

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Spartanburg County
The Honorable Roger L. Couch, Circuit Court Judge
Appellate case No. 2011-198472

S.C. Supreme Court

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RICHARD BERNARD MOORE, ,

S.C. Supreme Court

Petitioner,

vs.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUES PRESENTED

1. Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to perform a reasonable investigation concerning Petitioner's background and family life and present evidence of the investigation during the sentencing proceeding?

2. Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to call James Aiken to testify regarding Petitioner's adaptability to life in prison?

3. Whether trial counsel was ineffective, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, by failing to adequately prepare and rebut evidence Petitioner shot the decedent with premeditation while behind the store counter since how the decedent came to be shot was critical to the extent of Petitioner's culpability?

COUNTERSTATEMENT OF ISSUES PRESENTED

I. Whether this Court must deny certiorari because there is evidence of probative value to support the PCR judge's finding that counsel made a reasonable investigation for and presentation of evidence in mitigation of sentence, but that Moore and his extended family in Michigan did not cooperate? Also, whether there is evidence supporting the finding that Moore did not establish prejudice from counsel's failure to present the family members whose testimony was offered in PCR,

particularly where one witness - Moore's brother James - was incarcerated at the time of Moore's trial?

II. Whether this Court must deny certiorari because there is evidence of probative value to support the PCR judge's findings that trial counsel made an objectively reasonable decision under *Strickland v. Washington* not to present opinion evidence of Moore's adaptability to prison life through James E. Aiken, who was present for the sentencing, "since the presentation of Aiken's testimony would have resulted in the State being allowed to present damaging testimony in reply;" and that Moore was not prejudiced by counsel's failure to present Aiken's opinion on his adaptability?

III. Whether this Court must deny certiorari because there is evidence of probative value to support the PCR judge's findings that trial counsel's efforts to investigate the physical evidence at the crime scene and rebut the State's evidence that Moore shot the victim while he was behind the counter in the store were objectively reasonable and that Moore had not established prejudice under *Strickland*?

STATEMENT OF THE CASE

Petitioner, Richard Bernard Moore (Moore), is currently confined on death row at Lieber Correctional Institution, of the South Carolina Department of Corrections (S.C.D.C.), as the result of his Spartanburg County murder conviction and death sentence for murdering Jamie Mahoney during the commission of an armed robbery at Nikki's Speedy Mart, early in the morning of September 16, 1999. The Spartanburg County Grand Jury indicted him at the January 2000 term of court for murder, assault with intent to kill (AWIK), armed robbery and possession of a firearm during the commission of a violent crime. (00-GS-42-617 through -619). **App. pp. 2980-81; 2984-85.**

The State thereafter served notice of its intention to seek the death penalty. The Spartanburg County Grand Jury handed down another armed robbery indictment at the October 2001 term of court. **App. pp. 2987-88.** Ralph Keith Kelly, Michael David Morin and Jennifer Johnson, Esquires, represented Moore at trial. Seventh Circuit Solicitor Harold W. Gowdy, III, as well as Assistant Solicitors James Donald Willingham, II, and Barry J. Barnette, represented the prosecution.

The Honorable Gary E. Clary held motions hearings in the case on April 3, September 28, and October 15, 2001.¹ On October 16-22, 2001, Moore received a jury trial, pursuant to S.C. Code Ann. § 16-3-20 (Supp. 2012), in front of Judge Clary. The jury convicted him of each of the indicted offenses. **App. pp. 73-1607; 1765.** Following Moore's exercise of the twenty-four hour waiting period in § 16-3-20(B), a sentencing proceeding was conducted in front of the same jury. The prosecution relied upon the statutory aggravating circumstances that the murder was committed

¹ The transcripts of these hearings are found in the Appendix to the Petition for Writ of Certiorari at **App. pp. 1-14; 15-33; & 34-72**, respectively.

while in the commission of robbery while armed with a deadly weapon; that Moore, by his act of murder, had knowingly created a risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and that Moore had committed the murder for the purpose of receiving money or a thing of monetary value. § 16-3-20(C)(a)(1), (3)-(4) & (d). Judge Clary also submitted the statutory mitigating circumstances found in § 16-3-20(C)(b)(2), & (6)-(7).

The jury found the existence of each of the statutory aggravating circumstances alleged by the prosecution and it sentenced Moore to death. Judge Clary imposed the sentence of death for murder, and he sentenced Moore to five years for the weapons charge, ten years for AWIK and thirty years for armed robbery. **App. pp. 1609-1763; 2982-83; 2986; 2989.**

Moore timely served and filed a notice of appeal. Deputy Chief Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, represented Moore on direct appeal. On October 16, 2003, Moore filed a Final Brief of Appellant, in which he raised the following issues:

1. The judge erred in the guilt phase by preventing Moore from stressing the gravity of the decision facing the jury by arguing, "The State is seeking the death penalty on me, which means my very life is at stake." The judge abused his discretion by ruling that Moore could not mention punishment, but was limited solely to a discussion of "the testimony and evidence that has been presented."
2. The judge erred during the sentencing phase by once again limiting Moore's closing argument "to the evidence that has been presented and to the issues concerning the sentence imposed." Since S.C. Code Sections 16-3-20© and 16-3-28 afford a capital defendant the opportunity to ask for mercy and express feelings of remorse, this arbitrary limitation was an abuse of discretion and rendered Moore's purported waiver of closing argument involuntary.

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

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

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

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

On March 16, 2004, Moore (through Mr. Dudek) petitioned the South Carolina Supreme Court for a stay of execution. In an Order dated April 4, 2004, the Court granted a stay, pursuant to *In Re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996); it appointed the Honorable Larry R. Patterson to preside over the case; and it granted him exclusive jurisdiction over the matter. In accordance with *In Re Stays of Execution*, Judge Patterson held a hearing on July 22, 1999, to determine whether Moore desired to pursue Post-Conviction Relief and whether he wished to have counsel appointed. On June 17, 2004, Judge Patterson appointed Ms. Armstrong and Kathryn Hudgins, Esquire, to represent Moore. James M. Morton, Esquire, was thereafter substituted for Ms. Hudgins.

Moore then filed an Initial Application for Post-Conviction Relief (2004-CP-42-2713), which was dated August 8, 2004. **App. pp. 1766-69**. He raised two allegations of ineffective assistance of counsel in his Initial PCR Application:

[A] Ineffective assistance of counsel in violation of the Fifth, sixth and Fourteenth Amendments to the United States Constitution. Counsel was ineffective for failing to preserve for appellate review the question of whether defendant's waiver of his right to make a closing phase argument was rendered involuntary due to the trial

court's admonition to him. State v. Perez, 334 SC 563, 514 S.E.2d 754 (1999); State v. Hall, 312 SC 95, 439 S.E.2d 278 (1994).

[B] Ineffective assistance of counsel in violation of the Fifth, sixth and Fourteenth Amendments to the United States Constitution. Counsel failed to perform an adequate investigation into evidence in mitigation. Counsel produced only two lay witnesses during the penalty phase, and presented no expert evidence on applicant's behalf. Eddings v. Oklahoma, 455. US 104 (1982).

The State made its Return on August 4, 2005. **App. pp. 1770-87.** After Judge Patterson's retirement, the case was assigned to the Honorable Roger L. Couch.

Moore submitted his Amended Application for Post-Conviction Relief on December 31, 2010. **App. pp. 1788-95.** In pertinent part, he alleged that:

- 10.b. Trial counsel was ineffective in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and federal laws, South Carolina Constitution and South Carolina state law due to their failure to perform a reasonable investigation into Applicant's background and family life, resulting in a sentencing proceeding that was fundamentally unfair and assured a death verdict for Applicant would be returned by the jury. Trial counsel failed to conduct any investigation in the state of Michigan, where Applicant was born and raised. Had counsel conducted a reasonable investigation into Applicant's background, they would have learned that Applicant comes from a large family, had numerous relatives who could have testified to his good character and struggle with addiction, and these relatives and/or friends would have been willing to testify on Applicant's behalf during his sentencing proceeding at trial. Failure to conduct a reasonable investigation into potential avenues of mitigation is conduct failing below what is required of trial counsel in a capital case. Wiggins v. Smith, 539 U.S. 510 (2003); Strickland v. Washington, 466 U.S. 688 (1984) ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id., 466 U.S. at 691); Eddings v. Oklahoma, 455 U.S. 104 (1982).
- 10.c. Applicant was denied the right to effective assistance of counsel at both the trial and sentencing phases in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, federal law, South Carolina State Constitution, and South Carolina law in that trial counsel failed to properly and adequately investigate and prepare to confront and rebut the State's alleged physical evidence, and further trial counsel failed to

present its own expert or evidence to rebut or explain such physical evidence and/or object that ballistics and firearms and serology testimony was inadmissible in that it failed to meet the mandates of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and State v. Jones, 273 S.C. 723 (1979). Counsel's unreasonable omissions denied Applicant an opportunity to show to the jury he acted in self defense[.]

This incident involved a late night shoot out in a convenience store. Multiple gun shots involving two guns were fired. The defendant was wounded in the arm and chest and the victim was mortally wounded. There is undisputed evidence that the victim owned and/or possessed both guns involved and no evidence Applicant possessed any gun until he wrestled one of the guns from the victim. There was a great deal of evidence and testimony presented by the Solicitor regarding multiple guns, ballistics, shell casings, bullet jackets, bullet fragments, fingerprints, trace evidence, [gunshot] residue, blood, blood spatter, DNA, and pathology. Much of this testimony is subject to attack on the basis of its questionable admissibility. Even if admissible, the evidence was easily contradicted and/or explained in a manner consistent with "circumstances other than the guilt of the accused." Trial counsel never retained its own expert to assist with the forensic issues involved with the during his sentencing proceeding at trial. Thus, trial counsel did not adequately investigate or prepare to deny, rebut, or explain the State's physical evidence. Gardner v. Florida, 430 U.S. 122, 50 1.Ed.2d 339, 97 S.Ct. 399 (1976). Had counsel hired appropriate forensic experts, including a forensic pathologist, who could have testified as to the single bullet having killed James Mahoney, rather than two as opined by the state, and a crime scene analyst, who could have provided testimony concerning the likely origin of bullets, bullet fragments, shell casings, and general crime scene analysis, there is a reasonable probability that the guilt and/or penalty phase would have had a different outcome. Strickland v. Washington, *supra*.

