some mitigation evidence,” true enough, does not “foreclose an inquiry into whether a facially deficient ... investigation might have prejudiced the defendant.” Sears v. Upton, 130 S.Ct. 3259, 3266 (2010).

In the capital sentencing context, to assess prejudice, “we reweigh the evidence in aggravation against the totality of available mitigating evidence.” Wiggins, 539 U.S., at 534, 123 S.Ct. 2527. The critical question is whether “there is a reasonable probability that at least one juror would have struck a different balance” in weighing the evidence for and against sentencing the defendant to death. Wiggins, 539 U.S., at 537, 123 S.Ct. 2527

ANALYSIS

Notwithstanding the new evaluations set forth below from the FASDexperts.com group, the PCR Court reasonably concluded that Williams cannot show deficient performance by trial counsel. In light of the reasonable investigation conducted by trial counsel, including retention of appropriate experts, and development of a sound mitigation strategy, Williams cannot overcome the “strong presumption” of effective representation. Strickland, 466 U.S. at 689, 104 S.Ct. 2052. Williams has not shown that based on the information available to trial counsel in 2005, the failure to further investigate further neuropsychological deficits and the etiology of the alleged

brain damage from mother's drinking was unreasonable. This is not a case in which trial counsel failed to investigate a category of mitigating evidence, see Wiggins, 539 U.S. at 523–24, 123 S.Ct. 2527; Williams, 529 U.S. at 395–96, 120 S.Ct. 1495, or failed to take even basic steps to investigate, see Rompilla, 545 U.S. at 382–84, 125 S.Ct. 2456 (trial counsel failed to examine defendant's court file or prior conviction despite knowing prior convictions were a basis relied on by state to impose the death penalty). Nor was the expert team appointed too late to provide meaningful benefit to the case.

Trial counsel's duty is to retain qualified experts and provide those experts with relevant information; once appropriate experts are retained, determining what specific tests to perform may be properly left to those experts. "It was clearly within the 'wide range of professionally competent assistance' for defense counsel 'to rely on properly selected experts.'" quoting Harris v. Vasquez, 949 F.2d 1497, 1525 (9th Cir.1990) (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052))). Williams's implication that trial counsel should have specifically directed the retained neuropsychologist to look for fetal alcohol deficiencies is unavailing. Similarly, failure to retain an expert team specializing in FAS in 2005 for the specific purpose of opining on whether Williams possessed a fetal alcohol effects does not render counsel's performance deficient where the medical expert who were retained did not recommend that action to Petitioner's counsel (Dr. Halleck, Dr. Richards, Dr. Evans) or may have possessed the ability to make such a diagnosis as a psychiatrist. Failure to micro-manage the mental health and medical testing performed by experts is different in kind from failing to provide those experts with information needed to conduct their evaluations, which would constitute deficient performance. Cf. Wallace v. Stewart, 184 F.3d 1112, 1116 (9th Cir.1999) (noting counsel's "professional

responsibility to investigate and bring to the attention of mental health experts ... facts that the experts do not request"). Here, based upon the findings of the PCR Court, the defense team, through the mitigation investigator provided the experts (except apparently Dr. Griesemer) with information concerning mother's drinking during her pregnancy with the petitioner.

What Defense Counsel Learned in 2005

In any ineffective assistance analysis, the critical question goes initially to the reasonableness of counsel's efforts at the time of trial from counsel's perspective. Here, it is reasonable to conclude, as expressly found by the PCR court, that based upon mitigation investigator Jan Vogelsang's factual investigation, combined with the mental health testing done by the defense experts and their opinions with the knowledge of the drinking that they received from Vogelsang, counsel had an awareness of the issue and reasonably chose not to further pursue it at trial.

The critical failing in the Petitioner's PCR presentation was shown by the credible testimony of Jan Vogelsang, the mitigation investigator and social worker who frequently testifies in capital cases for the defense. Ms. Vogelsang gave the defense a unique perspective as a mitigation investigator because her background allowed her to be uniquely sensitive to issues of fetal alcohol syndrome and the damaging effects of a mother drinking during pregnancy.

However, Ms. Vogelsang stated that she was not surprised that fetal alcohol syndrome evidence was not presented in the 2005 trial after the discussions she had with the defense team and defense experts about the mother's drinking issue. App.p. 3247; PCR Tr. p. 73, ll. 11-24. She stated that she felt that fetal alcohol syndrome issue had a mixed picture because it was a challenge to distinguish between the signs and symptoms. She stated that in 2005 there was a

significant amount of information to support FAS, but at the same time the schools that had evaluated Williams showed there was a tremendous amount of conflict and violence in the Williams' home. App.p. 3248; PCR Tr. 74. Vogelsang noted the FAS issue was confused by the fact that the schools diagnosed Williams as learning disabled (LD) and then took the diagnosis back, that Dr. James Evans was not recommending a MRI brain scan. In addition, Vogelsang found that there was a lack of reliable resources with reliable information. App.p. 3248; PCR Tr. 74. She noted that the father, Dwight Williams, was "very unstable" and the sister was also unstable. Vogelsang noted that she personally believed that Daisy drank during pregnancy (although the mother denied it to her), but she was concerned about the instability of the reporters of her drinking. App.p. 3248-49; PCR Tr. 74-75. Although she admitted she was not an expert in FAS, she provided all she had concerning the pregnancy drinking to the experts. App.p. 3249; PCR Tr. 75.

What Vogelsang Learned in 2004 and 2005 and Presented to the Defense and the Experts

There is probative evidence to support the PCR Court's finding that the possibility of fetal alcohol syndrome issues about the mother's drinking were presented to mitigation investigator Vogelsang and that she presented the issue to both defense counsel and their experts according to her credible testimony.

Ms. Vogelsang, a clinical social worker with a MSW and board certified is published in a book, "The Witness Stand" concerning testifying social workers. App.p. 3187; PCR Tr. 13. Although she had testified in a number of prior capital cases as a clinical social work expert, this was one of her first cases as a mitigation investigator. App.pp. 3189-90, 3193; PCR Tr. 15-16, 19. She clarified that her role as an investigator differed from her social work role. App.p. 3191-

92; PCR Tr. 17-18. She opined that a mitigation investigator should never testify at trial because they gain both good and bad information concerning the client. App.p. 3192; PCR Tr. 18.

Vogelsang testified that she interviewed Dwight Williams, the Petitioner's father, March 18, 2004. App.p. 3206; PCR Tr. 32 (Applicant's Exhibit 7).⁶ She noted that he told her that his wife drank during her pregnancy with Petitioner. App.p. 3206; PCR Tr. 32. She also noted in a summary she made that "Chris was born to a mother who smoked and drank during pregnancy." App.p. 3206-07; PCR Tr. 32-33. See (Applicant Exhibit 8, #2) (App.p. 4269).

Vogelsang stated she also spoke to the Applicant's older sister, Maureen.⁷ She reported in her notes of that interview that "Daisy drank everything and smoked during pregnancy. Both parents drank and smoked pot." App.p. 3207; PCR Tr. 33. See (Applicant's Exhibit 9, ¶4) (App.p. 4270).

In assessing the information she received, Vogelsang prepared a document as attorney work product, styled "Preliminary Accumulation of Harmful Risk Factors." Applicant's Exhibit 10. Within these factors, including:

- Mother drank and smoked during pregnancy
- Parents were violent and drank, smoked pot and fought daily
- Early learning problems
- Developmental delays

App.p. 4271 (Applicant's Exhibit 10). These were among the 22 harmful factors she categorized. Vogelsang stated that she would have had this list prepared prior to a meeting with

⁶Dwight Williams testified at the sentencing hearing. ROA 2208-2219.

⁷Maureen Bangcuyo testified at the sentencing proceeding. ROA 2328-2351.

counsel so everyone on the team knew what she was discovering. App.p. 3209; PCR Tr. 35. She said the meeting she presented these risks factors occurred shortly after it was created. App.p. 3209; PCR Tr. 35.

Vogelsang had also prepared a list of the “themes” she saw in her investigation. See Applicant’s Exhibit 11 (App.p. 4272). Among the themes she developed were:

- Alcohol and drug use by parents
- Mental illness in family
- Developmental delays regarding relationships, maturity, emotions
- Learning disabilities

App.p. 4272 (Applicant’s Exhibit 11). App.pp. 3209-10; PCR Tr. 35-36. Vogelsang was unequivocal in declaring that the factor about “drinking through pregnancy” was provided to the defense lawyers, along with the other factors. App.p. 3210; PCR Tr. 36. Vogelsang stated that she had records that the mother, Daisy Huckaby, had alcoholic problems even after the crime took place and her interviews with her. App.p. 3211; PCR Tr. 37.

Critically important, Vogelsang testified that fetal alcohol syndrome remained a risk factor throughout the investigation and was not eliminated. App.p. 3211, l. 13-19; PCR Tr. 37.

Vogelsang testified that Williams was initially referred to Dr. James Evans, a neuro-psychologist, for testing on August 4, 2004. App.p. 3212; PCR Tr. 38, Applicant’s Exhibit 12 (App.p. 4273-74). Vogelsang emphasized that Dr. Evans opined that while Williams had an average IQ, there was a 15 point split between the verbal and performance sections. [I.Q. 99 - Verbal 105, Performance 90]. Dr. Evans advised her he felt this was consistent with his school records. He further opined that there was a math disability, but that his listening comprehension

tested as normal, even though his school records showed a listening comprehension problem. App.p. 3212; PCR Tr. 38. Importantly, Dr. Evans opined to the defense investigator that his neuropsychological testing showed an indication of "**mild brain damage**", which could account for the split between verbal and performance. Dr. Evans also found an indication of "parietal cortical area" impairment that could account for the arithmetic disability (an indentation in the head which may have resulted from a hammer blow at age 4 or 5). Additionally, he found "parietal impairment" on the Tactual Performance Test. Further, he found "frontal lobe damage" with rigid thought and some impulsivity. App.p. 3212-13; PCR Tr. 38-39.

In Dr. Evans' opinion to the defense, there was a psychiatric/personality component to the Applicant's behavior. He theorized that Williams was depressed prior to the crime, that the victim was a blend of his parents, "a liar and a drunk", that he was not thinking straight, that he thought he would go out by getting shot, and that he did not plan on her grabbing the gun or wrestling on the floor with her. App.p. 4274; Applicant's Exhibit 12. In her August 25, 2004 notes concerning the August 2, 2004 interview with Dr. Evans, Vogelsang noted:

The frontal impairment could contribute to the mild brain damage combined with a psychotic depression. He was obsessed with Mandy and extremely stressed. The rigid thinking and impulsivity affected his reaction.

Dr. Evans did not recommend a MRI or CT or EEG.

App.p. 3213; PCR Tr. 39, Applicant's Exhibit 12, p. 2 (App.p. 4274).

In her notes of an interview with Dr. Evans dated 9/7/2004, Vogelsang wrote that he opined on the Tactual Test a big problem concerning the right hand versus left hand and that it took longer with left hand and the Williams had a "slow start" with "three trials to catch on - as though no corpus callosum." App.p. 3215; PCR Tr. 41, Applicant's 12 (App.p. 4278).

Vogelsang speculated that this meant no transfer of information from one side of brain to the other. App.p. 3215.

Vogelsang noted Dr. Robert Richards had testified at the trial that Applicant was bipolar, with secondary impulsivity. App.p. 3216; PCR Tr. 42. See App.p. 1965, 1977.⁸ Vogelsang also recalled an email she sent to Mauldin on August 26, 2004 concerning Dr. Rob Richards. App.p. 3217; PCR Tr. 43, Applicant's Exhibit 13 (App.p. 4303). [Counsel emphasized that contrary to Dr. Evans, Dr. Richards wanted a MRI done immediately]. App.p. 3217-18; PCR Tr. 43. Vogelsang reported to Mauldin and she told him that there was a little brain damage from parietal to frontal, and that he wanted to see the QEEG concerning an issue of brain deterioration. App.p. 3213-14; PCR Tr. 39-40. She noted that Dr. Richards wanted birth records to get the circumference of the Petitioner's head at birth and his school records. App.p. 3218; PCR Tr. 44.⁹ [It was noted that MRI results were not completed until January 27, 2005. Applicant's Exhibit 24. App.pp. 3220-21, 5036].

Vogelsang further described her relationship with Dr. Hammock, the forensic social worker who actually testified. She stated that she provided Dr. Hammock with documents to tell the story of the Petitioner's life. She stated she consulted with Dr. Hammock right up until she

⁸At trial, Dr. Richards also testified he also had obsessive compulsive disorder. ROA 1967. He stated that according to hospital records, his mother had several suicide attempts and alcoholism. ROA 1978, l. 13-20. He stated that there was a high genetic disposition for mood disorders. Id.

On cross-examination during the guilt phase, Dr. Richards clarified that he was not saying the Williams was insane. He initially stated that he believed that Williams knew the difference between right from wrong on September 3, 2003, but was "not sure" he was able to conform his behavior to the requirements of law. ROA 1992, l. 14-21. However, he then clarified he was not saying that he couldn't conform his behavior on September 3, 2003 to the requirements of law. ROA 1993, l. 14-20. ("I never said that"). He admitted that he had read Dr. Crawford's report that he was able to conform his conduct to the requirements of law on September 3, 2003. ROA 1994, l. 3-9. [NOTE - Dr. Halleck stated that he was specifically not of the opinion the he could not conform his behavior, only that it was somewhat impaired. ROA 2319.

⁹ Dr. Richards testified at trial that he eventually got everything that he wanted when asked if there was any other information that he wanted that he could not get. ROA p. 1972, l. 1. Also, ROA 1971, l. 2-9.

was prepped by Mauldin and testified. App.p. 3223; PCR Tr. 49. Vogelsang stated that most of the PCR exhibits she had testified about were provided to Dr. Hammock. App.p. 3224; PCR Tr. 50. She stated the same information through consultation, the expert taking notes, taking the expert to visit the family members, and going through the documents. Vogelsang stated Dr. Hammock was provided with medical, mental health and psychiatric records. App.p. 3224; PCR Tr. 50.¹⁰

Particularly, Vogelsang stated that she told Dr. Hammock that she had learned from a daughter and the father (but not from the mother) that the mother drank during her pregnancy. App.p. 3225; PCR Tr. p. 51, ll. 1-4. Vogelsang stated that this was important information to share with the social worker because it is one of the criteria for Fetal Alcohol Syndrome. She said this was important information concerning the drinking during pregnancy to share with counsel and the social worker. App.p. 3226; PCR Tr. 52.

Importantly, in addition to the attorneys and the social worker, Vogelsang is confident that she shared the information with the other experts with both Dr. Evans and Dr. Richards. App.p. 3226; PCR Tr. 52. She thought alcoholism was one of the most important factors. Id.

Vogelsang stated that she had become aware of the existence of fetal alcohol syndrome long before her involvement in the Williams case. App.p. 3227; PCR Tr. 53. She described her

¹⁰Dr. Hammock testified that Daisy was described as a good mother while in Germany. ROA 2252, l. 11-12. However, she stated that after they moved to South Carolina things began to change. "There was a lot of drinking and use of marijuana." ROA 2252, l. 18-22. Also she testified that there was great use of drinking and drugging. ROA 2253.

In describing the circumstances surrounding Chris's birth, Dr. Hammock testified:

A. Well, as I indicated, there was a great deal of conflict going on in the home, and **there was drinking.** . .

ROA 2253, l. 12-16.(emphasis added).

work as a social worker in Los Angeles and her understanding of the developmental delays that had occurred from a mother's drinking and drug use. App.p. 3227; PCR Tr. p. 53, ll. 11-25. She had become certified in "alcohol and drug use" which included FAS. App.pp. 3227-28.

Vogelsang stated that in her prior (and present) work to determine the existence of FAS she would seek out reliable witnesses, anything in documents, a discussion with the mother about her drinking, and the details about the amount and frequency. Further, she would look to school and medical records for patterns consistent with FAS, including learning disabilities, impulsivity, facial features, and ADHD, among others. App.p. 3228-29; PCR Tr. 54-55. She stated in Williams case, she was sensitive to the potential of FAS and sought to highlight those areas for the social worker and defense experts. App.p. 3229; PCR Tr. 55.

Concerning factual development of the FAS issue, Vogelsang stated she asked the father about whether his wife drank while pregnant. App.p. 3229-30; PCR Tr. 55-56. Concerning the extent of his wife's drinking, she stated Dwight Williams was unable to provide any details. App.p. 3231; PCR Tr. p. 57, l. 8. He was only able to tell her he had seen her drinking when she was pregnant with Chris. "I was not able to get from him how frequently, how much, the typical things you ask."¹¹ App.p. 3231; PCR Tr. p. 57, ll. 11-14.

Contrary to Daisy Huckaby's PCR testimony, Vogelsang stated she interviewed her and asked her about her drinking during the pregnancy. Contrary to Daisy's new alleged revelation, Daisy told Vogelsang that she did not drink during the pregnancy. App.p. 3231; PCR Tr. p. 57,

¹¹ Vogelsang's testimony is also in sharp conflict with Dwight Williams PCR testimony. Unlike his 2004-2005 responses (or lack thereof) to Vogelsang's inquiries, Dwight Williams now claimed at the PCR hearing to be able to recall drinking a specific brand and type of wine (Carlo Rossi) which he referred to as a Petri burgundy wine. PCR Tr. 253-54. He stated his wife drank at least 3 to 4 glasses every night. App.p. 3428; PCR Tr. 254. He claimed they had the same level of drinking throughout. PCR Tr. 258. He claimed to tell Vogelsang the same thing. App.p. 3431; PCR Tr. 257.

ll. 18-24. Vogelsang stated that she tried to get Daisy to confirm her drinking during pregnancy, but was not able to get the information.¹² App.p. 3232; PCR Tr. 58. [At the PCR hearing, Daisy Huckaby claimed Vogelsang never asked her about her drinking. App.p. 3416-17; 3422-23; PCR Tr. 242-43, 248-29].

Vogelsang described her interview with Maureen, the Petitioner's older sister. She described to Vogelsang witnessing her mother drinking while she was pregnant. However, she was unable to describe what her mother was drinking or the amount. App.p. 3233; PCR Tr. 59. [In addition, she described her father beating the mother "many times" during the pregnancy.] App.p. 3233; PCR Tr. 59.¹³

Vogelsang was again unequivocal that she would have shared this information with the other experts. App.p. 3234; PCR Tr. 60. She described her normal procedure upon receipt of the information and referrals that she makes in her practice.

Vogelsang stated that she also remembered a specific conversation she had with Dr. Seymour Halleck, the defense expert psychiatric witness in the penalty phase, concerning the mother's drinking. App.p. 3235; PCR Tr. p. 61, ll. 14-22.¹⁴

¹² At the PCR hearing, Daisy testified that she was not aware it was wrong to drink during pregnancy when she had the Applicant. App.p. 3413; PCR Tr. 239. She claimed to not hide the fact she drank during the pregnancy. She claimed to drink 4 to 5 glasses of wine, sometimes more each night. App.p. 3414; PCR Tr. 240. She confirmed it was Carlo Rossi. She noted she bought a bottle every other day. App.p. 3416; PCR Tr. 242. She claimed Vogelsang never asked her about her drinking. App.p. 3416-17, 3422-23; PCR Tr. p. 242, ll. 10-14, p. 243, 248-29. She said she sometimes "went overboard" on her drinking on the weekends.

¹³ At the sentencing proceeding, Maureen Bangcuyo testified that her memories while they lived in Germany (before Applicant was born) had constant violence. "The violence and the alcohol every night, gallons gone in weeks, drugs, you know." ROA 2331, l. 23-25.

¹⁴ At the sentencing proceeding, Dr. Halleck testified upon examination from Mark MacDougall, that he had reviewed information about Williams background and history, including "some mitigation notes made by the defense" (ROA 2306, l. 12-14). In describing his mother, Dr. Halleck noted that according to the Applicant, the parents were involved in dishonest ventures that she wanted Williams to become involved in, including simulating injuries in order to sue various establishments. ROA 2308. Dr. Halleck also testified that he concluded only that

Vogelsang stated that she reviewed her accumulation of risk factors with everyone she talked with. She stated that the risk factors remained the same throughout the trial preparation, including that mother drank during pregnancy. App.p. 3237; PCR Tr. 63.

Vogelsang stated that Dr. Evans reported frontal lobe damage. App.p. 3243; PCR Tr. 69. She recognized that this was an organic factor which was reflected in the reports she provided to counsel and the experts. App.p. 3244; PCR Tr. 70. Vogelsang confirmed that organic problems of the brain can arise from multiple areas of situation. App.p. 3245; PCR Tr. 71.

Vogelsang testified that she acquired the Petitioner's school records, and attempted to acquire the medical and mental health records of the parents, Maureen, and his uncle. App.p. 3245-47; PCR Tr. 71-73. She stated that she tried to acquire family mental health records of the family because there was something significant happening and something was wrong in the family:

But at the same time any impact of Fetal Alcohol was still important to me if I could get the mother talking about drinking. ...

App.p. 3246; PCR Tr. 72. She wanted to confirm some things from the school records and Dr. Evans' report about the signs and symptoms of his behavior. App.p. 3246; PCR Tr. 72. "The fact that there was mental illness did not eliminate, for me, the possibility that there still might be Fetal Alcohol problems." App.p. 3246; PCR Tr. 72. Concerning birth records, Vogelsang could not recall if she received those, although she attempted and knew there were some problems with hospital in acquiring them. Id.

Williams "capacity to conform his behavior was somewhat impaired" and not that he could not conform his conduct to the requirements of law. ROA 2318-2319. He testified that Williams was having a terrible time trying to conform his behavior to the requirements of law. ROA 2318. Therefore his testimony expressly rejected the concept that he would have qualified for "guilty but mentally ill." See Section 17-24-20.

Vogelsang confirmed that she had multiple conversations with Dr. Evans. She stated she understood that FAS has motor impairments shown in the use of the hand in drawing, so she thought Dr. Evans testing concerning the left hand deficits was important. App.p. 3250; PCR Tr. p. 76, ll. 17-23. She was focused on showing the symptoms of FAS in her reporting. App.p. 3251; PCR Tr. 77.

Vogelsang confirmed that she met with Dr. Hammock "a lot," including many telephone discussions and spending hours in Mauldin's office going over records and information. She testified that she was satisfied that Dr. Hammock understood the themes concerning Williams' life. App.p. 3252; PCR Tr. 78.

On re-direct, she confirmed that they had never ruled out FAS. App.p. 3254; PCR Tr. 80. She speculated that going to Germany in 2005 may have helped her corroborate the mother's drinking at pregnancy. App.p. 3254-55; PCR Tr. 80-81.¹⁵ Vogelsang testified she would have requested a MRI to be done automatically. App.p. 3255-57; PCR Tr. 81-83. Vogelsang said that she told Dr. Evans that she had information that mother drank during pregnancy. App.p. 3257; PCR Tr. 83.¹⁶

THE LAWYERS'S ALLEGED FAILURE TO CONSIDER FETAL ALCOHOL SYNDROME ISSUES .

William Nettles

Counsel Bill Nettles recollection about fetal alcohol syndrome was inconsistent with the

¹⁵ It is unclear who Ms. Vogelsang would be interviewing in Germany concerning the mother drinking during pregnancy with Applicant. The Applicant has not named nor presented any witness connected with Germany who would have supported this speculation about confirming the drinking during pregnancy. Importantly, the Applicant was born December 11, 1982. Daisy was not pregnant with Chris while they lived in Germany. See ROA 2209-10, 2250, 2252-2253.

¹⁶ Vogelsang did not recall speaking with Dr. Griesemer. App.p. 3257-58; PCR Tr. 83-84.

testimony of social worker/investigator Vogelsang. After reviewing the risk factors set forth in Applicant's Exhibit 10, counsel Nettles declared he did not recall any discussion about fetal alcohol syndrome. App.p. 3269; PCR Tr. 95, ll. 1-5. He stated he made no correlation between mother's drinking while pregnant with FAS, but opined there was a correlation between it and showing a less than ideal childhood. App.p. 3269; PCR Tr. 95.

Nettles stated at some point he developed an understanding of FAS, but at the time of the Williams case he has no recall of the FAS issue being raised or rejected by them. He did not recall FAS being discussed with Mauldin and it being on his working "list". He stated he did not recall FAS being ruled in or out. App.p. 3271; 3274; PCR Tr. 97, 100.

Nettles acknowledged that in Applicant's Exhibit 15 that Dr. Griesemer found in his 2005 neurological examination "fine eye gaze nystagmus with movement of the eyes to the left." App.p. 3275; PCR Tr. 101. He further acknowledged that just before the trial, Dr. Griesemer spoke with Nettles about the "subtle neurological findings" he found and "that his testing shows that Chris may be bipolar" and that if brought to him, he would send him to a psychologist to confirm. App.p. 3278-79; PCR Tr. 104-05. This was consistent with their psychological diagnosis which bipolar disorder. App.p. 3279; PCR Tr. 105.¹⁷

Nettles said the team was concerned about Daisy's stress level during the trial. App.p. 3282; PCR Tr. 108. He felt during the trial there was also a concern about her sobriety. App.p. 3283; PCR Tr. 108.

Nettles stated that there was no surprise when Dr. Pam Crawford testified at trial that the mother drank for 30 years. App.p. 3282; PCR Tr. 108. (See App.p. 2180)(Dr. Crawford -

¹⁷

Nettles could not recall why a MRI was not done sooner than January 2005. PCR Tr. 106-07.

mother was an alcoholic for 30 years) (App.p. 2182)(Maureen verified mother unstable and that mother was an alcoholic).

Nettles confirmed that Ms. Vogelsang was present during the team meetings. App.p. 3293; PCR Tr. 119. Nettles clarified that it was the only the specific subject of Fetal Alcohol Syndrome that did not come up in the team meeting "and the subject of her drinking did." App.p. 3293; PCR Tr. 119, ll. 11-18. Nettles denied that there was ever a team meeting to resolve FAS and could not recall the phrase "fetal alcohol syndrome" ever being said. App.p. 3294.

Nettles stated that he felt the mother's drinking during pregnancy was a risk factor revealing a poor environment. App.p. 3294; PCR Tr. 120. However, he said he did not see a correlation between drinking and FAS at the time of the earlier trial preparation. Although the fact she drank while pregnant came up, Nettles expressly disputed that there was any discussion among the defense team that the drinking would lead to FAS. App.p. 3294; PCR Tr. 120.

He stated that Dr. Evans' report was discussed during the meetings, but did not recall a team meeting with Dr. Evans being present. App.p. 3295; PCR Tr. 121.

Nettles acknowledged his awareness of the A.B.A. guidelines and that they make a reference to Fetal Alcohol Syndrome. App.p. 3295; PCR Tr. 121. Nettles stated he was involved in decisions concerning the breadth of the testimony of the experts, Dr. Richards, Dr. Hammock, Dr. Elbogan and Dr. Halleck. App.p. 3296; PCR Tr. 122. He stated they called Dr. Richards in the guilt phase to introduce the jury with the fact that there were psychological issues in the case before they got to the penalty phase. App.p. 3296-97; PCR Tr. 122-23. He thought it was important based upon the testimony and questioning of Dr. Crawford. App.p. 3297; PCR

Tr. 123.

Nettles stated that while he had no independent recollection of discussions about mother's drinking while pregnant with the experts, he opined that it was not something they would have hidden from them because "it's bad to drink when you're pregnant." App.p. 3298; PCR Tr. 124. He felt it was brought up and it was in the statement [the Applicant's statement to Dr. Crawford] and "we certainly didn't run from it." App.p. 3298; PCR Tr. 124.

Nettles stated that while Dwight and Maureen were called at trial, the mother was not called to testify "because we had concerns about her willingness to tell the truth." App.p. 3304; PCR Tr. p. 130, ll. 12-15.

Counsel Nettles stated that if they had a diagnosis of guilty but mentally ill, they would have used it in the guilt phase. App.p. 3310; PCR Tr. 136. However, he did not recall that Dr. Halleck testified that Williams did not meet the definition of GBMI and that Dr. Richards testified that he was not saying that Williams could not conform his conduct to the requirements of law on September 3. App.p. 3319; PCR Tr. 145. See App.pp. 2318-19 (Dr. Halleck testified that his capacity to conform was substantially impaired, not that he couldn't conform his behavior to the requirements of law), App.p. 1993 (Dr. Richards testified that he is not saying he couldn't conform his behavior on September 3 to the requirements of law). Counsel stated that this was a case that he couldn't get his hand around because things just weren't right. App.p. 3312; PCR Tr. 138.¹⁸

¹⁸The Petitioner introduced at the hearing a September 12, 2012 affidavit of Dr. Griesemer that included a reference that in 2005 he was not made aware of the mother drinking during pregnancy and if he had, he would have referred the team to investigate FAS or at least rule it out. App.p. 3316; PCR Tr. 142, Applicant's Exhibit 24 (App.p. 4521-22). In the statement, Dr. Griesemer confirmed that he was not an expert in FAS. He stated with the additional information from Dr. Evans, he would have expressed greater concerns about the neurological functions and compelling evidence of problems with judgment and cognitive functioning. App.p. 3316-17; PCR Tr. 142-43.

John Mauldin

Counsel John Mauldin's PCR testimony was similar to Nettles. App.p. 3319 – 3383; PCR Tr. 145-209. He testified that he had handled close to a dozen capital cases to verdict and prepared three times as many after a death notice. App.p. 3320-21; PCR Tr. 146-47. He confirmed that he had hired Jan Vogelsang as a mitigation investigator as a fact-finding person for mental health records, family tree, and everything that goes into mitigation. App.p. 3323; PCR Tr. 149.

Concerning the risk factors summary made by investigator/social worker Vogelsang, Mauldin stated that if Ms. Vogelsang said she gave it to them, including the particular factor that mother drank and smoked during pregnancy, then she gave it to them. App.p. 3331; PCR Tr. p. 157, ll. 3-5. Mauldin stated that drinking during pregnancy is a red flag regarding Fetal Alcohol Syndrome. App.p. 3331; PCR Tr. 157. He said that Fetal Alcohol Syndrome has become more common today and that he knows more about the concept now than he did eight (8) or nine (9) years ago. App.p. 3332; PCR Tr. 158. However, Mauldin was unable to state why it was not a red flag to him for FAS in 2005. App.p. 3332; PCR Tr. 158.

Mauldin acknowledged that the risk factor of mother drinking during pregnancy was a flag regarding the potential for organic brain damage. App.p. 3333; PCR Tr. 159. He said in his cases one of the things that he would want to be conscious of is brain damage. App.p. 3333; PCR Tr. 159. He confirmed that if he had pictures of brain damage and potential evidence to support guilty but mentally ill, he would have put that in the trial phase. He stated this was why they called Dr. Richards in the first place. App.p. 3334; PCR Tr. 160. He confirmed that Vogelsang's notes included information about Dwight saying his wife drank during the

pregnancy and would have been provided to him if Vogelsang said so. App.p. 3335; PCR Tr. 161. See Exhibit 12. He stated that her report of Dr. Evans testing results indicated mild brain damage. App.p. 3336; PCR Tr. 162. However, Mauldin admitted that the particular reference to a test indicating that Petitioner tested in one test “as though he had no corpus callosum,” did not have any meaning to Mauldin, unless someone told him what it meant. App.p. 3337; PCR Tr. 163.

Mauldin stated that he would normally talk with Dr. Evans about the initial indicators in his testing. He stated he was surprised at the time of the hearing by the reference in Vogelsang’s notes about no MRI (or other testing). App.p. 3337-38; PCR Tr. 163-64.

Mauldin stated that he was aware at trial of the mild brain damage conclusion, but was unaware whether any finding would have been inconsistent with a FAS finding. App.p. 164; PCR Tr. 164. Concerning Dr. Richards’ requests (Exhibit 13), Mauldin stated he would have seen that there was a request for some additional testing that was not done at that point. App.p. 3340; PCR Tr. 166. He stated the MRI testing was not done until a week before trial (in January 2005). However, Mauldin noted that both Dr. Evans and Dr. Richards were stating matters related to brain damage. App.p. 3341; PCR Tr. 167. He could not clarify why a MRI was not done until January 2005. App.p. 3342-43; PCR Tr. 168-69. Mauldin could only state that Dr. Evans had asked to not do a MRI. App.p. 3343; PCR Tr. 169. At some point in early January, the defense team found a need to get a MRI done. App.p. 3344; PCR Tr. 170. When the MRI was done, the report noted some minor neurological, and recommend going to a psychologist, which had been done earlier with Dr. Evans. App.p. 3345; PCR Tr. 171.

Concerning his pre-trial checklist, Mauldin stated that they were prepared for team

meetings with the investigator. He noted on his checklist, there was a reference to brain damage. App.p. 3347; PCR Tr. 173. However, he stated that if they had discussed Fetal Alcohol Syndrome, it would have been on a checklist either typed or handwritten. App.p. 3347; PCR Tr. 173.

Mauldin stated, "as extraordinary as it seems," he had no explanation for not having a follow-up discussion or inclusion on the checklist of either mother drinking during pregnancy or FAS. App.p. 3348; PCR Tr. 174.

Counsel stated his pattern practice was to have Dr. James Evans to do a neuropsychological analysis to determine clues and directions for the defense. App.p. 3352; PCR Tr. 178. He confirmed the purpose of the assessment was to determine brain damage and other area. Although Dr. Evans found the existence of mild brain damage, he was not called as a witness. App.p. 3353; PCR Tr. 179. Mauldin said his intention in retaining Dr. Evans was not to be a testifying witness. App.p. 3354-55; PCR Tr. 180, 181. It was to give a roadmap for the defense investigation with other expert witnesses. He suggested if Dr. Evans found some neurological or organic brain damage indicated the defense would normally seek out a neurologist and have a MRI done.

Mauldin could not explain, even with Dr. Evans' memorandum, why he did not have a MRI done within the first 30 days. App.p. 3356; PCR Tr. 182. However, once the MRI was done prior to trial, it was not presented at trial. App.p. 3356; PCR Tr. 182. Mauldin could not recall if any of the testifying experts were provided the reports or results from the MRI. App.p. 3357; PCR Tr. 183.

Mauldin admitted that the memos reflected that Dr. Richards wanted birth records (that it

appeared they had) concerning the circumference of the head. App.p. 3359; PCR Tr. 185. Mauldin said that he was aware of a correlation between the size of a child's head and FAS. App.p. 3359-60; PCR Tr. 185-86. Although it appeared that Dr. Richards was considering FAS at that time, Mauldin again declared that he missed the FAS connection and had no explanation why he was missing these types of indicators at trial. App.p. 3360; PCR Tr. 186.

On reviewing Exhibit 10 on the risk indicators, he confirmed the presence of developmental delays, early learning problems, in addition to mother drank and smoked during pregnancy, were the types of information that correlates with Fetal Alcohol Syndrome. App.p. 3361; PCR Tr. 187. However, Mauldin confirmed that they were looking for the existence of brain damage and that FAS or fetal alcohol spectrum disorder are symptoms that brain damage exists. App.p. 3362; PCR Tr. 188. He said that the intent would be to show the jury that brain damage exists and the organicity comes from fetal alcohol. App.p. 3362; PCR Tr. 188. Counsel admitted that "brain damage" was on his checklist. App.p. 3363; PCR Tr. 189. He stated, however, that he had reviewed his checklists and could not locate any reference to Fetal Alcohol Syndrome. App.p. 3365; PCR Tr. 191. In addition, Mauldin stated that he looked through his hard files and could not locate it in his notes. App.p. 3365-66; PCR Tr. 191-92.

Mauldin acknowledged that the reports demonstrated that he had been made aware of the mother's drinking during pregnancy. App.p. 3366; PCR Tr. 192. He stated that his normal course would be to have retained a neurologist for a MRI on the FAS issue, but could not explain the delay from September 2003 until January 2005 for the MRI. App.p. 3367-68; PCR Tr. 193-94.

Concerning guilty but mentally ill, Mauldin stated that his experts did not support a

GBMI conclusion that Williams lack sufficient capacity to conform his conduct to the requirements of law, consistent with guilty but mentally ill. App.p. 3373; PCR Tr. 199. Mauldin stated the defense theme was Williams' inability to deal with his break-up with the victim, mixed with his bipolar condition which led to the explosive incident. App.p. 3372; PCR Tr. 198.

Mauldin stated he did not recall going to the experts and discussing mother drinking during pregnancy. Mauldin stated it was unexplainable because when Daisy would come to the office it was obvious that she had a horrible alcohol problem. App.p. 3382; PCR Tr. 208. With that knowledge and the Vogelsang memos, Mauldin could not explain why the additional steps were not taken to look further at FAS. App.p. 3382; PCR Tr. 208.

THE CREDIBILITY QUESTIONS ARISING FROM THE MOTHER AND FATHER'S PCR TESTIMONY RELATED TO DRINKING.

The credibility of the parents recollections concerning the mother drinking while pregnant with the Petitioner was called into question during the pre-trial investigation and preparation. Their testimony at the PCR hearing brought clear evidence of a conflict between Ms. Vogelsang's credible testimony and their testimony concerning the drinking during pregnancy issue.

The Petitioner's mother, Daisy Huckaby testified at the PCR hearing in sharp contrast with Jan Vogelsang's testimony. She testified that was born in Germany. She is still a German citizen. She said that she came to the U.S. in the late 1970's. App.p. 3412; PCR Tr. 238.

Ms. Huckaby claimed that she got drunk for the first time at the age of 6. As children, they were allowed to have a glass of wine on Christmas. It was a normal occurrence that her family drank. She noted that it was part of the culture. App.p. 3413; PCR Tr. 239. She didn't think at the time that there was anything wrong with drinking during pregnancy. She stated no

one told her there was anything wrong with that. She stated that cut down on her smoking when she was pregnant because she was told that if she smoked, the babies would be born smaller than they were supposed to be. However, she stated that no one told her about drinking during pregnancy. Contrary to the testimony of Ms. Vogelsang, she never hid the fact that she drank during her pregnancy. She would drink a lot. She would probably have 4 or 5 glasses of wine a night. She claimed that she would drink some kind of burgundy wine and it could have been Carlo Rossi. App.p. 3415; PCR Tr. 241. The bottles were about 1.5 liters. She would buy a new bottle every other day. This was when she was married to Dwight and was pregnant with the Petitioner. App.p. 3416; PCR Tr. 242, l. 3-4. She stated that Dwight would drink the wine too. She would have more on the weekends. App.p. 3416; PCR Tr. 239-242.

