IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2014

NO. 14A774

RICHARD BERNARD MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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ATTORNEYS FOR PETITIONER

INDEX

The Supreme Court of South Carolina

Richard Bernard Moore, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-198472

ORDER

The Petition for Rehearing filed in the above entitled matter is denied.

C.J.

J.

J.

J.

Hearn, J., not participating

Columbia, South Carolina

October 24, 2014

cc:
Robert Michael Dudek, Esquire
W. Edgar Salter, III, Esquire
J. Anthony Mabry, Esquire
Susan Barber Hackett, Esquire
Donald J. Zelenka, Esquire

The Supreme Court of South Carolina

Richard Bernard Moore, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-198472

ORDER

Petitioner seeks a writ of certiorari to review the denial of his application for post-conviction relief. We deny the petition.

C.J.

J.

J.

J.

Hearn, J., not participating

Columbia, South Carolina

September 11, 2014

cc:
Robert Michael Dudek, Esquire
W. Edgar Salter, III, Esquire
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Donald J. Zelenka, Esquire
M. Hope Blackley

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)	
)	
Richard Bernard Moore)	2004-CP-42-2715
)	
)	
Applicant,)	
)	
v.)	ORDER OF DISMISSAL
)	
State of South Carolina,)	
)	
Respondent.)	
)	

This death penalty Post-Conviction Relief (PCR) action is before the Court pursuant to an August 8, 2004 Application filed on behalf of the Applicant, Richard Bernard Moore (Moore), as amended. The Court held an evidentiary hearing into the matter on January 30, February 1 and February 3-4, 2011, at the Spartanburg County Courthouse. Moore was present at the hearing; and Lisa J. Armstrong and James M. Morton, Esquires, represented him. Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General Anthony Mabry represented the State. Moore testified on his own behalf at the hearing, and he presented testimony from Mr. Mabry; George Gibson; Pete Skidmore; Wilbert Casey; Charles R. "Rusty" Clevenger; James Aiken; Stephen L. Denton; Paul Dorman; Dr. Sandra E. Conradi; and Michael Morin Esquire. He also introduced the depositions of family members Harold Harrington, Dorothy J. Hooper, Cecil J. Hooper, Arma Nell Hadley, Maurice Moore and James A. Moore. The State presented testimony from Susan Porter, Esquire; R. Keith Kelly, Esquire; and the Honorable Donnie Willingham. The Court now denies relief and dismisses the Application with prejudice for the following reasons:

I. PROCEDURAL HISTORY

Moore is currently on death row at Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC), pursuant to commitment orders from the Spartanburg County Clerk of Court. The Spartanburg County Grand Jury indicted him at the January 2000 term of court for murder, assault with intent to kill (AWIK), armed robbery and possession of a firearm during the commission of a violent crime. (00-GS-42-617 through -619).

The State thereafter served notice of its intention to seek the death penalty. The Spartanburg County Grand Jury handed down another armed robbery indictment at the October 2001 term of court. The Honorable Gary E. Clary held motions hearings in the case on April 3, September 28, and October 15, 2001.

On October 16-22, 2001, Moore received a capital jury trial, pursuant to S.C. Code Ann. § 16-3-20 (Supp. 2002), in front of Judge Clary. The jury convicted him of each of the indicted offenses. Following Moore's exercise of the twenty-four hour waiting period in § 16-3-20(B), a sentencing proceeding was conducted in front of the same jury.

The prosecution relied upon the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon; that Moore, by his act of murder, had knowingly created a risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and that Moore had committed the murder for the purpose of receiving money or a thing of monetary value. § 16-3-20(C)(a)(1), (3)-(4) & (d). Judge Clary submitted the statutory mitigating circumstances found in § 16-3-20(C)(b)(2), (6)-(7). The jury found the existence of each of the statutory aggravating circumstances alleged by the prosecution and it sentenced Moore to death. Judge Clary imposed the sentence of death for murder, and he sentenced Moore to five years for the weapons charge, ten years for AWIK and thirty years for

armed robbery. Ralph Keith Kelly, Michael David Morin and Jennifer Johnson, Esquires, represented Moore at trial. Seventh Circuit Solicitor Harold W. Gowdy, III, as well as Assistant Solicitors James Donald Willingham, II, and Barry J. Barnette, represented the prosecution.

A timely Notice of Appeal was served and filed. On October 16, 2003, Moore filed a Final Brief of Appellant, in which he raised the following issues:

1. The judge erred in the guilt phase by preventing Moore from stressing the gravity of the decision facing the jury by arguing, "The State is seeking the death penalty on me, which means my very life is at stake." The judge abused his discretion by ruling that Moore could not mention punishment, but was limited solely to a discussion of "the testimony and evidence that has been presented."

2. The judge erred during the sentencing phase by once again limiting Moore's closing argument "to the evidence that has been presented and to the issues concerning the sentence imposed." Since S.C. Code Sections 16-3-20(C) and 16-3-28 afford a capital defendant the opportunity to ask for mercy and express feelings of remorse, this arbitrary limitation was an abuse of discretion and rendered Moore's purported waiver of closing argument involuntary.

The State filed a Final Brief of Respondent on September 15, 2003. It restated the issues as follows:

I. The trial judge did not abuse his discretion by ruling that Appellant could not argue "my very life is at stake" in his guilt phase closing argument because Appellant's argument was not relevant to the question of his guilt or innocence, which was the only question before the guilt phase jury.

II. Appellant's complaints about the trial judge's conduct of the on-the-record waiver of Appellant's right to make a closing argument in the sentencing phase is not properly before the Court because there was no objection at trial.

The South Carolina Supreme Court affirmed Moore's convictions and death sentence in a published decision filed on March 1, 2004. *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004). It sent the Remittitur to the Spartanburg County Clerk of Court on March 18, 2004. Deputy Chief

Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, represented Moore on direct appeal. William Edgar Salter, III, of the Attorney General's Office, represented Respondent.

On March 16, 2004, Moore (through Mr. Dudek) petitioned the State Supreme Court for a stay of execution. In an Order dated April 4, 2004, the Court granted a stay, pursuant to *In Re Stays of Execution in Capital Cases*, it appointed the Honorable Larry R. Patterson to preside over the case and it granted him exclusive jurisdiction over the matter. In accordance with *In Re Stays of Execution*, Judge Patterson held a hearing on July 22, 1999, to determine whether Moore desired to pursue Post-Conviction Relief and whether he wished to have counsel appointed. On June 17, 2004, Judge Patterson appointed Ms. Armstrong and Kathryn Hudgins, Esquire, to represent Moore. Mr. Morton was thereafter substituted for Ms. Hudgins.

Moore raised two allegations of ineffective assistance of counsel in his August 4, 2004, PCR Application:

> [A] Ineffective assistance of counsel in violation of the Fifth, sixth and Fourteenth Amendments to the United States Constitution. Counsel was ineffective for failing to preserve for appellate review the question of whether defendant's waiver of his right to make a closing phase argument was rendered involuntary due to the trial court's admonition to him. *State v. Perez*, 334 SC 563,514 S.E.2d 754 (1999); *State v. Hall*, 312 SC 95, 439 S.E.2d 278 (1994).
>
> [B] Ineffective assistance of counsel in violation of the Fifth, sixth and Fourteenth Amendments to the United States Constitution. Counsel failed to perform an adequate investigation into evidence in mitigation. Counsel produced only two lay witnesses during the penalty phase, and presented no expert evidence on applicant's behalf. *Eddings v. Oklahoma*, 455. US 104 (1982).

After Judge Patterson's retirement, the case was assigned to this Court. Moore submitted his amended allegations on December 31, 2010.

II. STATEMENT OF FACTS

Sometime between 8:00 and 10:00 p.m. on September 15, 1999, Moore went to the residence of George Gibson, on Hillside Drive in Whitney, S.C.[1] He asked Gibson to get him some crack cocaine. Gibson, who knew Moore as "Mo," refused because Moore did not have any money. Gibson also told Moore that he could not get the crack for Moore on credit. Moore, who was unemployed at the time, told Gibson he was going to work and would return the following morning. He then left. **R. pp. 1245-48; 1253; 1255; 1371-72.**

Meanwhile, Mr. Jamie Mahoney (the murder victim) was working the third shift at Nikki's Speedy Mart, a restaurant-convenience store located at the corner of Highway 221 and California Avenue in Whitney, South Carolina. He had been employed there for over three years. The owner of Nikki's kept a .32 caliber pistol and a .45 caliber semi-automatic pistol (**State's Ex. 3**) in the store for protection.[2] Also, Jamie Mahoney carried a .44 caliber handgun (**State's Ex. 1**) behind his back and in his waistband for protection. However, his hands were ravaged by arthritis and he was of slight build. (He was between 5' 7" and 5' 9" tall and weighed approximately 145 pounds). None of his co-workers or friends had seen him ever be physically aggressive towards anyone in Nikki's. **R. pp. 1195-96; 1346-57; 1361-63; 1366-70; 1489.**

Terry Hadden (the AWIK victim) was a regular customer at Nikki's. He stopped in to eat around 12:15 a.m. on September 16, 1999.[3] After eating and talking to Jamie for a while, he began playing on one of several video poker machines, around 1:00 a.m. The store was busy for a short period, and Jamie had a brief rush of customers around 1:15 a.m. Later, Jamie loaned his lug wrench to an African-American customer who had trouble with his tire in the parking lot.

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[1] All locations referred to in the Statement of Facts are in Spartanburg County unless otherwise specified.

[2] Neither weapon was visible to customers: the .45 was kept under a towel by the cash register and the .44 was kept in Mr. Mahoney's waistband. There was also a .32 revolver that was kept under the counter. It was not involved in this case.

[3] Mr. Hadden worked the second shift at Wise Snacks Company. **R. pp. 1193-94; 1196.**

Otherwise, the early morning hours remained relatively uneventful, until Moore walked into the store shortly after 3:00 a.m.; and it does not appear that anyone came into Nikki's between the time the man with a flat tire left and Moore arrived. Mr. Hadden and Moore glanced at each other briefly when Moore first entered. Then, Mr. Hadden turned around and continued playing video poker. Moore went to a cooler and, apparently, retrieved two cans of beer. *See* **R. pp. 1193-1205; 1309**.

Mr. Holland testified that:

> The next thing I know of anything going on in the store is when I heard Jamie say, 'What the hell do you think you are doing?' . . . in a loud tone of voice.

R. p. 1205, ll. 9-14.

Once Mr. Hadden heard this comment, he swiveled around in his chair and saw Moore holding both of Jamie's hands in one of Moore's hands. Moore immediately "come around and come up with a gun and told me not to move." Without giving Hadden an opportunity to comply with his directions, Moore fired the .45 caliber semi-automatic (**State's Ex. 3**), which he had taken from the victim's constructive possession, at Mr. Hadden. Mr. Hadden instantly fell to the floor and played dead. He then heard a number of gunshots but did not count how many were fired. **R. pp. 1204-09; 1215-17; 1288-89; 1424**.

During the exchange of gunfire, at least one shot mortally wounded Jamie Mahoney. The pathologist explained that the victim had a gunshot wound which "passed through the lower border of the eighth rib" before going through his liver, through and through his stomach, through and through his diaphragm, through and through his heart and his left lung. It then exited Jamie's right chest. Jamie also had a gunshot wound to his lower right arm, which broke his right arm. **R. pp. 1491-1502**.

The pathologist opined that it is possible that either there were two gunshot wounds or all of Jamie's injuries could have been caused by a single gunshot if his body had been positioned in such a manner in which that could have occurred. He died from internal hemorrhaging caused by the wound to his torso and would have died within six to ten minutes after receiving this wound. **R. pp. 1491-1502**. A bullet from Jamie's .44 caliber weapon went through Moore's left arm. **R. pp. 1380-84**.

Mr. Hadden continued to play dead until he heard Moore say, "Let's get the hell out of here" and exit the store. Mr. Hadden ran out of the building after he heard Moore's vehicle leave. He then went back into the store, saw that his friend was dead and called 911. **R. pp. 1205-13**.

Before Moore left the store, he took a money bag containing $1,408.00. Although he was profusely bleeding from a gunshot wound, he then immediately drove his pickup truck to Gibson's house. Along the way, he discarded the .45 caliber handgun which had his blood on it. **R. pp. 1211; 1262-64; 1267; 1312-13; 1352-54; 1466-69; 1478**. When he reached Gibson's, he asked for Gibson to get him some crack. Gibson refused because of the late hour. During their conversation, Moore told Gibson, "I done something bad, and I got to go turn myself in, and I got money." **R. pp. 1248-49.**

Moore was obviously bleeding and Gibson asked him what had occurred. Moore told him that he had been shot, and he asked Gibson to take him to the emergency room. Gibson refused because he did not want to become involved. When Moore tried to back his truck out of Gibson's driveway, he struck a telephone pole. **R. pp. 1249-50; 1256-57**.

Spartanburg County Deputy Sheriff Bobby Rollins was searching for "a black male, possibly injured, driving a loud vehicle" since this was the description of the suspect he had received. He passed by as Moore backed into the telephone pole. Therefore, he quickly turned

his car around, "threw all of my light in that general area" and exited his vehicle with his weapon drawn. **R. pp. 1234-38.**

Moore approached Deputy Rollins with his hands in the air and "bleeding profusely" from his left arm. The whole time Moore was complying with Deputy Rollins' instructions to get on the ground, he repeatedly said, "I did it, I did it, I give up, I give up." A search of Moore's truck resulted in the seizure of the stolen money and an open pocketknife. Officers found Moore's wallet in the roadway and the bloody shirt Moore had been wearing near Gibson's residence.[4] **R. pp. 1238-40; 1311-18.** Later, Moore told the emergency room nurse that he was using alcohol and cocaine. **R. pp. 1377-78.**

At the crime scene at Nikki's, officers found the victim lying in the kitchen floor. He was deceased, and his right arm was bent at such a peculiar angle that it was clearly broken. In addition to finding evidence of the victim's blood, Moore's blood was found across the back of the victim's clothing and a trail of his blood led out the front door. Also, a meat cleaver, which did not belong to Nikki's Speed Shop (**State's Ex. 83**), was found at the victim's feet with Moore's blood on it. Further, officers found six shell casings, two lead bullet cores and two fired bullets that had been fired by the .45 automatic, as well as several fragments that were consistent with having been fired by it.[5] **R. pp. 1271-93; 1305-18; 1352-53; 1364-65; 1368; 1421-32; 1460-80.**

In the penalty phase of Moore's trial, the State presented victim impact evidence (**R. pp. 1618-24; 1632-35; 1641-47**) as well as photographs and additional testimony from the pathologist who performed the autopsy. **R. pp. 1675-81.** The remainder of the State's evidence

[4] The presence of Moore's shirt in Gibson's yard corroborates that Moore was the person who had been in the yard yelling for Gibson to come outside.

[5] A reasonable inference from the presence of the cleaver at the store and the opened pocket knife is that Moore may have very well been armed before he entered the store. In any event, his crimes were certainly premeditated by the time he fired at Mr. Hadden, who was unarmed and had not spoken to him.

was devoted to presenting evidence related to Moore's character.

The State presented evidence of a 1985 Michigan conviction for unlawful possession of a weapon and a May 15, 1987, Michigan conviction (*see* **State's Ex. 49**) for attempted breaking and entering with intent. At the time, Moore had described the crime by saying that he had pushed open the front door of the Broadway Mark, entered the store and removed two handguns as well as $10.00 in quarters. When later stopped by police, he managed to get away from them. Moore spoke to David Saad (a parole and probation officer from the Michigan Department of Corrections) and said that his addiction to cocaine and crack cocaine caused him to commit the crime. **R. pp. 1648-57.**

Michelle Crowder testified to a September 1991 incident in South Carolina, in which Moore robbed her and beat and kicked both her and her boyfriend. Her boyfriend was so badly injured that he had to go to the hospital. **R. pp. 1658-60**. Valerie Wisniewski testified about a September 13, 1991, incident in which Moore stole money from her at the Rack Room where she was working as a cashier. **R. pp. 1662-64**.

Additionally, the State introduced evidence concerning Moore's South Carolina convictions. On September 15, 1993, he was convicted of second offense DUS (92-GS-63-59), habitual traffic offender (93-GS-42-1804), DUS third offense (93-GS-42-1805). He was convicted of habitual traffic offender again on August 23, 1994 (94-GS-42-3666). On the same date, he was convicted of common law robbery in connection with the incident at Rack Room Shoes (92-GS-42-2606). On July 13, 1995, he was convicted of driving under suspension (third offense) (95-GS-42-160). On January 18, 1996, he was convicted of driving under suspension (sixth offense) (95-GS-42- 3836) and driving under suspension (fifth offense) (96-GS-42-387).

On August 7, 1997, he was convicted of assault and battery of a high and aggravated nature on Ms. Sonja Harrison. **R. pp. 1665-70.**

III. ALLEGATIONS

Moore raises the following allegations in the December 31, 2010 Amended Application: allegations:

9&10. Applicant maintains, as the grounds on which he bases his claims of unlawful custody, that:

a. Trial Counsel was ineffective in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and federal laws, South Carolina Constitution and South Carolina state law due to counsel's failure to object to the trial court's erroneous limitation on Applicant's right to allocution/ right to address his jury at the end of the penalty phase and/or make a plea for mercy during his penalty phase closing statement. Counsel's failure to object to the trial court's improper admonition to Applicant deprived Applicant of the fundamentally important right to seek mercy from his sentencing jury, and prevented review of this issue on direct appeal. *State v. Perez*, 334 S.C. 563,514 S.E.2d 754 (1999); *State v. Hall*, 312 S.C. 95,439 S.E.2d 278 (1994).

b. Trial Counsel was ineffective in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and federal laws, South Carolina Constitution and South Carolina state law due to their failure to perform a reasonable investigation into Applicant's background and family life, resulting in a sentencing proceeding that was fundamentally unfair and assured a death verdict for the Applicant would be returned by the jury. Trial counsel failed to conduct any investigation in the state of Michigan, where the Applicant was born and raised. Had counsel conducted a reasonable investigation into Applicant's background, they would have learned that Applicant comes from a large family, had numerous relatives who could have testified to his good character and struggle with addiction, and these relatives and/or friends would have been willing to testify on Applicant's behalf during his sentencing proceeding at trial. Failure to conduct a reasonable investigation into potential avenues of mitigation is conduct falling below what is required of trial counsel in a capital case. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Strickland v. Washington*, 466 U.S. 668 (1984)

("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*, 466 U.S. at 691); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

c. Applicant was denied the right to effective assistance of counsel at both the trial and sentencing phases in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, federal law, South Carolina State Constitution and South Carolina law in that trial counsel failed to properly and adequately investigate and prepare to confront and rebut the State's alleged physical evidence, and further trial counsel failed to present its own expert or evidence to rebut or explain such physical evidence and/or object that ballistics and firearms and serology testimony was inadmissible in that it failed to meet the mandates of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and State v. Jones, 273 S.C. 723 (1979). Counsel's unreasonable omissions denied Applicant an opportunity to show to the jury he acted in self-defense or (sic).

This incident involved a late night shoot out in a convenience store. Multiple gun shots involving two guns were fired. The defendant was wounded in the arm and chest and the victim was mortally wounded. There is undisputed evidence that the victim owned and/or possessed both guns involved and no evidence the defendant possessed any gun until he wrestled one of the guns from the victim. There was a great deal of evidence and testimony presented by the Solicitor regarding multiple guns, ballistics, shell casings, bullet jackets, bullet fragments, finger prints, trace evidence, gun[] shot residue, blood, blood spatter, DNA, and pathology. Much of this testimony is subject to attack on the basis of its questionable admissibility. Even if admissible, the evidence was easily contradicted and/or explained in a manner consistent with "circumstances other than the guilt of the accused." Trial counsel never retained its own expert to assist with the forensic issues involved with the State's physical evidence. Trial counsel never called as witnesses its own experts for the jury to hear an opposing view and opinion as to the physical evidence. Thus, trial counsel did not adequately investigate or prepare to deny, rebut, or explain the State's physical evidence. *Gardner v. Florida*, 430 U.S. 122, 50 L.Ed.2d 339, 97 S. Ct. 399 (1976). Had counsel hired appropriate forensic experts, including a forensic pathologist, who could have testified as to the single bullet having killed James Mahoney, rather than two as opined by the state, and a crime scene analyst, who could have provided testimony concerning the likely origin of bullets, bullet fragments, shell casings, and general crime scene

analysis, there is a reasonable probability that the guilt and/or penalty phase would have had a different outcome. *Strickland v. Washington, supra.*

d. Applicant was denied due process of law and also denied the right to effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, the South Carolina Constitution and South Carolina law because the State failed to disclose material evidence to the defense concerning State's Witness George Gibson. *Brady v. Maryland*, 373 U.S. 83 (1963). Alternatively, if trial counsel was aware of all of the information set forth below about George Gibson, then trial counsel acted unreasonably in not cross-examining Gibson as to his pending charges and/or investigating the other witnesses at Gibson's home the night of the incident. *Strickland v. Washington, infra.*

George Gibson, a State witness had told detectives immediately after the shootings, in 1999, that Applicant came to Gibson's home and asked him for a ride to the hospital, which Gibson refused to do. On October 18, 2001, the first day of trial, defense counsel told the Court that the State now had an additional statement from Gibson. This new statement had been provided to counsel the previous week in a summary of supplemental aggravating circumstances notice, Gibson's new statement said that defendant robbed and murdered the store clerk in order to buy cocaine, and that was why Applicant showed up at Gibson's home after the shooting. Although other witnesses were at Gibson's residence on the night of the incident at the time of Moore's visit there, and had talked to law enforcement, defense counsel was either unaware of these other witnesses, which the state failed to name or take statements from, or had not been able to locate or interview them before trial.

