

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

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

RECEIVED

JAN 20 2016

SC SUPREME COURT

CHARLES CHRISTOPHER WILLIAMS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2013-001945

BRIEF OF RESPONDENT ON CERTIORARI

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENSKA
Senior Assistant Deputy Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

WILLIAM W. WILKINS, III
Solicitor, Fifth Judicial Circuit

305 East North St., Ste. 325
Greenville, South Carolina 29601

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
PETITIONER’S QUESTION GRANTED ON CERTIORARI	viii
STATEMENT OF THE CASE.....	1
ARGUMENT WHY THE APPEAL SHOULD BE DENIED	3
I. The PCR Court reasonably concluded that 2005 counsel were not deficient in their reasonable investigation of Petitioner’s mental health and medical issues based upon their receipt of conflicting evidence of whether Petitioner’s mother drank alcohol during the pregnancy and an MRI report which indicated a normal brain.	
a. The defense provided the drinking information to most of their mental health expert witnesses who did not recommend additional testing for fetal alcohol syndrome.	
b. Counsel reasonably presented evidence of mental illnesses and a troubled childhood.	
c. Counsel presented an expert witness who opined that Petitioner had the capacity to conform his conduct to the requirements of law and was not required to seek a second opinion that might conflict with the presentation.	
II. The PCR Court further properly concluded that any omission on counsel’s part was not prejudicial under <u>Strickland</u> when there is no reasonable probability that but counsel counsel’s failure to further investigate fetal alcohol syndrome, the result of the proceeding would have been different.	3
HOW THIS ISSUE WAS DISMISSED BY JUDGE WELMAKER.....	4
ANALYSIS	6
RELEVANT LAW FOR APPELLATE REVIEW OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS	9
DEFICIENT PERFORMANCE NOT SHOWN.....	14
What Defense Counsel Learned in 2005	16
What Social Work Expert and Mitigation Investigator Vogelsang Learned in 2004 and 2005 and Presented to the Defense Counsel and the Experts.....	17
Vogelsang’s Information from Dr. James Evans.....	20

Vogelsang and Dr. Richards	21
Vogelsang and Social Worker Dr. Hammock.....	22
Vogelsang and Alcohol Effects.....	23
THE LAWYERS’S ALLEGED FAILURE TO CONSIDER FETAL ALCOHOL SYNDROME ISSUES	27
William Nettles Testimony	27
John Mauldin’s Testimony.....	30
THE CREDIBILITY QUESTIONS ARISING FROM THE MOTHER AND FATHER’S PCR TESTIMONY RELATED TO DRINKING.....	35
The FASDExpert.com Team PCR Testimony.....	38
Dr. Paul Connor	39
Dr. Richard Adler - Clinical and Forensic Psychiatrist – Partial Fetal Alcohol Syndrome Disorder	52
Dr. Adler and Facial Features.....	56
Dr. Adler and Growth retardation.....	57
Dr. Adler and CNS (Central Nervous System abnormalities)	57
Dr. Adler and the QEEG Assessment	60
Dr. Natalie Novick-Brown – Psychological Opinions	67
WHY DEFICIENT PERFORMANCE NOT SHOWN	73
SIXTH AMENDMENT PREJUDICE NOT SHOWN FOR GUILT OR PUNISHMENT.....	78
2005 Case in Mitigation -	86
CONCLUSION	93
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases

<i>Ard v. Catoe</i> , 372 S.C. 318, 642 S.E.2d 590 (2007)	10
<i>Arnold v. State</i> , 309 S.C. 157, 420 S.E.2d 834 (1992)	13
<i>Atkins v. Singletary</i> , 965 F.2d 952 (11th Cir. 1992)	74
<i>Bell v. Cone</i> , 535 U.S. 685, 123 S.Ct. 1843, 152 L.Ed.2d 914 (2002)	74
<i>Bobby v. Dixon</i> , 565 U.S. —, 132 S.Ct. 26, 181 L.Ed.2d 328 (2011)	14
<i>Bobby v. Mitts</i> , 563 U.S. 395, 131 S.Ct. 1762, 179 L.Ed.2d 819 (2011)	14
<i>Bobby v. Van Hook</i> , 558 U.S. 4, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009)	14
<i>Boyle v. McKune</i> , 544 F.3d 1132 (10th Cir.2008)	11
<i>Brown v. Ornoski</i> , 503 F.3d 1006 (9th Cir. 2007)	74
<i>Brown v. Thaler</i> , 684 F.3d 482 (5th Cir. 2012)	83
<i>Butler v. State</i> , 286 S.C. 441, 334 S.E.2d 813 (1985)	10
<i>Byram v. Ozmint</i> , 339 F.3d 203 (4th Cir. 2003)	76
<i>Card v. State</i> , 992 So.2d 810 (Fla.2008)	80
<i>Chandler v. U.S.</i> , 218 F.3d 1305 (11th Cir. 2000)	74
<i>Cherry v. State</i> , 300 S.C. 115, 386 S.E.2d 624 (1989)	9
<i>Dempsey v. State</i> , 363 S.C. 365, 610 S.E.2d 812 (2005)	9, 74
<i>Eberts v. Gaetz</i> , 610 F.3d (7th Cir. 2010)	74
<i>Edwards v. LaMarque</i> , 475 F.3d 1121 (9th Cir. 2007)	74
<i>Falksen v. Secretary of Dept. of Health and Human Services</i> , 2004 WL 785056 (Fed.Cl.)	60
<i>Francis v. Dugger</i> , 908 F.2d 696 (11th Cir.1990)	83
<i>Franklin v. Catoe</i> , 346 S.C. 563, 552 S.E.2d 718(2001)	12

<i>Fulks v. United States</i> , 875 F. Supp. 2d 535 (D.S.C. 2010).....	14
<i>Fulks v. U.S.</i> , 683 F.3d 512 (4th Cir. 2012)	14
<i>Gardner v. Ozmint</i> , 511 F.3d 420 (2007).....	76
<i>Garza v. Stephens</i> , 730 F. 3d (5th Cir. 2013)	85
<i>Garza v. Stephens</i> , 738 F.3d 669 (5th Cir. 2013)	75
<i>Garza v. Thaler</i> , 909 F. Supp. 2d 578 (W.D. Tex. 2012).....	84
<i>Goins v. State</i> , 397 S.C. 568, 726 S.E.2d 1 (2012)	10
<i>Harrington v. Richter</i> , 562 U.S. 86, 131 S.Ct. 770 (2011).....	10, 11, 12, 13
<i>Harris v. Dugger</i> , 874 F.2d 756, fn. 4 (11th Cir. 1989)	74
<i>Harris v. Vasquez</i> , 949 F.2d 1497 (9th Cir.1990)	15
<i>Heishman v. Ayers</i> , 621 F.3d 1030 (9th Cir. 2010)	76
<i>Holden v. State</i> , 393 S.C. 565, 713 S.E.2d 611 (2011)	9, 10
<i>Hoskins v. State</i> , 75 So.3d 250 (Fla.2011).....	80
<i>In re Breast Implant Litigation</i> , 11 F. Supp. 2d 1217 (D. Colo. 1998).....	61, 62
<i>In re Stays of Execution in Capital Cases</i> , 321 S.C. 544, 471 S.E.2d 140 (1996)	93
<i>Jones v. State</i> , 332 S.C. 329, 504 S.E.2d 822 (1998)	6, 8, 12, 13
<i>Knowles v. Mirzayance</i> , 556 U.S. 111, 129 S.Ct. 1411 (2009).....	12
<i>Maryland v. Kulbicki</i> , __ U.S. __, __, 136 S. Ct. 2 (2015).....	10
<i>Mendoza v. State of Florida</i> , 87 So.3d. (S.Ct. Fla. 2012).....	61
<i>Miller v. Champion</i> , 161 F.3d 1249 (10th Cir. 1998)	74
<i>Murray v. Carrier</i> , 477 U.S. 478 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).....	13
<i>Nadell v. Las Vegas Metropolitan Police Dept.</i> , 268 F.3d 924 (9th Cir. 2001)	61

<i>Parker v. Matthews</i> , 567 U.S. —, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012).....	14
<i>Powell v. Kelly</i> , 562 F.3d 656 (4th Cir. 2009)	75
<i>Rhoades v. Henry</i> (<i>Michelbacher</i>), 611 F.3d 1133	74
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005).....	8, 15, 84
<i>Rosemond v. Catoe</i> , 383 S.C. 320, 680 S.E.2d 5 (2009)	13
<i>Ross v. Schrantz</i> , No. C8–94–1729, 1995 WL 254409 (Minn.Ct.App. June 14 1995)	60
<i>Samayoa v. Ayers</i> , 649 F.3d 919 (9th Cir. 2011)	76
<i>Sears v. Upton</i> , 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010)	13
<i>Sells v. Thaler</i> , 2012 WL 2562666	84
<i>Sigmon v. State</i> , 403 S.C. 120, 747 S.E.2d 394 (2013)	12
<i>Silva v. Woodford</i> , 279 F.3d 825 (9th Cir.2002)	84
<i>Simpson v. Moore</i> , 367 S.C. 587, 627 S.E.2d 701 (2006)	6, 8
<i>Simuel v. State</i> , 390 S.C. 267, 701 S.E.2d 738 (2010)	9, 74
<i>Soliz v. State</i> , 432 S.W.3d 895 (Tex. Crim. App. 2014).....	83
<i>State v. Blakely</i> , 402 S.C. 650, 742 S.E.2d 29 (Ct. App. 2013).....	14
<i>State v. Downs</i> , 361 S.C. 141, 604 S.E.2d 377 (2004)	5, 80
<i>State v. Wilson</i> , 306 S.C. 498, 413 S.E.2d 19 (1992)	5, 80
<i>State v. Zimmerman</i> , 166 Ariz. 325, 802 P.2d 1024 (App. 1990).....	61
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	passim
<i>Terry v. State</i> , 394 S.C. 62, 714 S.E.2d 326 (2011)	9
<i>Tran v. Hilburn</i> , 948 P.2d 52 (Colo.App.1997).....	60, 61
<i>U.S. v. Eyman</i> , 313 F.3d 741 (2d Cir. 2000).....	74
<i>U.S. v. Purkey</i> ,	

428 F.3d 738 (8th Cir. 2005)	84
<i>Von Dohlen v. State</i> , 360 S.C. 598, 602 S.E.2d 738 (2004)	76
<i>Wallace v. Stewart</i> , 184 F.3d 1112 (9th Cir.1999)	16
<i>White v. Wheeler</i> , ___ U.S. ___,136 S. Ct. 456 (2015).....	14
<i>Wiggins v. Smith</i> , 539 U.S. 510, (2003).....	passim
<i>Williams v. Taylor</i> , 529 U.S. 362, 120 S.Ct. 1495 (2000).....	11, 15
<i>Wilson v. Greene</i> , 155 F.3d 396 (4th Cir.1998)	80
<i>Wong v. Belmontes</i> , 558 U.S. 15, 130 S.Ct. 383 (2009).....	12
<i>Wright v. Hopper</i> , 169 F.3d 695 (11th Cir. 1999)	74
<i>Yarborough v. Gentry</i> , 540 U.S. 1, 124 S.Ct. 1 (2003).....	10, 11

Statutes

S.C. Code Ann. § 17-24-20.....	3, 5
S.C.Code Ann. § 17-24-70 (2003).....	5

Rules

Rule 71.1 (e), SCRCPP	10
South Carolina Rules of Evidence, Rule 701 through 704	61

Other Authorities

<i>Imaging the Mind, Minding the Image: An Historical Introduction to Brain Imaging and the Law</i> , 33 Am. J.L. & Med. 171 (2007)	61
--	----

PETITIONER'S QUESTIONS GRANTED ON CERTIORARI

1. Did the PCR judge commit error by finding trial counsel made a strategic decision not to present evidence of fetal alcohol syndrome, when trial counsel testified they simply failed to realize and investigate the evidence of fetal alcohol syndrome and would have liked to have had such evidence before the jury?

STATEMENT OF THE FACTS

The Crime

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

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

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

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

ARGUMENT WHY THE APPEAL SHOULD BE AFFIRMED

- I. The PCR Court reasonably concluded that 2005 counsel were not deficient in their reasonable investigation of Petitioner's mental health and medical issues based upon their receipt of conflicting evidence of whether Petitioner's mother drank alcohol during the pregnancy and an MRI report which indicated a normal brain.
 - a. The defense provided the drinking information to most of their mental health expert witnesses who did not recommend additional testing for fetal alcohol syndrome.
 - b. Counsel reasonably presented evidence of mental illnesses and a troubled childhood in mitigation.
 - c. Counsel presented an expert witness who opined that Petitioner had the capacity to conform his conduct to the requirements of law and was not required to seek a second opinion that might conflict with the presentation.
- II. The PCR Court further properly concluded that any omission on counsel's part was not prejudicial under *Strickland* when there is no reasonable probability that but counsel counsel's failure to further investigate fetal alcohol syndrome, the result of the proceeding would have been different.

The primary issue in the post-conviction relief hearing was whether the defense team was ineffective in failing to more fully investigate whether Petitioner suffered from a form of fetal alcohol syndrome, particularly partial fetal alcohol syndrome (PFASD). The Petitioner claims that had they more fully investigated the matter in 2005, they would have had evidence available to support an assertion of guilty but mentally ill in the guilt phase (S.C. Code Ann. § 17-24-20) and additional mitigating mental health evidence in support of the existence of brain damage. The PCR Court rejected the showing. App.p. 4202-4214. Viewing the probative evidence in the record supporting the fact-finding of the PCR judge, Respondent submits reversal is not warranted where the Petitioner has failed to prove that counsel's investigation was deficient in 2005 and additionally, that failed to prove 6th Amendment prejudice under *Strickland v. Washington*, 466 U.S. 664 (1984).

HOW THIS ISSUE WAS DISMISSED BY JUDGE WELMAKER

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

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

9. Dr. Halleck concluded that Petitioner knew right from wrong and **was able, though with difficulty, to conform his conduct to the requirements of law,**” citing App.p. 2318. App.p. 4210 (emphasis added).¹
10. Trial counsel presented evidence of mother’s alcohol addiction and her consumption of alcohol during pregnancy. App.p. 4211.²
11. Trial counsel had an MRI done (in 2005) and retained (neurology) expert Dr. Griesemer reported prior to trial that it showed a normal brain. App.p. 4209.3
12. Trial counsel did not present evidence to the jury that Petitioner suffered from Fetal Alcohol Syndrome or that he had organic brain damage. App.p. 4208.

Critical to this appeal, Judge Welmaker opined that “considering all of the information it had available and in consultation with its experts, trial counsel developed a cogent strategy to present mitigation evidence - including evidence of mother’s alcohol addiction – but also made a strategic decision to not present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (though trial counsel was unable to articulate the reasons for that strategic decision).” App.p. 4210. The PCR Court found that “trial counsel’s strategy was to present mitigation evidence regarding Petitioner’s troubled childhood and his mental illness, as diagnosed by defense experts.” In concluding that 2005 defense counsel was not deficient, Judge

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

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

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

Welmaker concluded that: while it is easy in retrospective to criticize an unsuccessful trial strategy, Petitioner has not shown that trial counsel's investigation and presentation fell below the standard required in a PCR action. App.p. 4211.