Daisy claimed - contrary to Ms. Vogelsang's testimony - that Vogelsang never asked her about her drinking. She stated that she wouldn't have hidden her drinking from Ms. Vogelsang. App.p. 3416; PCR Tr. 242. She claimed that she had heard that wine was "good for the blood" her entire life. Oddly, she heard that you weren't supposed to drink water because it was for animals, so she drank wine and beer instead. App.p. 3416; Tr. PCR 242.

Daisy claimed that she wasn't drunk every night, but that sometimes she was drunk. She testified that when she was pregnant, she would sometimes go overboard on the weekend. App.p. 3417; PCR Tr. 243.

Daisy testified, in hindsight, that if she had known that she was going to hurt her children by drinking, she wouldn't have drank. App.p. 3417; PCR Tr. 243. She testified that she would not have been ashamed to tell Ms. Vogelsang this. App.p. 3417; PCR Tr. 243. She stated that the first time the PCR counsel's investigators asked her about her drinking she told them. App.p.

3417; PCR Tr. 243. She first heard about FAS when she was in PCR counsel's office. She had never heard of Fetal Alcohol Syndrome before that time. App.p. 3417-18; PCR Tr. 243-244.

She claimed that she was 10 or 15 pounds lighter when she was pregnant with Williams. When she first got pregnant, she weighed about 112 or 114 pounds. During the height of her pregnancy, she weighed 168 pounds. She is 5'7." App.p. 3419-20; PCR Tr. 245-246.

Daisy stated that she can't exactly remember how many times she met with Ms. Vogelsang. She thought that it was maybe once a week or sometimes twice a week. App.p. 3420; PCR Tr. 246. The first time she met with Mr. Mauldin, he asked her very few questions. She claimed that has never had actual contact with Mr. Nettles. App.p. 3421; PCR Tr. 247. She claimed that anything Ms. Vogelsang wanted to know about her, her son, and Dwight, she would tell her. App.p. 3422; PCR Tr. 248.

Contrary to Vogelsang's testimony, Daisy stated that Ms. Vogelsang never asked her about her drinking. Daisy stated that at one point she volunteered information to her and told her that everybody in Europe drank. However, she was firm that Vogelsang never asked her about drinking during her pregnancy with Williams. App.p. 3422-23; PCR Tr. 248-249.

Daisy stated that she was very upset that she didn't testify in Williams' trial. She stated that she would have wanted to tell the Judge that the Petitioner is "not the ordinary hoodlum murderer." She stated that Williams got caught in a situation and that something went wrong with him. She opined that Williams was a well-behaved, smart, bright, and intelligent person. However, she admitted that she didn't tell anybody that this was what she wanted to testify to in 2005. App.p. 3423-24; PCR Tr. 249-250.

Dwight Williams, the Petitioner's father testified at the PCR hearing that he was still

married to Daisy when the Petitioner was born. He claimed that he was there the entire time of the pregnancy. App.p. 3426; PCR Tr. 252. He stated that he and Daisy drank during the pregnancy. He stated that they drank Petri wine, a burgundy wine that he claimed a Carlo Rossi wine. He stated, similar to Daisy that they come in "small, pot-belly bottles" and are about 1.5 liters.¹⁹ He said that they tried to have wine in the house every day, claiming that once every other day they would buy wine. He said sometimes they would buy wine more often. He said that they each would have about 4 glasses a night. He said that there were about 8 glasses of wine per bottle. App.p. 3427-29; PCR Tr. 253-255.

He stated that Ms. Vogelsang asked him about Daisy's drinking. Dwight Williams claimed that he told her that there was always some alcohol consumed when he and Daisy were together. However, he doesn't think that the attorneys asked him much about Daisy's drinking and he would have shared that information with the attorneys. App.p. 3429; PCR Tr. 255.

He admitted that Ms. Vogelsang did ask about how much Daisy drank during her pregnancy. However, he told her that he and Daisy did their share of drinking together. They constantly had wine or alcohol in the home. He stated at that time they didn't know about any of the implication about drinking too much. Daisy's level of drinking didn't change when she was pregnant with Williams. App.p. 3431-32; PCR Tr. 257-258.

Dwight stated that by the time of the trial, he didn't have any interaction with Daisy about her discussions with Ms. Vogelsang regarding Williams' case. At the time, he and Daisy

¹⁹ Williams stated that he knew by looking at the bottle of wine which one they drank all the time. The bigger bottle was purchased on weekends. The smaller bottle was purchased on the weekdays. The smaller bottle is 1.5 liters. App.p. 3435; PCR Tr. 261. Dwight stated that he would have gone to the grocery store and pointed out the bottle of wine with Ms. Vogelsang if she had asked. App.p. 3434-35; PCR Tr. 260-261.

were separated. App.p. 3432; PCR Tr. 258. He stated that he had about 3 interviews with Ms. Vogelsang and the drinking. App.p. 3433; PCR Tr. 259. He recalled one time that he met with Ms. Vogelsang and Mr. Mauldin. App.p. 3433-34; PCR Tr. 259-260.

The FASDexpert.com Team PCR Testimony

The bulk of the petitioner's attempt to show deficient performance and prejudice came from the FASDexpert.com team from Seattle, Washington; clinical neuro-psychologist Dr. Paul Connor, Dr. Richard Adler, a board certified psychiatrist and Dr. Natalie Novick Brown, a psychologist. These witnesses in a multi-disciplinary team approach evaluate potential clients for the existence of fetal alcohol spectrum disorder.²⁰

Dr. Paul Connor

Dr. Paul Connor testified the in 1973, at the University of Washington, a group of clinicians, including Dr. Anne Streissguth, the "Godmother of Fetal Alcohol, were observing the children of alcoholic women. They noticed specific facial features that eventually became to be used in the diagnosis of Fetal Alcohol. These are listed in the Center of Disease Control Study. Over the years, it has been narrowed down to 3 primary facial features: small eyes, a very thin upper lip, and a smooth philtrum, which are the ridges between the nose and lip. App.p. 3449; (275)

Dr. Paul Connor was qualified as an expert in clinical neuropsychology and, specifically, in Fetal Alcohol Spectrum Disorders. App.p. 3448; PCR Tr. 274. He is part of the

²⁰ Dr. Connor testified that The South Carolina Fetal Alcohol Spectrum Disorders Strategic Plan for Fiscal Years 2011 to 2013 mentions on page 74 that FASD is a serious national problem. Researchers at the University of Washington estimate that 35% of individuals with FASD have been in jail or prison. They also estimate that more than half of the individuals diagnosed with FASD have been in trouble with the law. He was a part of the team that did this study Washington study in 1994-96. App.p. 3446; PCR Tr. 272.

FASDExperts.com experts team. Within the team, he is usually asked to do an neuro-psychological assessment at the beginning of a requested evaluation. If the testing looks consistent with Fetal Alcohol Spectrum Disorder (FASD), then the next expert, Dr. Richard Adler will get called in. App.p. 3447-48; PCR Tr. 273-274.

Dr. Connor stated that prior to 1996, there were 2 main diagnoses. Fetal Alcohol Syndrome (FAS) where all of the facial features existed and Fetal Alcohol Effects (FAE) where there were some or no facial features. App.p. 3453; PCR Tr. 279. The Institute of Medicine (IOM) wanted to narrow these diagnoses into different groups. The IOM created 5 diagnoses: (1) full FAS with confirmed exposure; (2) FAS without confirmed exposure; (3) alcohol related birth defects (ARBD); (4) Partial Fetal Alcohol Syndrome (PFAS) (some physical features , but not the full gambit of facial features and not growth deficiencies); and (5) alcohol related neurodevelopmental disorder (ARND) (no physical features with normal facial and normal growth). App.p. 3453; PCR Tr. 279. Dr. Connor stated that there's really no difference between FAS, PFAS, and ARND and the same neuro-psychological impairments are present. App.p. 3453-54; PCR Tr. 279-280. The CDC is still in the process on Guidelines for ARND. They published Guidelines for the diagnosis of FAS. App.p. 3455; (281).

Dr. Connor described the effect of alcohol injected during pregnancy. He stated that FAS can affect all parts of the brain. App.p. 3456; PCR Tr. 282. She stated that alcohol is specifically killing cells. He said that the blood flow through the placenta diminishes when the mother drinks. Heavy alcohol use can cause hypoxia, which limits the oxygen to the fetus. App.p. 3458; PCR Tr. 284.

Dr. Connor noted that facial features of FAS are laid down during a very short window

during pregnancy, typically during the 6th or 8th week. Alcohol during this period will cause the facial features seen in FAS. App.p. 3464-65; PCR Tr. 290-291.

The brain develops throughout the pregnancy. Alcohol at any time during the pregnancy can have an impact on the brain. This is why there is a lot of variability in functioning in people with FAS. App.p. 3465-66; PCR Tr. 291-292.²¹

Dr. Connor stated that IQ is impacted by pre-natal alcohol exposure. He stated that about 20% of the people with FASD have IQs in the mentally retarded range. When you move away from full-blown FASD, the rates of mental retardation are even lower. App.p. 3470; PCR Tr. 296. Those with FAS have an IQ of about 80. Those with FAE have IQs of about 90. Normal IQ is about 100. There is a range in IQs of people with Fetal Alcohol Syndrome Spectrum Disorders. Dr. Connor opined that you can't look at IQ as a predictor of whether or not an individual has been impacted by Fetal Alcohol. App.p. 3470-71; PCR Tr. 296-297. If their IQ is in the average range, their adaptive abilities are expected to be in the average range. This is the same in individuals with FAE. He stated that these individuals are functioning at a very impaired level of somebody who is mentally retarded, even though their IQ is in the average range. App.p. 3474; PCR Tr. 300. [Williams IQ was tested as a full scale 99.]

Dr. Connor opined that people with fetal alcohol do not learn from their mistakes. App.p.

²¹ Dr. Connor opined that FAS is very rare. App.p. 3467; PCR Tr. 293. For example, in Seattle, there is a 1% rate of FAS. For every one person with FAS, there will be at least 2 people with ARND or one of the other FAS spectrum disorders. App.p. 3467-68; PCR 293-294. FAS is not any more potentially damaging or serious than the other FAS spectrum disorders. App.p. 3468; PCR 294. The only difference between FAS and FAE are the physical signs. App.p. 3468; PCR 294. However, he stated that quite frequently, somebody who has full-blown FAS would appear to have something wrong with them. App.p. 3467-69; PCR Tr. 295.

Dr. Connor also discussed a study where it found FASD tend to congregate in mental health settings. They have many more mental health problems. In one study, there was a 5% rate of FASD and ARND in a child psychiatry unit. In another study, there was a 23% rate of FAS and ARND in the psychiatric unit of prisons. App.p. 3469; PCR Tr. 295.

3477-78; PCR Tr. 303-304. He stated that secondary disabilities are not those disabilities that a person is born with. Due to the problems individuals have on the primary deficits or how they process information, they will develop difficulties in other areas. Dr. Connor opined that these areas are troubles in school (suspensions, expulsions, etc.) and difficulties with the law. App.p. 3478; PCR Tr. 304. He stated that studies show that about 95% of the individuals with FAS have some form of mental health problem. App.p. 3478-79; PCR Tr. 304-305.²² According to a University of Washington study where individuals with FAS of ages 6 to 51 were interviewed, over 40% of individuals with FAS have had problems with the law and in adolescent and adult populations these rates were higher. App.p. 3479; PCR Tr. 305.²³

Alcohol injection impacts IQ, ADHD symptoms, developmental delays, motor problems, sensory problems, and withdrawal symptoms when the child is born. App.p. 3481-82; PCR Tr. 307-308. He opined that alcohol is far more damaging during pregnancy than cocaine. App.p. 3483; PCR Tr. 309.

Dr. Connor stated that he saw Williams about 6 hours with him in May 2012. App.p. 3489; PCR Tr. 315.²⁴ The neuropsychological assessment was not designed to measure damage

²² According to Dr. Connor's secondary disability slide presentation, among persons with FAS, 40% would have a disruptive school experience, 40% would have trouble with the law, 30% would be confined, 45% would have inappropriate sexual experiences, 20% would have alcohol and drugs problems, 80% would be in dependent living situations and 79% would have problems in employment.

²³ Dr. Connor stated that he is not aware of any studies that suggest that people with FAS don't have higher significant problems mental health or trouble with the law. There are some studies from Germany where they are not seeing as many troubles in some other areas. This is due to the German Health Care System, where they are receiving more services up front. There are not as many secondary disabilities seen as in the States. App.p. 3480; PCR Tr. 306.

²⁴ He agreed that his group FASDExperts was not doing its multi-disciplinary approach and that topically it was done by individuals in 2004. He noted Kenneth Jones, dysmorphologist, Dr. Streissguth among others were doing the evaluations. App.p. 3570-71; PCR Tr. 396-397. He stated that the post-2007 multi-disciplinary approach was more consistent with what the "gold standard" in clinical care is, though it did not exist prior to 2005. App.p.

to the brain. He looks at the functioning of the brain and comments on the function or dysfunction of the brain. App.p. 3489; PCR Tr. 315. Dr. Connor stated that FASD by definition is a brain damage. App.p. 3491-92; PCR Tr. 317-318

According to Dr. Connor, the first step in diagnosing FASD is establishing whether or not there are cognitive deficits. App.p. 3493; PCR Tr. 320. Dr. Connor stated that he uses a grouping of neuropsychological assessments in FASD cases because the tests have been shown to be sensitive to the impacts of pre-natal alcohol exposure, especially in the adult population. The tests he pulled involve skills that are sensitive in a lot of Fetal Alcohol cases. App.p. 3498; PCR Tr. 324.

He stated the tests are broken into domains of functioning.²⁵ The first test is IQ, which test a global area of functioning. He stated that this is usually by the Wechlser Adult Intelligence Scales (WAIS). Dr. Connor stated that he looks at achievement, academic, math, reading, writing, spelling, and arithmetic. He looks at different aspects of memory, verbal and visuospatial. He looks at attention. He looks at motor coordination because about 1/3 of the people with FAS have motor condition deficits. Dr. Connor stated he pays particular close

3571; PCR Tr. 397. Dr. Connor did not know what the state of the art was in S.C., N.C. or Georgia in February 2005 when the case was tried. App.p. 3571; PCR Tr. 397. He stated that he was aware that at Emory University in Atlanta they have been doing work with FASD and were involved with the CDC, through a female named Claire Coles.

²⁵ In his slide presentation, he broke down the testing presentation as follows:

- IQ - WAIS-IV
- Achievement - WRAT
- Visual Spatial - RCFY
- Learning and Memory - CVLT
- Attention - CPT
- Motor Coordination - GPB, Finger Tap
- Executive Function - WCST, COWAT, RFF, Sroop, CCT, Trials,.
- Auditory Comprehension - NAB, Auditory Reception
- Emotional and Social Understanding - ACS: Social Perception

attention to two levels of executive functioning: high structured test and low structured tests. He looks at adaptive skills. In this case, he interviewed Dwight Williams to determine Williams' adaptive skills. He looked at auditory comprehension and the emotional social understanding. App.p. 3499-3501; PCR Tr. 325-327.

Dr. Connor stated that he opted for the CDC Guideline because they are much more restrictive, concise, and clear. He stated that he needed to have either an IQ in the mentally retarded range and/or deficits in the mildly impaired range in at least 3 domains of functioning. App.p. 3502-03; PCR Tr. 328-329. However, he opined that IQs in the mentally retarded range in people who have FASD are rare. App.p. 3504; PCR Tr. 330. Dr. Connor stated that he gives a series of measures or tasks that are designed to determine the level of effort that the person is putting into the tests. App.p. 3505-06; PCR Tr. 331-332.

In a number of cases, especially ones with FASD, Dr. Connor stated that you see very large splits between different skills. App.p. 3509; PCR Tr. 335. In Williams' case, his verbal skills were very high whereas his scores in other areas were very low or average. He opined that these ranges mean you can't use full-scale IQ. App.p. 3509; PCR Tr. 335. When there are large splits in the IQ testing, it raises a large red flag that there could be something neurological going on with the individual according to Dr. Connor. App.p. 3510; PCR Tr. 336. He found that verbal comprehension was 118, processing speed was 84 and that Williams has a 99 full-scale IQ. He stated that but that can't be used because of the lower scores in other areas. App.p. 3510-11; PCR 336- 337. Dr. Connor stated that Williams' variability is consistent with what he expects to see in Fetal Alcohol. App.p. 3511; PCR Tr. 337.

Dr. Connor opined that although Williams wasn't being overly impulsive on the test, he

wasn't responding to things when he was supposed to. Connor found that he was failing to maintain his attention. This got worse as the test got longer. He gets distracted by other things. Dr. Connor opined that this is very consistent with FASD. App.p. 3520-21; PCR Tr. 346-347. Dr. Connor also found that Williams has strength in language based skills and in reading skills. He was doing much more poorly on low structured executive function tests. He opined that processing speed areas showed problems. App.p. 3521; PCR Tr. 347. He stated that because the Petitioner's verbal function is so high, he appears normal and that if you talked to him you wouldn't expect that he had FASD. App.p. 3521-22; PCR Tr. 347-348. He stated that Williams' strength in verbal function is masking the deficits. App.p. 3522; PCR Tr. 348.

On the testing, Dr. Connor opined that Williams was doing mirror movements. He described this as when he asked him to do something with his left hand that he would also do it with his right. Dr. Connor stated that this is a neurologic soft sign. This is part of the communication between both sides of the brain. This existed in Williams even though his motor coordination was good. App.p. 3522-23; PCR Tr. 348-349.

Dr. Connor opined that Williams was very inefficient in being able to figure out a rule. It took him a long time to figure out how to solve a problem. App.p. 3527; PCR Tr. 353. Williams proved to have problems with the Wisconsin Sorting Test on both Dr. Connor's and Dr. Evans' testing. When Dr. Evans performed the test, it took Williams 18 trials to figure it out. When Dr. Connor performed the same test, it took Williams 41 times to get it right. App.p. 3527-28; PCR Tr. 353-354.

Dr. Connor opined that Williams had problems with the Wisconsin Sorting Test on both Dr. Connor's and Dr. Evans' testing. App.p. 3527-28; PCR Tr. 353-354. Dr. Connor concluded

that Williams isn't able to focus on one idea very well. He asserted that when he does focus on one idea, he loses track of it and has to start over. He then has difficulties being able to adjust when the rules change. Once he does get it, if the rules change, Williams has a hard time figuring out how to go about the next way. This illustrates an executive functioning problem. App.p. 3528-29; PCR Tr. 354-355 App.p. 3529; PCR Tr. 355.²⁶

Dr. Connor also found that Williams is at least 2 deviations below on those and far more than 2 deviations below on the low structure tests. He found this to be consistent with FASD. App.p. 3532; PCR Tr. 358. He opined that when there aren't a lot of rules, Williams can't figure out what to do App.p. 3533; PCR Tr. 359.

Dr. Connor tested adaptive functioning section with the Vineland interview of Dwight Williams, the auditory comprehension test, and the social cognition test, which looks at emotional cues. App.p. 3533; PCR Tr. 359. 27 He stated that Williams showed deficits in communication skills and in socialization skills in the actual laboratory test. He opined that they showed impaired functioning. App.p. 3533-34; PCR Tr. 359-360. These tests are similar to the

²⁶ Dr. Connor reported that Dr. Brown tested Williams for suggestibility using the Gudjonsson Suggestibility Test. This test is a memory test. He described it as the subject is given a story, and then asked questions about the story. A lot of the questions are leading questions to determine how often the individual needs to be led. After asking the leading questions, the tester informs the individual he made some mistakes, and then you go back through and ask him the same questions. This is when the doctor will see if the individual will change their answers. PCR 356-357. Dr. Connor opined that the Gudjonsson Suggestibility Test leads into evaluating adaptive functioning abilities and into the individual's ability in social interactions, to be their own person, and to not be swayed by peer influence, etc. App.p. 3530-3532; PCR Tr. 358.

27 At trial, Dwight Williams was portrayed as an absent parent after he left in the divorce when the Applicant was 8 years old. ROA 2210-2212. He claimed that he neglected to see him after the divorce as much as he should have. ROA 2217-18. The second respondent on the Vineland was the Applicant's first grade teacher in 1990, Ann Wilson, who had referred Applicant for special education. ROA 2230. There was no evidence presented of any continuing contact with Applicant after 1990. Dr. Connor stated he was not evaluating Dwight's internal mental status of what was behind Williams' responses. He said that they were asking concrete questions about whether Williams was able to perform skills independently or not. App.p. 3593; PCR Tr. 419. He doesn't know if Dwight's responses would be different had he been tested prior to September 2003, before he knew that his son had committed a crime and placed the victim in a hostage situation which had resulted in being sent to death row. App.p. 3593; PCR 419. Dr. Connor denied that his father's responses would be reflective of the situation.

ones Dr. Connor would have given in a mental retardation test. App.p. 3534; PCR Tr. 360.

Dr. Connor found that Williams had the greatest difficulties with receptive communication - his ability to take in what he's hearing and respond appropriately. Dr. Connor found that when he was testing Williams, Williams would use very big, multi-syllabic, complex words. Sometimes, these words would not be the correct word for the situation. Dr. Connor found that Williams has difficulty applying his high language-based skills to information that he is looking at. App.p. 3536-37; PCR Tr. 362-363. According to the testing, Dr. Connor concluded that Williams' daily living skills, especially with respect to community skills, ability to interact appropriately, ability to withstand suggestibility, and ability to pick up on verbal and non-verbal cues are all at least 1.5 standard deviations below the norm. App.p. 3537; PCR Tr. 363. He stated that it is usually expected that the IQ test and adaptive functioning score will be roughly similar. App.p. 3538; PCR Tr. 364.

Dr. Connor concluded that receptive communication was impaired in both tests. He also found the same for the socialization and interpersonal relationships. He said Williams was showing deficits as reported by Dwight and he was showing similar deficits during his testing. According to Dr. Connor, Williams is not able to pick up on social and emotional cues. App.p. 3539; PCR Tr. 365. The ability tests were at least one deviation below and reflected that he was impaired, consistent with FASD. App.p. 3539-40; PCR Tr. 365-366. Dr. Connor noted that there's a split between verbal and non verbal skills, as well as other skills consistent with FASD. App.p. 3542; PCR Tr. 368. Williams' spelling score was very high, the math score fell below expectations based on the IQ. He found adaptive functioning was significantly below expectations which was consistent with FASD. App.p. 3543-44; PCR Tr. 369 370.

Dr. Connor noted that Williams repeated kindergarten and first grade. The records showed that he was put into special education resource room in 1st grade. He noted that special education service placement is extremely common in FASD. He found that Williams had an evaluation in 3rd grade for learning disability and ADHD. The records showed that he was staffed out of special education in 4th grade. Dr. Connor stated that this is also not uncommon in FASD because if the individuals gets extra support in the classroom, they can improve. He reported that things fall apart for FASD persons when they are moved out of special education and lose the support. He found that Williams repeated 8th grade and dropped out in 9th grade.

Dr. Connor reported that dropping out of school is a secondary disability that is extremely common in FASD. App.p. 3544-45; PCR Tr. 370-371. He found that as he goes further away from structure, Williams is much more problematic in his ability to organize himself and apply what he does know appropriately, accurately, and correctly. App.p. 3546; PCR Tr. 372. The variability among Williams' test scores is extremely consistent with FASD. App.p. 3546; PCR Tr. 372.

The QEEG testing Williams had done in 2004/2005 showed abnormal electrical activity in a number of different regions in the brain: the frontal lobes, the singular gyrus, the temporal lobes, and the occipital lobes. The tasks in which Williams was doing poorly are usually associated with the frontal lobes including executive function problems, such as visuospatial organization, socialization skills, communication skills, especially expressive, and math skills. The singular gyrus on top of the corpus callosum is associated with focusing and maintaining attention and staying on task. Williams was showing deficits in all of these aspects in his testing. App.p. 3547-48; PCR Tr. 373-374. Dr. Connor stated that temporal lobes are associated with

memory. Williams had trouble with visuospatial learning and memory. App.p. 3548; PCR Tr. 374. The deficits in electrical activity in the parietal lobe may be reflective in visuospatial issues and with sensory input. Williams was having difficulties with these in his testing. App.p. 3549; PCR Tr. 375. Further, the occipital lobe also deals with visuospatial processing, taking visual information into the system. App.p. 3549; PCR Tr. 375.

Dr. Connor opined that according to the CDC Guidelines, they need to see at least 3 domains that are in deficit. He opined that he had found eight deficits. These domains included

- visuospatial construction organization,
- visuospatial memory
- attention,
- executive functions; particularly lower structure executive functions,
- suggestibility,
- communication,
- daily living skills,
- and social functioning.

App.p. 3549-50; PCR Tr. 375-76.

Dr. Connor opined that this is a severe functional impairment because Williams had deficits in all but 3 domains of the eleven domains that they tested. He asserted that this is consistent with the diagnosis from the DSM of **cognitive disorder NOS**, a broad spectrum of deficits of cognitive impairments. App.p. 3549-50; PCR Tr. 375-376. Dr. Connor stated that he would not diagnose Williams with FAS or any of the other spectrum disorders because they are medical diagnoses, noting that FAS is not in the DSM. App.p. 3550-51; PCR Tr. 376-377.

However, Dr. Connor concluded that based on a reasonable degree of medical or psychological certainty, everything in his testing was consistent with FASD deficits and that he didn't find anything that was inconsistent with FASD. App.p. 3551; PCR Tr. 377. 28

28

Cross-Examination of Dr. Connor

Dr. Connor confirmed that he was not testifying about FAS when the case was tried in 2005. **He began testifying in 2007.** App.p. 3556-57; PCR Tr. 382-383. At the time of the 2005 trial, the IOM Guidelines were standard for diagnosis. App.p. 3558; PCR Tr. 384.

Dr. Connor stated that he tested Williams on May 15, 2012 at Lieber Correctional Institution. App.p. 3559; PCR Tr. 385. He stated it was a 6 hour interview was completed in one sitting, over the course of one day. App.p. 3559; PCR Tr. 385.

Comparing his testing with Dr. Evans in 2004, Dr. Connor stated there was a difference between his findings with processing speeds and Dr. Evans' results. He stated that a variability in performance over time is something that is seen extremely common in FAS. App.p. 3562-63, 3585; PCR Tr. 388-389, 391. Dr. Connor found that there were a number of other areas where their results almost have a perfect overlap. App.p. 3583; PCR Tr. 389. Based on Williams' IQ, Dr. Connor stated that he did not expect him to do poorly on reading, math is a difficulty that is often seen in Fetal Alcohol as he found with Williams. App.p. 3567; PCR Tr. 393. Connor thought that all of the areas that he observed deficits in with Williams, he expects to see these deficits if he were observing an individual with Fetal Alcohol. App.p. 3568; PCR Tr. 394.

Connor of the 68 test scores, 24 or 20 of them were below the line. A further number were at the line. App.p. 3568-69; PCR Tr. 394-395. He stated that therefore about one-third were in deficit in areas that he expected to see deficits. App.p. 3570; PCR Tr. 396.²⁸

Dr. Connor rejected the interpretation to the "hit or miss" slide pre -2007. **Dr. Connor stated in 2004 he would not have become involved in this case because it was not part of his work at that time.** App.p. 3572; PCR Tr. 398, l. 7-10.

Dr. Connor acknowledged that some of the tests where he was doing poorly were within the last third of the test, although some others were not. This is why he does effort testing throughout the course. App.p. 3580; PCR Tr. 406. Dr. Connor stated that Williams refused a break and lunch break in the 6 hour testing.²⁸

Dr. Connor stated the WAIS-IV full-scale IQ was 99 and verbal IQ was 118. He said that the WAIS-IV does not give a performance IQ (PIQ), but has perceptual reasoning, which has some of the components from the PIQ which was a 92 and the working memory score was a 97. Processing speed was an 84. Dr. Connor opined that these are all within 2 standard deviations of the norm. App.p. 3582-83; PCR Tr. 408-409.

Dr. Connor found that Williams has very good skills on a surface level. Williams was kind of a trivia guy, he was able to tell him information. Some of the details he told Dr. Connor were incorrect. There were some misusages of some words. He was doing extremely well on his verbal skills. His ability to manage, especially on visual things, had problems. A lot of the tests came back to show that there were troubles with his visual processing on the Rey Complex, the WAIS, the Wisconsin Card Sorting Test, and the Tower Test. He has troubles with visual and spatial skills. App.p. 3583-84; PCR Tr. 409-410.

Some problems concerning the Vineland were pointed out to Dr. Connor. The Vineland Interview is a test based upon a structured interview. The tester asks the same questions to everybody tested. He stated that the Vineland is very sensitive to FASD. Dr. Connor stated that he asks for contact information who know the client well and who interact with him frequently. However, he was only provided Dwight's name for this. He compares this to the adaptive test that he gives to see if they are consistent. App.p. 3585-86; PCR Tr. 411-412. Dr. Connor admitted that he did not how long Dwight lived with Williams. App.p. 3586; PCR Tr. 412. Dr. Connor also did not know why the Petitioner's mother, who Williams lived with for most of the period of time up until the incident, was not chosen for the Vineland test. App.p. 3587; PCR Tr. 413. This is even though questions of this test ask about tasks that he has been able to do throughout his life up until the present time. App.p. 3587; PCR Tr. 413.²⁸ He doesn't know if there are any norms in Vineland with regard to incarcerated individuals. App.p. 3587-88; PCR 413-14. However, Williams has been incarcerated since 2004. App.p. 3587; PCR Tr. 413. He admitted that the

He opined that Williams current testing was consistent with his past testing, noting he showed the same pattern of deficits across a lot of ages. Dr. Connor stated that when he was about 7, he had an IQ test and showed the same split. App.p. 3551; PCR Tr. 377. Dr. Connor further he didn't see anything else in the report, interview, or records that he reviewed that indicated these problems could be caused by something else. App.p. 3551; PCR Tr. 377. He stated that Williams reported a blow to the head when he was 4 or 5, but Connor did not review and medical records confirming it. Williams reported that he never lost consciousness. Dr. Connor stated that an injury like Williams reported would have been potentially specific to one area of the brain than a problem through multiple areas. App.p. 3551; PCR Tr. 378. Dr. Connor opined based on a reasonable degree of medical or psychological certainty, there is nothing else that could explain all of Williams' impairments App.p. 3552; PCR 378.

Dr. Connor also compared his testing to that of Dr. Evans in 2004. He concluded that there is almost a complete overlap in what Dr. Evans found in 2004 and what he found currently. There is the same IQ split with good reading, bad arithmetic. App.p. 3552-53; PCR Tr. 378-379; App.p. 3553; PCR Tr. 379; Like Dr. Connor, he found that Dr. Evans also found deficits in

Vineland was supposed to test the Petitioner's current functioning in 2012 in the questions, (yet the Respondent was a father would had not lived with Petitioner since he was 8 and his first grade teacher from 1990). App.p. 3588; PCR Tr. 414.

Dr. Connor opined that the Vineland suggested that Williams had significant difficulties in his receptive abilities, his ability to take in and appropriately react and respond to what is said to him. He was commenting on difficulties with Williams' expressed communication, verbally and written. Williams was having particular difficulty with how to respond with what he was hearing. App.p. 3592-93; PCR Tr. 418-419. Dr. Connor stated that Williams' full scale IQ isn't a good measure of his overall functioning. He stated that Williams' high IQ masks the problems that he does have in functioning. His good verbal skills mask that he has significant troubles being able to understand and react appropriately to the environment that's around him. App.p. 3594; PCR Tr. 420.

Dr. Connor stated that a personal bias can come to play in any of our life responses, intentional or unintentional. App.p. 3596-97; PCR Tr. 422-23. However, after a series of questions in which he refused to respond concerning whether he had a bias concerning the death penalty, he ultimately declared that he could see a scenario where the death penalty could be appropriate. App.p. 3598-99; PCR Tr. 424-25.

Williams' visuospatial skills. He asserted that the pattern of testing is almost a perfect overlay between the testing done in 2004 and the testing done in 2012. App.p. 3554; PCR Tr. 380.²⁹

Dr. Richard Adler - Clinical and Forensic Psychiatrist

Dr. Richard Adler, a part of the FASDexperts.com team testified as an expert in Clinical and Forensic Psychiatry and as an expert in FASD. App.p. 3606-07; PCR Tr. 432-433 His sole responsibility in the protocol set out by the FASD Experts is to forensically examine the client and to render a diagnosis, if a diagnosis is appropriate. App.p. 3605-06; PCR Tr. 431-432. As related to Fetal Alcohol, he has testified about 50 times. App.p. 3606; PCR Tr. 433. Dr. Adler stated that he has specialized in FAS since 2007.³⁰ This is also when he began working with FASD Experts. App.p. 3607; PCR Tr. 433. He was in practice around 2006 when he was first contacted by the Director of the Fetal Alcohol Syndrome Law Resource Center who asked if he would be willing to assess someone for FAS. Subsequently, he was encouraged to develop a standard model for cases like this and he helped set up FASD Experts. App.p. 3608-09; PCR Tr. 434-436.

Dr. Adler stated that he diagnosed Williams with **Partial Fetal Alcohol Syndrome (PFASD)**. App.p. 3606; PCR Tr. 432. He noted that the 2004 CDC Criteria didn't have explicit diagnostic criteria for anything other than Fetal Alcohol Syndrome and that the 1996 Institute of

²⁹ Dr. Connor opined that Dr. Evans would have found 5 domains that had deficits. App.p. 3554; PCR Tr. 380. Connor found that the testing that was the most different between his testing and Dr. Evans' testing was the Trails A test, which is a "connect the dots" test. He thought that most likely, they gave the exact same test. He found that Williams did much more poorly in the Evans testing, he was a lot slower. App.p. 3555; PCR Tr. 381. However, Dr. Connor explained that in FASD, variability is seen one day to the next, with good days and bad days. App.p. 3555-56; PCR Tr. 381-382.

³⁰ Dr. Adler works with the other FASDexperts.com as part of a multi-disciplinary team. App.p. 3608; PCR Tr. 434. He stated had some training and experience in FASD by way of being a child psychiatrist. He was the First Fellow of a world famous expert on Attention Deficit Disorder, Dr. Biederman at Harvard. He stated that he knew early in his training that Fetal Spectrum Disorder persons have a high incidence of attention problems but was not likely the run of the mill ADD case. App.p. 3608; PCR 434.

Medicine Criteria was vague in certain areas. He claimed that the FASD Experts attempted to adopt and follow an approach that was more stringent, clear, and straightforward. App.p. 3610-11; PCR Tr. 436-437.

An FASD diagnosis has aspects that rely on psychological data. Dr. Adler opined that steps to making a diagnosis includes conducting a physical examination, which requires a person with a medical license, doctor, or nurse practitioner to perform. He stated that he goes through a diagnostic process and asks himself if there are other hypotheses. Knowledge of general medicine is required. In many situations, he orders tests or administers medicine for certain evaluative procedures. He orders neuro-diagnostic tests and reviews those tests with a neuro-radiologist. He reviews medical records, birth records, and medical records of care. App.p. 3613-14; PCR 439-440.

He opined that Williams has PFAS as well as **cognitive disorder not otherwise specified**. Cognitive disorder NOS is on axis one and PFAS is on axis 3. App.p. 3614; PCR Tr. 440.³¹ Dr. Adler stated that the diagnosis that applies to Williams is “**partial FAS with confirmed exposure**” He stated that there has to be element A, confirmed exposure to alcohol. There is in this case. There has to be element B, facial anomalies. Any one of elements C (growth retardation), D (central nervous system abnormalities), or E (cognitive abnormalities) needs to be present. He opined that all three do not need to be present, but, in this case, all three were present. He claimed that there was evidence of growth retardation, central nervous system

³¹ He stated that a diagnosis is generated based on a book published by the IOM. There are areas of investigation, which are elements that will be attended to, and the actual diagnoses. There's FAS with confirmed maternal exposure, FAS without confirmed maternal exposure, Partial FAS with confirmed exposure, alcohol-related birth defects, and alcohol-related neurodevelopmental disorder. App.p. 3615; PCR 441. The CDC only has FAS with confirmed maternal exposure. App.p. 3615; PCR 441.

abnormalities, and cognitive abnormalities. There are birth defects in this case, although that is not a diagnostic element that needs to be satisfied. App.p. 3616-17; PCR Tr. 442-443.

He asserted that the evidence comes from multiple different sources. App.p. 3617-18; PCR Tr. 443-444. He claimed he had seen school records, pediatric records, and material from the beginning of Williams' life to Dr. Connor's testing. App.p. 3618; PCR Tr. 444. However, he didn't see the actual hospital visit related to the 2003 suicide attempt when Williams was treated with Risperdal, 2011 radiologist report, or the Petitioner's birth records. App.p. 3620; PCR Tr. 446. 32

Confirmed Exposure to Alcohol .

Dr. Adler also opined that there was confirmed exposure to alcohol. Dr. Adler based his opinion on a number of sources. He relied on Daisy Huckaby's recent affidavit that he received . Dr. Adler found it was a great benefit to have an affidavit that established the pre-natal exposure. He found that in her affidavit, it outlines that on a daily basis, Daisy was drinking a minimum of 3 to 4 alcoholic beverages and on weekends, she drank more. He found that this was a significant amount of alcohol for a person who claimed she weighed 114 pounds. App.p. 3622-23; PCR Tr. 448-449. 33

32 Dr. Adler stated that he also reviewed Dr. Evans's 2004 testing materials, spoke with Dr. Evans on the phone and communicated with him by email. App.p. 3620; PCR Tr. 446. He opined that Dr. Evans' material from 2004 or 2005 can be relied on with certainty to make a diagnosis. App.p. 3620; PCR Tr. 446. Dr. Evans obtained the Quantitative EEG in 2004 and reviewed and read it. Dr. Evans also sent out the raw EEG data to a consultant, Dr. Walker. He claimed that to the world's leading expert, Dr. Thatcher. Dr. Adler stated that the data existed in 2004 and was abnormal (and showed brain damage). App.p. 3620-21; PCR 446 447. Dr. Alder stated that although Dr. Evans did not do as extensive testing as Dr. Connor, based on Dr. Evans' testing alone, it revealed 5 domains at the required level of severity. Dr. Adler submitted that the diagnostic criteria for FAS would have been satisfied prior to the original trial. App.p. 3621; PCR Tr. 447.

33 Dr. Adler stated that in FASD research, the general consensus that a total of 14 drinks a week is the kind of drinking that was reflective of having a child with FASD. App.p. 3623; PCR Tr. 449. In Daisy's case, she now claimed to have drunk about 28 drinks a week, which would be in excess of what is considered heavy drinking pre natal exposure. App.p. 3623; PCR Tr. 449. He noted that there are 2 major factors: how many times in a given month did someone have 5 drinks or more, a binge, how many occasions is the person taking just 3 or 4 drinks.