Additionally, defense counsel was not informed that, at the time of his testimony, George Gibson was incarcerated at Allendale Correctional Institution and was brought to Spartanburg to testify at the solicitor's direction. Defense counsel was never told that Mr. Gibson was also out on bond for a then-new (July 2001) possession of crack arrest (although counsel had been informed of Gibson's 2000 Trafficking Crack charge that was pending in the 7th Circuit). Assuming, *arguendo*, that the State did provide the above information to the defense about Mr. Gibson, then counsel failed to adequately investigate this matter. Impeachment evidence related to a critical witness, such as George Gibson, whose testimony formed the centerpiece/lynchpin of the state's case against Applicant, and whose second statement to law enforcement, given at the eleventh

hour, became their basis for *res gestae* testimony, that was used to prove a sketchy, yet overwhelmingly prejudicial, "motive" and should have been disclosed to defense counsel. George Gibson had substantial charges for which he faced significant prison time, which fact, had it been known to the jury, would certainly have cast doubt on Gibson's credibility. *State v. Mizzell*, 394 S.C. 326 (2002). The State's nondisclosure of critical impeachment evidence against its star witness undermines any confidence that can be had in the jury's guilt and/or sentencing verdict(s). *Brady v. Maryland*, *supra*; *Strickland v. Washington*, *supra*. Alternatively, if trial counsel were aware of the information, they were ineffective in failing to use it during cross-examination and for investigation. *Strickland v. Washington*, *supra*.

e. Applicant was denied due process of law and also denied the right to effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, the South Carolina Constitution and South Carolina law because trial counsel failed to pursue their *Batson v. Kentucky*, 476 U.S. 79 (1986) claim, despite the fact that Applicant's jury was exclusively white and the state struck the only two African-Americans qualified to serve as jurors. Applicant is African-American and the alleged victim, James Mahoney, was Caucasian. The State's decision to strike the only two qualified African-American jurors on the jury panel established a prima facie case of racial discrimination. Trial Counsel raised a *Batson* challenge, but later abandoned it. (Tr. P. 1137). Trial Counsel's failure to pursue and/or preserve for direct appeal a *Batson* challenge was unreasonable, as the State's alleged race-neutral reasons for striking jurors Morrow and Huffman were pre-textual, as white jurors who gave almost mirror like responses and/or were similarly-if not exactly-situated insofar as having relatives who were prosecuted, were not challenged by the State and were seated on Applicant's jury. Counsel's failure to preserve this meritorious issue was deficient and unreasonable, as well as prejudicial. *Strickland v. Washington*, *supra*.

f. Applicant was denied due process of law and also denied the right to effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, the South Carolina Constitution and South Carolina law because trial counsel failed to preserve their objection to the trial court's refusal to give a jury charge on voluntary manslaughter. Assuming, *arguendo*, that the issue of the trial judge failing to give a voluntary manslaughter charge was properly preserved, appellate counsel was ineffective in failing to raise this issue on direct appeal. Applicant was entitled to a charge of voluntary manslaughter based on the

facts of his case. It is undisputed that Applicant was shot by James Mahoney and he was shot by a weapon owned by either James Mahoney or the owner of Nikki's Convenience Store. James Mahoney's death was likewise the result of being shot with his own weapon. The fact that all three firearms collected from the crime scene in and near Nikki's Convenience Store belonged to either Mahoney or the store owner establishes that: (1) Applicant entered the store without a firearm and (2) that James Mahoney initiated what later became a deadly gun fight.

Voluntary manslaughter is a lesser-included offense of murder. Voluntary manslaughter is defined as an "unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *State v. Cole*, 338 S.C. 97 (2000). The only time a voluntary manslaughter charge should not be provided to the jury is when there is "no evidence whatsoever tending to reduce murder to voluntary manslaughter." *State v. Pittman*, 373 S.C. 527 (2007). In Applicant's case, there was ample evidence that Mahoney was killed as a result of a gun battle he initiated with a weapon that did not belong to Applicant. These facts alone establish sufficient provocation by Mahoney to entitle Applicant to a charge on voluntary manslaughter.

Trial counsel's failure to preserve this issue or, alternatively, appellate counsel's failure to raise it on direct appeal amounts to ineffective assistance of counsel. *Strickland v. Washington, supra.*

g. Applicant was denied due process of law and also denied the right to effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, the South Carolina Constitution and South Carolina law because trial counsel failed to present adaptability evidence from James Aiken, a nationally recognized expert in the field of penal institution safety and management. Mr. Aiken was prepared and available to testify on behalf of Applicant but never called as a witness. Counsel's unreasonable decision to not call Mr. Aiken opened the door for the state's damning closing argument that Applicant had shown "escalating violence," thereby injecting the fear of Applicant's future dangerousness into the minds of the jurors, who were never told that Applicant could be safely housed for the duration of his life. The prejudice to Applicant stemming from counsel's inexplicable (and seemingly eleventh hour) decision to discard the only defense expert is manifest. *Strickland v, Washington, supra.*

h. Applicant was denied due process of law and also denied the right to effective assistance of counsel in violation of the Fifth, Sixth,

Eighth and Fourteenth Amendments to the U.S. Constitution, the South Carolina Constitution and South Carolina law because trial counsel failed to request a charge on the statutory mitigating circumstance of provocation by the victim, as set forth in S.C. Code Section 16-3-20 (c)(b)(8). Failure to request this mitigating circumstance was both deficient and prejudicial to Applicant. Counsel argued to the jury that Applicant was also a "victim," so there is no conceivable professionally reasonable basis for not seeking instruction to the jury that the victim's provocation could be considered by them as a factor in mitigation of punishment. Without such an instruction, the jury was left with no guidance to assist them in taking into consideration the fact that Mahoney shot Applicant, which was the whole basis of counsel's argument that Applicant was a victim, too. Trial counsel's failure to request the statutory mitigator of provocation by the victim was ineffective assistance of counsel. *Strickland v. Washington, supra.*

i. Trial Counsel was ineffective in failing to object to the State's request to charge the statutory aggravating circumstance found at S,C, Code Section 16-3-20(c)(3) because it was not appropriate to the facts of Applicant's case. Alternatively, if the trial court correctly held that S.C. Code Section16-3-20(c)(3) is properly applied to the facts of Applicant's case, then this code section is unconstitutional due to its over-breadth, in that it fails to sufficiently narrow the class of offenders who are eligible for a death sentence.

South Carolina Code Section 16-3-20(c)(3) reads as follows: The Offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

Applicant's case involved use of a pistol. A pistol is not "a weapon or device which normally would be hazardous to the lives of more than one person." Alternatively, if a single-shot pistol meets the criteria of 16-3-20(c)(3), then this aggravating factor would make any non-residential intentional shooting death occurring near a third-party eligible for the death penalty, Clearly, this is not what the legislature intended. The more reasonable construction of 16-3-20(c)(3) is to apply it in those few cases where an incendiary device, bomb or other explosive type of weapon is used to kill people in a public place. To hold otherwise would violate the basic Eighth Amendment principle that death penalty statutes must sufficiently narrow the class of death-eligible offenders.

Applicant either received ineffective assistance of counsel or S.C. Code Section 16-3-20(c)(3) is unconstitutional. *Strickland v. Washington, supra, Lewis v. Jeffers*, 497 U.S. 764,774 (1990).

Additionally, Moore submitted the following allegations, without objection, on January 5, 2011:

(9/10j). Appellant was denied the right to effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution during the appellate proceedings when appellate counsel failed to raise on appeal the trial court's error in admitting the testimony of State's witnesses George Gibson and Jeanie Smith as res gestae witnesses. These witnesses' testimony should not have been admitted under a res gestae theory and, as such, the probative value of such testimony was substantially outweighed by its prejudicial nature.

(9/10k). Appellant was denied the right to effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution in that trial counsel failed to object to the admission of testimony by State's witness Jeanie Smith in that such testimony was inadmissible hearsay.

At the PCR hearing, Moore, through his attorneys, abandoned allegation 10(i). *See State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000) (a firearm is a "weapon or device which would normally be hazardous to the lives of more than one person;" thus, the trial judge properly refused to direct a verdict on the statutory aggravating circumstance in S.C. Code Ann. § 16-3-20(C)(a)(3) (Supp. 2000)).

IV. DISCUSSION

To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. *See Wiggins v. Smith*, 539 U.S.510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). "[E]very effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective as

the time." *Id* at 689. "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, 104 S.Ct. 2052. 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, 104 S.Ct. 2052." *Harrington v. Richter*, 131 S.Ct. 770, 787 (2011) (quoting *Strickland*).[6]

The inmate must also demonstrate that he was prejudiced by counsel's deficient performance. *Strickland*, 466 U.S. at 691. To do so, he must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. It is insufficient to prove "that the errors had some conceivable effect on the outcome of the proceeding." *Id* at 693. Rather, "[c]ounsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Richter*, 131 S.Ct. at 787 (quoting *Strickland*, 466 U.S. at 687).

Applying these principles to the present case, the Court finds that Moore has failed to meet either prong of the *Strickland* test as to any and all of the issues raised at PCR. I specifically find that Mr. Moore was represented by capable and experienced counsel at both the jury trial and on appeal, and that each of the complaints now asserted at PCR were the result of either an articulated and reasonable trial strategy, they were not raised due to a lack of meritorious proof or supporting law, or there was no prejudice to Moore based upon counsel's alleged errors.

A. Guilt Phase Allegations.

GROUND 10(c)

[6] "Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to "second-guess counsel's assistance after conviction or adverse sentence.'" *Id* at 787 (citation omitted).

Moore first alleges that trial counsel failed to properly and adequately investigate and prepare to confront and rebut the State's alleged physical evidence, and that counsel failed to present its own expert or evidence to rebut or explain this physical evidence. The Court finds that he has not proven either deficient performance or resulting prejudice.[7]

The Court in *Strickland* explained the deference owed counsel's strategic judgments in terms of the adequacy of the investigations supporting those judgments:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-691. *See also Wiggins*, 539 U.S. at 521-22.

Further, "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. In assessing counsel's investigation, the Court "must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' *Strickland*, 466 U.S., at 688, [. . .], which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time,' *id.*, at 689 [. . .] ('[E]very effort [must] be made to eliminate the distorting effects of hindsight')" *Wiggins*, 539 U.S. at 523.

[7] He also claims that "trial counsel failed to present its own expert or evidence to rebut or explain such physical evidence and/or object that ballistics and firearms and serology testimony was inadmissible in that it failed to meet the mandates of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and State v. Jones, 273 S.C. 723 (1979)." However, he failed to present any evidence in support of this portion of his allegation and he did not address it in his proposed Order. Therefore, the Court finds that he has abandoned this allegation.

Based upon the credible evidence before the Court, the Court finds that counsel's investigation to "prepare to confront and rebut the State's alleged physical evidence" was objectively reasonable. Both of Moore's attorneys had a great deal of experience in trying major felony cases when they were appointed to represent him. Also, Mr. Morin, who was the lead attorney, sought and obtained Mr. Kelly's appointment as second chair because they had a good working relationship. Both Mr. Morin and Mr. Kelly met with Moore on numerous occasions and they had discussed his version of what had occurred. He repeatedly denied that he had intended to rob Nikki's went he entered the store, which was the State's theory of the case, but he gave conflicting accounts about whether he used crack that night.

The Court further finds that Mr. Morin employed the services of a forensic pathologist, a crime scene expert and a private investigator to assist them in their efforts. Mr. Morin thought that both were competent. He did not see the need for employing another expert and was unsure that funding would be approved for such a request. Also, Mr. Kelly has a great deal of experience with and knowledge of the use of firearms.

Mr. Morin reviewed the physical evidence with both his crime scene expert and his investigator.[8] Counsel's investigation and the information that the State provided to him through

[8] **Respondent's Ex. 1**, a billing statement from Pete Skidmore, the investigator, reflects that Mr. Skidmore met with Mr. Morin and Mr. Moore for 5.5 hours on July 2, 2001, and he reviewed the case file on July 23-24, 2001. Thereafter, either Mr. Skidmore or his associate (1) prepared a list of people who need to be interviewed; (2) again met with Moore; (3) spoke to Ann Yarborough (a Nikki's employee); (4) spoke to Lynda Byrd; (5) after repeatedly unsuccessful attempts to locate and speak to Terry Hadden, interviewed him; (6) interviewed several of Moore's former co-workers; (7) attempted to locate Gibson at Perry Correctional Institution and at Kirkland Correctional Institution on October 12, 2001, and discovered that Gibson was in the Spartanburg County jail "waiting to be transported;" (8) spoke to another potential witness; (9) met with Mr. Morin and reviewed the physical evidence; and (10) attended trial on October 19, 2001, where he again interviewed Gibson, reviewed his statement and ascertained that Gibson's "answers seemed fairly consistent with report." Counsel had a copy of the report prepared by Mr. Clevenger, an investigator with the Solicitor's Office (**Applicant's Ex. 25**) in his file. This report was prepared shortly after the crimes and contains hearsay evidence of some matters that were later determined to be incorrect.

discovery[9] revealed that Moore did not have a handgun on him when he entered Nikki's and that both the murder weapon (a .45 caliber handgun) and a .44 caliber revolver, originated with the victim. There were a number of shots fired at the store and a number of shell casings. He had his experts to assist him in reviewing the physical evidence and determining what the physical evidence indicated as to the relative positions of Moore and Jamie Mahoney and what had occurred. Mr. Morin did not tell his experts what Moore said had occurred. Also, Mr. Morin reviewed the physical evidence with his crime scene expert, Donald Girndt, and he provided Mr. Girndt with crime scene photographs. Mr. Morin met with both his pathologist and his crime scene expert, at the same time, to discuss their findings.

After counsel's investigation was concluded, Mr. Morin did not perceive this case as extremely complex from a factual standpoint, and he ranked it somewhere in the middle of the cases that he had tried. His theory of defense was to attack the credibility of the State's witnesses and attempt to use those witnesses to demonstrate that Moore was in the heat of passion when the shooting occurred.

The Court finds that the evidence of Moore's guilt was overwhelming. Terry Hadden, who survived the assault, positively identified Moore as the perpetrator of the crimes. Hadden, who was sitting just a few feet from Moore when Moore fired the first shot at Hadden, positively identified Moore from a photo line-up and he positively identified Moore at trial as the perpetrator of the crimes against him and against James Mahoney. Also, Moore's DNA was found inside the store, outside the store, on the murder weapon, on the side of the getaway vehicle, and inside the getaway vehicle after Moore was arrested.

[9] This would have included the reports of the officers involved in the investigation.

The motive for the crime was clearly robbery. Moore went to George Gibson's house before the crime in search of crack cocaine. Gibson told Moore that he would not sell or give Moore any crack cocaine, unless Moore had some money to purchase it. Moore told Gibson he was going to work but would be back later. Moore was unemployed at the time and had no way to get money legally.[10]

Moore eventually went to the convenience store where the victim worked, which contained readily available cash that Moore could steal. Moore entered Nikki's around 8:00 a.m. From the evidence in the record, it is clearly inferable that Moore placed items on the counter pretending to be there to purchase these items, and then attempted to steal money from Mahoney and the store.[11] Moore went behind the counter to the cash register and took the bank bag that contained over $1,400 in cash, the video-poker money, evidencing his intent when he went into the store. Moore's jury heard this information.

Moore did not testify at his capital trial, but the Court viewed and heard Moore's PCR testimony of how and why the shooting occurred. Moore claimed that he went into the store only to purchase the items he placed on the counter; that he and the victim got into an argument over 11 or 12 cents; that the victim made a racial slur in the course of directing Moore to leave the store; and that a struggle ensued. The Court finds that Moore's testimony is not credible. Moore's contention that he only took the money as an after-thought is completely beyond belief.

[10] At the time he testified at trial, Gibson had pending charges for possession of crack cocaine and trafficking in crack cocaine. Moore's jury knew of the trafficking charge.

[11] As discussed, Hadden testified at the trial that he heard James Mahoney state "What the hell are you doing?" Hadden heard no other argument or discussion. When Hadden turned to see what was occurring, Moore had the victims' hands in one of his hands and came up with a pistol, pointed it at Hadden and told him not to move. Moore fired a shot at Hadden. Hadden then heard an exchange of gunfire. . Hadden testified at the trial that he heard James Mahoney state "What the hell are you doing?" Hadden heard no other argument or discussion. When Hadden turned to see what was occurring, Moore had the victims' hands in one of his hands and came up with a pistol, pointed it at Hadden and told him not to move. Moore then fired a shot at Hadden. Hadden thereafter heard an exchange of gunfire, as he pretended to be dead.

The Court finds that as the victim lay helpless on the floor behind the counter, Moore, who had been seriously shot in the arm by the victim in self-defense, stole the bank bag from behind the counter. While doing so, he bled onto the victim's clothing. This required Moore to go behind the counter of the store. Moore left Nikki's only after stealing the money-bag containing the $1,400 in cash and not before doing so.

Moore fled the crime-scene leaving a trail of his own DNA out of the store and into the parking-lot. Moore bled profusely down the side of his truck as he drove away from the scene. Instead of turning right out of the parking lot of the convenience store and driving just a few short blocks to Spartanburg Regional Hospital and receiving emergency treatment for his serious gunshot wound, Moore drove approximately six miles in the opposite direction. Moore did not drive to the hospital or even to his own home, but directly to George Gibson's house. This was the same house where he had earlier tried to purchase crack. Only now, Moore had over $1,400 in cash with which to purchase it.

Once he arrived there, Gibson refused to sell crack to or assist Moore, not wanting to get involved in what Moore had done. Moore then tried to back out of the driveway, wrecked his truck, and eventually passed out in the roadway. He told a Spartanburg County deputy that "he did it." The blood soaked money-bag and money was recovered from the front seat of Moore's truck. Moore told either EMS personnel or the emergency room nurse that he had been using alcohol and cocaine that day. However, Moore denied before this Court that crack cocaine had anything to do with the crime and he denied that he was addicted to crack. Rather, Moore testified that he went to Gibson's residence only because he wanted Gibson's assistance in bandaging his wound. Again, the Court finds that his testimony is simply not credible given the entire record in this case.

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George Gibson has no medical training whatsoever. The credible evidence shows that Gibson is a crack cocaine dealer or one who facilitates crack cocaine sales. Further, the testimony at PCR established that when one exits Nikki's convenience store, Spartanburg Regional Hospital is visible to one's right, just a few blocks from Nikki's. Although Moore was seriously wounded, he went in the opposite direction of the hospital, travelling over six miles to Gibson's house. As previously stated, the evidence of Moore's guilt was overwhelming.

Moore alleges that counsel was ineffective for not retaining and calling their own pathologist to rebut the State's evidence presented at trial and in the sentencing phase. However, as discussed, the record shows trial counsel retained a forensic pathologist to review the evidence in the case. Specifically, counsel retained Dr. Susan McMahon, a forensic pathologist from MUSC in Columbia, S.C. Counsel met with Dr. McMahon and his crime scene expert before trial, together, to review their findings.

Dr. McMahon informed trial counsel that, in her opinion, Moore shot the victim while Moore was behind the counter with the victim and a relatively short distance from the victim. The significance of this opinion is that Moore did not fatally shoot the victim in an exchange of gunfire while Mahoney was on one side of the counter and Moore was on the customer side of the counter. Instead, Moore went through an entrance doorway which led to the area behind the counter in pursuit of the victim Mr. Mahoney and to where the cash register and video-poker money was located.

This testimony would have been damaging to Moore's defense and mitigation presentation. Counsel did not want to introduce any evidence showing that Moore had fired a shot behind the counter. The Court finds that counsel reasonably determined under *Strickland* not

to present her to testify to facts that would have incriminated Moore and was inconsistent with his version of the shooting. *E.g.*, *Pruett v. Thompson*, 996 F.2d 1560, 1574 (4th Cir. 1993) (counsel was entitled to rely on the information he obtained from his retained experts and not second-guess this information just because the experts he had retained and had evaluated petitioner rendered an unfavorable or less than desirable opinion); *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995) ("If an attorney has the burden of reviewing the trustworthiness of a qualified expert's conclusion before the attorney is entitled to make decisions based on that conclusion, the role of the expert becomes superfluous"); *Murtishaw v. Woodford*, 255 F.3d 926, 947 (9th Cir. 2001) (counsel is entitled to rely on the expert(s) consulted).