Judge Welmaker also found that the Petitioner had not shown 6th Amendment prejudice by trial counsel's failure to present evidence of brain damage resulting from fetal alcohol syndrome. The hearing judge found that "trial counsel presented a well-reasoned mitigation defense, which included compelling evidence of Petitioner's troubled childhood and evidence of Petitioner's mental illness based on multiple expert opinions." App.p. 4212. Judge Welmaker concluded that William's case was similar to the settings in *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998) and *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006) equating Williams's fetal alcohol argument a merely resulting in a fancier mitigation case, having no effect on the outcome of the trial. App.p. 4212-13. In support of his conclusion, Judge Welmaker noted a series of cases from other jurisdictions where evidence of fetal alcohol syndrome was presented and a death sentence still resulted. App.p. 4213-14.

ANALYSIS

In his appeal before this Court, Petitioner claims the PCR judge erred in concluding that counsel was not deficient in failing to more fully investigate the existence of fetal alcohol syndrome (FAS) as a mitigating factor in 2005 because both trial counsel made admissions at the hearing that although they knew of mother's drinking they did not consider or discuss the possibility of FAS. Petitioner contends that the alleged failure of Judge Welmaker to acknowledge trial counsels assertions that they did not consider FAS ignores the testimony and

brings into question the entire Order.⁴ Brief of Petitioner, p. 30, 33. He claims that there was undisputed PCR testimony that the petitioner could not conform his actions to the requirements of law where at trial the Solicitor used disagreement between the trial experts on whether Williams could conform his conduct to the requirements of law. Brief of Petitioner, p. 34. He complains that the PCR Order did not factually address particular issues he presented such as PCR testimony about the Gudjonsson test that Williams was “highly suggestible” to suggest an explanation for his inculpatory responses to Dr. Crawford during her interview; evidence that the trial team’s neurologist (Dr. Griesemer) was hired in January and did not evaluate Petitioner until January 27, 2005 with the trial starting with voir dire February 7, 2005 and was not given additional material from the clinical psychologist (Dr. Evans) which in hindsight suggested to him “greater concerns” about Williams neurological functioning, a need to have fetal alcohol effects ruled out and “noted compelling evidence of problems with judgment and cognitive functioning that might be significant in understanding his actions.” App.p. 4852 (Dr. Griesemer’s September 27, 2012 affidavit).⁵ Brief of Petitioner, p. 34.

4 The Order of Dismissal was completed without submission of proposed orders from either party. The record shows that that closing statements were made by both parties on February 6, 2013 after the completion of the evidence. App.p. 3958-4015. The Petitioner submitted a Post-Hearing Memorandum of Law. App.p. 4017-4167. The Order of Dismissal was filed without receipt of a post-hearing memorandum of law by the Respondent when Respondent’s extension request was pending. App.p. 4167. In his Brief of Petitioner, Williams notes that there was an extension for post-hearing briefing by the state pending when Judge Welmaker issued his order of dismissal. *Importantly, the Petitioner ignores that at the conclusion of the PCR hearing, Judge Welmaker indicated at the conclusion of the hearing after closing arguments that he would give findings of fact after to the parties after reviewing the hearing transcript prior to the submission of findings of fact.* App.p. 4014-4015. The State had been similar arguments about findings and conclusions in its closing statement to Judge Welmaker at the conclusion of the hearing on February 6, 2013 which are presented in the earlier Return and the Brief of Respondent. See App.p. 3976-3997, 4008-4010. ***See also App. 5075 – June 9, 2013 email noting the State’s request for fact-finding on particular issues.*** When the judge’s law clerk submitted his proposed order for comment on July 17, 2013, counsel for Respondent responded that it use the order to address its final post-hearing memorandum thinking at that time it would address the finding of fact Judge Welmaker suggested he would make for the parties at the February 2013 hearing and requested in the June 9, 2013 email. App.p. 5079.

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

In addition, he complained that Judge Welmaker's order did not address the disabilities that FAS causes which he contends undermined whether the Order gave the effects proper consideration on the impact it would have had upon a jury and its verdict. Brief of Petitioner, p. 36. He contends that Judge Welmaker ignored testimony that there were experts in 2005 who could diagnose and testify about FAS when the Court emphasized in its order that the art of forensic assessment was "hit" or "miss" prior to 2007. App.p. 4203. Brief of Petitioner, p. 36. He claims that the PCR Court ignored that Seattle, Washington based expert, Dr. Novick-Brown, the forensic psychologist who testified in this hearing, had testified in 2004 (in New Jersey) about FAS. App.p. 3805, 3808. Petitioner claims that Judge Welmaker failed to recognize that diagnostic criteria for FAS had been accepted prior to 2005 and claimed it had been recognized as mitigating evidence in *Wiggins v. Smith*, 539 U.S. 510, (2003) (counsel required to do an investigation of "all reasonably available mitigating evidence") and *Rompilla v. Beard*, 545 U.S. 374 (2005) (trial counsel ineffective for failing to adequately investigate evidence of organic brain damage caused by FAS). Brief of Petitioner, p. 36-37.

The Petitioner further asserts that the PCR court additionally failed in its assessment of Sixth Amendment prejudice under *Strickland v. Washington*. Brief of Petitioner, p. 38. He contends that the new mitigation case of Partial Fetal Alcohol Syndrome Disorder (PFASD) presented in 2005 as FAS would have undermined the State's case in aggravation and made him more sympathetic because it would have challenged whether he could control his actions. He claims the PCR Court's reliance on *Jones v. State* and *Simpson v. Moore* were misplaced because he contends that the evidence of FAS and its effects is new diagnosis because the new experts gave "uncontradicted opinions that petitioner had severe cognitive deficits, impulse control

follows. App.p. 4852.

problems and could not conform his actions to the law.” Brief of Petitioner, p. 39. Petition, p. 37. He further complains that the PCR court based its assessment on a case survey that found many criminal defendants who presented mitigating evidence of FAS still received the death penalty. Brief of Petitioner, p. 41, n. 6, citing App.p. 4213-14. Petitioner found the analysis flawed because there are cases where counsel had been found to be ineffective for failing to present available evidence of FAS and that many of the PCR court’s cited cases are distinguishable. Brief of Petitioner, p. 41-42.

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

RELEVANT LAW FOR APPELLATE REVIEW OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

“On certiorari in a PCR action, the Court applies the ‘any evidence’ standard of review.” *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (quoting *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This “Court will affirm if any evidence of probative value in the record exists to support the findings of the PCR court.” *Id.* See also *Holden v. State*, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) (“In reviewing the PCR judge’s decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision.”). Upon appellate review, this court gives great deference to the PCR court’s findings of fact and conclusions of law. *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). This court also “gives great deference to a PCR [court’s] findings where matters of credibility are involved.” *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010).

“An ineffective assistance claim has two components: A petitioner must show that counsel’s performance was deficient, and that the deficiency prejudiced the defense.” *Wiggins v.*

Smith, 539 U.S. 510, 521, 123 S.Ct. 2527 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 673, 104 S.Ct. 2052 (1984)). A PCR “applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.” Rule 71.1 (e), SCRCF. See also *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In order to prove deficient performance, the convicted defendant must “show ‘that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment.’” *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770 (2011) (quoting *Strickland*, 466 U.S. at 687). Further, “[t]he standard for judging counsel’s representation is a most deferential one.” *Harrington*, 562 U.S. at 105. “[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance....” *Strickland*, 466 U.S. at 689. *Holden*, 393 S.C. at 572, 713 S.E.2d at 615 (“There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.”) (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). “[F]air assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Butler v. State*, 286 S.C. 441, 445, 334 S.E.2d 813, 815 (1985) (quoting *Strickland*, [466 U.S. at 690]). Moreover, the Sixth Amendment does not require “‘perfect advocacy’” but “‘reasonable competence’” given the circumstances at the time of trial. *Maryland v. Kulbicki*, __ U.S. __, __, 136 S. Ct. 2, 5 (2015) (quoting *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S.Ct. 1 (2003)).

Courts apply “a ‘strong presumption’ that counsel’s attention to certain issues to the

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

An inadequate investigation of mitigating evidence may cause counsel’s performance to fall below an objective standard of reasonableness. *Williams v. Taylor*, 529 U.S. 362, at 395–96, 120 S.Ct. 1495 (2000). “Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.” *Wiggins*, 539 U.S. at 533, 123 S.Ct. 2527. Rather, the inquiry focuses on whether “reasonable professional judgments support the limitations on investigation.” *Id.* (quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052). This includes consideration of “whether the known evidence would lead a reasonable attorney to investigate further.” *Id.* at 527, 123 S.Ct. 2527.

Further, “[i]n order for counsel’s inadequate performance to constitute a Sixth Amendment violation, petitioner must show that counsel’s failures prejudiced his defense.” *Wiggins v. Smith*, 539 U.S. at 534, 123 S.Ct. 2527 (citing *Strickland*, 466 U.S., at 692, 104 S.Ct. 2052). For sentencing phase error, an applicant must show “there is a reasonable probability that, absent [counsel’s] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating

and mitigating circumstances did not warrant death.” *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998) (quoting *Strickland*, 466 U.S. at 695). See also *Sigmon v. State*, 403 S.C. 120, 127, 747 S.E.2d 394, 398 (2013) (same). “A reasonable probability is a probability sufficient to undermine confidence in the outcome” of the proceeding. *Strickland*, 466 U.S. at 694. See also *Franklin v. Catoe*, 346 S.C. 563, 571, 552 S.E.2d 718, 723 (2001) (“applicant must show there is a reasonable probability that but for counsel’s deficient performance, the result of the proceeding would have been different.”). Prejudice is evaluated by consideration of the prior evidence along with the PCR evidence, compared to the aggravating circumstances evidence. *Wong v. Belmontes*, 558 U.S. 15, 26, 130 S.Ct. 383 (2009).

“The likelihood of a different result must be substantial, not just conceivable.” *Harrington*, 131 S.Ct. at 792 (citing *Strickland*, 466 U.S. at 693). The Supreme Court has cautioned: “An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, ‘nullification,’ and the like.” *Strickland*, 466 U.S. at 694-695. The Supreme Court has resisted efforts to dilute the *Strickland* test to mere possibility of a different result. See *Wiggins v. Smith*, 539 U.S. at 534-537 (finding “there is a reasonable probability that at least one juror would have struck a different balance” but clearly relying upon *Strickland*, and “reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence”). See also *Wong v. Belmontes*, 558 U.S. at 27 (“... *Strickland* does not require the State to ‘rule out’ a sentence of life in prison to prevail. Rather, *Strickland* places the burden on the defendant, not the State, to show a ‘reasonable probability’ that the result would have been different.”); *Knowles v. Mirzayance*, 556 U.S. 111, 122, 129 S.Ct. 1411 (2009) (“no Supreme Court precedent establish [es] a ‘nothing to lose’ standard for ineffective-

assistance-of-counsel claims”). “[W]hile in some instances ‘even an isolated error’ can support an ineffective-assistance claim if it is ‘sufficiently egregious and prejudicial,’ *Murray v. Carrier*, 477 U.S. 478, 496 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), it is difficult to establish ineffective assistance when counsel’s overall performance indicates active and capable advocacy.” *Harrington v. Richter*, 562 U.S. at 111.

Prejudice is not sufficiently shown, and an applicant is not entitled to relief for guilt phase related claims, where there is overwhelming evidence of guilt, or, for sentencing related claims, if the deficient performance did not affect jury consideration. *Rosemond v. Catoe*, 383 S.C. 320, 325-326, 680 S.E.2d 5, 8 (2009). See also *Jones v. State*, 332 S.C. at 333, 504 S.E.2d at 824 (“The bottom line is that we must determine whether or not Jones has met his burden of showing that it is reasonably likely that the jury’s death sentence would have been different if counsel had presented additional information about Jones’s mental condition.”). Cf. *Arnold v. State*, 309 S.C. 157, 171-172, 420 S.E.2d 834, 842 (1992) (reviewing claim malice charge was unconstitutional: “Based upon all the evidence presented tending to prove or disprove malice, no rational juror could have failed to find malice ... The erroneous malice charge beyond a reasonable doubt did not contribute to the verdict. Thus, the error was harmless.”). In addressing the prejudice caused by the failure to conduct a competent investigation, the fact that counsel employed a reasonable mitigation theory is irrelevant. *Sears v. Upton*, 130 S.Ct. 3259, 3265, 177 L.Ed.2d 1025 (2010) (per curiam). The existence of “some mitigation evidence,” true enough, does not “foreclose an inquiry into whether a facially deficient ... investigation might have prejudiced the defendant.” *Sears v. Upton*, 130 S.Ct. 3259, 3266 (2010).

The standards of review apply equally to capital and non-capital cases. See *White v. Wheeler*, ___ U.S. ___, ___, 136 S. Ct. 456, 462 (2015) (citing e.g., *Parker v. Matthews*, 567 U.S. ___, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012) (*per curiam*); *Bobby v. Dixon*, 565 U.S. ___, 132 S.Ct. 26, 181 L.Ed.2d 328 (2011) (*per curiam*); *Bobby v. Mitts*, 563 U.S. 395, 131 S.Ct. 1762, 179 L.Ed.2d 819 (2011) (*per curiam*); *Bobby v. Van Hook*, 558 U.S. 4, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009) (*per curiam*)) (Supreme Court “again advises the Court of Appeals that the provisions of AEDPA apply with full force even when reviewing a conviction and sentence imposing the death penalty.”). While the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases may indicate otherwise, these are only guides to reasonableness, not its definition. *Bobby v. Van Hook*, 558 U.S. 4, 8 & n. 1, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)) (criticizing the Sixth Circuit for treating the ABA Guidelines as inexorable commands).⁶

DEFICIENT PERFORMANCE NOT SHOWN

Notwithstanding the new evaluations set forth below from the “FASDexperts.com” group, the PCR Court reasonably concluded that Williams cannot show deficient performance by trial counsel. In light of the reasonable investigation conducted by trial counsel, including

⁶ Petitioner’s numerous references to the ABA guidelines speaks to the lack of prejudice. Guidelines are not law, much less constitutional mandates. *Bobby v. Van Hook*, 558 U.S. at 14 (Alito, J. concurring) (“It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.”); *Fulks v. United States*, 875 F. Supp. 2d 535, 556-57 (D.S.C. 2010) *order clarified*, No. CA 4:08-70072-JFA, 2010 WL 8987255 (D.S.C. Aug. 25, 2010) and *aff’d*, 683 F.3d 512 (4th Cir. 2012) (“Before addressing the alleged deficiencies of trial counsel, the court notes for the record Petitioner’s emphasis on the ABA Guidelines, rather than the prevailing professional practice, at the time of the trial. The Supreme Court has made clear that the ABA Guidelines do not set the standard for effective representation, and the court refuses to recognize them as the constitutional standard here.”); *State v. Blakely*, 402 S.C. 650, 665, 742 S.E.2d 29, 37 (Ct. App. 2013) (“while the ABA standards may be useful or may offer assistance in the analysis of an issue, these standards are not controlling or dispositive”).

retention of appropriate experts, and development of a sound mitigation strategy, Williams cannot overcome the “strong presumption” of effective representation. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Williams has not shown that based on the information available to trial counsel in 2005, the failure to further investigate further neuropsychological deficits and the etiology of the alleged brain damage from mother’s drinking was unreasonable. This is not a case in which trial counsel failed to investigate a category of mitigating evidence, see *Wiggins v. Smith*, 539 U.S. at 523–24, 123 S.Ct. 2527; *Williams v. Taylor*, 529 U.S. at 395–96, 120 S.Ct. 1495, or failed to take even basic steps to investigate, see *Rompilla v Beard*, 545 U.S. 374 at 382–84, 125 S.Ct. 2456, at 2456 (2005) (trial counsel failed to examine defendant’s court file or prior conviction despite knowing prior convictions were a basis relied on by state to impose the death penalty). Nor was the expert team appointed too late to provide meaningful benefit to the case.