In addition, Dr. Adler relied upon investigator Vogelsang's notes that the father stated to her that Daisy drank during her pregnancy with Williams. App.p. 3627; PCR 453. Exhibit 7. In addition Exhibit 8 reflected that "Williams was born to a mother who smoked and drank during her pregnancy." App.p. 3628; PCR 454. Maureen, Williams' sister, confirmed to Vogelsang that Daisy drank and smoked during her pregnancy. App.p. 3628; PCR 454, citing Exhibit 9. Dr. Adler stated that these sources would be enough information to confirm the exposure to alcohol under IOM standards. App.p. 3629; PCR Tr. 455.

Dr. Adler discounted Daisy's pre-trial statements to Vogelsang that she did not drink during pregnancy. App.p. 3629-30; PCR Tr. 455-456.³⁴ Dr. Adler opined that it is well known that mothers are reluctant to speak about their drinking. But he found reports that mothers are good reporters and that as a general rule, mothers report during the pregnancy. Dr. Adler reported that there was literature that when mothers are asked up to 16 years later, they tend to be consistent. The kinds of deficits that their kids show ultimately are the deficits that reflect a dose response effect. The mothers, who said they drank more, even before the child was born, had kids who were more afflicted. The 2004 CDC Criteria explicitly states under the section of maternal drinking that in many cases, even if the mother boldly denies alcohol consumption, it's appropriate to ask other collateral informants such as relatives, a husband, a boyfriend, and looking at medical records. App.p. 3629-30; PCR Tr. 455-456. Dr. Adler stated that he did not

App.p. 3625-26; PCR Tr. 451 452. Dr. Adler opined that if Daisy's glasses of wine were big glasses of wine, they could be considered a binge drink every night. Because she is talking about more drinks on the weekend, it could be at least 8 binge sessions a month. If she drank 3 or 4 glasses of wine on weeknights, which would have been about 16 days a month, that would be about 90 drinks a month. This would match the formula needed to have a child with FASD. App.p. 3625-27; PCR 451 453.

³⁴ Respondents noted he credibility concerns with Daisy which were recognized by the original defense team. Further, Daisy denied ever making these statements to Vogelsang, again reflecting her credibility issues concerning anything she states in this matter.

see medical records where Daisy was admitted as an alcoholic nor did he see any information that neighbors claimed Daisy was an alcoholic. App.p. 3631; PCR Tr. 457. However, Dr. Adler stated that Williams has more data to support this diagnosis than any person I've ever diagnosed." App.p. 3632; PCR Tr. 458, l. 15-19. Also PCR 457.

Facial Features.

According to Dr. Adler, in FASD, the palpebral fissure length is shortened. In FAS and in PFAS, the philtrum is thin. The ridges are not as prominent. There are also abnormalities with the upper lip in FASD. App.p. 3633-34; PCR Tr. 459-460. He stated that facial abnormalities occur between the 6th and 8th week of pregnancy. App.p. 3634; PCR Tr. 460. However, he opined that the facial features have no effect on the amount of brain damage. It has more of an effect forensically or medically because they cannot be caused by anything after the child is born. App.p. 3635; PCR Tr. 461. He opined that facial features are correlated with abnormalities in the brain, particularly the frontal areas. App.p. 3637; PCR Tr. 463.

Dr. Adler found the FAS facial features were present in Williams. In the PFAS diagnosis, Dr. Adler stated that need at least 2 facial features. App.p. 3642; PCR Tr. 468. He found that the features were mild. He determined in the distance between the eyes, the inner cathal distance, was not abnormal and Williams' palpebral features are normal. However, the philtrum edges show up more at a three-quarter angle. Williams scored a 4 on the philtrum edge scale, 5 being the worst, but it was not totally flat. He suggested that Williams might have had more facial features when he was younger. App.p. 3638-42; PCR Tr. 464-468. He stated that Williams' circularity is a 3, which is a finding. The pattern is A, C, B, which is consistent with FAS features although they are mild. App.p. 3642-3643; PCR 468-469. He stated that people with

FASD tend to have a flattened mid-face. However, this criteria is not used because it tends to be a subjective finding. App.p. 3643-44; PCR Tr. 469-470.

Growth retardation

Dr. Adler stated that growth retardation is the C element for FAS. App.p. 3644; PCR Tr. 470. He found that there was a lack of birth records for Williams and there are scant pediatric records. At 22 months, Williams was sent to the ophthalmologist because he had an abnormality in the movement of his eyes. App.p. 3644; PCR Tr. 470. According to the Christie Pediatric Group in Greenville growth chart, at 10 months, Williams' length was between the 75th and 90th percentile. At the time, his weight was just above the 10th percentile. It is between the 10th and 25th percentile. Dr. Adler declared this was a mismatch, concluding that Williams was tall for 10 months, but he was thin. A disproportion between weight and height is one of the growth criteria that would be abnormal in FASD according to the IOM FAS Manual. App.p. 3645-47; PCR Tr. 471-473. He Also opined that the abnormality in Williams' eyes is a birth defect. App.p. 3647; PCR Tr. 473.

CNS (Central Nervous System Abnormalities)

Dr. Adler stated that element D was evidence of CNS, central nervous system, which is the brain and the spinal cord, neurodevelopmental abnormalities. There could be decreased cranial size, the size of the brain/skull at birth. He doesn't have any data regarding this. The other elements are structural brain abnormalities, having a small head, having abnormalities of the corpus callosum. He stated that all were not needed only one and opined that in Williams' case, they had more than one. App.p. 3648; PCR Tr. 474. Dr. Adler stated that showing a sagittal view of an MRI, the cut is down the middle of the brain. There are plus signs outlining the corpus

callosum, the largest white matter structure in the brain and connects the right and left sides of the brain. He state that when Dr. Evans evaluated Williams, he found that the right hand didn't know what the left hand was doing. Dr. Adler stated that people with FASD have abnormalities of their corpus callosum. App.p. 3650-52; PCR Tr. 476-478.³⁵ He spoke with Dr. Evans about the notes Ms. Vogelsang took from her conversation with Dr. Evans. He wanted to make sure that her notes were correct and accurate. App.p. 3653; PCR Tr. 479. He stated that on Dr. Evans' tactual perception test, Williams had a big problem with that. It took him longer with his left hand. It took Williams 3 trials to catch on. It was as if there was no corpus callosum was noted by Dr. Evans. Dr. Adler found that this was a huge red flag for FAS because damage in the corpus callosum is a red flag. The corpus callosum is tied with visual or special, motor performance. App.p. 3655; PCR Tr. 481. Dr. Adler opined that Williams' corpus callosum is abnormal so the brain itself is abnormal. App.p. 3655; PCR Tr. 481. He stated that in FASD, if you are going to find a problem with the corpus callosum, it is going to be in areas 2 and 4. App.p. 3656; PCR Tr. 482.

Dr. Adler presented a sagittal cut of Williams' brain. He opined that area 4 of his corpus callosum becomes significantly thin. He stated that the configuration of gyri are jumbled, it looks like a ball. The corpus callosum is thinner than normal. The thinned area was 2.6 units, more than 50% thin. 7.1 units is the area to the left of the corpus callosum. This is moderate thinning. App.p. 3657-60; PCR Tr. 483-486. He stated that partial agenesis, when there is no corpus

³⁵He said that previous abnormalities with the corpus callosum were associated with mental retardation. The vast majority of people with FASD will not have an IQ of 70 or below. there are corpus callosum abnormalities in people who do not have mental retardation. App.p. 3652-53; PCR Tr. 478-479. He stated that literature says that people with FAS, the more seriously affected people have about 10 points lower IQ and they don't get into serious criminal trouble as much because they don't have the opportunity. He opined that because they are so infirmed, that they have supervision. App.p. 3661; PCR Tr. 487.

callosum, can be seen in FASD, but he did not see it on Williams. App.p. 3660; PCR Tr. 486. He suggested that moderate thinning is a significant finding. App.p. 3661; PCR Tr. 487. In 2004, Dr. Evans could have and did show neuropsychological impairment that he predicted would correlate with an abnormality of the corpus callosum. App.p. 3662; PCR Tr. 488.

In the 2011 MRI, Dr. Adler opined that the same thinning in the exact same spot and the exact same abnormality of the gyri pattern was shown. App.p. 3662; PCR Tr. 488. In the MRI of Williams' brain, there are things where they are not supposed to be. He stated that this is a congenital abnormality, it arose before birth. It is an unusual pattern of gyri. He stated it was the size of a kiwi and located to the left of the mid-line. In FASD, because of the early development, a lot of the things that affect the brain are mid-line or near mid-line. It was located directly above the isthmus of the corpus callosum, this is a rare finding. This is often associated with cases where there is epilepsy. Epilepsy is often associated with FASD. App.p. 3663-65; PCR Tr. 489-491.

The gyri pattern is tissue that has an appearance that's abnormal. It shows brain damage CNS abnormality. This is one of the classic early described central nervous system abnormalities in FASD. App.p. 3666-67; PCR Tr. 492-493. When you do a neurologic examination of any type, there are some signs that tell you clearly where in the brain there is a lesion, abnormality, growth, or tumor. It helps localize. Soft signs are things that indicate that there is some kind of brain abnormality, but it will not be associated with a particular location. App.p. 3667-68; PCR Tr. 493-494.

Dr. Adler opined that he found nystagmus which is associated with a person's smooth eye movement. App.p. 3668; PCR Tr. 494. He stated that Williams was not on medications are

known to produce nystagmus at the time that he saw him. App.p. 3668-69; PCR Tr. 494-495. He stated that Dr. Griesemer in 2004 noticed the nystagmus. App.p. 3669; PCR Tr. 495.

The mirror movements that Dr. Connor observed are also a soft sign for CNS. App.p. 3669; PCR Tr. 495. Dr. Griesemer in 2005 noticed a Romberg sign and a fine tremor on extending of the hands. He noticed some soft signs as well. App.p. 3669; PCR 495. He did not observe the Romberg sign or the soft tremor. App.p. 3669; PCR Tr. 495. Dr. Adler stated that there can be variability in the neurologic exam. App.p. 3670; PCR Tr. 496. The Romberg sign is a test where you have someone stand up with their feet reasonably together. The person puts their hands in front of them, and then they close their eyes. The average person should be able to maintain their posture and not fall. Williams fell to the left during Dr. Griesemer's examination. It is a soft sing of CNS dysfunction. App.p. 3670; PCR Tr. 496.

The QEEG

Dr. Adler stated that he didn't do the QEEG, but it was originally done by Dr. Evans in 2004. He also sent the test to a neurologist in Texas to look at the data. App.p. 3672; PCR Tr. 498.³⁶ Although he didn't see the QEEG report, he reviewed the notes from Ms. Vogelsang's

³⁶ "In an assessment of QEEG sponsored by the American Academy of Neurology and the American Clinical Neurophysiology Society, the authors indicated that QEEG analysis techniques "remain controversial." The authors concluded from their assessment that "[b]ecause of substantial risk of erroneous interpretations, it is unacceptable for any ... QEEG techniques to be used clinically by those that are not physicians highly skilled in clinical EEG interpretation." Id. at 14. "Qeeg techniques are very predisposed to false-positive errors ." Nuwer, Marc, M/D., Ph.D., "Assessment of Digital EEG, Quantitative EEG, and EEG Brain Mapping: Report of the American Academy of Neurology and American Clinical Neurophysiology Society", Neurology 1997, 49:277-292. **The authors stated that "[o]n the basis of clinical and scientific evidence, opinions of most experts, and the technical and methodologic shortcomings, QEEG is not recommended for use in civil or criminal judicial proceedings."** Id. at 49:285. Id at 13." Falksen v. Secretary of Dept. of Health and Human Services , 2004 WL 785056, 10 (Fed.Cl.) (FED.CL.,2004). The Tenth Circuit found that the Plaintiff in Head could not meet her burden, and therefore made a showing that a QEEG test had not achieved some scientific acceptability, or that the test does not have a reasonable measure of trustworthiness. Head v. Lithonia Corp., Inc., 881 F.2d 941, 942-944 (10th Cir.1989). "In some circumstances, QEEG has some positive values, but they are outweighed by the substantial problems encountered in trying to use the tests clinically." Id. at 49:280. QEEG is an unreliable, unacceptable methodology for diagnosing cognitive disorders and is not generally accepted by the relevant scientific community for that purpose. See APA

conversation with Dr. Evans and spoke to Dr. Evans. Dr. Adler did review the report from Dr. Walker. App.p. 3672; PCR Tr. 498.³⁷

According to Dr. Adler, the Quantitative EEG (QEEG) measures different brain waves at different sites and the frequencies. The QEEG compares the results against a database of people with normal brains. App.p. 3679-80; PCR Tr. 505-506. Dr. Walker assessed the raw data and Dr. Thatcher prepared the QEEG report. App.p. 3680; PCR 506. Dr. Adler opined that a well-functioning brain has all the parts working together in synchrony. This is what you look for in a QEEG. He stated that in an abnormal brain, you would see higher electrical activity in a particular area of the brain. App.p. 3684; PCR Tr. 510. The abnormality has to be in the uppermost 2.5% to show up on LORETA. App.p. 3685; PCR 511. Dr. Adler claimed that QEEGs have been generally accepted in the scientific field under Daubert standard and under

Official Actions, "Quantitative Electroencephalography: A Report on the Present State of Computerized EEG Techniques," Am.J. of Psych., 148:7, July 1991, at 962; see also Head v. Lithonia Corp. Inc., 881 F.2d 941, 942-44 (10th Cir.1989) (plaintiff, as proponent of this scientific evidence, did not meet her burden of showing that the proffered QEEG test has achieved some scientific acceptability and that the test has a reasonable measure of trustworthiness); Brownell v. Bulldog Trucking Co., Inc., Civ. 4-91-0005 (E.D.Tenn. July 7, 1993); Tran v. Hilburn, 948 P.2d 52, 57 (Colo.App.1997) ("QEEG is not generally accepted in the relevant scientific and clinical community for the purposes for which the evidence was offered."); Ross v. Schrantz, No. C8-94-1729, 1995 WL 254409 (Minn.Ct.App. June 14 1995) (record supported district court's decision to exclude QEEG evidence). Petitioner has presented no scientific validation of the use of QEEG. Mendoza v. State of Florida, 87 So.3d. 694 (S.Ct. Fla. 2012) (circuit court did not abuse its discretion in excluding QEEG test results where the QEEG had not passed the Frey test).

³⁷ The State objected to the admissibility of the QEEG report. The State urged that several courts have held that the QEEG is not admissible as a science. Under South Carolina Rules of Evidence, Rule 701 through 704, the State submitted that standing alone for an opinion, the QEEG is not admissible. However, after a discussion about the QEEG report, the hearing judge allowed its consideration. App.p. 3672-73; PCR Tr. 498 505. The QEEG has not been generally accepted in the scientific community as reliable and therefore is inadmissible. See State v. Zimmerman, 166 Ariz. 325, 802 P.2d 1024 (App. 1990); see also Nadell v. Las Vegas Metropolitan Police Dept., 268 F.3d 924, 927-28 (9th Cir. 2001); Tran v. Hilburn, 948 P.2d 52, 55-57 (Colo. App. 1997) (qEEG not generally accepted in relevant scientific and clinical community for purposes of diagnosing and treating mild closed-head injuries); In re Breast Implant Litigation, 11 F. Supp. 2d 1217, 1238 (D. Colo. 1998) (rejecting qEEG evidence because it is not well recognized in clinical setting, it is pre-disposed to false-positive errors, it is not recommended for use in civil or criminal proceedings, and it is an unreliable and unacceptable methodology for diagnosing cognitive disorders and is not generally accepted by the relevant scientific community for that purpose).

Frye standard. App.p. 3685; PCR Tr. 511.³⁸ The QEEG is data he uses with all the other data that he has. App.p. 3686; PCR Tr. 512. Dr. Adler state that Dr. Connor's testing, there will be areas shown that are malfunctioning. App.p. 3686; PCR Tr. 512. He contended that the abnormalities shown on the tests are well correlated and consistent with the things that Dr. Connor found independently when he tested Williams, not knowing anything about the QEEG. App.p. 3686-87; PCR Tr. 512-513.

Dr. Adler stated that Dr. Thatcher could have done the QEEG in 2004. App.p. 3689; PCR Tr. 515. He said Dr. Evans analyzed the data and conveyed that information to Ms. Vogelsang and had the raw data analyzed by Dr. Walker. He reported that Dr. Walker had abnormal findings that he conveyed were consistent with the neuropsychological testing results of Dr. Evans. App.p. 3690; PCR Tr. 516. He reported that Dr. Walker stated that his analysis of the raw EEG is "abnormal because of the prominent intermittent, independent frontal alpha activity. This is consistent with the neuropsychological testing suggesting some frontal lobe dysfunction and probable attention difficulty and memory problems." App.p. 3691-92; PCR Tr. 517-518. According to Dr. Adler, Dr. Walker found that the electrical activity in the frontal lobe, the part that is making decision, contemplating choices, prioritizing, and abstracting, is essentially untethered, intermittently doing its own thing. App.p. 3692; PCR Tr. 518. He stated that Dr. Evans had this information in 2004. App.p. 3692; PCR Tr. 518.

Dr. Adler opined that this is additional material that is not centrally necessary to make the

³⁸ Respondent submits that considerable debate exists within the literature as to the reliability of QEEG scans. See e.g., *Laura Stephens Khoshbin & Shahram Khoshbin, Imaging the Mind, Minding the Image: An Historical Introduction to Brain Imaging and the Law*, 33 Am. J.L. & Med. 171 (2007). In fact, the Ninth Circuit has affirmed a district court's decision to exclude QEEG expert testimony based on record evidence indicating QEEG's may tend to produce "false positives." See *Nadell v. Las Vegas Metro. Police Dep't*, 268 F.3d 924, 928 (9th Cir.2001). Additionally, a District Court in Colorado found that Quantum EEG testing was "not well recognized in the clinical setting." *In re Breast Implant Litigation*, 11 F.Supp.2d 1217, 1238 (D.Colo.1998).

diagnosis, but confirms it. App.p. 3693; PCR Tr. 519. He interpreted that Dr. Walker's report is saying that Williams has brain damage. App.p. 3693; PCR Tr. 519. The Court allowed the QEEG over objection. App.p. 3693-95; PCR 519-521. Adler reported that Dr. Thatcher is able to show the abnormality visually like an MRI picture and able to tell that parts of the brain are not working smoothly. App.p. 3694-96; PCR Tr. 522.

Dr. Adler opined that abnormality found in Brodmann area 39 and 40 is consistent with the neurological testing.³⁹ These areas are the angular gyrus (39) and the supramarginal gyrus (40) considered by some to be part of Wernicke's area. App.p. 3698-99; PCR Tr. 524-25. Dr. Adler contended that Dr. Connor's testing shows the types of abnormalities you would expect to see from those areas. App.p. 3698-99; PCR Tr. 524-525.

Dr. Adler concluded that the second major area that is abnormal is the cingulum. Adler asserted that there was a mid-line symmetrical abnormality. He claimed it was consistent with the neurological testing. He described the cingulum as an area of the brain that is very important for volitional attention. From an early age, Williams had attention problems, a common occurrence in FASD. App.p. 3700-3702; PCR Tr. 526-528. Dr. Adler stated that there must be need 3 domains with cognitive abnormalities. He opined that Dr. Connor indicated that 8 were present and that Dr. Evans found 5. App.p. 3703; PCR Tr. 529.

Dr. Adler also opined that he found certain abnormalities and indicia on the physical examination that are not pathognomonic and determinative of FAS, but are frequently found. One of these things is clinodactyly or misshapen fingers, particularly fingers that are twisted in appearing like a hockey stick that you see this with some frequency in FASD. He claimed this

³⁹ The reference to Brodmann concerns the brain map areas originally developed by the German anatomist Korbinian Brodmann.

was found in Williams. App.p. 3703-04; PCR Tr. 529-531.

Dr. Adler also asserted that he found ophthalmic abnormalities with Williams. According to Adler, the IOM points out that you will see abnormalities of the eyes. According to the social history, Williams' father first noticed an abnormality and brought it to the attention of the doctors. They sent Williams to a neuro-ophthamologist, who found an abnormality of the eyes. Dr. Adler stated that Dr. Griesemer also noted the abnormality. Dr. Adler described the eyes rotated out on the elevation of the gaze. He concluded that this was a birth defect. App.p. 3703-04; PCR Tr. 531-532.

According to the DSM IV TR, a mental disorder is a clinically significant behavioral or psychological syndrome or pattern associated with present distress or disability or with a significantly increased risk of an important loss of freedom. App.p. 3706; PCR Tr. 532. He opined that as a general rule, people with FASD don't live independently, but they also get psychiatrically hospitalized and incarcerated. He claimed this was a mental disease or defect because he had shown that the corpus callosum was thinned so the brain itself is abnormal. App.p. 3706; PCR Tr. 532.

Adler stated that FAS isn't in the DSM because it is a "medical" disorder. He stated that pre-natal alcohol exposure and its negative effect is mentioned in the DSM, but the diagnostic criteria are not part of the DSM. App.p. 3707; PCR Tr. 533. Dr. Adler opined that Williams' cognitive disorder and neuropsychological abnormalities are severe. App.p. 3707; PCR Tr. 533.

Dr. Adler suggested that Partial Fetal Alcohol Syndrome is more serious than FAS. He stated because people with FAS have the full abnormal face and their IQ is lower, they get services more readily. He claimed that people with FAS are sheltered and helped, and they

generally don't have criminal problems. However, he felt that people with PFAS have more difficult lives with more negative things that happen to them because their problems are not as easily detected. App.p. 3707-08; PCR Tr. 533-534. Dr. Adler stated that Williams can communicate well and he looks fine. "Williams talks a good game." Adler suggested that Williams is able to mask his problems. App.p. 3708-09; PCR Tr. 534 -535.⁴⁰

Dr. Adler declared that bipolar disorder mental illness is not a symptom of FASD because there can be co-occurring disorders. App.p. 3716; PCR Tr. 542. He opined that if a person has FASD, there is a higher risk of having other disorders. App.p. 3716; PCR Tr. 542. 41

According to Dr. Adler, Williams has Partial Fetal Alcohol Syndrome. He opined that the impairment that PFASD gives the individual in life is markedly greater than bipolar disorder or Obsessive Compulsive Disorder. App.p. 3717-18; PCR Tr. 543. Dr. Adler's particular diagnosis of Williams is Partial Fetal Alcohol Syndrome. App.p. 3718; PCR Tr. 544.

Dr. Adler stated that he has been involved in cases in which this type of information has

40 Dr. Adler stated that a 1999 study of children and exposure to fetal alcohol comparing those with prenatal alcohol exposure versus kids without exposure. He stated the study determined that the actual curves of the two groups don't intersect, suggesting that they have nothing in common. He claimed that the study found statistically significant differences between the two groups in areas such as school achievement, intellectual ability, development, depression, family problems, delinquency, withdrawal, anxiety, psychosis, hyper vigilance. The study found psychosis was the second highest point. He opined that people with FASD have a much higher rate of psychosis beginning at age 4. App.p. 3710-11; PCR Tr. 536 537. In addition, the study from Dr. Streissguth also looked at groups, kids ages 6 to 11, people from 12 to 20, and adults 21 to 51. In the group of people ages 12 to 20, the rate of attention deficit problems is 60%. It concluded that this is 6 to 8 times the normal rate found in the general population. In that study, he asserted all of the participants studied had FASD. In the group ages 21 to 51, attention deficit was extremely high; there was depression, psychosis, and a rate of suicide attempts between 12% and 20%. In children between 6 to 11, the rate of depression is 20%. The study found mood disorders is consistent with FASD. App.p. 3711-12; PCR Tr. 537 538.

41 Dr. Adler stated that Williams had been prescribed Risperdal, an anti-psychotic by the state doctors. He stated that at that time a possible diagnosis entertained by the State doctors was paranoid schizophrenia. App.p. 3713; PCR Tr. 539. Dr. Adler stated that a problem with FASD is that it is commonly misdiagnosed. He opined that in FASD, it is a frequent and common circumstance that there will be disagreement over diagnosis between experts, because people with FASD can have atypical presentations of a particular difficulty. He noted that there is an increased rate of mood disorders and anxiety disorders, including Obsessive Compulsive Disorder. He found that people with FASD are terrible historians, they are suggestible and felt that Williams was similar. App.p. 3713-14; PCR Tr. 539 542.

been offered at the penalty phase, resulting in a life without the possibility of parole sentence. App.p. 3718; PCR 544. Dr. Adler stated that he had seen a summary of Williams' hospital records after a suicide attempt. App.p. 3719; PCR 545. Exhibits 38, 39. He opined that there was nothing in those records that would change his diagnosis of PFAS. App.p. 3721; PCR 547. However, Dr. Adler claimed that it show that Williams was a bad historian, because Williams said that he had taken 10 pills, Klonopin and Estradiol, when he actually took tricyclics, which are extremely toxic. App.p. 3721-22; PCR Tr. 547-548.

When Dr. Adler was recalled concerning the November 2011 MRI report ordered by Dr. Bachman, he confirmed that the report indicated a "normal brain MRI." App.p. 3787; PCR Tr. 613. See 2011 MRI Report (App.p. 5035). It also specifically indicated only mild thinning of the corpus callosum in contrast to Dr. Adler's assertion of "moderate thinning." App.p. 5035. See App.p. 3787:PCR 613. Dr. Adler disagreed with the finding in the report that it was *mild* thinning, but conceded that the person who made the report stated it. Dr. Adler also stated that although the earlier 2005 MRI report stated it was a normal MRI of the brain, he disagreed with the conclusion because they did not report thinning of the corpus callosum which Dr. Adler believes would be there in 2005. App.p. 3791. He further admitted that the 2005 MRI report indicated it was done to evaluate for congenital anomaly versus focal injury. App.p. 5036. He declared this meant the 2005 MRI was looking for any damage at birth. However, Dr. Adler conceded that both the 2005 and 2011 MRI reports indicated a normal brain by the reporters.

On redirect, Dr. Adler indicated even if there was no thinning of the corpus callosum and it was normal, he opined that he could still make a diagnosis of PFAS. App.p. 3798; PCR 624. Dr. Adler confirmed that in 2012, he went to MUSC to try to get the 2011 report changed

concerning the thinning of the corpus callosum, but they refused to change the report which declared it to be a normal MRI. App.p. 3799.

On cross-examination, it was developed that the first case Dr. Adler ever did his a multi-disciplinary assessment for FAS was the post-2005 Jonathan Binney death penalty PCR case in 2006, after the trial in Williams's case. App.p. 3733. Concerning evidence of the mother's drinking – a condition precedent to FAS, Dr. Adler stated that he was aware that mother had denied drinking during pregnancy prior to the 2005 trial. App.p. 3738-39. However, he acknowledged that he made no assumption that the mother's claim now that she drank was accurate because " people are accurate reporters about drinking, even retrospectively. App.p. 3741. He speculated that mother's in a capital case as a general rule will tend to deny drinking because she has a concern that her actions contributed to the fatal and tragic death of somebody else. App.p. 3741. However, he admitted that he did not know for a fact with a 100% certainty whether the mother drank during pregnancy. App.p. 3742.

Further, that while Dr. Adler emphasized that Dr. Evans had reported during his earlier testing that a response indicated that he acted like he did not have a corpus callosum, there was a corpus callosum indicted in 2005 and 2011 MRI's. App.p. 3750-3742.

Dr. Natalie Novick-Brown testified that she had reviewed the work of the other team members. Like the others, she explained how FASD affected executive functions, including self-regulation, behavior control, and thought control. App.pp. 3817-18. She opined that the frontal lobe controls the processing of information to the brain and uses it to make decisions , reduce urges, and reduce the intensity of emotions. App.p. 3818. She stated that when the executive functions are impaired it leads to behavior difficulties. App.p. 3818. She opined

that Williams executive functioning was significantly impaired due to the brain damage because he has FASD. People with FASD have problems with self-monitoring and opined that they have impulse control problems. App.p. 3821. She asserted that the inability to resist urges explains some of the writing in his journal. She contended that Williams's FASD does not have the capacity to determine what is the worst thing that could happen and resist the urges. App.p. 3823. She opined that they cannot understand the significance of the behavior on others or control it. App.p. 3824. She opined that the more stress the person is under the worse the decision. App.p. 3824.

She further opined that people with FASD have child-like coping skills. App.p. 3836. She opined that testing suggested that his skill level for coping was equivalent to that of a nine year old. App.p. 3838.

Dr. Brown opined that Williams's bipolar diagnosis was a symptom of problems caused by his brain damage. App.p. 3844. She found that people with FASD cannot manage in adulthood because of their childlike ability to self-regulate and cope. App.p. 3847. She opined that he needed a structured environment to work. App.p. 3851-52. She noted that Williams had no problem in a structured prison environment, but did in day to day life. App.p. 3853.

Concerning the crime, Dr. Brown found that based on his journal, he had a series of plans with the victim that he did not follow up on. She focused on his stated plan to tie her up which he did not do. App.p. 3858. She opined that his behavior led to his seeing himself as the wronged person after a confrontation with her and the inability to cope leads to the attempted suicide. App.p. 3876-37. She notes that he begins drinking heavily for the first time, mimicking his mother's behavior. App.p. 3877. She notes that Williams in July starts making numerous

telephone calls to the victim demanding that she pay attention and communicate with him. App.p. 3878. She finds on July 16 he confronts her and he strikes her in the face after he claims to beg her to come back to him. This leads to his arrest for assault. App.p. 3878.

Dr. Brown opined that this is evidence of executive function impairment and an inability to cope by showing his constant attempt to go back to her until there is a confrontation and he blows, unable to moderate his feelings. App.p. 3878. She notes this happens at the same time as the perceived abortion by her of his child. App.p. 3878. She notes that FASD people see things rigidly in black and white. App.p. 3879. She states Williams now perceives the victim as all bad at that point of time, though he is still holding out hope. App.p. 3879. She states that his holding out hope, as reflected in his journal is classic child-like behavior.

Dr. Brown also found that fact that he wrote down his plans to kill the victim as foolish and consistent with FASD. She further found that there was no contingency in the plan for not getting caught as suggesting that he thought she would give in. App.p. 3880-81; 3884. She also opined that his lists (getting cigarette, getting sleeping pills) suggests that Petitioner knew he would forget things and needed reminders. App.p. 3882. She thought the fact of making lists is evidence of executive function impairment. App.p. 3882. Dr. Brown stated that she was looking for an executive plan for ways to rule out FASD. App.p. 3882.

Dr. Brown noted that the Petitioner asserted another version of the incident that he had run out of gas in front of the store and that Williams had told her at that point he panicked and wanted to leave. She stated that he feared that if he asked for help someone would have known he was there against the restraining order so he could not leave. App.p. 3883. Dr. Brown found

this version illogical as she did with the crime itself when he parked in front of the store and left the keys in the car during work hours with employees present carrying a visible gun by his side. App.p. 3883. She stated he was aware there would be camera and found this action did not make sense. App.p. 3883-84. She stated that he let the victim communicate with 9-1-1 and suggested that it was not a sophisticated plan to hurt someone. Dr. Brown suggests the video supports her finding that the incident was not a sophisticated plan. She opined that he never contemplated that there would be a struggle. App.p. 3885-86. At the scene, it appears that he no longer wants to kill her as reflected in the journal, but now just wants her attention. App.p. 3886. Dr. Brown stated then the unexpected happens to him which he perceives as a threat and thinks she will get the gun from him according to his report to her. App.p. 3886-87. She states this version is in two statements. App.p. 3887, 3888-89. She states that when the struggle happened he feared that she would get the upper hand and shoot him based upon the supportive evidence of the struggle. App.p. 3889. Again she found the behavior illogical. App.p. 3889. After the fact of the shooting, Williams drops the gun and hides in the storage area knowing SWAT is around. App.p. 3889-90.⁴² She notes that he has in his possession the letters talking about killing her and about a suicide. App.p. 3890. Dr. Brown finds these letters (State Exhibits 16 and 17 at trial) were written to intimidate the victim and threaten her. App.p. 3890.

Dr. Brown notes that it was illogical for Williams to consent without counsel to an interview with the police and admit what he had done, but with a tendency to blame the victim. App.p. 3890-91.

⁴² Dr. Brown consistently considers this illogical. However, alternately, if the desire was only to kill the victim and torture her by delaying committing the act, but to survive, the best action would be to drop the weapon and hide knowing that SWAT was there.

Dr. Brown states that when Dr. Crawford begins her interrogation she leads him away from what he originally said. App.p. 3887. Dr. Brown notes that Williams ultimately takes responsibility for planning the whole thing out and making (inculpatory) statements that no sophisticated person do showing premeditation, intent to kill and torture. Dr. Brown claims that whatever was suggested to him, he endorsed. App.p. 3887.⁴³ Dr. Brown stated that FASD people are suggestible and easily manipulated. App.p. 3892. She used the Gudjonsson test standard for suggestibility and determined that his score rated him as more suggestible than the general population. App.p. 3894-95. This suggested a tendency to change answers. She found it to also be higher than the prison population. App.p. 3896.

Dr. Brown opined that the high stress and unstructured aspect without a contingency plan with an unexpected struggle “overwhelmed his capacity to adjust quickly and come out with the right kind of behavior.” App.p. 3899. She claimed this goes to the heart of culpability on why he did the illogical act. App.p. 3900. She opined that Williams lacked the sufficient capacity to conform his conduct to the requirements of law. App.p. 3900-3901.

On cross-examination, Dr. Brown noted that the FASDExperts.com group did not begin until 2007. App.p. 3902-03. She admitted that she was involved in the Binney case in South Carolina. She testified that the experts in 2003-2005 had information about frontal lobe deficits. App.p. 3912. She admitted that the expert in 2005 found that Williams had the capacity to conform his conduct. App.p. 3912. She admitted that although she had stated her role was to rule out FASD, the Dr. Adler before she had begun her assessment had already opined that Petitioner

43 A review of the statement does not support this generalization that the critical responses were suggested during the interrogation as opposed to the Petitioners. See App.p. 2869-2863. See App.p. 2914-2924, 2930-2931; 2934-39; 2944-2951, 2956-2957, 2963.

had PFASD. App.p. 3913. She admitted that when Petitioner entered the Bi-Lo "I think he did have an intent to kill her, but it was a vacillating intent." App.p. 3914. She further admitted that the intent to kill did not occur as an irresistible impulse. App.p. 3914. She recognized that there was evidence that the intent to kill existed for a month before, but discounted it because she does not accept anything that anyone with FASD says. App.p. 3914, l. 19-21. Further she discounted the journal entries because they were not dated. App.p. 3914. Further, the self-reporting of an earlier aborted attempt to kill her was also questioned. App.p. 3915. Although he was not arrested, Dr. Brown did not find other events as showing his capacity to conform when he did not kill her because she found he was in violation of a restraining order at the time. App.p. 3916.

Dr. Brown confirmed that there was ample evidence of planning the killing of the victim, noting the journal entries and to do lists. App.p. 3916. He had a certain jacket, he had her work schedule which he removed from the store at an earlier visit. App.p. 3917. She noted that the letters he had with him about the killing done in advance was additions evidence of his planning in advance and the similar statements to Dr. Crawford. App.p. 3917. She stated that there was ample evidence of planning. App.p. 3920.

Dr. Brown also stated that a person with FASD could conform his conduct to the requirements of law if it's a familiar routine. App.p. 3924-25. Importantly, she confirmed that she is not saying that Chris Williams could not conform his conduct to the requirements of law. App.p. 3924, l. 25- p. 3925, l. 6. She stated he could conform in routine situations. App.p. 3925. She asserted that as the stress built up, his capacity to conform lowered until the incident. App.p. 3926. She admitted that after the incident he did not have the gun on him and was in

the corner of the store when he was arrested. She admitted that he had said he was aware the SWAT team was in the store when he dropped the gun. She also admitted that he never aimed the gun at law enforcement. App.p. 3927. Dr. Brown also noted that his statements about the offering the victim the choice of death was consistent with his letters. App.p. 3928. She admitted that his statements also reflect an understanding of right from wrong. App.p. 3929.

Dr. Brown admitted that Petitioner was able to delay the entry of the SWAT team by negotiating with them before shooting the victim which he had stated was part of his plan. App.p. 3932-33. She admitted that Petitioner's plan was not to let the victim walk out of the store. App.p. 3935. She admitted that the plan he described to her after he had received a death sentence was different than earlier statements. App.p. 3935.

Dr. Brown confirmed that Petitioner had a tendency to blame others for his mistakes. She confirmed that this is not unique to FASD and common among criminals. App.p. 3936. She confirmed that it is also present in individuals with obsessive compulsive disorder. App.p. 3937.

She stated that when one is conforming his conduct to the requirements of law that it shows that he has the capacity to conform. App.p. 3937-38. She stated that there were many times Williams was conforming his conduct. It was pointed out that in his statement (2911-14) that he was going to confront the victim at her home one night but chose not to do so when he was concerned that a family member might be there. App.p. 3938. She also confirmed that during the negotiations, he refused the suggestions to release the victim. App.p. 3940-41. However, she did not equate that rejection of the suggestion with the suggestibility she placed

on Dr. Crawford's interrogation. App.p. 3940-42. When inquiry was made about the comments he made to Dr. Crawford, she discounted them. App.p. 3943-44.

Deficient Performance Not Shown

At the outset, Petitioner complains that the PCR court failed to accept the admissions of counsel that they had no reason why they did not consider fetal alcohol. As noted above, a collateral court is not required to accept admissions by counsel of ineffectiveness which is not determinative. U.S. v. Eyman, 313 F.3d 741, 743 (2d Cir. 2000).⁴⁴ Further, the Petitioner fails to recognize that the testimony of Jan Vogelsang was found to be credible and relied upon by the PCR judge to show that counsel's investigation was reasonable and preparation was not constitutionally deficient. In appellate review, the Court gives great deference to the PCR court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). This court also "gives great deference to a PCR [court's] findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010).

44 The Petitioner initially points to counsel's admissions that their choice not to engage an expert in fetal alcohol was not motivated by strategic considerations. Counsel Nettles and Mauldin could not recall or explain why they did not further investigate FAS. The PCR Court recognized that counsel "could not identify a reason why they did not develop a mitigation strategy based on Fetal Alcohol Syndrome." App.p. 4208.