In an attempt to meet his burden of proving that he was prejudiced by counsel's failure to present a pathologist at trial, Moore alleges that Dr. Sandra Conradi, the forensic pathologist his collateral attorneys retained and had testify at the PCR hearing, could have rebutted the findings of the State's pathologist. The Court finds that counsel was not ineffective for failing to retain and call Dr. Conradi at the trial for several reasons.

First, counsel is not required to call a specific expert, such as Dr. Conradi. If counsel has retained a qualified pathologist, who gives him an unfavorable opinion regarding the evidence in the case, counsel is not required to search for another expert who will testify favorably. Counsel is not required to "expert shop." *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992) (petitioner could not establish ineffective assistance because counsel did not expert shop until he found one that who would testify favorably); *Pruett v. Thompson*, *supra* (same); *see also Walton v. Angelone*, 321 F.3d 442, 464 (4th Cir. 2003) (defendant has no constitutional right to insist on the appointment of any particular expert under *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985); and the Constitution does not entitle a criminal defendant to the effective assistance of an expert

witness). More importantly, Moore's own expert, Dr. Conradi, further incriminated and damned applicant Moore by her own testimony at PCR.

Moore testified at the PCR hearing that the victim fired first and shot him in the arm with the .44 pistol after Moore took the .45 pistol away from the victim. Moore claimed that he retreated to a door frame approximately six feet way located directly in front of the counter and returned fire from this location with the .45. He then fired no more shots. Moore thereafter went around an entrance door, which led to the area behind the counter, to see if Mahoney was dead. This entrance door, which is different from the door frame from which Moore testified he fired all of his shots, leads to the area behind the counter, *i.e.* the kitchen area.

It is clear from Moore's testimony at PCR that he allegedly shot Mahoney with one of the bullets he fired from the door frame approximately six feet away and directly in front of the store counter. According to Moore he saw the victim lying on the floor, wounded, after he went through the door-way leading to the area behind the counter. Moore claimed that he then saw the money bag and, as an after-thought, he decided to take the money-bag from behind the counter despite his own serious wound.

However, and importantly, Dr. Conradi opined that there was stippling around the fatal wound to the victim Mahoney's left side. She also admitted that Moore would had to have been within several inches of the victim when he fired the fatal shot into the victim because the victim was wearing a shirt at the time he was shot, and the stippling penetrated the outer clothing of the victim and is visible on the autopsy photographs. Dr. Conradi's testimony would place Moore going through the doorway leading to the area behind the counter and shooting Mahoney in the side after Moore entered the door-way to the area behind the counter. The significance of this testimony is that it would demonstrate that Moore was not going behind the counter to see if

Mahoney was dead. He was going behind the counter to murder Mahoney and to steal the store's money.

If Dr. Conradi's opinion in this regard is accepted, and the Court accepts it as credible, then Moore's testimony regarding how the shooting occurred is simply not credible given the physical evidence. More importantly, Dr. Conradi's testimony agrees with trial counsel's expert pathologist and trial counsel's forensic expert that the fatal shooting of the deceased victim in this case occurred when Moore and the victim were both in the area behind the counter and in the kitchen area.

The Court finds that if trial counsel had called Dr. Conradi to the stand, this damaging testimony would have been elicited on cross-examination by the State, as it was by the Attorney General at PCR. It would have been devastating to Moore's guilt phase defense and to his mitigation presentation during the sentencing phase. Therefore, Moore cannot show any prejudice from failing to present Dr. Conradi's testimony. *Strickland*; *See also Wong v. Belmontes*, 130 S.Ct. 383, 386 (2009).[12]

Moore also alleges trial counsel was ineffective in failing to retain their own crime-scene expert. The Court disagrees. First, Moore did not meet his burden of proof on this issue because he did not call a crime scene expert of his own at PCR to testify to how counsel was ineffective in failing to call a crime-scene expert. He failed to establish deficient performance or prejudice in this regard. *Lorenzen v. State*, 376 S.C. 521, 657 S.E.2d 771 (2008) (defendant's testimony that expert would have helped his case was merely speculative where he failed to call expert to testify at PCR). Therefore, this ground must be dismissed with prejudice.

[12] Although *Belmontes* involved an assessment of prejudice in the sentencing phase of a capital trial, the Court makes clear that an assessment of prejudice under *Strickland* requires a reviewing court "to consider all the relevant evidence that the jury would have had before it if [counsel] had pursued the different path" not just the positive information that counsel could have presented through the witness(es), but also the damaging evidence from the prosecution "that almost certainly would have come in with it." *Id.*

Second, the record shows that trial counsel did retain its own crime-scene expert to review the crime-scene photographs and the evidence recovered by law enforcement. The record shows trial counsel met with this expert, Donald Girndt, prior to trial to discuss his findings. Mr. Girndt, who was present with counsel when Dr. McMahon stated her findings, agreed with Dr. McMahon that the evidence indicated that Moore shot the victim while both he and the victim were in the area behind the store's counter. This Court finds that it was objectively reasonable trial strategy for trial counsel not to call Mr. Girndt to testify to evidence that would have further incriminated Moore or to have Girndt prepare a report with these findings; *Strickland*. This ground must be dismissed with prejudice.

Moore also alleges that trial counsel were ineffective in failing to properly cross-examine the State's crime-scene technician, Paul Dorman. The Court disagrees. Moore repeatedly referred to the crime-scene technician as "the State's expert" during the PCR merit's hearing. This is a misnomer. Mr. Dorman was not the State's expert at trial or at PCR. Mr. Dorman was called at trial as a crime scene technician, *i.e.* to testify about where he located particular pieces of evidence and his retrieval of the same. Moore called Mr. Dorman at the PCR hearing.

Dorman testified at the PCR hearing that, in his opinion, one of the shell casings found behind the counter must have come from someone firing the gun from behind the counter. Moore argued that this indicated that the victim shot at him first with the .45, and that trial counsel was ineffective in failing to cross-examine Mr. Dorman on this specific issue.

However, as previously set forth, Mr. Dorman was not "the State's expert" as Moore contends. Rather, as the crime scene technician, he was simply the person from the Sheriff's Office who was designated to film the crime-scene, photograph it, and recover all of the physical evidence found at the scene. He is not an expert in crime scene reconstruction or ballistics, and

Moore did not qualify him as such at the PCR merit's hearing. (He was qualified at PCR only as an expert in crime-scene processing). Further, Mr. Dorman, admitted at PCR that *a firearms expert* was more qualified to testify how or why one of the fired shell casings ended up behind the counter on the floor. The record shows *the firearms expert* did so testify at trial. The forensic firearms examiner testified at trial that there were a myriad of ways in which the fired shell casing found behind the counter could have ended up behind the counter. **R. pp. 1419-50.**

This Court listened to Mr. Dorman's, PCR testimony and finds that his testimony on this specific issue, *i.e.* how the shell casing ended up behind the counter, is not credible. The record shows that Moore struggled with the victim and items were knocked over on the counter. There are a myriad of ways that the shell casing could have ended up behind the counter and in the location it was found. The shell casing could have landed on the counter and been knocked to the floor by either Moore or Mahoney, or the shell casing could have simply bounced off the counter and rolled onto the floor behind the counter.

Additionally, depending on the position of the gun at the time it was fired by Moore, the shell casing could have landed on the floor behind the counter. This was in essence the testimony of the qualified ballistics expert at trial, and this Court finds that the ballistics experts' testimony is credible, given his qualifications and all of the evidence and the record in this case.

The Court further finds that Mr. Dorman's testimony on this specific issue at PCR does not meet the standard of admissibility required for admission of such evidence at a trial before a jury. Indeed, Mr. Dorman admitted that it would be better to ask a firearms examiner about this specific issue than him. The record shows that Mr. Dorman did not perform specific testing of the weapon fired in this case to determine how this specific weapon ejects shell casings, the distance this specific weapon would eject shell casings, and in what direction it would eject shell

casings depending on the angle the gun was held when fired. Mr. Dorman's testimony on this issue is thus speculative. The Court finds that trial counsel was not ineffective in failing to cross-examine him on his personal opinion regarding how the shell casing could have ended up on the floor behind the counter because this was outside of his expertise and, by his own admission, the firearms examiner was person qualified to testify to such matters. Therefore, Moore has failed to show deficient performance or prejudice in this regard. *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998) (state's failure to object to hearsay testimony as to what another witness's testimony might have been does not relieve applicant of the burden of producing admissible evidence in accordance with the rules of evidence).

Even if this testimony could have been admitted, this Court finds that Moore has failed to show prejudice. *Strickland.* Given that (1) there are several other factors that could have contributed to or caused the shell casing to have ended up on the floor behind the counter; (2) Dorman's admission that the firearms examiner was qualified person to explain how the shell casing could have ended up behind the counter; (3) the firearms examiner testified it was impossible to tell how the shell casing ended up behind the counter; (4) the implausibility of Moore's version of the shooting; (5) Moore's own expert, Dr. Conradi, testified that Moore would had to have been behind the counter when he fired the fatal shot given the stippling around the victim's wound; and (6) the overwhelming evidence of Moore's guilt of these crimes, the Court finds that Moore was not prejudiced by counsel's alleged deficient performance in this regard. Moore has failed to show that had this testimony been admitted there is a reasonable probability the result of the proceeding would have been different. *Strickland.*[13]

GROUND 10(d)

[13] By this time, he had taken the .45 caliber semi-automatic from the victim, which would explain how one fired shell casing ended up behind the counter, *i.e.*, he was behind the counter when he fatally shot the victim.

In his **Ground 10(d)**, Moore maintains that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) by failing to disclose material evidence to the defense concerning prosecution witness George Gibson. Alternatively, he asserts that trial counsel were ineffective if they had but did not impeach Gibson with the information at issue. Moreover, he alleges that counsel were ineffective because other witnesses were at Gibson's residence on the night of the murder when Moore went there, and these witnesses had spoken to law enforcement. However, "defense counsel was either unaware of these other witnesses, which the state failed to name or take statements from, or had not been able to locate or interview them before trial." For the following reasons, the Court finds that Moore has not established a *Brady* violation or that counsel was ineffective as urged by Moore.

1. Gibson's statements.

First, Moore claims that the State did not disclose that Gibson had given two statements to law enforcement, after September 16, 1999, in which he confirmed his September 16th statement that did not mention Moore's visit on the night of the 15th and in which Gibson said that Moore had come to his residence to get Gibson to take him to the hospital but Gibson refused. The Court finds that there was no constitutional violation.

Prior to the guilt phase, lead trial counsel, Michael Morin, Esquire, moved to exclude testimony from Gibson related to Moore's efforts to purchase crack from Gibson. Mr. Morin noted that "[u]p until last week when I received the state's supplementary notices of additional evidence in support of aggravating circumstances, this wasn't an issue." However, in the State's "listing of some of their witnesses the issue about Mr. Moore's alleged drug use in or around the time of this incident, they indicated in here there were two specific people who have given statements, but apparently they have supplemented their statements at some point, which I do not

know, but apparently they have, because the summaries that they have given me had in it information that I hadn't previously received." **R. pp. 1149-54**. As discussed in **Ground 10(j)**, *infra*, he unsuccessfully argued that this evidence should be suppressed.

On direct examination, the State established that Gibson had given a statement to the police on September the 16, 1999 in which Gibson did not mention Moore's September 15th visit to Gibson's house because Gibson "was just scared to get involved." **R. pp. 1251-52**. Trial counsel Morin thereafter cross-examined Gibson. **R. pp. 1254-59**.

In pertinent part, counsel established the following:

Q Now, **the night that this happened you went down to the police station**, is that right?

A **That morning, yes**, after, you know.

Q **You gave a statement to the police**.

A **Yes**.

Q **Didn't say anything about the drugs**, did you? If you need to see a copy of it, I can give it to you.

A **I know**. Uh-huh.

Q **You didn't say anything about it. Didn't say anything about Steve or Dollar or the other gentleman**, did you?

A **No**.

Q You had crack in the house that night, didn't you?

A No.

Q You told the jury that he wanted to give you -

A I said . . . wanted me to get something for him.

Q Okay.

A That is why.

Q So there wasn't any reason for you to leave that part out then, was there?

A At the time I wasn't thinking about it like that, because . . . this man was bleeding. I was concerned about it. I wasn't thinking about it like that.

Q Well, yeah. I understand.
A Okay.

Q Now, **this part that you now say that you remember that's not in your statement about the drugs, when did you first tell police or the solicitors about that?**

A About - -

Q **About this drugs and him wanting to get it on the credit and that kind of stuff. Do you remember when you first told them about that?**

A **A month ago.**

Q A month ago?

A September, I guess.

Q **Two years after this happened, is that right?**

A Well.

Q September of 2001 . . .?

A **Yeah, yeah, whatever.**

See **App. pp. 1254-55** (emphasis added).

On redirect examination, the State elicited that:

Q **Mr. Gibson, did you give a written statement the night this happened?**

A **Yes**, sir.

Q **When is the next time you talked to somebody about this case?**

A About as far as a statement or anything?

Q About the case itself, when you talked to somebody about your statement or your - -

A **About three days later. The investigator and the solicitor stopped by and asked me, you know, and, about three or four days later, about two or three days later, I think.** In fact, it wasn't long. That was -- you know, it was just a brief statement, a brief moment, you know, stopped by. And **then this time**. That's it.

Q So **when was the next time after that you talked to anybody else about that case**?

A **The 25th of** December, of **September** rather.

Q **When you came and talked to the solicitor**?

A **Yes**, sir. That's when I - - yes.

Q And the time that you are talking about happened two or three days afterward, was we any of those three solicitors that was - -

A Sir?

Q Was any of us one of those solicitors that came and talked to you two or three days afterwards?

A Really, I'm going to be honest with you. All I remember is Officer -- policeman. He's the one I really saw, you know, because it was hot, and the window was up in the car. That's who I remember talking to. That's the only one that really I could, you know, place his face.

Q But, you know, it was three gentlemen in the car, and they said they were with the solicitor's office. So, you know, that's the only one I recognized at the time.

See **R. pp. 1260-61** (emphasis added).

In closing argument, Mr. Morin launched a scathing attack on Gibson's credibility, which included Gibson's failure to mention crack in either his original statement to police or to the Solicitor's Office several days after the offense:

> Mr. Gowdy called it a crack house in his own closing. When it helps him, it's a crack house. But the fact of the matter is he never said anything to any police about, or authorities about, any drugs being mentioned.

> Mr. Barnette asked him after I sat down did you ever talk to anybody after the police, and he said, oh, yes. Somebody from the solicitor's office, an investigator, came out there and talked to me about three days later. He didn't say one single thing about any drugs being mentioned. But he did remember it three weeks ago when he met with them again.
>
> What changed? Well, 18 months ago he got a charge for trafficking crack. Eighteen months ago. And has anything happened to that? No. That case is still pending. But, by the way, I just remember that before Mr. Moore said he needed help, he wanted to talk about the crack.

R. p. 1565, ll. 2-19.

Mr. Morin then showed jurors a photograph taken from Gibson's house and showing his view of the roadway from that location; which had been introduced as **State's Ex. 23**. Morin urged jurors that this photograph refuted Gibson's testimony that he looked out in the street and saw Moore laying on the ground because the photograph plainly demonstrated that Gibson's vision at 3:00 a.m. would have been obstructed by large bushes. Mr. Morin argued that Gibson "is not telling the truth. He doesn't want to be involved. He doesn't want to be involved. He has got a pending drug charge as it is." **R. pp. 1565-66**.

Gibson, Mr. Morin, Susan Porter, Esquire, and Mr. Mabry testified at the PCR hearing on matters related to these allegations. Mr. Mabry, who is currently employed in the South Carolina Attorney General's Office and assigned as second chair in this case, was the senior Deputy Solicitor in Seventh Circuit Solicitor's Office at the time of the murder. He had some involvement in this case and he served notice of intent to seek death penalty. He explained that the hospital is visible as you exit Nikki's. To get to it, one would take a right and it is a two or three minute drive. Moore, however, took a left and drove to George Gibson's residence. Several days after the murder, Mr. Mabry went to the crime scene. He then went to Gibson's residence

along with Solicitor Gossett and the Office's investigator, Rusty Clevenger, because this was a death penalty case and Gibson was a potential witness. A policeman met them there.

Gibson was not connected to the armed robbery or murder, but he later provided a motive: Moore's desire for crack cocaine, which was consistent with the emergency room nurse's testimony. Mr. Mabry's instinct was that Gibson had not been truthful in his statement. Mr. Mabry spoke to a family member of Gibson and then to Gibson. He communicated to Gibson that he did not believe Gibson's statement. However, Gibson told Mr. Mabry the same story that he had told police on the night of the murder, *i.e.*, that Moore had come and asked Gibson to take him to the hospital. Mr. Mabry did not tell Mr. Morin about this conversation before he left the Solicitor's Office on January 10, 2001and he was not called to testify at trial.[14]

Mr. Mabry did not recall if he took notes of this conversation. If he did, then they would have been on his computer or in the Solicitor's file.[15] He did not have any further involvement in this case after he left the Solicitor's Office. Neither of Moore's trial attorneys spoke to him about his involvement in this case. He would have written down Gibson's statement to him if Gibson had said that crack was involved in the case.

Gibson testified that he spoke to police on the morning of September 16, 1999 and ultimately gave a statement, **Applicant's Ex. 1**. This statement does not mention crack, cocaine or drugs, and the statement indicates that Moore had asked Gibson to take him to the hospital and Gibson refused. Gibson, however, claimed that he told officers on the 16th that Moore had asked him to get something for Moore. He recalled members of the Solicitor's Office coming to his residence several days after the 16th, but he thought that they had come to check out the scene and he did not recall speaking to anyone at that time.

[14] He also met with the victim's family and he may have spoken to Terry Hadden.

[15] The computer was erased following the election and before he left the Solicitor's Office in January 2001.

From September 16, 1999 until October 2001, he told officers that Moore had come to his residence asking for help. He told Solicitor Gowdy that crack was involved in Moore's visits to his residence on September 15-16, 1999, because Solicitor Gowdy was the first person to ask him about what the "something" was that Moore wanted Gibson to get for him. On cross-examination, Gibson corroborated his trial testimony about Moore's efforts to get crack from him on credit on September 15, 1999, Moore's statement that Moore was going to "work" on the night of the 15th and Moore's activities with him on the morning of September 16th.[16] Gibson admitted that his recollection of these events was better at the time of Moore's 2001 trial.

Gibson's recollection of his criminal history at the time of the offense was somewhat limited and confusing, and he denied his guilt of several charges for which he was convicted. However, he recalled the March 2000 trafficking charge, as well as his arrest on July 22, 2001, for charges of possession of crack, DUS and failure to stop. He admitted that he was incarcerated at the time of Moore's trial and his recollection was that this was at K.C.I. for a sixty day sentence for third offense DUS. Gibson did not remember being interviewed by either Mr. Morin or Mr. Kelly, even though **Respondent's Ex. 1** clearly reflects that Mr. Skidmore interviewed him during Moore's trial.

Mr. Morin testified that he felt that Gibson's testimony may have hurt the defense, but he did not think that the jury convicted Moore based on Gibson's testimony. Mr. Morin first learned that Gibson had changed his story about a week before trial when the State disclosed that Gibson had now given the story to which he testified at trial. Mr. Morin was unaware that Mr. Mabry

[16] Before this Court, Moore admitted that he had lost his job before September 16, 1999. He also testified that he had met Gibson before the crimes, that he knew that Gibson was involved in crack and that someone could get crack from Gibson, but he denied that he went to Gibson's to buy crack on the 15th. Also, he claimed that he had gone to Gibson's on the 16th to seek medical attention because he knew that Gibson would be awake. As noted above, the Court does not find his testimony credible.

had taken a statement from Gibson but he acknowledged that the prosecution had elicited evidence of this statement on re-direct examination of Gibson. *See* **R. p. 1261**.

Also, he would not have done anything with that statement if he had known that it was given to Mr. Mabry. He further testified that the June 15, 2001 unsigned memo by an investigator from the Solicitor's Office, **Applicant's Ex. 27**, would not have been shared with him. Still, he thought that it would have been helpful to know that Gibson had been consistent with his account of the events in the past. Although counsel could not recall many details about Gibson's record at the time of the PCR hearing, the State had provided him with a "rap" sheet for Gibson.

Also, the bill from the defense investigator, Mr. Skidmore, reflects that Mr. Skidmore attempted to locate Gibson at Perry Correctional Institution and at Kirkland Correctional Institution on October 12, 2001. On that date, it was discovered that Gibson was in the Spartanburg County jail "waiting to be transported." Further, Mr. Skidmore attended trial on October 19, 2001, where he again interviewed Gibson; he reviewed Gibson's statement and ascertained that Gibson's "answers seemed fairly consistent with report." **Respondent's Ex. 1**.