Trial counsel’s duty is to retain qualified experts and provide those experts with relevant information; once appropriate experts are retained, determining what specific tests to perform may be properly left to those experts. “It was clearly within the ““wide range of professionally competent assistance” ‘for defense counsel ‘to rely on properly selected experts.’” quoting *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir.1990) (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052))). Williams’s implication that trial counsel should have specifically directed the retained neuropsychologist to look for fetal alcohol deficiencies is unavailing. Similarly, failure to retain an expert team specializing in FAS in 2005 for the specific purpose of opining on whether Williams possessed a fetal alcohol effects does not render counsel’s performance deficient where the medical expert who were retained did not recommend that action to

Petitioner's counsel (Dr. Halleck, Dr. Richards, Dr. Evans) or may have possessed the ability to make such a diagnosis as a psychiatrist. Failure to micro-manage the mental health and medical testing performed by experts is different in kind from failing to provide those experts with information needed to conduct their evaluations, which would constitute deficient performance. *Cf. Wallace v. Stewart*, 184 F.3d 1112, 1116 (9th Cir.1999) (noting counsel's "professional responsibility to investigate and bring to the attention of mental health experts ... facts that the experts do not request"). Here, based upon the findings of the PCR Court, the defense team, through the mitigation investigator provided the experts (except apparently Dr. Griesemer) with information concerning mother's drinking during her pregnancy with the petitioner.

What Defense Counsel Learned in 2005

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

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

during pregnancy.

However, Ms. Vogelsang stated that she was not surprised that fetal alcohol syndrome evidence was not presented in the 2005 trial after the discussions she had with the defense team and defense experts about the mother's drinking issue. App.p. 3247; PCR Tr. p. 73, ll. 11-24. She stated that she felt that fetal alcohol syndrome issue had a mixed picture because it was a challenge to distinguish between the signs and symptoms. She stated that in 2005 there was a significant amount of information to support FAS, but at the same time the schools that had evaluated Williams showed there was a tremendous amount of conflict and violence in the Williams' home. App.p. 3248; PCR Tr. 74. Vogelsang noted the FAS issue was confused by the fact that the schools diagnosed Williams as learning disabled (LD) and then took the diagnosis back, that Dr. James Evans was not recommending a MRI brain scan. In addition, Vogelsang found that there was a lack of reliable resources with reliable information. App.p. 3248; PCR Tr. 74. She noted that the father, Dwight Williams, was "very unstable" and the sister was also unstable. Vogelsang noted that she personally believed that Daisy drank during pregnancy (although the mother denied it to her), but she was concerned about the instability of the reporters of her drinking. App.p. 3248-49; PCR Tr. 74-75. Although she admitted she was not an expert in FAS, she provided all she had concerning the pregnancy drinking to the experts. App.p. 3249; PCR Tr. 75.

What Social Work Expert and Mitigation Investigator Vogelsang Learned in 2004 and 2005 and Presented to the Defense Counsel and the Experts.

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

according to her credible testimony.

Ms. Vogelsang, a clinical social worker with a MSW and board certified is published in a book, “The Witness Stand” which concerns testifying social workers. App.p. 3187; PCR Tr. 13. Although she had testified in a number of prior capital cases as a clinical social work expert, this was one of her first cases as a mitigation investigator. App.pp. 3189-90, 3193; PCR Tr. 15-16, 19. She clarified that her role as an investigator differed from her social work role. App.p. 3191-92; PCR Tr. 17-18. She opined that a mitigation investigator should never testify at trial because they gain both good and bad information concerning the client. App.p. 3192; PCR Tr. 18.

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

Vogelsang stated she also spoke to the Applicant’s older sister, Maureen.⁸ She reported in her notes of that interview that “Daisy drank everything and smoked during pregnancy. Both parents drank and smoked pot.” App.p. 3207; PCR Tr. 33. See (Applicant’s Exhibit 9, ¶4) (App.p. 4270).

In assessing the information she received, Vogelsang prepared a document as attorney work product, styled “Preliminary Accumulation of Harmful Risk Factors.” Applicant’s Exhibit 10. Vogelsang included factors within these report for trial counsel including:

⁷Dwight Williams testified at the sentencing hearing. ROA 2208-2219.

⁸Maureen Bangcuyo testified at the sentencing proceeding. ROA 2328-2351.

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

App.p. 4271 (Applicant's Exhibit 10). These pertinent factors were among the 22 harmful factors she categorized. Vogelsang stated that she would have had this particular list prepared prior to a meeting with counsel so everyone on the team knew what she was discovering. App.p. 3209; PCR Tr. 35. She said the meeting she presented these risks factors occurred shortly after it was created. App.p. 3209; PCR Tr. 35.

Vogelsang had also prepared for counsel an additional list of the "themes" she saw in her investigation. See Applicant's Exhibit 11 (App.p. 4272). Among the pertinent themes she developed were:

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

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

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

Vogelsang's Information from Dr. James Evans

Vogelsang testified that Williams was initially referred to Dr. James Evans, a neuropsychologist, for testing on August 4, 2004. App.p. 3212; PCR Tr. 38, Applicant's Exhibit 12 (App.p. 4273-74). Vogelsang emphasized that Dr. Evans opined that while Williams had an average IQ, there was a 15 point split between the verbal and performance sections. [I.Q. 99 - Verbal 105, Performance 90]. Dr. Evans advised her he felt this was consistent with his school records. He further opined that there was a math disability, but that his listening comprehension tested as normal, even though his school records showed a listening comprehension problem. App.p. 3212; PCR Tr. 38. Importantly, Dr. Evans opined to the defense investigator that his neuropsychological testing showed an indication of "**mild brain damage**", which could account for the split between verbal and performance. Dr. Evans also found an indication of "parietal cortical area" impairment that could account for the arithmetic disability (an indentation in the head which may have resulted from a hammer blow at age 4 or 5). Additionally, he found "parietal impairment" on the Tactual Performance Test. Further, he found "frontal lobe damage" with rigid thought and some impulsivity. App.p. 3212-13; PCR Tr. 38-39.

In Dr. Evans' opinion to the defense, there was a psychiatric/personality component to the Applicant's behavior. He theorized that Williams was depressed prior to the crime, that the victim was a blend of his parents, "a liar and a drunk", that he was not thinking straight, that he thought he would go out by getting shot, and that he did not plan on her grabbing the gun or

wrestling on the floor with her. App.p. 4274; Applicant's Exhibit 12. In her August 25, 2004 notes concerning the August 2, 2004 interview with Dr. Evans, Vogelsang noted:

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

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

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

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

Vogelsang and Dr. Richards

Vogelsang noted Dr. Robert Richards had testified at the trial that Applicant was bipolar, with secondary impulsivity. App.p. 3216; PCR Tr. 42. See App.p. 1965, 1977.⁹ Vogelsang also recalled an email she sent to Mauldin on August 26, 2004 concerning Dr. Rob Richards. App.p.

⁹At trial, Dr. Richards also testified he also had obsessive compulsive disorder. ROA 1967. He stated that according to hospital records, his mother had several suicide attempts and alcoholism. ROA 1978, l. 13-20. He stated that there was a high genetic disposition for mood disorders. Id.

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

3217; PCR Tr. 43, Applicant's Exhibit 13 (App.p. 4303). [Counsel emphasized that contrary to Dr. Evans, Dr. Richards wanted a MRI done immediately]. App.p. 3217-18; PCR Tr. 43. Vogelsang reported to Mauldin and she told him that there was a little brain damage from parietal to frontal, and that he wanted to see the QEEG concerning an issue of brain deterioration. App.p. 3213-14; PCR Tr. 39-40. She noted that Dr. Richards wanted birth records to get the circumference of the Petitioner's head at birth and his school records. App.p. 3218; PCR Tr. 44.¹⁰ [It was noted that MRI results were not completed until January 27, 2005. Applicant's Exhibit 24. App.pp. 3220-21, 5036].

Vogelsang and Social Worker Dr. Hammock

Vogelsang further described her relationship with Dr. Hammock, the forensic social worker who actually testified. She stated that she provided Dr. Hammock with documents to tell the story of the Petitioner's life. She stated she consulted with Dr. Hammock right up until she was prepped by Mauldin and testified. App.p. 3223; PCR Tr. 49. Vogelsang stated that most of the PCR exhibits she had testified about were provided to Dr. Hammock. App.p. 3224; PCR Tr. 50. She stated the same information through consultation, the expert taking notes, taking the expert to visit the family members, and going through the documents. Vogelsang stated Dr. Hammock was provided with medical, mental health and psychiatric records. App.p. 3224; PCR Tr. 50.¹¹

¹⁰ Dr. Richards testified at trial that he eventually got everything that he wanted when asked if there was any other information that he wanted that he could not get. ROA p. 1972, l. 1. Also, ROA 1971, l. 2-9.

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

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

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

Vogelsang and Alcohol Effects

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

Vogelsang stated that she had become aware of the existence of fetal alcohol syndrome long before her involvement in the Williams case. App.p. 3227; PCR Tr. 53. She described her work as a social worker in Los Angeles and her understanding of the developmental delays that had occurred from a mother's drinking and drug use. App.p. 3227; PCR Tr. p. 53, ll. 11-25. She had become certified in "alcohol and drug use" which included FAS. App.pp. 3227-28.

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

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

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

Williams case, she was sensitive to the potential of FAS and sought to highlight those areas for the social worker and defense experts. App.p. 3229; PCR Tr. 55.

Concerning factual development of the FAS issue, Vogelsang stated she asked the father about whether his wife drank while pregnant. App.p. 3229-30; PCR Tr. 55-56. Concerning the extent of his wife's drinking, she stated Dwight Williams was unable to provide any details. App.p. 3231; PCR Tr. p. 57, l. 8. He was only able to tell her he had seen her drinking when she was pregnant with Chris. "I was not able to get from him how frequently, how much, the typical things you ask."¹² App.p. 3231; PCR Tr. p. 57, ll. 11-14.

Contrary to Daisy Huckaby's PCR testimony, Vogelsang stated she interviewed her and asked her about her drinking during the pregnancy. Contrary to Daisy's new alleged revelation, Daisy told Vogelsang that she did not drink during the pregnancy. App.p. 3231; PCR Tr. p. 57, ll. 18-24. Vogelsang stated that she tried to get Daisy to confirm her drinking during pregnancy, but was not able to get the information.¹³ App.p. 3232; PCR Tr. 58. [At the PCR hearing, Daisy Huckaby claimed Vogelsang never asked her about her drinking. App.p. 3416-17; 3422-23; PCR Tr. 242-43, 248-29].

Vogelsang described her interview with Maureen, the Petitioner's older sister. She

¹² Vogelsang's testimony is also in sharp conflict with Dwight Williams PCR testimony. Unlike his 2004-2005 responses (or lack thereof) to Vogelsang's inquiries, Dwight Williams now claimed at the PCR hearing to be able to recall drinking a specific brand and type of wine (Carlo Rossi) which he referred to as a Petri burgundy wine. PCR Tr. 253-54. He stated his wife drank at least 3 to 4 glasses every night. App.p. 3428; PCR Tr. 254. He claimed they had the same level of drinking throughout. PCR Tr. 258. He claimed to tell Vogelsang the same thing. App.p. 3431; PCR Tr. 257.

¹³ At the PCR hearing, Daisy testified that she was not aware it was wrong to drink during pregnancy when she had the Applicant. App.p. 3413; PCR Tr. 239. She claimed to not hide the fact she drank during the pregnancy. She claimed to drink 4 to 5 glasses of wine, sometimes more each night. App.p. 3414; PCR Tr. 240. She confirmed it was Carlo Rossi. She noted she bought a bottle every other day. App.p. 3416; PCR Tr. 242. She claimed Vogelsang never asked her about her drinking. App.p. 3416-17, 3422-23; PCR Tr. p. 242, ll. 10-14, p. 243, 248-29. She said she sometimes "went overboard" on her drinking on the weekends.

described to Vogelsang witnessing her mother drinking while she was pregnant. However, she was unable to describe what her mother was drinking or the amount. App.p. 3233; PCR Tr. 59. [In addition, she described her father beating the mother “many times” during the pregnancy.] App.p. 3233; PCR Tr. 59.¹⁴

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

Vogelsang stated that she also remembered a specific conversation she had with Dr. Seymour Halleck, the defense expert psychiatric witness in the penalty phase, concerning the mother’s drinking. App.p. 3235; PCR Tr. p. 61, ll. 14-22.¹⁵

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

Vogelsang stated that Dr. Evans reported frontal lobe damage. App.p. 3243; PCR Tr. 69. She recognized that this was an organic factor which was reflected in the reports she provided to counsel and the experts. App.p. 3244; PCR Tr. 70. Vogelsang confirmed that organic problems

¹⁴ At the sentencing proceeding, Maureen Bangcuyo testified that her memories while they lived in Germany (before Applicant was born) had constant violence. “The violence and the alcohol every night, gallons gone in weeks, drugs, you know.” ROA 2331, l. 23-25.

¹⁵ At the sentencing proceeding, Dr. Halleck testified upon examination from Mark MacDougall, that he had reviewed information about Williams background and history, including “some mitigation notes made by the defense” (ROA 2306, l. 12-14). In describing his mother, Dr. Halleck noted that according to the Applicant, the parents were involved in dishonest ventures that she wanted Williams to become involved in, including simulating injuries in order to sue various establishments. ROA 2308. Dr. Halleck also testified that he concluded only that Williams “capacity to conform his behavior was somewhat impaired” and not that he could not conform his conduct to the requirements of law. ROA 2318-2319. He testified that Williams was having a terrible time trying to conform his behavior to the requirements of law. ROA 2318. Therefore his testimony expressly rejected the concept that he would have qualified for “guilty but mentally ill.” See Section 17-24-20.

of the brain can arise from multiple situations. App.p. 3245; PCR Tr. 71.

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

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

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

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

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

life. App.p. 3252; PCR Tr. 78.