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

counsel's inexplicable (and seemingly eleventh hour) decision to discard the only defense expert is manifest. Strickland v. Washington, *supra*.

App. pp. 1789-90; 1792-93. His Supplemental Amendments to Application for Post Conviction Relief were dated January 5, 2011. **App. 1796-97.**

Judge Couch held a hearing into the matter on January 30, February 1 and February 3-4, 2011, at the Spartanburg County Courthouse. Moore was present at the hearing; and Ms. Armstrong and Mr. Morton represented him. Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General Anthony Mabry represented the State.² **App. pp. 1962-2740.**

Judge Couch filed an Order of Dismissal on August 1, 2011. **App. 2879-2979.** Moore timely served his notice of appeal. He filed his Petition for Writ of Certiorari on July 18, 2012. He is currently represented by Chief Appellate Defender Robert M. Dudek and Appellate Defender Susan Barber Hackett. Respondent now makes its Return to the Petition.

² Moore testified on his own behalf at the hearing, and he presented testimony from Mr. Mabry; George Gibson; Pete Skidmore; Wilbert Casey; Charles R. "Rusty" Clevenger; James Aiken; Stephen L. Denton; Paul Dorman; Dr. Sandra E. Conradi; and Michael Morin Esquire. He also introduced the depositions of family members Harold Harrington, Dorothy J. Hooper, Cecil J. Hooper, Arma Nell Hadley, Maurice Moore and James A. Moore. **App. pp. 1798-1923.** The State presented testimony from Susan Porter, Esquire; R. Keith Kelly, Esquire; and the Honorable Donnie Willingham.

ARGUMENTS

I. This Court must deny certiorari because there is evidence of probative value to support the PCR judge's finding that counsel made a reasonable investigation for and presentation of evidence in mitigation of sentence, but that Moore and his extended family in Michigan did not cooperate. Also, there is evidence supporting the finding that Moore did not establish prejudice from counsel's failure to present the family members whose testimony was offered in PCR, particularly where one witness - Moore's brother James - was incarcerated at the time of Moore's trial.

Moore's first argument is that trial counsel was ineffective because they failed to adequately investigate for, develop and present mitigation evidence from family members of Moore. Respondent submits that certiorari must be denied because there is evidence of probative value to support the PCR judge's finding that counsel made a reasonable investigation for and presentation of evidence in mitigation of sentence, but that Moore and his extended family in Michigan did not cooperate. Also, there is evidence supporting the finding that Moore did not establish prejudice from counsel's failure to present the family members whose testimony was offered in PCR, particularly where one witness - Moore's brother James - was incarcerated at the time of his trial.

A. Standard of Review on Certiorari.

This Court must deny certiorari if there is any evidence of probative value to support the PCR judge's findings, *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007); *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989), and it will only reverse the decision of the PCR judge when there is no probative evidence to support his findings or the decision is controlled by an error of law. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000). Moore cannot meet this burden of proof.

B. Evidence presented at PCR hearing.

In support of this claim, Moore presented the deposition testimony of family members Harold

Harrington, Dorothy J. Hooper, Cecil J. Hooper, Arma Nell Hadley, Maurice Moore and James A. Moore. **App. pp. 1798-1923.**

Mrs. Hooper is Moore's aunt. She was never contacted by defense counsel and was unaware of Moore's death sentence until 2006. However, she claimed that she would have spoken to an investigator if she had been contacted prior to the trial. She also indicated that Moore's mother, her sister, had died by the time of the trial and that no family members contacted her and asked her to testify on Moore's behalf. Nor did either Moore's father or sister tell her that they had been contacted by an investigator who wanted to talk to them about Moore. **App. pp. 1801-04; 1807-08; 1814.**

Mrs. Hooper testified that Moore was a good child; that he played with her children; that he never gave her any trouble; that he was respectful; and that he was not aggressive. Also, he came from a good family and they made him go to church. If she had testified, she would have asked the jury to spare Moore's life. **App. pp. 1804-06; 1812.** On cross-examination, she indicated that Moore's family was upset about him being charged with murder, but she claimed that they had never told her that he had been in trouble before the murder and that she was unaware of any of his prior criminal the street. **App. pp. 1808-11.**

Cecil J. Hooper is Dorothy Hooper's husband and he has known Moore all of Moore's life. Moore grew up with Mr. Hooper's son, and Hooper was around him until Moore left Michigan. He learned of the murder charge against Moore through his wife. He likewise indicated that he was never contacted by defense counsel and that he would have been willing to testify if he had been asked to do so. **App. pp. 1819-22; 1824.**

According to Mr. Hooper, Moore was "a nice kid growing up," and did not have any

behavioral problems. Moore played football with Mr. Hooper and Mr. Hooper's children.³ He would have asked for mercy on behalf of Moore. **App. pp. 1821-22.** On cross-examination, Mr. Hooper admitted that he had no idea when Moore first began getting into trouble, and that Moore's family did not tell him about Moore's prior criminal history. Also, none of Moore's family members asked him to come to the South Carolina and testify or otherwise contacted him about the case. **App. pp. 1822-25.**

Harold Harrington testified that he is Moore's maternal uncle and that he has known Moore all of Moore's life. However, he was unaware of in this case until PCR counsel contacted him. If he had been called as a witness, he would have asked the jury to be lenient. Also, he would have told the jury that Moore "was a good person and not the type of person to go out and try to harm anybody." Further, Mr. Harrington would have asked jurors not to impose the death penalty because Moore's family loved him, and "we've known him a long time and he's always been a good person." **App. pp. 1831-34.**

On cross-examination, Mr. Harrington claimed that he saw Moore "several times a week," and that he saw him Moore until Moore had reached his twenties. Mr. Harrington likewise claimed it he could not remember Moore acting aggressively. However, Mr. Harrington admitted that he was unaware of Moore's prior criminal history or incarceration. Likewise, Mr. Harrington was unaware of Moore's use of alcohol or drugs and he did not learn of the murder charge until shortly after the trial. Finally, Mr. Harrington admitted that he didn't stay close to Moore as Moore grew older and he lost contact with Moore after Moore left the Michigan area. **App. pp. 1835-37.**

Arma Nell Hadley testified that she is also a maternal aunt of Moore. She was unaware of

³ To the contrary, Moore came from a good family and he was told right from wrong. **App p. 1825.**

the murder charge in South Carolina until a couple of years before her deposition, and she never spoke to any attorneys about the case before speaking with collateral counsel. Ms. Hadley testified that she would have been willing to testify on Moore's behalf if she had been asked to do so. **App. pp. 1844-47.**

Ms. Hadley described Moore as "a really nice guy, sweet guy, very sweet, friendly." She indicated that he respected her as his aunt, that he worked hard, that he played on the basketball team at school, and that "he grew up in a family of being around people that was loving." (Sic).⁴ Also, she never had any disciplinary problems with him and she never saw him behave aggressively. She claimed that if she had been called upon to testify on Moore's behalf, she would have testified that "he wasn't that type of guy, he didn't seem to be what I knew him, when we grew up together with my family ... he didn't seem to have that kind of personality." Further, she would have told the jury that she loved him, and she would have asked the jury to be considerate of him as a human being because she did not think that he deserved to die. **App. pp. 1847-49.**

On cross-examination, she admitted that Moore's father never told her about the murder, even though he lived next door to her, because during this time period "he didn't tell me too much." Also, she was only aware of one occasion in which Moore had gotten into trouble before the murder. She did not ask his family why he was in jail on that occasion, and his family never told her about any of his other convictions.⁵ Moore moved to Detroit with his girlfriend after he graduated from high school, Ms. Hadley lost track of him when he moved, and she did not know what kind of life

⁴ She testified that Moore came from a "very good home," and that he was made to go to church. **App. p. 1858.**

⁵ Likewise, she was unaware if of whether his brothers had been in any trouble with the law. **App. p. 1857.**

he was living after he moved. **App. pp. 1850-59.**

Maurice Moore testified that he is Moore's older brother. He testified on direct examination that he became aware of the murder charge from his brother's wife "a few months after it happened." While no one ever came and spoke with him before Moore's trial, he remembered receiving a phone call from someone he thought had said that she was Moore's lawyer and had explained Moore's situation. This caller said she was going to call back, but she did not do so. He further claimed that he would have been willing to come to South Carolina and testify if he had been asked. **App pp. 1896-1900; 1904-05.**

Maurice claimed that his brother "was a loving person. I know he got in a little bit of trouble, but as far as I know as my brother, he didn't go around looking for trouble, ... it seemed like, you know, sometimes... you be in a certain situation where you be around the wrong people and I know he would do that a couple times, but other than that, I can't see him in the crime that he's and now to do something like that." He admitted that Moore had gotten into some "minor trouble" but reiterated that Moore was "a caring, loving person" and a "good brother," whom he loved. **App. pp. 1900-01.**

Maurice further claimed that he would liked to ask the jury to have mercy and spare his brother's life. Although Maurice was sorry that someone else's life had been taken, he did not think taking his brother's life was necessary. He added that Moore was "not a monster or nothing like that ... He didn't go around carrying a gun looking for trouble. I guess he was just in bad situations." **App. pp. 1902-03.**