Mr. Morin noted that the defense had been given a "rap sheet" on Gibson, which reflected the then-current charges that Gibson was facing. Mr. Morin may have been willing to use other pending charges to impeach Gibson's credibility if he could do so under the Rules of Evidence. However, he did not believe that Gibson could be impeached with some offenses that did not carry more than one year, such as a bench warrant for failure to appear. Mr. Morin also did not independently recall whether Gibson was incarcerated at the time of trial; but, in deciding how to deal with Gibson's testimony, he did not think whether Gibson was incarcerated or not was important. Instead, he thought that the pending trafficking charge was important because

even if jurors did not fully understand the statutory definition of this offense, he thought that they would understand that it was a serious offense. Further, he had impeached Gibson with evidence that he was a drug dealer. The jury would either believe this or not. His strategy is not to necessarily use every prior available to impeach. Moreover, the simple possession charge would tend to show Gibson was a possessor of drugs, not a seller.

Susan Porter, Esquire, testified that she was formerly employed as an Assistant Solicitor in the Seventh Circuit Solicitor's Office.[17] The Court finds that her testimony is credible and based upon her testimony finds that Gibson's March 2000 trafficking charge was assigned to her to prosecute. Ultimately, she dismissed it because two officers involved in the case were no longer employed by the Spartanburg Police Department. One of these witnesses, who was necessary to establish chain of custody, had moved to Texas and did not want to come back for the trial. If this had been treated as a second offense trafficking, he would have been looking at between seven and twenty years.

Respondent also introduced **Respondent's Ex. 23**, case histories of Gibson with the dispositions of his charges, through Ms. Porter. These records reflect that the March 2000 trafficking charge was *nolle prossed* in May 2003, as Ms. Porter testified. Also, on the indictment stemming from his July 2001 arrest for possession of crack cocaine (02-GS-42-3146), Gibson pled guilty on May 13, 2003 to second offense possession of powder cocaine and received a three year sentence, suspended upon service of sixty days or payment of $ 200.00, with one year probation.[18]

[17] She is currently General Counsel for SLED.

[18] **Respondent's Ex. 23** further reflects Gibson's post-trial arrest for possession with intent to distribute (PWID) crack on December 15, 2003. Gibson entered a plea to distribution, in connection his charge, on November 30, 2005. The Court notes this charge only because it indicates that Gibson is a crack dealer.

"A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006). Evidence is favorable if it is either exculpatory or impeaching. *See*, e.g., *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Youngblood*, 547 U.S. at 870 (internal quotation marks omitted); *Strickler*, 527 U.S. at 281 ("the term 'Brady violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence;" however, "strictly speaking, there is never a real 'Brady violation' unless the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict"). A "'showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal,'" *Youngblood*, 547 U.S. at 870 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)), but only a "'showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,'" *Youngblood*, 547 U.S. at 870 (quoting *Kyles*, 514 U.S. at 435). The assessment of materiality is made in light of the entire record. *United States v. Agurs*, 427 U.S. 97, 112 (1976).

An individual asserting a *Brady* violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. *Strickler*, 527 U.S. at 282, 119 S.Ct. 1936.

In the present case, the Court finds that the credible evidence - from counsel, Mr. Mabry and the trial record - is that Gibson spoke to police on the morning of September 16th and that he

gave a written statement that day. He did not mention Moore's visit to his house to try and get crack on September 15th in this statement. He also claimed that Moore came to his house on the morning of the 16th to get Gibson to take Moore to the hospital and again did not mention crack.

Gibson thereafter gave a statement to Mr. Mabry several days later that was consistent with the September 16th statement. He subsequently was brought to the Solicitor's Office roughly a month before trial, and he gave the statement to Solicitor Gowdy in which he first disclosed that Moore had been to his house on the night of the 15th looking for crack, and that Moore's reason for returning to Gibson's residence immediately after the murder and armed robbery was to purchase crack.

The Court finds that the substance of this second statement was disclosed to the defense, but not that the second statement was given to Mr. Mabry, since it was elicited by the State and heard by Moore's jury at trial. The Court finds that it is unclear whether or not **Applicant's Ex. 27** reflects that Gibson gave yet another consistent statement because that document is not signed by anyone and because Moore did not present the author thereof at the PCR hearing.

Even assuming that it does reflect another statement, the Court finds that Moore is still not entitled to relief and that Moore has failed to prove that the prosecution violated *Brady* by the nondisclosure of Gibson's statement that was consistent with the September 16th version. First, the Court rejects this allegation because the defense investigator, Mr. Skidmore, attempted to locate Gibson at Perry Correctional Institution and at Kirkland Correctional Institution on October 12, 2001. On that date, it was discovered that Gibson was in the Spartanburg County jail "waiting to be transported." Mr. Skidmore later interviewed Gibson during the course of Moore's trial. *See* **Respondent's Ex. 1**.

Therefore, evidence of these other statements was available to counsel through means other than the State's disclosure of them. "[W]here the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine." *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990) (Government did not have obligation to disclose allegedly exculpatory testimony of witness whom defendant was free to question and would naturally have interviewed in preparation for trial); *see also United States v. Hicks*, 848 F.2d 1, 4 (1st Cir.1988) (Government need not disclose details of a witness' grand jury testimony when defendant is aware of the grand jury witness and has access to interview that witness and have the witness testify at trial); *United States v. Grossman*, 843 F.2d 78, 85 (2nd Cir.1988) (concluding that no *Brady* violation occurred when defendant " 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information' ").[19]

More importantly, in light of the entire record, *Agurs*, 427 U.S. at 112, the Court finds that there cannot be a *Brady* violation because Moore has failed to demonstrate the materiality of the suppressed evidence by "'showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Youngblood*, 547 U.S. at 870 (quoting *Kyles*, 514 U.S. at 435). The Court finds that Gibson was a collateral witness, rather than an eyewitness such as in *Riddle*, and that his credibility was thoroughly assailed by defense counsel, through cross-examination and closing argument.

[19] The Court finds that the present case is thus distinguishable from *Riddle v. Ozmint*, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006), where the Court rejected the State's argument that impeaching information with respect to an eyewitness' account could have been learned through interviewing the officer who took notes of the inconsistent statement. The Supreme Court found that it was "unrealistic to require petitioner and his attorneys to reinterview all officers and investigators in the days before the trial," *Id.* Here, however, Gibson was a collateral witness. Also, the defense was obviously aware that Gibson was incarcerated and knew where he was located. Moreover, Mr. Skidmore had, in fact, interviewed him during trial. Thus, this Court finds that counsel could have learned details about other statements Gibson had given and his criminal history that could be used for impeachment in this interview.

Further, one of the two allegedly undisclosed statements was, in fact, disclosed to the defense: his statement to Mr. Mabry several days after the murder. The fact that there was no disclosure that this statement was made to Mr. Mabry is not important to whether the prosecution violated *Brady*, since the statement's existence was brought out at trial and counsel was able to effectively use it for impeachment purposes, as demonstrated. *See State v. Kennerly*, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct.App.1998); *Sheppard v. State*, 357 S.C. 646, 660, 594 S.E.2d 462, 470 (2004) (finding no *Brady* violation when defense counsel was given witness's statements in time for cross-examination, and, thus, there was not a reasonable probability the outcome of the trial would have been different had the statements been disclosed prior to trial).

Additionally, there was overwhelming evidence establishing that Moore was guilty of murder, assault with intent to kill (AWIK), armed robbery and possession of a firearm during the commission of a violent crime as noted from the facts presented in a previous section. Any impeachment of Gibson does nothing to impeach or otherwise lessen the impact of Hadden's eyewitness testimony.[20] Given the strength of his identification of Moore and the physical evidence circumstantially corroborating it, Moore cannot prove that the undisclosed statement was material under Brady and the Court rejects this claim. *See State v. Gunn*, 313 S.C. 124, 136-38, 437 S.E.2d 75, 82 (1993) (given abundance of other evidence detailing witness' disrespect for law, defendants could not show failure to disclose evidence witness bribed or attempted to bribe magistrate was "material" under *Brady*). *See also Mills v. Singletary*, 161 F.3d 1273, 1288 (11th Cir. 1998) (defendant's Sixth Amendment right to confront witnesses is satisfied where the cross-examination permitted exposes the jury to facts sufficient to evaluate the witness' credibility and "enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable").

[20] Indeed, Moore does not challenge identity in PCR.

Further, the Court rejects Moore's alternative argument that counsel's cross-examination and impeachment of Gibson was ineffective because the existence of the June 2001 statement was not presented to the jury. The Court finds that counsel's performance was not deficient and that counsel's chosen manner for impeaching Gibson was objectively reasonable under *Strickland*. "[D]ecisions whether to engage in cross-examination and if so to what extent and in what manner, are . . . strategic in nature" and will not support an ineffective assistance claim." *United States v. Nersesian*, 824 F.2d 1294, 3121 (2nd Cir. 1987); *see also Hunt v. Nuth*, 57 F.3d 1327, 1333 (4th Cir.1995) (refusing to indulge in a "grading of the quality of counsel's cross-examination"); *Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978).

"In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." *Willis v. United States*, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel. *Yarrington v. Davies*, 779 F.Supp. 1304, 1308 (D. Kan. 1991), *aff'd*, 992 F.2d 1077 (10th Cir. 1993). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. *Dyer v. Crisp*, 613 F.2d 275 (10th Cir. 1980). In the present case, counsel did cross-examine and thoroughly impeach Mr. Gibson - just not in the manner that Moore and his collateral attorneys suggest that he should have. This does not show deficient performance under *Strickland* because "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689.

More importantly, the Court finds that he cannot show any prejudice resulting from counsel's alleged errors because, for the same reasons that he has not established materiality under *Brady*, he cannot prove that "[c]ounsel's errors [were] 'so serious as to deprive [him] of a fair trial, a trial whose result is reliable.'" *Richter*, 131 S.Ct. at 787 (quoting *Strickland*, 466 U.S. at 687).[21]

2. Gibson's pending charges.

Moore further alleges that the State failed to disclose that Gibson "was incarcerated at Allendale Correctional Institution and was brought to Spartanburg to testify at the solicitor's direction. Defense counsel was never told that Mr. Gibson was also out on bond for a July 2001 possession of crack arrest, although the State had informed counsel of Gibson's 2000 trafficking in crack charge that was still pending at the time of Moore's trial." The Court finds that there is no *Brady* violation and that Moore has alternatively failed to establish either deficient performance or prejudice under *Strickland*.

Initially, the Court finds that there was no violation of *Brady* because the prosecution had provided counsel with a rap sheet for Gibson that accurately reflected Gibson's then-pending charges. *See Kennerly*, *supra*; *Sheppard v. State*, *supra*. Also, Mr. Skidmore's report (**Respondent's Ex. 1**) shows that the defense was aware of Gibson's incarceration at the time leading up to the trial and the trial itself. This exhibit further reflects that Mr. Skidmore interviewed Gibson during Moore's trial and may have, or at the very least could have, inquired

[21] Unlike this Court's analysis for alleged *Brady* violations, *see Kyles*, *supra*, the Court will not aggregate any of Moore's ineffectiveness claims and perform a "cumulative prejudice" analysis because every ineffective assistance claim must be analyzed individually. While it is perfectly logical to consider the cumulative effect of failing to disclose evidence under *Brady*, since the determination to be made is whether non-disclosure of evidence deprived the defendant of due process, id. 514 U.S. 419 (1985), the Court finds that the same is not true when focusing upon whether trial counsel rendered ineffective assistance of counsel. Moreover, the Court finds that alleged errors, which are not unconstitutional individually, simply cannot be added together to create a constitutional violation. *See Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998); *United States v. Stewart*, 20 F.3d 911, 917-18 (8th Cir. 1994).

about all of Gibson's pending charges. *See Wilson*, 901 F.2d at 381; *see also Hicks*, 848 F.2d at 4. *Contra Riddle*, 369 S.C. at 44, 631 S.E.2d at 73.

More importantly, in light of the entire record, *Agurs*, 427 U.S. at 112, the Court finds that there cannot be a *Brady* violation because Moore has failed to demonstrate the materiality of the suppressed evidence. *See Youngblood*, 547 U.S. at 870; *Kyles*, 514 U.S. at 435. Again, Gibson was a collateral witness, rather than an eyewitness such as in *Riddle*. Also, his credibility was thoroughly assailed by defense counsel, through cross-examination and closing argument. Further, counsel utilized the pending trafficking charge to impeach Gibson. His credibility was thoroughly impeached.

Thus, he cannot show materiality for any supposed non-disclosure. Additionally, as noted earlier, there was overwhelming evidence establishing that Moore was guilty of murder, assault with intent to kill (AWIK), armed robbery and possession of a firearm during the commission of a violent crime.

Nor has Moore proven ineffectiveness in counsel's handling of Gibson on cross-examination. The Court first finds that counsel's performance was not deficient and that counsel's chosen manner for impeaching Gibson was objectively reasonable under *Strickland*. *See Nersesian*, 824 F.2d at 3121; *see also Hunt*, 57 F.3d at 1333 (refusing to indulge in a "grading of the quality of counsel's cross-examination"). The Court finds that this allegation appears to be primarily based upon the 20/20 vision of hindsight, which almost invariably results in a claim that the cross-examination could have been improved upon. This is not the standard of constitutional effectiveness. *E.g.*, *Willis*, 87 F.3d at 1006. As discussed, *Strickland* does not require counsel to raise every conceivable issue or pursue every avenue of inquiry. Rather, counsel is required only to exercise normal skill, judgment, and diligence. Here, counsel did

cross-examine and thoroughly impeach Mr. Gibson - just not in the manner that Moore and his collateral attorneys suggest that he should have. This does not show deficient performance under *Strickland* because "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689.

More importantly, the Court finds that he cannot show any prejudice resulting from counsel's alleged errors because, for the same reasons that he has not established materiality under *Brady*, he cannot prove that "[c]ounsel's errors [were] 'so serious as to deprive [him] of a fair trial, a trial whose result is reliable.'" *Richter*, 131 S.Ct. at 787 (quoting *Strickland*, 466 U.S. at 687).

3. Counsel's failure to present other witnesses who were at Gibson's residence on September 15-16, 1999.

The Court likewise rejects Moore's claim that counsel was ineffective in failing to investigate the other persons who were present at Gibson's house and present these individuals as defense witnesses. The Court first notes that Moore has not proven that counsel's performance was deficient because the Court finds that he did not prove that any statements from these witnesses were not disclosed by the prosecution and, more importantly, because this Court concludes that counsel were objectively reasonable under *Strickland* in opposing the introduction of evidence that the unemployed Moore had gone to Gibson's house on September 15th and, when informed that he had to have cash to pay for it, later committed the armed robbery and murder before returning to Gibson's home to purchase crack with the stolen money. This in spite of the serious gunshot wound to his arm.

The Court finds that the reasonableness of counsel's performance on this allegation dovetails into the reasons for the Court finding that Moore cannot show prejudice on this claim.

The only witness that Moore presented in support of this allegation was Wilbert Casey. Casey testified that he is Gibson's friend and that he was present at Gibson's residence on September 16, 1999. Moore, who had been shot, came there and someone told him that he needed to go to the hospital. Four or five people were there at the time.

Casey only saw Moore once that evening. Further, he admitted that he was high at the time and did not remember a lot. However, he stated that he had known Gibson for roughly twenty-five years; and he confirmed both that Gibson sold crack and that Gibson's residence was a gathering place to smoke crack. He further corroborated that Moore had asked for Gibson on his visit to Gibson's house. He did not overhear any conversation between Moore and Gibson and his only knowledge of the conversation was based upon what Gibson told him.

There is no prejudice from counsel's failure to present Casey's testimony, which is cumulative to and would have corroborated Gibson's trial testimony. It was not trial counsel's job to corroborate the Gibson's testimony and the State's theory of why the murder and armed robbery occurred. Indeed, the absence of prejudice is demonstrated by the claim in the first part of this allegation, as well as the other allegations in which Moore asserts ineffectiveness in connection with the State's introduction of testimony concerning crack through Gibson and Ms. Smith. The Court finds that Moore cannot show prejudice from counsel's failure to present a witness who is inconsistent both with counsel's chosen theory of defense and Moore's other allegations in collateral proceedings.

Moreover, as stated earlier, there was overwhelming evidence establishing that Moore was guilty of the crimes, including Mr. Hadden's eyewitness testimony and the physical evidence circumstantially corroborating it. Given the strength of his identification of Moore and the physical evidence circumstantially corroborating it, Moore cannot prove a reasonable

probability of a different result but for counsel's failure to present Casey. *See Strickland*, 466 U.S. at 694. *See also Richter*, 131 S.Ct. at 787

GROUND 10(e)

Moore alleges that counsel were ineffective because trial counsel failed to pursue their *Batson v. Kentucky*, 476 U.S. 79 (1986) claim, where Moore's jury was exclusively white; the State struck the only two African-Americans qualified to serve as jurors; and the State's facially race-neutral reasons for striking the two African-American jurors were allegedly pretext. The Court finds that this claim lacks merit.

In the course of jury selection, the State struck white jurors Joyce Smythe (# 251); Debra Perkins (# 213), Charles Kent (# 145) and alternate Edward Huffman (# 132). It struck African-American jurors Joyce Morrow (# 191) and Douglas Alexander (# 2). **R. pp. 1134; 1765.**[22]

Following jury selection, trial counsel Morin made a *Batson* motion, noting that the State had struck the only two qualified African-American jurors. **R. pp. 1134-35.** Solicitor Gowdy explained that the State struck Ms. Morrow because she had withheld information about her criminal record. The Solicitor observed that but for his initial misunderstanding about how the trial judge qualified jurors, he would have moved to have her disqualified for cause "because her answers were, frankly, closer, I thought, to Mr. Rookard's who was disqualified than they were any of the other people who had an innocent mis-recollection." **R. p. 1135, ll. 10-21.**

Solicitor Gowdy further noted that Ms. Morrow also indicated that "she thought guns were used improperly." While some other jurors may have had "reluctance about guns," no other juror stated that they believed guns are "improperly" used. "That's obviously going to be an issue in this case, if the victim was armed." Moreover, she was a school teacher who initially wanted

[22] The jury selection sheet reflects that the State first struck juror Smythe. It then struck jurors Morrow, Alexander, Perkins, Kent and alternate juror Huffman, in that order. **R. p. 1765.**

to be switched to another term, and "only when she was confronted with the fact that she would miss her vacation did she opt to stay." He indicated that the State only wanted petit jurors who wanted to serve. The principle reason for striking her, however was "the withholding of [information about her prior] convictions, and only when confronted with the fact that she had an alias did we begin to get any truthful responses." **R. p. 1135, l. 22-p. 1136, l. 10**.

The State struck juror Alexander because the Seventh Circuit Solicitor's Office prosecuted Mr. Alexander's son for murder. In fact, Solicitor Gowdy 's recollection was that Mr. Alexander was the only juror who had a child incarcerated for murder This is the same reason that the State struck Mr. Huffman, a white alternate juror, who likewise had a close family member prosecuted for murder. Solicitor Gowdy explained that "Mr. Moore is also somebody's son. And we did not want a juror who had recently had a son sent to prison . . . for the charge of murder." Although this was the primary reason for striking him, Solicitor Gowdy stated that his notes reflected that Mr. Alexander had misunderstood a question from the trial judge and he was the only juror who misunderstood that question. **R. p. 1136, l. 11-p. 1137, l. 7**.

The trial judge gave trial counsel an opportunity to show that the prosecution's stated reasons for striking the jurors were pretextual, but Mr. Morin stated that "we can't argue with the State." **R. p. 1137, ll. 8-14**. The trial judge then denied counsel's motion, as follows:

> Given the fact that the state has presented the reasons that they have, and that in accordance with our case law of the State vs. Adams, 322 South Carolina 114, 470 S. E. 2d., 366, a 1996 case, wherein a motion is made to hold a Batson hearing where members of a cognizable racial group or gender is struck and the opposing party requests a hearing, that was done by the defendant. The second step of the analysis requires only a race neutral explanation by the proponent of the strike.
>
> Mr. Morin and Mr. Kelly, it's my understanding that you have accepted those reasons. I do find, by the way, that they are race neutral reasons, and, as such, . . . these strikes were not just pretext. And, as such, the motion is denied.

R. p. 1137, l. 15-p. 1138, l. 3.

Trial counsel testified in connection with this issue, as did Mr. Willingham, who was the Deputy Solicitor at the time of trial and part of the prosecution team.[23] The Court finds that their testimony is credible and that counsel's testimony is credible as to all of the issues addressed herein. In light of this credible testimony and the trial transcript, the Court finds that Moore has not proved either deficient performance or prejudice under *Strickland*.