On re-direct, she confirmed that they had never ruled out FAS. App.p. 3254; PCR Tr. 80. She speculated that going to Germany in 2005 may have helped her corroborate the mother's drinking at pregnancy. App.p. 3254-55; PCR Tr. 80-81.¹⁶ Vogelsang testified she would have requested a MRI to be done automatically. App.p. 3255-57; PCR Tr. 81-83. Vogelsang said that she told Dr. Evans that she had information that mother drank during pregnancy. App.p. 3257; PCR Tr. 83.¹⁷

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

William Nettles Testimony

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

Nettles stated at some point he developed an understanding of FAS, but at the time of the Williams case he has no recall of the FAS issue being raised or rejected by them. He did not recall FAS being discussed with Mauldin and it being on his working "list". He stated he did not

¹⁶ It is unclear who Ms. Vogelsang would be interviewing in Germany concerning the mother drinking during pregnancy with Applicant. The Applicant has not named nor presented any witness connected with Germany who would have supported this speculation about confirming the drinking during pregnancy. Importantly, the Applicant was born December 11, 1982. Daisy was not pregnant with Chris while they lived in Germany. See ROA 2209-10, 2250, 2252-2253.

¹⁷ Vogelsang did not recall speaking with Dr. Griesemer. App.p. 3257-58; PCR Tr. 83-84.

recall FAS being ruled in or out. App.p. 3271; 3274; PCR Tr. 97, 100.

Nettles acknowledged that in Applicant's Exhibit 15 that Dr. Griesemer found in his 2005 neurological examination "fine eye gaze nystagmus with movement of the eyes to the left." App.p. 3275; PCR Tr. 101. He further acknowledged that just before the trial, Dr. Griesemer spoke with Nettles about the "subtle neurological findings" he found and "that his testing shows that Chris may be bipolar" and that if brought to him, he would send him to a psychologist to confirm. App.p. 3278-79; PCR Tr. 104-05. This was consistent with their psychological diagnosis which bipolar disorder. App.p. 3279; PCR Tr. 105.¹⁸

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

Nettles stated that there was no surprise when Dr. Pam Crawford testified at trial that the mother drank for 30 years. App.p. 3282; PCR Tr. 108. (See App.p. 2180)(Dr. Crawford - mother was an alcoholic for 30 years) (App.p. 2182)(Maureen verified mother unstable and that mother was an alcoholic).

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

¹⁸

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

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

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

Nettles acknowledged his awareness of the A.B.A. guidelines and that they make a reference to Fetal Alcohol Syndrome. App.p. 3295; PCR Tr. 121. Nettles stated he was involved in decisions concerning the breadth of the testimony of the experts, Dr. Richards, Dr. Hammock, Dr. Elbogan and Dr. Halleck. App.p. 3296; PCR Tr. 122. He stated they called Dr. Richards in the guilt phase to introduce the jury with the fact that there were psychological issues in the case before they got to the penalty phase. App.p. 3296-97; PCR Tr. 122-23. He thought it was important based upon the testimony and questioning of Dr. Crawford. App.p. 3297; PCR Tr. 123.

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

Nettles stated that while Dwight and Maureen were called at trial, the mother was not

called to testify “because we had concerns about her willingness to tell the truth.” App.p. 3304; PCR Tr. p. 130, ll. 12-15.

Counsel Nettles stated that if they had a diagnosis of guilty but mentally ill, they would have used it in the guilt phase. App.p. 3310; PCR Tr. 136. However, he did not recall that Dr. Halleck testified that Williams did not meet the definition of GBMI and that Dr. Richards testified that he was not saying that Williams could not conform his conduct to the requirements of law on September 3. App.p. 3319; PCR Tr. 145. See App.pp. 2318-19 (Dr. Halleck testified that his capacity to conform was substantially impaired, not that he couldn’t conform his behavior to the requirements of law), App.p. 1993 (Dr. Richards testified that he is not saying he couldn’t conform his behavior on September 3 to the requirements of law). Counsel stated that this was a case that he couldn’t get his hand around because things just weren’t right. App.p. 3312; PCR Tr. 138.¹⁹

John Mauldin’s Testimony

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

¹⁹The Petitioner introduced at the hearing a September 12, 2012 affidavit of Dr. Griesemer that included a reference that in 2005 he was not made aware of the mother drinking during pregnancy and if he had, he would have referred the team to investigate FAS or at least rule it out. App.p. 3316; PCR Tr. 142, Applicant’s Exhibit 24 (App.p. 4521-22). In the statement, Dr. Griesemer confirmed that he was not an expert in FAS. He stated with the additional information from Dr. Evans, he would have expressed greater concerns about the neurological functions and compelling evidence of problems with judgment and cognitive functioning. App.p. 3316-17; PCR Tr. 142-43.

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

Mauldin acknowledged that the risk factor of mother drinking during pregnancy was a flag regarding the potential for organic brain damage. App.p. 3333; PCR Tr. 159. He said in his cases one of the things that he would want to be conscious of is brain damage. App.p. 3333; PCR Tr. 159. He confirmed that if he had pictures of brain damage and potential evidence to support guilty but mentally ill, he would have put that in the trial phase. He stated this was why they called Dr. Richards in the first place. App.p. 3334; PCR Tr. 160. He confirmed that Vogelsang's notes included information about Dwight saying his wife drank during the pregnancy and would have been provided to him if Vogelsang said so. App.p. 3335; PCR Tr. 161. See Exhibit 12. He stated that her report of Dr. Evans testing results indicated mild brain damage. App.p. 3336; PCR Tr. 162. However, Mauldin admitted that the particular reference to a test indicating that Petitioner tested in one test "as though he had no corpus callosum," did not have any meaning to Mauldin, unless someone told him what it meant. App.p. 3337; PCR Tr. 163.

Mauldin stated that he would normally talk with Dr. Evans about the initial indicators in

his testing. He stated he was surprised at the time of the hearing by the reference in Vogelsang's notes about no MRI (or other testing). App.p. 3337-38; PCR Tr. 163-64.

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

Concerning his pre-trial checklist, Mauldin stated that they were prepared for team meetings with mitigation investigator Vogelsang. He noted on his checklist, there was a reference to brain damage. App.p. 3347; PCR Tr. 173. However, he stated that if they had discussed Fetal Alcohol Syndrome, it would have been on a checklist either typed or handwritten. App.p. 3347; PCR Tr. 173.

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

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

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

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

On reviewing Exhibit 10 on the risk indicators, he confirmed the presence of developmental delays, early learning problems, in addition to mother drank and smoked during

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

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

Concerning guilty but mentally ill, Mauldin stated that his experts did not support a GBMI conclusion that Williams lack sufficient capacity to conform his conduct to the requirements of law, consistent with guilty but mentally ill. App.p. 3373; PCR Tr. 199. Mauldin stated the defense theme was Williams' inability to deal with his break-up with the victim, mixed with his bipolar condition which led to the explosive incident. App.p. 3372; PCR Tr. 198.

Mauldin stated he did not recall going to the experts and discussing mother drinking during pregnancy. Mauldin stated it was unexplainable because when Daisy would come to the office it was obvious that she had a horrible alcohol problem. App.p. 3382; PCR Tr. 208. With

that knowledge and the Vogelsang memos, Mauldin could not explain why the additional steps were not taken to look further at FAS. App.p. 3382; PCR Tr. 208.

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

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

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

Ms. Huckaby claimed that she got drunk for the first time at the age of 6. As children, they were allowed to have a glass of wine on Christmas. It was a normal occurrence that her family drank. She noted that it was part of the culture. App.p. 3413; PCR Tr. 239. She didn't think at the time that there was anything wrong with drinking during pregnancy. She stated no one told her there was anything wrong with that. She stated that cut down on her smoking when she was pregnant because she was told that if she smoked, the babies would be born smaller than they were supposed to be. However, she stated that no one told her about drinking during pregnancy. Contrary to the testimony of Ms. Vogelsang, she never hid the fact that she drank during her pregnancy. She would drink a lot. She would probably have 4 or 5 glasses of wine a night. She claimed that she would drink some kind of burgundy wine and it could have been Carlo Rossi. App.p. 3415; PCR Tr. 241. The bottles were about 1.5 liters. She would buy a new

bottle every other day. This was when she was married to Dwight and was pregnant with the Petitioner. App.p. 3416; PCR Tr. 242, l. 3-4. She stated that Dwight would drink the wine too. She would have more on the weekends. App.p. 3416; PCR Tr. 239-242.

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

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

Daisy testified, in hindsight, that if she had known that she was going to hurt her children by drinking, she wouldn't have drank. App.p. 3417; PCR Tr. 243. She testified that she would not have been ashamed to tell Ms. Vogelsang this. App.p. 3417; PCR Tr. 243. She stated that the first time the PCR counsel's investigators asked her about her drinking she told them. App.p. 3417; PCR Tr. 243. She first heard about FAS when she was in PCR counsel's office. She had never heard of Fetal Alcohol Syndrome before that time. App.p. 3417-18; PCR Tr. 243-244.

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

Daisy stated that she can't exactly remember how many times she met with Ms. Vogelsang. She thought that it was maybe once a week or sometimes twice a week. App.p. 3420;

PCR Tr. 246. The first time she met with Mr. Mauldin, he asked her very few questions. She claimed that has never had actual contact with Mr. Nettles. App.p. 3421; PCR Tr. 247. She claimed that anything Ms. Vogelsang wanted to know about her, her son, and Dwight, she would tell her. App.p. 3422; PCR Tr. 248.

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

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

Dwight Williams, the Petitioner's father, testified at the PCR hearing that he was still married to Daisy when the Petitioner was born. He claimed that he was there the entire time of the pregnancy. App.p. 3426; PCR Tr. 252. He stated that he and Daisy drank during the pregnancy. He stated that they drank Petri wine, a burgundy wine that he claimed a Carlo Rossi wine. He stated, similar to Daisy that they come in "small, pot-belly bottles" and are about 1.5 liters.²⁰ He said that they tried to have wine in the house every day, claiming that once every

²⁰ Williams stated that he knew by looking at the bottle of wine which one they drank all the time. The bigger bottle was purchased on weekends. The smaller bottle was purchased on the weekdays. The smaller bottle is 1.5 liters. App.p. 3435; PCR Tr. 261. Dwight stated that he would have gone to the grocery store and pointed out

other day they would buy wine. He said sometimes they would buy wine more often. He said that they each would have about 4 glasses a night. He said that there were about 8 glasses of wine per bottle. App.p. 3427-29; PCR Tr. 253-255.

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

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

Dwight stated that by the time of the trial, he didn't have any interaction with Daisy about her discussions with Ms. Vogelsang regarding Williams' case. At the time, he and Daisy were separated. App.p. 3432; PCR Tr. 258. He stated that he had about 3 interviews with Ms. Vogelsang and the drinking. App.p. 3433; PCR Tr. 259. He recalled one time that he met with Ms. Vogelsang and Mr. Mauldin. App.p. 3433-34; PCR Tr. 259-260.

The FASDExpert.com Team PCR Testimony

The bulk of the petitioner's attempt to show deficient performance and 6th Amendment prejudice came from the FASDexpert.com team from Seattle, Washington; clinical neuro-

the bottle of wine with Ms. Vogelsang if she had asked. App.p. 3434-35; PCR Tr. 260-261.

psychologist Dr. Paul Connor, Dr. Richard Adler, a board certified psychiatrist and Dr. Natalie Novick Brown, a psychologist. These witnesses in a multi-disciplinary team approach evaluate potential clients for the existence of fetal alcohol spectrum disorder.²¹

Dr. Paul Connor

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

Dr. Paul Connor was qualified as an expert in clinical neuropsychology and, specifically, in Fetal Alcohol Spectrum Disorders. App.p. 3448; PCR Tr. 274. He is part of the FASDExperts.com expert team. Within the team, he is usually asked to do a neuro-psychological assessment at the beginning of a requested evaluation. If the testing looks consistent with Fetal Alcohol Spectrum Disorder (FASD), then the next expert, Dr. Richard Adler will get called in. App.p. 3447-48; PCR Tr. 273-274.

Dr. Connor stated that prior to 1996, there were 2 main diagnoses. Fetal Alcohol Syndrome (FAS) where all of the facial features existed and Fetal Alcohol Effects (FAE) where

²¹ Dr. Connor testified that The South Carolina Fetal Alcohol Spectrum Disorders Strategic Plan for Fiscal Years 2011 to 2013 mentions on page 74 that FASD is a serious national problem. Researchers at the University of Washington estimate that 35% of individuals with FASD have been in jail or prison. They also estimate that more than half of the individuals diagnosed with FASD have been in trouble with the law. He was a part of the team that did this study Washington study in 1994-96. App.p. 3446; PCR Tr. 272.

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

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

Dr. Connor noted that facial features of FAS are laid down during a very short window during pregnancy, typically during the 6th or 8th week. Alcohol during this period will cause the facial features seen in FAS. App.p. 3464-65; PCR Tr. 290-291.

The brain develops throughout the pregnancy. Alcohol at any time during the pregnancy can have an impact on the brain. This is why there is a lot of variability in functioning in people with FAS. App.p. 3465-66; PCR Tr. 291-292.²²

²² Dr. Connor opined that FAS is very rare. App.p. 3467; PCR Tr. 293. For example, in Seattle, there is a

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

Dr. Connor opined that people with fetal alcohol do not learn from their mistakes. App.p. 3477-78; PCR Tr. 303-304. He stated that secondary disabilities are not those disabilities that a person is born with. Due to the problems individuals have on the primary deficits or how they process information, they will develop difficulties in other areas. Dr. Connor opined that these areas are troubles in school (suspensions, expulsions, etc.) and difficulties with the law. App.p. 3478; PCR Tr. 304. He stated that studies show that about 95% of the individuals with FAS have

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

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

some form of mental health problem. App.p. 3478-79; PCR Tr. 304-305.²³ According to a University of Washington study where individuals with FAS of ages 6 to 51 were interviewed, over 40% of individuals with FAS have had problems with the law and in adolescent and adult populations these rates were higher. App.p. 3479; PCR Tr. 305.²⁴

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

Dr. Connor stated that he saw Williams about 6 hours with him in May 2012. App.p. 3489; PCR Tr. 315.²⁵ The neuropsychological assessment was not designed to measure damage to the brain. He looks at the functioning of the brain and comments on the function or dysfunction of the brain. App.p. 3489; PCR Tr. 315. Dr. Connor stated that FASD by definition is a brain damage. App.p. 3491-92; PCR Tr. 317-318

According to Dr. Connor, the first step in diagnosing FASD is establishing whether or not

²³ According to Dr. Connor's secondary disability slide presentation, among persons with FAS, 40% would have a disruptive school experience, 40% would have trouble with the law, 30% would be confined, 45% would have inappropriate sexual experiences, 20% would have alcohol and drugs problems, 80% would be in dependent living situations and 79% would have problems in employment.

²⁴ Dr. Connor stated that he is not aware of any studies that suggest that people with FAS don't have higher significant problems mental health or trouble with the law. There are some studies from Germany where they are not seeing as many troubles in some other areas. This is due to the German Health Care System, where they are receiving more services up front. There are not as many secondary disabilities seen as in the States. App.p. 3480; PCR Tr. 306.