The question of ineffectiveness is a question for the court to decide so admissions of defective performance by attorneys are not decisive. Wright v. Hopper, 169 F.3d 695, 707 (11th Cir. 1999), citing Harris v. Dugger, 874 F.2d 756, 761, fn. 4 (11th Cir. 1989). The same analysis was quoted in Atkins v. Singletary, 965 F.2d 952, 959-60 (11th Cir. 1992); See also Edwards v. LaMarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (trial court is not obligated to "accept a self-proclaimed assertion of trial counsel"); Chandler v. U.S., 218 F.3d 1305, 1316 n. 16 (11th Cir. 2000) (en banc). See also Rhoades v. Henry (Michelbacher), 611 F.3d 1133, 1138 n.1 ("... it is all too easy" for counsel or a court "to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight," citing Bell v. Cone, 535 U.S. 685, 702, 123 S.Ct. 1843, 1854, 152 L.Ed.2d 914 (2002); Eberts v. Gaetz, 610 F.3d 415 (7th Cir. 2010) (an attorney's reflection about what should have been done after the fact is irrelevant to the question of ineffective assistance); Miller v. Champion, 161 F.3d 1249, 1286 (10th Cir. 1998) (that counsel would have done something different in "hindsight" is unhelpful because that is the wrong test); Brown v. Ornoski, 503 F.3d 1006, 1013 (9th Cir. 2007) (that counsel would do something different today did not prevail because the court would not employ 20-20 hindsight, what was done was reasonable despite the baggage involved, and Strickland recognizes that there are countless reasonable ways to try a case).

Respondent submit that the record provides support that counsel in 2005 were not “deficient” in their investigation even though they failed to develop evidence that Petitioner suffered from FAS. First, underlying the FAS claim is the fact that the Petitioner’s mother in 2004 advised Vogelsang that she did not drink alcohol during her pregnancy. As Vogelsang noted, this contrasted with what the father and daughter had suggested, but Vogelsang even found those inquires to be unclear about the amount of alcohol used by the mother at that time. Plainly, this was revealed to the defense. It is additional undisputed that Vogelsang provided this conflicting information about mother drinking during pregnancy themes to defense counsel in her reports at team meetings as shown through her memorandum for those meetings. Vogelsang recognized that the failure of mother to admit drinking brought the possible FAS issue as a problem and was not surprised that it was not directly presented as FAS during the trial. Vogelsang’s testimony was found credible and supported Judge Welmaker’s fact finding. See Garza v. Stephens 738 F.3d 669 (5th Cir. 2013) (trial counsel's failure to investigate and introduce evidence that defendant suffered from fetal alcohol syndrome as mitigation during the punishment phase of a capital murder trial was not deficient performance, as an element of claim of ineffective assistance of counsel, where no family members interviewed mentioned the mother's alcohol or drug abuse to trial counsel, and three prior psychological evaluations of defendant did not mention fetal alcohol syndrome);

Further, counsel’s reasonable investigation is shown though Vogelsang’s testimony where she declared that she provided information about mother’s drinking during pregnancy to the social historian, and the two psychiatrists Dr. Halleck and Dr. Richards who testified for the defense. Vogelsang also provided them the information about the frontal lobe dysfunction from

Dr. Evans neurological testing to these experts which suggested brain damage. Additionally important, when the MRI was done in January 2005 before the trial, it reported as a normal brain MRI. App.p. 5035. [It is also interesting that when another MRI was in 2011, the report again was a normal brain MRI with “only mild thinning of the posterior body” of the corpus callosum. App.p. 5035.]

It is important to note that it is uncontested that none of these experts armed with the conflicting information about mother’s drinking during pregnancy indicated or requested further testing for fetal alcohol syndrome was needed to be done for their purposes. As Dr. Adler and Dr. Connor noted, the determination of the existence of fetal alcohol syndrome is a medical determination and the psychiatrist would be appropriate in making that determination. It is significant that the experts that counsel relied on did not suggest further testing to counsel. Counsel took reasonable steps in providing the information to them. The Court was correct to find that counsel was not deficient in light of their reasonable investigation. The fact that in hindsight, they could not recall any specific discussion about FAS and feel that they should have taken additional steps does not address the constitutional question. Here, the expert psychiatrist and social workers who were aware of the conflicting evidence on mother’s drinking did not recommend seeking additional medical testing for FAS.

Importantly, counsel were aware from Dr. Evans report about frontal lobe dysfunction to suggest brain damage. However, no evidence of brain damage was presented to the jury, although evidence was presented about mother’s drinking through the cross-examination of Dr. Crawford and through Professor Hammock. The mitigation presentation consisted showing that Petitioner suffered from mental illnesses such as bipolar disorder, obsessive compulsive disorder

and depression. These mental illnesses fit within the picture that the defense was using to show his relationship with the victim that led to the murder. As the PCR Court found, the defense presented a compelling case in mitigation. It reflected evidence of impulsivity to contrast with overpowering evidence of premeditation and planning reflected in the Petitioner's journals and statements made to Dr. Crawford in her interviews with Petitioner.

Respondent submit that the PCR Court did not ignore the evidence that Petitioner placed before it on the issue of deficient performance. It is undisputed that defense counsel were aware in a general sense of FAS and that it impacts on brain damage. It is undisputed that counsel was aware of the A.B.A. guidelines to complete a reasonable investigation. It is undisputed that counsel did not call Daisy Huckaby to testify in 2005 when her testimony according to credible witness Vogelsang would be that she did not drink during pregnancy. It is further undisputed that with the report from Dr. Evans and the normal MRI report in 2005, the defense chose to not present specific evidence that there was brain damage from Dr. Evans's testing.

Respondent submits that the PCR court had a basis to find that counsel was not deficient. For this initial reason, certiorari must be denied.

Prejudice Not Shown

Respondent submits that Sixth Amendment prejudice was not shown in the presentation before the PCR Court. As stated, the focus of his prejudice showing is that partial fetal alcohol spectrum disorder which would have possibly been FAS in 2005 is that it is a mitigating factor and could have supported a verdict of guilty but mentally ill based on Dr. Novick-Brown's testimony. What he fails to recognize is while FAS is a mitigating factor, the presentation of the

evidence and its claimed effect as an additional explanation for his actions was a two-edge sword on the basis of the record because of Dr. Novick-Brown inability to recognize the salient facts of the Petitioner's action showing planning and premeditation in his intent to kill the victim on that date. Additionally, the conflicting evidence that Petitioner had in 2005 on whether mother drank during pregnancy while an alternate explanation could have been given remove the power of the assessment. Simply put, attempting to shoehorn Williams with all the potential traits of people who suffer from PFASD or FAS in light of the entire record to a reasonable probability would not have resulted in a new verdict.

One of the defects in Dr. Novick-Brown's opinion that Petitioner due to FAS lacked the capacity to conform his conduct to the requirements of law such that he met the definition for a verdict of "guilty but mentally ill" shows a misunderstanding of the law and the evident bias in her opinion. She testified that some people with FAS had the capacity to conform yet used those generalizations to suggest that Williams lacked the capacity to conform. Dr. Brown testified that people with FAS cannot make long-term plans, yet the record showed through the Petitioner's journals that he had written plans to kill the victim well in advance of the death. Dr. Brown even testified that he had intended to kill the victim as noted in the journals. App.p. 3885. Dr. Brown was addressing the claim as his capacity as being substantially impaired by his mental illness which was a conclusion consistent with Dr. Halleck's similar testimony. However, unlike Dr. Halleck who opined that the petitioner had the capacity to conform his conduct to the requirements of law, Dr. Brown did not recognize that the threshold of guilty but mentally ill was equivalent to an irresistible impulse test. State v. Wilson, 306 S.C. 498, 512, 413 S.E.2d 19, 27 (1992) (one acting under an irresistible impulse is guilty but mentally). This mistake on her

part was evident when she specifically denied that Petitioner was acting under an irresistible impulse when he killed the victim. See App.p. 3914, 1. 7-15.

Prejudice is not shown on the GBMI issue merely because current counsel found a different expert who disagrees with the original expert opinion by Dr. Halleck concerning whether Petitioner lacked capacity to conform his conduct to the requirements of law. Wilson v. Greene, 155 F.3d 396, 403 (4th Cir.1998) (observing that, where counsel had received a psychologist's opinion that defendant was not mentally ill at time of offense, "counsel was not required to second-guess the contents of this report," but rather "understandably decided not to spend valuable time pursuing what appeared to be an unfruitful line of investigation." (internal quotation marks omitted) . Further, as noted in State v. Downs, *supra.*, in a capital case the issue of whether a person meets the definition of GBMI is not one of "culpability, but rather a treatment option which is not at issue if the person is sentenced to death. See Hoskins v. State, 75 So.3d 250, 255 (Fla.2011) (" 'This Court has repeatedly held that counsel's entire investigation and presentation will not be rendered deficient simply because a defendant has now found a more favorable expert.' " (quoting Card v. State, 992 So.2d 810, 818 (Fla.2008))).

Dr. Brown also chose to discount or ignore the overwhelming evidence of planning and premeditation and an expressed desire to kill the victim as reflecting capacity to plan by merely relying upon psychological testing that showed the Petitioner was suggestible. Dr. Brown used the trait to generalize that Petitioner's responses to the interview were suggestible and therefore unreliable. However, a full review of Dr. Crawford September 3, 2003 statement with the Petitioner minimizes the effect of the "suggestibility" conclusions. See App.p. 2897-2963. Although Dr. Crawford like any interrogator in a lengthy interview may have asked a few

leading questions, the bulk of Williams responses could not be classified as "suggestible." To the contrary, at most, the inquiries included follow-up questions to comments he has made or written before. A review of the entirety of the statements reflects the limited value of Dr. Brown's characterization and would have affected the jurors own credibility determination of her opinion.

The Petitioner's statements reflected that he blamed the victim for the July incident. App.p. 2904-05. Although Williams tried to get her out of his mind, he felt that she had done something wrong and caused him to think about "payback." App.p. 2906-09. He described that he wanted her to feel the pain that she had caused him. App.p. 2910. Although he had never thought about running over her with a car, he admitted that he thought about shooting her. App.p. 2910-11. He stated that he thought about killing her for a month. App.p. 2913-14. He also described his conduct at the crime scene and asking the victim the manner she wanted to be killed by shooting or strangulation. App.p. 2917-18. He claimed to have bought the shotgun the year before. App.p. 2922. His ability to control his impulses was reflected in his response to Dr. Crawford as why he did he did not kill the others in the deli and declared "I wasn't going to just walk in there and just start shooting everybody...there was nobody else in there who I had my heart set on beside her."

Further, the Petitioner's letters showed the planning and existing desire to kill the victim. State Exhibit 17 reflected his comment that throwing him away was signing her death warrant, that she will die. App.p. 1756-57. State 16 revealed that the victim had lied to him about everything and that he was going to kill her. App.p. 1758-1759.

The Petitioner's 72 page journal including references reflecting a change in his feelings for the victim in advance of the murder, including a premature comment to the victim's parents about having to kill their daughter followed by continued discussions about his desire to kill. App.p. 1882.

Further, viewing the perspective in 2005 for prejudice, it must be remembered that the mother was denying that she drank during pregnancy – the condition precedent to having FAS. Although there was conflicting evidence between the father and the mother on this issue, it was clear that there was a dispute that impact on how a jury would view the evidence. As Dr. Adler stated, he did not know if the mother drank during pregnancy. App.p. 3742. Further, Dr. Adler's reliance upon the amounts of alcohol at that time she indicated in her affidavit and PCR testimony that she drank after her earlier denials would have been viewed with great suspicion to her credibility. Support for the questioned credibility was reflected in 2005 counsel's decision not to call her as a mitigation witness in 2005 due to demeanor, concerns about her willingness to tell the truth, and implicit credibility concerns of the entire defense team. App.p. 3231-32, 3282, 3304.

The Petitioner takes issue with the PCR Court survey which showed cases where evidence of FAS had been admitted and a death verdict occurred. Petition, p. 4212-13. This analysis was plainly a review to the Dr. Adler's testimony where he stated that same kind of information that he had presented in William's case had been presented in another penalty phase case and resulted in a life sentence. App.p. 3718. As the PCR court found that assessment on prejudice needed to be viewed from the entire record in this particular case, not the mere fact that a similar diagnosis may have been presented in a different case with different

aggravation and other mitigation. Plainly, Judge Welmaker was not stating that the mere presentation of FAS automatically would require a new trial or satisfy the prejudice prong. Plainly, it was a collateral portion of the reasonable assessment. See *Soliz v. State*, 432 S.W.3d 895 (Tex. Crim. App. 2014) (the jurors weighed appellant's evidence of brain damage and partial fetal-alcohol syndrome along with other relevant evidence and made a normative judgment that the evidence did not warrant a life sentence).

More importantly, prejudice is not shown because the admission of the evidence would have been a double edged sword. See *Brown v. Thaler*, 684 F.3d 482, 499 (5th Cir. 2012) (“The [fetal alcohol disability] evidence that [petitioner] claims his counsel should have presented is ‘double-edged’ because, although it might permit an inference that he is not as morally culpable for his behavior, it also might suggest that he, as a product of his environment, is likely to continue to be dangerous in the future.”). The *Brown* court reached that conclusion amid significant evidence of fetal alcohol syndrome; the evidence showed that the petitioner's mother drank on a “daily, or near daily basis; that she drank heavily throughout her pregnancy with Brown [and] that [she] was likely an alcoholic.” 684 F.3d at 494. Also *Francis v. Dugger*, 908 F.2d 696, 702–04 (11th Cir.1990) (finding that failure to present additional mitigating evidence of an “impoverished, abused, and socio-economically limited childhood, and ... of his brain dysfunction, diagnosed by his expert as fetal alcohol syndrome,” did not prejudice defendant convicted of torture-murder of government informant); *U.S. v. Purkey*, 428 F.3d 738 (8th Cir. 2005) (erroneous exclusion of expert medical testimony that defendant suffered from fetal alcohol syndrome was harmless, during sentencing phase of capital murder trial; jury would likely have imposed death sentence, even with such testimony, since it heard significant expert

testimony on defendant's brain abnormalities and their impact on defendant's mental and emotional health) . Cf. Rompilla v. Beard, 545 U.S. 374, 391–92, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (discussing unproduced evidence the defendant suffered fetal alcohol syndrome, was mentally retarded and repeatedly beaten, and suffered an extraordinarily deprived childhood); Silva v. Woodford, 279 F.3d 825, 847 (9th Cir.2002) (holding that failure to present *1094 evidence of childhood abuse, mental illness, organic brain disorder, and substance abuse, which included PTSD, fetal alcohol syndrome, and attention deficit disorder, was extremely prejudicial).

Even more significantly, mitigating evidence showing petitioner actually suffers from Fetal Alcohol Syndrome or Fetal Alcohol Effects would necessarily have been double-edged in nature and might well have helped convince petitioner's capital sentencing jury that Petitioner was a dangerous person. See Garza v. Thaler, 909 F. Supp. 2d 578, 648 (W.D. Tex. 2012), citing Sells v. Thaler, 2012 WL 2562666, at 58 (discussing Dr. Adler's and Dr. Novick-Brown's expert opinions associating prenatal alcohol exposure to damaged executive functioning with attendant socially inappropriate behavior, inability to apply consequences from past actions (i.e., an inability to learn from one's mistakes), lack of impulse control, rage reactions, physical aggression, high risk behaviors, and the inability to experience or display remorse)), affirmed Garza v. Stephens, 730 F. 3d 669 (5th Cir. 2013).

If Dr. Natalie Brown's descriptions of the effects of fetal alcohol syndrome are deemed credible, then there were objectively reasonable reasons why prejudice would not be shown by counsel's failure to present the evidence. Chief among these are Dr. Brown's assertions that (1) prenatal alcohol exposure causes significant malformation in structures within the brain that are

necessary for normal development and functioning (meaning a finding of FAS meant petitioner was permanently marked as brain altered), (2) as of 2005, the DSM-IV-TR had not been amended to recognize FAS as an independent mental health disorder (meaning such a diagnosis could be performed only by a psychiatrist not a psychologist such as Dr. Brown who did not opine here that Petitioner had FAS), and (3) prenatal alcohol exposure damaged executive functioning, resulting in socially inappropriate behavior, inability to apply consequences from past actions (i.e., an inability to learn from one's mistakes), lack of impulse control, rage reactions, physical aggression, stealing, high risk behaviors, and the inability to experience or display remorse. Thus, pursuit of a mitigation defense at the punishment phase of petitioner's trial premised upon petitioner suffering from fetal alcohol syndrome would have amounted to an admission to the jury by petitioner's trial counsel that petitioner would, in fact, pose a substantial risk of future violent conduct.

Presenting a Fetal Alcohol Syndrome defense at the punishment phase of Petitioner's capital murder trial would, in all reasonable likelihood, have reinforced the prosecution's arguments that petitioner was likely to pose a risk of future dangerousness for the rest of his life. Had petitioner called Dr. Brown to testify regarding the effects of fetal alcohol syndrome and she had testified in a manner consistent with her PCR testimony, the prosecution would have undoubtedly employed her testimony to convince the jury to answer the issue of Petitioner's dangerous character affirmatively. A naked emotional appeal for mercy (based upon a purported diagnosis of fetal alcohol syndrome or fetal alcohol effects—a diagnosis not then independently recognized by the DSM-IV-TR) combined with an admission the petitioner was constitutionally incapable of experiencing remorse would not reasonably have resulted in a different verdict at

the punishment phase of petitioner's capital murder trial. In all reasonable probability, the brutal facts of petitioner's offense were simply too compelling to be overcome by a naked emotional appeal for mercy premised upon meager evidence showing petitioner's mother drank a few while pregnant with petitioner and his twin sister. The evidence regarding petitioner's fetal alcohol syndrome and fetal alcohol effects presented by petitioner to this Court is, at best, clearly double-edged in nature because it necessarily led to a conclusion that petitioner would forever be unable to control his aggressive, anti-social, impulses and would never be able to learn from his mistakes.

The record reveals the multi-state defense team in the penalty phase focused on development of the traumatic and troubled family background and mental background of Williams - beginning with John Mauldin's opening statement in the penalty phase. ROA 2122-2130. Particularly, he emphasized that Williams had accepted responsibility for his actions and made no excuse for what he did, but noted the defense would present evidence about "the presence of a mental illness, . . . the lack of family support or family support systems and how the combination of those two things combined to create a very very horrible and difficult situation." ROA 2131. Supporting this argument was the actual presentation of evidence in mitigation. Viewing the entirety of the Petitioner's planned and aggravated murder of the victim, and the entirety of the case in mitigation placed in the 2005 trial⁴⁵ with the additional evidence

The Defense Mitigation

A. Guilt Phase.

Counsel Nettles confirmed at the PCR hearing that he was it was a decision by the defense team to call Dr. Richards in the guilt phase of the trial. PCR 122-123. He stated they felt it was a good idea to go ahead and introduce the psychological issues that were going to be relevant to the penalty phase. PCR 123. This is a concept of front-loading the mental health issues in a capital case.

In the guilt phase counsel Nettles called in the guilt phase Dr. Robert Richards, a clinical psychiatrist, testified in the guilt phase of the trial as an expert in general psychiatry. ROA 1965. Dr. Richards testified Williams suffered from bipolar disorder-type one (manic episode) as a primary diagnosis with rapid cycling mixed features and obsessive compulsive disorder. ROA 1967. Dr. Richards stated that he found a history of environmental stress supportive of bipolar disorder. ROA 1978. Dr. Richards stated that he relied upon the history he received from the Applicant, Dr. Crawford's report, spoke with Chris's sister, his mother, his father, his first grade teacher, his fifth grade teacher and reviewed multiple reports about family history since bipolar is inherited. ROA 1971. He also had reviewed material from Dr. Evans according to investigator Vogelsang.

Dr. Richards noted that in the hospital records that there were reports that his father, Dwight Williams, had a similar difficulty and reported to a therapist that he feared that he would kill his wife and son resulting in the admission to Patrick Harris Hospital where Dwight received treatment. ROA 1977-78. Dr. Richards testified that according to hospital records, his mother had several suicide attempts and suffered from alcoholism. ROA 1978, l. 13-20. He stated that there was a high genetic disposition for mood disorders. Id. In addition, Williams recalled an incident where his parents were fighting and he thought he was killing her and there was nothing he could do. ROA 1979. Another incident was recalled where he had to sit at the beauty shop without saying a word in fear that she would not treat him well. ROA 1979.

Dr. Richards reported that he was diagnosed in school as having ADHD which was described as being hyper, not being able to sit still and talking too fast. Richards opined that this was more like ADD or ADD Plus. He noted that his pediatrician had recommended Ritalin, but Williams mother refused. However, there was a school notation that he did much better on Ritalin, although it could not be found that he was prescribed it. ROA 1980. Dr. Richards stated that Chris's sister tried throughout to get him into a treatment plan.

Dr. Richards stated that Applicant had taken an overdose of tricyclic antidepressants for depression which had been likely prescribed for his mother. He stated that effect could have been lethal. At the time of the overdose, it was reported that the Applicant's relationship with Maranda had started going downhill. After he spoke with her on the phone he took the drugs and then called a friend and the crisis line. After he was taken to the hospital, he could not state whether he was homicidal or suicidal. ROA 1982-83. He stayed there 13 hours after the event, which Dr. Richards thought was too soon to be released. ROA 1983. Next, he had signed a "no suicide" contract with his mother. ROA 1984. He stated that two days later when his parents were arguing, he felt something bad was going to happen and called the crisis line again and was taken back to the hospital and placed in restraints. ROA 1985. He stated that after the arrest, Applicant was referred to a psychiatrist and it was noted to "rule out paranoid schizophrenia." ROA 1986.

On cross-examination during the guilt phase, Dr. Richards clarified that he was not saying the Williams was insane. He initially stated that he believed that Williams knew the difference between right from wrong on September 3, 2003, but was "not sure" he was able to conform his behavior to the requirements of law. ROA 1992, l. 14-21. However, he then clarified he was not saying that he couldn't conform his behavior on September 3, 2003 to the requirements of law. ROA 1993, l. 14-20. ("I never said that"). He admitted that he had read Dr. Crawford's report that he was able to conform his conduct to the requirements of law on September 3, 2003. ROA 1994, l. 3-9.

Counsel Nettles developed some additional testimony in mitigation in his cross-examination of Dr. Crawford. She testified that Williams told her that his parents got divorced when he was 10 years old and that he was raised by his mother with her various step-fathers. ROA 2178-79. She further stated that Williams was angry with his father about the divorce because he had broken up the family. ROA 2173. She said he felt like he was an "evil child" after the divorce. He told Dr. Crawford that his mother married twice and that his relationship with the step-fathers was mixed, but generally not good. ROA 2179-80. She was told that his mother was an alcoholic for 30 years and intoxicated much of the time he was a child. ROA 2180. She stated that she had spoken with Williams mother and father. ROA 2181. She stated that Williams had reported that he had flunked the first grade and that ADD (attention deficit disorder) may have been discussed, but he never received medicine for it and nobody followed through. His sister Maureen verified that his mother was an alcoholic and claimed that his mother provided Williams "virtually no support" and "very little supervision." ROA 2182. The sister had told Dr. Crawford that she offered to have Williams live with her because she was worried about the lack of adequate supervision and support. ROA 2182. Dr. Crawford stated that she visited the mother's house the night of the incident. She also stated that no one told her about Williams using drugs and he only stated that he drank some. ROA 2183. She stated that Williams told her that he met Maranda at the Bi-Lo and that they became friends and quickly started dating. She said he told

her that he thought that Maranda had an abortion.

He described to her a journal that he wrote to record his feelings about ending their relationship and described a suicide attempt and that he had overdosed on his mother's medication to try to get Maranda's attention. ROA 2185. Williams told her he became angry when she did not respond to the suicide attempt and branded his arm with an "M". ROA 2185. He told Dr. Crawford that at different times he planned to kill himself, had experienced a decrease in sleep months before the break-up and had racing thoughts at times. ROA 2182-83. She stated that Williams kept long lists about supplies that he would buy and he would distract himself by listing them and their prices. She clarified that the distraction was not about moving into the woods, but by making the lists. ROA 2186.

B. Penalty Phase

In addition to the guilt phase evidence presented, the defense team presented a series of witnesses. First, counsel Nettles called **Dwight Williams, the Applicant's father**. ROA 2208. Mr. Williams was a multi-instrumental (13) band master in the Army. He stated that Daisy Huckaby Williams was Applicant's mother though they later divorced when Applicant was 8 years old. ROA 2210. He stated the divorce affected Applicant. He stated that there were disturbances within the home which "weren't physical arguments, but more or less verbal arguments" and he felt it was best to separate to keep the child from continued arguments. ROA 2210-11. He admitted that there may have been violence in the home with bruising someone and breaking objects. He stated it was not a healthy place for kids. He stated that the divorce affected Applicant because it bothered him because he has lost his father as a friend. Dwight stated that Applicant did not have friends and was real quiet, subdued and kept to himself. ROA 2212. While it was the best decision for the father, it was not the best situation for the Applicant. ROA 2213. He said his son was left with his wife and his older daughter Maureen had already left for college.

Dwight Williams testified that his situation alone with Applicant's mother was not the best for Applicant because his mother had a habit of drinking heavily. ROA 2214. He described his own life after the separation as having "crashed and burned." He stated he went through a period of despair without any place to live. He said he lived in his car for about a month. ROA 2214. Although he began a relationship with a woman, he stated that he developed depression. *Id.* He began treatment with visits at Greer Mental Health and then checked into Patrick Harris Mental Health facility for two weeks for situational depression. ROA 2215. He stated he was placed on antidepressants - Doxepin. However, he later sought treatment at Charters Hospital. ROA 2215-16. Dwight stated that he needed to have friends around to help him through his depression. He stated that as far as he knew he was his son's best friend. ROA 2217. He said that he reached out to him, but not as well as he should have for fear of getting into trouble and locked up by "character assassination" because of what his son had been told which was not true. ROA 2217.

Dwight Williams stated that the last time he spoke to his son Applicant was agitated about something and had scattered speech. ROA 2218, l. 1-4. Although he did not go by Applicant's current house, Dwight stated he tried to keep in touch with him once every two weeks. However, Dwight stated he thought of his own situation more than about his son and should have seen him more. He stated that Applicant's depression was similar to his own, but Dwight had friends to help him handle it. He felt Applicant was reserved and did not reach out to anyone. He stated that Applicant was a good kid, despite being "stone-faced." ROA 2219.

Ann Wilson, an elementary school teacher at Taylors Elementary School, testified that she taught Williams in 1990 when he was in the first grade. ROA 2220-21. She found him to be very weak academically and not ready for second grade. She made a request within three months of school for him to be in remedial classes. [Exhibit 25]. She based this request upon her conclusions on his immaturity and that he had a very short attention span. ROA 2222. He was in her regular class, but also attended extra remedial reading and math classes in an EIA program. Concerning her school reports, she stated that he was easily distracted by noise, had to be refocused with teacher prompts to process, unable to maintain attention, had difficulty staying on task, easily distracted, restless, impulsive, blames others for mistakes, moody and inconsistent in his behavior. ROA 2224-26. As a result of her evaluation, Williams was referred to a school psychologist, Janice Hawkins. ROA 2227-29. He was then referred to "special education" classes. Wilson stated that she spoke with the Applicant's mother and she found her to be negative and not wanting her son retained in the first grade. However, Wilson recommended that he repeat the first grade. ROA 2232.

Rebecca Owens testified that she knew Williams because his mother worked for her in her beauty salon for six years. ROA 2234-35. She described Williams as a wonderful child who would come to the salon when he

was between 9 and 13 years old. ROA2236. She also described her visits to the home and found Williams was always sent to his room. She described an occasion when Daisy (his mother) had moved in with Hans. She described Hans as an older man who was a German ambassador. On one occasion, Daisy had started drinking heavily and Williams called over and stated that his mother was "going crazy." Owens went to the home and saw Daisy hit Williams in the face and cuss at him when he was talking on the telephone with his sister Maureen. Williams later was sent to his room. ROA 2237-38. On another occasion, his mother was again drinking heavily and started having "fits and disorientation." Owens found her at the top of the stairs naked screaming for an ambulance. ROA 2238. Owens stated that Daisy's relationship with Hans was volatile and that she was abusive towards him. She recalled one time when Daisy came to work and appeared very beaten up. However, Daisy told her she had beaten herself up with a telephone and called the police and had Hans thrown into jail. ROA 2239-40. She stated that Applicant did not have any friends and was not allowed outside to play. ROA 2240. She stated that she knew the victim, Maranda, because she was her waitress at a restaurant where she went. ROA 2240.

Professor Margorie Hammock, a clinical social worker testified as an expert in sociology. ROA 2241-42. She stated that she did a biopsychosocial assessment of Williams. ROA 2243. She stated that she had interviewed Williams, his father, his mother, two teachers, his cousins - Alfred and Ernestine, and paternal grandmother Mary Snipes. ROA 2246. In addition, she stated that she reviewed educational records, medical records, and psychiatric history of family members, employment records and Army records of Mr. Williams. ROA 2247. She also consulted with Dr. Rob Richards, Dr. Seymour Halleck, and Dr. Eric Elbogen. ROA 2247. At trial she used visual aids, including a family tree (genogram). [Exhibit 28]. She initially described the family tree. ROA 2248-49. She described mother Daisy as born in Germany with an unknown father and raised by her grandparents. However, she was also abandoned by her mother and faced consternation in the family because of her mixed background. She had married at 16, but the marriage was unsuccessful and included a great deal of violence. She leaves her husband, but he assumes responsibility for raising their two children.

She described Williams father, Dwight, as being raised by his mother after his parents separated at an early age. There had been conflict between his mother and father, who was in the Army. Dwight saw little of his father. He was taught to think negative of his father who he had only seen a few times after the separation. ROA 2250. Like his father, he joined the Army and graduated from high school. He had a serious stuttering problem and was unsure of himself, but did well in the service and started a band which aided relations between the U.S. and Germany. ROA 2251.

Professor Hammock stated that Dwight met Daisy when he was playing in a rhythm and blues band at a club. She became pregnant with Maureen after a short courtship and the two eventually married. After Maureen was born they moved to the U.S. Eleven years later, the Applicant is born. Prior to the move, the years in Germany were harmonious and Daisy was a good mother. After the U.S. move and Dwight's discharge, things changed due to an increase in drinking and the use of marijuana. They fought about their lives. Dwight completed a degree and was working on his masters, but Daisy wanted him to spend the time with her and also make more money leading to the substance abuse and fighting. ROA 2252-53. In 1982 when Williams was born, they were living in Greenville. They were violent toward each other prior to the birth and it was a couple of days before Dwight was allowed to see his child. ROA 2253.

Professor Hammock stated that Daisy ignored Williams's human development "red flag" needs as a special needs child. ROA 2255. She did not respond to the recommendations for help and resources from the teachers and other professionals. As a result, Hammock concluded that Williams withdrew and stopped trying to be a part of the environment where he could continue to grow. She stated he did not develop the skills he needed to feel comfortable in society and to be able to interact. There was a great deal of violence in his home (shown by police reports) and challenges to his ability to interact with other children and learn academically. ROA 2256. This created a withdrawal from other children and his growth and development were not attended to by his mother. In reviewing the records, she saw numerous recommendations from school personnel that were not followed up with his identified needs. She also saw the numerous changes in his schools - three elementary and two middle schools - contributed to the inability to fulfill his needs. ROA 2258. He was perceived by his teachers to be a child with a need for special education. She opined that problems in testings showed a disparity between what he appeared to know and what he could demonstrate. He was found to isolate himself and unable to play with others by the fifth grade.

Professor Hammock found members of the Williams family had the existence of mental health issues. ROA

2259-60. [Exhibit 29]. Particularly his father had a history of hospitalizations with suicidal and homicidal feelings with diagnosis of major depressive episodes - severe and need to be assessed for bipolar and alcohol dependence. ROA 2261.

Professor Hammock concluded that Daisy also had contact with mental health facilities due to threats of suicides with 7 referrals to facilities. These involved overdoses of medicine, depression, anxiety, panic and alcohol abuse. This resulted in a series of medicine including Wellbutrin, Xanax, Trofranil and Valium. ROA 2262. She found that Williams' uncle also had numerous admissions for suicidal and homicidal threats towards family. ROA 2262. Maureen, his sister also had a history of suicidal feelings and was diagnosed with depression and insomnia, but she had not been hospitalized. The grandmother Mary Snipes also had been known to be in facilities, had "bad nerves" and was considered unstable and threatening. ROA 2263.

Professor Hammock concluded that the Applicant had never sought treatment or help for his mental health issues. ROA 2264, l. 21-24.

Retired Mauldin police officer James Tollison testified concerning the domestic violence calls in 1997 concerning Daisy and Hans Seifert. ROA 2264-65. He stated that he was called to the scene and Hans would come to the department and request help because he spoke a little German. Tollison described the various events of one accusing the other of attacking them. He stated that there was a time that he was concerned about the couple's safety when Hans made an allegation when they were separated - one living on one floor and the other on the other floor - and she was alleged to have stolen his equipment and clothes and changed the locks. Tollison stated that he found a gun missing from its holster. He described her to be very erratic and violent and not a credible person. ROA 2268. Daisy had also made allegations against the police department and Tollison claiming that Hans had paid off the police department. He estimated that the police were called out to the residence in 1997 at least 10 to 12 times. ROA 2269. On cross-examination, Tollison stated that he had no knowledge that there was any complaint that Ms. Huckaby (Daisy) was abusing or neglecting Charles Christopher Williams. ROA 2268.

Dr. Eric Elbogen, an assistant professor at Duke University with a Ph.D. in clinical forensic psychology, testified as an expert in the field of violence risk assessment. ROA 2274. He testified that he examined Applicant for two hours. He concluded that there is an extremely low risk that Williams will kill a correctional officer while serving a life sentence in prison. ROA 2281. His only risk factor of the six factors he considers is based upon Williams low age at the time of the offense. ROA 2281. His risk is lowered because there were no instances in the 18 months he had been in the detention center, no instances of engaging in any serious violence previously, and the fact that he would be getting treatment for his mental illness while in prison and monitoring of his symptoms. ROA 2282. He further opined that the risk would decrease as he aged. *Id.* Concerning whether he would be likely to commit a serious crime against another inmate, Dr. Elbogen opined it would be "extremely low" for similar reasons. ROA 2282-2283. He also opined that if he had seen Williams prior to the murder, read his journal, knew about the suicide attempt, interviewed him and knew he had a shotgun in his closet, he would have him committed (admitted) instantly to a locked mental health facility. ROA 2283-84. His assessment was introduced as Exhibit 31. On cross-examination, Dr. Elbogen acknowledged that a failure by Williams to take his medicine to some extent would increase the probability of violence. ROA 2288. He admitted that he was not saying that there was no risk of violence because he does not have a crystal ball. ROA 2289.

James Aiken, a former warden in the South Carolina correctional system and commissioner of corrections in Indiana and the Virgin Islands testified as an expert regarding the assessment of the defendant and prison security. ROA 2297. He testified about Williams' prison adaptability as he asserts he would have done upon entry into the department of corrections. He opined that "Williams can be safely confined in a prison system for the remainder of his life without causing an undue risk of harm to staff, inmates, nor the community." ROA 2301, ll. 8-10. On cross-examination, Mr. Aiken confirmed that this could be true of any person, regardless of their degree of violence, but that he would not say that about every inmate he had evaluated. ROA 2301-02. He pointed out that corrections could tie them down in a bed, give them electric shocks and kill them if necessary to control them. ROA 2302.

Dr. Seymour Halleck, a forensic psychiatrist, testified as an expert in forensic psychiatry. ROA 2304. He stated that he interviewed Williams for four hours. He claimed to have reviewed a significant amount of material including the Applicant's journal, the reports of officers McNamara and Silvaggio, a report from the Greenville police department, mitigation notes from the defense, statement of the defendant, his prior incidents including the paint ball incident and his first assault on Miss Williams, his detention records, his school records, his hospital

records concerning his suicide attempt, all the witness reports of observers of the attack on Miss Williams and the police reports. ROA 2306-07.

Dr. Halleck opined that Williams childhood was very chaotic and that there was a great deal of violence between his mother and father. ROA 2307. He noted that things got worse in Applicant's family history when his father left the home. Although he had problems with his father and the father would frequently beat his mother, Dr. Halleck opined that the Applicant was fond of his father and felt loss when his father left the home. ROA 2307. He found the relationship with his mother was ambivalent. Although she was close to him, trying to run his life, Applicant tried hard for her not to do so. Dr. Halleck found some strange matters in their relationship noting that his mother let Williams sleep with her until he was 14 years old. Dr. Halleck noted that it was reported that his mother would playfully touch his genitals as well as his sister. ROA 2307. He stated after his sister strongly objected it eventually stopped. Id.

He noted that Williams also did not like his parents' involvement in dishonest ventures trying to have him participate, including his mother feigning injuries to sue various establishments. ROA 2308. Dr. Halleck also concluded that Williams had trouble with an uncle who asked Applicant to fondle his genitals and to put toothpicks in his uncle's urethra which he did several times. Id.

Dr. Halleck opined that Williams had a great deal of trouble in school at the beginning and was placed in special classes. He stated that he was considered to have attention deficit hyperactivity disorder. ROA 2308. He stated that medication was recommended for him, but was not used. However, Dr. Halleck noted that in 1993, some new testing indicated that Applicant could function in a regular classroom with special attention. But, he never did well in school and dropped out at age 18 when he was in the ninth grade. ROA 2309.

According to Dr. Halleck, Williams was a highly disturbed and sick young man during the months leading up to the crime. ROA 2309. He opined that Williams had two diagnoses - major depressive episode and obsessive compulsive disorder. ROA 2309. He considered the major depressive disorder to be "the most serious depressive disorder diagnosis we have in the manual," meaning that he was practically dysfunctional. ROA 2309. Dr. Halleck stated that this would place Applicant with a need for medication and a high risk of killing himself. ROA 2310. He pointed out the symptoms of sad feelings, withdrawn from people, not interested in pleasurable things, and not able to enjoy pleasurable things - antionia/phonias, agitation, inability to think clearly and inability to concentrate, feelings of guilt or worthlessness and suicidal ideation. ROA 2311. Concerning the obsessive compulsive disorder, he found that Williams was obsessed with Maranda by thoughts and images. ROA 2311. He found him to be almost delusional concerning his thought that Maranda had aborted their child. He found the obsessions so bizarre, so unfounded, and so violent that they approached being psychotic delusions. ROA 2313.