Under *Batson* and its progeny, "parties are constitutionally prohibited from exercising peremptory challenges to exclude jurors on the basis of race, ethnicity, or sex." *Rivera v. Illinois*, 129 S.Ct. 1446, 1451 (2009). As the South Carolina Supreme Court explained in *State v. Rayfield*, 369 S.C. 106, 112, 631 S.E.2d 244, 247 (2006):

> "The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender." *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). "The purposes of *Batson* and its progeny are to protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venireperson's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process." *State v. Haigler*, 334 S.C. 623, 628-29, 515 S.E.2d 88, 90 (1999). Both the State and defendants are prohibited from discriminatorily exercising a peremptory challenge of a prospective juror. *Georgia v. McCollum*, 505 U.S. 42, 58, 112 S.Ct. 2348, 2358-59, 120 L.Ed.2d 33 (1992).
>
> We set forth the proper procedure for a *Batson* hearing in *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996) (citing *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)). After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation. This explanation is not required to be persuasive or even plausible. Once the proponent states a reason that is race-neutral, the

[23] The Court rejects Moore's claim that Mr. Willingham's testimony is irrelevant to the question of whether the State properly exercised his strikes and that "[o]nly Solicitor Gowdy knows why he exercised strikes against African-Americans in a certain way, and his reasons are set forth in the trial record." The Court finds that Mr. Willingham had input into and actively participated in the State's decision of which jurors to strike and, as a result, was permitted to testify about the reason for the State's use of its strikes, even though the Solicitor stated those reasons in the *Batson* hearing. Mr. Willingham's testimony and **Respondent's Ex. 26** (his folder for juror Morrow) corroborate the State's use of its challenges at trial.

> burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race were seated on the jury or the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment. *Adams*, 322 S.C. at 123-24, 470 S.E.2d at 371-72; *Haigler*, 334 S.C. at 629-30, 515 S.E.2d at 90-91.

See also Rice v. Collins, 546 U.S. 333, 338 (2006).

Further, "in *Batson* inquiries, 'the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed.' Because there is rarely any direct evidence of the attorney's state of mind when he made the challenge, 'the best evidence often will be the demeanor of the attorney who exercises the challenge.' This type of credibility assessment lies 'peculiarly within a trial judge's province.'" *Byram v. Ozmint*, 339 F.3d 203, 208 (4th Cir. 2003) (*citing Miller- El v. Cockrell*, 537 U.S. 322, 340 (2003)). *See also Batson*, 476 U.S. at 98 n. 21 ("Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because the finding 'largely will turn on evaluation of credibility'").

Initially, the Court finds that Moore has failed to prove deficient performance based on counsel's failure to argue the reasons proffered by the State for striking jurors Morrow and Anderson were, in fact, pretextual. The Court finds that Mr. Morin, who was primarily responsible for handling the guilt phase, made a reasonable strategic decision not to further argue the *Batson* motion because, based upon his knowledge of the record, the reasons proffered by the State were race-neutral.

Counsel had obviously participated in the lengthy voir dire process and he was aware of the jurors' responses to the questions posed as well as the jurors' demeanor. With respect to juror Morrow, counsel had witnessed the following exchange between Mr. Willingham and Ms. Morrow:

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Q And . . . on the questionnaire it does say have you or any other family member been arrested, charged with a crime other than minor traffic offenses, and you indicated yes. And in parenthesis you put gambling or drugs. Who was that convicted of those?

A Can I put what?

Q Let me show you what I believe is your questionnaire. Question number 23, "Have you or any family member been arrested or charged with a crime other than a minor traffic offense?" You put yes. "If so, please explain." Who was charged with what crime, gambling and drugs? Is that your questionnaire?

A Yes, sir.

Q Okay. I am just trying to find out who was charged.

A Oh, my brother.

Q Your brother. Okay. So you have never been charged with anything.

A Yes, sir.

Q What have you been charged with?

A With gambling.

Q Okay. When was that?

A It was in '85.

Q And - -

A It was expunged.

Q Expunged?

A Yeah.

Q Okay. No other prior convictions that you are aware of?

A No, sir.

Q What happened? I know you said it's already been expunged. But before it was expunged, what happened to the trial? Was it a trial or did you plead guilty?

A No, sir.

Q What happened?

A It was tickets, ball tickets.

Q Okay. Forfeited, is that what happened?

A Yes.

Q Do you think because you have had this prior dealing with the criminal justice system that would in any way effect your ability to be fair and impartial to the state or to the defense?

A No, sir.

Q Ms. Morrow, is your maiden name or prior name Atchison?

A Yes, sir.

Q Okay. And, again, I don't mean to pry more than I have to, but in 1982 did you have an arrest for simple possession of marijuana?

A In 82? Yes, sir.

Q And what happened to that charge?

A It was expunged.

Q But before -- you say it was expunged. What happened?

A It was a fine.

Q And you didn't have a jury trial or anything?

A No, sir.

Q You just again forfeited the bail bond?

A Yes.

R. p. 322, l. 21-p. 325, l. 1.

Counsel was thus aware that juror Morrow consciously withheld information about her prior criminal *conviction* and that she only revealed a prior conviction when the State confronted

her with its knowledge that she was formerly known by the name Atchison. A prior criminal conviction is a neutral reason to strike. *State v. Dyar*, 317 S.C. 77, 452 S.E.2d 603 (1994) (prior prosecution by that particular solicitor's office); *State v. Casey*, 325 S.C. 447, 453, 481 S.E.2d 169, 172 n. 2 (S.C. App. 1997); *Sumpter v. State*, 312 S.C. 221, 223-24, 439 S.E.2d 842, 844 (1994) (prospective juror had a prior DUI involvement). Counsel was also aware that, when asked how the fact that her stepson being killed made her feel, she had stated that "guns . . . used inappropriately[,] . . . wrong things can happen. And that's my feeling that . . . everyone shouldn't be allowed to carry a gun. **R. p. 326.**[24]

Counsel was likewise aware of the following information when he made the decision to accept the prosecution's stated reasons for their strikes as race-neutral. Stacey Gannt (# 94), a white juror who became the second alternate juror, had failed to disclose an arrest for receiving stolen goods during the same year as Moore's trial, but she had apparently misunderstood the questionnaire and did not disclose this because she was *acquitted* of the charge. **R. pp. 904-05.**[25] Further, the State had already struck white juror Edward Huffman (# 132), who was presented as a possible alternate, with the only challenge that it had for alternate jurors. **R. 1765.** Thus, it could not strike Ms. Gantt. Mr. Alexander, an African-American juror, had informed the trial judge that his son, John Alexander, was incarcerated for a Spartanburg County murder that the Seventh Circuit Solicitor's Office had prosecuted. **R. pp. 191-92.** In addition to striking juror

[24] Her stepson had been shot and no one was ever prosecuted for that crime. **R. p. 326.**

[25] When it was explained to her that the information requested in the questionnaire was arrests or convictions of herself or other family members, she immediately responded "that's wrong" in referring to her questionnaire responses and she explained that her uncle had served three or four years for a Spartanburg County shoplifting conviction. **R. pp. 903-04.**

Anderson, the State had struck Mr. Huffman, who was white, based upon its knowledge that he had a brother-in-law who was convicted of murder.[26]

This Court finds that the reasonableness of counsel's acceptance of the reasons given by the State is demonstrated by the trial judge's finding that the State's reasons for striking jurors Morrow and Alexander were race-neutral and not pretext. The trial judge, unlike this Court, heard the jurors' responses to the questions posed and he viewed their demeanor. He also had the opportunity to view the demeanor of the Solicitor when exercising the State's strikes. His finding is entitled to great deference, and on direct review would have been upheld unless clearly erroneous. *Felkner v. Jackson*, 131 S.Ct. 1305, 1306 (2011); *See also Batson*, 476 U.S. at 98 n. 21; *Miller-El*, 537 U.S. at 340-41 ("Deference is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations. ... In the context of direct review, therefore, we have noted that 'the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal' and will not be overturned unless clearly erroneous"). The Court further finds that Moore has not presented it with any sound reason to disturb the trial judge's finding that there was no pretext.

The Court finds that, much like any other objection, a *Batson* motion can be forgone for strategic or tactical reasons, *Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir.1991); *Scott v. Gomez*, No. C-91-2181-SBA, 1993 WL 303728 *2 (N.D.Cal. July 29, 1993). Here, the Court finds that counsel made an objectively reasonable decision under *Strickland* not to contest the State's strikes after hearing the race-neutral reasons offered by the prosecution because counsel did not

[26] Mr. Huffman was the last juror who participated in voir dire. **R. pp. 1131-33.** The precise relationship of the "close family member" who was prosecuted for murder was not revealed until the PCR testimony of Mr. Willingham.

think that those reasons were a pretext for racial discrimination. *See Shabazz v. Com.*, 2006 WL 3751322, 4 (Ky.App., Dec. 22, 2006) (unpublished).

The Court further finds that Moore has not presented this Court with any credible evidence that he was prejudiced by trial counsel's decision. To show prejudice in the context of failing to argue that the reasons proffered by the State were a pretext for racial discrimination, Moore must show a reasonable probability that further argument in support of a *Batson* challenge would have resulted in a different jury. *State v. Pryor*, 2011 WL 1344165, 1 -2 (Ariz.App., Apr. 7, 2011). He has not met that burden. *Id. See also United States v. Franklin*, 157 F.3d 90, 92 (2nd Cir.1998) (finding that petitioner, alleging ineffective assistance of counsel based on his attorney's waiver of *Batson* claim, was unable to meet the requirements of *Strickland* where the challenge was meritless); *Williams v. Duncan*, 2007 WL 2177075, 21 (N.D.N.Y., July 27, 2007) ("Significantly, it is entirely possible that [trial counsel] recognized the futility of the *Batson* challenge and strategically decided to abandon the motion. An attorney's purported failure to pursue a meritless *Batson* claim cannot be the basis of an ineffective assistance of counsel claim") (citing *Franklin*).

In an effort to demonstrate prejudice from the strike of juror Morrow, he points out that the State failed to strike juror Gantt, the second alternate. He ignores, however, that the State had exercised its only challenge for alternates to strike juror Huffman. Further, Ms. Gannt failed to disclose a charge of which she was *acquitted*, but Ms. Morrow was not forthcoming about a prior *conviction*. The Court rejects Moore's contention that the State indicated that Ms. Morrow's use of an alias was one of the reasons for striking her. Rather, it challenged her because she was unwilling to admit her prior marijuana conviction until confronted with the alternate identity.[27]

[27] The Court would note, as did the Solicitor at trial, that the trial judge subsequently excused juror Rookard (# 235) because he had been dishonest in not disclosing a number of arrests and convictions on his questionnaire. Also, the

Further, the State used a peremptory challenge to strike white juror Charles Kent (# 145), who had failed to reveal past offenses, after the trial judge had denied the State's request to strike Kent for cause. **R. pp. 715-18; 1765**. Nor has Moore proved that the State's other reasons for striking Ms. Morrow were pretext.

Although the Solicitor noted that other jurors expressed some concerns over use of firearms, he noted that none had used the term "improperly" in doing so. Moore has not pointed to any other juror that the State accepted who expressed his or her reservations about gun use in this fashion or who had such strong reservations about possessing a weapon. Moreover, because this challenge was based upon an assessment of the juror's concern about gun use, this Court finds that it should defer to the trial judge. Again, he had the opportunity to actually listen to the responses and assess the demeanor of the various jurors when they responded to questioning.

Thus, he was in the best position to determine whether the State's assessment of Ms. Morrow's distrust of gun use was more than fellow members of the venire, whereas this Court must rely solely upon the cold record.[28] Likewise, he has not pointed to any other juror that the State accepted who sought to avoid jury service in this case, only to change his or her mind when informed that such a decision would result in loss of vacation time. The Court further finds that Moore has failed to show pretext in the striking of juror Anderson.

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trial judge informed Mr. Rookard that he would hold a contempt hearing as to the dishonest responses following Moore's trial. **R. pp. 485-92**.

[28] Even if the Solicitor was mistaken in regard to his assessment, the Court finds that Moore has not shown pretext. Rather, the reason proffered was still race-neutral, *see Hurd v. Pittsburg State Univ.*, 109 F.3d 1540, 1546-47 (10th Cir.1997) (finding that a proffered race-neutral explanation for peremptory strike based solely on strike proponent's mistaken belief satisfied the second prong of *Batson* analysis), *abrogated on other grounds, Migneault v. Peck*, 204 F.3d 1003 (10th Cir.2000); *United States v. Watford*, 468 F.3d 891, 912-13 (6th Cir. 2006); and because resolution of this claim rests on credibility, "the best evidence often will be the demeanor of the attorney who exercises the challenge." *Miller-El*, 537 U.S. at 339. For this Court to reverse the trial judge's findings "would require this Court to give greater weight to inferences and assumptions drawn from the cold appellate record concerning what the prosecutor must have known, than to specific credibility determinations made by the [trial judge] . . . with the benefit of firsthand observation." The Court declines to make those inferences and assumptions based upon this record. *Cf. Watford*, 468 F.3d at 914.

To the contrary, he recognizes that Mr. Anderson and Mr. Huffman were similarly situated jurors and that they were of different races. However, he has their races reversed, erroneously asserting that Mr. Anderson was white and Mr. Huffman was African-American. More importantly, he ignores that the prosecution struck both men (**R. p. 1736**) and for the same reason: a close family member of each juror was prosecuted by the Seventh Circuit Solicitor's Office for murder. *See* **Applicant's proposed Order, pp. 4, 17**. As noted, this is a race-neutral reason for exercising for the State's exercise of its peremptory challenges. *See Casey*, 325 S.C. at 453, 481 S.E.2d at 172 n. 2; *Sumpter*, 312 S.C. at 223-24, 439 S.E.2d at 844. Further and as noted, the State had already exhausted its peremptory challenges by the time Ms. Gantt was presented and, therefore, it could not strike her.

As a result, Moore has not established a reasonable probability that further argument in support of a *Batson* challenge would have resulted in a different jury. Therefore, the Court finds that Moore has failed to prove either deficient performance or resulting prejudice under *Strickland* based upon counsel's failure to assert that the prosecution's stated reasons were, in reality, pretextual.

GROUND 10(f)

Moore further contends that trial counsel were ineffective for not preserving their objection to the trial judge's refusal to give a jury charge on voluntary manslaughter. Alternatively, he maintains that, if "the issue of the trial judge failing to give a voluntary manslaughter charge was properly preserved, appellate counsel was ineffective in failing to raise this issue on direct appeal." The Court finds that he has failed to prove either deficient performance or resulting prejudice on the part of trial counsel because counsel requested a voluntary manslaughter charge that was denied by the trial judge, and because there was no

evidence to support the requested instruction. The Court further finds that he has not established ineffectiveness on the part of appellate counsel because there was no evidence to support the requested instruction.

1. Trial counsel's performance.

At the charge conference, Mr. Morin requested a voluntary manslaughter charge because, "there is evidence that the victim produced the weapon, which certainly would be legal provocation. And there is evidence as to whether or not he was shot, which would be sudden heat of passion." **R. p. 1526, ll. 7-11**. The State opposed the requested charge. Citing to *State v. Tucker*, 324 S.C. 155, 171-72, 478 S.E.2d 260, 268-69 (1996) and *State v. Tyson*, 283 S.C. 375, 323 S.E.2d 770 (1984), the Solicitor argued that there was no evidence of voluntary manslaughter. "I can't recall a single shred of evidence that would tend to show that this was a killing based on sufficient legal provocation or heat of passion. It's either murder, or it's not." **R. p. 1526, ll. 15-23**.

In response, Mr. Morin argued that "there is no doubt that Mr. Mahoney started out armed with all of these weapons. That is not an issue." He further argued that Jamie Mahoney "produced the weapon," and that all that was in question was "whether or not Mr. Moore was . . . shot before he fired any rounds at Mr. Mahoney." It was Mr. Morin's theory that "if Mr. Mahoney produces a weapon, a gun, that's legal provocation itself. But once Mr. Moore is shot and he reacts, that's certainly in sudden heat of passion. Being shot, I think, covers this heat of passion." **R. p. 1527, ll. 3-14**.

The Solicitor, however, argued that the only evidence "on this point comes from Terry Hadden who was unequivocal in saying that Richard Moore fired the first shot." Relying upon *Tucker*, *supra* for the proposition that "'[e]vidence that the victim was defending himself from an

armed robbery and got killed in this process is not sufficient legal provocation to warrant a voluntary manslaughter charge,'" the Solicitor argued that "even under the facts Mr. Morin just laid out, the only evidence is that Mr. Moore grabbed Mr. Mahoney's hands before anything else happened." Mr. Mahoney was entitled to defend himself and to defend the store. As a result, a manslaughter instruction would be improper. **R. p. 1527, l. 15-p. 1528, l. 13.**

After the trial judge had re-read *Tucker* and *Tyson*, the trial judge denied the request to charge, as follows:

> I think from my, from my recollection of the, of the testimony, the thing that Mr. Hadden testified to was that when he heard the quote, "What the hell do you think you are doing," then he turned to see what was going on. The first shot was fired at him. And the hands were held.
>
> And I think that the Tucker case, as well as the Tyson case, both stand for the proposition that evidence that a victim was defending himself from an armed robbery and got killed in the process is not sufficient legal provocation to warrant a voluntary manslaughter charge.
>
> Quite frankly, I don't know of any testimony that is persuasive to me that would cause me to charge voluntary manslaughter. And, as a result, your request is denied.

R. p. 1528, l. 25-p. 1529, l. 12.

Mr. Morin objected to the failure to charge manslaughter and he argued that there was no testimony that a robbery was in progress before the guns were drawn. Rather, he asserted that this was an assumption that the Solicitor was making. The trial judge observed that this was a circumstantial evidence case and that he would give a circumstantial evidence charge. **R. p. 1529, l. 17-p. 1530, l. 3.**

Thus, the Court finds that counsel were not deficient under *Strickland* because they requested a voluntary manslaughter instruction but it was denied by the trial judge based upon the absence of evidence to support it. They thus perfected the issue of whether he was entitled to

a manslaughter charge for appellate review and further objection unnecessary. *State v. Johnson*, 333 S.C. 62, 64 n. 1, 508 S.E.2d 29, 30 n. 1 (1998) ("neither our opinion in [*State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996)] nor Rule 20(b), SCRCrim.P. (notwithstanding requests to charge, party must object to the giving or failure to give an instruction before the jury retires. Failure to do so constitutes a waiver of objection) have altered the long-standing rule that where a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at conclusion of the court's instructions"). The Court further finds that there was neither deficient performance nor prejudice because, as more fully discussed *infra*, there is no evidence in the trial transcript that supports the requested charge.[29]

2. Appellate counsel's performance.

The Court rejects his claim that appellate counsel was ineffective because the Court finds that there was no evidence presented at trial that the killing was "in the sudden heat of passion" or "upon sufficient legal provocation," as required for a manslaughter charge.

A defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). "[R]eviewing 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). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, since "[t]here can hardly be any question

[29] Based upon counsel's PCR testimony, the Court finds that, although Moore provided counsel with differing accounts of the incident in their numerous pretrial meetings, he told counsel, in a June 25, 2001 meeting, that he had been drinking all day on September 16th, 1999 and that had used crack that evening. He never told counsel that he had the intent to rob Nickki's when he entered the store and he relayed a story to them that was similar to his PCR testimony: he claimed that the trouble began after he entered the store because of a dispute with Mr. Mahoney. The Court further finds that counsel advised Moore of his right to testify, that his testimony might permit a jury instruction on voluntary manslaughter or provide a possible defense to the charges, and that the defense might not be able to receive a jury instruction on voluntary manslaughter if he did not testify. Also, Mr. Morin expressly advised Moore that he should testify, but Moore repeatedly refused to do so.

about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." *Jones v. Barnes*, 463 U.S. 745, 752 (1983). To obtain relief a PCR applicant must prove "that his counsel was objectively unreasonable in failing" to identify and argue present significant and obvious issues on appeal, and "a reasonable probability that, but for his counsel's unreasonable failure . . ., he would have prevailed on his appeal." *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (citation omitted).[30]

The Supreme Court in *Robbins* recognized that, "[n]otwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim" on direct appeal. However, "it [will be] difficult to demonstrate that counsel was incompetent." *Robbins*, 528 U.S. at 288. "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" *Id* (quoting *Gray*, 800 F.2d at 646). *See also Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000) (en banc). Moore, who did not present the testimony of his appellate counsel, Mr. Savitz, even though he has the burden of proving his allegations under *Strickland*, cannot overcome the presumption that his appellate counsel "decided which issues were most likely to afford relief on appeal," *Pruett*, 996 F.2d at 1568, because the trial judge properly found **(R. pp. 1528-29)** that no evidence supported a manslaughter instruction.

The law to be charged to the jury is to be determined by the evidence presented at trial. *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989); *see also State v. Dennis*, 468 S.E.2d 674 (S.C. Ct.App.1996). If there is any evidence to warrant a jury instruction, the trial judge

[30] *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) (When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal"). *See also Smith v. South Carolina*, 882 F.2d 895, 899 (4th Cir.1989) (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims").

must, upon request, give the instruction. *State v. Starnes*, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010); *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). However"[t]he trial court should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser rather than the greater offense." *Tucker*, 324 S.C. at 170, 478 S.E.2d at 268.