²⁵ He agreed that his group FASDExperts was not doing its multi-disciplinary approach and that topically it was done by individuals in 2004. He noted Kenneth Jones, dysmorphologist, Dr. Streissguth among others were doing the evaluations. App.p. 3570-71; PCR Tr. 396-397. He stated that the post-2007 multi-disciplinary approach was more consistent with what the "gold standard" in clinical care is, though it did not exist prior to 2005. App.p. 3571; PCR Tr. 397. Dr. Connor did not know what the state of the art was in S.C., N.C. or Georgia in February 2005 when the case was tried. App.p. 3571; PCR Tr. 397. He stated that he was aware that at Emory University in Atlanta they have been doing work with FASD and were involved with the CDC, through a female named Claire Coles.

there are cognitive deficits. App.p. 3493; PCR Tr. 320. Dr. Connor stated that he uses a grouping of neuropsychological assessments in FASD cases because the tests have been shown to be sensitive to the impacts of pre-natal alcohol exposure, especially in the adult population. The tests he pulled involve skills that are sensitive in a lot of Fetal Alcohol cases. App.p. 3498; PCR Tr. 324.

He stated the tests are broken into domains of functioning.²⁶ The first test is IQ, which test a global area of functioning. He stated that this is usually by the Wechlser Adult Intelligence Scales (WAIS). Dr. Connor stated that he looks at achievement, academic, math, reading, writing, spelling, and arithmetic. He looks at different aspects of memory, verbal and visuospatial. He looks at attention. He looks at motor coordination because about 1/3 of the people with FAS have motor condition deficits. Dr. Connor stated he pays particular close attention to two levels of executive functioning: high structured test and low structured tests. He looks at adaptive skills. In this case, he interviewed Dwight Williams to determine Williams' adaptive skills. He looked at auditory comprehension and the emotional social understanding. App.p. 3499-3501; PCR Tr. 325-327.

Dr. Connor stated that he opted for the CDC Guideline because they are much more

²⁶ In his slide presentation, he broke down the testing presentation as follows:

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

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

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

Dr. Connor opined that although Williams wasn't being overly impulsive on the test, he wasn't responding to things when he was supposed to. Connor found that he was failing to maintain his attention. This got worse as the test got longer. He gets distracted by other things. Dr. Connor opined that this is very consistent with FASD. App.p. 3520-21; PCR Tr. 346-347. Dr. Connor also found that Williams has strength in language based skills and in reading skills. He was doing much more poorly on low structured executive function tests. He opined that

processing speed areas showed problems. App.p. 3521; PCR Tr. 347. He stated that because the Petitioner's verbal function is so high, he appears normal and that if you talked to him you wouldn't expect that he had FASD. App.p. 3521-22; PCR Tr. 347-348. He stated that Williams' strength in verbal function is masking the deficits. App.p. 3522; PCR Tr. 348.

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

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

Dr. Connor opined that Williams had problems with the Wisconsin Sorting Test on both Dr. Connor's and Dr. Evans' testing. App.p. 3527-28; PCR Tr. 353-354. Dr. Connor concluded that Williams isn't able to focus on one idea very well. He asserted that when he does focus on one idea, he loses track of it and has to start over. He then has difficulties being able to adjust when the rules change. Once he does get it, if the rules change, Williams has a hard time figuring out how to go about the next way. This illustrates an executive functioning problem. App.p.

3528-29; PCR Tr. 354-355 App.p. 3529; PCR Tr. 355.²⁷

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

Dr. Connor tested adaptive functioning section with the Vineland interview of Dwight Williams, the auditory comprehension test, and the social cognition test, which looks at emotional cues. App.p. 3533; PCR Tr. 359.²⁸ He stated that Williams showed deficits in communication skills and in socialization skills in the actual laboratory test. He opined that they showed impaired functioning. App.p. 3533-34; PCR Tr. 359-360. These tests are similar to the ones Dr. Connor would have given in a mental retardation test. App.p. 3534; PCR Tr. 360.

Dr. Connor found that Williams had the greatest difficulties with receptive communication - his ability to take in what he's hearing and respond appropriately. Dr. Connor found that when he was testing Williams, Williams would use very big, multi-syllabic, complex

²⁷ Dr. Connor reported that Dr. Brown tested Williams for suggestibility using the Gudjonsson Suggestibility Test. This test is a memory test. He described it as the subject is given a story, and then asked questions about the story. A lot of the questions are leading questions to determine how often the individual needs to be led. After asking the leading questions, the tester informs the individual he made some mistakes, and then you go back through and ask him the same questions. This is when the doctor will see if the individual will change their answers. PCR 356-357. Dr. Connor opined that the Gudjonsson Suggestibility Test leads into evaluating adaptive functioning abilities and into the individual's ability in social interactions, to be their own person, and to not be swayed by peer influence, etc. App.p. 3530-3532; PCR Tr. 358.

²⁸ At trial, Dwight Williams was portrayed as an absent parent after he left in the divorce when the Applicant was 8 years old. ROA 2210-2212. He claimed that he neglected to see him after the divorce as much as he should have. ROA 2217-18. The second respondent on the Vineland was the Applicant's first grade teacher in 1990, Ann Wilson, who had referred Applicant for special education. ROA 2230. There was no evidence presented of any continuing contact with Applicant after 1990. Dr. Connor stated he was not evaluating Dwight's internal mental status of what was behind Williams' responses. He said that they were asking concrete questions about whether Williams was able to perform skills independently or not. App.p. 3593; PCR Tr. 419. He doesn't know if Dwight's responses would be different had he been tested prior to September 2003, before he knew that his con had committed a crime and placed the victim in a hostage situation which had resulted in being sent to death row. App.p. 3593; PCR 419. Dr. Connor denied that his father's responses would be reflective of the situation.

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

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

Dr. Connor noted that Williams repeated kindergarten and first grade. The records showed that he was put into special education resource room in 1st grade. He noted that special education service placement is extremely common in FASD. He found that Williams had an evaluation in 3rd grade for learning disability and ADHD. The records showed that he was

staffed out of special education in 4th grade. Dr. Connor stated that this is also not uncommon in FASD because if the individuals gets extra support in the classroom, they can improve. He reported that things fall apart for FASD persons when they are moved out of special education and lose the support. He found that Williams repeated 8th grade and dropped out in 9th grade.

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

The QEEG testing Williams had done in 2004/2005 showed abnormal electrical activity in a number of different regions in the brain: the frontal lobes, the singular gyrus, the temporal lobes, and the occipital lobes. The tasks in which Williams was doing poorly are usually associated with the frontal lobes including executive function problems, such as visuospatial organization, socialization skills, communication skills, especially expressive, and math skills. The singular gyrus on top of the corpus callosum is associated with focusing and maintaining attention and staying on task. Williams was showing deficits in all of these aspects in his testing. App.p. 3547-48; PCR Tr. 373-374. Dr. Connor stated that temporal lobes are associated with memory. Williams had trouble with visuospatial learning and memory. App.p. 3548; PCR Tr. 374. The deficits in electrical activity in the parietal lobe may be reflective in visuospatial issues and with sensory input. Williams was having difficulties with these in his testing. App.p. 3549; PCR Tr. 375. Further, the occipital lobe also deals with visuospatial processing, taking visual

information into the system. App.p. 3549; PCR Tr. 375.

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

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

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

Dr. Connor opined that this is a severe functional impairment because Williams had deficits in all but 3 domains of the eleven domains that they tested. He asserted that this is consistent with the diagnosis from the DSM of **cognitive disorder NOS**, a broad spectrum of deficits of cognitive impairments. App.p. 3549-50; PCR Tr. 375-376. Dr. Connor stated that he would not diagnose Williams with FAS or any of the other spectrum disorders because they are medical diagnoses, noting that FAS is not in the DSM. App.p. 3550-51; PCR Tr. 376-377. However, Dr. Connor concluded that based on a reasonable degree of medical or psychological certainty, everything in his testing was consistent with FASD deficits and that he didn't find anything that was inconsistent with FASD. App.p. 3551; PCR Tr. 377.²⁹

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

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

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

Connor of the 68 test scores, 24 or 20 of them were below the line. A further number were at the line. App.p. 3568-69; PCR Tr. 394-395. He stated that therefore about one-third were in deficit in areas that he expected to see deficits. App.p. 3570; PCR Tr. 396.²⁹

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

Dr. Connor acknowledged that some of the tests where he was doing poorly were within the last third of the test, although some others were not. This is why he does effort testing throughout the course. App.p. 3580; PCR Tr. 406. Dr. Connor stated that Williams refused a break and lunch break in the 6 hour testing.²⁹

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

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

Some problems concerning the Vineland were pointed out to Dr. Connor. The Vineland Interview is a test based upon a structured interview. The tester asks the same questions to everybody tested. He stated that the Vineland is very sensitive to FASD. Dr. Connor stated that he asks for contact information who know the client well and who interact with him frequently. However, he was only provided Dwight's name for this. He compares this to the adaptive test that he gives to see if they are consistent. App.p. 3585-86; PCR Tr. 411-412. Dr. Connor admitted that he did not how long Dwight lived with Williams. App.p. 3586; PCR Tr. 412. Dr. Connor also did not know why the Petitioner's mother, who Williams lived with for most of the period of time up until the incident, was not chosen for the Vineland test. App.p. 3587; PCR Tr. 413. This is even though questions of this test ask about tasks that he has been able to do throughout his life up until the present time. App.p. 3587; PCR Tr. 413.²⁹ He doesn't know if there are any norms in Vineland with regard to incarcerated individuals. App.p. 3587-88; PCR 413-14, However, Williams has been incarcerated since 2004. App.p. 3587; PCR Tr. 413. He admitted that the Vineland was supposed to test the Petitioner's current functioning in 2012 in the questions, (yet the Respondent was a father would had not lived with Petitioner since he was 8 and his first grade teacher from 1990). App.p. 3588; PCR Tr. 414.

Dr. Connor opined that the Vineland suggested that Williams had significant difficulties in his receptive abilities, his ability to take in and appropriately react and respond to what is said to him. He was commenting on difficulties with Williams' expressed communication, verbally and written. Williams was having particular difficulty with how to respond with what he was hearing. App.p. 3592-93; PCR Tr. 418-419.

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

Dr. Connor also compared his testing to that of Dr. Evans in 2004. He concluded that there is almost a complete overlap in what Dr. Evans found in 2004 and what he found currently. There is the same IQ split with good reading, bad arithmetic. App.p. 3552-53; PCR Tr. 378-379; App.p. 3553; PCR Tr. 379; Like Dr. Connor, he found that Dr. Evans also found deficits in Williams' visuospatial skills. He asserted that the pattern of testing is almost a perfect overlay between the testing done in 2004 and the testing done in 2012. App.p. 3554; PCR Tr. 380.³⁰

Dr. Connor stated that Williams' full scale IQ isn't a good measure of his overall functioning. He stated that Williams' high IQ masks the problems that he does have in functioning. His good verbal skills mask that he has significant troubles being able to understand and react appropriately to the environment that's around him. App.p. 3594; PCR Tr. 420.

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

30 Dr. Connor opined that Dr. Evans would have found 5 domains that had deficits. App.p. 3554; PCR Tr. 380. Connor found that the testing that was the most different between his testing and Dr. Evans' testing was the Trails A

Dr. Richard Adler - Clinical and Forensic Psychiatrist – Partial Fetal Alcohol Syndrome Disorder

Dr. Richard Adler, a part of the FASDexperts.com team testified as an expert in Clinical and Forensic Psychiatry and as an expert in FASD. App.p. 3606-07; PCR Tr. 432-433 His sole responsibility in the protocol set out by the FASD Experts is to forensically examine the client and to render a diagnosis, if a diagnosis is appropriate. App.p. 3605-06; PCR Tr. 431-432. As related to Fetal Alcohol, he has testified about 50 times. App.p. 3606; PCR Tr. 433. Dr. Adler stated that he has specialized in FAS since 2007.³¹ This is also when he began working with FASD Experts. App.p. 3607; PCR Tr. 433. He was in practice around 2006 when he was first contacted by the Director of the Fetal Alcohol Syndrome Law Resource Center who asked if he would be willing to assess someone for FAS. Subsequently, he was encouraged to develop a standard model for cases like this and he helped set up FASD Experts. App.p. 3608-09; PCR Tr. 434-436.

Dr. Adler stated that he diagnosed Williams with **Partial Fetal Alcohol Syndrome (PFASD)**. App.p. 3606; PCR Tr. 432. He noted that the 2004 CDC Criteria didn't have explicit diagnostic criteria for anything other than Fetal Alcohol Syndrome and that the 1996 Institute of Medicine Criteria was vague in certain areas. He claimed that the FASD Experts attempted to adopt and follow an approach that was more stringent, clear, and straightforward. App.p. 3610-

test, which is a "connect the dots" test. He thought that most likely, they gave the exact same test. He found that Williams did much more poorly in the Evans testing, he was a lot slower. App.p. 3555; PCR Tr. 381. However, Dr. Connor explained that in FASD, variability is seen one day to the next, with good days and bad days. App.p. 3555-56; PCR Tr. 381-382.

³¹ Dr. Adler works with the other FASDexperts.com as part of a multi-disciplinary team. App.p. 3608; PCR Tr. 434. He stated had some training and experience in FASD by way of being a child psychiatrist. He was the First Fellow of a world famous expert on Attention Deficit Disorder, Dr. Biederman at Harvard. He stated that he knew early in his training that Fetal Spectrum Disorder persons have a high incidence of attention problems but was not likely the run of the mill ADD case. App.p. 3608; PCR 434.

11; PCR Tr. 436-437.

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

He opined that Williams has PFAS as well as **cognitive disorder not otherwise specified**. Cognitive disorder NOS is on axis one and PFAS is on axis 3. App.p. 3614; PCR Tr. 440.³² Dr. Adler stated that the diagnosis that applies to Williams is “**partial FAS with confirmed exposure**” He stated that there has to be element A, confirmed exposure to alcohol. There is in this case. There has to be element B, facial anomalies. Any one of elements C (growth retardation), D (central nervous system abnormalities), or E (cognitive abnormalities) needs to be present. He opined that all three do not need to be present, but, in this case, all three were present. He claimed that there was evidence of growth retardation, central nervous system abnormalities, and cognitive abnormalities. There are birth defects in this case, although that is not a diagnostic element that needs to be satisfied. App.p. 3616-17; PCR Tr. 442-443.

³² He stated that a diagnosis is generated based on a book published by the IOM. There are areas of investigation, which are elements that will be attended to, and the actual diagnoses. There's FAS with confirmed maternal exposure, FAS without confirmed maternal exposure, Partial FAS with confirmed exposure, alcohol-related birth defects, and alcohol-related neurodevelopmental disorder. App.p. 3615; PCR 441. The CDC only has FAS with confirmed maternal exposure. App.p. 3615; PCR 441.