On cross-examination, he admitted that he and Moore's wife "lost contact" about three or four months after the murder. He also admitted that Moore's wife had called his girlfriend and not

him. Although Maurice had the telephone number of Moore and Moore's wife, he did not call her back because he no longer had her telephone number and she did not call him. Maurice never called South Carolina and he never wrote any letters because he does not write letters. Moore wrote letters to Maurice's girlfriend, but Maurice did not read the letters because he was upset with his brother for not writing him. **App. pp. 1903-10.**

Maurice contradicted himself and stated that Moore had telephoned him on either one or three occasions and that they had discussed the charges. However, Maurice claimed that he could not remember whether or not Moore told him about the trial date. Also, Moore did not ask him to come testify at trial, and Maurice did not offer to testify.⁶ Moore had called their father, "but they didn't have no conversation." Maurice further claimed that Moore was in contact with other family members after being arrested for murder. **App. pp. 1908-12.**

Maurice was unaware of several of his brother's prior convictions and he lost track of his brother after Moore moved to South Carolina. However, Maurice knew of Moore's 1987 conviction for attempted breaking and entering, and admitted that the this was "looking for trouble." He also knew of two other occasions where Moore had been convicted, and he had heard "in the streets" that Moore was using crack. **App. pp. 1912-16.**

Finally, Maurice admitted that he had been convicted in 1988 of larceny and conspiracy, for which she received a six month sentence. He further admitted that all of the brothers were raised in a good family; that they had been taught right from wrong by their parents; and that Moore knew that it was wrong to steal, break into businesses or assault people. **App. pp. 1916-18; 1924-35.**

⁶ Maurice could not give a reason for his failure to offer to come to South Carolina and testify. **App. pp. 1908-09.**

James Allen Moore testified that he is the youngest of the brothers in Moore's family and that Moore was eight or nine years older than him. He did not become aware of the murder charge until after Moore had been convicted. He was not contacted by his brother's lawyers and he indicated that he would have been willing to testify if he had been asked. **App. pp. 1865-69.**

James claimed that Moore "was a real nice, nice man as I can remember growing up." James would have wanted the jury to know that Moore was a good man and that Moore had a lot of people who loved him. He also would have asked the jury for mercy. Yet, he had to admit that he had not seen his brother "in I don't know how many years."⁷ **App. pp. 1869-70.**

On direct examination and throughout most of cross-examination, James claimed that he did not know why his family had not told him about Moore's charges and he suggested that it was because he was the baby of the family. **App. pp. 1868; 1870; 1882-83.** On cross-examination, however, he reluctantly admitted that he had two drug-related convictions in 2000, and that he was sentenced on March 27, 2000 to "[a] couple years" in prison. As a result, he was incarcerated at the time of his brother's trial. **App. pp. 1884-85.**⁸

Further, James admitted that Moore had lived in Detroit for a period of time and that he lost track of Moore after Moore moved to South Carolina. Moore finally began writing him after Moore was in SCDC. **App. pp. 1871-73.** Cross-examination further established that although James claimed that he had been living in his father's home, he never heard his family discussing the various

⁷ He thought that he had last seen Moore when James was eighteen. **App. pp. 1871; 1876.**

⁸ His first conviction was for possession of a controlled substance an amount less than fifty grams. He received a sentence of between two years and 240 months. The other 2000 conviction was an identical charge and he received an identical sentence. James likewise had a 1994 conviction for possession of a controlled substance, for which she received a sentence of between two and twenty years in prison. **App. pp. 1884-85.**

legal problems that Moore had, and he was supposedly unaware of whether or not his father was upset with Moore as a result of the murder charge. Likewise, Moore supposedly never mentioned the murder in their letters and James refused to admit that his brother had taken someone else's life. **App. pp. 1872-79.**

Moore testified that he had moved to South Carolina roughly ten or twelve years before the murder. He has two children but he has never been legally married. Linda Byrd is the mother of his two children. The rest of his family is in Michigan. He testified that he has his father, five brothers and two sisters, as well as multiple aunts, uncles, first cousins, nieces and nephews. While in high school, he played basketball and wrestled. He also graduated from high school. **App. pp. 2256-57; 2259.**

Moore claimed that when his attorneys asked him about his family in Michigan, he provided them with names, addresses and telephone numbers. He further contended that "I think maybe they tried to call a few of the numbers and that's as far as they went." Neither of his attorneys went to Michigan and he was unaware of whether anybody went there on their behalf. Counsel did not call any of his family members from Michigan as witnesses in the sentencing phase of the trial. **App. pp. 2259-62; 2278-79; 2282.**

On cross-examination, Moore denied that his family did not want anything to do with him following his arrest for murder. However, he admitted that he wrote **Respondent's Exhibit 19**, and that his family, "to some extent," had told him to get himself out of the situation. **App. pp. 2286-89.** Also, he remembered the defense's mitigation expert, Ms. Drucy Glass, but he claimed that "I am sure I gave her all the information that I had," which may have included information that two of his brothers were in prison. He was unsure of whether she had made any effort to contact his family

members and he testified that she never told him she had contacted any of his family. He likewise denied that she told him that no one had responded to certified letters sent to family members. **App. pp. 2289-91.**

Moore claimed that he had only been expelled once in high school for fighting, but he admitted that his problems with the law began while he was in high school. Nevertheless, he attempted to downplay his various parole violations and other criminal convictions. In particular, he denied that he committed any of the crimes while addicted to crack cocaine. While he admitted that he was using crack during the time period when the murder occurred, he denied using crack that night or telling anyone he had used it. Also, he denied that his blood had been drawn that night or that crack was the motive for the armed robbery. Further, and contrary to testimony from several of his relatives, he claimed that he had never lived in Detroit. **App. pp. 2261; 2277; 2291-93; 2304-05; 2313-17.**

Michael Morin, Esquire, testified that he was appointed as lead counsel in this case shortly after Moore's arrest. Before his appointment in this case, he had tried between two and four non-capital murder cases. He also sat as third chair in the death penalty trials of Theodore Kelly and Jimmy Locklair.⁹ **App. pp. 2342-45; 2508-09.**

Once the State had served the notice of intent to seek the death penalty, Mr. Morin knew that a second attorney would be appointed; and he wanted to have some say-so in deciding who would be appointed because he was concerned that the court might appoint an attorney who lacked

⁹ Mr. Morin graduated from law school in 1992 and he went to work for Brooks law firm in the Fall, where he remained until 1995. In April 1995, he was hired by the Spartanburg County Public Defender's Office. He worked in the public defender's office until December 2002. He then began working in the Seventh Circuit Solicitor's Office on January 1, 2003 and he was currently employed by the Seventh Circuit Solicitor's Office in Spartanburg. **App. pp. 2342-43.**

experience in criminal trial work. He had previously worked with Mr. Kelly and was aware that Mr. Kelly had experience in trying criminal cases. Therefore, he asked Mr. Kelly if Mr. Kelly would accept appointment in this case, and Mr. Kelly agreed. The two lawyers first met and discussed the case of September 19, 2004, and they subsequently met between fifteen and twenty times before the trial.¹⁰ **App. pp. 2345-46; 2519-20.**

Following his appointment, Mr. Morin met with Moore a number of times. **App. pp. 2509-14.** However, the attorneys agreed that his primary responsibility was handling the guilt phase of the trial, whereas the sentencing phase was Mr. Kelly's responsibility. They divided their responsibilities in this fashion based on Mr. Morin's experience in the two other death penalty cases in which he was involved, as well as information learned at CLEs that a lawyer who argues for client's innocence of the guilt phase may lose credibility with the jury in its sentencing phase. He took the responsibility for the guilt phase because he had already investigated the facts related to the guilt phase. **App. pp. 2521-22.**

Nevertheless, Mr. Morin was also involved in the investigation for mitigating evidence. First, he explained to Moore the need for Moore to cooperate with the experts hired by the defense and he would have explained the types of mitigating information that the defense was seeking. Also, his notes of January 10, 2001 reflect that he gave Moore a copy of a social history packet prepared by Ms. Drucy Glass, who had been hired by the defense as a mitigation specialist. After Moore had filled out the packet, counsel had some conversations with him about his family. **App. pp. 2551-52.**

Moore had a lot of extended family in Michigan. When counsel tried to contact them,

¹⁰ Some meetings were in the Public Defender's Office, while others were with Moore and/or Drucy Glass, the defense mitigation expert. **App. pp. 2520-21.**

however, the family members told the defense that “he’s gonna have to take care of it or something to that effect.” According to Mr. Morin, Moore was mad at his family and there was friction between his family and him. **App. pp. 2552-53; 2668-69.**

For his part, Moore wrote counsel a letter on April 20, 2001 (**Respondent’s Exhibit 19**), in which he stated “I’m writing to inform you that I am unable to supply you the information you want about my family in Michigan.” He thought that his sister, Vanessa, could provide the information and he listed her contact information. He also said,

Whether you call or write, explain the reason for this information. I have not informed them of the [State’s] intention to seek the death penalty. When I was first arrested I asked for their help, and was told “there would be no help coming and to get myself out of this mess.” At that point I made up my mind not to call them ever again for any reason. I [meant] then, I mean it now. This is why if you really want this information, you need to contact her for yourself. I’m not trying to be uncooperative, it’s just the way it is.