South Carolina defines "murder" as the "killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10. "Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998). It is the doing of a wrongful act intentionally and without just cause or excuse. *Tate v. State*, 351 S.C. 418, 570 S.E.2d 522 (2002).

On the other hand, voluntary manslaughter is an "unlawful killing of a human being in a sudden heat of passion upon sufficient legal provocation. S.C. Code Ann. § 16-3-50 (Supp. 2011); *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001); *State v. Walker*, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). Both heat of passion and sufficient legal provocation must be present for the killing to constitute voluntary manslaughter. *State v. Cole*, 338 S.C. 97, 101-02, 525 S.E.2d 511, 513 (2000).

> A defendant is not entitled to a voluntary manslaughter charge merely because he was in a heat of passion. *See* [*State v.* Wharton, 381 S.C. 209, 215, 672 S.E.2d 786, 788 (2009)]. (holding the State's request for a voluntary manslaughter charge was not warranted where there was no evidence of sufficient legal provocation, although the defendant may have been acting under heat of passion). Conversely, a defendant is not entitled to voluntary manslaughter merely because he was legally provoked. *See State v. Pittman*, 373 S.C. 527, 576, 647 S.E.2d 144, 170 (2007) (holding although sufficient legal provocation arguably existed, there was no evidence the defendant was in a heat of passion). Moreover, there must be evidence that the heat of passion was caused by sufficient legal provocation.

Starnes, 388 S.C. 590, 596-97, 698 S.E.2d at 608.

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Voluntary manslaughter mitigates an otherwise felonious killing, and while the elements of passion and provocation need not be of such a degree so as to dethrone reason entirely, or shut out knowledge and volition, they must "be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce that, according to human experience, may be called an uncontrollable impulse to do violence." *Walker*, 324 S.C. at 260, 478 S.E.2d at 281 (citing *State v. Byrd*, 323 S.C. 319, 474 S.E.2d 430 (1996)). *See also State v. Smith*, 391 S.C. 408, ___, 706 S.E.2d 12, 14-15 (2011).

Here, the record is completely devoid of any evidence to support the argument that the killing was "in a sudden heat of passion upon sufficient legal provocation." To the contrary, the State presented evidence that reasonably tended to demonstrate that the crimes for which Moore was charged were motivated by his desire to obtain money with which to purchase crack cocaine. This included evidence that Moore went to George Gibson's residence between 8:00 and 10:00 p.m. on September 15, 1999, and he asked Gibson to get him some crack cocaine. Gibson refused because Moore did not have any money and he would not give Moore any crack on credit. Then, Moore, who was unemployed at the time, told Gibson he was going to work and would return the following morning. He then left. **R. pp. 1245-48; 1253; 1255; 1371-72.**

Even though the victim shot Moore in their exchange of gunfire and Moore was bleeding profusely, Moore did not try to go to the hospital. Instead, he took over $ 1,400.00 from the store and he drove straight to Gibson's house. Once there, he, again, sought to purchase crack cocaine. **R. pp. 1211; 1262-64; 1267; 1312-13; 1352-54; 1466-69; 1478.** Gibson refused because of the late hour. During their conversation, Moore told Gibson, "I done something bad, and I got to go turn myself in, and I got money." **R. pp. 1248-49.** Moore only asked Gibson to take him to the emergency room after Gibson refused to sell him crack and suggested that he needed to go to the

hospital. Gibson refused because he did not want to become involved. When Moore tried to back his truck out of Gibson's driveway, he struck a telephone pole. **R. pp. 1249-50; 1256-57.**

With respect to the shooting itself, the *only* evidence is Mr. Hadden's eyewitness testimony that the first thing that he heard after Moore had entered the store was Jamie Mahoney exclaiming 'What the hell do you think you are doing?' . . . in a loud tone of voice. **R. p. 1205, ll. 9-14.** Hadden swiveled around on his stool to see what was happening. Hadden saw that Moore had grabbed both of Mr. Mahoney's hands and was holding them in one of his hands. Moore then immediately "come around and come up with a gun and told me not to move." Without giving Hadden an opportunity to comply with his directions, Moore fired the .45 caliber semi-automatic (**State's Ex. 3**), which he had taken from the victim's constructive possession, at Hadden. Hadden instantly fell to the floor and played dead. He then heard a number of gunshots but did not count how many were fired. **R. pp. 1204-09; 1215-17; 1288-89; 1424.**

The Court finds that the only reasonable inference from Gibson's testimony and Moore's statement to the emergency room nurse (or EMS personnel) that he had used alcohol and cocaine that night (**R. pp. 1377-78**) is that Moore's motive for the crimes was robbery; to obtain money, so that he could buy crack. However, even if this Court was to ignore the remainder of the State's case and this evidence of motive, it is clear that Moore did not kill the victim "in sudden heat of passion" that was "caused by sufficient legal provocation" because there is no evidence that the victim - who was much smaller in stature than Moore, had bad eyesight and arthritis in both hands - did anything to provoke Moore. *Starnes*, 388 S.C. 590, 596-97, 698 S.E.2d at 608.

The victim clearly had a right to defend himself and the store from Moore's efforts to rob it. *See State v. Ivey*, 325 S.C. 137, 481 S.E.2d 125 (1997) (voluntary manslaughter charge not required when there was evidence the victim, who was a law enforcement officer, was acting

lawfully and had a right to defend himself); *Tucker*, (victim's attempt to defend herself from a crime could not give rise to legal provocation); *Tyson*, 283 S.C. at 379, 323 S.E.2d at 772 (the trial court properly refused to charge the jury on voluntary manslaughter because evidence of a struggle as the victim resisted an armed robbery showed that the victim was defending himself).

Nor does evidence that the victim was initially armed with both weapons or that he may have produced a weapon first constitute sufficient legal provocation. The Court finds that the record does not clearly reflect that the victim first produced the weapon. It is equally possible that Moore may have somehow discovered the .45 laying under the towel next to the cash register. Yet, even if the victim did first present the .45, it is clear that Moore had managed to take that weapon away from him and completely subdue him before any shots were fired. Further, the *only* evidence is that the victim did not shoot at Moore, until after Moore had fired a shot at Hadden. Again, the victim had the right to defend Mr. Hadden.

Thus, whether Mr. Mahoney was acting to defend himself, the store or Hadden, he was acting lawfully when he finally fired his .44 caliber weapon at Moore, and there could not be sufficient legal provocation. As a result, assuming *arguendo* that heat of passion existed,[31] any heat of passion that he may have been under was not caused by sufficient legal provocation and he was not entitled to a manslaughter charge. *Starnes*, 388 S.C. 590, 597, 698 S.E.2d at 608. Therefore, Moore cannot prevail on his claim that appellate counsel was ineffective because has not overcome the presumption of effective assistance of counsel, since the ignored issue was not "'clearly stronger than those presented.'" *Robbins*, 528 U.S. at 288 (quoting *Gray*, 800 F.2d at 646).

GROUND 10(j)

[31] The Court does not find any such evidence in the record. Rather, the record demonstrates that the victim acted lawfully at all times.

Ground 10(j) is that Moore received ineffective assistance of appellate counsel because counsel failed to argue on appeal the trial judge's supposed "error in admitting the testimony of State's witnesses George Gibson and Jeanie Smith as res gestae witnesses." Once again, the Court finds that Moore has failed to show deficient performance or prejudice.

1. Gibson's testimony.

Prior to the guilt phase, lead trial counsel, Mr. Morin, moved to exclude testimony from Gibson related to Moore's efforts to purchase crack from Gibson and a nurse's testimony that he had crack in his system. Mr. Morin argued that "[u]p until last week when I received the state's supplementary notices of additional evidence in support of aggravating circumstances, this wasn't an issue." However, in the State's "listing of some of their witnesses the issue about Mr. Moore's alleged drug use in or around the time of this incident, they indicated in here there were two specific people who have given statements, but apparently they have supplemented their statements at some point, which I do not know, but apparently they have, because the summaries that they have given me had in it information that I hadn't previously received." He argued that this evidence should be excluded because the State could not establish a sufficient nexus between the crimes with which Moore was charged and his drug use. **R. pp. 1149-51; 1153-54.**

The State explained the substance of Mr. Gibson's proposed testimony and argued that the evidence was relevant and admissible, citing *State v. Dickerson*, 341 S.C. 391, 535 S.E.2d 119 (2000) (prior bad acts evidence of defendant's drug use during time period of murder was admissible under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) and as part of the *res gestae* of the crime charged). **R. pp. 1151-52.** The trial judge was inclined to rule that the testimony was admissible, but he deferred his ruling until after hearing an *in camera* proffer of Gibson's testimony. **R. pp. 1153-54.**

The trial judge later addressed the admissibility of Gibson's testimony *in camera*. Gibson testified that he knew Moore by the name of "Mo" in September 1999. Mo came to Gibson's residence between 8:00 and 10:00 p.m. on September 15th and he asked Gibson "[t]o get him something," specifically, cocaine. Gibson refused because Moore did not have any money. Moore then told Gibson that "he had to go to work and, he would be back." **R. pp. 1166-68.**

Early the next morning, Gibson heard someone "calling me from the outside, [asking me] to come outside." However, Gibson did not go outside because he was in bed. The person then knocked on Gibson's door. Gibson's roommate came and told him that someone was at the door and wanted to see him. So, Gibson went to the back door, and he saw Moore. Moore told Gibson that "I need for you to do something for me." When Gibson asked what, Moore said, "I need you to get me something." Again, Moore was referring to cocaine, and he told Gibson that he had some money. **R. pp. 1168-71.**

When Gibson told Moore that it was too late, Moore said, "well, look, I been hurt . . . and I need something bad, I got to go turn myself in." Gibson could see that Moore was bleeding badly and he asked Moore what had happened. Moore said "he had been shot, . . . he had to go turn [himself] in." Gibson told him to go to the emergency room and Moore asked Gibson "to take him, go with him to the emergency room, but . . . I got kinda panicked, because I was scared . . . and I didn't want to get involved, because he was shot." **R. pp. 1169-70.**

Gibson convinced Moore that Moore could drive himself to the hospital and Moore got into his truck. "[H]e was backing out of the yard, and I guess he backed into the post. And at that time there was a county car coming up the street, so he got out of the car and he said I give up, going to turn myself in, and that was it." Gibson witnessed this from his front yard. **R. p. 1170.**

On cross-examination, Gibson testified that a Steve Knight and Wilbur Casey had spent the night at his house that night, and that Casey was the roommate who had gone to the front door. Gibson spoke to the police that night. He acknowledged at trial that he had not told them everything that had occurred "[b]ecause I was afraid of getting involved because of the cocaine thing." (Sic). On September 25, 2001, however, he told the story that he gave at trial to the Solicitor and Mr. Barnette. He indicated that this was the truth. **R. pp. 1171-73**.

Following Gibson's testimony, Mr. Morin argued that Gibson had testified that Moore went to his residence on two occasions and asked Gibson "for some stuff," which Gibson understood to be cocaine. However, Gibson did not testify that Moore asked him for cocaine. Also, Gibson "never saw any monies. He never knew whether or not Mr. Moore had any money." Further, Moore's first visit to Gibson's house was seven or eight hours before "the incident." Mr. Morin argued that "this vague recollection [Gibson] has about something that happened almost eight, or more than six hours, almost eight hours prior to anything happening is not a significant enough connection to what happened at the store to be able to say that it's part of this crime." **R. pp. 1174-75**.

The Solicitor responded by noting that his research revealed cases where the conduct admitted as part of the *res gestae* occurred more than twenty-four hours before the criminal conduct for which the defendant was on trial. He also observed that Gibson testified that Moore come to Gibson's house "looking for cocaine and said he had no money. He came back immediately after robbing this store, shot in the arm, bleeding and wanted cocaine and had money. And I think that that is part of the context of the crime." **R. pp. 1174-75**.

The trial judge specifically rejected the argument that Moore had not gone to Gibson's house looking for cocaine and he ruled that Gibson's testimony was admissible:

Well, sir, I think that his testimony and his credibility is going to speak for itself. I don't believe that from what I have been able to observe from Mr. Gibson that he was selling M & M's or lollipops down there that there would be any confusion about.

It sounds to me like he was a dope dealer, and, you know, that's something that the jury will have to sort out. I think that the case of the State vs. Dickerson is instructive, because it gives an analysis by the Chief Justice of that case, and then also cites back to the case of the State vs. Adams. The case of the State vs. Adams is 322 S. C., 114, 470, S. E. 2d., 366, a 1996 case wherein there was, I think, a series of robberies that were involved, people using the money to buy drugs.

I believe that from my finding or from my review of the cases here that the evidence not only meets the issues that I would consider under, let's say, a Lyle analysis but also would meet a res gestae analysis . . . ; and then also Rule 403 when we look at that, I find that this evidence is clear and convincing in my mind to fall within the exception and that it is probative and outweighs any danger of unfair prejudice to the defendant.

I believe that the issues presented here are such that allow me to allow the state to introduce this evidence.

R. p. 1175, l. 16-p. 1176, l. 14.

The record demonstrates that Mr. Morin did not interpose an objection at the time of Gibson's testimony before the jury. **R. pp. 1245-53**.Thus, the issue of whether his testimony was admissible was not preserved for appellate review because an *in limine* ruling is not final and does not preserve the issue for appeal. *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993).[32] The Court therefore finds that Moore cannot meet his burden of showing either deficient performance or prejudice of appellate counsel under *Robbins*.

Even assuming *arguendo* that the issue of the admissibility of Gibson's testimony was preserved for appellate review, the Court finds that Moore has not met his burden of proof. Generally, "'[i]n criminal cases, an appellate court reviews errors of law only and is bound by

[32] An exception to this rule is recognized only where the *in limine* ruling is made immediately before where the motion is ruled on immediately prior to the introduction of the evidence in question. In that situation, no further objection is necessary. *See State v. Tufts*, 355 S.C. 493, 497, 585 S.E.2d 523, 525 (Ct.App. 2003); *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct.App.1998).

the factual findings of the trial court unless clearly erroneous.'" *State v. Bixby*, 388 S.C. 528, 541, 698 S.E.2d 572, 579 (2010) (quoting *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007)).

In *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996) the Supreme Court cited, with approval, the following quotation from the Fourth Circuit Court of Appeals' decision in *United States v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980):

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with an explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the '*res gestae*'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...' [and is thus] part of the *res gestae* of the crime charged." And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "*res gestae*."

Adams, 322 S.C. at 122, 470 S.E.2d at 370-71 (citations omitted from original). *See also State v. Sweat*, 362 S.C. 117, 132-33, 606 S.E.2d 508, 516-17 (Ct.App. 2004); *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001); *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999); *State v. Gagum*, 328 S.C 560, 492 S.E.2d 822 (Ct. App. 1997).

This Court finds that appellate counsel was not deficient in failing to challenge the trial judge's ruling that Gibson's testimony was admissible as part of the *res gestae* of the charged offenses because the trial judge's ruling in this regard was correct. Gibson's testimony of Moore's efforts to acquire cocaine from him places the murder and robbery of Jamie Mahoney in context. Also, it is so intimately connected with and explanatory of the crimes charged against Moore and is so much a part of the setting of the case and its "environment" that its proof is

appropriate in order "to complete the story of the crime on trial by proving its immediate context or the '*res gestae*.'" *Adams*, 322 S.C. at 122, 470 S.E.2d at 370-71.

His testimony was relevant to his state of mind at the time of the offenses, identity of the perpetrator and a motive for the armed robbery and murder: his desire for crack cocaine.[33] The Court rejects the argument that there was not a sufficient temporal connection between Moore's effort to get cocaine from Gibson on the night of September 15th and the murder and armed robbery on the 16th merely because the charged offenses occurred five to seven hours later. First, the Court would note that the appellate courts in this State have upheld the introduction of evidence under the *res gestae* theory where the temporal connection between the conduct admitted as part of the *res gestae* and the criminal conduct for which the defendant was on trial was similar to or less than that here. *E.g.*, *State v. Martucci*, 380 S.C. 232, 257-58, 669 S.E.2d 598, 611-12 (Ct.App. 2008) (prior incidents of defendant's alleged abuse of child in the weeks immediately preceding child's death were admissible, in prosecution for homicide by child abuse); *State v. Benjamin*, 345 S.C. 470, 549 S.E.2d 258 (2001) (evidence concerning convenience store robbery committed by defendant and accomplice approximately five hours after charged murder and armed robbery at another convenience store was admissible as part of res gestae, where weapon that was used and left behind at second convenience store was also the weapon used in charged crimes); *Sweat*, 362 S.C. at 130-32, 606 S.E.2d at 515-16 (passage of two months from date of prior episode of domestic violence and incident in question was not too remote to make evidence of prior act inadmissible).

Further, the facts of this case demonstrate the requisite connection between Moore's two visits to Gibson's house and the crimes at Nikki's so as to support its introduction a part of the

[33] Although Gibson only referred to cocaine *in camera*, his testimony before the jury made clear that Moore wanted crack cocaine.

res gestae. When Gibson refused to get cocaine for Moore because Moore did not have any money, the unemployed Moore told Gibson that "he had to go to work and, he would be back." He committed the charged offenses several hours later. Any doubt about whether proof of the first visit and the reason for that visit was relevant to show the complete, whole, and unfragmented story of Moore's crimes is resolved by Moore's actions immediately after murdering Jamie Mahoney and stealing the $ 1,400.00.

Moore was shot in the arm during the murder around 3:00 a.m. He bled so profusely from this wound that he left a trail of blood from the victim's body to the front door of the store. He also bled on the murder weapon, as well as in the truck and on the driver's side door of the truck. Instead of seeking medical attention for the gunshot wound, however, he immediately drove to Gibson's house and attempted to purchase cocaine with the stolen money. He thought of seeking medical attention only after Gibson refused to get any cocaine for him.

Additionally, the Court cannot say that the trial judge abused his discretion in finding that the State had by proven these other acts by Moore by clear and convincing evidence. "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." *State v. Fletcher*, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008). The Court finds that the proffered evidence in this case met this standard, unlike the evidence introduced in *Fletcher*. Moreover, it was not error for the Court to omit giving the jury a limiting instruction as to its consideration of this evidence, since it was properly admitted as part of the *res gestae*. *State v. Johnson*, 306 S.C. 119, 126-127, 410 S.E.2d 547, 552 (1991).

The Court further finds that the probative value of this evidence was not substantially outweighed by its prejudicial effect under Rule 403, SCRE. Gibson's testimony was extremely probative of placing the murder and robbery in proper context. It was also relevant to establishing identity, Moore's state of mind and motive. The Court finds that the logical connection articulated by the State was sufficiently strong that this probative value was not substantially outweighed by the tendency of the evidence to show propensity, or by some other form of unfair prejudice.

Moreover, even if this Court were inclined to find that the trial judge's ruling was erroneous, the Court finds that any error was harmless beyond a reasonable doubt. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result").

Gibson's testimony was cumulative to the testimony of Jeanie Smith, the emergency room nurse at Spartanburg Regional Medical Center who treated Moore on the morning of September 16, 1999. Ms. Smith testified, without objection, that the notes for her assessment of Moore's injury reflected that "he had alcohol and cocaine present; and that I had noted the odor of alcohol; also that he was disoriented." **R. pp. 1377-78.** Because Gibson's testimony was cumulative to testimony by Ms. Smith, it was harmless. *State v. Haselden*, 353 S.C. 190, 577 S.E.2d 445 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); *State v. Johnson*, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (admission of improper evidence is harmless where it is merely cumulative to other evidence).

Also, there was overwhelming evidence of guilt, separate and apart from the testimony of Gibson or Smith. This evidence included the eyewitness testimony of Terry Hadden (the ATM victim) (**R. pp. 1193-1209; 1309; 1215-17; 1288-89; 1424**); evidence that Moore's DNA was found on the .45 caliber weapon that was used to kill the victim and which Moore had discarded after he left the crime scene; evidence that Moore's blood (established through DNA testing was found on the victim's clothing, the money ($1,408.00) that was recovered from Moore's truck, a meat cleaver that was found at the scene (at the victim's feet) but which did not belong to the business and a trail of his blood leading out of the business (**R. pp. 1271-93; 1305-10; 1352-53; 1364-65; 1368; 1421-32**); and evidence of Moore's admission of "I did it, I did it, I give up, I give up," when Spartanburg County Deputy Sheriff Bobby Rollins came across Moore after the truck had hit the pole. **R. pp. 1238-40; 1311-18**. Given the present record, any error in the admission of Gibson's testimony must be viewed as harmless and non-prejudicial beyond any reasonable doubt. *See Sherard* and *Bailey, supra.*

Finally, the Court notes that Moore has not asserted ineffective assistance of appellate counsel based on the failure to challenge the admissibility of Gibson's testimony under Rule 404(b), SCRE, and *Lyle, supra.* Therefore, he cannot show any prejudice from counsel's failure to challenge the ruling that Gibson's testimony formed part of the *res gestae* because "[w]here the ruling of a trial judge is based on more than one ground, an appellate court must affirm unless the appellant appeals all grounds upon which the ruling was based." *State v. Hicks*, 387 S.C. 378, 379, 692 S.E.2d 919, 920 (2010); *Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993) (where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case). Thus, Moore still cannot "'overcome the presumption of effective assistance of counsel,

since the ignored issue was not "'clearly stronger than those presented.'" *Robbins*, 528 U.S. at 288 (quoting *Gray*, 800 F.2d at 646). He also cannot prove "a reasonable probability that but for this counsel's unreasonable failure...he would have prevailed on his appeal." *Id.* At 285.