He asserted that the evidence comes from multiple different sources. App.p. 3617-18; PCR Tr. 443-444. He claimed he had seen school records, pediatric records, and material from the beginning of Williams' life to Dr. Connor's testing. App.p. 3618; PCR Tr. 444. However, he didn't see the actual hospital visit related to the 2003 suicide attempt when Williams was treated with Risperdal, 2011 radiologist report, or the Petitioner's birth records. App.p. 3620; PCR Tr. 446.³³

Dr. Adler also opined that there was confirmed exposure to alcohol. Dr. Adler based his opinion on a number of sources. He relied on Daisy Huckaby's recent affidavit that he received. Dr. Adler found it was a great benefit to have an affidavit that established the pre-natal exposure. He found that in her affidavit, it outlines that on a daily basis, Daisy was drinking a minimum of 3 to 4 alcoholic beverages and on weekends, she drank more. He found that this was a significant amount of alcohol for a person who claimed she weighed 114 pounds. App.p. 3622-23; PCR Tr. 448-449.³⁴

³³ Dr. Adler stated that he also reviewed Dr. Evans's 2004 testing materials, spoke with Dr. Evans on the phone and communicated with him by email. App.p. 3620; PCR Tr. 446. He opined that Dr. Evans' material from 2004 or 2005 can be relied on with certainty to make a diagnosis. App.p. 3620; PCR Tr. 446. Dr. Evans obtained the Quantitative EEG in 2004 and reviewed and read it. Dr. Evans also sent out the raw EEG data to a consultant, Dr. Walker. He claimed that to the world's leading expert, Dr. Thatcher. Dr. Adler stated that the data existed in 2004 and was abnormal (and showed brain damage). App.p. 3620-21; PCR 446 447. Dr. Alder stated that although Dr. Evans did not do as extensive testing as Dr. Connor, based on Dr. Evans' testing alone, it revealed 5 domains at the required level of severity. Dr. Adler submitted that the diagnostic criteria for FAS would have been satisfied prior to the original trial. App.p. 3621; PCR Tr. 447.

³⁴ Dr. Adler stated that in FASD research, the general consensus that a total of 14 drinks a week is the kind of drinking that was reflective of having a child with FASD. App.p. 3623; PCR Tr. 449. In Daisy's case, she now claimed to have drunk about 28 drinks a week, which would be in excess of what is considered heavy drinking pre natal exposure. App.p. 3623; PCR Tr. 449. He noted that there are 2 major factors: how many times in a given month did someone have 5 drinks or more, a binge, how many occasions is the person taking just 3 or 4 drinks. App.p. 3625-26; PCR Tr. 451 452. Dr. Adler opined that if Daisy's glasses of wine were big glasses of wine, they could be considered a binge drink every night. Because she is talking about more drinks on the weekend, it could be at least 8 binge sessions a month. If she drank 3 or 4 glasses of wine on weeknights, which would have been about 16 days a month, that would be about 90 drinks a month. This would match the formula needed to have a child with FASD. App.p. 3625-27; PCR 451 453.

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

Dr. Adler discounted Daisy's pre-trial statements to Vogelsang that she did not drink during pregnancy. App.p. 3629-30; PCR Tr. 455-456.³⁵ Dr. Adler opined that it is well known that mothers are reluctant to speak about their drinking. But he found reports that mothers are good reporters and that as a general rule, mothers report during the pregnancy. Dr. Adler reported that there was literature that when mothers are asked up to 16 years later, they tend to be consistent. The kinds of deficits that their kids show ultimately are the deficits that reflect a dose response effect. The mothers, who said they drank more, even before the child was born, had kids who were more afflicted. The 2004 CDC Criteria explicitly states under the section of maternal drinking that in many cases, even if the mother boldly denies alcohol consumption, it's appropriate to ask other collateral informants such as relatives, a husband, a boyfriend, and looking at medical records. App.p. 3629-30; PCR Tr. 455-456. Dr. Adler stated that he did not see medical records where Daisy was admitted as an alcoholic nor did he see any information that neighbors claimed Daisy was an alcoholic. App.p. 3631; PCR Tr. 457. However, Dr. Adler

³⁵ Respondents noted he credibility concerns with Daisy which were recognized by the original defense team. Further, Daisy denied ever making these statements to Vogelsang, again reflecting her credibility issues concerning anything she states in this matter.

stated that Williams has more data to support this diagnosis than any person I've ever diagnosed." App.p. 3632; PCR Tr. 458, l. 15-19. Also PCR 457.

Dr. Adler and Facial Features.

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

Dr. Adler found the FAS facial features were present in Williams. In the PFAS diagnosis, Dr. Adler stated that need at least 2 facial features. App.p. 3642; PCR Tr. 468. He found that the features were mild. He determined in the distance between the eyes, the inner cathal distance, was not abnormal and Williams' palpebral features are normal. However, the philtrum edges show up more at a three-quarter angle. Williams scored a 4 on the philtrum edge scale, 5 being the worst, but it was not totally flat. He suggested that Williams might have had more facial features when he was younger. App.p. 3638-42; PCR Tr. 464-468. He stated that Williams' circularity is a 3, which is a finding. The pattern is A, C, B, which is consistent with FAS features although they are mild. App.p. 3642-3643; PCR 468-469. He stated that people with FASD tend to have a flattened mid-face. However, this criteria is not used because it tends to be a subjective finding. App.p. 3643-44; PCR Tr. 469-470.

Dr. Adler and Growth retardation

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

Dr. Adler and CNS (Central Nervous System Abnormalities)

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

know what the left hand was doing. Dr. Adler stated that people with FASD have abnormalities of their corpus callosum. App.p. 3650-52; PCR Tr. 476-478.³⁶ He spoke with Dr. Evans about the notes Ms. Vogelsang took from her conversation with Dr. Evans. He wanted to make sure that her notes were correct and accurate. App.p. 3653; PCR Tr. 479. He stated that on Dr. Evans' tactual perception test, Williams had a big problem with that. It took him longer with his left hand. It took Williams 3 trials to catch on. It was as if there was no corpus callosum was noted by Dr. Evans. Dr. Adler found that this was a huge red flag for FAS because damage in the corpus callosum is a red flag. The corpus callosum is tied with visual or special, motor performance. App.p. 3655; PCR Tr. 481. Dr. Adler opined that Williams' corpus callosum is abnormal so the brain itself is abnormal. App.p. 3655; PCR Tr. 481. He stated that in FASD, if you are going to find a problem with the corpus callosum, it is going to be in areas 2 and 4. App.p. 3656; PCR Tr. 482.

Dr. Adler presented a sagittal cut of Williams' brain. He opined that area 4 of his corpus callosum becomes significantly thin. He stated that the configuration of gyri are jumbled, it looks like a ball. The corpus callosum is thinner than normal. The thinned area was 2.6 units, more than 50% thin. 7.1 units is the area to the left of the corpus callosum. This is moderate thinning. App.p. 3657-60; PCR Tr. 483-486. He stated that partial agenesis, when there is no corpus callosum, can be seen in FASD, but he did not see it on Williams. App.p. 3660; PCR Tr. 486. He suggested that moderate thinning is a significant finding. App.p. 3661; PCR Tr. 487. In 2004, Dr.

³⁶He said that previous abnormalities with the corpus callosum were associated with mental retardation. The vast majority of people with FASD will not have an IQ of 70 or below. there are corpus callosum abnormalities in people who do not have mental retardation. App.p. 3652-53; PCR Tr. 478-479. He stated that literature says that people with FAS, the more seriously affected people have about 10 points lower IQ and they don't get into serious criminal trouble as much because they don't have the opportunity. He opined that because they are so infirmed, that they have supervision. App.p. 3661; PCR Tr. 487.

Evans could have and did show neuropsychological impairment that he predicted would correlate with an abnormality of the corpus callosum. App.p. 3662; PCR Tr. 488.

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

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

Dr. Adler opined that he found nystagmus which is associated with a person's smooth eye movement. App.p. 3668; PCR Tr. 494. He stated that Williams was not on medications are known to produce nystagmus at the time that he saw him. App.p. 3668-69; PCR Tr. 494-495. He stated that Dr. Griesemer in 2004 noticed the nystagmus. App.p. 3669; PCR Tr. 495.

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

Dr. Adler and the QEEG Assessment

Dr. Adler stated that he didn't do the QEEG, but it was originally done by Dr. Evans in 2004. He also sent the test to a neurologist in Texas to look at the data. App.p. 3672; PCR Tr. 498.³⁷ Although he didn't see the QEEG report, he reviewed the notes from Ms. Vogelsang's

³⁷ "In an assessment of QEEG sponsored by the American Academy of Neurology and the American Clinical Neurophysiology Society, the authors indicated that QEEG analysis techniques "remain controversial." The authors concluded from their assessment that "[b]ecause of substantial risk of erroneous interpretations, it is unacceptable for any ... QEEG techniques to be used clinically by those that are not physicians highly skilled in clinical EEG interpretation." Id. at 14. "Qeeg techniques are very predisposed to false-positive errors ." Nuwer, Marc, M/D., Ph.D., "Assessment of Digital EEG, Quantitative EEG, and EEG Brain Mapping: Report of the American Academy of Neurology and American Clinical Neurophysiology Society", Neurology 1997, 49:277-292. **The authors stated that "[o]n the basis of clinical and scientific evidence, opinions of most experts, and the technical and methodologic shortcomings, QEEG is not recommended for use in civil or criminal judicial proceedings."** Id. at 49:285. Id at 13." Falksen v. Secretary of Dept. of Health and Human Services , 2004 WL 785056, 10 (Fed.Cl.) (FED.CL.,2004). The Tenth Circuit found that the Plaintiff in Head could not meet her burden, and therefore made a showing that a QEEG test had not achieved some scientific acceptability, or that the test does not have a reasonable measure of trustworthiness. Head v. Lithonia Corp., Inc., 881 F.2d 941, 942-944 (10th Cir.1989). "In some circumstances, QEEG has some positive values, but they are outweighed by the substantial problems encountered in trying to use the tests clinically." Id. at 49:280. QEEG is an unreliable, unacceptable methodology for diagnosing cognitive disorders and is not generally accepted by the relevant scientific community for that purpose. See APA Official Actions, "Quantitative Electroencephalography: A Report on the Present State of Computerized EEG Techniques," Am.J. of Psych., 148:7, July 1991, at 962; see also Head v. Lithonia Corp. Inc., 881 F.2d 941, 942-44 (10th Cir.1989) (plaintiff, as proponent of this scientific evidence, did not meet her burden of showing that the proffered QEEG test has achieved some scientific acceptability and that the test has a reasonable measure of trustworthiness); Brownell v. Bulldog Trucking Co., Inc., Civ. 4-91-0005 (E.D.Tenn. July 7, 1993); Tran v.

conversation with Dr. Evans and spoke to Dr. Evans. Dr. Adler did review the report from Dr. Walker. App.p. 3672; PCR Tr. 498.³⁸

According to Dr. Adler, the Quantitative EEG (QEEG) measures different brain waves at different sites and the frequencies. The QEEG compares the results against a database of people with normal brains. App.p. 3679-80; PCR Tr. 505-506. Dr. Walker assessed the raw data and Dr. Thatcher prepared the QEEG report. App.p. 3680; PCR 506. Dr. Adler opined that a well-functioning brain has all the parts working together in synchrony. This is what you look for in a QEEG. He stated that in an abnormal brain, you would see higher electrical activity in a particular area of the brain. App.p. 3684; PCR Tr. 510. The abnormality has to be in the uppermost 2.5% to show up on LORETA. App.p. 3685; PCR 511. Dr. Adler claimed that QEEGs have been generally accepted in the scientific field under Daubert standard and under Frye standard. App.p. 3685; PCR Tr. 511.³⁹ The QEEG is data he uses with all the other data that

Hilburn, 948 P.2d 52, 57 (Colo.App.1997) ("QEEG is not generally accepted in the relevant scientific and clinical community for the purposes for which the evidence was offered."); Ross v. Schrantz, No. C8-94-1729, 1995 WL 254409 (Minn.Ct.App. June 14 1995) (record supported district court's decision to exclude QEEG evidence). Petitioner has presented no scientific validation of the use of QEEG. Mendoza v. State of Florida, 87 So.3d. 694 (S.Ct. Fla. 2012) (circuit court did not abuse its discretion in excluding QEEG test results where the QEEG had not passed the Frey test).

³⁸ The State objected to the admissibility of the QEEG report. The State urged that several courts have held that the QEEG is not admissible as a science. Under South Carolina Rules of Evidence, Rule 701 through 704, the State submitted that standing alone for an opinion, , the QEEG is not admissible.. However, after a discussion about the QEEG report, the hearing judge allowed its consideration. App.p. 3672-73; PCR Tr. 498 505. The QEEG has not been generally accepted in the scientific community as reliable and therefore is inadmissible. See State v. Zimmerman, 166 Ariz. 325, 802 P.2d 1024 (App. 1990); see also Nadell v. Las Vegas Metropolitan Police Dept., 268 F.3d 924, 927-28 (9th Cir. 2001); Tran v. Hilburn, 948 P.2d 52, 55-57 (Colo. App. 1997) (qEEG not generally accepted in relevant scientific and clinical community for purposes of diagnosing and treating mild closed-head injuries); In re Breast Implant Litigation, 11 F. Supp. 2d 1217, 1238 (D. Colo. 1998) (rejecting qEEG evidence because it is not well recognized in clinical setting, it is pre-disposed to false-positive errors, it is not recommended for use in civil or criminal proceedings, and it is an unreliable and unacceptable methodology for diagnosing cognitive disorders and is not generally accepted by the relevant scientific community for that purpose).

³⁹ Respondent submits that considerable debate exists within the literature as to the reliability of QEEG scans. See e.g., *Laura Stephens Khoshbin & Shahram Khoshbin, Imaging the Mind, Minding the Image: An Historical Introduction to Brain Imaging and the Law*, 33 Am. J.L. & Med. 171 (2007). In fact, the Ninth Circuit

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

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

Dr. Adler opined that this is additional material that is not centrally necessary to make the diagnosis, but confirms it. App.p. 3693; PCR Tr. 519. He interpreted that Dr. Walker's report is saying that Williams has brain damage. App.p. 3693; PCR Tr. 519. The Court allowed the

has affirmed a district court's decision to exclude QEEG expert testimony based on record evidence indicating QEEG's may tend to produce "false positives." See Nadell v. Las Vegas Metro. Police Dep't, 268 F.3d 924, 928 (9th Cir.2001). Additionally, a District Court in Colorado found that Quantum EEG testing was "not well recognized in the clinical setting." In re Breast Implant Litigation, 11 F.Supp.2d 1217, 1238 (D.Colo.1998).

QEEG over objection. App.p. 3693-95; PCR 519-521. Adler reported that Dr. Thatcher is able to show the abnormality visually like an MRI picture and able to tell that parts of the brain are not working smoothly. App.p. 3694-96; PCR Tr. 522.

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

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

Dr. Adler also opined that he found certain abnormalities and indicia on the physical examination that are not pathognomonic and determinative of FAS, but are frequently found. One of these things is clinodactyly or misshapen fingers, particularly fingers that are twisted in appearing like a hockey stick that you see this with some frequency in FASD. He claimed this was found in Williams. App.p. 3703-04; PCR Tr. 529-531.