Respondent’s Exhibit 19, App. p. 2805. Counsel felt that Moore was competent to make this decision. **App. p. 2577.**

Additionally, Mr. Morin’s May 9, 2001 notes reflect that when he called Moore’s father in Michigan, the person answering the phone told him, “nobody by the name of Moore lived there.” Mr. Morin then called one of Moore’s sisters, but no one answered the phone. When counsel spoke with Moore’s common-law wife, she was unable to help because she did not know much about his family in Michigan. **App. pp. 2553-54.**

Mr. Morin described Ms. Glass’s main function as trying to collect “as much . . . background information, family information, those kind of things, that were specific to Mr. Moore that would be in the penalty phase.” The information developed by her would have gone more directly to Mr. Kelly. **App. p. 2555.**

Also, Mr. Morin had retained the services of a private investigator, Pete Skidmore. Although Mr. Skidmore's primary responsibilities concerned interviewing potential guilt phase witnesses, Mr. Morin also had Mr. Skidmore attempt to locate ten co-workers who might be potential witnesses in the sentencing phase. Unfortunately, none of these witnesses provided information that was beneficial to the case in mitigation. **App. pp. 2057-58; 2532-38; Respondent's Ex. 21, App. pp. 2808-09.**

Additionally, Mr. Morin had Moore evaluated by a neuropsychologist, Dr. James Evans. Mr. Morin explained that "the State was trying to get Mr. Moore to be sent to the state mental hospital, which I wanted to prevent because that would get the State information about his mental health. Plus would... [it] may give them an insight into what he was saying."¹¹ (Sic). **App. pp. 2528-30.**

Dr. Evans' report (**Respondent's Exhibit 20, App. pp. 2606-07**) reflects that Moore "claimed no history of significant head injuries, serious illnesses, psychiatric type treatment or seizures. Moore likewise denied "ever having used alcohol, or illegal drugs to any significant degree." Moore scored within average range on the Weschler Adult Intelligence Scale – III, and the primary findings of the other neuropsychological testing were that Moore "showed evidence of significant problems with response control (tendency to respond impulsively) and mild problems with visual attention." Dr. Evans also reported that Moore "showed some evidence of difficulty dealing with emotional responsivity. Specifically, it seems likely that he would lose intellectual efficiency to greater than average degrees under conditions of continuing emotional arousal." Dr. Evans told Mr. Morin that this meant that Moore was showing signs of antisocial behavior, a finding

¹¹ The trial judge had given counsel a deadline by which to decide whether or not Moore's mental health was appointed be at issue. Therefore, Mr. Morin asked Dr. Evans to evaluate Moore than provide the defense with its own evaluation of Moore's mental status. **App. p. 2528.**

which Mr. Morin did not want to present to the jury because the State's doctors would be able to portray Moore as a monster. **App. pp. 2528-30; Respondent's Ex. 20, App. pp. 2606-07.**

Keith Kelly testified that he was appointed as the second chair in the defense of Mr. Moore on April 3, 2001. He confirmed that he and Ms. Morin had previously practiced together in the same law office, and that they knew each other. Also, he had been counsel in three death penalty cases, he had tried two or three non-capital murder cases and he had extensive experience in handling drug cases, prior to his appointment and this case. **App. pp. 2626-29; 2835-36; 2659-60.**¹²

Mr. Kelly and Mr. Morin had first met on March 14, 2001. At some point, they decided that one lawyer should be in charge of the sentencing phase and one lawyer in charge of the guilt phase of the trial. Mr. Morin elected to assume responsibility for the guilt phase and Mr. Kelly handled the sentencing phase. **App. p. 2629; 2660.**¹³

Following his appointment, Mr. Kelly and Mr. Morin met with Teresa Norris, Esquire, at the Center for Capital Litigation. There, they were given the name of Drucy Glass as a mitigation expert.¹⁴ Also, Mr. Kelly had telephone conversations with her husband, John H Blume, Esquire, an attorney with experience in handling capital cases, on several occasions before and during the trial. He had likewise spoken with Rick Vieth and Mitch Slade, Esquires, because they had previously

¹² Between 40 and 50% of his practice has been in General Sessions since he was admitted to practice in 1988. **App. p. 2628.** Respondent introduced a copy of Mr. Kelly's time sheet for the trial, as **Respondent's Exhibit 24.** Mr. Kelly indicated that he actually spent more time on the case and was reflected in his time sheet, but that he had done everything set forth in the time sheet. **App. 2631-33; Respondent's Ex. 24, App. pp. 2837-45.**

¹³ He corroborated Mr. Morin's testimony that this was done to maintain credibility with the jury. **App. pp. 2629-30.**

¹⁴ Ms. Glass was hired before September 4, 2001. **App. pp. 2695-97.**

defended capital cases. **App. pp. 2635-36; 2640; 2661-63.**

Mr. Kelly met with Moore between a dozen and eighteen times before trial. In their meetings, they discussed a possible plea or a life sentence.¹⁵ **App. pp. 2630-31.** Mr. Kelly testified that, based on his conversations with Ms. Glass and her notes, it appeared that Moore's mother "had been a matriarch of the family and that she... sort of held the family together," and that the family was not as close after her death. Although Mr. Kelly did not recall whether Moore had cut off his family or they had cut him off, counsel was aware that Moore and his family were no longer close. Counsel tried to get Moore's cooperation in developing the family information, but Moore wrote the April 20, 2001 letter discussed above (**Respondent's Exhibit 19, App. p. 2805**). **App. pp 2638-40; 2664-70.**

Mr. Kelly could not recall whether or not Moore had related a history of alcohol or drug addiction, but he was aware of this information from records provided to him by Ms. Glass. Ms. Glass also provided counsel with a thirteen page report detailing her efforts to contact Moore's family members, her search for school records, and a history of Moore's various arrests and convictions (*see* **Respondent's Ex. 25, App. pp. 2848-60**). **App. pp. 2637-38; 2663-64; 2668-69.** Mr. Kelly felt that Ms. Glass "was good about telling us what she found. I mean, she had experience and [was] suppose[d] to know what she was doing, and [she] was putting ... her report together about the family and so forth." **App. p. 2663.**

Mr. Kelly explained that he is a pilot and that counsel would have personally flown to

¹⁵ In every conversations with the Deputy Solicitor, the defense was asked to "come to them with a number [of years] before they would go to the family to see ... if the family would be willing to do to do that versus a trial." However, Moore wanted to serve only fifteen years "and that was not a possibility." Counsel explained this to Moore. **App. p. 2631.**

Michigan and interviewed family members. However, Ms. Glass was unable to get in touch with any of the family members. Also, Moore did not try to assist by writing his family and he did not provide counsel with any names or contact information for family members by that justified further investigation of his family members. Further, Mr. Kelly did not see any advantage to Moore in presenting the brothers who were incarcerated for drug related offenses as witnesses “[b]ecause they were inmates according to this in the Michigan State Prison. I mean they would not be helpful witnesses for us.” **App. 2664-73; 2692-95.**

Ms. Glass’ report reflects that she left numerous messages for Moore’s father, James Maurice Moore, on his home telephone in Mount Clemens, Michigan. She also sent him a certified letter on September 17, 2001. However, he did not return her phone calls and apparently did not respond to the letter. The report also reflects that Moore stated that he did not believe he would be cut off from his family if his mother was still alive time of trial. Ms. Glass also attempted to contact Moore’s brother, Maurice Moore, but his telephone had a privacy line and was not set up to accept incoming calls unless the caller had been approved. Maurice likewise did not to respond to a certified letter dated September 17, 2001. **App. pp. 2848-49.**

Ms. Glass’ report further reflects that there was no listing in the telephone directory for Moore’s brother, Jerry Lee Moore; and that Moore told her that his brother Michael lived “somewhere in Alabama.” However, he did not give her an address. Also, Moore’s sister, Vanessa, told Moore’s common-law wife (Linda Byrd) that “Richard is dead to us.” Additionally, the report lists the names of another sister and brothers Phillip Duran Moore and James Allen Moore. However, the address for both men is “Michigan State Prison” and there is a notation that “**[a]ccording to Richard, both of his younger brothers or in prison for drugs.” **App. pp. 2849-50.**

Mr. Kelly advised Moore of his right to testify in the sentencing phase of the trial. While Mr. Kelly did not give advice as to whether or not Moore should testify, Moore did not wish to do so.

App. pp. 2641-42.

With respect to the two mitigation witnesses who testified and sentencing, Linda Byrd and Moore's stepson, counsel explained the reason for presenting them:

we were begging for mercy here at this point, and I think that ... you'll see that the State's theory was he is death eligible, and I was saying he's life eligible because he has a family. He has a wife who loves him. ... Drucy's report shows that ... Mrs. Byrd, even though he's incarcerated for a long time here in Spartanburg, she visited regularly. She left money for him, I think it was about \$20 that he could have. I don't think she missed a single week.

Her child, his stepson, as I recall, called him daddy, referred to him as daddy. And the other two children were smaller children. They did not testify because of their ages. And... I recall making my notes for the closing and at my house sitting... In my glassed in room that night, and ... the whole theory was put these folks up ... to [show] that he's life eligible. He can parent from behind bars. He can talk about basketball games. He can talk about soccer. He... can help with Spanish lessons, if necessary.... But ... he can do all of those things.

App. pp. 2645-46.