2. Smith's testimony.

The Court finds that Moore did not argue this portion of **Ground 10(j)** in his proposed Order. Therefore, he has abandoned his claim that appellate counsel was ineffective for not arguing on appeal that Ms. Smith's testimony was inadmissible as part of the *res gestae* of the charged crimes. Alternatively, the Court finds that Moore has failed to prove deficiency or resulting prejudice under *Robbins* because the issue he now asserts should have been raised was not preserved for appellate review because there was no objection to Ms. Smith's testimony. **R. pp. 1377-78.**

Even if the *in camera* ruling did cover her testimony, however, counsel did not interpose an objection at the time of her testimony and the issue of whether her testimony was admissible was not preserved for appellate review because an *in limine* ruling is not final and does not preserve the issue for appeal. *Schumpert, supra.*

Also, her testimony was admissible for the reasons discussed in **Ground 10(k)** and the State could introduce it without establishing that it constituted part of the *res gestae* of the armed robbery and murder. Because the issue was not preserved for appellate review and was admissible on other grounds than as part of the *res gestae* of the charged offenses, Moore cannot meet his burden of proving ineffectiveness of appellate counsel.

GROUND 10(k)

In his remaining guilt phase claim, Moore asserts that trial counsel were ineffective for not raising a hearsay objection to Ms. Smith's testimony. The Court disagrees and finds that

counsel strategically decided not to object because he correctly recognized that her testimony was admissible.

The credible evidence before this Court is that Mr. Kelly did not object to the introduction of Ms. Smith's testimony because he thought that it was admissible. Also, even if he successfully raised a hearsay objection, he believed the State could call the emergency personnel and present the same evidence. The Court finds that his performance was not deficient under *Strickland* because he correctly viewed her testimony as admissible.

The Court finds that Ms. Smith's personal observations of Moore, such as noting "the odor of alcohol" and "that he was disoriented" did not constitute hearsay. Also, any information that he provided to her was admissible as admissions by him under Rule 801(d)(2)(A), SCRE, or as statements as to his then existing mental, emotional, or physical condition under Rule 803(3), SCRE. The Court finds that Moore has failed to prove that Ms. Smith did not personally acquire this information from him because he did not call her as a witness at the PCR hearing and she testified at trial that "[m]ore than likely," she would have obtained this information from him. **R. p. 1378, ll. 6-9**. *See Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1999) ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice").

More importantly, even if the information in her notes was provided to her by EMS personnel, who had acquired it from Moore, she was properly permitted to testify thereto because the information introduced through her testimony was not barred by the hearsay rule. Rather, it is admissible under Rule 803(4), SCRE, as statements made for purposes of medical diagnosis or treatment. *See Todd v. Joyner*, 385 S.C. 421, 425-426, 685 S.E.2d 595, 597-98 (2009) (affirming trial court's rejection of appellant's hearsay objection to testimony by respondent's doctor about

complaints or statements appellant made to her physicians because medical history was properly admissible under Rule 803(4), SCRE). *See also Gentry v. Watkins-Carolina Trucking Co.*, 249 S.C. 316, 154 S.E.2d 112 (1967) (a patient statements as to his or her present condition made to a physician consulted for treatment are generally admitted as evidence of facts stated); *State v. Ruiz*, 94 NM 771, 774-76, 617 P.2d 160, 163-65 (Ct. App. 1980), *superseded by statute on other grounds as stated in State v. McCormack*, 101 N.M. 349, 682 P.2d 742 (Ct.App.1984).

While Rule 803(4) provides that "the admissibility of statements made after commencement of the litigation is left to the court's discretion," Moore cannot show an abuse of discretion based upon this record because Ms. Smith's testimony was very probative of Moore's state of mind and circumstantially corroborated his motive. This Court further finds that the probative value of her testimony was not substantially outweighed by the tendency of the evidence to show propensity, or by some other form of unfair prejudice. Rule 403, SCRE.

Moreover, even if Moore had established that counsel's failure to object was deficient under *Strickland*, he has failed to establish that he was prejudiced by counsel's error. Ms. Smith's testimony was cumulative to that of Gibson. Also, there was overwhelming evidence of guilt, separate and apart from the testimony of Gibson or Smith. *Strickland*, 466 U.S. at 694. Given this record, Moore simply has not proven "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.[34]

B. Sentencing Phase Allegations.

GROUND 10(a)

Moore's first claim as to counsel's performance in the sentencing phase is that trial counsel were ineffective because they did not object to the trial judge's "erroneous limitation on

[34] Again, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

[Moore]'s right to allocution/ right to address his jury at the end of the penalty phase and/or make a plea for mercy during his penalty phase closing statement. He asserts that their failure to object deprived him "of the fundamentally important right to seek mercy from his sentencing jury." The Court finds that Moore did not prove either deficient performance or prejudice resulting from counsel's alleged error.

As he had in the guilt phase, the trial judge obtained an on-the-record waiver of Moore's right to testify in the penalty phase. **R. pp. 1686-87**. Following a charge conference, the trial judge obtained an on-the-record waiver of Moore's right to personally address the penalty phase jury. The waiver colloquy was as follows:

[THE COURT]: Of course, Mr. Moore, would you stand, please, sir?

(Whereupon, the defendant stood).

THE COURT: As is the case in the sentencing phase, as well as the guilt phase that we have already been through, **you** certainly **have the right**, along with your attorney, **to** have a **closing argument regarding the sentence imposed**.

Now, once again, this is your right, Mr. Moore, to address the jury; and once again, the statement that you would make to the jury would have to be **confined to the evidence** that has been **presented and to the issues concerning the sentence imposed**.

Do you understand that you have this right, sir?

THE DEFENDANT: Yes, sir, I do.

THE COURT: And what is your decision?

THE DEFENDANT: I shall not speak, Your Honor.

THE COURT: You will not speak to the jury?

THE DEFENDANT: No, sir.

THE COURT: But you understand that that is your right?

THE DEFENDANT: Yes, sir.

THE COURT: All right, sir. Thank you very much, Mr. Moore.

R. p. 1713, l. 6 - 1714, l. 1 (emphasis added).

Moore's second issue on direct appeal was that the judge erroneously limited his closing argument "to the evidence that has been presented and to the issues concerning the sentence imposed" because "S.C. Code Sections 16-3-20(C) and 16-3-28 afford a capital defendant the opportunity to ask for mercy and express feelings of remorse."[35] Therefore, he argued that his waiver of sentencing phase closing argument was not knowing and voluntary. *Moore*, 357 S.C. at 464, 593 S.E.2d at 611-12.

The South Carolina Supreme Court, however, found that his "argument is procedurally barred. At trial, Moore did not assert that the trial judge's comments prohibited him from asking for mercy and/or expressing feelings of remorse; he simply advised the court that he did not intend to address the sentencing phase jury. His failure to raise this contention to the trial judge precludes review of the issue on appeal." *Id* at 464-65, 593 S.E.2d at 612 (citing *State v. Perez*, 334 S.C. 563, 514 S.E.2d 754 (1999) and *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991) (issue must be raised to and ruled upon by trial judge to be preserved for appellate review)).

The Court added that:

> Moreover, to the extent the trial court's comment could feasibly be viewed as limiting Moore's ability to express remorse to the sentencing phase jury, the matter is more appropriately addressed in a post conviction relief (PCR) action. As noted above, the only comment made by the trial court was that Moore could address the sentencing jury as to "the issues concerning the sentence to be imposed." This statement arguably encompasses the right to argue remorse and mercy. There is no further explanation of what this sentence means, nor any objection to it. On the present record, it is simply impossible to determine

[35] Section 16-3-28 provides: "Notwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument."

precisely what the trial court meant by this statement, or what Moore understood it to mean. In the PCR context, however, a court could analyze all the facts surrounding the trial to determine if Moore knowingly and intelligently waived his rights under section 16-3-28. *See Franklin v. Catoe*, 346 S.C. 563, 552 S.E.2d 718 (2001) (noting that PCR process is specifically designed to allow for an inquiry into the relevant facts surrounding the adequacy of a defendant's information and/or waiver of rights). Accordingly, given the lack of objection and failure to raise the present issue at trial, Moore's remedy, if any, is through PCR.

Moore, 357 S.C. at 465, 593 S.E.2d at 612.

In *State v. Rocheville*, 310 S.C. 20, 425 S.E.2d 32 (1993), the Court explained that the waiver of last argument should be viewed in light of the facts surrounding the trial. "The post conviction relief process is specifically designed to allow for an inquiry into the relevant facts surrounding the adequacy of a defendant's information and/or waiver of rights." *State v. Cartrette*, 323 S.C. 15, 18, 448 S.E.2d 553, 555 (1994). *See also Franklin v. Catoe*, 346 S.C. 563, 568, 552 S.E.2d 718, 721 (2001).

This Court finds that the only evidence before it is that Moore understood both that he had the right to address the sentencing phase jury in closing argument and that he had the right to express remorse in his argument. Moore testified before this Court that he understood he had the right to make a closing statement in the sentencing phase and that he understood he could express remorse in his argument. He then testified, initially, that his recollection was that he had attempted to express remorse, but that the State objected to his argument. On the other hand, he claimed that he did not make a sentencing phase argument asking for mercy because he was intimidated by the prosecution in the guilt phase.

Although the Court has elsewhere found that Moore's testimony is generally not credible as to the various matters to which he testified, the Court finds that his testimony that he understood that he had the right to express remorse in closing is credible because his testimony is consistent with the PCR testimony of trial counsel. Mr. Morin testified that he advised Moore of

Moore's right to address the jury in sentencing phase closing argument prior to the trial judge's colloquy with Moore, that he advised Moore of Moore's right to ask his jury for mercy and that he informed Moore that he thought that Moore should address the jury at that point. Moore apparently understood their conversation.[36]

Mr. Morin did not object to the trial judge's colloquy with Moore during the on-the-record waiver proceeding or request a recess to further discuss this issue with Moore after the trial judge conducted the on-the-record waiver because his understanding was that the trial judge's explanation of the law was correct. Mr. Kelly agreed that the trial judge's explanation to Moore correctly stated the law relating to a closing sentencing phase argument. Also, Mr. Kelly corroborated that counsel had advised Moore of his right to make a closing argument in the sentencing phase before the on-the-record inquiry by the trial judge. This advice included the right to ask the jury for mercy.

Based upon counsel's credible testimony, the Court finds that Moore has failed to prove deficient performance resulting from counsel's failure to object to the trial judge's remarks during the on-the-record waiver hearing. Indeed, he does not dispute that counsel had advised him of his right to address the jury by way of argument in the sentencing phase; including his right to allocate and that he understood his rights. The Court further finds that counsel had advised Moore of his rights in this regard before the on-the-record inquiry by the trial judge.

Moore further asserts that counsel's failure to object "prevented review of this issue on direct appeal." However, there is nothing in the trial judge's colloquy that incorrectly stated the law governing closing statements or contravened counsel's advice that he could ask the jury for mercy. To the contrary, the trial judge's explanation is consistent with counsel's advice.

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[36] Mr. Morin had advised Moore of the right to address the guilt phase jury, a right that counsel had advised Moore not to assert and which Moore had indicated that he would not assert. However, Moore ultimately addressed the jury in the guilt phase and both attorneys felt that his argument did not make a favorable impression on the jury.

Clearly, the admonition that a closing argument would have to be confined to the evidence presented at trial and to issues concerning the appropriate sentence was proper.[37] First, he could not discuss matters not in evidence, apart from his right to allocate. Second, the purpose of the sentencing phase in a capital trial pursuant to § 16-3-20(B) is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender. *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001); *State v. Shaw*, 273 S.C. 194, 200, 255 S.E.2d 799, 802 (1979). Additionally, the trial judge specifically informed Moore that he had the right to discuss "the issues concerning the sentence imposed." This Court finds that a request for mercy falls within such issues. Because the trial judge's statements did not incorrectly state the law governing closing statements or contravened counsel's earlier advice that properly explained Moore's right to allocution and which he understood, the Court finds that that counsel were not deficient in failing to object and that Moore knowingly, voluntarily and intelligently waived his rights under section 16-3-28.

The Court further finds that Moore has failed to prove any prejudice resulting from counsel's failure to object to the trial judge's remarks. To establish prejudice, he must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In a capital sentencing proceeding, he must prove that "there is a reasonable probability that ... 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." *Strickland*, 466 U.S. at 695. *See also Wiggins v. Smith*, 539 U.S. 510, 537 (2003). The Court finds that he did not meet his burden of proof under *Strickland*.

[37] Any contention that the trial judge improperly limited his argument by stating that any argument "would have to be confined to the evidence that has been presented" (*see* **R. p. 1713, ll. 14-15**), ignores the remaining portion of the trial judge's explanation "and to the issues concerning the sentence imposed." **R. p. 1713, ll. 15-16**.

There was overwhelming evidence that established Moore's guilt of murder and the statutory aggravating circumstances, as discussed above. *See Strickland*, 466 U.S. at 694. Also and as noted, counsel had already properly advised Moore of his rights under § 16-3-28 and Moore understood counsel's advice. Further, while the jury did not hear from Moore, personally, counsel ably argued the defense's case in mitigation. **R. pp. 1726-30**. Counsel's argument was succinct. However, Moore has not raised any allegation as to it and it was more than constitutionally adequate under *Strickland*.

Moreover, he did not allocate to the crime in the PCR hearing and the Court finds that he would not have done so at trial, even if counsel had objected to the trial judge's remarks to Moore or further advised him regarding this right. Although he did testify at PCR that he was sorry that the shooting occurred and that the victim was dead, he did not admit that he had gone into Nickki's with the intent to commit a robbery or that the killing was murder, which the jury had already had found in the guilt phase. In spite of a history of strong armed robberies and theft related convictions, he claimed that the trouble only began after the victim ordered him out of the store in a racially insulting manner and thereafter pulled a .45 caliber weapon on him. Even after he got that weapon away from the victim, the victim produced a second gun and shot at him. This does not constitute allocution. Thus, the Court finds that he has failed to prove prejudice because, based upon this record, the Court is unable to conclude that "the balance of aggravating and mitigating circumstances did not warrant death" if he had exercised his right to address the jury. *Strickland*, 466 U.S. at 695.

GROUND 10(b)

Moore also alleges trial counsel was ineffective in failing to investigate, develop, and present mitigation evidence from family members of Moore. There is no merit to this ground.

This Court viewed and heard the testimony of trial counsel on this issue and finds trial counsel's testimony is credible on this issue. This Court also viewed the video-taped depositions of Moore's family from Michigan. This Court finds their testimony on the issue of their willingness to come to trial and testify to be not credible given this entire record.

It is trial counsel's responsibility to adequately investigate and present evidence in mitigation of guilt. *Williams v. Taylor*, 529 U.S. 362, 395 (2000); *Byram v. Ozmint*, 339 F.3d 203, 209 (4th Cir.2003). However, counsel is only required to make a reasonable investigation for possible mitigating evidence. *Matthews v. Evatt*, 105 F.3d 907, 919 (4th Cir.1997). As the Court emphasized in *Wiggins*,

> we emphasize that *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. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland,* 466 U.S., at 689. *We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation."* *Id.*, at 690-691. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id.*, at 691.

Wiggins, 539 U.S. at 533 (emphasis added). *See also Lovitt v. True*, 403 F.3d 171, 179 (4th Cir. 2005); *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005); *Id* at 157 (Traxler, J., concurring) (citing *Wiggins* and *Strickland*).

The Court finds that counsel's investigation for and presentation of mitigating evidence in the present case was objectively reasonable under the "prevailing professional norms." *Strickland*, 466 U.S. at 686. The record shows that trial counsel investigated and attempted to locate mitigation witnesses for Moore from his family in Michigan. However, Moore was largely uncooperative in their endeavor and initially did not want these members to assist. Additionally,

counsel attempted to develop potential mitigation witnesses in South Carolina through the investigator, Mr. Skidmore, to whom Mr. Morin provided a list of persons to contact. These results were apparently unsuccessful. Ultimately, counsel presented Moore's wife and stepson. Their testimony is discussed elsewhere in the Order.[38]

To assist in obtaining the cooperation of Moore's family members in Michigan, counsel retained Drucy Glass as their mitigation investigator. Ms. Glass is the wife of attorney John Blume, and she has acted as a mitigation investigator in numerous capital cases. Ms. Glass prepared and filed a report with trial counsel regarding her attempts to locate possible family members from Michigan in this case. **Respondent's Ex. 25, Report of Drucy Glass.**

The report indicates that Ms. Glass left numerous messages for Moore's father on his answering machine at Moore's father's residence in Mt. Clemens, Michigan, but that Moore's father did not return Ms. Glass' phone calls. The report also indicates that she sent a certified letter to Moore's father on September 17, 2001. The credible testimony at PCR was that Moore's father did not respond. The Court finds that Ms. Glass' report indicates the reason Moore's father did not respond to either telephone calls or a certified letter: Moore related to Ms. Glass that he had been "cut off" by his family in Michigan. Moore also told trial counsel that he had asked his family for help and he was told "there would be no help coming, and to get myself out of this mess." **Respondent's Ex. 19.**

[38] Although no issue in PCR has been raised concerning counsel's failure to present a mental health defense, or the failure to present expert testimony regarding his crack addiction, the Court notes that the defense had Moore examined by Dr. James Evans, a neuropsychologist, and counsel had contacted a Dr. Alexander Morton, a pharmacologist. Neither expert provided counsel with any information that would assist in mitigating Moore's punishment. Instead, both provided information that would hurt any reasonable efforts to mitigate the sentence for murder. Mr. Morin testified that Dr. Evans felt that Moore had an anti-social personality disorder. The State introduced Dr. Evans' June 22, 2001 report as **Respondent's Ex. 20**. Based upon the findings in the report (such as Moore's denial to Dr. Evans that he had used illegal drugs or alcohol "to any significant degree;" his average score on intelligence testing; and evidence that Moore "showed some evidence of difficulty dealing with emotional responsibility," which he explained to Mr. Morin) and counsel's credible testimony, the Court finds that counsel wisely chose not to present either expert.

Ms. Glass' report indicates why Moore's family would have cut him off. Her report details Moore's life of crime beginning in 1984 with an arrest for receiving stolen goods. In that incident, Moore actually admitted to the victim that he broke into her apartment with another individual. Moore was then arrested in 1985 for possession of a firearm. Moore was placed on two years probation during that year. In 1986, Moore was arrested for armed robbery. Again in 1986, he was arrested for breaking and entering where several guns were stolen. In 1987, he was sentenced to one year probation and three months in jail.

In 1987, Moore was sentenced to one year and six months to five years for attempted breaking and entering. In January of 1988, he was arrested for a probation violation. In September 1988, he was released from prison on parole. He was subsequently arrested in October of that same year for driving with a suspended license. Moore was recommitted to the Michigan Department of Corrections as a "parole violator" in July 1989. He was paroled six months later in December of 1989. In January 1990, Moore absconded from parole. He was returned to the Michigan Department of Corrections on February 20, 1990. Moore maxed out his prison sentence and was released from the Michigan Department of Corrections on August 3, 1991. He then moved to South Carolina one week after his release from the Michigan Department of Corrections. **Respondent's Ex. 25.**

Ms. Glass' report reveals Moore's life of crime did not end once he moved to South Carolina. He was arrested on September 13, 1991 for driving under suspension (DUS) and habitual traffic offender. He was arrested on October 10, 1991 for two counts of assault and battery and two counts of attempted purse snatching. On November 22, 1991, he was charged with common law robbery and strong armed robbery. He was eventually convicted of these charges and received a suspended sentence and probation. In 1992, he was arrested for DUS and

possession of marijuana, for which he received sixty days in jail. In 1993, he was arrested for speeding, DUS, and habitual traffic offender. He eventually received ninety days in jail to be served on weekends.