⁴⁰ The reference to Brodmann concerns the brain map areas originally developed by the German anatomist Korbinian Brodmann.

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

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

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

Dr. Adler suggested that Partial Fetal Alcohol Syndrome is more serious than FAS. He stated because people with FAS have the full abnormal face and their IQ is lower, they get services more readily. He claimed that people with FAS are sheltered and helped, and they generally don't have criminal problems. However, he felt that people with PFAS have more

difficult lives with more negative things that happen to them because there problems are not as easily detected. App.p. 3707-08; PCR Tr. 533-534. Dr. Adler stated that Williams can communicate well and he looks fine. "Williams talks a good game." Adler suggested that Williams is able to mask his problems. App.p. 3708-09; PCR Tr. 534 -535.⁴¹

Dr. Adler declared that bipolar disorder mental illness is not a symptom of FASD because there can be co-occurring disorders. App.p. 3716; PCR Tr. 542. He opined that if a person has FASD, there is a higher risk of having other disorders. App.p. 3716; PCR Tr. 542. 42

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

Dr. Adler stated that he has been involved in cases in which this type of information has been offered at the penalty phase, resulting in a life without the possibility of parole sentence.

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

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

App.p. 3718; PCR 544. Dr. Adler stated that he had seen a summary of Williams' hospital records after a suicide attempt. App.p. 3719; PCR 545. Exhibits 38, 39. He opined that there was nothing in those records that would change his diagnosis of PFAS. App.p. 3721; PCR 547. However, Dr. Adler claimed that it show that Williams was a bad historian, because Williams said that he had taken 10 pills, Klonopin and Estradiol, when he actually took tricyclics, which are extremely toxic. App.p. 3721-22; PCR Tr. 547-548.

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

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

declared it to be a normal MRI. App.p. 3799.

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

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

Dr. Natalie Novick-Brown – Psychological Opinion

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

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

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

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

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

App.p. 3878. She finds on July 16 he confronts her and he strikes her in the face after he claims to beg her to come back to him. This leads to his arrest for assault. App.p. 3878.

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

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

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

the keys in the car during work hours with employees present carrying a visible gun by his side. App.p. 3883. She stated he was aware there would be camera and found this action did not make sense. App.p. 3883-84. She stated that he let the victim communicate with 9-1-1 and suggested that it was not a sophisticated plan to hurt someone. Dr. Brown suggests the video supports her finding that the incident was not a sophisticated plan. She opined that he never contemplated that there would be a struggle. App.p. 3885-86. At the scene, it appears that he no longer wants to kill her as reflected in the journal, but now just wants her attention. App.p. 3886. Dr. Brown stated then the unexpected happens to him which he perceives as a threat and thinks she will get the gun from him according to his report to her. App.p. 3886-87. She states this version is in two statements. App.p. 3887, 3888-89. She states that when the struggle happened he feared that she would get the upper hand and shoot him based upon the supportive evidence of the struggle. App.p. 3889. Again she found the behavior illogical. App.p. 3889. After the fact of the shooting, Williams drops the gun and hides in the storage area knowing SWAT is around. App.p. 3889-90.⁴³ She notes that he has in his possession the letters talking about killing her and about a suicide. App.p. 3890. Dr. Brown finds these letters (State Exhibits 16 and 17 at trial) were written to intimidate the victim and threaten her. App.p. 3890.

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

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

Dr. Brown states that when Dr. Crawford begins her interrogation she leads him away from what he originally said. App.p. 3887. Dr. Brown notes that Williams ultimately takes responsibility for planning the whole thing out and making (inculpatory) statements that no sophisticated person do showing premeditation, intent to kill and torture. Dr. Brown claims that whatever was suggested to him, he endorsed. App.p. 3887.⁴⁴ Dr. Brown stated that FASD people are suggestible and easily manipulated. App.p. 3892. She used the Gudjonsson test standard for suggestibility and determined that his score rated him as more suggestible than the general population. App.p. 3894-95. This suggested a tendency to change answers. She found it to also be higher than the prison population. App.p. 3896.

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

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

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

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

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

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

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

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

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

She stated that when one is conforming his conduct to the requirements of law that it shows that he has the capacity to conform. App.p. 3937-38. She stated that there were many times Williams was conforming his conduct. It was pointed out that in his statement (2911-14) that he was going to confront the victim at her home one night but chose not to do so when he was concerned that a family member might be there. App.p. 3938. She also confirmed that during the negotiations, he refused the suggestions to release the victim. App.p. 3940-41. However, she did not equate that rejection of the suggestion with the suggestibility she placed on Dr. Crawford's interrogation. App.p. 3940-42. When inquiry was made about the comments he made to Dr. Crawford, she discounted them. App.p. 3943-44.

WHY DEFICIENT PERFORMANCE NOT SHOWN

At the outset, Petitioner complains that the PCR court failed to accept the admissions of counsel that they had no reason why they did not consider fetal alcohol. A collateral court is not required to accept admissions by counsel of ineffectiveness which is not determinative. *U.S. v. Eyman*, 313 F.3d 741, 743 (2d Cir. 2000).⁴⁵ Further, the Petitioner fails to recognize that the testimony of Jan Vogelsang was found to be credible and relied upon by the PCR judge to show that counsel's investigation was reasonable and preparation was not constitutionally deficient. In appellate review, the Court gives great deference to the PCR court's findings of fact and conclusions of law. *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). This court also "gives great deference to a PCR [court's] findings where matters of credibility are involved." *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010).

Respondent submit that the record provides support that defense counsel in 2005 were not "deficient" in their investigation even though they failed to develop evidence that Petitioner suffered from FAS. First, underlying the FAS claim is the fact that the Petitioner's mother in

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

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

2004 advised Vogelsang that she did not drink alcohol during her pregnancy. As Vogelsang noted, this contrasted with what the father and daughter had suggested, but Vogelsang even found those inquiries to be unclear about the amount of alcohol used by the mother at that time. Plainly, this was revealed to the defense. It is additionally undisputed that Vogelsang provided this conflicting information about mother drinking during pregnancy themes to defense counsel in her reports at team meetings as shown through her memorandum for those meetings. Vogelsang recognized that the failure of mother to admit drinking brought the possible FAS issue as a problem and was not surprised that it was not directly presented as FAS during the trial. Vogelsang's testimony was found credible and supported Judge Welmaker's fact finding. See *Garza v. Stephens*, 738 F.3d 669 (5th Cir. 2013) (trial counsel's failure to investigate and introduce evidence that defendant suffered from fetal alcohol syndrome as mitigation during the punishment phase of a capital murder trial was not deficient performance, as an element of claim of ineffective assistance of counsel, where no family members interviewed mentioned the mother's alcohol or drug abuse to trial counsel, and three prior psychological evaluations of defendant did not mention fetal alcohol syndrome). See *Bobby v. Van Hook*, 558 U.S. at ("given all the evidence they unearthed from those closest to Van Hook's upbringing and the experts who reviewed his history, it was not unreasonable for his counsel not to identify and interview every other living family member or every therapist who once treated his parents"); *Powell v. Kelly*, 562 F.3d 656, 670 (4th Cir. 2009) (quoting *Wiggins v. Smith*, 539 U.S. at 523) ("When the claim is that counsel failed to present a sufficient mitigating case during sentencing, the inquiry 'is not whether counsel should have presented a mitigation case' but 'whether the investigation supporting counsel's decision not to introduce mitigating evidence ... was itself reasonable.'");

Gardner v. Ozmint, 511 F.3d 420, 427 (2007) (acknowledging more detail in evidence submitted may be found, but no *Strickland* error where counsel investigated the case, relied on experts, presented a sound defense, and evidence of aggravation was overwhelming and compelling); *Byram v. Ozmint*, 339 F.3d 203, 209-210 (4th Cir. 2003) (simple showing that additional records were available does not render counsel ineffective); *Samayoa v. Ayers*, 649 F.3d 919, 929 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1564 (2012) (state court “not unreasonable in deciding that the additional evidence of Samayoa’s childhood probably would not have caused a different verdict to be rendered”). Compare *Heishman v. Ayers*, 621 F.3d 1030, 1039 (9th Cir. 2010) (counsel’s representation deficient where the record shows an “inexplicabl[e]” failure to pursue further psychological evaluation where such evaluation was recommended by defense team expert and counsel secured authorization for funds); *Von Dohlen v. State*, 360 S.C. 598, 605, 602 S.E.2d 738, 741 (2004) (additional information demonstrated error in opinion for trial).

Further, counsel’s reasonable investigation is shown though Vogelsang’s testimony where she declared that she provided information about mother’s drinking during pregnancy to the social historian, and the two psychiatrists Dr. Halleck and Dr. Richards who testified for the defense. Vogelsang also provided them the information about the frontal lobe dysfunction from Dr. Evans neurological testing to these experts which suggested brain damage. Additionally important, when the MRI was done in January 2005 before the trial, it reported as a normal brain MRI. App.p. 5035. [It is also interesting that when another MRI was in 2011, the report again was a normal brain MRI with “only mild thinning of the posterior body” of the corpus callosum. App.p. 5035.]

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

Importantly, counsel were aware from Dr. Evans report about frontal lobe dysfunction to suggest brain damage. However, no evidence of brain damage was presented to the jury, although evidence was presented about mother's drinking through the cross-examination of Dr. Crawford and through Professor Hammock. The mitigation presentation consisted showing that Petitioner suffered from mental illnesses such as bipolar disorder, obsessive compulsive disorder and depression. These mental illnesses fit within the picture that the defense was using to show his relationship with the victim that led to the murder. As the PCR Court found, the defense presented a compelling case in mitigation. It reflected evidence of impulsivity to contrast with overpowering evidence of premeditation and planning reflected in the Petitioner's journals and statements made to Dr. Crawford in her interviews with Petitioner.

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

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

SIXTH AMENDMENT PREJUDICE NOT SHOWN FOR GUILT OR PUNISHMENT

Respondent submits that Sixth Amendment prejudice was not shown in the presentation before the PCR Court. As stated, the focus of Petitioner's initial prejudice claim is that partial fetal alcohol spectrum disorder (PFASD) [which would have possibly been diagnosed as FAS in 2005] is that it is a mitigating factor and could have supported a verdict of guilty but mentally ill based on Dr. Novick-Brown's testimony. What he fails to recognize is while FAS is a mitigating factor, the presentation of the evidence and its claimed effect as an additional explanation for his actions was a two-edge sword on the basis of the record. This is because of Dr. Novick-Brown inability to recognize the salient facts of the Petitioner's criminal action in this case which showed planning and premeditation in his intent to kill the victim on that date. Additionally, the conflicting evidence that Petitioner had in 2005 on whether mother actually

drank during pregnancy while an alternate explanation could have been given remove the persuasive power of the FAS assessment. Simply put, Petitioner's current attempt to shoehorn Williams with all the potential traits and deficits of people who suffer from PFASD or FAS in light of the entire record of Williams actual functioning in this crime to a reasonable probability would not have resulted in a new verdict.

Unlike 2005 defense witness Dr. Halleck, PCR witness Dr. Novick-Brown did not understand "guilty but mentally ill" verdicts under South Carolina law.⁴⁶ One of the defects in Dr. Novick-Brown's opinion that due to FAS Petitioner lacked the capacity to conform his conduct to the requirements of law such that he met the definition for a verdict of "guilty but mentally ill." This would have directly conflicted with Dr. Halleck's opinion. A review of the record showed a misunderstanding of the law and the evident bias in her opinion. She testified that some people with FAS had the capacity to conform yet used those generalizations to suggest that Williams lacked the capacity to conform which ignored persuasive conflicting evidence in the record. Dr. Brown testified that people with FAS cannot make long-term plans, yet the record showed through the Petitioner's journals that he had written plans to kill the victim well in advance of the killing. Dr. Brown even testified that Williams had intended to kill the victim as noted in the journals. App.p. 3885. Dr. Brown was addressing the claim as his capacity as being "substantially impaired" by his mental illness which was a conclusion consistent with Dr. Halleck's similar testimony. However, unlike Dr. Halleck who opined that the petitioner had the capacity to conform his conduct to the requirements of law, Dr. Brown did not recognize that

46 9. Dr. Halleck concluded that Petitioner knew right from wrong and was able, though with difficulty, to conform his conduct to the requirements of law," citing App.p. 2318. See Order of Dismissal , App.p. 4210 (emphasis added).

the threshold of guilty but mentally ill was equivalent to an “irresistible impulse” test. *State v. Wilson*, 306 S.C. 498, 512, 413 S.E.2d 19, 27 (1992) (one acting under an irresistible impulse is guilty but mentally). This mistake of law on her part was evident when she specifically denied that Petitioner was acting under an “irresistible impulse” when he killed the victim. See App.p. 3914, l. 7-15. Simply put, though his capacity may have been impaired by FAS, he still had the capacity to conform his conduct to the requirements of law.

Strickland “prejudice” is not shown on the GBMI issue merely because current counsel found a different expert who disagrees with the original defense expert opinion by Dr. Halleck concerning whether Petitioner lacked capacity to conform his conduct to the requirements of law. *Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir.1998) (observing that, where counsel had received a psychologist's opinion that defendant was not mentally ill at time of offense, “counsel was not required to second-guess the contents of this report,” but rather “understandably decided not to spend valuable time pursuing what appeared to be an unfruitful line of investigation.” (internal quotation marks omitted) . Further, as noted in *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004) in a capital case the issue of whether a person meets the definition of GBMI is not one of “culpability,” but rather a post-sentencing treatment option which is not at issue if the person is sentenced to death. See *Hoskins v. State*, 75 So.3d 250, 255 (Fla.2011) (“ ‘This Court has repeatedly held that counsel's entire investigation and presentation will not be rendered deficient simply because a defendant has now found a more favorable expert.’ ” (quoting *Card v. State*, 992 So.2d 810, 818 (Fla.2008))).

Dr. Brown also chose to discount or ignore the overwhelming evidence of planning and premeditation and an expressed desire to kill the victim as reflecting capacity to plan by merely

relying upon psychological testing that showed the Petitioner was “suggestible.” Dr. Brown used the trait to generalize that Petitioner’s responses to the interview were suggestible and therefore unreliable. However, a full review of Dr. Crawford’s September 3, 2003 statement with the Petitioner minimizes the effect of the “suggestibility” conclusions and generalizations by Dr. Brown. See App.p. 2897-2963. Although Dr. Crawford, like any interrogator in a lengthy interview, may have asked a few leading questions, the bulk of Williams’ responses could not be classified as “suggestible.” To the contrary, at most, the inquiries included follow-up questions to comments he had already made or written before. A review of the entirety of the statements reflects the limited value of Dr. Brown’s biased characterization and would have affected the jurors own credibility determination of her opinion in a negative way.