B. The PCR judge's ruling.

The PCR judge found that Moore had failed to prove either deficient performance or prejudice. **App. pp. 2962-71.** He found that counsel made a reasonable investigation for and presentation of mitigating evidence. He further found that counsel had made a reasonable effort to locate Moore's family members in Michigan, even though Moore "was largely uncooperative in their endeavor and initially did not want these members to assist." The PCR judge also found that counsel had made a reasonable investigation for potential co-workers to testify in the sentencing phase, with the use of their private investigator. **App. pp. 2963-64.**

The PCR judge found that the reasonable efforts to search for mitigating witnesses included hiring Ms. Glass, and that Ms. Glass' report revealed why Moore's father did not respond to either telephone calls or a certified letter: "Moore related to Ms. Glass that he had been 'cut off' by his family in Michigan. Moore also told trial counsel that he had asked his family for help and he was told 'there would be no help coming, and to give myself out of this mess.'" The Court further found that **State's Exhibit 25**¹⁶ reflected Moore's criminal history, and that "[h]is life of crime set forth in detail in Ms. Glass' report explains why his sister, Vanessa, stated to Moore's wife: 'Richard is dead to us. ... It also explains why applicant's family told him: 'there would be no help coming [from Michigan], and to get myself out of this mess.'" **App. pp. 2964-66.**

The PCR judge found that counsel's testimony was credible. Further, he found that both trial counsel and Ms. Glass made unsuccessful but reasonable attempts to locate and obtain the cooperation of Moore's family members in Michigan, but that these family members would not answer telephone calls or respond to certified letters sent to them. Finally, the PCR judge found that Moore had failed to prove that he was prejudiced by counsel's performance. He found that the deposition testimony of Moore's family members concerning their willingness to testify was not credible; that it was objectively reasonable for counsel not to seek out Moore's two brothers who were incarcerated at the time of his trial; and that the family members who testified by way of deposition did not offer any additional mitigating evidence that would create a reasonable probability that "the balance of aggravating and mitigating circumstances did not warrant death' if his Michigan family members had testified at sentencing." **App. pp. 2967-71.**

¹⁶ While the Order erroneously refers to "State's Exhibit 19," the letter by Moore, it is clear that the PCR judge was referring to and relying upon Ms. Glass' report, **Respondent's Exhibit 25.**

C. Discussion.

To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. See *Wiggins v. Smith*, 539 U.S.510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). "Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective as the time." *Id.* at 689. Also, a reviewing court must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.* "The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *Harrington v. Richter*, 131 S.Ct. 770, 787 (2011) (quoting *Strickland*, 466 U.S. at 687).¹⁷

The inmate must also demonstrate that he was prejudiced by counsel's deficient performance. *Strickland*, 466 U.S. at 691. To do so, he must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.¹⁸ In a capital sentencing proceeding, he must prove that "there is a reasonable probability that

¹⁷ "Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" *Id.* at 787 (citation omitted). See also *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight").

¹⁸ It is insufficient to prove "that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, "[c]ounsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Richter*, 131 S.Ct. at 787 (quoting *Strickland*, 466 U.S. at 687).

... the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. *See also Wiggins*, 539 U.S. at 537.

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

we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*, 466 U.S., at 689. **We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation."** *Id.*, at 690-691. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id.*, at 691.

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

This Court must deny certiorari because there is evidence to support the PCR judge's findings. First, there is nothing in the record to refute the PCR judge's finding that counsel's testimony was credible. To the contrary, the testimony of both attorneys is internally consistent. Also, counsel's testimony is consistent with Ms. Glass' report (**Respondent's Exhibit 25, App pp. 2848-60**); Moore's April 20, 2001 letter (**Respondent's Exhibit 19, App. p. 2805**); and the letter

from Mr. Morin to the defense's private investigator, **Respondent's Ex. 21, App. pp. 2808-09.** Likewise, the findings that the testimony of Moore and several of his family members, whose depositions were taken, lacked credibility is supported by the record, as was the finding that the family had "cut off" Moore, as the result of his lengthy history of criminal behavior, which had escalated in violence over the years.

Based upon this credible evidence, it is clear that counsel made more than reasonable efforts to secure the assistance of Moore's family members in presenting the defense's case in mitigation. Mr. Morin made efforts under *Strickland* and *Wiggins* to contact Moore's father and his sister. However, his family refused to cooperate: when Mr. Morin called Moore's father on May 9, 2001, the person answering the phone told him, "nobody by the name of Moore lived there." Mr. Morin then called one of Moore's sisters, but no one answered the phone.

Even though counsel had been unsuccessful in his efforts to contact Moore's family in Michigan, they did not stop the efforts to interview his family members there. Instead, they hired Ms. Glass, an experienced mitigation specialist. Unfortunately, she, too, was unable to get family members to cooperate in Moore's defense, with her phone calls being unanswered and certified letters being ignored. Instead, Moore's sister told Ms. Byrd that "Richard is dead to us," and Moore indicated that his two youngest brothers were serving sentences on drug-related charges at the time.

Likewise, Moore refused to independently contact family members or otherwise assist counsel in getting any of his family to testify in mitigation because his family had refused to help him when he was first arrested and they told him to get himself out of the "mess." As discussed by Mr. Kelly, he simply did not give counsel any information that justified further investigation of his

Michigan family members.¹⁹ Indeed, if Moore's trial counsel's case in mitigation evidence was somehow inadequate because the Michigan family members were not called, any deficiency would be directly attributable to Moore and to no one else, since he refused to assist counsel in their efforts to secure the cooperation of his family members, even though counsel explained the information that they were seeking and Moore was aware that his family was not cooperating. *See Lovitt*, 403 F.3d at 179 (client's instruction not to talk to family, while not a *per se* justification, does figure into counsel's judgment). *See also Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.... In particular, what investigation decisions are reasonable depends critically on such information"); *DeCastro v. Branker*, 642 F.3d 442, 456 (4th Cir. 2011) ("the state court did not act unreasonably in refusing Petitioner's attempt to upend his conviction and sentence based on the information that he failed to timely provide to counsel"); *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005); *Id* at 157 (Traxler, J., concurring) (citing *Wiggins* and *Strickland*); *Sims v. Singletary*, 155 F.3d 1297, 1316 (11th Cir. 1998) (counsel told client of need for mitigating evidence but client said not to bother the family which excused non-presentation of evidence of troubled childhood); *Soria v. Johnson*, 207 F.3d 232, 251 (5th Cir. 2000) (petitioner concealed abuse information despite exhortations to be candid).

¹⁹ Moore contends that the "question presented in the instant case is whether trial counsel's decision not to investigate [Moore's] family history in Michigan was reasonable." **Petition for Writ of Certiorari**, p. 27. As demonstrated, however, counsel did not decide to not to investigate Moore's family history. Rather, they made a decision not to *further* investigate after both counsel and their mitigation specialist had been rebuffed in their reasonable efforts to make contact with his family and Moore had refused to assist them by providing any information that would justify further investigation. *Cf. Bobby v. Van Hook*, 130 S.Ct. 13, 19 (2009) (Court, in pre-AEDPA case, characterizing the issue not as counsel's failure to investigate while potential mitigating evidence stared them in the face, but as a professionally reasonable judgment not to seek more by contacting remote family members.

Further, it was objectively reasonable for counsel to use surrogates, such as Ms. Glass, to attempt to locate and interview potential witnesses, rather than doing so personally. *E.g.*, *Walls v. Bowersox*, 151 F.3d 827, 834, n. 4 (8th Cir. 1998) (interviews conducted by second chair and social worker); *Rhode v. Hall*, 582 F.3d 1273, 1283-84 (11th Cir. 2009) (counsel utilized investigators, reviewed their investigative product, and thereby satisfied investigative responsibilities). Their decision was particularly reasonable once counsel’s initial efforts to speak with family members had been rebuffed.²⁰

Moreover, counsel made a reasonable presentation of mitigating evidence through Ms. Byrd and her son, Moore’s stepson, since these were the only adult family members willing to cooperate with counsel. In support of his Petition, Moore quotes *Wiggins* for the proposition that “investigations into mitigating evidence ‘should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.’ [539 U.S.] at 524 (citing *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 11.4.1© (1989).” **Petition for writ of Certiorari, p. 22** (emphasis deleted). However, his argument is not properly before this Court on certiorari because it was not presented to the PCR judge.²¹ *See Evans v. State*, 363 S.C. 495, 503-04, 611 S.E.2d 510, 515 (2005) (an issue must have been raised to and ruled upon by the PCR judge to be preserved for appellate review); *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992) (issue or argument which is neither

²⁰ Although Moore does not challenge counsel’s performance for failing to present the testimony of co-workers or an expert opinion on his mental health, the record demonstrates that counsel made a reasonable investigation into these matters, as well.

²¹ In particular, Respondent notes that Moore did not present this argument either in his Amended Application (**App. pp. 1788-97**) or his proposed Order, which he did not include in the Appendix.

raised at PCR hearing nor ruled upon by the PCR court is procedurally barred from appellate review); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (petitioner failed to preserve for review on appeal claim that trial counsel was ineffective for failure to object that sentences constituted cruel and unusual punishment where point was not raised in PCR application or at hearing); *Gary v. State*, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001) (“This issue was not raised below and is not properly before us”). *See also Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (“Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review, and the Court of Appeals erred in addressing the merits of the issues and remanding the matter to the PCR judge”); *Simpson v. Moore*, 367 S.C. 587, 600 n.3, 627 S.E.2d 701, 708 n.3 (2006) (holding that question of whether the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose “a memo to the file written by one of the solicitors” was not properly before state supreme court on certiorari where “the PCR court did not consider whether the State's failure to disclose this memo constituted a *Brady* violation nor did PCR counsel raise the issue in the Rule 59(e), SCRCF, motion to alter or amend”) (citation omitted).

Moreover, his reliance upon the ABA Guidelines must be rejected for two reasons. First, the United States Supreme Court re-emphasized in *Bobby v. Van Hook*, 130 S.Ct. 13 (2009), that these are merely guidelines, at best, and that trial counsel need not comply with them to render objectively reasonable representation *See Bobby v. Van Hook*, 130 S.Ct. 13, 17 (2009) (the court of appeals erroneously treated the ABA's 2003 Guidelines “as inexorable commands with which all capital defense counsel “must fully comply” because these “are ‘only guides’ to what reasonableness means, not its definition;” and holding that “ “[w]hile States are free to impose whatever specific

rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices”) (citations omitted).²²

Second, counsel’s investigation satisfied § 11.4.1© of the ABA Guidelines, upon which Moore relies. Counsel made “efforts to discover all reasonably available mitigating evidence.” The problem with his argument is that the testimony of the family members living in Michigan was not “reasonably available.” To the contrary, it was unavailable in spite of very reasonable efforts by counsel to interview these witnesses and present their testimony.