Dr. Halleck opined that these diagnoses made each worse and contributed to a powerful sense of hopelessness which was a factor in the act in 2003. ROA 2313. Based upon this sense of helplessness and hopelessness, he had to do something to escape from the suffering that he was experiencing. ROA 2313. Dr. Halleck stated that according to records Applicant had taken 40 or 50 pills, including a potentially lethal antidepressant, in an apparent suicide attempt that led to his hospitalization although he was not kept on June 13. However, he was back again on June 15. ROA 2315. Dr. Halleck opined that the releases were highly inappropriate. ROA 2315. He stated he would have civilly committed Williams with his information. ROA 2316-17. Similarly, he would have committed Williams on September 2, the day before the murder, had he read the journal, been aware of the suicide attempt and aware that a shotgun was in the closet because Applicant was dangerous to himself and others. ROA 2317.

On cross-examination, Dr. Halleck opined that his opinion is that his capacity to conform his behavior was somewhat impaired - not that he could not conform his conduct to the requirement of the law. ROA 2318-19. He stated that his opinion on the death penalty was that he opposed it. ROA 2319.

Maureen Bangcuyo, the Applicant's sister was the final mitigation witness. ROA 2328. She stated that when Williams was born that she was excited about having a baby in the house because it would be a positive thing. ROA 2329. She said he was always special. She stated at that time things needed changing because she had to endure seeing her mother beaten by her biological father - Dwight. ROA 2331. She stated that they were constantly fighting and that she was beaten. She described alcohol every night and drugs. Maureen said that she was not allowed to do anything or date. She recalled when she went to college that Williams would come and stay over the summer and she described him as smart. ROA 2332. Months before the divorce, she stated that her mother constantly called and described being beaten. ROA 2333. She described calls from Williams about it being worse since she left for school. ROA 2333. She said her mother and Williams lived in a shelter after the divorce because

concerning FAS, Respondent submits that the Petitioner has not shown a reasonable probability that the result would be different under the Strickland standard. The PCR court was correct in rejecting the showing. Certiorari must be denied.

2. *IAC Trial Counsel Failed to object to Solicitor's closing argument.*

II. The PCR Court reasonably concluded that trial counsel was not deficient in failing to object to different portions of the closing argument. There was probative evidence to support the conclusion that the failures to object were either done for strategic reasons or counsel's view that the comments were not prejudicial and therefore there was no deficient performance shown. Alternately, if deficient performance is shown, the PCR Court correctly applied the prejudice prong of Strickland based upon its review of the entire

Dwight stopped making payments on the home. She said that Dwight set fire to all their clothes and belongings. ROA 2334. She said she became concerned about that Applicant she tried to take care of him in Fall of 1997. ROA 2336-37. However, because of her own workload and his needs, Williams went back to his mother in Greenville. ROA 2336.

Maureen stated that she had been diagnosed with a mental illness and had thoughts about killing herself, but takes medications. She stated that she was married to a wonderful man. She stated that his family is supportive and love Williams. ROA 2337. She stated that when she was treating herself, she kept a journal when she was 13 about her own thoughts. She described how her faith had helped. She said that she had gone to see Williams after his suicide attempt and asked him to go back to Columbia with her family. ROA 2339.

Maureen also described a second time when he came to live with her in Atlanta. ROA 2340. She described her father breaking appointments to visit him. She said that she wanted Applicant out of that environment and away from Daisy and to have a chance to fulfill his dreams. ROA 2341. She stated that she was unable the second time to dedicate the time to Williams. ROA 2341. She was looking for a job while she was 7 months pregnant and Williams needed to return and complete his obligation for PTI from the paintball assault incident. ROA 2342.

Maureen stated that there were a lot of good things about her brother. ROA 2342. She said that he was a dedicated brother who would come and see her whenever he was available. She described him being dedicated to his sister, cleaning her car, the house and starting to cook dinner. She stated that they talked on the telephone almost every day about Daisy and Dwight. ROA 2343. However, Applicant does not know her second son because he was born October 29, 2003. ROA 2343.

She described how she had to tell her son about why the Applicant is not around. ROA 2344. She stated that Williams was a good son who did not drink or get into fights. ROA 2344. She recalled that as a child he would run through sprinklers. She stated that his present look of appearing vacant was programmed from his father about how they could not show emotion and not allowed to express themselves. ROA 2345.

Maureen stated that the happiest time in her life was when they went to Myrtle Beach with Williams before she started nursing school. ROA 2345. She described Williams being stung by jellyfish, going to the Pavilion and having a wonderful time. ROA 2346.

She stated that she met Mandy one time and felt that he loved her and her daughter, Callista. ROA 2346. When asked how many people loved Williams, she stated that she did unconditionally. ROA 2347. She only sees the millions of good things he had done in his life and that he is warmhearted. She described him once going to the grocery on his own when he visited in Columbia to get ingredients to make brownies after he had accidentally ate a tray of brownies of her roommates. ROA 2347. She described him volunteering at her animal clinic job. She also read a letter she had written on behalf of her family expressing sympathy to the victim's family, an expression of love for her brother and a hope that violence in the home is stopped. ROA 2350-51

record in concluding that the prosecutorial comments did not undermine confidence in the verdict. Certiorari should be denied

In his second argument for certiorari, Petitioner alleges that his trial counsel was deficient in failing to object to a number of assertions made by the Solicitor during his closing argument in the penalty phase of the trial. In Petition before this Court, Williams characterizes the following alleged deficiencies in counsel's failure to object to the solicitor's comments in either the opening or closing argument in the penalty phase:

1. Statements discussing life in prison,
2. Statements about the death penalty being extremely limited,
3. Injecting his own personal beliefs in the argument, including his decision to seek death, and
4. Repeatedly referencing the community and the result of the verdict in the community.

App.p. 4020-4039. Petition for Writ of Certiorari, p. 41-58. The Petitioner further argues that the PCR court used an erroneous standard of Strickland prejudice in evaluation counsel's alleged deficiency. Petition, p. 46-49. The PCR court rejected the showing concluding counsel's failure to object was not deficient and additionally that Strickland prejudice was not shown. App.p. 4182-4191. Respondent submits the PCR court properly applied Strickland in its assessment based upon probative evidence in the record.

Concerning ineffective assistance of counsel claims on the failure to object to a prosecutor's closing argument, courts generally have found these failures to be within the "wide range" of reasonable professional assistance for which a strong presumption of sound judgment is due citing Strickland, 466 U.S. 668, 689. This presumption that counsel's conduct is within this wide range of reasonable professional assistance is cited in U.S. v. Necoechea, 986 F.2d

1273, 1281 (9th Cir. 1993). See also, Claiborne v. Lewis, 64 F.3d 1373, 1383 (9th Cir. 1995) (finding no error where counsel may have had many reasons for not objecting to the form of question or interrupting during opening or closing); Julius v. Johnson, 840 F.2d 1533, 1538-1539 (11th Cir. 1988) (similar). See also Bussard v. Lockhart, 32 F.3d 322, 324 (8th Cir. 1994) (reasons for not objecting recited). Desiring not to antagonize the jury and to appear as “good guys” justified failure to object to prosecution’s religiously loaded statements at penalty in Bennett v. Angelone, 92 F.3d 1336, 1349-1350 (4th Cir. 1996).

“A solicitor’s closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors’ passions or prejudices, and its content should stay within the record and reasonable inferences to it.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). “When a solicitor’s personal opinion is explicitly injected into the jury’s deliberations as though it were in itself evidence justifying a sentence of death, the resulting death sentence may not be free from the influence of any arbitrary factor....” State v. Woomer, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981). However, “[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant.” Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). “The relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.* at 338, 503 S.E.2d at 166–67. See also Sigmon v. State, 403 S.C. 120, 742 S.E.2d 394 (2013); Von Dohlen v. State, 360 S.C. 598, 614, 602 S.E.2d 738, 746 (2004).

2005 TRIAL COUNSEL’S TESTIMONY AT THE PCR PROCEEDING

Trial counsel Bill Nettles and John Mauldin testified at the PCR hearing. Bill Nettles, who made the penalty phase closing argument, testified that he made no objections to comments

by the solicitor in closing which PCR counsel characterized as “you’re not the one making the call I’m the one deciding whether it should be the death penalty,”⁴⁶ “you’re not the one putting him to death.”⁴⁷ App.p. 3289-90; PCR Tr.p. 115-116. Counsel Nettles stated that there was no strategy in not objecting to the characterized comments. App.p. 3290; PCR Tr.p. 116, l. 1-3. However, he made no comment when asked if he had a strategy to mock the prosecutor. App.p. 3290; PCR Tr.p. 116, l. 4-7. Counsel Nettles also stated that he did not object to comments characterized by PCR counsel as stating that “it was not enjoyable for the solicitor to ask them to impose death,” that “we agree that the defendant could adapt to prison because they’ll make him adapt, but that’s not the issue.” App.p. 3290; PCR Tr.p. 116, l. 8-16. In response to an inquiry about when the solicitor stated that “they have said earlier the solicitor is not satisfied with a life sentence. And I agree, I am not. They told you he’s going to want the death penalty, and I do,” (App.p. 2370), counsel Nettles then declared as to why he did not object:

...if the transcript says I didn’t object, I didn’t object. Okay? And if, you know Bob [Ariail] said something that smarter people now say I should have objected to, I should have objected. Okay, **I objected to everything in the closing argument that I thought was objectionable.**

App.p. 3291; PCR Tr.p. 117, l. 3-8 (emphasis added).

On cross-examination, in addressing his prior death penalty trial experience, Nettles acknowledged that at the time of this February 2005 trial, the State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450 (2007) and State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005) decisions

46 There is no argument by the solicitor in the record that stated that specific comment.

47 There was a comment about “you’re not killing anyone” (App.p. 2367), but as set forth within, in context, this was a discussion about the role of the jury and that they are not the actual killer, but a decision-maker. Respondent notes that these comments are in contrast to the defense closing which stated “kill” multiple times such as “the government makes it sound like the hard thing is to kill him. So, you ought to do the hard thing . . .” (App.p. 2393, l. 3-7) “...you don’t need to kill this kid. . .,” “I beg you not to kill my client.” App.p. 2394, l. 10-14.

had not been decided, so that Nettles could not have relied upon them to make any objection to the prosecution comment. App.p. 3301-02; PCR p. 127-128. Counsel stated that the information about the favorable prison conditions was prejudicial to Williams. Nettles declared that it was improper and so irresponsible that he felt by mocking the prosecutor at the outset of his own opening it would begin to undermine the solicitor's credibility. App.p. 3302; PCR p. 128, l. 13-18. Counsel did not recall whether he made other objections during the state's argument, but noted that it would not have surprised him if he did. App.p. 3302-03; PCR 128-129. See App.p. 2372, l. 9-12.

Nettles recalled that he reviewed the jury focus group theme report prepared by Jeff Bloom [PCR Exhibit 17] (App.pp. 4449-4459) which included a specific recommendation concerning limitations and objections to "Holiday Inn" type of prosecution arguments. App.p. 3308; PCR 134. See App.p. 4458, [Report, p. 10, §B (Prison)]. He confirmed that with those comments he preferred to make a mockery of the Solicitor's statements within his argument, rather than object. App.p. 3308; PCR 134, l. 1-13.

Co-counsel John Mauldin testified that since Nettles was doing the penalty phase argument that he would defer to him on objecting to the state's argument. App.p. 3308-09; PCR 175. More particularly, Mauldin initially stated that it was Nettle's responsibility to object. On cross-examination, Mauldin clarified that it was not solely Nettles's responsibility. App.p. 3368; PCR 194. Mauldin stated that Bill was going to argue and he should be the one to object. However, Mauldin admitted that he had a role also stated:

I believe if I'm sitting at the table and an horrific comment that is just absolutely untrue or just blatantly improper, then I think the judge would allow any counsel to stand and object. However, Mauldin stated that the

matters that Nettles had been asked about at the hearing, "I would not want to stand and object when another person was going to be making the argument, because he might not even want that objected to. If you follow that. In other words, I don't know - - it may feed directly into what he's - - some of the points he was making, even though it might be questionable from a legal appropriateness standpoint, it might be something this lawyer would pass on the objecting to, because he has an idea about what he's going to say. So Mr. Nettles had the primary responsibility. If I, as counsel for Williams , had heard an argument that I thought was grotesquely inappropriate under anybody's law, then I think it would be my responsibility , as well, to object to it. . .

App.p. 3369-70; PCR p. 195, l. 14 - p. 196, l. 11. (emphasis added). The record reveals Mauldin did not object to any of the Solicitor's comments during the penalty phase.

A. Life in Prison Comments – Valid Strategy Found

The PCR court rejected the assertions that trial counsel was ineffective in failing to object to the so-called prison life comments.. App.p. 4187-4191. The PCR judge concluded that based upon counsel Nettles testimony at the PCR hearing, counsel was acting under a "valid strategic decision" in choosing to not object to the prison life comments finding it was not deficient performance. App.p. 4190. The PCR court found it was a reasonable strategy was to respond "by emphasizing to the jury the absurdity and ridiculousness of those comment" and therefore not deficient. There was a factual basis for the lower court's conclusion through probative evidence from Nettles's testimony. Since deficient performance was not found, the prejudice prong does not be considered because Strickland requires both prongs to be shown for relief to be granted. There is probative evidence to support the strategic decision. Certiorari as to this argument issue must be denied.

In his Petition, Williams makes reference to the prison life argument. Petition, p. 44-45.⁴⁸ During the Solicitor's penalty phase closing argument, no objections were made by the defense to the specified challenged comments which are emphasized below in bold:

SO, WHAT IS THE APPROPRIATE SENTENCE TO FIT THIS CRIME AND HOLD HIM RESPONSIBLE? LIFE IN PRISON IS NOT APPROPRIATE. YOU CAN'T PUT HIM IN PRISON FOR LIFE AND EXPECT HIM TO SUFFER. YOU CAN'T DO IT. BECAUSE HE IS NOT GOING TO THINK ABOUT IT EVERY DAY, BECAUSE THERE'S NOT GOING TO BE ANYBODY THERE TO REMIND HIM OF THE DAMAGE THAT'S DONE TO MANDY'S FAMILY OR TO HIS FAMILY. NO ONE IS GOING TO DO THAT. NOBODY IS GOING TO CONSTANTLY REMIND HIM. SO, HE'S NOT GOING TO THINK ABOUT IT.

SURE YOU AND I MAY THINK GOING TO PRISON FOR LIFE IS A SERIOUS SENTENCE, BUT WHAT ABOUT CHRIS WILLIAMS? BEING IN PRISON IS LIKE A SMALL CITY, ALLOW ALL THINGS OF LIFE. PLACES, RESTAURANT, PLACES TO EXERCISE, RECREATION WHEN HE WANTS. DOCTORS, HOSPITAL TAKE CARE OF HIM, CLOTHING PROVIDED, TV. CONTACT WITH FAMILY AND LOVED ONES. HE'LL HAVE FREEDOM OF MOVEMENT, A SOCIAL STRUCTURE. HE'LL PLAY CARDS AND GAMES. GO TO WORK IF HE WANTS, GO TO SCHOOL IF HE WANTS. WATCH BALL GAMES ON TV.

SURE, HE DOESN'T HAVE A CAR AND HIS TRAVEL IS LIMITED, BUT IT'S NOT REALLY MUCH MORE THAN A SERIOUS CHANGE OF ADDRESS. HE WILL HAVE HIS FAMILY TO VISIT HIM. BUT MANDY'S FAMILY WON'T, AND HER DAUGHTER WON'T. THE DEATH PENALTY IS THE APPROPRIATE PUNISHMENT. I WANT YOU TO REMEMBER IN CONSIDERING THAT, THAT A HUMAN BEING, A LIVE, LIVING, BREATHING HUMAN BEING WHO HAD NEVER HARMED A SOUL, WITH A BUBBLY PERSONALITY, A GOOD JOB,

48 The record reflects at one portion of the Solicitor's argument, defense counsel Nettles requested a bench conference after the Solicitor argued: "the greater extent of culpability, obviously, the more severe the punishment, remember the worst of the worst. That's where we are, the worst of the worst. Life imprisonment is the least of the two punishments the law allows in this case. Does this case deserve the least?" ROA p. 2372, l. 3-12. No objection was made on the record. Id.

WORK ETHIC, A GOOD AND SWEET PERSON WHO LOVED HER DAUGHTER WAS KILLED. MURDERED. HE INVADDED HER WORK PLACE AND HE TOOK HER LIFE. HE WENT OVER THERE WITH MALICE, CARRIED ENOUGH AMMUNITION TO GET THE JOB DONE. AND TO MAKE SURE IF HE HAD TO, HE COULD KILL OTHERS THAT GOT IN HIS WAY.

App.p. 2377, l. 17 - p. 2378, l. 13. Petition, p. 45.

An additional reference to prison adaptability that preceded the above comments was not objected to by the defense team:

NOW, MR. AIKEN TESTIFIED TO YOU THAT LIFE IN PRISON WAS SOMETHING THAT THIS MAN COULD ADAPT TO; THAT HE WOULD BE A LOW RISK, ALONG WITH TESTIMONY OF THE PSYCHIATRIST, IF CONFINED IN PRISON. HE COULD ADAPT TO PRISON. BUT THE DEPARTMENT OF CORRECTIONS CAN MAKE ANYBODY, EVEN MR. AIKEN SAID IF THEY DON'T ADAPT, WE'LL KILL THEM. THE POINT WE SHOULD CONSIDER THERE IS NOT WHETHER SOLITARY CONFINEMENT AND THREE GUARDS TO A CELL, LIMITATIONS, AND CAMERAS AND TYING THEM TO BEDS AND THAT SORT OF THING IS WHAT WE'RE TALKING ABOUT. THAT MISSES THE POINT. IT'S NOT WHAT'S THE EASIEST THING WE COULD DO, IT IS WHAT IS THE APPROPRIATE THING TO DO UNDER THE CIRCUMSTANCES OF THIS CASE?

WE WILL AGREE THAT THE DEFENDANT COULD ADAPT TO A PRISON, BECAUSE THEY WILL MAKE HIM ADAPT. BUT THAT'S NOT THE ISSUE. BECAUSE, OTHERWISE, WE WOULD NEVER HAVE THE DEATH PENALTY. THERE WOULD BE NO REASON FOR IT. AND THE SOLICITOR (?)⁴⁹ SAYS THERE IS A REASON FOR IT AND THAT IT'S SOMETHING YOU SHOULD CONSIDER IN SHAPING THE PUNISHMENT TO FIT THE EXTENT OF THE CRIME.

App.p. 2373, l. 19- p. 2374, l. 13.50

49 It is likely this is a clerical error. Since the solicitor was speaking, this was either misheard or misstated. It would appear more that the reference was to the "legislature" rather than "solicitor."

50 In the second portion concerning adapting to prison life related to Aiken and Dr. Elbogan, it was clearly an appropriate comment concerning the weight to be given their adaptability testimony. App.p. 2373-74. The underlying thrust of Aiken's testimony was that - unrelated to the characteristics of Williams - the prison system has sufficient tools to make any inmate adapt and be managed. ROA 2298-99. Aiken asserted that an inmate will stay confined and safe and "will not cause an unusual risk of harm to staff, inmates, and the community," subject to the

Plath, Bowman, Burkhart, and Bryant

The reason evidence about “good” prison conditions is problematic in 2005 stems from four South Carolina cases – one that was in existence prior to this case (Plath) and three that were handed down subsequent to Petitioner’s 2005 trial (Bowman, Burkhart and Bryant). Although, counsel Nettles was on notice about the potential easy prison life arguments in 2005, the status of closing argument law on this issue was less than clear at that time.

In State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), the court *affirmed* a death sentence despite issues related to the State’s cross-examination and evidence responsive to a defense presentation “[demonstrating] the permanence and deprivation entailed in life imprisonment.” Plath, 281 S.C. at 12, 313 S.E.2d at 626. In doing so, the court rebuked sentencing phase defenses which “sought to portray life imprisonment as preferable to capital punishment as a matter of social policy,” or “drew a picture of life imprisonment as slavery, a condition of irretrievable loss.” Plath, 281 S.C. at 14, 313 S.E.2d at 626-27. The court stated that such defenses improperly “invite[d] the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment,” and concluded that “determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury.” Plath, 281 S.C. at 14-15, 313 S.E.2d at 627. However, the Plath court concluded the State’s challenged questioning was only proper response to the defense presentation which brought up the subject matter in the first place. Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28.

use of lethal force. App.p. 2300. On cross-examination, Aiken conceded that his opinion would be similar for most any prisoner, regardless of their level of violence. App.p. 2301-02. Dr. Elbogan had opined that Williams’ likelihood to commit a serious crime against another inmate was extremely low. App.p. 2282.

After the February 2005 trial, the Supreme Court decided State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (November 28, 2005). In that case, the appellant contended that the solicitor's questioning was improper about movies, television, and books in prison. The Court found the issue was not preserved, but added a cautionary instruction to both sides:

We take this opportunity, however, to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant.

State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 384 (2005).

Subsequent to Bowman, and the Petitioner's 2005 trial, the South Carolina Supreme Court addressed another case where the *solicitor* preemptively called a witness who extensively testified as to the conditions of confinement for an inmate serving life without parole. State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450 (2007). The defense objected to the state's evidence, and later put in its own evidence of "bad" prison conditions. Justice Moore was joined by Justice Waller and wrote the opinion of the Court.⁵¹ Justice Moore cited Plath and other cases from the

51 In fact, even after the 2007 Burkhardt decision, death penalty opponents continue to assert that security conditions should be offered by the defense to address jury concerns of violence in prison. See Blume, Johnson and Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 Hofstra L.Rev. 1035 (2008) ("a juror may be worried that the defendant will escape. Here, the testimony of prison officials, or more often, former prison officials concerning security conditions for inmates sentenced to life imprisonment and the success of the applicable security measures in the past may be necessary" citing ABA Guidelines 10.11, commentary & nn. 291, 309-11). Likewise, death penalty opponents also continue to challenge these evidentiary prohibitions from other jurisdictions. See Tanner, "'Continuing Threat' to Whom?: Risk Assessment in Virginia Capital Sentencing Hearings," 17 Cap. Def. J. 381, 408 (2008) (challenging Virginia's prohibition as violation of the right "to present a complete defense," noting "[q]uestions by jurors also indicate that

1980s and 1990s for the proposition that evidence outside of the circumstances of the crime and the characteristics of the defendant was inadmissible in a sentencing phase. This included conditions of incarceration, the process of execution, or the deterrent effect of capital punishment. Burkhart, 640 S.E.2d at 453. Justice Moore noted that while the case at issue was tried before the decision in Bowman, its result was consistent with the “long-standing rule that evidence in the sentencing phase of a capital trial . . . be relevant to the character of the defendant or the circumstances of the crime.” Id. Thus, Justice Moore concluded that reversible error had occurred, since the evidence of conditions of confinement “invited the jury to speculate about irrelevant matters” and injected an arbitrary factor in the proceedings in violation of S.C. Code Ann. § 16-3-25(C)(1) (2003). In concurrence, Justice Pleicones wrote that he did not believe the court should apply the normal harmless error standard for constitutional violations to this issue, concluding that “once improper evidence of any kind injects an arbitrary factor into the jury’s consideration, [the] Court cannot uphold the death sentence under § 16-3-25(C)(1).” Burkhart, 640 S.E.2d at 454.

Subsequent to Burkhart, the South Carolina Supreme Court decided State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007). There, although the prosecutor called *no* witness on conditions of confinement, the *defense* called an expert who testified in great detail as to the “dismal conditions of prison life in general,” including testimony about the mean guards, the bad food, the uncomfortable furniture, and the incessant noise. Like Bowman, the Court reiterated that

sentencers want to know more about the specific prison conditions that might affect the defendant’s potential for violence in prison.”).

defense evidence on conditions of confinement was just as improper as State evidence on the subject.⁵²

Nettles's Valid Strategic Decision

In the challenged prison life argument, the solicitor used a rhetorical analogy that being in prison is like being in a small city where the prisoner's needs would be met. Respondent submits that he has failed to prove both deficient performance and Strickland prejudice under the state of the law when the case was tried. He focuses on two isolated sentences in which he describes prison as "allowing all things of life , places [to] restaurant, places to exercise, recreation when he wants . . ." App.pp. 2377-78.

Rather than object to the solicitor's brief characterization [or mischaracterization] of prison life, counsel Nettles strategically chose to mock and attack the prosecutor's credibility at the outset of his own statement to the jury. In particular,

"Did he say restaurants? Did he say Chris Williams is going to a place in prison with restaurants there? Because I didn't hear anything about restaurants. What I did heard about where Chris Williams is going at the end of this trial is a place where its men and he's in a cell by himself. What I heard Jim Aiken talk about was a place where if you don't do what they tell you to do , they'll kill you.

He said restaurants. Restaurants in prison? Do any of you all really believe your tax dollars are paying for restaurants in prison? They're not. Prison is a very serious place. And what you are being asked is to decide between whether Chris Williams dies on God's time or your time ...

App. p. 2380, l. 14- p. 2381, l. 3.

⁵² But see People v. Salcido, 186 P.3d 437, 48 (Cal. 2008)(prosecutor's reference to "leisure time" activities, "such as reading, watching television, writing letters, or communicating with friends or relatives and suggest[ing] those activities also would be available to defendant even in a maximum security prison" was argument in response to defense witness' testimony "concerning the harsh realities of life in prison without the possibility of parole."); State v. Jaynes, 353 N.C. 549 S.E.2d 179, 198-199 (2001)(prosecutor's "comments reasonably 'served to emphasize the [s]tate's position that the defendant deserved the penalty of death rather than a comfortable life in prison.'").

The PCR Court found that counsel's strategy in questioning the credibility of the solicitor's comments about prison life with his own argument mocking it rather than objecting was informed and a valid strategy. App.p. 4190. There is probative evidence to support his strategy. As noted above, counsel Nettles was aware of the potential prison life argument from the Jeff Bloom memorandum. App.pp. 3302, 3308, 4458. Further, he was aware that there was no evidence in the record supported the assertions - a fact he specifically pointed out in his comments to the jury. App.p. 2380-81. Although, in hindsight, an objection could have been made concerning the comment based upon matters outside of the record, the choice defense counsel took was to address the easy prison life comments directly to the jury in their presence - thereby building his own credibility with the jury and minimizing the prosecutor's credibility.

The PCR Court's findings on this issue are entitled to deference. Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) ("We give great deference to a judge's findings where matters of credibility are involved since we lack the opportunity to directly observe the witnesses."). See Strickland v. Washington, 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."). It is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland. See, e.g., Booth-El v. Nuth, 288 F.3d 571, 584 (4th Cir.2002) (Wilkinson, C.J.) (counsel's failure to object to objectionable jury panel that may have been favorable for other reasons was not objectively unreasonable) ("Defense counsel made a tactical decision to preserve the jury that had already been selected."); Spicer v. Roxbury

Corr. Inst., 194 F.3d 547, 562 (4th Cir.1999) (opinion joined by Wilkinson, C.J.) (counsel's failure to object at trial to the testimony of an eyewitness was not objectively unreasonable because counsel may have preferred cross-examination to exclusion of the witness); Arnold v. Evatt, 113 F.3d 1352 (4th Cir.1997) (failure to object at trial to evidence discrediting a witness' testimony could reasonably have been part of a trial strategy).

Respondent further notes that when this case was tried in February 2005, the easy prison life argument issue had not been developed with the subsequent Burkhart and Bowman line of cases. To the contrary, in State v. Patterson, 299 S.C. 280, 384 S.E.2d 699 (1989), the South Carolina Supreme Court had concluded that a similar argument was not improper when based on prison life evidence in the record.⁵³ There, the Court found in context that the thrust of the argument was to distinguish life on death row with life in the general prison population where the defendant would be placed if he received a life sentence. However, in Patterson, the court noted that the comment was coming from evidence in the record, unlike the comments here which was drawing upon common perceptions that prisons would be housed, fed and with the ability to exercise and watch TV. While the "restaurant" comment may have been overstated as

53 In Patterson, the Court addressed the following comment:

'They [inmates] can come and go as they please.' 'They can come out for visits.' They have got a horrible requirement. They have got to report back to their cells for the evening meal. That's life imprisonment, folks.

Appellant claimed this comment trivialized life imprisonment and violated State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987), wherein the Court disapproved the solicitor's reference to "those bad life sentences." The Court concluded that the thrust of the solicitor's comment is to distinguish life on death row, where appellant has been residing, from life in the general prison population where appellant would be placed if given a life sentence. The solicitor is directly quoting appellant's own witness and is clearly within the record as required. The Court also concluded that this comment did not undermine the requirement that life imprisonment be understood in its plain and ordinary meaning nor that the defendant be allowed to present evidence in mitigation of death.

opposed to a dining hall, it contrasted with single cell life subject to lethal force suggested with Warden Aiken's adaptability to prison testimony.⁵⁴

The Petitioner asserts that an objection was proper (and required) because he may be claiming the state improperly argued that defendant should be executed because prison conditions are not harsh enough in South Carolina. However, Respondent notes a similar claim has been rejected in North Carolina which has consistently held that these comments reasonably "served to emphasize the [s]tate's position that the defendant deserved the penalty of death rather than a comfortable life in prison." State v. Jaynes, 353 N.C. 534, 549 S.E.2d 179 (2001), citing State v. Alston, 341 N.C. 198, 252, 461 S.E.2d 687, 717 (1995).⁵⁵

Because Deficient Performance Not Proven Due To A Valid Strategic Decision, A Prejudice Assessment under Strickland was Not Required.

Since the Petitioner failed to prove deficient performance because of a valid strategy to address the comments by the State as ridiculous and mock them to gain credibility, the PCR court did not need to access whether Sixth Amendment prejudice was proven (or whether the standard as its relates to this issue was properly done by the PCR court).

⁵⁴ James Aiken, a former warden in the South Carolina correctional system and commissioner of corrections in Indiana and the Virgin Islands testified as an expert regarding the assessment of the defendant and prison security. App.p. 2297. He testified about Williams' prison adaptability as he asserts he would have done upon entry into the department of corrections. He opined that "Williams can be safely confined in a prison system for the remainder of his life without causing an undue risk of harm to staff, inmates, nor the community." App.p. 2301, ll. 8-10. On cross-examination, Mr. Aiken confirmed that this could be true of any person, regardless of their degree of violence, but that he would not say that about every inmate he had evaluated. App.p. 2301-02. He pointed out that corrections could tie them down in a bed, give them electric shocks and kill them if necessary to control them. App.p. 2302.

⁵⁵ In Jaynes, the prosecutor pointed out in his closing argument that if sentenced to life imprisonment, defendant would continue to have access to various prison amenities, such as art classes, a library, counseling, and correspondence courses.

A similar argument was addressed in People v. Mendoza, 24 Cal 4th 130, 6 P.3d 150, 99 Cal.Rptr.2d 485 (Cal. 2000) and concluded that Sixth Amendment prejudice was not found. The California Supreme Court concluded:

At one point in her closing argument to the jury, the prosecutor also mentioned prison life in general in California. She said prisoners had access to libraries, television and videos; they could write and receive letters; and they could "even get married and have children." Again, we need not here decide whether counsel's failure to object constituted deficient performance. (See People v. Quatermain (1997) 16 Cal.4th 600, 632, 66 Cal.Rptr.2d 609, 941 P.2d 788 [conditions of confinement are irrelevant to a jury's penalty determination].) It is not reasonably probable the result here would have been different if the prosecutor had not made these remarks to the jury. (People v. Mayfield, supra, 5 Cal.4th at p. 208, 19 Cal.Rptr.2d 836, 852 P.2d 331.) **The remarks were effectively countered when defense counsel in closing argument described prison conditions, recounting his numerous visits to inmates in maximum security prisons. Under these circumstances, defendant was not prejudiced by counsel's failure to object to the prosecution's comments in question.**

People v. Mendoza, supra, ,6 P.3d at 187-188, 99 Cal.Rptr.2d at 523-24.

Like Mendoza, whether counsel was deficient or not in failing to object, Sixth Amendment prejudice has not been shown. Like Mendoza, these comments were countered by defense counsel's reaction at the outset of the defense argument addressing the overstatements by the prosecutor. Further, the brief comments here were not the focus of the argument by the prosecutor which was clearly concerned with the character of the crime. The Petitioner has not shown a reasonable probability that the result would have been different had the Petitioner objected.⁵⁶

⁵⁶ Petitioner had maintained below that this is not the correct standard in his earlier argument. He prefers a test that always reads whether "at least one juror would have struck a different balance." The United States Supreme Court has used that general wording, but has never disavowed the *Strickland* prejudice test. See Wiggins v. Smith, 539 U.S. 510, 534-537, 123 S.Ct. 2527 (2003) ("there is a reasonable probability that at least one juror would have struck a different balance" but clearly relying upon Strickland, and "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence"). In fact, the Court has repeatedly resisted attempts to shift the

Since the PCR Court found the Petitioner failed to prove deficient performance, certiorari is not warranted concerning whether the PCR court used the proper standard for Sixth Amendment prejudice in his determination about these prison life comments. See Petition, p. 46-51. The Petitioner contends that the PCR court's prejudice conclusion applied an erroneous standard rather than the test under State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007) and Vasquez v. State, 388 S.C. 447, 698 S.E. 2d 561 (2010). Petitioner contends that since Burkhart and its progeny suggest that easy prison life comments may be an arbitrary factor, that comments are always prejudicial and require a new trial.

Respondent submits the PCR Court used the correct standard for determining Sixth Amendment violations in the death penalty setting. The PCR court viewed the totality of the record and the effect the comment would have had on the verdict, citing State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 268(1996) (noting solicitor's improper comment "was one isolated event in the entire argument"). Petitioner ignores a fair reading of Sigmon where the Court concluded that counsel was not deficient in failing to object to an argument about alleged personal opinion: "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

burden to the State and or reduce the test to a mere catch all that the defense had "nothing to lose" by offering evidence, or different argument, that *may* have made a difference. Wong v. Belmontes, 558 U.S. 15, 27, 130 S.Ct. 383, 390-391 (2009)("While the Court of Appeals quoted the pertinent language from Strickland, that court elsewhere suggested it might have applied something different. In explaining its prejudice determination, the Ninth Circuit concluded that '[t]he aggravating evidence, even with the addition of evidence that Belmontes murdered Howard, is not strong enough, in light of the mitigating evidence that could have been adduced, to rule out a sentence of life in prison.' But Strickland does not require the State to 'rule out' a sentence of life in prison to prevail. Rather, Strickland places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different.")(internal citations omitted); Knowles v. Mirzayance, 556 U.S. 122, 129 S.Ct. 1411, 1419 (2009)(noting "no Supreme Court precedent establishing a 'nothing to lose' standard for ineffective-assistance-of-counsel claims" and relying on the Strickland test). The Petitioner failed in his burden. .

“The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id. at 338, 503 S.E.2d at 166–67. This assessment is not limited to the particular isolated comment, but the effect of the comment on the entire trial. Under Strickland, a determination of prejudice required to determine if counsel was ineffective is whether the defendant has shown a reasonable probability that the result of the proceeding would have been different. Unlike the PCR Court in its reasonable application of Strickland, Petitioner ignores it. The term “prejudice,” in turn, is defined as a reasonable probability that the outcome of the trial would have been different, and this formulation is further refined by the statement that such a reasonable probability is shown if the reviewing court, **after surveying the entire record, lacks confidence in the outcome**. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (emphasis added).

The Petitioner further contends that Judge Welmaker erroneously drew from Chief Justice Toal’s dissent in Vasquez in his reference to the Strickland test. Petition, p. 47. However, he fails to acknowledge that in Vasquez, the Court did not merely find the comment in error, but assessed the entire record to determine if prejudice was satisfied. Vasquez did review the entire record in that case and concluded the sheer weight of the evidence in the instant case did not negate the prejudicial impact of the solicitor’s improper comments.” Vasquez, supra.

Respondent recognizes that the Court in Vasquez cited Simmons v. State, 331 S.C. 333, 338, 593 S.E.2d 164, 166 (1998) for the proposition that “because the issue is whether the solicitor’s improper argument prevented the jury from fairly considering the guilty with a recommendation of mercy verdict, the overwhelming evidence of petitioner’s guilt does not

eliminate the reasonable probability that the result of the trial would have been different had trial counsel objected to portions of the solicitor's argument." Applying the Strickland standard, the Vasquez court concluded that there was a reasonable probability the outcome would have been different. In Vasquez, the Court cited Simmons (and Strickland) that "a reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." This was the proper test. In fact, in the Order of Dismissal, Judge Welmaker referenced both Simmons and Vasquez. App.p. 4184. Judge Welmaker assessment was not based solely on the evidence of the crime as Petitioner suggests. Rather, "considering the closing statement in its entirety within the context of the full record and careful instructions by the trial judge, and given the overwhelming evidence of guilt and the egregious circumstances of the crime, Petitioner has failed to prove that there is a reasonable probability that the jury would have returned a different verdict had the solicitor not made these comments." App.p. 4191.

Even though prejudice did not need to be determined since a valid strategy was found, Judge Welmaker, consistent with Strickland, surveyed the entire record in his decision. It was the correct standard. App.p. 4191. See also Williams v. Taylor, 529 U.S. 362, 390, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (entire record viewed as a whole). Certiorari is not warranted.

B. Death Penalty Being Extremely Limited Comments

Petitioner makes the assertion that counsel should have objected to statements that the death penalty was extremely limited.⁵⁷ In particular, he asserts that the prosecutor injected a

⁵⁷ Deputy Solicitor Betty Strom, in the penalty phase opening, without objection, also discussed the limited nature of when the death penalty could be sought:

Part of that, when the legislature passed the laws, said that the state could not seek the death

personal opinion by injecting a comment that "You're not killing anyone." ROA, p. 2367.⁵⁸ This is primarily addressed in the portion of the memorandum concerning the prosecution's personal opinion set forth below. Petitioner has referred to various portions of the transcript on this matter concerning limited availability of the death penalty:

THE STATE IS ASKING YOU TO IMPOSE THE DEATH PENALTY. THAT'S WHAT WE'RE HERE FOR AND WHAT THIS SECTION IS ABOUT. THIS PHASE OF THIS CASE, YOU MAY HEAR ARGUMENTS FROM THE DEFENSE. I HAVE TO ANTICIPATE WHAT THEY MAY SAY. I DON'T KNOW WHAT THEY WILL SAY. BUT YOU MAY HEAR ARGUMENTS FROM DEFENSE COUNSEL THAT TRIES TO PERSUADE YOU THAT GIVING THE DEATH PENALTY IS SOMEHOW WRONG OR THAT KILLING THE DEFENDANT IS SOMEHOW WRONG. THOSE PHRASES

penalty in every case. We talked a little bit about this. It has to be a murder plus an aggravating circumstance. And I actually went back and looked at the statute. There are 11 aggravating circumstances outlined in the statute. So, if it's a murder and we don't have one of those aggravating circumstances, we can't even seek the death penalty.