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

Further, the Petitioner's letters showed the planning and existing desire to kill the victim. State Exhibit 17 reflected his comment that by throwing him away she was signing her death warrant and that she will die . App.p. 1756-57. State Exhibit 16 revealed that the victim had lied to him about everything and that he was going to kill her. App.p. 1758-1759. The Petitioner's 72 page journal included references reflecting a change in his feelings for the victim in advance of the murder, including a premature comment to the victim's parents about having to kill their daughter followed by continued discussions about his own desire to kill. App.p. 1882.

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

Finally, the Petitioner takes issue with the PCR Court's survey which showed cases where evidence of FAS had been admitted and a death verdict still occurred. Brief of Petitioner p. 41. App. p. 4212-13. This analysis was plainly a review to the Dr. Adler's testimony where he stated that same kind of information that he had presented in William's case had been presented in

another penalty phase case and still resulted in a life sentence. App.p. 3718. As the PCR court found that assessment on prejudice needed to be viewed from the entire record in this particular case, not the mere fact that a similar diagnosis may have been presented in a different case with different aggravation and other mitigation. Plainly, Judge Welmaker was rejecting the underlying assertion by Petitioner that the mere presentation of FAS automatically would require a new trial or satisfy the prejudice prong. Plainly, this portion of the Order was a collateral portion of the reasonable assessment and reaction to a suggestion that the presentation of FAS would always result in a life sentence (or acquittal or GBMI verdict). *See Soliz v. State*, 432 S.W.3d 895 (Tex. Crim. App. 2014) (the jurors weighed appellant's evidence of brain damage and partial fetal-alcohol syndrome along with other relevant evidence and made a normative judgment that the evidence did not warrant a life sentence).

More importantly, Respondent submits that the Petitioner failed in his burden of proof and that prejudice is not shown because the admission of the evidence would have been a double-edged sword. *See Brown v. Thaler*, 684 F.3d 482, 499 (5th Cir. 2012) (“The [fetal alcohol disability] evidence that [petitioner] claims his counsel should have presented is ‘double-edged’ because, although it might permit an inference that he is not as morally culpable for his behavior, it also might suggest that he, as a product of his environment, is likely to continue to be dangerous in the future.”). The *Brown* court reached that conclusion amid significant evidence of fetal alcohol syndrome; the evidence showed that the petitioner's mother drank on a “daily, or near daily basis; that she drank heavily throughout her pregnancy with Brown [and] that [she] was likely an alcoholic.” 684 F.3d at 494. Also *Francis v. Dugger*, 908 F.2d 696, 702–04 (11th Cir.1990) (finding that failure to present additional mitigating evidence of an “impoverished,

abused, and socio-economically limited childhood, and ... of his brain dysfunction, diagnosed by his expert as fetal alcohol syndrome,” did not prejudice defendant convicted of torture-murder of government informant); *U.S. v. Purkey*, 428 F.3d 738 (8th Cir. 2005) (erroneous exclusion of expert medical testimony that defendant suffered from fetal alcohol syndrome was harmless, during sentencing phase of capital murder trial; jury would likely have imposed death sentence, even with such testimony, since it heard significant expert testimony on defendant's brain abnormalities and their impact on defendant's mental and emotional health). *Cf. Rompilla v. Beard*, 545 U.S. 374, 391–92, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (discussing unproduced evidence the defendant suffered fetal alcohol syndrome, was mentally retarded and repeatedly beaten, and suffered an extraordinarily deprived childhood); *Silva v. Woodford*, 279 F.3d 825, 847 (9th Cir.2002) (holding that failure to present evidence of childhood abuse, mental illness, organic brain disorder, and substance abuse, which included PTSD, fetal alcohol syndrome, and attention deficit disorder, was extremely prejudicial).

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

reactions, physical aggression, high risk behaviors, and the inability to experience or display remorse)), affirmed *Garza v. Stephens*, 730 F. 3d 669 (5th Cir. 2013).

If Dr. Natalie Brown's descriptions of the effects of fetal alcohol syndrome are deemed credible, then there were objectively reasonable reasons why prejudice would not be shown by counsel's failure to present the evidence. Chief among these are Dr. Brown's assertions that (1) prenatal alcohol exposure causes significant malformation in structures within the brain that are necessary for normal development and functioning (meaning a finding of FAS meant petitioner was permanently marked as brain altered), (2) as of 2005, the DSM-IV-TR had not been amended to recognize FAS as an independent mental health disorder (meaning such a diagnosis could be performed only by a psychiatrist (not a psychologist such as Dr. Brown) who did not opine here that Petitioner had FAS), and (3) prenatal alcohol exposure damaged executive functioning, resulting in socially inappropriate behavior, inability to apply consequences from past actions (i.e., an inability to learn from one's mistakes), lack of impulse control, rage reactions, physical aggression, stealing, high risk behaviors, and the inability to experience or display remorse. Thus, pursuit of a mitigation defense at the punishment phase of petitioner's trial premised upon petitioner suffering from fetal alcohol syndrome would have amounted to an admission to the jury by petitioner's trial counsel that petitioner would, in fact, pose a substantial risk of future violent conduct.

Presenting a Fetal Alcohol Syndrome defense at the punishment phase of Petitioner's capital murder trial would, in all reasonable likelihood, have reinforced the prosecution's arguments that petitioner was likely to pose a risk of future dangerousness for the rest of his life. Had petitioner called Dr. Brown to testify regarding the effects of fetal alcohol syndrome and she

had testified in a manner consistent with her PCR testimony, the prosecution would have undoubtedly employed her testimony to convince the jury to answer the issue of Petitioner's dangerous character affirmatively. A naked emotional appeal for mercy (based upon a purported diagnosis of fetal alcohol syndrome or fetal alcohol effects—a diagnosis not then independently recognized by the DSM–IV–TR in 2005) combined with an admission the petitioner was constitutionally incapable of experiencing remorse would not reasonably have resulted in a different verdict at the punishment phase of petitioner's capital murder trial. The evidence regarding petitioner's fetal alcohol syndrome and fetal alcohol effects presented by petitioner to this Court is, at best, clearly double-edged in nature because it necessarily led to a conclusion that petitioner would forever be unable to control his aggressive, anti-social, impulses and would never be able to learn from his mistakes.

The record reveals the multi-state defense team in the penalty phase focused on development of the traumatic and troubled family background and mental background of Williams - beginning with John Mauldin's opening statement in the penalty phase. ROA 2122-2130. Particularly, he emphasized that Williams had accepted responsibility for his actions and made no excuse for what he did, but noted the defense would present evidence about "the presence of a mental illness, . . . the lack of family support or family support systems and how the combination of those two things combined to create a very very horrible and difficult situation." ROA 2131. Supporting this argument was the actual presentation of evidence in mitigation. Viewing the entirety of the Petitioner's planned and aggravated murder of the victim, and the entirety of the case in mitigation placed in the 2005 trial⁴⁷ with the additional evidence

The Defense Mitigation

A. Guilt Phase.

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

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

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

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

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

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

Counsel Nettles developed some additional testimony in mitigation in his cross-examination of **Dr. Crawford**. She testified that Williams told her that his parents got divorced when he was 10 years old and that he was raised by his mother with her various step-fathers. ROA 2178-79. She further stated that Williams was angry with his father about the divorce because he had broken up the family. ROA 2173. She said he felt like he was an "evil child" after the divorce. He told Dr. Crawford that his mother married twice and that his relationship with the step-fathers was mixed, but generally not good. ROA 2179-80. She was told that his mother was an alcoholic for 30 years and intoxicated much of the time he was a child. ROA 2180. She stated that she had spoken with Williams mother and father. ROA 2181. She stated that Williams had reported that he had flunked the first grade and that

ADD (attention deficit disorder) may have been discussed, but he never received medicine for it and nobody followed through. His sister Maureen verified that his mother was an alcoholic and claimed that his mother provided Williams "virtually no support" and "very little supervision." ROA 2182. The sister had told Dr. Crawford that she offered to have Williams live with her because she was worried about the lack of adequate supervision and support. ROA 2182. Dr. Crawford stated that she visited the mother's house the night of the incident. She also stated that no one told her about Williams using drugs and he only stated that he drank some. ROA 2183. She stated that Williams told her that he met Maranda at the Bi-Lo and that they became friends and quickly started dating. She said he told her that he thought that Maranda had an abortion.

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

B. Penalty Phase

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

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

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

Ann Wilson, an elementary school teacher at Taylors Elementary School, testified that she taught Williams in 1990 when he was in the first grade. ROA 2220-21. She found him to be very weak academically and not ready for second grade. She made a request within three months of school for him to be in remedial classes. [Exhibit 25]. She based this request upon her conclusions on his immaturity and that he had a very short attention span. ROA 2222. He was in her regular class, but also attended extra remedial reading and math classes in an EIA program. Concerning her school reports, she stated that he was easily distracted by noise, had to be refocused with teacher prompts to process, unable to maintain attention, had difficulty staying on task, easily distracted, restless, impulsive,

blames others for mistakes, moody and inconsistent in his behavior. ROA 2224-26. As a result of her evaluation, Williams was referred to a school psychologist, Janice Hawkins. ROA 2227-29. He was then referred to "special education" classes. Wilson stated that she spoke with the Applicant's mother and she found her to be negative and not wanting her son retained in the first grade. However, Wilson recommended that he repeat the first grade. ROA 2232.

Rebecca Owens testified that she knew Williams because his mother worked for her in her beauty salon for six years. ROA 2234-35. She described Williams as a wonderful child who would come to the salon when he was between 9 and 13 years old. ROA 2236. She also described her visits to the home and found Williams was always sent to his room. She described an occasion when Daisy (his mother) had moved in with Hans. She described Hans as an older man who was a German ambassador. On one occasion, Daisy had started drinking heavily and Williams called over and stated that his mother was "going crazy." Owens went to the home and saw Daisy hit Williams in the face and cuss at him when he was talking on the telephone with his sister Maureen. Williams later was sent to his room. ROA 2237-38. On another occasion, his mother was again drinking heavily and started having "fits and disorientation." Owens found her at the top of the stairs naked screaming for an ambulance. ROA 2238. Owens stated that Daisy's relationship with Hans was volatile and that she was abusive towards him. She recalled one time when Daisy came to work and appeared very beaten up. However, Daisy told her she had beaten herself up with a telephone and called the police and had Hans thrown into jail. ROA 2239-40. She stated that Applicant did not have any friends and was not allowed outside to play. ROA 2240. She stated that she knew the victim, Maranda, because she was her waitress at a restaurant where she went. ROA 2240.

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

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

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

Professor Hammock stated that Daisy ignored Williams's human development "red flag" needs as a special needs child. ROA 2255. She did not respond to the recommendations for help and resources from the teachers and other professionals. As a result, Hammock concluded that Williams withdrew and stopped trying to be a part of the environment where he could continue to grow. She stated he did not develop the skills he needed to feel comfortable in society and to be able to interact. There was a great deal of violence in his home (shown by police reports) and challenges to his ability to interact with other children and learn academically. ROA 2256. This created a withdrawal from other children and his growth and development were not attended to by his mother. In reviewing

the records, she saw numerous recommendations from school personnel that were not followed up with his identified needs. She also saw the numerous changes in his schools - three elementary and two middle schools - contributed to the inability to fulfill his needs. ROA 2258. He was perceived by his teachers to be a child with a need for special education. She opined that problems in testing showed a disparity between what he appeared to know and what he could demonstrate. He was found to isolate himself and unable to play with others by the fifth grade.

Professor Hammock found members of the Williams family had the existence of mental health issues. ROA 2259-60. [Exhibit 29]. Particularly his father had a history of hospitalizations with suicidal and homicidal feelings with diagnosis of major depressive episodes - severe and need to be assessed for bipolar and alcohol dependence. ROA 2261.

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

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

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

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

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

corrections could tie them down in a bed, give them electric shocks and kill them if necessary to control them. ROA 2302.

Dr. Seymour Halleck, a forensic psychiatrist, testified as an expert in forensic psychiatry. ROA 2304. He stated that he interviewed Williams for four hours. He claimed to have reviewed a significant amount of material including the Applicant's journal, the reports of officers McNamara and Silvaggio, a report from the Greenville police department, mitigation notes from the defense, statement of the defendant, his prior incidents including the paint ball incident and his first assault on Miss Williams, his detention records, his school records, his hospital records concerning his suicide attempt, all the witness reports of observers of the attack on Miss Williams and the police reports. ROA 2306-07.

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

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

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

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

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

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

Maureen Bangcuyo, the Applicant's sister was the final mitigation witness. ROA 2328. She stated that when Williams was born that she was excited about having a baby in the house because it would be a positive thing.

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

ROA 2329. She said he was always special. She stated at that time things needed changing because she had to endure seeing her mother beaten by her biological father - Dwight. ROA 2331. She stated that they were constantly fighting and that she was beaten. She described alcohol every night and drugs. Maureen said that she was not allowed to do anything or date. She recalled when she went to college that Williams would come and stay over the summer and she described him as smart. ROA 2332. Months before the divorce, she stated that her mother constantly called and described being beaten. ROA 2333. She describe4d calls from Williams about it being worse since she left for school. ROA 2333. She said her mother and Williams lived in a shelter after the divorce because Dwight stopped making payments on the home. She said that Dwight set fire to all their clothes and belongings. ROA 2334. She said she became concerned about that Applicant she tried to take care of him in Fall of 1997. ROA 2336-37. However, because of her own workload and his needs, Williams went back to his mother in Greenville. ROA 2336.

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

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

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

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

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

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

CONCLUSION

For all the foregoing reasons, Respondent submit that the decision denying state post-conviction relief should be affirmed. Respondent further submits that the stay of execution entered by this Court should be vacated and the judgment of the Court of General Sessions should be carried out pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996).

Respectfully submitted,

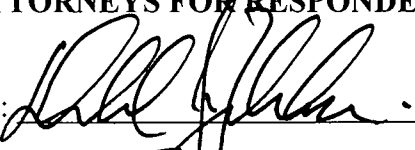
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENTS

By: 

DONALD J. ZELENKA

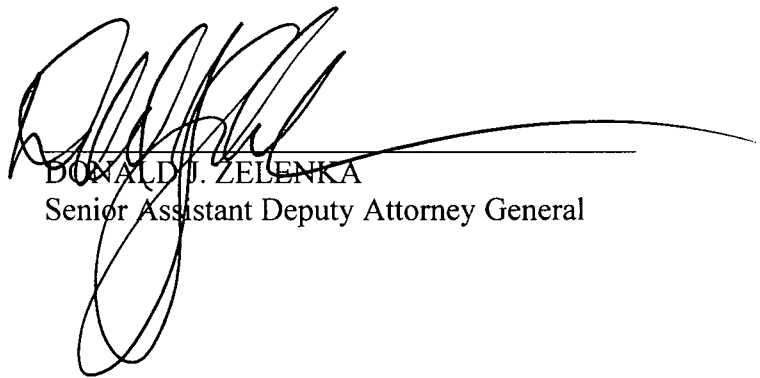
January 20, 2016

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Brief of Respondent in the foregoing action by depositing a copy in the United States Mail to:

Derek J. Enderlin, Esquire
Ross and Enderlin, PA.
330 East Coffee Street
Greenville, South Carolina 29601

This 20th day of January, 2016.



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General