In 1994, he was arrested for four counts of passing fraudulent checks. In 1994, he was arrested, again, for DUS. In 1995, he was arrested for ABHAN. Also in 1995, he was convicted of DUS 3rd and sentenced to six months, suspended, with ninety days house arrest and probation. Also in 1995, he was arrested again for DUS and for driving under the influence. On March 7, 1996 he was arrested and charged with first degree burglary, criminal sexual conduct, and assault and battery. On August 7, 1997, Moore's probation was revoked on a charge of common law robbery. He was ordered to serve six years in prison. His probation was also revoked on a habitual traffic offender charge. On the same date, Moore pled guilty to ABHAN, arising from the 1995 arrest and was sentenced on that charge as well. Moore was released from SCDC on "Supervised Furlough" on December 9, 1998. Approximately nine months later, he was arrested on September 16, 1999 and charged with the murder of James Mahoney, the armed robbery of Nikki's convenience store, and AWIK for the attempted shooting of Terry Hadden. **Respondent's Ex. 25, Report of Drucy Glass.**

Ms. Glass' report also indicates that Moore's mother died in 1997 and that Moore could not attend his mother's funeral because he was incarcerated at the time. **Respondent's Ex. 25.** It is no small wonder that Moore's family had cut him off. His life of crime set forth in detail in Ms. Glass' report explains why his sister, Vanessa, stated to Moore's wife: "Richard is dead to us." **Respondent's Ex. 25.** It also explains why applicant's family told him: "there would be no help coming [from Michigan], and to get myself out of this mess." **Respondent's Ex. 19.**

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The record shows both trial counsel and Ms. Glass unsuccessfully attempted to locate family members of Moore in Michigan, who would come to South Carolina and testify favorably for him. The attempts of trial counsel's and Ms. Glass' to locate and obtain the cooperation of Moore's family members in Michigan were rebuffed. His family members would not answer telephone calls or answer letters sent by counsel or their mitigation investigator. Moore told Ms. Glass that if his mother had not died in 1997, he would not have been "cut-off" by his family like he was in this case.

This Court viewed the testimony of the witnesses in this case, including trial counsel, and finds that trial counsel's testimony on this issue is credible. Counsel's testimony is corroborated by the letter written to trial counsel by Moore and Ms. Glass' report. The Court finds that Moore's family members did not want to assist in his case and that they avoided all efforts to gain their assistance and cooperation. Counsel's investigation was reasonable. O'Brien v. Dretke, 156 Fed.Appx. 724, 2005 WL 3529255 (5th Cir. 2005) (counsel's failure to discover particular family friends and relatives and call them to testify in mitigation during penalty phase of capital murder prosecution, did not amount to deficient performance, where counsel's investigation into defendant's background was reasonable; counsel asked defendant to identify potential mitigation witnesses; interviewed several of defendant's family members and friends; and retained mental health experts, and determined that none of those potential witnesses would be favorable to defense).

Nor has Moore established prejudice from counsel's alleged errors. This Court has reviewed the deposition testimony of Moore's family from Michigan and it finds that their testimony as to their willingness to come and testify is not credible. In particular, the testimony of one of Moore's brothers typifies the credibility of Moore's family members on this issue.

James Moore testified he would have come and testified if he had been notified of the trial. James Moore claimed he was living at home with his and Moore's, father during the time from Moore's arrest until trial.

However, on cross-examination by Respondent, James was forced to admit that he was incarcerated in a prison during part of the time leading up to Moore's trial and at the time of Moore's trial on drug charges. James also admitted that he was kept in the dark by Moore's Michigan family regarding the fact that Moore had been charged with murder and was facing the death penalty. This further corroborates the fact that Moore's Michigan family was embarrassed and angered by Moore's commission of a murder and armed robbery in South Carolina, and that they had washed their hands of him.

Another of Moore's brothers, Maurice Moore, admitted that he too had a criminal record, for conspiracy and grand larceny. He also was angry with Moore after Moore's arrest for murder and armed robbery. Maurice Moore admitted that when Moore called him from jail after his arrest for these crimes, he did not talk to Moore initially. So, Moore talked to Maurice's girlfriend. Maurice further admitted that Moore's father basically disowned him after he was charged with murder and armed robbery in South Carolina.

Maurice Moore later admitted that he talked with Moore several times on the telephone prior to the trial. Maurice testified that they talked about him coming to South Carolina and testifying, however, he then reversed himself and said he was just imagining that Moore wanted him to come and testify. Maurice also testified he did not come and testify at the trial because he could not afford to. He then admitted that his girlfriend could have driven him to South Carolina, and that he could have stayed with Moore's wife during the trial.

This Court simply does not find Maurice Moore credible because of his conflicting testimony about his discussions with Moore regarding coming and testifying at his capital trial, and his later testimony that he could not afford to come at the time. Additionally, Maurice Moore's testimony is contradicted by Ms. Glass' mitigation report. Maurice denied that he was contacted by any person acting on behalf of his brother prior to or at the time of his brother's capital trial, but Ms. Glass mitigation report specifically states that she sent a certified letter to Maurice Moore on September 17, 2001.

This Court finds it was an objectively reasonable trial strategy decision not to seek out two of Moore's brothers. Ms. Glass' report indicates Moore related to either his counsel or Ms. Glass that two of his brothers were incarcerated for drugs. Moore related that his brother James and his brother Phillip were both incarcerated in state prison outside South Carolina. **Respondent's Ex. 25**. Trial counsel Kelly testified that he would not want to present a family member who was, himself, incarcerated.

This Court has also carefully reviewed the testimony of Moore's other family members from Michigan, and the Court finds that he was not prejudiced by the failure of trial counsel to call any of them in his capital case. First, counsel called Moore's wife and his stepson, to testify in mitigation and to make a plea for applicant's life.

Second, most of the Michigan family members testified that they had little contact with Moore after he reached the age of 18 or after he moved to South Carolina. These witnesses would have been thoroughly impeached with their lack of knowledge of Moore. Even though they lived in the same small community in Michigan and lived in close proximity to him, they testified that they were unaware of his convictions in Michigan for possession of a weapon, and

attempted burglary. Additionally, they had no knowledge and were unaware of his criminal convictions for common law robbery, habitual traffic offender, and ABHAN.

Moreover, one witness contradicted Moore's PCR testimony. She testified that he moved to Detroit around the age 18. **Deposition testimony of Arma Hadley, p. 15**. However, Moore denied at PCR that he had ever lived in Detroit. This Court finds the family's testimony that they were not aware of Moore's extensive criminal history is not credible. Even if credible, they would be thoroughly impeached at trial, by any claim that they were unaware of it. *See Belmontes*. It would have appeared to the sentencing jury that either his Michigan family members were lying about not knowing about his criminal record, or that they really did not know about Moore as a person.

Finally, while the witnesses said some good things about Moore, they offered no evidence that he suffered from any mental illness, mental retardation, personality disorder, physical or sexual abuse, or deprivation or poverty. Nor was there any testimony from any of these family members that Moore witnessed any physical or sexual abuse during his formative years. In fact, they each testified that Moore came from a good family, had good parents, had positive role models, and was made to attend church growing up and taught the difference between right and wrong. Given the totality of their testimony, this Court finds Moore has failed to show prejudice from the alleged deficient performance in not calling these witnesses in the penalty phase. This Court finds that even if they had been called, there is no reasonable probability the result of the sentencing proceeding would have been different. *See Belmontes*. He simply did not meet his burden of proving that "there is a reasonable probability . . . that the balance of aggravating and mitigating circumstances did not warrant death" if his Michigan

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family members had testified at sentencing. *See Strickland*, 466 U.S. at 695. *See also Wiggins*, 539 U.S. at 537.

GROUND 10(g)

Next, Moore alleges that counsel were ineffective because they failed to present evidence of his adaptability to prison through their retained "expert in the field of penal institution safety and management," James Aiken. He asserts that their failure to present Aiken's testimony "opened the door for the state's damning closing argument that [Moore] had shown 'escalating violence.'" He claims that he was prejudiced by counsel's decision because the State injected the issue of Moore's future dangerousness by its argument, and that Aiken's opinion that Moore could be safely incarcerated if he received a life sentence would have rebutted the State's argument. The Court finds that counsel made a reasonable strategic decision not to present Aiken's testimony. The Court further finds that Moore has not proven any prejudice resulting from counsel's decision.

Mr. Aiken, an expert in correctional institution management, was presented by Moore at the PCR hearing. Mr. Aiken testified that he is President of James E. Aiken & Associates, and he gave a summary of his work experience, both of working for various departments of corrections and as a consultant. He explained prison classification systems, his own assessment of Moore's classification and his opinion that Moore would be of low risk of presenting a future danger in the prison system. Mr. Aiken opined that Moore can be controlled and managed in a prison environment for the remainder of his life without causing an undue risk of harm to staff, inmates or the general community. In part, the basis for Aiken's favorable opinion is that Moore does not have a history of escape attempts, use of weapons against other inmates or officers and there was no indication that he participates in gang or other predatory activity.

Based upon Mr. Kelly's credible testimony, the Court finds that Mr. Aiken was present at trial and prepared to testify that Moore could be safely housed and controlled by SCDC. While Mr. Kelly did not have all of the prison records that had been gathered by the time of his PCR testimony, he had given copies of all of those records to Mr. Aiken in preparing for Moore's trial. Mr. Kelly felt that Aiken would have given favorable testimony.

However, the prosecution had brought a records custodian down from Michigan to testify about misconduct while incarcerated in that State. The State had provided Mr. Kelly a copy of the records that it intended to introduce through this witness and he provided the records to Aiken. Although Mr. Kelly was unable to recall the precise nature of these records,[39] he recalled that the State's evidence was damaging enough that he thought the defense would be "hammered" if Aiken testified. Therefore, he decided not to present Mr. Aiken as a witness.

"In light of 'the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant,' the performance inquiry necessarily turns on 'whether counsel's assistance was reasonable considering all the circumstances.'" *Belmontes*, 130 S.Ct. at 384-85 (citing *Strickland*, 466 U.S. at 688-689). Considering the circumstances of discussed above, this Court finds counsel's decision not to offer this evidence was reasonable under *Strickland*, since the presentation of Aiken's testimony would have resulted in the State being allowed to present damaging testimony in reply. *See Gaskin v. Secretary, Dept. of Corrections*, 494 F.3d 997, 1002-03 (11th Cir. 2007) (petitioner did not present clear and convincing evidence to rebut presumption that defense counsel's decisions

[39] The Court finds that, in 2011, Mr. Kelly had telephoned Mr. Aiken in an effort to obtain a copy of the records from Mr. Aiken and refresh his recollection. Mr. Aiken did not return his call, but he was informed that Aiken did not have the records. Therefore, Mr. Kelly could not recall whether Mr. Moore was involved in gangs, assaults or escape or some other misconduct. Although he did not have a specific recollection, the report sent to him by Ms. Glass (**Respondent's Ex. 25**) shows a detailed account of his criminal history in both Michigan and South Carolina, including several offenses that the State did not introduce at trial. *See* **Ground 10(b)**. Included in the information provided to counsel was that Moore absconded from parole in Michigan on January 10, 1990. **Respondent's Ex. 25, p. 8.**

not to present retained mental health expert's findings or further evidence regarding petitioner's educational history were tactical: counsel purposely withheld information about defendant's past, including school records, because he had reason to believe that it would lead to damaging testimony regarding defendant's past violent and criminal conduct); *Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003) (counsel's strategic decision not to present psychological evidence, where experts' findings contained suggestions of antisocial behavior that could have been harmful to client's defense "was a reasonable one because such evidence 'is a double-edged sword that might as easily have condemned [defendant] to death as excused his actions.'") (citation omitted); *Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir. 2001) ("The clearest respect in which the lawyer's representation fell below the minimum level was the decision to put the psychologist on the stand, knowing what the lawyer knew"), order directing the district court to issue a conditional writ of habeas corpus vacated and the petition for rehearing dismissed, 268 F.3d 485 (7th Cir. 2001); *Bonin v. Calderon*, 59 F.3d 815, 834 (9th Cir. 1995) ("while the Constitution requires that a criminal defendant receive effective assistance of counsel, the presentation of expert testimony is not necessarily an essential ingredient of a reasonably competent defense." Counsel's presentation of childhood mitigation evidence was reasonable since expert testimony would have been of "slight value at best" and it "would have opened the door to precisely the type of cross-examination that [counsel] sought to avoid by refusing to call psychiatric experts-another recitation of all of Bonin's atrocities for the purpose of determining whether, in the expert's opinion, such behavior is the likely product of such abuse").

The Court further finds that Moore has not proven that he was prejudiced by counsel's failure to present Mr. Aiken's testimony. This requires Moore "to establish 'a reasonable probability that a competent attorney, aware of [the available mitigating evidence], would have

introduced it at sentencing,' and 'that had the jury been confronted with this ... mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.'" *Belmontes*, 130 S.Ct. at 386 (citing *Wiggins*, 539 U.S. at 535, 536). Further, "[i]n evaluating that question, it is necessary to consider all the relevant evidence that the jury would have had before it if [counsel] had pursued the different path-not just the mitigation evidence [counsel] could have presented" through Mr. Aiken, but also the damaging evidence from the prosecution in reply "that almost certainly would have come in with it." *Belmontes*, 130 S.Ct. at 386.

The Court finds that, on cross-examination, Respondent significantly impeached his opinion of Moore's adaptability with a contrary history of disciplinary infractions that Moore has committed while incarcerated. Specifically, Respondent elicited that Moore had committed a number of disciplinary infractions, both in the Spartanburg County Jail and on death row. The most serious offense that he has committed while housed on death row is possession of a cell phone and cell phone charger, which occurred in July 2006. This was considered a major infraction by SCDC.

Mr. Aiken was dismissive of all of the disciplinary infractions that Respondent elicited; and he opined that none of the infractions, including Moore's possession of the cell phone charger, caused him to alter his opinion that Moore was adaptable to life in prison and could be safely incarcerated. However, the Court finds that Moore's record while incarcerated demonstrates that he has refused to adapt to prison and that his various infractions demonstrate an unwillingness and refusal to comply with the rules and regulations of the institutions that have incarcerated him. Indeed, the offense of inmates possessing cell phones while incarcerated is such a grave problem for the Department that SCDC and prison officials from twenty-nine other

states petitioned the Federal Communications Commission in 2010 for permission to install technology that would jam cell phone transmissions and render them useless.[40]

Further, although Respondent did not impeach Mr. Aiken's opinion with the January 10, 1990 offense that Moore absconded from parole in Michigan (*see* **Respondent's Ex. 25, p. 8**), this offense and any other infractions that he committed during his incarceration in Michigan would almost certainly be presented by the State at trial to rebut Mr. Aiken's opinion as to Moore's adaptability. The Court finds that this offense and the numerous disciplinary infractions that Moore committed in South Carolina prior to the trial would have minimalized the effectiveness of Aiken's testimony. This is particularly true if there was further evidence of misconduct that Moore committed in the Michigan incarcerations, as there appears to be. Under these circumstances, the Court finds that Aiken's expert testimony would have been of slight value, at best, and that it would have permitted the introduction of evidence that would be damaging to the defense's case in mitigation.[41]

Counsel's decision not to present Mr. Aiken's opinion meant that the defense did not present expert testimony to rebut any argument by the State as to Moore's future dangerousness, but, at the same time, it avoided the introduction of much evidence that circumstantially tended to demonstrate his future dangerousness: *i.e.*, his inability or unwillingness to adjust to life in prison. Furthermore, counsel presented Moore's wife and stepson at trial and counsel argued that these witnesses suggested that Moore's actions after his arrest proved that he "is being a

[40] *See* http://www.nytimes.com/2011/01/03/us/03prisoners.html.

[41] The original jury would obviously not have been presented with any of the disciplinary infractions that Moore committed after the trial, such as his misconduct while he has been incarcerated on death row. However, a resentencing jury obviously would be presented with this evidence, as well. The Court finds that this post-trial evidence of misconduct would all but conclusively demonstrate his inability or refusal to adjust to confinement.

productive member of society." **R. p. 1730**. Thus, the defense did present evidence to rebut the State's argument on future dangerousness.

Additionally, the Court finds that there was overwhelming proof that Moore was guilty of the murder of Jamie Mahoney and the aggravating circumstances. There was also overwhelming proof of Moore's future dangerousness, through the introduction of evidence concerning his prior criminal history, which included convictions for common law robbery, aggravated assault and battery, thefts of valuables the theft or possession of weapons, and parole violations. There was also a similar robbery where he went behind the counter threatened and assaulted the victim. Finally, the record shows that Moore had been incarcerated several times before and was not rehabilitated by his incarceration. Thus, the Court finds that Moore did not meet his burden of proving that "there is a reasonable probability . . . that the balance of aggravating and mitigating circumstances did not warrant death" if such an instruction had been given. *See Strickland*, 466 U.S. at 695. *See also Wiggins*, 539 U.S. at 537.

GROUND 10(h)

Moore maintains that trial counsel were ineffective because they failed to request a charge on the statutory mitigating circumstance of provocation by the victim, as set forth in S.C. Code Ann. § 16-3-20(C)(b)(8) (Supp. 2011).[42] He asserts that there was "no conceivable professionally reasonable basis for not seeking" the charge since counsel argued to the jury that Moore was also a "victim," and that, in the absence this "instruction, the jury was left with no guidance to assist them in taking into consideration the fact that Mahoney shot [Moore], which was the whole basis of counsel's argument that [Moore] was a victim, too." The Court finds that he has not proven that counsel's performance was deficient because the credible evidence is that

[42] Section 16-3-20(C)(b)(8) provides that it is a mitigating circumstance that "[t]he defendant was provoked by the victim into committing the murder." The Court's Westlaw search of the statutes of those states that have the death penalty revealed that South Carolina is the only one that has this mitigating circumstance.

counsel made a reasonable strategic decision not to request the charge. The Court further finds that there was no prejudice from counsel's alleged error because there was no evidence that the victim provoked him.

First, this Court finds that counsel's failure to request this statutory mitigating instruction did not amount to deficient performance under *Strickland*. The credible evidence is that Mr. Kelly correctly determined that there was no legal basis for counsel to request the charge, in the absence of testimony from Moore to support it. Also, the jury had already convicted Moore of murder and armed robbery. Therefore, the Court finds that trial counsel made a reasonable strategic decision under not to ask the trial judge to submit this statutory mitigating circumstance. The Court further finds that counsel discussed with Moore that the defense might be entitled to this statutory mitigating circumstance if there was evidence to support it, in connection with the discussion as to whether or not Moore would testify in the sentencing phase. However, Moore refused to testify in either phase of the trial. Moreover, he has not raised any allegation that counsel were ineffective in their advice as to his right to testify in either phase of the trial.

Nor has Moore established any prejudice under *Strickland* from counsel's chosen strategy. He would have been entitled to this statutory mitigating circumstance if there was any evidence presented that the victim did anything to provoke the murder. This Court does not read § 16-3-20(C)(b)(8) to require the existence of evidence that would constitute sufficient legal provocation such as would warrant a manslaughter instruction. However, as discussed in **Ground 10(f)**, there is absolutely no evidence in the trial transcript that the victim did anything, whatsoever, to provoke Moore. *Contra State v. Plemmons*, 286 S.C. 78, 84, 332 S.E.2d 765, 769 (1985). Rather, the only evidence at trial was that the victim was acting lawfully and in defense

of himself or Mr. Hadden. Also, evidence that the victim was initially armed with both weapons or that he may have produced a weapon first did not constitute provocation by him for the reasons discussed in **Ground 10(f)**.

Even if the victim did first present the .45, it is clear that Moore had managed to take that weapon away from him and completely subdue him before any shots were fired. Further, the *only* evidence is that the victim did not shoot at Moore, until after Moore had fired a shot at Hadden. Thus, whether Mr. Mahoney was acting to defend himself, the store or Hadden, he was acting lawfully when he finally fired his .44 caliber weapon at Moore, and the victim did not provoke the defendant to commit the murder. Moreover, there was overwhelming evidence that proved that Moore was guilty of murder and the statutory aggravating circumstances. *See Strickland*, 466 U.S. at 694. Also, there was no evidence to support the submission of this mitigator.

Additionally and contrary to Moore's argument before this Court, counsel's sentencing phase closing argument did not assert that Moore was a victim, even though the evidence did show that Moore was shot during his confrontation with Mr. Mahoney and counsel did urge that Moore's had "suffered with an addiction problem." **R. p. 1728**. Rather, counsel pointed out the meaningful contributions that Moore could make within his family if given a life sentence[43] and counsel argued for a life sentence as an act of mercy. **R. pp. 1726-30**.

Therefore, the Court finds that he did not meet his burden of proving that "there is a reasonable probability . . . that the balance of aggravating and mitigating circumstances did not warrant death" if such an instruction had been given. *See Strickland*, 466 U.S. at 695. *See also Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

[43] In obvious response to the prosecutions argument, counsel suggested that Moore's actions after his arrest demonstrated that he "is being a productive member of society." **R. p. 1730**.

IT IS, THEREFORE, ORDERED:

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

2. That Applicant is remanded to the custody of Respondent.

AND, IT IS SO ORDERED this 29th day of July, 2011.

ROGER L. COUCH
Presiding Circuit Court Judge

Spartanburg, South Carolina