So it's a very limited situation. There are **only limited crimes** for which we can even seek the death penalty. And out of those 11 we are going to rely on two. We only have to prove one. We're going to offer to you two different aggravating circumstances for your consideration, your determination.

App.pp. 2112-2113. The Petitioner cited to this portion in his Pre-Trial Memorandum, p. 12-13.

58 Petitioner's criticism of this comment is off base. This was not "limiting the responsibility of the jurors." The Petitioner contends the parsed comment about not killing the Petitioner suggests that the solicitor was removing from the jury any responsibility for the sentence. This is not a correct reading. In context, it was only the actual carrying out of the death sentence was removed, but the entire responsibility for the decision was squarely placed upon the jurors. The comments were:

... YOU ARE SHAPING A LAWFUL PUNISHMENT TO AN UNLAWFUL ACT. SO, THE RESPONSIBILITY IS GIVEN TO YOU TO DECIDE WHAT THE APPROPRIATE PUNISHMENT IS. I REMEMBER IN VOIR DIRE WE WENT OVER THIS, YOU ARE THE JUDGE. THE JUDGE DOES NOT SENTENCE, YOU SENTENCE. AND THAT'S WHAT THIS PROCESS IS ABOUT. AND IT IS A PROCESS WHICH WE HAVE ENTRUSTED TO YOU AS OUR CITIZENS TO CARRY IT OUT FAIRLY; **AND THERE'S NOTHING WRONG WITH WHAT YOU'RE DOING. YOU'RE NOT KILLING ANYONE, AND YOU'RE NOT MAKING A DECISION THAT IS IN ANY WAY WRONG.**

NOW, LET'S TALK A LITTLE BIT ABOUT THE FACT THAT THIS IS OBVIOUSLY A DIFFICULT DECISION, THAT THIS IS NOT AN EASY DECISION. IT'S NOT EASY FOR ME TO ASK YOU TO EVEN MAKE IT. BUT RESPONSIBLE PEOPLE MAKE TOUGH DECISIONS ALL THE TIME. YOU MAKE TOUGH DECISIONS IN YOUR JOBS ...

App.p. 2367, l. 2-14.

YOU MAY HEAR AND THAT TRY TO INDICATE TO YOU THAT WHAT YOU'RE DOING MAY NOT BE RIGHT.

LET ME TALK TO YOU A LITTLE BIT ABOUT THAT. I WANT TO PUT IT IN CONTEXT. THE STATE, REPRESENTED BY THE SOLICITOR, CAN IN CERTAIN CIRCUMSTANCES UNDER OUR LAW ASK FOR THE IMPOSITION OF THE DEATH PENALTY. HOWEVER, IT IS ONLY IN LIMITED CIRCUMSTANCES, SPECIFICALLY MURDER CASES, AND ONLY THOSE MURDER CASES IN WHICH IS SPECIFICALLY DEFINED BY OUR STATUTORY LAW BY OUR LEGISLATURE. AND ONLY IN THOSE CASES CAN THE STATE SEEK TO HAVE THE DEATH PENALTY IMPOSED.

SO, THIS IS A LEGAL PROCESS, A LEGAL PENALTY ENACTED BY OUR LEGISLATORS; AND IT IS A FUNCTION OF GOVERNMENT CARRIED OUT BY YOU, THE CITIZENS. AND THAT'S THE WAY THE PROCESS HAS BEEN INITIATED AND CREATED BY OUR STATE LEGISLATURE AND APPROVED BY OUR COURTS. THIS IS A FUNCTION OF YOU AS CITIZENS CARRYING OUT PART OF OUR GOVERNMENT PROCESS. YOU ARE SHAPING A LAWFUL PUNISHMENT TO AN UNLAWFUL ACT. SO, THE RESPONSIBILITY IS GIVEN TO YOU TO DECIDE WHAT THE APPROPRIATE PUNISHMENT IS.

App.pp. 2366, l. 12- p. 2367, l. 4. A second portion is as follows:

THE LAW LIMITS THE STATE'S RIGHT TO SEEK THE DEATH PENALTY TO A VERY FEW MURDERS. WE SEEK THE DEATH PENALTY IN ONLY A FEW CASES. BUT THE CIRCUMSTANCES WHERE IT'S AVAILABLE ARE FOR MEAN AND EVIL PEOPLE.⁵⁹ THE WORST OF THE WORST. CHRISTOPHER WILLIAMS AND THIS MURDER ARE ONE OF THOSE CASES. THE WORST OF THE WORST.

59 The comment referencing "mean evil people" and the death penalty again goes to the jury's process of determining the appropriate sentence, and it was directly tied to same in the solicitor's argument. This was raised and rejected in Sigmon also. There is nothing inherently improper in using the term "evil." See Kinder v. Bowersox, 272 F.3d 532, 552 (8th Cir. 2001)(finding no unreasonable application of federal law where state supreme court did not reverse on the following argument, "*Evil stares at you in the courtroom... We don't want to share our streets one day with evil. We cannot risk one day sharing our lives and our world with evil*" but found "the statements were proper argument because they addressed [the individual defendant's] character and the appropriate punishment for his crime.") (emphasis in original). See also State v. Anderson, 306 S.W.3d 529, 543 (Mo. 2010) (upholding use of quote, "The only thing necessary for evil to triumph is for good men to do nothing."); State v. Gregory, 147 P.3d 1201, 1255 (Wash. 2006) (reviewing solicitor's characterization of defendant ("evil" and "menace to society") and finding no error: "the prosecutor is entitled to draw inferences from the evidence and these inferences could have been justified given Gregory's criminal history and the facts of this case"); People v. Wilson, 628 N.E.2d 472, 485 (Ill. Ct. App. 1 Dist. 1993) ("The prosecutor may also refer to the defendant as an evil man and comment on the particularly brutal nature of a crime if his statements are supported by the evidence.").

App.p. 2371, l. 1-6.⁶⁰

The PCR Court rejected this claim for relief finding initially that the argument was distinguishable to the comments found to be error in State v. Woomer, 277 S.C. 170, 284 S.E. 2d 357(1981), but similar to comments upheld in Sigmon v. State, 403 S.C. 120, 742 S.E.2d 394 (2013). App.p. 4184-85. The Respondent submits that the Petitioner cannot satisfy either requirement of the Strickland test.

In Sigmon v. State, 403 S.C. 120, 742 S.E.2d 394 (2013), the Court rejected a similar assertion. Like in Sigmon, the Petitioner complains that the prosecutor emphasized that the he and legislature had already deemed the death penalty an appropriate punishment. He claims that this introduced an arbitrary factor away from the nature of the crime and the characteristics of the defendant. He claims that this violated the decisions of the Court in State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982); State v. Bowman, 366 S.C. 690, 623 S.E.2d 378 (2005) and State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890 (1979).

However, viewed in context, the challenged references in context only assert that the legislature has decided there may be circumstances that authorize a death sentence, not that it mandates a death sentence for Williams. As noted, the jury was instructed on the requirements if

60 There is another similar portion of his argument :

THEY HAVE SAID EARLIER THE SOLICITOR IS NOT SATISFIED WITH A LIFE SENTENCE. AND I AGREE, I AM NOT. THEY TOLD YOU HE'S GOING TO WANT THE DEATH PENALTY, AND I DO. WHY IS THE DEATH PENALTY THE APPROPRIATE SENTENCE IN THIS CASE? AND THAT IS A FAIR QUESTION FOR YOU TO ASK, ASK OF US, THE STATE OF SOUTH CAROLINA. AND I SUBMIT TO YOU THAT THIS IS THE REASON, IS THAT THERE ARE MEAN AND EVIL PEOPLE WHO LIVE IN THIS WORLD WHO DO NOT DESERVE TO CONTINUE TO LIVE WITH THE REST OF US REGARDLESS OF HOW CONFINED THEY MAY BE.

App.p. 2370, l. 16-25.

it decided to give as death sentence, as well as the consideration of mitigating circumstances and the concept of mercy authorizing a life sentence for any reason or no reason at all. App.p. 2404, ll. 2-15. (mercy instruction).

Prosecutorial argument error not linked to a constitutional guarantee violates the Due Process Clause only if it renders the defendant's trial fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637, 645, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). That did not happen. A prosecutor may refer to the policy rationales behind a State's decision to make the death penalty available. See Irick v. Bell, 565 F.3d 315, 325 (6th Cir.2009). And a prosecutor has no less right to discuss a jury's duty to impose the death penalty if legally warranted than a defense counsel has the right to discuss a jury's duty to acquit (or give a life sentence) if legally warranted. See Hicks v. Collins, 384 F.3d 204, 219 (6th Cir.2004); Strouth v. Colson, 680 F.3d 596, 606 (6th Cir. 2012) (Any error in prosecutor's statement to jurors in during penalty phase of defendant's capital murder trial, that "no one is asking you to kill anyone," was harmless, and thus reversal for prosecutorial misconduct was not warranted, particularly where other parts of the prosecution's closing argument emphasized the importance of the jury's role in the process).

This is not a situation like in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Caldwell addresses a different type of argument and is not applicable here. In that case, the jury was led to believe, by the prosecutor's argument, that responsibility for determining the appropriateness of a death sentence rested not with the jury, but with the court system thereby directly minimizing their sense of responsibility for that defendant's sentence. This was not the case with the solicitor's comments here.

A death sentence is unconstitutional if the jury believes “that the responsibility for deciding the appropriateness of the [death penalty] lies elsewhere.” Caldwell, 472 U.S. at 329, 105 S.Ct. 2633. “[T]o establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.” Romano v. Oklahoma, 512 U.S. 1, 9, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994) (internal quotation marks omitted). See Bland v. Sirmons, 459 F.3d 999 (10th Cir. 2006) (prosecutors’ closing arguments in punishment phase of capital murder case, to effect that defendant was responsible for his own predicament and that in imposing death sentence jury would “simply have followed the law,” did not violate Caldwell v. Mississippi prohibition on diminishing jury responsibility, as argument did not induce jury to believe that some other governmental decisionmaker would ultimately bear responsibility for deciding appropriateness of death sentence, particularly when considered in context of entire argument, in which both prosecutors also reminded jury that it had “final say,” and instructions that underscored jury’s responsibility).

Here, there was no reason for the defense to object to the brief comments about the law. Further, any error in the prosecutor’s statement to jurors in during penalty phase of defendant’s capital murder trial about “you’re not killing anyone,” was not prejudicial under Strickland because there is no reasonable probability the result would have been different had counsel objected and the comment been struck. Other parts of the prosecution’s closing argument emphasized the importance of the jury’s role in the process and that they were the “judge” on the issue of life and death. This was not a comment that they had no responsibility in the verdict or that others were responsible for the decision in Williams’s case. With the arguments and the clear instructions and with mercy options given to the jury, no juror would have thought the

actual responsibility for sentencing rested elsewhere even though someone else would actually carry out the verdict in the prison. The Petitioner failed in his burden under Strickland.

C. Injecting The Solicitor's Beliefs and Minimizing the Jury's Role Comments

Petitioner also contends that defense counsel was deficient in failing to object to the Solicitor injecting "his personal beliefs" in the argument. He asserts that counsel should have objected to various portions of the penalty phase closing which he claims injected his the fact of his decision and a personal opinion about the case. He claims that these portions violated the mandates of State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982); State v. Woomer, 277 S.C. 170, 284 S.E. 2d 357(1981) and State v. Butler, 277 S.C. 543, 290 S.E.2d 420 (1982). The Petitioner contends that comments by the solicitor minimized the jury's role in the decision.

The PCR Court rejected this showing finding the prosecutor did not diminish the jury's responsibility. App.p. 4186-87. These comments were similar to those upheld in Sigmon v. State as informing the jury that he had already made the decision to seek death and used the term "we" in referencing the decision. App.p. 2367, l. 12-23. The Petitioner points to the following:

REMEMBER IN VOIR DIRE WE WENT OVER THIS, YOU ARE THE JUDGE. THE JUDGE DOES NOT SENTENCE, YOU SENTENCE. AND THAT'S WHAT THIS PROCESS IS ABOUT. AND IT IS A PROCESS WHICH WE HAVE ENTRUSTED TO YOU AS OUR CITIZENS TO CARRY IT OUT FAIRLY; AND THERE'S NOTHING WRONG WITH WHAT YOU'RE DOING. YOU'RE NOT KILLING ANYONE, AND YOU'RE NOT MAKING A DECISION THAT IS IN ANY WAY WRONG. NOW, LET'S TALK A LITTLE BIT ABOUT THE FACT THAT THIS IS OBVIOUSLY A DIFFICULT DECISION, THAT THIS IS NOT AN EASY DECISION. IT'S NOT EASY FOR ME TO ASK YOU TO EVEN MAKE IT. BUT RESPONSIBLE PEOPLE MAKE TOUGH DECISIONS ALL THE TIME. YOU MAKE TOUGH DECISIONS IN YOUR JOBS, AT YOUR HOMES, REGARDING YOUR CHILDREN, AND YOU MAKE THEM IN YOUR MARRIAGE

THE PROCESS MAKES YOU RESPONSIBLE FOR THIS DIFFICULT DECISION BUT WE CAN'T RUN AND HIDE FROM OUR RESPONSIBILITIES. THE LAW PLACES IT ON OUR SHOULDERS, **THE LAW ENTRUSTED IT TO YOU** AND IT MEANS WE'LL DO IT, JUST LIKE ANY OTHER TOUGH DECISION THAT WE MAKE; THAT IS, YOU WILL APPLY COMMON SENSE, YOU WILL CONSIDER THE FACTS AND YOU WILL CONSIDER THE ALTERNATIVE SOLUTION, JUST LIKE YOU DO WHEN YOU MAKE YOUR DECISIONS ON YOUR JOBS, WITH YOUR FAMILY, OTHERWISE. IF YOU IMAGINE YOURSELF MAKING A TOUGH DECISION AND HANDLING IT IN THE SAME WAY YOU WOULD HANDLE IT WITH YOUR JOB OR WITH YOUR FAMILY, **WE TRUST YOU WOULD MAKE THE RIGHT DECISION.**

App.pp. 2367-2368, l. 5.

The Petitioner's emphasis is misplaced. In context, the focus of the comment is not that the decision has been made by the solicitor, but that it is a difficult decision and that "THE PROCESS MAKES YOU RESPONSIBLE FOR THIS DIFFICULT DECISION ." The Petitioner's suggestion that the use of "we" minimizes the role is in error, particularly where it is clear from a reasonable reading that the jurors would know the entire decision was up to them.

In his brief, the Petitioner noted the following additional areas related to this issue:

ALSO, THEY ARGUED IN THEIR OPENING THAT ANY LIFE IS WORTH GIVING MEANINGFUL CONSIDERATION TO. WE AGREE WITH THAT. ANY LIFE IS WORTH GIVING MEANINGFUL CONSIDERATION TO. BUT I ASK YOU AGAIN, IN CONSIDERING AND CARRYING OUT YOUR RESPONSIBILITY IN THE CONTEXT OF THIS CASE, WHAT MEANINGFUL CONSIDERATION DID THIS DEFENDANT GIVE TO THE LIFE OF MANDY WILLIAMS ON SEPTEMBER 3RD 2003? **IT'S NOT ENJOYABLE FOR ME OR US TO ASK FOR YOU TO IMPOSE THE DEATH PENALTY. THAT'S NOT SOMETHING WE LIKE TO DO.**

WE WISH THE CASES DIDN'T EXIST. WE WISH WE DIDN'T HAVE A CASE LOAD, BUT WE DO. AND OUR RESPONSIBILITY IS I COME TO YOU AS THE ELECTED PROSECUTOR AND PRESENT THESE CASES WE DEEM APPROPRIATE FOR THE DEATH PENALTY. IT'S A NECESSARY DECISION. WE DON'T WANT TO HURT HIS FAMILY, WE DON'T WANT TO DO ANYTHING TO CAUSE ANY

MORE DISRUPTION TO THAT FAMILY THAN HAS ALREADY OCCURRED; BUT JUST REMEMBER, WE ARE HERE, WE ARE HERE BECAUSE OF WHAT CHRISTOPHER WILLIAMS DID. THAT'S WHY WE'RE HERE. HE BROUGHT US HERE. HE BROUGHT US HERE AND IT'S HIS RESPONSIBILITY.

App.p. 2369, l. 22- p. 2370, l. 9.

IT IS WHAT IS THE APPROPRIATE THING TO DO UNDER THE CIRCUMSTANCES OF THIS , CASE?

WE WILL AGREE THAT THE DEFENDANT COULD ADAPT TO PRISON, BECAUSE THEY WILL MAKE HIM ADAPT. BUT THAT'S NOT THE ISSUE. BECAUSE, OTHERWISE, WE WOULD NEVER HAVE THE DEATH PENALTY. THERE WOULD BE NO REASON FOR IT. AND THE SOLICITOR [sic] [legislature?] SAYS THERE IS A REASON FOR IT AND THAT IT'S SOMETHING YOU SHOULD CONSIDER IN SHAPING THE PUNISHMENT TO FIT THE EXTENT OF THE CRIME.

App.p. 2374, l. 4-13.

THEY HAVE SAID EARLIER THE SOLICITOR IS NOT SATISFIED WITH A LIFE SENTENCE. AND I AGREE, I AM NOT. THEY TOLD YOU HE'S GOING TO WANT THE DEATH PENALTY, AND I DO. WHY IS THE DEATH PENALTY THE APPROPRIATE SENTENCE IN THIS CASE? AND THAT IS A FAIR QUESTION FOR YOU TO ASK, ASK OF US, THE STATE OF SOUTH CAROLINA. AND I SUBMIT TO YOU THAT THIS IS THE REASON, IS THAT THERE ARE MEAN AND EVIL PEOPLE WHO LIVE IN THIS WORLD WHO DO NOT DESERVE TO CONTINUE TO LIVE WITH THE REST OF US REGARDLESS OF HOW CONFINED THEY MAY BE.

App.p. 2370, l. 16-25.⁶¹

Petitioner contends that these comments were similar to the comment found in Butler to have minimized the juror's responsibility. However, similar comments were found in Sigmon

61 Petitioner contends that the defense never asserted that the solicitor would not be satisfied with a life sentence. Although those precise words were not stated in the defense's penalty phase opening, a similar comment was made by defense counsel Mauldin when he stated that "the question is, as the prosecution would have you believe, that death is the only answer." App.p. 2129, l. 8-12. The Petitioner's complaint although technically correct is off point where a similar point about the prosecution's position was made in the opening. This was a distinction without a difference. Any error in the failure to object would have only clarified or corrected it to the reference to Mauldin's actual comment. There was neither prejudice nor deficient performance in the failure to object.

and Williams v. Ozmint, 380 S.C. 473, 671 S.E.2d 600 (2009)⁶² to not require new sentencing proceeding. Respondent submits that neither of these comments would justify an objection. Neither comment suggested “the solicitor attempted to minimize the jurors’ own sense of responsibility for appellant’s fate by stressing that he had himself already made the same decision that he was now asking them to make.” State v. Woomer, 277 S.C. 170, 175, 284 S.E.2d 357, 359-360 (1981).

While a solicitor should not express that he has already reviewed the facts and found, in his own opinion, the defendant deserves a sentence of death in such a way as to diminish the jury’s role or responsibility, Woomer, *supra*, the mere mention of the solicitor’s involvement in the process to seek the death penalty is not improper. *See State v. Bell*, 302 S.C. 18, 34, 393 S.E.2d 364, 373 (1990). The harm to avoid is an argument that “attempt[s] to minimize the jury’s sense of responsibility for appellant’s fate by stressing that [the solicitor] himself had already made the same decision he was asking them to make.” State v. Butler, 277 S.C. 543, 545, 290 S.E.2d 420, 421 (1982), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). “When a solicitor’s personal opinion is explicitly injected into the jury’s determinations as though it were in itself evidence justifying a sentence of death, the resulting death sentence may not be free from the influence of any arbitrary factor as required by S.C. Code Ann. § 16-3-25(C)(1), and the Eighth Amendment to the United States Constitution.” Butler, 277 S.C. at 546, 290 S.E.2d at 421; Woomer, 277 S.C. at 175, 284 S.E.2d at 359. The

62 In Williams v. Ozmint, the Court found the solicitor’s comment that he expected the death penalty did not warrant habeas relief. The Court viewed the totality of his argument and concluded that the comment did not minimize the jury’s own sense of its responsibility for the defendant’s fate. Like the present situation, the solicitor had additionally referenced the juror’s comments to base their verdict on the testimony and exhibits, that after consideration of all the evidence they should give the punishment that fits the crime, in addition to the court’s instructions that they were never required to give the death penalty.

comments at issue here are much more aligned with the proper “involvement in the process” comments in Bell than the improper “diminished responsibility” comments in Butler and Woomer. A review of the actual comments in those cases is helpful in considering the difference.

In both Butler and Woomer, the solicitors’ comments at issue were more than mere acknowledgment of the solicitor’s part in the process. The solicitors in those cases pointedly told the jurors that they had already made the decision, based on a review of all the evidence. The Court has used these very comments in Butler and Woomer to form a template by which to evaluate what comments are deemed unacceptable as diminishing the jury’s sense of responsibility. For example, in State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982), *overruled on other grounds by* State v. Patterson, 290 S.C. 523, 351 S.E.2d 853 (1986), the Court considered the comments on appeal as follows:

... appellant alleges that the solicitor injected his personal opinion into the jury’s deliberations. We agree. The solicitor made the following statements during his closing argument at the sentencing phase:

... I, as Solicitor and chief prosecuting officer in this county, must make the decision whether or not the State of South Carolina must seek the death penalty So, you see, you are not alone in your decision. I have already made that decision....

I made that decision some months ago.

And if I can do it, you can

278 S.C. at 538, 298 S.E.2d at 774. The Court held: “This is precisely the same argument that required reversal of the death sentences in State v. Butler ... and State v. Woomer” Id. See also State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982) (comment minimized jury’s responsibility).

In contrast, the arguments found to be proper in Bell are distinctly different and similar to the comments in Williams's case. The solicitor in Bell, though he argued vigorously for the death penalty, left the decision to the jury. Again, specific reference to the comments at issue are illustrative of the point. In Bell:

... one Solicitor stated during his closing argument that if "this [wasn't] a case in which a jury should impose the death penalty, if this [wasn't] the type of case in which the State should seek the death penalty and expect the death penalty, then there is none." The Solicitor also implored the jury 'to do what's right.' He stated that if 'it was not right in this case, it was never right.'

302 S.C. at 33, 393 S.E.2d. The Court found:

... the Solicitor's comments in Woomer and Butler are easily distinguishable from the instant case. Here, the Solicitor did not inject his personal opinion concerning the death penalty into the proceedings. Nor did the Solicitor comment on his involvement in deciding whether or not to prosecute for the death penalty. The Solicitor's comments did not diminish the role of the jury to decide Bell's fate, thus, we hold that the argument was proper.

Bell, 302 S.C. at 34, 393 S.E.2d at 373.

The Court also noted that "[t]he Solicitor did not challenge the jury by telling them what he would do if the jury failed to impose a death sentence," and again, found the comments were not improper. Id., citing State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981) and State v. Davis, 239 S.C. 280, 122 S.E.2d 633 (1961).

Like Sigmon, the arguments at issue here simply are not improper. The solicitor repeatedly reminded the jury of their duty to determine the appropriate sentence. (See, for example, App.p. 2367, l. 3-10 ("the responsibility is given to you to decide what the appropriate punishment is . . . you sentence . . . we have entrusted you as our citizens to carry it out fairly"); App.p. 2367, ll. 4-5 (" you are the judge. The judge does not sentence, you sentence"); App. p.

2367, l. 21-22 (“the law entrusted it to you”). Respondent also notes that the fact the jury was charged with the responsibility of the decision was also emphasized by the trial judge in his instructions. (App.p. 2397, l. 16-17 (“it now becomes your duty to decide what sentence you recommend this Court to impose upon this defendant”). The jury was further charged on its ability to recommend life for any reason, for no reason at all, or for no reason than compassion, mercy, charity or understanding. App.p. 2404, l. 2-18.

Even so, Petitioner complains that the solicitor’s comments were improper, in part, because they were made in connection with statements acknowledging he represented the State. However, the jury was well aware that the solicitor represented the State, and they would have been equally well aware the State was seeking a death sentence. But, importantly, they were reminded and instructed that the decision on sentencing was a jury decision. If mere reference to a solicitor’s involvement in the proceedings at all would be considered error, such a holding would essentially have the effect of disallowing any argument from the solicitor. Consequently, the comments must stand or fall on the basis of the comments alone.

The Court has repeatedly stated that a solicitor’s closing argument should be premised on seeking justice. See Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010); State v. Finklea, 388 S.C. 379, 697 S.E.2d 543 (2010); State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). A solicitor, like any other advocate, may also be zealous and may “prosecute vigorously,” without being unduly prejudicial in his argument. Finklea, 388 S.C. at 387, 697 S.E.2d at 547-48. See also State v. Murrell, 665 S.E.2d 61, 75-76 (N.C. 2008) (rejecting claim of error, finding “the prosecutor merely sought to fulfill the well-recognized ‘duty to advocate zealously that the facts in evidence warrant imposition of the death penalty.’” Thus, the prosecutor

was advocating the State's position as to the Issues and Recommendation as to Punishment form rather than expressing a personal opinion or desire that defendant be sentenced to death.") (internal citations omitted). Further, the solicitor has the right to make persuasive arguments to the jury. State v. Bell, 293 S.C. 391, 404, 360 S.E.2d 706, 713 (1987) (argument where solicitor "referred to appellant as 'different from the rest of us'; (2) suggested he was appearing on behalf of [victim]; (3) referred to [victim] as the only witness from whom the jury would not be able to hear; and, (4) referred to the protections of the legal process being afforded appellant and said appellant gave [victim] no similar protections," found "the solicitor's argument was eloquent, but we believe it was within acceptable limits.").

It is not (and could not be) error for the solicitor to argue that the case presented – the case in which the State is without question seeking a death sentence – supports imposition of this most serious penalty. The similar arguments reviewed and approved in State v. Cain, 297 S.C. 497, 508-509, 377 S.E.2d 556, 562 (1988), well illustrate this fact along with confirming the propriety of the "send the message" argument.

In light of the arguments approved in Sigmon, Bell and in Cain, the argument here on the appropriateness of the death penalty were proper. There was no cause to object, much less prejudice to the defendant. See also State v. Johnson, 306 S.C. 119, 133, 410 S.E.2d 547, 555 (1991) (finding following statement no improper, "I feel that it would have to be and would hope that you would agree a verdict of death by electrocution" reasoning "the comment did not diminish the role of the jury."). See State v. Shuler, 353 S.C. 176, 188-189, 577 S.E.2d 438, 444 (2003) (acknowledging "[g]eneral deterrence arguments are admissible" and finding the argument that if death imposed it may "cause somebody else thinking of murder not to do it,"

found not to inject “an arbitrary factor (fear or personal responsibility)”); Williams v. Ozmint, *supra*. See Sigmon v. State, *supra*; Northcutt, 372 S.C. at 222, 641 S.E.2d at 881 (2007) (appellate court “must review the argument in the context of the entire record”).

In sum, the record fully supports that there was no improper personal opinion (*i.e.* lessening the duty or responsibility of the jury) or even demand for a sentence. The focus firmly remained on the defendant, his acts, and his appropriate punishment. See State v. Smart, 278 S.C. 515, 526, 299 S.E.2d 686, 692-693 (1982), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (cautioning such comments must be case specific and defendant specific). Further, the comments were not inflammatory or otherwise improper on their face that would warrant an objection. Compare Northcutt, 372 S.C. at 222, 641 S.E.2d at 881 (solicitor’s statement in child murder case that there would be an “open season on babies in Lexington County” if death sentence was not recommended was improper as “[t]he sole purpose of this statement was to inflame the jury”).

Lastly, even if the comments could possibly constitute error, and counsel rendered deficient performance in failing to object, counsel’s failure to object would be harmless in light of the evidence in aggravation. “When a defendant challenges a death sentence, prejudice is established 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.’” Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998), quoting Strickland, 466 U.S. at 694. But this Court need not look at the prejudice prong because the record well supports that

counsel was not deficient in failing to object to the referenced comments. The comments were not improper. There was neither deficient performance nor prejudice shown.

E. References to the Community and the Results of the Verdict in the Community.

In his final specification in this allegation, Petitioner contends that counsel should have objected to comments about "the community." A review of the closing argument⁶³ reveals the following comments concerning the community that were not objected to by defense counsel:

THIS IS ABOUT ACCOUNTABILITY, CULPABILITY . . . BECAUSE WE DON'T JUST BLINK OUR EYES AND FORGET ABOUT THIS HORRIBLE CRIME. JUST DOESN'T GO AWAY. THIS IS LONG TERM, NOT JUST ON THIS FAMILY. YOU HEARD FROM -- **BUT THE ENTIRE COMMUNITY IS A VICTIM OF THIS CRIME** BECAUSE HE INTENTIONALLY, WILLFULLY, AND MALICIOUSLY; AFTER FULL PLANNING, DESTROYED TWO FAMILIES, THE FRIENDS OF BOTH.

THE GREATER COMMUNITY BECAME A VICTIM AND THIS WAS A BRUTAL MURDER IN A PUBLIC PLACE, IN A PUBLIC PLACE WITH NO CONCERN SHOWED FOR THE SAFETY OF OTHERS. CRIME SHOULD MEET THE PUNISHMENT, SHOULD MEET THE CULPABILITY AND EXTENT OF THE CRIME. THIS IS A CROWDED SHOPPING CENTER, INNOCENT BYSTANDERS ALL OVER.

App.p. p. 2373, l. 6-18.

AND IN CLOSING, LET ME TELL YOU THIS IN CONSIDERING THE PROPER PUNISHMENT. YOU HAVE BEEN ENTRUSTED UNDER OUR SYSTEM AND BY US AS JURORS TO CONSIDER AND **MAKE A DECISION AS REPRESENTATIVES OF THE COMMUNITY TO SPEAK FOR THIS COMMUNITY AS TO WHAT IS THE APPROPRIATE PUNISHMENT.** AND THE APPROPRIATE SENTENCE UNDER THE FACTS OF THIS CASE YOU KNOW THIS CASE AS WELL AS ANYBODY, YOU'VE HEARD EVERYTHING THAT'S BEEN PRESENTED IN THIS COURTROOM -- AND

⁶³ Comments about "community" were also made in Deputy Solicitor Strom's opening statement in the penalty phase. ROA 2110-2117. See particularly ROA 2112, l. 1-19. ("Because as a member of a jury collectively you become a body that speaks for the community. That's what your job is, to speak for the community. You become one. Individuals who become one and you are the voice of this community.").

IT IS YOUR DECISION AND AS YOU SPEAK FOR THIS COMMUNITY, MAKE THAT DECISION, WHATEVER THAT DECISION IS, IT WILL RING LIKE A BELL OUTSIDE OF THIS COURTHOUSE. IT WILL RING LIKE A BELL TO BE HEARD WHILE ALL OF THOSE WHO ARE REASONING AND ALL OF THOSE WHO WANT TO LISTEN. AND I URGE YOU, ON BEHALF OF THE STATE OF SOUTH CAROLINA THAT THE APPROPRIATE PUNISHMENT UNDER THIS CRIME IS THE DEATH PENALTY. LET THAT BELL RING SO THIS COMMUNITY WILL KNOW THAT WE WILL NOT TOLERATE CONDUCT OF THIS TYPE WITHOUT THE MAXIMUM PUNISHMENT. THOSE WHO COMMIT THIS TYPE OF CRIME MUST PAY THE ULTIMATE PRICE.

App.p. 2379, l. 18- p. 2380, l. 12.

The South Carolina Supreme Court has held that it was not error for solicitor to argue that the verdict would be a message to the county and state. State v. South , 285 S.C. 529, 331 S.E.2d 775 (1985). Further, the Court held in State v. Cain, 377 S.E.2d 556 (1988), that it was not error for solicitor to argue the death penalty would send a message that you do not commit murder without paying the price. More recently in Sigmon v. State, supra., the Supreme Court concluded that trial counsel were not deficient in failing to object to a strikingly similar argument. Respondent adopts the reasoning of Sigmon as to why this specification should be rejected as a Sixth Amendment violation.⁶⁴

Respondent submits that counsel was not deficient in failing to object. As counsel Nettles testified, he objected to everything he considered objectionable and Mauldin stated he would have objected to anything that was blatantly improper. App.pp. 3291, 3369-70. Here, the

⁶⁴ Further, other courts have rejected similar claims. See Littlejohn v. Trammell, 704 F.3d 817 (10th Cir. 2013) (prosecution's comments during closing arguments at resentencing in a capital murder prosecution, which comments referred to jurors as representatives of community and urged them to impose death penalty, did not improperly embed into jury's sentencing consideration a sense of societal alarm or need for community justice so as to deprive defendant of due process; in advocating for a result commensurate with justice, prosecution nonetheless emphasized that jury retained full responsibility for weighing evidence and that justice was product of weighing process); Hicks v. Collins, 384 F.3d 204 (6th Cir. 2004) (prosecutor's closing argument in capital murder prosecution urging jury to act as community's conscience was proper general reference to societal need to punish guilty people, rather than prosecutorial misconduct; argument was not calculated to incite passions and prejudices of jurors).

Petitioner has failed in his burden of proof of showing either deficient performance or prejudice. Most recently in Sigmon, the Court reviewed the entirety of an argument which included similar language about sending a message to the community, ringing the bell for the community that the conduct would not be tolerated and concluded that the trial counsel was not deficient for not objecting to an identical argument. Sigmon v. State, supra. Certiorari must be denied.

3. ***IAC Trial and Appellate - Death Penalty not appropriate and/or used in an arbitrary manner.***

III. Respondent submits that Petitioner's free-standing 8th Amendment claim that the death penalty in South Carolina (and Greenville County) is disproportionate to similar crimes and unconstitutional because of the existence of a kidnapping aggravating factor, as defined in S.C., is barred under Simmons v. State and Drayton v. Evatt. Similarly, his assertion that this Court (and the PCR Court) should have considered a different pool of cases must be rejected by the decisions in Copeland and Dickerson to the extent it can even be considered in this setting.

Petitioner's third argument for certiorari is that the South Carolina Death Penalty statute is unconstitutional under Furman v. Georgia, 408 U.S. 238 (1972), because the manner that South Carolina defines the aggravating factors of kidnapping and physical torture means that virtually every murder in South Carolina is death eligible. This issue was raised in an amended application as allegation (g). However, it was only raised as a Sixth Amendment claim of ineffective assistance of trial and appellate counsel. App.p. 3037. The Petitioner first raised this allegation as a free-standing constitutional claim, as opposed to a Sixth Amendment violation, in his pre-trial brief and in his post-hearing memorandum of law. App.p. 4040-4061. The state PCR court addressed the claim addressed the claim as one of ineffective assistance of trial and appellate counsel. App.p. 4178-4182; Order, p. 12-16. As the PCR court concluded "Petitioner

has not shown that trial counsel or appellate counsel were ineffective. App.p. 4182; Order, 16. There is probative evidence to support this conclusion of law.

A. The Issue is not proper as a free-standing claim under Drayton v. Evatt.

At the outset, Petitioner's free-standing federal constitutional claim is barred from certiorari consideration. This freestanding claim could have been properly raised on direct appeal and is inappropriate in PCR. S.C. Code Ann. § 17-27-20(b) (2003); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel); Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (an application for post-conviction relief is not a substitute for an appeal). These claims could have been asserted at trial. These are not claims that are cognizable for post-conviction relief. As a result, these claims should be denied and dismissed with prejudice.

Second, the claim was ruled on by Judge Welmaker as a Sixth Amendment ineffective assistance of counsel claim. App.p. 4178-4182. The Petitioner did assert, in a Motion to Alter Judgment, that the PCR court failed to adequately address his claim that the death penalty scheme in S.C. fails to limit eligible murders in a meaningful way or address his claim that this Court's review was not a meaningful review of similar cases. App.p. 4223-4224. Judge Welmaker denied the motion. App.p. 4229-4230. However, his submission does not create a vehicle to avoid the limitations of § 17-27-20(b) or this Court's precedent in Drayton and Simmons concerning free-standing claims. Certiorari should be denied for this initial reason.

B.

In his seventh amended allegation [G], as addressed by the PCR Court, Petitioner asserted that both trial counsel and appellate counsel were ineffective in failing to preserve at trial or brief in the direct appeal, that the death penalty was not appropriate and that the death penalty was used in an arbitrary manner. Respondent agrees that this general issue was not specifically raised and or/briefed before the South Carolina Supreme Court in the direct appeal. However, in completing its statutory review, the South Carolina Supreme Court conclusively held that:

PROPORTIONALITY REVIEW

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

State v. Williams, supra.⁶⁵ See Scott v. Mitchell, 209 F.3d 854 (6th Cir.2000)(noting that "when a state appellate court expressly states that it has conducted a proportionality review, this court may not assume that the review was inadequate [or did not really occur] merely because the state court did not describe in writing all aspects of its review"); McQueen v. Scroggy, 99 F.3d 1302, 1333-34 (6th Cir.1996)(stating that there is "no federal constitutional requirement that a state appellate court conduct a comparative proportionality review").

In his original allegation, Petitioner asserted that trial counsel was ineffective in not preserving, and appellate counsel was ineffective for not briefing, an argument that South

⁶⁵ The Petitioner's claim clearly fails under Simmons and Drayton. He is asserting that this language was merely boilerplate language because it was consistently used by the Court in its prior death penalty cases. He further contends this is borne out because, under his view, no proportionality assessment was done by the Court since its alleged reliance on State v. Tucker is distinguishable.

Carolina's death penalty statute is unconstitutional under Furman v. Georgia. The PCR Court found that Petitioner had not satisfied his burden of proof on this issue. App.p. 4179-4182. However, no questions were asked of either trial counsel concerning this claim as set forth in allegation G.