Similarly, *Wiggins* is distinguishable. In *Wiggins*, the only significant mitigating factor that the sentencing jury heard was that Wiggins did not have any no prior convictions. Although defense counsel had indications that Wiggins’ childhood had been miserable, counsel conducted only a minimal investigation and failed to discover that he had experienced severe, long-term physical and sexual abuse and torment throughout his childhood, including repeated rape while in foster care. *Id.* at 535. The Court held that such compelling mitigating evidence might well have produced a

²² Justice Alito wrote a separate concurring opinion in *Bobby*, to more forcefully emphasize his “understanding that the [majority] opinion in no way suggests that the American Bar Association’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (2003 Guidelines or ABA Guidelines) have special relevance in determining whether an attorney’s performance meets the standard required by the Sixth Amendment.” *Bobby*, 130 S.Ct. at 20 (Alito, J., concurring). He explained that “[t]he ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association’s members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. 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.” *Id.* (emphasis added). See also *Montejo v. Louisiana*, 129 S.Ct. 2079, 2087 (2009) (the Constitution does not codify ABA Model Rules); *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983) (ABA standards do not necessarily establish what the Constitution commands in a given context); see also *Yarborough v. Johnson*, 520 F.3d 329, 338-39 (4th Cir. 2008) (finding that the state court properly distinguished *Wiggins* and observing that ABA standards do not define minimum Constitutional standards).

different outcome and that counsel's scant efforts were prejudicially deficient. *Id.* at 536.

Here, on the other hand, counsel did not unreasonably limit their investigation. Instead, their reasonable investigative efforts were thwarted by a lack of cooperation from both Moore and his family. Moore's reliance upon *Rompilla v. Beard*, 545 U.S. 374 (2005),²³ *Council v. State*, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008), and *Von Dolen v. State*, 360 S.C. 598, 608, 602 S.E.2d 738, 743 (2004), is misplaced for this same reason.

Likewise, the record supports the PCR judge's conclusion that Moore did not prove any prejudice from counsel's failure to interview and present the family members who were deposed for the PCR hearing. To establish prejudice, he had the burden to prove that "there is a reasonable probability that, absent the 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." *Strickland*, 466 U.S. at 695. In other words, "[t]o

²³ In *Rompilla*, the Supreme Court reaffirmed that a trial counsel's performance cannot be found adequate if it is supported by an unreasonably limited investigation. 545 U.S. ---, 125 S.Ct. 2456 (2005). *Rompilla*'s mitigation evidence consisted of testimony from five of his family members who pleaded with the jury for mercy, and asserted that *Rompilla* was an innocent and good man. *Id.* at 378. Nonetheless, the jury found that the aggravating factors outweighed the mitigation evidence and sentenced *Rompilla* to death. *Rompilla* later presented a habeas claim for ineffective assistance, based upon the inadequacy of counsel's investigation for mitigating evidence.

The Supreme Court reversed the denial of habeas relief. The Court found that trial counsel's investigation was unreasonable because counsel failed to examine *Rompilla*'s prior conviction file even though the prosecution had acknowledged that it was going to use *Rompilla*'s prior convictions as an aggravating factor to push for the death penalty. *Id.* at 383-85. The *Rompilla* Court rejected the argument that trial counsel sufficiently investigated *Rompilla*'s prior convictions by reviewing his rap sheet. *Id.* at 385 n. 3.

The Court held that if trial counsel had examined *Rompilla*'s prior conviction file, counsel would have found information that would have made them skeptical of the impression of *Rompilla*'s background they had gotten from the family members thus far. Therefore, counsel would have undoubtedly investigated further and uncovered the voluminous mitigating evidence not introduced at trial. *Id.* at 390-93. The Court also rejected the contention that the efforts that counsel did take--namely, extensively interviewing *Rompilla* and his family, and consulting three mental health experts--were enough to release counsel from investigating further. *Id.* at 387-90.

assess [the] probability [of a different outcome under *Strickland*], [the Court must] consider the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding-and reweig[h] it against the evidence in aggravation.” *Porter v. McCollum*, 130 S.Ct. 447, 449 (2009) (*per curiam*).

Again, the record supports the finding that these witnesses lacked credibility. Moore’s brother Maurice was not credible for the reasons noted by the PCR judge (**App. pp. 2967-69**) and James Moore’s testimony that he would have testified at trial if he had known about the case but he was not told because he was the baby in the family was undermined by his veery reluctant admission that he was incarcerated on two drug possession charges at the time Moore was tried. Additionally,

most of the Michigan family members testified that they had little contact with Moore after he reached the age of 18 or after he moved to South Carolina. These witnesses would have been thoroughly impeached with their lack of knowledge of Moore. Even though they lived in the same small community in Michigan and lived in close proximity to him, they testified that they were unaware of his convictions in Michigan for possession of a weapon, and attempted burglary. Additionally, they had no knowledge and were unaware of his criminal convictions for common law robbery, habitual traffic offender, and ABHAN.”

App. pp. 2969-70.²⁴

Likewise, Ms. Hadley, Moore’s maternal aunt, contradicted Moore’s PCR testimony that he never lived in Detroit, by testifying that she lost contact with him after he moved to Detroit when

²⁴ Moore’s only argument in support of his claim that he was prejudiced by counsel’s alleged error is that the family members presented in PCR would have asked jurors to spare Moore’s life. However, the PCR judge found that these witness’ supposed willingness to testify at trial was not credible and, again, his finding is supported by evidence in the record. Further, the testimony of his extended family members would have been fodder for cross-examination that they did not know anything about Moore as a late teen or as an adult, while his brothers’ testimony is likewise not credible or beneficial to Moore, for the reasons shown. Moreover, any plea of mercy by these witnesses would have been cumulative to the testimony of Linda and James Byrd that counsel offered in mitigation of punishment. **App. pp. 1687-1703.**

he was roughly eighteen. *Compare App. p. 1855 with App. p. 2293.*²⁵ Also, the PCR judge correctly found that, although the proffered family witnesses had favorable things to say about Moore's behavior when young, none offered any "evidence that he suffered from any mental illness, mental retardation, personality disorder, physical or sexual abuse, or deprivation or poverty. Nor was there any testimony from any of these family members that Moore witnessed any physical or sexual abuse during his formative years. In fact, they each testified that Moore came from a good family, had good parents, had positive role models, and was made to attend church growing up and taught the difference between right and wrong." **App. p. 2970.**

As a result, this Court must deny certiorari. *See Cherry, supra.*

II. This Court must deny certiorari because there is evidence of probative value to support the PCR judge's findings that trial counsel made an objectively reasonable decision under *Strickland v. Washington* not to present opinion evidence of Moore's adaptability to prison life through James E. Aiken, who was present for the sentencing, "since the presentation of Aiken's testimony would have resulted in the State being allowed to present damaging testimony in reply;" and that Moore was not prejudiced by counsel's failure to present Aiken's opinion on his adaptability.

Next, Moore claims that counsel were ineffective because they failed to present evidence of Moore's adaptability to prison life through James E. Aiken, who was present for the sentencing phase of the trial but was not called as a witness. Again, Respondent submits that this Court must deny certiorari because there is evidence of probative value to support the PCR judge's finding that counsel made an objectively reasonable strategic decision not to present Aiken's testimony, once counsel became aware that the State would present damaging rebuttal evidence of Moore's misconduct while incarcerated in Michigan. **App. pp. 2971-73.** Also, there is evidence to support

²⁵ James also thought that his brother had lived in Detroit (**App. p. 1871**) and Maurice was uncertain. **App. p. 1913.**

the PCR judge's finding that Moore failed to prove that he was prejudiced by counsel's performance. **App. pp. 2973-76.**²⁶

A. Evidence presented at PCR hearing.

Mr. Aiken, an expert in correctional institution management, was presented by Moore at the PCR hearing. Mr. Aiken testified that he is President of James E. Aiken & Associates, and he gave a summary of his work experience, both of working for various departments of corrections and as a prison consultant. He explained prison classification systems, his own assessment of Moore's classification and his opinion that Moore would be of low risk of presenting a future danger in the prison system. Based on Mr. Aiken's review of Moore's records while incarcerated, Aiken opined that Moore can be controlled and managed in a prison environment for the remainder of his life without causing an undue risk of harm to staff, inmates or the general community. **App. pp. 2098-2107; 2109-13; 2126.**

In part, the basis for Aiken's favorable opinion is that Moore does not have a history of escape attempts, use of weapons against other inmates or officers and there was no indication that he participates in gang or other predatory activity. **App. 2126-27.** Aiken testified that he had been prepared to testify at Moore's trial, but the defense did not call him as a witness. Also, he would have testified to the same matters and 2001 as he did at the PCR hearing. **App. pp. 2097-98; 2113.**

On cross-examination, Respondent elicited that of the fifteen or so capital trials or PCR hearings at which Mr. Aiken had testified in South Carolina, he had always testified on behalf of the inmate and never on behalf of the State. More importantly, Mr. Aiken acknowledged that Moore has committed several disciplinary violations while the car serrated on death row. While Mr. Aiken was

²⁶ See *Suber*, 371 S.C. at 558-59, 640 S.E.2d at 886.

Mr. Kelly testified that they had retained Mr. Aiken to testify about Moore's adaptability to prison. He specifically remembered working a lot with Mr. Aiken. Mr. Aiken's testimony would have been to the effect that Moore was uncontrollable; the Department of Corrections could safely incarcerate Moore; that he would never get out of prison; and that he would not be a danger to the population. Counsel could not recall what documents he provided to Mr. Aiken, but he indicated that he provided anything that Mr. Aiken requested. Also, Mr. Aiken was present in the courthouse at the time of the trial and prepared to render a favorable opinion. **App. pp. 2649-50; 2681-24.**

However, the State had brought down the records custodian from Michigan, and the custodian was prepared to offer evidence about Mr. Moore's various problems while incarcerated in Michigan. Additionally, Moore had a lot of disciplinary infractions while incarcerated in this Spartanburg County Jail. **App pp. 2650; 2681-22; 2684-88.**²⁸

The State was prepared to introduce the evidence of Moore's prior incarcerations in rebuttal, if Mr. Aiken testified. Otherwise, the State would not present this evidence. Mr. Kelly testified that, after reviewing the evidence of Michigan disciplinary infractions with Mr. Aiken and Ms. Glass, defense counsel jointly made a strategic decision not to present Mr. Aiken as a witness because counsel did not want the sentencing jury to hear all of the negative information about Moore's prior incarcerations. "I just wanted to keep all of that out, every bit of it." according to Mr. Kelly, "I

²⁸ Mr. Kelly telephoned Mr. Aiken, shortly before the PCR hearing, in an effort to obtain a copy of the records from Mr. Aiken and refresh his recollection. Although Mr. Aiken did not return his call, he was informed that Aiken did not have the records. Therefore, Mr. Kelly could not recall whether Mr. Moore was involved in gangs, assaults or escape or some other misconduct. Although he did not have a specific recollection, the report sent to him by Ms. Glass (**Respondent's Ex. 25**) shows a detailed account of his criminal history in both Michigan and South Carolina, including several offenses that the State did not introduce at trial. *See Argument I.* Included in the information provided to counsel was that Moore absconded from parole in Michigan on January 10, 1990. **Respondent's Ex. 25, p. 8, App. p. 2855.**

thought we were gonna get hammered with... that.” So, the defense did not call Mr. Aiken. **App pp. 2650-51; 2681-22; 2684-88.**

B. The PCR judge’s ruling.

The PCR judge initially found that Mr. Aiken had been retained to present testimony that Moore would be adaptable to prison; that counsel had given Mr. Aiken a copy of all of Moore’s prison records to counsel had obtained; that Mr. Aiken was prepared to give a favorable opinion as to Moore’s adaptability; that Mr. Aiken was present during the sentencing phase of the trial; and that trial counsel had originally planned to present his testimony. **App. p. 2972.** The PCR judge further found that counsel, however, decided not to present Mr. Aiken’s testimony once counsel learned that the State had brought the a records custodian from Michigan; that the custodian was prepared to testify about Moore’s misconduct while incarcerated in Michigan; and that this information would be damaging to the defense. The PCR judge found that counsel made a reasonable decision under *Strickland* not to present Mr. Aiken’s testimony, “since the presentation of Aiken’s testimony would have resulted in the State being allowed to present damaging testimony in reply.” **App. pp. 2972-73.** Alternatively, the PCR judge found that Moore had not established any prejudice from counsel’s failure to present Mr. Aiken’s testimony at trial. **App. pp 2973-76.**

C. Discussion.

Certiorari should be denied to review this claim because there is evidence to support the PCR judge’s findings in rejecting it. First, there is nothing in the record to refute the PCR judge’s finding that counsel’s testimony was credible. To the contrary, counsel’s testimony is consistent with Ms. Glass’ report, **Respondent’s Exhibit 25, App pp. 2848-60;** the other evidence elicited in the PCR hearing concerning Moore’s disciplinary infractions while incarcerated in the Spartanburg County

Jail; and Mr. Aiken's own testimony that he could not dispute that Moore had committed a number of disciplinary infractions during the time he is incarcerated in Michigan. Counsel's testimony is likewise circumstantially corroborated by evidence of Moore's extensive history of convictions in Michigan.

Based on counsel's testimony, it is clear that Mr. Kelly made the reasonable strategic decision not to present Mr. Aiken as a witness, with a full understanding of the right to present evidence of Moore's adaptability to prison life in mitigation of sentence and after originally planning to call Aiken as a witness.²⁹ Also, this decision was only made after counsel had provided all available records to Mr. Aiken, and Mr. Kelly had reviewed the damaging information that the State intended to present with Mr. Morin, Mr. Aiken and Ms. Glass.

Further and contrary to the position espoused by Moore, counsel's decision not to present Aiken as a witness because the State would present rebuttal evidence damaging to the defense was clearly reasonable under *Strickland*. In *Strickland*, the Court observed that "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. *See also United States v. Guerrero*, 938 F.2d 725, 730 (7th Cir.1991) (under *Strickland*, there is no ineffective assistance of counsel where the attorney chooses one reasonable strategy to the exclusion of another). As correctly recognized by the PCR judge, "[i]n light of 'the variety of circumstances faced by

²⁹ Moore spends a good portion of his current argument arguing that a capital defendant has the right to present evidence of adaptability to prison life under *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (evidence of good behavior of previously incarcerated defendant is relevant evidence in mitigation of punishment), and that a trial judge's ruling prohibiting the introduction of such evidence may be reversible error. Respondent does not dispute either of these points. However, neither of these points is at issue because the trial judge did not prohibit counsel from introducing Mr. Aiken's opinion in this case, and counsel was unquestionably aware of the right to present evidence of Moore's future adaptability to prison.

defense counsel [and] the and a legitimate decisions regarding how best to represent a criminal defendant,' the performance informative inquiry necessarily turns on 'whether counsel's assistance was reasonable considering all the circumstances.'" *Belmontes*, 130 S.Ct. at 384-85 (citing *Strickland*, 466 U.S. at 688-689)." **Order, p. 94, App. p. 2972.**

Additionally, it is objectively reasonable under *Strickland* for trial counsel to refrain from presenting favorable evidence where introduction of this evidence will lead to the introduction of damaging evidence by the prosecution. *E.g.*, *Gaskin v. Secretary, Dept. of Corrections*, 494 F.3d 997, 1002-03 (11th Cir. 2007) (petitioner did not present clear and convincing evidence to rebut presumption that defense counsel's decisions not to present retained mental health expert's findings or further evidence regarding petitioner's educational history were tactical: counsel purposely withheld information about defendant's past, including school records, because he had reason to believe that it would lead to damaging testimony regarding defendant's past violent and criminal conduct); *Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003) (counsel's strategic decision not to present psychological evidence, where experts' findings contained suggestions of antisocial behavior that could have been harmful to client's defense "was a reasonable one because such evidence 'is a double-edged sword that might as easily have condemned [defendant] to death as excused his actions.'" (citation omitted); *Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir. 2001) ("The clearest respect in which the lawyer's representation fell below the minimum level was the decision to put the psychologist on the stand, knowing what the lawyer knew"), *order directing district court to issue a conditional writ of habeas corpus vacated and petition for rehearing dismissed*, 268 F.3d 485 (7th Cir. 2001); *Bonin v. Calderon*, 59 F.3d 815, 834 (9th Cir. 1995) (Counsel's presentation of childhood mitigation evidence was reasonable since expert testimony would have been of "slight

value at best" and it "would have opened the door to precisely the type of cross-examination that [counsel] sought to avoid by refusing to call psychiatric experts-another recitation of all of Bonin's atrocities for the purpose of determining whether, in the expert's opinion, such behavior is the likely product of such abuse"); *Smith v. Workman*, 550 F.3d 1258, 1269-71 (10th Cir. 2008) (mitigation described by the district court as "shocking in its brevity" nevertheless involved understandable reluctance to open the door to a lifetime of a propensity for fighting); *Gilson v. Sirmons*, 520 F.3d 1196, 1247-48 (10th Cir. 2008) (evidence of brain injury and inability to control explosive behavior reasonably found by the state court to be two-edged and dangerous rather than emphasizing non-violent past). *Cf. Gardner v. Ozmint*, 511 F.3d 420, 429-30 (4th Cir. 2007) (defense counsel's agreement on cross examination of co-defendant, to admission of all of co-defendant's pretrial statements after the prosecutor objected to defense counsel's detailed cross-examination of co-defendant regarding one of those statements was deficient performance, since jury would not have otherwise heard inflammatory statements of racial motive for gang raping and murdering victim).

Respondent further notes that the PCR judge's decision is consistent with this Court's decision in *Drayton v. Evatt*, 312 S.C. 4, 430 S.E.2d 517 (1993). In *Drayton*, this Court held that trial counsel's decision not to present evidence of Drayton's future adaptability to prison life was not deficient performance because counsel testified that, although aware that Skipper was pending in the United States Supreme Court, he had decided not to present evidence of future adaptability because the evidence included unfavorable psychiatric evaluations, Drayton's poor disciplinary reports and evidence of Drayton's misconduct while incarcerated. *Id* at 10, 430 S.E.2d at 521. This Court found that "Drayton's past actions in juvenile detention and when incarcerated as an adult reflect a mixed picture of his ability to function in a prison setting. An attempt to develop favorable evidence of

future adaptability would have opened the door for the prosecution to reveal Drayton's earlier misconduct in prison. Trial counsel also determined that testimony from prison guards that Drayton had behaved well on death row would have had a negative impact on the jury. In our view, there is evidence to support the PCR judge's finding that trial counsel was not ineffective for failing to present evidence of Drayton's future adaptability to prison." *Id* at 11, 430 S.E.2d at 521. *See also Smith v. Quarterman*, 515 F.3d 392, 403-06 (5th Cir. 2008) ("Smith's good behavior during previous imprisonment constitutes evidence capable of both mitigating and aggravating his punishment. While Smith's good behavior in institutional settings shows an ability to not cause problems in controlled environments, this attribute also shows his propensity to not abide by the laws of our society." Also, noting that the State would have elicited evidence of three disciplinary violations if evidence had been presented).