Appellate counsel Dudek testified that he did not pursue this claim on appeal in this case and that it had never been previously successful. App.p. 3388-89. Mr. Dudek stated that there was no objection and no assertion at trial that the death penalty was used in an arbitrary manner for him to have raised on appeal. App.p. 3402, l. 21-p. 3405, l. 2. Counsel Dudek recalled that the Court had addressed some issues before where it had reversed when there was no objection in State v. Denisona Crisp and State v. Fredrick Owens. App.p. 3404.⁶⁶ However, unlike those cases, counsel Dudek confirmed that he could not add to the record and was limited to whatever research or argument had been made to the trial record. App.p. 3404-05. A review of the trial record does not show that any motion or objection was specially made by trial counsel prior to or after the sentencing proceeding on this same ground. Petitioner's claim is without merit. The PCR Court correctly rejected the claim.

The underlying premise of each part of Petitioner's claim fails to support a finding that he is entitled to relief upon this claim. Petitioner asserts that the South Carolina death penalty statute is unconstitutional because it does not adequately restrict the circumstances upon which a jury can impose a death sentence upon a defendant. Specifically, he argues that the two aggravating circumstances of murder committed while in the commission of a kidnapping and

⁶⁶ See State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005); State v. Owens, 362 S.C. 175, 607 S.E.2d 78 (2004). In both cases, resentencing was ordered based upon a conclusion that the trial judge's comments about the waiver of a right to a jury trial injected his personal opinion in the decision.

murder committed while in the commission of physical torture, are defined so broadly by South Carolina law that they do not narrow the circumstances in which the death penalty can be applied in this State.

Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Maynard v. Cartwright, 486 U.S. 356, 362-63 (1988).

To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. Tuilaepa v. California, 512 U.S. 967, 971 (1994); Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). To render a defendant eligible for the death penalty in a homicide case, the United States Supreme Court has indicated that the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase. Tuilaepa, 512 U.S. at 971-72; see, e.g., Lowenfield v. Phelps, 484 U.S. 231, 244-246, 108 S.Ct. 546, 554-555, 98 L.Ed.2d 568 (1988); Zant v. Stephens, 462 U.S. 862, 878, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235 (1983). The aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. Tuilaepa, 512 U.S. at 972; see Arave v. Creech, 507 U.S. 463, 474, 113 S.Ct. 1534, 1542, 123 L.Ed.2d 188 (1993) ("If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm"). Second, the aggravating circumstance may not be unconstitutionally vague. Tuilaepa, 512 U.S. at 972; Godfrey v. Georgia, 446 U.S. 420, 428, 100

S.Ct. 1759, 1764-1765, 64 L.Ed.2d 398 (1980); see Arave, *supra*, 507 U.S., at 471, 113 S.Ct., at 1541 (court “must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer”) (quoting Walton v. Arizona, 497 U.S. 639, 654, 110 S.Ct. 3047, 3057-3058, 111 L.Ed.2d 511 (1990)).

For purposes of vagueness analysis, in examining the propositional content of a factor, the concern is that the factor has some “common-sense core of meaning ... that criminal juries should be capable of understanding.” Tuilaepa, 512 U.S. at 975 (quoting Jurek v. Texas, 428 U.S. 262, 279 (1976)(White, J., concurring in judgment)).

Petitioner’s assertion that the aggravating circumstance of committing the murder while in the commission of kidnapping does not narrow is without merit. Similar arguments have been consistently rejected by the South Carolina Supreme Court. For instance, in State v. Ray, 310 S.C. 431, 427 S.E.2d 171 (1993), our Supreme Court rejected an argument that the statutory aggravating circumstance of kidnapping was unconstitutionally “overbroad and overinclusive.” Id. at 437, 427 S.E.2d at 174-75. See also State v. Charping, 313 S.C. 147, 178-179, 437 S.E.2d 88, 105 (1993) (Goolsby, A.A.J and Toal, C.J., concurring in part and dissenting in part) (adhering to the court’s prior determinations upholding the statute against an attack on overbreadth grounds, citing State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) and State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982)).

Although courts may not indulge “post hoc rationalization” for counsel’s decisionmaking that contradicts the available evidence of counsel’s actions, Wiggins v. Smith, 539 U. S., at 526-527, neither may they insist that counsel confirm every aspect of the strategic basis for his or her actions. There is a “strong presumption” that counsel’s attention to certain issues to the exclusion

of others reflects trial tactics rather than “sheer neglect.” Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel’s performance, not counsel’s subjective state of mind. 466 U. S., at 688. Harrington v. Richter, _ U.S. _ (2011).

In light of the Court’s reasoning in Ray, reasonable trial counsel (and appellate counsel) in 2005 would have no reason to believe that a similar argument in this case would have been a meritorious argument after similar rejections by the state appellate court. Thus, trial counsel could not be deficient in not raising this argument at trial. A review of the transcripts of the trial reveal that this same claim was not pursued prior to or after the trial in a motion hearing. There was a sound basis for not doing so. The Petitioner has not met his burden of proof.⁶⁷

To the extent he claims that appellate counsel should have raised this same claim, it was not preserved. Respondent submit that counsel could not be deemed ineffective because this issue was not preserved since he did not present the same argument to the trial judge. Appellate counsel had no basis to present the claim. Appellate counsel is not ineffective for failing to raise

67 *Physical Torture Aggravator Not Charged*

To the extent that Petitioner asserts counsel should have argued the statute violated the Eighth Amendment due to an alleged overbreadth of the aggravating circumstance of physical torture, his claim is without merit. Petition, pp. 60, 63. First, counsel would have had no reason to consider any implication relating to the physical torture aggravating circumstance because it was never asserted as an aggravator for the jury to consider. The jury was only instructed to consider the statutory aggravating circumstance of kidnapping. (App.p. 2397). Second, our Supreme Court has rejected arguments asserting that the statutory aggravating circumstance of physical torture was too broad to narrow a jury’s discretion in imposing the death penalty. State v. Smith, 298 S.C. 482, 381 S.E.2d 724 (1989). In light the Supreme Court’s holding in Smith, counsel in 2005 could not have been deficient for not raising this objection at trial, or for not raising this argument on appeal.

on appeal an issue that was not preserved for review. Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005). If an issue has not been preserved for review by timely objection, appellate counsel is not ineffective for failure to raise it. Lee v. Davis, 328 F.3d 896, 901-02 (7th Cir. 2003). The fact he previously lost a similar claim is not a ground to raise it anew.

Closing Argument Did Not Equate Murder with Kidnapping

Contrary to Petitioner's assertions, the solicitor's closing argument in the guilt phase of the trial did not equate murder with kidnapping. Petitioner claimed below that the following passage was improper argument to which trial counsel should have objected:

We're going to go through those charges individually. Kidnapping. The judge will charge you it's unlawful to seize, confine, kidnap, enveigle or carry away another person without authority of law. He will tell you that the State does not have to prove each one of those, only one of those.

It does not require ransom. That's what a lot of people think. That's what we see on TV. Kidnapping, someone is taken somewhere. They're hidden out in some shed and we start seeing ransom notes. That is a form of kidnapping. It's not the only one. If you confine someone against their will without the authority of law, it is kidnapping. And His Honor will tell you that kidnapping begins when the person's freedom has been taken away. Kidnapping ends when the freedom has been restored. And that's key.

App.p. 2022, ll. 6-21.

Ladies and gentlemen, as I told you, kidnapping starts when a person's freedom has been taken away. And it ends when the freedom has been restored. Mandy's freedom was never restored. Her kidnapping was the ultimate kidnapping. She never again was free to move, because when she did, when she started fighting for her life, when she began to run away from the defendant, what does he do? What does he do?

Does he say, "oh, let me let her go, because I'm going to let her go out anyway"?

The get up here and try to argue to you that he was going to let her go. He told the negotiator he was going to let her go. I submit to you he was lying to the negotiator when he said he was going to let her go. He never intended to let her go. Because if he had, when she started running, all you do is let her run slap out the front door. But that's not what he did.

What does he do?

(Mrs. Strom pumps shotgun four times.)
Her freedom is permanently taken away.

App.p. 2024, ll. 3-22.

The first part of the State's closing argument was clearly just a general explanation of the law of kidnapping. This argument was consistent with South Carolina law on kidnapping. "Kidnaping is a continuing offense. The offense commences when one is wrongfully deprived of freedom and continues until freedom is restored." State v. Tucker, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999). As noted by the solicitor, one does not have to be held for ransom for a kidnapping to occur. See generally State v. Jefferies, 316 S.C. 13, 19, 446 S.E.2d 427, 430 (1994) (noting that element of holding for ransom in kidnapping was deleted from the statute by the Legislature in 1976). Due process does not require reversal based on improper jury argument unless the argument "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986). Moreover, the comments of the prosecutor "are not considered in isolation, but are evaluated in the context of the entire trial as a whole including the prosecutor's entire closing argument." Kirkpatrick v. Blackburn, 777 F.2d 272, 281 (5th Cir.1985), *cert. denied*, 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986). See also State v. Huggins, 325 S.C. 103, 481 S.E.2d 114, 116 (S.C.1995) (an allegedly improper argument should be grounds for reversal only when the argument has "so infected the trial with unfairness as to make the resulting conviction a denial of due process.").

Nothing in the second part of the argument equates murder to kidnapping. Contrary to Petitioner's assertions, the State's argument was not that a person who kills another is automatically guilty of kidnapping. Instead, the solicitor made clear that the kidnapping was

ongoing when Petitioner killed the victim. Because the solicitor did not make an improper argument in the portion of the guilt phase closing that Petitioner challenges, counsel was not deficient in failing to object. Also, counsel may not have objected so as to minimize objections during the closing arguments. See Driscoll v. Delo, 71 F.3d 701, 714 (8th Cir.1995) (finding counsel's general trial strategy to minimize objections to prosecution's closing argument is objectively reasonable).

Proportionality and Pool of Cases

Petitioner further contends that the proportionality review conducted by the South Carolina Supreme Court in his case was inadequate and unconstitutional. Petitioner's argument consists of three parts. Petition, 64-67. First, the proportionality finding in this case was inadequate because Petitioner's case is not similar to State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). Second, Petitioner claims proportionality review is inadequate because it considers cases that have not led to actual executions. Third, Petitioner asserts that the murder he committed is not proportionally worse than a number of Greenville County murder cases that did not result in death sentences. Petition, p. 70-73. His arguments are without merit.

First, contrary to Petitioner's assertions, the Eighth Amendment does not require a capital sentencing structure to include comparative proportionality review for the sentencing structure to be considered constitutional. Pulley v. Harris, 465 U.S. 37, 50-1, 104 S. Ct. 871, 879 (1984); Shaw v. Martin, 733 F.2d 304, 317 (4th Cir. 1984); State v. Hughes, 336 S.C. 585, 596, 521 S.E.2d 500, 506 (1999); State v. Dickerson, 395 S.C. 101, 127 n.9, 716 S.E.2d 895, 909 n.9 (2011) (Pleicones, A.J., concurring). Because proportionality review is not required by the Constitution, states have great latitude in defining the pool of cases used for comparison.

Wickline v. Mitchell, 319 F.3d 813, 824 (6th Cir.2003), cert. denied, 540 U.S. 955, 124 S.Ct. 405, 157 L.Ed.2d 291 (2003); see e.g., Moore v. Balkcom, 716 F.2d 1511, 1522 (11th Cir. 1983) (“Discretion exists in the Georgia Supreme Court’s review of capital cases. The court exercises discretion in determining whether the death sentence was imposed under the influence of passion, prejudice, or other arbitrary factors and in selecting the ‘similar cases’ for its proportionality review. . . . Such discretion is necessary if the Georgia Supreme Court is to serve as a clearinghouse of all cases in which the death penalty has been imposed pursuant to the Georgia procedure and to ensure that the sentence has not been ‘freakishly’ imposed.”).

Our State’s requirement that the Supreme Court engage in a proportionality review is codified in S.C. Code Ann. § 16-3-25(C). That section states that:

With regard to the sentence, the court shall determine:

- (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
- (2) Whether the evidence supports the jury’s or judge’s finding of a statutory aggravating circumstance as enumerated in § 16-3-20, and
- (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

S.C. Code Ann. § 16-3-25(C). In State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982), our Supreme Court stated, “the search for ‘similar cases’ can only begin with an actual conviction and sentence of death rendered by a trier of fact in accordance with § 16-3-20 of the Code.” Copeland, 278 S.C. at 591, 300 S.E.2d at 74. The Court acknowledged that other jurisdictions included a more expansive “universe” of cases in their consideration of the proportionality of a death sentence; however, the Court determined that potential drawbacks to a more expansive set of similar cases supported the Court’s limitations in defining the cases it would review in its proportionality examinations.

Under such a regime, the reviewing court could only determine the size of its sample or “universe” by some arbitrary device. Fact findings of the trial court, by contrast, provide a fundamental line of demarcation well recognized in and even exalted by our legal tradition. The decisive importance of such findings is evidenced by the language of Article V, section 5, South Carolina Constitution, which limits our review to “correction of errors at law” in all but equity cases.

To expand the notion of a “universe” would also entail intolerable speculation by this Court. Under the South Carolina statute, a jury is not required to state its reasons for failing to recommend a sentence of death. In a given case, the alleged aggravating circumstance may not have been proven to the satisfaction of the jury, while in another “similar case” (expansively defined) the statutory mitigating circumstances or some mitigating factor “otherwise authorized or allowed by law” may have deterred imposition of the death sentence.

This Court would enter a realm of pure conjecture if it attempted to compare and contrast such verdicts with an actual sentence of death. They represent acts of mercy which have not yet been held to offend the United States Constitution. Moreover, they reflect the emphasis upon individualized sentencing mandated by the United States Supreme Court. We will not subject these verdicts to scrutiny in pursuit of phantom “similar cases,” when a meaningful sample lies ready at hand in those cases where the jury has spoken unequivocally.

Id.

As noted by Petitioner and by the Supreme Court in State v. Dickerson, 395 S.C. 101, 124 n.8, 716 S.E.2d 895, 908 n.8 (2011), Copeland remains the law in place. Thus, Petitioner’s request for this Court to consider cases in which a defendant did not receive a death sentence is improper and inconsistent with South Carolina law.

Contrary to Petitioner’s assertions, the Supreme Court’s reference to State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996), supports the Supreme Court’s determination that the imposition of the death sentence in Petitioner’s case was neither excessive nor disproportionate. While the Court did not specifically explain why it cited to Tucker in finding Petitioner’s sentence was neither excessive nor disproportionate, similarities between the two cases supports the Court’s conclusion. In Tucker, the victim was essentially held hostage at gunpoint in her

home by the defendant, and the defendant shot the victim as she attempted to get away from his control by grabbing his gun. 324 S.C. at 160-61, 478 S.E.2d at 263. Similarly, Petitioner held his victim hostage at gunpoint and he shot her as she attempted to get away from him.

Altogether, Petitioner has not shown that either trial counsel or appellate counsel was ineffective in not raising this argument. Nothing in the state court record indicates that the Supreme Court did not engage in a proper proportionality review as required by statute and outlined in Copeland. And to the extent Petitioner argues that counsel should have asserted that the South Carolina Supreme Court's proportionality review under Copeland is generally insufficient, his argument is wholly without merit. As the Supreme Court indicated in Dickerson, expansion of the pool of cases to be considered in the statutory proportionality would require the Court to overrule Copeland, which to date has not occurred. See Dickerson, 395 S.C. at 124 n.8, 716 S.E.2d at 908 n.8. "An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction." Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004); see Thornes v. State, 310 S.C. 306, 309, 426 S.E.2d 764, 765 (1993)(same); see, e.g., Spaziano v. Singletary, 36 F.3d 1028, 1039 (11th Cir. 1994) ("[r]easonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop.")(internal quotation omitted). Here, a change in the law has yet to occur. Neither trial counsel nor appellate counsel can be found ineffective for not raising an argument that would require a change in the law to be successful and that has otherwise not been successful prior to Petitioner's trial and appeal.

Further, the eighth footnote in the Dickerson opinion, which is arguably the discussion since Copeland about modifying the pool of cases considered by the Supreme Court in its

proportionality review, was not available to either counsel to consider until the opinion was filed by the Supreme Court on October 3, 2011, over nineteen months after the opinion in Petitioner's direct appeal. In light of the lack of case law available at the time of the trial, and in light of appellate counsel's testimony that he had never been successful in raising a challenge to the proportionality review of a death sentence and was unaware of any successful challenges (Tr. p. 214), Respondent submits Petitioner has failed to meet his burden as to these claims. As a result, this ground should be denied and dismissed.

Greenville Pool Issue

Further, the Petitioner apparently asserts that the more effective pool of cases would be those from Greenville County and he completed a brief anecdotal assessment of his new pool. Judge Welmaker did not directly address this issue in denying post-conviction relief, but he implicitly rejected it in concluding that Copeland was complied with in Williams' case. App.pp. 4181-4182. After the evidentiary hearing was completed, Petitioner in his post-hearing memorandum listed what he claimed was every case in Greenville, since 1997, in which the Thirteenth Circuit Solicitor's Office served a death notice. Petition, pp. 70-71. App.pp. 4059-4060. He summarized the charges in his post-hearing pleading, but he did not reflect evidence of aggravating circumstances or the existence of mitigating circumstances within the listing, even including cases that resulted in voluntary manslaughter convictions.

Many years ago, a similar case by case showing was attempted in collateral review and found deficient by this Court with a directive to the bench and bar to avoid similar assertions in the future. In Thompson v. Aiken, 281 S.C. 239, 240, 315 S.E.2d 110, 110 (1984), in a PCR appeal, the Court rejected a comparison of cases scenario similar to this action because, like

Williams here, *"the petitioner has relied upon gross statistics and probabilities. The petitioner has elected not to consider various intangible factors entering into prosecutorial decisions."* Id.

The petitioner acknowledges that this Court has already settled the scope of proportionality review. State v. Copeland, 278 S.C. 572, 586-596, 300 S.E.2d 63, cert. denied, 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 367. Prosecutorial discretion plays no role in such review, yet the sole basis upon which this or any other petitioner could offer a showing of "patterns" would be an argument based on disproportionate punishment. **We are not persuaded and accordingly we recommend that the bench and bar focus attention upon real and substantial issues in future capital cases.**

Thompson v. Aiken, supra (emphasis added). Similar arguments have been squarely rejected elsewhere. Prosecutors have wide discretion in making the decision whether to seek the death penalty. See McCleskey v. Kemp, 481 U.S. 279, 296-97, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); Gregg, 428 U.S. at 199 (pre-sentencing decisions by actors in the criminal justice system that may remove an accused from consideration for the death penalty are not unconstitutional). In Smith v. Stewart, 140 F.3d 1263 (9th Cir. 1998), the Ninth Circuit rejected the argument that Arizona's death penalty statute is constitutionally infirm because "the prosecutor can decide whether to seek the death penalty." 140 F.3d at 1272. "[A] defendant cannot 'prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty.'" United States v. Johnson, 495 F.3d 951, 961 (8th Cir.2007) (quoting McCleskey v. Kemp, 481 U.S. 279, 306-07, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)); see also Getsy v. Mitchell, 495 F.3d 295, 305-06 (6th Cir. 2007) (en banc).

Simply put, Petitioner argued that certain defendants had been subject to lesser sentencing than the Petitioner, without presenting evidence of the other defendant's crimes or the existence of aggravating factors and mitigating circumstances. Asserting that this was merely a

domestic murder, he claims that death penalty should not have been given and that it was disproportionate. This is the type of anecdotal assessment rejected for post-conviction relief settings in Thompson and Copeland. Trial counsel Mauldin (and Nettles) reasonably did not raise a similar claim to the trial judge in 2005. Appellate counsel Dudek was not ineffective in failing to assert this argument to the Supreme Court when the alleged evidence was not presented at trial. The PCR Court correctly rejected the claim where no evidence was presented to support it and Thompson admonished that similar claims should not be considered as free-standing claims. Counsel has not been proven to be ineffective. Certiorari should be denied where this Court already found under its standard in Copeland that the sentence for Williams was neither excessive nor disproportionate.

For all the multifarious reasons, certiorari on Issue 3 should be denied.

IV. *IAC - Ineffective assistance of trial counsel and German citizen issue.*
Certiorari is not warranted where there is probative evidence that when trial counsel was aware that Williams was a U.S. citizen, counsel was not deficient in failing to seek any assistance from the consulate of the Federal Republic of Germany due to the fact that the Petitioner's mother was born in Germany. The PCR Court reasonably applied Strickland in concluding that counsel was not deficient and that prejudice under the Sixth Amendment had not been proven based upon the speculative assertions raised before the lower court and this Court. Order, App. pp. 4197-4201.

In his fourth issue on certiorari, Petitioner Williams asserts that counsel was ineffective in apparently failing to more fully investigate the identity of Williams's still unknown grandfather and to invoke consular rights as a German "foreign national" because Daisy Huckaby, Petitioner's mother was a German citizen. In the Petition for Writ of Certiorari, the Petitioner incorporates by reference the "Brief of Amicus Curiae The Federal Republic of Germany" (hereafter "Amicus Brief") before this Court. Petition for Writ of Certiorari, p. 74.

Germany asserts that the failure of appointed defense counsel after Williams's arrest to contact the German consulate was outcome determinative. Germany contends that had they been notified they would have provided full consular assistance, which they claim would have changed the sentencing outcome even though he had existing citizenship in the United States. Germany asserts that it would have provided financial assistance and monitored the investigation and trial. Germany asserts this assistance would have included investigating partial fetal alcohol spectrum disorder (PFASD) and other potential mitigating factors concerning the German family background. Further, Germany speculates (without proof) that they would have ensured trial counsel obtained an MRI to analyze potential brain damage and consulted with fetal alcohol syndrome experts in 2005 (raised in Argument I). Germany additionally speculates that the German consul's presence would have tempered the prosecutor's comments regarding potential prison conditions (raised in Argument II). Amicus Brief, p. 6-28. Finally, Germany speculates that had the German consul become aware and involved in assisting Williams's defense, it could have convinced Solicitor Ariail to drop the notice of intent to seek the death penalty in exchange for a guilty plea based upon some evidence to support a guilty but mentally ill plea. Germany supports such speculation on anecdotal reports that two defendants in 1989 and 2012 were offered plea bargains by different solicitors after entering GBMI pleas. Amicus Brief, p. 28-30.

WHAT THE PCR COURT HELD

In his order of dismissal, Judge Welmaker concluded that the German citizenship issue did not reflect ineffective assistance of counsel. App. pp. 4197-4201, Order, pp. 31-35. Judge Welmaker concluded that Williams, contrary to assertions in the pleadings before him, was not

a “foreign national” but a United States citizen, born in the United States to an American father. App. p. 4198. Although Williams is now recognized as a dual citizen of Germany,⁶⁸ he was not required to have consular notification in 2003-2005. The PCR Court further concluded that even if it assumes that Williams was entitled to advice and that counsel failed to notify him (and Germany), he had not demonstrated prejudice. App. pp. 4199-4200. The PCR court found that “beyond mere speculation, Petitioner has not shown any evidence that assistance from the German consulate would have changed the outcome of the trial.” App. p. 4200. Judge Welmaker found that counsel in capital cases always desire more time to prepare, but Judge Welmaker felt in this particular case that they were sufficiently prepared. App. p. 4200, citing App. pp. 3322-3323 (PCR 148-149). Further, contrary to the suggestions by the Amicus Brief, the PCR court concluded that there was no evidence that the defense lacked adequate resources. App. p. 4200. Particularly, Judge Welmaker found that “the defense team was composed of highly qualified, experienced attorneys, including the Public Defender for the Thirteenth Judicial Circuit, John Mauldin, and attorney Bill Nettles, who now serves as United States Attorney for the District of South Carolina.” App. p. 4200. In addition, Judge Welmaker noted that “attorneys Mark MacDougall⁶⁹ and Colleen Coyle of the Washington, D.C. law firm of Akin Gump Strauss

68 Judge Welmaker asked Mr. Gerrit Morking of the German consulate whether a person born to a German citizen is also a German citizen. As noted in the Order, Mr. Morking announced that German citizenship inherited by birth could be passed on from generation to generation confirming that “if my great, great great grandfather was a German Citizen, I’m still a German Citizen also.” Order, App. p. 4198, n. 6, Order, p. 32, n.6. (citing App. p. 3975, l. 7- p. 3976, l. 8; PCR Tr. p. 801-02). Respondent’s below-signed counsel has learned that German citizenship would be lost if it was relinquished or if the person fought against Germany. Under those circumstances, the descendant would not acquire it by birth. See Amicus Brief, p. 3, n. 4.

69 Mark MacDougall has been recognized for his work in capital defense work in South Carolina, including this case by “The American Lawyer” magazine. The American Lawyer in 2014 featured Akin Gump litigation partner Mark MacDougall in its article “A Pro Bono Champ” for his death penalty defense work in South Carolina. <http://www.akingump.com/en/news-insights/the-american-lawyer-highlights-mark-macdougall-s-pro-bono-work.html>. On September 11, 2014, the article notes, the American Bar Association’s (A.B.A.) Death Penalty Representation Project awarded MacDougall its “Guiding Hand of Counsel” award. A.B.A. director Robin Maher said, “At a time when pressures on law firm lawyers have created an environment where firms seem to be looking

Hauer and Feld also aided in the Petitioner's defense." App. p. 4200. The PCR Court also found that the defense team had retained and "relied on the skills and resources of its mitigation investigator, Jan Vogelsang, a well-respected and experienced social case worker who has worked on numerous capital defense teams (including the defense of Zacarias Moussaoui)." App. p. 4200. Further, the PCR judge found that there was a "team of highly-qualified experts who met with Petitioner and his defense team on numerous occasions and testified at trial." App. p. 4200. The PCR Court concluded that using the resources at its disposal, "the defense team developed a comprehensive trial strategy." App. p. 4200.

EVIDENCE AND ISSUES

Petitioner asserts that he is entitled to relief because his counsel never investigated whether Williams could be a German citizen nor sought the assistance of the consulate. In the PCR court, he relied upon A.B.A. Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.6 (rev. ed. Feb.2003). This particular guideline sets forth:

GUIDELINE 10.6 – ADDITIONAL OBLIGATIONS OF COUNSEL REPRESENTING A FOREIGN NATIONAL

- A. **Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals.**
- B. Unless predecessor counsel has already done so, counsel representing a foreign national should:
 - 1. immediately advise the client of his or her right to communicate with the relevant consular office; and

for cases with, well, tighter parameters, Mark's commitment to doing capital trial work is very rare." *Id.* The National Association for the Advancement of Colored People (NAACP) has honored MacDougall its 2004 Foot Soldier in the Sands Award. Mr. MacDougall was recognized, along with Bill Nettles of Columbia, South Carolina, for his trial and appellate work on behalf of indigent defendants facing the death penalty.

2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest.
 - a. Counsel who is unable to obtain consent should exercise his or her best professional judgment under the circumstances.

App. pp. 4382-84 (emphasis added). He argued that the failure to seek such assistance for Williams was ineffective assistance, citing Valdez v. State, 46 P.3d 703, 710 (Okla.Crim.App. 2002), which granted postconviction relief to a Mexican national (who had failed to raise a Vienna Convention on Consular Relations violation at trial) because he showed that his trial lawyer could have obtained financial, legal and investigative assistance from his Mexican consulate that would have produced important new evidence. See also Ledezma v. State, 626 N.W.2d 134, 152 (Iowa 2001) (concluding that "all criminal defense attorneys representing foreign nationals should be aware of the right to consular access as provided by Article 36, and should advise their clients of this right" because local counsel "are not equipped to provide the same services as the local consulate"); cf. Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456, 162 L.Ed.2d 360 (2005).

Respondent submits that counsel was not ineffective in failing to pursue the German national issue because Williams was not a foreign national. Neither deficient performance or prejudice under the Sixth Amendment was proven to the PCR Court.

Dual German Citizenship Was Not Sought To Be Determined Until PCR Action by Williams.

The record before this Court reveals that at no time prior to the filing of this PCR application had Petitioner claimed to be a German national or suggested to his trial counsel or any state agency that he was either a German foreign national or German citizen, in addition to being a U.S. citizen. In his presentation, the Petitioner introduced Petitioner's Exhibit 26, a

September 13, 2012 document from the Consulate General of the Federal Republic of Germany certifying that the certificate of citizenship for the German citizen Charles Christopher Gerard Williams was issued on July 16, 2012. App. pp. 4860-61. Neither the Respondent nor the PCR Court contest that Williams now possesses dual citizenship with Germany under German law.

Trial Counsel Reasonably Did Not Seek to Contact The Consulate for the Federal Republic of Germany Prior to the 2005 Trial.

The 2005 trial record reveals that the Petitioner's father, Dwight Williams, testified that he was a band director for the U.S. Army in Germany when the Petitioner was born to his mother, Daisy Huckaby, in Greenville, South Carolina. App. p. 2209. Forensic social worker Marjorie Hammock testified about the family history, including his mother's previous marriage in Germany and the fact that his mother was born in Germany to woman named Erica, who was a teenage parent, and that "her father was unknown." App. p. 2249, l. 14-17. Dr. Hammock testified that Daisy was of a mixed background and left the home at an early age to marry her first husband. App. pp. 2249-50. She stated that Chris Williams was born and grew up in Greenville, South Carolina. App. pp. 2250, 2253.

Counsel Mauldin testified at the PCR hearing that he was aware that Daisy and her family were from Germany. App. pp. 3325-26; PCR Tr. 151-52. Contrary to Vogelsang's testimony, Mauldin did not recall any discussion about her going to Germany to interview family or investigate the background. App. pp. 3326-27; PCR Tr. 152-54, 205. He denied that he ever laughed off the request. App. p. 3328; PCR Tr. 154.

Mauldin stated that he was unfamiliar with a group called "Reprieve" who could have helped in mitigation investigation. App. p. 3327; PCR Tr. 153. Mauldin stated that he never thought of notifying the German Consulate's Office of Williams's arrest. App. p. 3327, l. 14-15;

PCR Tr. 153. He stated that he was aware that the Petitioner was born in Greenville. App.p. 3328, ll. 18-19. However, it did not connect to him that Williams would possibly have dual citizenship in Germany. App. p. 3328; PCR Tr. 154. Mauldin admitted his familiarity with the A.B.A. Guidelines and acknowledged that Guideline 10.6 concerned obligations related to a foreign national. App. p. 3329; PCR Tr. 155.

Mauldin testified that he did not recall Williams ever indicating to him that he was a German citizen. App. p. 3375; PCR Tr. 201.⁷⁰ He stated, although he was aware the consular notice obligation issue was in litigation around 2005, he had no indication that Williams would have been subject to it because he was born in Greenville though his mother was from Germany. Mauldin was aware Williams's father was a U.S. citizen and was in the military. Further, he said no one broached the German citizenship issue with him. App. p. 3376; PCR Tr. 202.

Counsel Bill Nettles testified similar to Mauldin. He said it was obvious that his mother was from Germany. App. p. 3281; PCR Tr. 107. However, he was not aware that since his mother was a German national that they could have received assistance on the case from Germany. App. p. 3282; PCR Tr. 108. He stated the subject never came up. Nettles further declared that he had not heard of the group called "Reprieve." App. pp. 3283, 3300; PCR Tr. 109, 126. Nettles testified that they never considered investigating whether Williams had dual citizenship. App. p. 3300; PCR Tr. 126. He said it did not occur to him that it would extend to a child. App. p. 3300; PCR Tr. 126.

Like Mauldin, Nettles further indicated that he did not recall any discussion about sending Vogelsang or someone to Germany to investigate. App. p. 3300; PCR Tr. 126.

70 Petitioner did not testify at the PCR hearing.

Contrary to Mauldin and Nettles, mitigation investigator and forensic social worker Jan Vogelsang testified that she brought up going to Germany a few times with counsel. App. p. 3239; PCR Tr. 65. Also App. p. 3198, l. 12-24 (recalling discussing with Mauldin funding to send her to Germany 2 or 3 times). She noted that there was a gap in the family tree concerning information about the mother's side. Although she was advised that the mother had been abandoned by her mother and raised by the grandparents (App. p. 3239; PCR Tr. 65), she wanted to get more detailed information to show patterns in the family. App. p. 3240; PCR Tr. 66. This would include information about medical, mental, emotional and behavioral conditions across generations. App. pp. 3240-41; PCR Tr. 66-67. She said she preferred to do it across five generations. App. p. 3241; PCR Tr. 67. She did not recall what prevented her from making contact with individuals in Germany in 2005. She said she was aware of Daisy's first husband and children, but did not recall efforts made to contact them. App. p. 3243; PCR Tr. 69.

The Petitioner's mother, Daisy Huckaby testified at the PCR hearing about her children; Uwe Scheller, Sylvia, Maureen, and Christopher. App. pp. 3418-19; PCR Tr. 244-45. She stated that she told Vogelsang everything about where she was born and raised and about her family. App. pp. 3421, 3423; PCR Tr. 247, 249. She claimed she gave Vogelsang contact information about family members in Germany. App. p. 3421; PCR Tr. 247.

With respect to the claim by Germany and current counsel that the German consulate could have helped gather information about Daisy's family history, including mental health and alcohol consumption (citing App. pp. 3241, 3254-55 (PCR 67, 80-81)), Jan Vogelsang testified that she advised counsel that she felt she could not provide a complete genogram without the opportunity to travel to Germany. App. pp. 3238-39, 3241-42 (PCR 64-65, 67-68). Judge

Welmaker found that “in spite of the defense team’s lack of ability to travel to Germany to investigate Daisy’s family history, the team did in fact collect information and evidence regarding Daisy’s family history, mental health history and alcohol addiction.” App. p. 4201 (PCR Order, p. 35). As to this issue, the PCR Court concluded that Petitioner had failed to prove that counsel was prejudiced in not having the assistance of the German Consulate at trial. App. p. 4201. As noted within the individual arguments concerning the alleged failure to present mitigation evidence, and failure to object to alleged prosecutorial argument, including comments concerning prison life set forth fully within this Return, Petitioner has failed to show either deficient performance or prejudice under Strickland v. Washington. Since there is probative evidence to support those conclusion, relief on this argument must be similarly denied.

Germany’s Assertions

In the amicus briefs in the lower court and before this Court from the Federal Republic of Germany, Germany asserts that the consulate should have been notified after the arrest of Williams even though he had not claimed German citizenship previously. Germany contended that they have a policy to assist its citizens facing capital punishment in foreign jurisdictions. Germany contends it would have provided assistance with Reprieve, particularly with the additional investigation of mitigating factors. Additionally, Germany contends that it would have monitored trial counsel’s performance. In the Amicus Brief, Germany claims it would have intervened to remind appointed counsel of its obligations under the A.B.A. standards and would have assisted in shedding light on Williams’s family background. Germany also suggests it would have monitored the case and recognized fetal alcohol syndrome as a significant mitigating

factor. Germany also claims its involvement would have provided access to the family's ancestral records in Germany, which they claim would have allowed compliance with the three (3) generation investigation of the family required under the A.B.A. Standards.

Germany states that it was able to confirm Williams's German citizenship with documents in Germany. In addition, the "Reprieve" group assisted in interviewing a maternal uncle in Germany, who was not interviewed prior to the trial. Petitioner's Exhibit 2 - Reprieve Report. App. pp. 4239-44. Germany claims that it would have assured an earlier MRI was done by providing financial assistance and consultation with the fetal alcohol syndrome experts.⁷¹

Germany claims that had it been involved, it would have been less likely that improper statements would have been made by the prosecution and that it could averted the decision by the prosecutor to seek the death penalty.

The A.B.A. Standards Issue

The A.B.A. Guidelines do not establish independent standards for counsel; rather, they are merely guides to be considered in determining whether an attorney's conduct was reasonable. Strickland, 466 U.S. at 688, 104 S.Ct. at 2065 ("Prevailing norms as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable, but they are only guides."); see also Bobby v. Van Hook, 558 U.S. 4, 8-9, 130 S.Ct. 13, 17, 175 L.Ed.2d 255 (2009) (rejecting the treatment of A.B.A. Guidelines as "inexorable commands with which all capital defense counsel must fully comply" (internal quotation marks omitted)). The A.B.A. Guidelines "can be useful as 'guides' to what reasonableness entails, but only to the extent that

⁷¹ Respondent states that in this proceedings, according to filing before the PCR court, the funding for FASDexperts.com (Dr. Connor, Dr. Adler, Dr. Novick-Brown) was through court approved funding. *See Motion to Clarify Expert Licensing Requirements*, filed Sept. 14, 2012, p. 1. In addition, a continuance was granted on May 11, 2012 to allow these experts from Washington to evaluate Petitioner earlier.

they describe the professional norms prevailing when the representation took place.” Van Hook, 558 U.S. at 7, 130 S.Ct. at 16; accord Missouri v. Frye, 566 U.S. ___, 132 S. Ct. 1399, 1408, 182 L.Ed.2d 379 (2012) (“Though the standard for counsel’s performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides.”); State v. Blakely, 402 S.C. 650, 663, 742 S.E.2d 29, 36 (Ct. App. 2013); Medlin v. State, 276 S.C. 540, 544, 280 S.E.2d 648, 650 (1981) (Littlejohn and Gregory, JJ., concurring in part and dissenting in part) (noting “no other state and no other jurisdiction has adopted the A.B.A. Standards as a rule of court”).

The Supreme Court’s decision in Bobby makes clear that reliance on either the 1989 or the 2003 (and we submit 2008 Supplementary) A.B.A. Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases as “binding” or “inexorable commands” would be to repeat the error of the Sixth Circuit Court of Appeals; the A.B.A. Guidelines are “‘only guides’ to what reasonableness means, not its definition.” Id. at 17 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). The overriding standard remains whether counsel made “‘objectively reasonable choices.’” Id. (quoting Roe v. Flores-Ortega, 528 U.S. 470, 479, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000)). Further, within this argument, the Petitioner additionally relies upon the 2008 Supplementary Guidelines which did not exist when the case was tried in 2005. See *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 677 (2008) in support of a three-generation requirement. These guidelines related to the three-generations of family witnesses and an assertion that it supports a three generation genogram requirements cannot be binding on a 2005 trial.

Accordingly, while the A.B.A. standards may be useful or may offer assistance in the analysis of an issue, these standards are not controlling or dispositive. Moreover, with respect to Williams's specific claim, Respondent note the A.B.A. standards do not create a due process right; instead, due process rights emanate from the U.S. Constitution and the South Carolina Constitution.

ANALYSIS

Trial counsel was not deficient in failing to seek assistance of the German consulate when Petitioner is a United States citizen.

There is no present dispute that Williams is a U.S. citizen. There is also no dispute that his current PCR counsel have determined in 2012 that Williams has dual citizenship in Germany. Since Williams's mother is a German citizen, Charles Williams is also a German citizen by birth to a German citizen. Williams was born on December 11, 1982. According to the presentation at the hearing, children born in wedlock after January 1, 1975 acquire German citizenship if one of the parents was a German citizen at the time of their birth. Thus, since it was established that Williams's mother was a German citizen when he was born in the United States, he was able to establish that he has German citizenship during the PCR action.

A. Williams's status as a German citizen did not entitle him to any of the rights of consultation under the Vienna Convention where he was a United States citizen at the time of his arrest and not a "foreign national."

Williams's effort to be declared a German citizen is part of his effort to become eligible for consultation rights outlined by the Vienna Convention. The PCR court rejected this based upon the fact that he was a United States citizen at the time of his arrest. App. p. 4198-99. First, even if Williams claimed German citizenship at the time of his arrest, he was not entitled to any of the protections outlined by the Vienna Convention. Courts in the United States have

consistently held that a defendant who holds dual citizenship in the United States and another country are not privy to the consular rights outlined by the Vienna Convention because they are not foreign nationals in the United States. Commonwealth v. Baumhammers, 599 Pa. 1, 63-64, 960 A.2d 59, 97-98 (2008) (rejecting claim of capital defendant that his rights under Vienna Convention on Consular Relations were violated where defendant was Latvian and U.S. dual citizen); Cauthern v. State, 145 S.W.3d 571, 628 (Tenn. Crim. App. 2004) (noting the State Department's official position is that a person of dual citizenship may be treated solely as a United States citizen, thus negating any requirement of consular notification under Vienna Convention, in denying claim PCR claim based upon Vienna Convention). He was not a defined "foreign national" under its meaning in the United States. See 31 C.F.R. § 800.215 (any individual other than a U.S. citizen"). The term "foreign national" is a statutory term of art and has a narrower scope: It covers foreign citizens **except for lawful permanent residents of the United States**. See 2 U.S.C. § 441e(b). Bluman v. Federal Election Com'n, 800 F.Supp.2d 281, 283 (D.D.C. 2011).⁷² The PCR court was correct in making this conclusion. App.p. 4198.

The PCR Court reasonably found Sixth Amendment deficient performance and prejudice was not proven.

Williams is making an assertion of ineffective assistance of counsel regarding counsel's failure to assert Williams's claim of German citizenship and notify the consulate. He now asserts that the consulate would have provided assistance which would have affected the outcome of his case. Under the two-prong test of Strickland v. Washington, 466 U.S. 668 (1984), the petitioner must prove both ineffective assistance (incompetence) and prejudice as a result thereof.

⁷² "[I]t is a recognized fact of international law that a dual national is never entitled to invoke the protection or assistance of one of the two countries while within the other country. See Nishikawa v. Dulles, 356 U.S. 129, 132, 78 S.Ct. 612, 2 L.Ed.2d 659 (1958); Kawakita v. United States, 343 U.S. 717, 733, 72 S.Ct. 950, 96 L.Ed. 1249 (1952)."

Kimmelman v. Morrison, 477 U.S. 365, 381 (1986). To grant relief, therefore, the state court had to find: (1) Williams's lawyer's performance fell below the range of competence demanded of lawyers in criminal cases, Strickland, 466 U.S. at 690; and (2) there is a reasonable probability that, but for the deficient performance by counsel, the ultimate result would have been different, id. at 694. Also, a reviewing court need not consider the two prongs of the Strickland analysis in sequential order. Strickland, 466 U.S. at 697. The court need not even address both prongs if the petitioner fails to make a sufficient showing on one. Id. When evaluating an ineffective assistance of counsel claim, a court should first apply whichever prong more quickly disposes of the respective claim. See id. Stated another way, a court is not required to address both parts of the Strickland standard when the petitioner makes an insufficient showing on one of the prongs. See, e.g., Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir.2000) ("Because both parts of the test must be satisfied in order to show a violation of the Sixth Amendment, the court need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa.").

In this case, his claim of ineffective assistance of counsel has no merit. First, counsel in 2003 through 2005 cannot be deemed constitutionally deficient in failing to contact the German consulate when his client was a U.S. citizen and had not claimed German citizenship in any manner in 2005. The fact that neither counsel considered it does not rise to a showing of neglect under the Sixth Amendment because as defined by the United States Department of State, a U.S. citizen was not considered a "foreign national." Respondent acknowledges that the A.B.A. Guideline 10.6.A. states that "counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals." App.p. 4382. Further, the standard's comments note that "a foreign government might

recognize an American citizen as one of its nationals on the basis of an affiliation (e.g. one grandparent of the nationality) that would not be apparent at first glance.” App.p. 4384.

However, as noted above these guidelines are not the constitutional mandate. At the time of the trial, counsel reasonably understood that Petitioner was a native born U.S. citizen of Greenville County. The Constitution does not place upon counsel a duty to seek out whether he may possess dual citizenship as part of the defense where consular rights do not apply.

The Petitioner and Germany assert implicitly that Germany would have been willing to provide financial, legal, and investigative assistance to defense counsel based upon his dual citizenship. However, the Petitioner has failed to show that when the case was tried in 2005 that appointed counsel was lacking in financial assistance from the court or in specific need of added financial assistance that had been denied by the court. Petitioner has not shown the required financial nexus beyond mere speculation. Simply put, there was no showing that in 2005 Williams was denied court-approved funding to acquire fetal alcohol syndrome experts or an MRI by the trial court that only Germany would have supplied. He is unable to show how Germany’s assistance would have changed the case, other than to piggyback on the existing claims made by current PCR counsel prior to Germany acknowledging that Petitioner was a German citizen. App.p. 4200.⁷³

There is no constitutional requirement for counsel to seek financial assistance from a foreign government for his trial since Williams was not a “foreign national.” App.p. 4198

73 The record before this Court even defeats the claim of the impact of German funding. In this PCR proceeding, before Williams’s German citizenship was confirmed, court-approved funding was done by the PCR court for retaining experts and testing by FASDexperts.com for fetal alcohol syndrome prior to May 2012. App.pp. 3489, 3559, PCR 315, 385. The German citizenship was not confirmed until August 23, 2012 – subsequent to the approved retention of the FASDexperts.com group (although the underlying consular assistance allegation was raised in the September 2011 amended application). App.p. 4860-61. The Petitioner failed to show the nexus to retaining FAS experts and Germany.

Under Williams's theory, counsel representing any U.S. citizen with German ancestry would have a Sixth Amendment obligation in 2005 to investigate and contact the German consulate and seek their assistance for no other reason than to determine if he could be a dual German citizen with his United States citizenship. The Sixth Amendment does not demand that action be taken by "reasonable" counsel. Counsel is not deficient under these circumstances. See Wright v. Angelone, 151 F.3d 151, 161 (4th Cir.1998). The PCR court was correct in rejecting this condition precedent as deficient performance.

Williams has further provided no probative evidence of how he was specifically affected at trial by not having had an opportunity to contact the German consulate at the time of the investigation and trial in 2005. Simply put, Petitioner failed to tie the German connection with counsel's alleged deficiencies as to FASD, a belated MRI, a denied financial assistance (needs) from the court, objections to prosecutorial argument, or restrictions on mitigation investigation. He has only shown additional family contact in Germany and confirmation of dual citizenship. Petitioner has shown that Germany would have been interested in the trial and could have resolved the new question raised in the PCR setting as to whether Petitioner had dual citizenship with Germany. However, this German interest in Williams is not enough to show either deficient performance by 2005 counsel or undermining confidence in the outcome of the verdict. As the PCR Court correctly found, this information about dual citizenship is not outcome-determinative nor the resolution of Sixth Amendment prejudice as Petitioner suggests. App.p. 4199-4200.

In its amicus brief, Germany claims it would have intervened to remind counsel of its obligations under the A.B.A. standards. However, it is undisputed that all defense counsel knew

of the standards at the time of the trial. App. pp. 3267, 3295, 3329-30; PCR 93, 121, 155-156. There was no showing about a lack of knowledge of the standards at trial by the extensive defense team. The issue under the Sixth Amendment is not whether counsel were aware of the particular A.B.A. standards, but whether counsel acted reasonably in their investigation and preparation for Williams's defense and whether any act or omission by counsel outside of those requirements undermined confidence in the outcome of the trial such that there was shown a reasonable probability that the result of the proceeding would have been different. As to the German consul issue, the PCR court reasonably rejected it based upon the totality of the record before it.

The Petitioner contends that Germany would have helped shed additional light on Williams's family background in Germany. However, the Petitioner failed to show that Daisy Huckaby was unable to assist in providing similar information about the family to that provided in the "Reprieve" report to current PCR counsel. Further, counsel could have received a similar document from the Reprieve group in 2005 independent of whether Petitioner had German citizenship to assist the social history development in the capital case.⁷⁴

Germany's claim that its involvement would have provided access to the family's ancestral records in Germany is unavailing. It is unclear how this information would have impacted in any manner on the defense presentation in the case in 2005 and to a reasonable probability affected the outcome. Despite the assertion that it would have complied with the so-called three (3) generation investigation of the family which is allegedly "required" under the

⁷⁴ "Reprieve U.S." was established in 1999 and works with Reprieve U.K. One of its missions is to "investigate, litigate and educate on behalf of individuals facing abusive detention, extrajudicial killing and execution, focusing on those cases most likely to help reshape US foreign policy debate and the administration of the death penalty." <http://www.reprieve.org/mission.html>.

non-binding 2003 A.B.A. Standards⁷⁵ and the particular supplementary guideline in 2008, the Petitioner failed to show how it would have accomplished it. Under their own standard, it is still an “incomplete” family tree. As stated at the hearing, the missing (unknown) grandfather has still not been determined so that link remains missing from the original preliminary family tree. App. p. 4238 (Vogelsang genogram) App. pp. 2248-2250 (testimony of social worker Dr. Marjorie Hammock) (Trial Defense Exhibit 28 – family tree). The Petitioner’s mother testified at the PCR hearing that she gave mitigation investigator Vogelsang the cities in Germany she was raised in and family contact information in Germany (telephone numbers and addresses) that she had. App. p. 3421, 1. 1-16. The Petitioner failed to show added information in the amended genogram (family tree) that satisfied Strickland prejudice, even assuming this was deficient performance as to the German family. The PCR court correctly found that the Petitioner has failed in this burden.

Germany’s additional suggestion that it would have monitored the case and recognized fetal alcohol syndrome in 2005 as a significant mitigating factor is sheer speculation and retrospective hindsight. Other than the references in their brief, there is no evidence how Germany’s interest in Williams in 2005 would have accomplished this and particularly how it

75 In fact the specific guideline Petitioner is relying upon did not exist until 3 years after the trial in 2008. The Petitioner relies upon post-trial 2008 “Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases” (Supplementary Guidelines), reprinted in 36 Hofstra L.Rev. 677 (2008), which were promulgated in 2008, particularly supplementary guideline 10.11(E) (2) (a), which provides specifically that defense team members have “the duty to aid counsel in the selection and preparation of witnesses who will testify, including...[T]he client’s family, extending *at least three generations back* . . .” *Id.*, at 692. The Petitioner additionally relies upon a companion law review article which asserts inquiry is not confined to the defendant and his experiences, as it “has long been recognized that a competent *mitigation investigation has to include the family history going back at least three generations*, and must document genetic history, patterns, and effects of familial medical conditions.” (Emphasis added.) S. O’Brien, “*When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*,” 36 Hofstra L.Rev. 693, 725 (2008). Also *State v. Sanitago*, 305 Conn. 101, 231-33, 49 A.3d 566, 648-650 (2012), citing 2008 guideline.

would have been done by Germany in 2005. The 2005 defense team had included Jan Vogelsang who noted her own special expertise in the area of alcohol abuse and family social work. Vogelsang stated that she had become aware of the existence of fetal alcohol syndrome long before her involvement in the Williams case. App. p. 3227; PCR Tr. 53. She described her work as a social worker in Los Angeles and her understanding of the developmental delays that had occurred from a mother's drinking and drug use. App. p. 3227; PCR Tr. p. 53, ll. 11-25. She had become certified in "alcohol and drug use" which included FAS. Vogelsang stated that in her prior (and present) work to determine the existence of FAS she would seek out reliable witnesses, anything in documents, a discussion with the mother about her drinking, and the details about the amount and frequency. Further, she would look to school and medical records for patterns consistent with FAS, including learning disabilities, impulsivity, facial features, and ADHD, among others. App. pp. 3228-29; PCR Tr. 54-55. She stated in Williams's case, she was sensitive to the potential of FAS in her questioning of the family and sought to highlight those areas for the social worker and defense experts.⁷⁶ App. p. 3229; PCR Tr. 55. It is pure hindsight to suggest that contacting Germany would have changed the approach taken by trial counsel by the bare statement within their Amicus Brief.

It is similar hindsight that Germany suggests that the MRI would have been done in a different manner and at an earlier time than it was done in 2005. A pre-trial MRI was done on

⁷⁶ It should additionally be noted that in addition to not identifying or locating the missing grandfather, none of the information from Reprieve in their report to PCR counsel discussed whether there was additional information the Petitioner's mother ever drank, ever suffered from alcoholism or was drinking during her other pregnancies. App. p. 4239-4247.

January 27, 2005. App.p. 5036. Before the German citizenship was resolved, an MRI was also done November 11, 2011. App.p. 5035].⁷⁷

The speculation also ignores that the 2005 defense team comprised of well-seasoned capital counsel Mauldin and Nettles and the defense lawyers from Akin Gump, including the recently honored capital defense expert Mark MacDougal who addressed the mental health issues at the trial. The defense further included a battery of forensic experts such as forensic psychiatrist Dr. Seymour Halleck, clinical psychologist Dr. James Evans, and social historian Professor Marjorie Hammock, who were aware through Vogelsang of the social history of the mother's drinking in making their assessments. The Petitioner has not identified anything that Germany could have uniquely brought to the defense in this matter. The PCR Court noted the extraordinary team that the 2005 defense had put together. App.p. 4200. The speculative suggestion must be rejected where there was no showing that in 2005 Germany's potential intervention into the trial would have uniquely developed this factor.

Further Germany's extraordinary claims that had they been involved, it would have been less likely that the prosecution would have made improper closing statements and that Germany might changed the decision by Solicitor Ariail to seek the death penalty is pure retrospective speculation. Nothing has been shown that Germany, to the exclusion of the experience of counsel Mauldin and Nettles, would have brought a different perspective to the closing argument made in

⁷⁷ Mauldin could not explain why the MRI was not done prior to January 2005. App.p. 3356. However, he admitted that after it was done, it was not presented during the trial. App.p. 3356-57. He was also unclear why Dr. Evans did not recommend an MRI. App.p. 3336-41, 3354-56. Also App.p. 3298-99 (Nettles similar testimony about MRI). Compare App.pp. 3337-39, 4274 (Vogelsang's August 24, 2004 notes of interview with Dr. Evans, noting that "Dr. Evans did not recommend an MRI or CT or EEG.") with Vogelsang's memo to Mauldin about August 25, 2004 telephone call from Dr. Rob Richards where she reports that "he would order an MRI immediately. But I cooled his jets." Vogelsang stated that fact that Dr. Evans not recommending brain scans confused her. App.p. 3248. She confirmed that Mauldin's usual practice was to have MRI's done pretty quickly after appointment. App.p. 3251. See App.p. 3272-3274. 3299. 3343.

the case. This speculation is particularly unavailing since, as noted within in argument two of this Return, none of the argument issues required granting post-conviction relief under the Sixth Amendment. Finally, the speculative claim that Germany could have convinced Solicitor Ariail to have offered a life sentence in return for a guilty plea is without any factual support. There is no evidence that the Solicitor would have changed his mind. It was evident from the trial record that Petitioner's mother was from Germany based on the testimony from both Petitioner's father and social worker Hammock. App. pp. 2209, 2249-50. Solicitor Ariail still pursued the death sentence with this information about the German parenthood. This speculation was reasonably rejected by Judge Welmaker.

Since at the time of his arrest in 2003, Williams had not revoked his United States citizenship or declared himself to be a German citizen, trial counsel cannot be deemed deficient or prejudicial under the Sixth Amendment in failing to raise a German citizenship issue, failing to seek financial or other assistance from Germany or failing to further investigate the identity and background of Daisy's still "unknown" father for the genogram and family background. The Petitioner has failed to show Sixth Amendment prejudice that there is a reasonable probability that the result in the proceeding would have been different under Strickland. The PCR Court reasonably applied Strickland in denying relief. Certiorari must be denied.

ISSUE 5 – GUILTY PLEA JURY SENTENCING

- V. **Certiorari is not warranted for a claim that Petitioner had a right to plead guilty and have jury sentencing where the claim is contrary to state law and the PCR Court reasonably rejected the showing as presented in an ineffective assistance of counsel claim where deficient performance and prejudice was not shown.**

The PCR court denied relief as a claimed Sixth Amendment violation. App.p. 4195-96. Judge Welmaker found that the Petitioner's assertion was conceded by Petitioner to be contrary state law decisions and Petitioner concedes that matter again before this Court. Petition, p. 76. However, Petitioner seeks to preserve the issue "for further review." However, the claim appears to be a free-standing claim in his Petition, rather than a Sixth Amendment ineffective assistance violation. As such, he is procedurally barred from raising the claim in this proceeding. See Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517, 519 (1993) ("[E]rrors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."); See Simmons v. State, 264 S.C. 417, 215 S.E.2d 883, 885 (S.C.1974) [Post conviction relief is not a substitute for a direct appeal]; Ashley v. State, 260 S.C. 436, 196 S.E.2d 501, 502 (S.C.1973) [A post conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal]. Wilson v. Ozmint, 352 F.3d 847, 867 (4th Cir. 2003).

The record supports the PCR court's rejection of the 6th Amendment ineffective assistance of trial or appellate counsel claim raised before the PCR court. On a pre-trial motion hearing on November 1, 2004, counsel Mauldin moved to quash the death penalty claiming that should he plead guilty to murder he would be deprived of the opportunity for jury sentencing and further that if he had jury sentencing and could use his guilty plea as evidence of remorse. ROA 2432. There was a discussion between counsel and the Court concerning what the procedures would be like, assuming he pled guilty in light of Ring v. Arizona. ROA 2432-34. The State asserted that under a state court rule, it had the absolute right not to consent to the waiver of a jury trial and guilty plea and asserted it would not consent to the guilty plea. ROA 2425. What

Ariail argued was that Ring did not apply in South Carolina because if the defendant is pleading guilty, he also must make a knowing and intelligent waiver of his right to jury sentencing. ROA 2438-39. If he does that then the state will consent to the entry of a guilty plea, if not then the state does not consent to waiving the jury trial. Further, Solicitor Ariail asserted that this was a hypothetical because Williams had not indicated that he was willing to plead guilty. ROA 2439. The court took the matter under advisement. ROA 2441, l. 16-18.

At the outset of the trial proceedings, counsel Mauldin made a renewed motion concerning the statutory requirement that a defendant had to enter a plea of not guilty in order to have jury sentencing and a companion motion that the indictments in the case had to have the statutory aggravating circumstances included. ROA 7-8. Although acknowledging that the S.C. Supreme Court had rejected the position, Mauldin stated he wanted to clarify his position. He contended that the statutory scheme that required the entry of a not guilty plea violated the 6th and 14th Amendments, relying upon a memorandum submitted to the Court on October 27, 2004. The trial court and counsel agreed to have the memorandum submitted as an exhibit for purposes of the appeal. ROA 9.

During counsel Mauldin's opening statement in the penalty phase, he addressed his reasons for entering a "not guilty" plea. ROA 2124-2125. He stated that his client had accepted responsibility for the crime. After a bench conference [ROA 2125, l. 11-13], counsel Mauldin stated:

The law is in order for a person accused under this procedure that we've been going through for the past two weeks, in order for that person to have a jury decide the penalty, he has to enter a not guilty plea at the first phase so the jury can first deliberate and then come back. So, that's what I was trying to say. But you need to know that. That's why we had that first phase of that trial that seemed

to -- it was just something came to my mind while you were there deliberating. So, I did want to mention that to you.

ROA 2125, l. 17-2126, l.1.

In the sentencing court's final instructions to the jury, he addressed this issue:

UNDER SOUTH CAROLINA CODE SECTION 16-3-20(B) A DEFENDANT CHARGED WITH MURDER IS REQUIRED TO ENTER A PLEA OF NOT GUILTY IN ORDER TO BE SENTENCED BY A JURY OF HIS PEERS. IF A DEFENDANT PLEADS GUILTY A SENTENCING PROCEEDING MUST BE CONDUCTED BY A JUDGE, NOT A JURY. IN ORDER TO HAVE A JURY DETERMINE WHETHER THE DEFENDANT SHOULD BE SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE, OR SENTENCED TO DEATH FOR MURDER AND KIDNAPPING, THE DEFENDANT HAD TO PROCEDURALLY ENTER A PLEA OF NOT GUILTY.

ROA 2394, l. 23- p. 2395, l. 7.

Subsequent to the verdict and sentence, Applicant made a motion to reconsider on February 28, 2005. In the motion, he asserted that the statutory scheme in South Carolina which requires a defendant to enter a not guilty plea was unconstitutional under both the federal and state constitutions. A motion hearing was held on April 6, 2005 in which this issue was raised. App.pp. 2844-45. The court denied the motion. App.p. 2845, l. 11.

There is No Right to Plead Guilty in South Carolina.

Underlying Applicant's perceived constitutional claim is an assertion that a mere proffer for a guilty plea is sufficient to establish his constitutional claim under either the 6th, 8th or 14th Amendment. Contrary to the suggestion, there is no "right" to enter a guilty plea in South Carolina as a matter of state constitutional or federal constitutional law. Plainly then, there is no enforceable right to plead guilty. See South Carolina Rule of Criminal Procedure, Rule 14(b) ("A defendant may waive his right to a trial by jury only with the approval of the solicitor and the trial judge). See State v. Burgin, 255 S.C. 237, 178 S.E.2d 325 (1970) (federal Constitution

does not encompass any right to waive a jury trial); State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (1999) (no constitutional right to plead guilty).

- A. There is a mandatory statutory requirement under Section 16-3-20 that when a guilty plea is accepted, the trial judge sentences the Appellant in the sentencing proceeding which thereby requires a knowing and intelligent consent to judge sentencing before a plea can be accepted.**

The Supreme Court addressed in State v. Allen (Quincy), 386 S.C. 93, 101, 687 S.E.2d 21, 25 (2009), whether the trial court erred in failing to declare that S.C. Code Ann. § 16-3-20 violates the Eighth and Fourteenth Amendments to the United States Constitution by denying him the right to plead guilty while maintaining the right to have a jury determine his sentence. He contended the issue he raised was distinguishable from the Sixth Amendment claims repeatedly rejected by the Supreme Court, citing State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005); State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004); State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004). Essentially, Allen claimed, like Williams, that the effect of denying him a jury at the sentencing phase deprives him of the opportunity to present mitigating evidence (i.e., that he accepts his guilt) to a jury of his peers, and therefore violates due process under the Fourteenth Amendment, resulting in cruel and unusual punishment in violation of the Eighth Amendment. The Supreme Court rejected that claim finding no constitutional violation. State v. Allen, 386 S.C. at 101, 687 S.E.2d at 25. Absent legislation to amend Section 16-3-20 there remains no right to jury sentencing in a knowing and voluntary guilty plea where it is also required to include a consent to judicial fact finding under our statute. Until the legislature acts, the statutory complex remains the same. Simply put, the claims do not empower the PCR Court to overturn legislative enactments and create new procedures expressly contrary the legislative mandate and the decisions of the South Carolina Supreme Court.

Further, the Petitioner misreads the impact of Ring to suggest that it would create a jury right to determine life or death. Neither Apprendi nor Ring holds that a defendant who pleads guilty to capital murder and waives a jury trial under the state's capital sentencing scheme retains a constitutional right to have a jury determine aggravating factors. Lewis v. Wheeler, 609 F.3d 291, 309 (4th Cir. 2010). His claim is without merit.

B. Appellate Counsel Was Not Deficient.

Appellate counsel was not deficient in seeking a claim before the court that had been rejected previously and consistently. Effective assistance of appellate counsel does not require the presentation of all issues on appeal that may have merit, Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc), and we “must accord [] counsel the presumption that he decided which issues were most likely to afford relief on appeal,” *id.* (internal quotation marks omitted). “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” Gray v. Greer, 800 F.2d 644, 646 (7th Cir.1986), cited with approval in Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). “Although appellate counsel is required to provide effective assistance of counsel, ‘appellate counsel is not required to raise every nonfrivolous issue that is presented by the record.’ “ Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), cert. denied, 543 U.S. 845, 125 S.Ct. 287, 160 L.Ed.2d 73 (2004) (quoting Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990)).

At the PCR hearing, counsel Dudek stated that he did not raise the issue on appeal in the Williams case because he believed that it was a meritorious issue, noting that there was a jury trial. App.p. 3386-87; PCR 212-13. He noted that he had lost on this issue before and opined that

the Court had not shown interest in the issue. Dudek concluded that you can waive a right to jury sentencing just like you can waive other rights. App.p. 3387-88; PCR 213-214. Counsel Dudek stated that he handled the case of State v. Downs in which he raised this issue. App.p. 3398-99; PCR 224-225. He stated that if it was decided in 2004, he filed his final brief in Williams' case on May 13, 2008, well after the rejection of the same issue in Downs. App.p. 3399. He was aware the issue had also been raised in the Quincy Allen and Jerry Buck Inman cases. App.p. 3400. Although Dudek opined that he thought that issue may have been preserved in this case,⁷⁸ that the state would likely argue a lack of preservation did not cause him to not raise the claim. His decision was likely based upon the fact that the Supreme Court had rejected the claim in other South Carolina capital cases. App.p. 3401-02; PCR 227-228.

The appellate counsel made a reasonable decision in winnowing out this issue. His strategic reason for doing so was based upon his failure to be successful on similar claims in cases where the defendants had pled guilty. Here, the Applicant pled not guilty. In assessing the claim, counsel reasonably recognized that constitutional rights may be waived. His assessment where a jury determined his punishment was not unreasonable.

Further, we submit that counsel could not be deemed ineffective because this issue was not preserved since he did not plead guilty. Appellate counsel is not ineffective for failing to raise on appeal an issue that was not preserved for review. Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005). If an issue has not been preserved for review by timely objection, appellate counsel is not ineffective for failure to raise it. Lee v. Davis, 328 F.3d 896, 901-02 (7th Cir. 2003).

⁷⁸ Respondent submits that by pleading not guilty, the issue concerning a jury sentencing right to a guilty plea is not preserved.

Alternately, the Applicant has failed to show prejudice. As stated above, the South Carolina Supreme Court has specifically addressed the underlying issue and determined that it was without merit. Claims of ineffective counsel on appeal require a showing of prejudice, i.e., whether, but for counsel's errors, petitioner would have prevailed on appeal. Miller v. Keeney, 882 F.2d 1428, 1434, fn. 9 (9th Cir. 1989).

C. Trial Counsel Was Not Ineffective.

Similarly, Respondent submits that trial counsel was not ineffective in pursuing this issue further. The Applicant has not shown how he intended to reasonably present this issue where he entered a "not guilty" plea. Counsel reasonably sought before the trial judge for the trial judge in a pretrial setting to raise the jury sentencing issue. However, he did not plead guilty. Subsequent to the verdict and sentence, Applicant made a motion to reconsider on February 28, 2005. In the motion, he asserted that the statutory scheme in South Carolina which requires a defendant to enter a not guilty plea was unconstitutional under both the federal and state constitutions. A motion hearing was held on April 6, 2005 in which this issue was raised. ROA 2844-45. The court denied the motion. App.p. 2845, l. 11. The Applicant has failed to show how this performance was unreasonable.

Further, for the reasons set forth above, he has also failed to show prejudice under Downs, Crisp, and Allen. Certiorari on the PCR court's reasonable rejection must be denied.

ISSUE 6 – AGGRAVATORS IN INDICTMENT

VI. The stated issue "are aggravating circumstances required to be in the indictment?" is a free-standing statutory and constitutional claim which is not properly before this Court because it was not raised in this post-conviction action as an Eighth Amendment or Due Process claim the Circuit Court nor addressed in the PCR Order. Further, this claim would not be proper in the collateral action because it is not a substitute for an appeal under Drayton v. Evatt. Alternately, when a claim of ineffective assistance

of trial or appellate counsel claim based upon a failure to object to the indictment was raised, the PCR court reasonably denied relief on each applying the proper standards of Strickland v. Washington in concluding that trial counsel had objected to the alleged omission prior to the trial and appellate counsel reasonably did not raise the issue in the Brief of Appellant in 2007 when the same claim had been specifically rejected by this Court previously.

In his sixth argument on certiorari, the Petitioner contends that in a free-standing assertion that his constitutional rights were violated when the indictment did not include the statutory aggravating circumstances. Petition, p. 77. Petitioner apparently is basing his claim on the decision of the United States Supreme Court in Ring v. Arizona, 536 U.S. 584 (2002). He concedes that trial counsel objected to this failure at trial and that South Carolina case law, particularly State v. Laney, 367 S.C. 639, 649-650, 627 S.E.2d 726, 732 (2006) and State v. Downs, 361 S.C. 141, 147-48, 604 S.E.2d 377, 380-381 (2004) is directly against the Petitioner's position. He asserts that the issue was not preserved by appellate counsel and is only seeking to preserve this issue for "further review." In the PCR court in his amended allegation (K) Williams asserted that trial counsel and appellate counsel were ineffective in not preserving and/or briefing in the appeal an issue of whether it violated the state and federal constitution to seek the death penalty when the statutory aggravating factors were not included in the indictment for murder. App.p. 3038.

The PCR court denied the allegation when it was presented as a claim of ineffective assistance of trial or appellate counsel, rather than a free-standing claim. App.p. 4196-97. The PCR court concluded that Petitioner had also conceded before it, based upon Laney, Downs, and State v. Crisp, 362 S.C. 412, 419-20, 608 S.E.2d 429, 433-34 (2005), that the position that the aggravators should be included in the indictment was contrary to South Carolina case law.

App.p. 4196. Judge Welmaker also found that the trial counsel had objected at the outset of the trial that the circumstances of aggravation were not included in the indictment. App.p. 4197, citing App. at 9-12. Judge Welmaker concluded that "the trial judge appropriately denied these motions, citing App.pp. 12, 2849. App.p. 4197. Further, the PCR court found that during the PCR hearing, appellate counsel Robert Dudek testified that he did not raise the issue on appeal because he had raised it before and lost and because he did not believe he would prevail on that issue based upon the applicable case law and his past experiences with the issue, citing App.p. 3397-3399 (PCR Tr.p. 223-225) and Lawrence v. Branker, 517 F.3d 700, 713 (4th Cir. 2008) (appellate counsel has wide discretion in deciding which issues are most likely to afford relief on appeal and cannot be ineffective for failing to assign error to an issue that is without merit). App.p. 4197. The PCR Court concluded that Petitioner had not shown either trial counsel or appellate counsel was ineffective on this issue. App.p. 4197.⁷⁹

79 This record reflects this underlying issue was raised at trial and denied, but was abandoned in the direct appeal. In light of the existing decisions of the South Carolina Supreme Court in this area, Respondent submits that the PCR Court reasonably concluded deficient performance has not been shown by either trial or appellate counsel and further that 6th Amendment prejudice has not been shown.

Counsel Mauldin argued at trial that under the decision of Ring v. Arizona, there was a claim that the state was required to list the statutory aggravating factors in the indictment. App.p. 9-10. While again recognizing that recent cases had decided against their position, Mauldin asserted that the indictments they received on November 2, 2004 were defective for purposes of seeking the death penalty because the aggravators that they alleged were not within the indictment. App.p. 10. He asserted that the aggravators were an element of the offense which separates it from a non-capital homicide case and is defective. Judge Nicholson denied the request to quash the death penalty notice concerning the failure to list the aggravators. App.p. 12, l. 5-6.

Subsequent to the verdict and sentence, Applicant made a motion to reconsider on February 28, 2005. A motion hearing was held on April 6, 2005 in which this issue was raised. App.pp. 2845-49. In the motion, he asserted that the statutory scheme in South Carolina required the statutory aggravating circumstances to be included in the indictment. ROA 2847, l. 3-14. Counsel Mauldin claimed the face of the indictment was sufficient if the state proceeded with non-capital murder. App.p. 2848. However, Mauldin claimed that in seeking the death penalty, the state got an indictment for murder, served notice of intent to seek the death penalty and served notice of evidence in aggravation. App.p. 2848. Counsel Mauldin recognized that case law was contrary to his position. App.p. 2849. The motion was denied. App.p. 2849, l. 18. This issue was not raised by appellate counsel in the direct appeal briefing.

Respondents submit that the PCR court correctly concluded that Petitioner was unable to show deficient performance by trial counsel in 2004-2005 because he actually raised the issue before the court and that it was denied. Respondent further submit that appellate counsel was not deficient and that 6th Amendment prejudice has not been shown because the same issue has been rejected by the South Carolina Supreme Court before and subsequent to the trial and appeal.

A similar issue was rejected in State v. Laney, 367 S.C. 639, 649-650, 627 S.E.2d 726, 732 (2006). In Laney, the Supreme Court concluded that a similar claim had been previously rejected in State v. Downs, 361 S.C. 141, 147-48, 604 S.E.2d 377, 380-81 (2004), citing State v. Crisp, 362 S.C. 412, 419-20, 608 S.E.2d 429, 433-34 (2005) (under South Carolina law, aggravating circumstances need not be alleged in murder indictment) and State v. Wood, 362 S.C. 135, 144, 607 S.E.2d 57, 61 (2004). State v. Laney, 367 S.C. 639, 649-650, 627 S.E.2d 726, 732 (2006).

In applying the Strickland test to claims of ineffective assistance of counsel on appeal, “reviewing courts must accord appellate counsel the “presumption that he decided which issues were most likely to afford relief on appeal.” Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir.1993). See also Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir.1989). Indeed, “[w]innowing out weaker arguments on appeal and focusing on’ those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.” Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). “If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance.” *Id.* (internal quotation marks omitted). “On the other hand, if the omitted issue has merit but is not so

compelling; we must examine the issue in relation to the rest of the appeal.” Id. “[O]f course, if the issue is meritless, its omission will not constitute deficient performance.” Cargle v. Mullin, 317 F.3d 1196, 1202 (10th Cir.2008).

Appellate counsel Dudek was not deficient in failing to raise this claim in the direct appeal where it had been conclusively and consistently rejected as a matter of state and federal law. At the PCR hearing, appellate counsel Robert Dudek⁸⁰ testified that the failure to include the [kidnapping] aggravating factor in the murder indictment issue was lost by him in the past. Mr. Dudek stated that after Ring v. Arizona, there was a lot of excitement in the defense about raising the indictment issue, but it resolved that as long as the jury found the aggravating factor beyond a reasonable doubt it solved any problem. App.p. 3397-98. Counsel Dudek acknowledged that he had handled the appeal in State v. Downs in 2004 and raised this issue, but was unsuccessful long before the brief in Williams was filed in 2008. App.p. 3398-3399. [The record before this Court reveals the *Initial Brief of Appellant* was filed on July 7, 2007 and the *Final Brief of Appellant* was filed May 13, 2008]. Counsel acknowledged that he would have been aware of the issue being rejected by this Court under its prior decisions when he filed his brief in Williams.⁸¹ See State v. Downs, 361 S.C. 141, 147-48, 604 S.E.2d 377, 380-81 (2004) (Dudek – appellate counsel). App.p. 3398-3399. See also State v. Crisp, 362 S.C. 412, 419-20, 608 S.E.2d 429, 433-34 (2005) (under South Carolina law, aggravating circumstances need not be alleged in murder indictment) (Jeffrey Bloom – appellate counsel); State v. Wood, 362 S.C. 135, 144, 607 S.E.2d 57, 61 (2004), cert. denied, 545 U.S. 1132, 125 S.Ct. 2942, 162 L.Ed.2d

⁸⁰ Counsel Dudek testified that he had been a member of the South Carolina Bar since 1984 and been employed by the South Carolina Office of Appellate Defense since 1990.

⁸¹ See State v. Downs, 361 S.C. 141, 147 48, 604 S.E.2d 377, 380 81 (2004).

873 (2005) (same) (Robert Dudek – appellate counsel) ; State v. Laney, 367 S.C. 639, 649-650, 627 S.E.2d 726, 732 (2006) (same) (Dudek – appellate counsel).

Upon appellate review, this Court gives great deference to the PCR court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). Because there is probative evidence to support the findings, the appeal is without merit and certiorari on this issue should be denied.

Alternately, if the claim is a free-standing 8th Amendment claim the it was a federal constitutional violation to sentence to death where the statutory aggravating factor was not included in the murder indictment it is not properly before this Court for a number of reasons. First, it was not raised as such in the lower court so it cannot be raised here for the first time. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266, 267 (2007). If the PCR court fails to address a claim as is required by S.C.Code Ann. § 17–27–80, counsel for the applicant must make a motion to alter or amend the judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Failure to do so will result in the application of a procedural bar by the South Carolina Supreme Court). Additionally this claim as a free-standing claim is barred from consideration in this appeal. A free-standing constitutional claim, other than a Sixth Amendment counsel claim, is not proper for state PCR proceedings. See Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517, 519 (1993) (“[E]rrors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings.”);

Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, Respondent submit that the Petition for Writ of Certiorari should

Respectfully submitted,

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DONALD J. ZELENKA

January 30, 2015

CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, certify that I have served the foregoing State's *Return to Petition for Writ of Certiorari* on counsel for Respondent/Petitioner by depositing two copies of same in the United States mail, postage prepaid, addressed as follows:

Mr. Derek J. Enderlin
Ross and Enderlin, PA.
330 East Coffee Street
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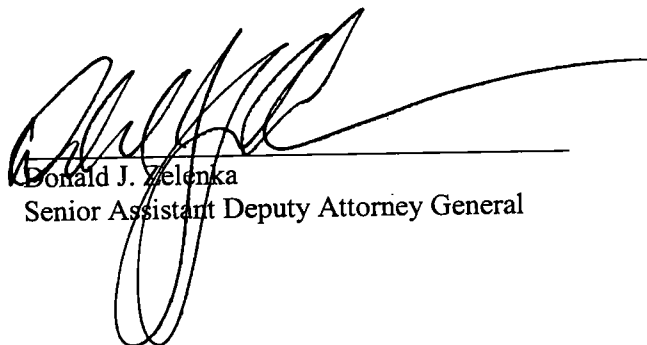
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and one copy to :

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S.C. Supreme Court

This 31st day of January, 2015.



Donald J. Zelenka
Senior Assistant Deputy Attorney General