Moore asserts that the PCR judge erroneously found that counsel's stated reason was objectively reasonable under Strickland because the prosecution had the right to introduce evidence of Moore's misconduct in prison, "without waiting for [Moore] to open the door to such testimony." **Petition for Writ of Certiorari, p. 44.** Regardless of whether the prosecution may introduce evidence of a defendant's conduct in prison without waiting for the defense to present evidence of adaptability in other cases, no such evidence was presented by the State *in this case*. Rather, the State elected to reserve such evidence for rebuttal. However, the State clearly would have presented this evidence if Mr. Aiken had offered his opinion that Moore was adaptable to prison. *The only reason* the jury did not hear the evidence of Moore's misconduct in the Michigan prison system and while

incarcerated in the Spartanburg County Jail is because of trial counsel's chosen strategy.³⁰

There is also no merit to Moore's assertion that the evidence of his misconduct while incarcerated in Michigan was "entirely speculative." **Petition for Writ of Certiorari, p. 44.** This assertion ignores the record before this Court. Mr. Kelly testified that there was such information, and Mr. Aiken did not dispute that those disciplinary infractions existed. Respondent's cross-examination of him about the Michigan infractions was curtailed after his response. More importantly, Respondent's Exhibit 25 clearly indicates that Moore absconded from parole on January 10, 1990. **App. p. 2855.**³¹

Further, Respondent submits that the record supports the PCR judge's finding that Moore did not prove that he was prejudiced by counsel's failure to present Mr. Aiken's testimony. **App. pp. 2973-76.** To establish that he was prejudiced by counsel's performance, Moore was required "to establish 'a reasonable probability that a competent attorney, aware of [the available mitigating evidence], would have introduced it at sentencing,' and 'that had the jury been confronted with this ... mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.'" *Belmontes*, 130 S.Ct. at 386 (citing *Wiggins*, 539 U.S. at 535, 536). He did not meet this burden.

Again, the PCR judge's findings that Respondent "significantly impeached" Aiken's opinion on Moore's prison adaptability, with a contrary history of disciplinary infractions that Moore had committed while incarcerated and that the history of Moore's behavior while incarcerated shows an

³⁰ In light of counsel's strategy, the State did not seize the opportunity to finish the case by presenting evidence of Moore's extensive history of misbehavior and refusing to adapt to confinement.

³¹ Additionally, his argument in this regard is disingenuous, since the evidence was never introduced in the sentencing phase, in light of the strategy chosen by counsel.

unwillingness to adapt to prison (**App. pp. 2974-75**) are supported by the record. As demonstrated, Respondent elicited evidence of disciplinary infractions committed by Moore while incarcerated in the Spartanburg County Jail and while housed within the apparently strict confines of death row. Perhaps the most serious of these infractions was Moore's possession of a cell phone and cell phone charger in July 2006, which SCDC considers a major infraction.³²

Further, if Aiken had testified at trial, his opinion would have been impeached with the January 10, 1990 offense that Moore absconded from parole in Michigan (**App. p. 2855**), as well as any other infractions that he committed during his incarceration in Michigan. The PCR judge also correctly found that these offenses and the numerous disciplinary infractions that Moore committed in South Carolina prior to the trial would have minimized the effectiveness of Aiken's testimony, and that "[u]nder these circumstances, ... Aiken's expert testimony would have been of slight value, at best, and ... it would have permitted the introduction of evidence that would be damaging to the defense's case in mitigation."

Therefore, while counsel's strategic decision not to present Mr. Aiken as a witness "meant that the defense did not present expert testimony to rebut any argument by the State as to Moore's future dangerousness," it likewise "avoided the introduction of much evidence that circumstantially tended to demonstrate his future dangerousness: *i.e.*, his inability or unwillingness to adjust to life in prison." Also, "counsel presented Moore's wife and stepson at trial and counsel argued that these witnesses suggested that Moore's actions after his arrest proved that he 'is being a productive member of society.' R. p. 1730. Thus, the defense did present evidence to rebut the State's argument

³² See <http://www.wncn.com/news/regional/SC-prisons-try-to-block-contraband-cell-phones-149483305.html>; <http://www.wistv.com/story/13244837/fcc-discussing-cell-phone-jamming-in-prisons>; <http://www.nytimes.com/2011/01/03/us/03prisoners.html>.

on future dangerousness.” **App. pp. 2975-76.**

Further, the PCR judge correctly found that there was overwhelming proof that Moore was guilty of murdering Jamie Mahoney and the aggravating circumstances. “There was also overwhelming proof of Moore’s future dangerousness, through the introduction of evidence concerning his prior criminal history,” which tended to show escalating violence by Moore. This history “included convictions for common law robbery, aggravated assault and battery, thefts of valuables the theft or possession of weapons, and parole violations. There was also a similar robbery where he went behind the counter threatened and assaulted the victim.” **App. p. 2976.**

Finally, the record reflected that Moore had been incarcerated several times before and that he had not been rehabilitated during his previous incarcerations. As a result, the record supports the PCR judge’s finding that “Moore did not meet his burden of proving that ‘there is a reasonable probability . . . that the balance of aggravating and mitigating circumstances did not warrant death’ if such an instruction had been given. *See Strickland*, 466 U.S. at 695. *See also Wiggins*, 539 U.S. at 537.” **App. p. 2976.**

III. This Court must deny certiorari because there is evidence of probative value to support the PCR judge’s findings that trial counsel’s efforts to investigate the physical evidence at the crime scene and rebut the State’s evidence that Moore shot the victim while he was behind the counter in the store were objectively reasonable and that Moore had not established prejudice under *Strickland*.

Moore’s remaining claim is that trial counsel were ineffective in their efforts to investigate the physical evidence at the crime scene and rebut the State’s evidence that Moore shot the victim while he was behind the counter in the store. Respondent submits that this Court must deny certiorari because there is probative evidence in the record supporting the PCR judge’s findings that counsel’s performance was not deficient and that Moore had not established prejudice under *Strickland*.

A. The prosecution's evidence at trial.

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

Meanwhile, Mr. Jamie Mahoney (the murder victim) was working the third shift at Nikki's Speedy Mart, a restaurant-convenience store located at the corner of Highway 221 and California Avenue in Whitney, South Carolina. He had worked there for over three years. The owner of Nikki's kept a .32 caliber pistol and a .45 caliber semi-automatic pistol (**State's Ex. 3**) in the store for protection. Also, Jamie Mahoney carried a .44 caliber handgun (**State's Ex. 1**) behind his back and in his waistband for protection. However, his hands were ravaged by arthritis and he was slightly built.³³ None of his co-workers or friends had seen him ever be physically aggressive towards anyone in Nikki's. **App. pp. 1195-96; 1346-57; 1361-63; 1366-70; 1489.**

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

Otherwise, the early morning hours remained relatively uneventful, until Moore walked into

³³ He was between 5' 7" and 5' 9" tall and weighed approximately 145 pounds.

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

Mr. Hadden testified that:

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

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

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

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

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

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

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

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

Spartanburg County Deputy Sheriff Bobby Rollins was searching for "a black male, possibly injured, driving a loud vehicle" since this was the description of the suspect he had received. He

passed by as Moore backed into the telephone pole. Therefore, he quickly turned his car around, "threw all of my light in that general area" and exited his vehicle with his weapon drawn. **App. pp. 1234-38.**

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

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

It was undisputed at trial and in PCR that both of the guns involved in the shoot out between Moore and the victim were initially within the victim's control, and that Moore did not bring either gun to the store.

B. Evidence in PCR.

Moore testified at the PCR hearing that he knew Jamie Mahoney from patronizing the store “two or three times a week.” Moore claimed that he had gone into the store to buy beer and cigarettes on the night of the incident, but that Jamie suggested that Moore purchase a certain type of cigarette lighter. Moore supposedly knew there was the security camera that was supposed to monitor what occurred in the store, and that Jamie kept a pistol in his waistband. **App. pp. 2264-67; 2304-05; 2316.**³⁴

With respect to the shooting, Moore claimed that he went to a cooler, selected two 22 ounce beers and went to the counter. He asked Jamie for a pack of New Port cigarettes. After Jamie rang up the transaction and placed these bagged items on the counter, Moore contended that he and Jamie got into an argument over 11 or 12 cents. At some point, Jamie made a racial slur in the course of directing Moore to leave the store and a struggle ensued. Jamie then reached under the counter and came back up with “a pistol in his hand.” **App. pp. 2267-68; 2305-08.**

Moore further claimed that he “automatically responded and, and I wouldn't allow him to point the pistol at me. So, I reached for it. We struggled over that particular pistol, and it fired, it went off, and it jammed, and that's how I was able to get it from his hands.” With Moore now in possession of the .45, Jamie reached behind his back, pulled out the .44 magnum and shot Moore with it. **App. pp. 2263-64; 2268-77; 2308-11; 2315.**

Moore claimed that he retreated behind a “pillar” near the Pepsi stand, and that he was able to fire three or four shots at Jamie. Jamie fell to the floor. Moore specifically denied that he had pointed the gun at Hadden, who was playing the video poker machine. He also denied that he had

³⁴ He claimed that he had been riding with a friend earlier that morning and he admitted that he had been to see Gibson. However, he denied that he had used crack.

fired a shot from behind the counter and he claimed that he only grabbed the bag of money, as an afterthought, before fleeing with it to Gibson's house to secure treatment for his gunshot wound from Gibson - a man whom he knew used crack. **App. pp. 2263-64; 2268-77; 2308-11; 2315.**

Although Moore admitted that trial counsel had explained his right to testify to him, he denied that counsel told him that his testimony would be necessary to potentially receive a voluntary manslaughter instruction. **App. pp. 2280-81.** He admitted that he elected not to testify on counsel's advice. However, he denied not wanting to testify because of his prior record. **App. pp. 2295-96.**

Moore also presented the testimony of Dr. Sandra Conradi, a forensic pathologist. She opined that, based upon her review of the record,³⁵ "the cause of death is a single gunshot wound to the chest with perforation of the heart ... which means bleeding into the sac around the heart causing the heart to become unable to beat." **App. 2326-27.**

She further opined that:

"[t]he exit wound from the chest is ... somewhat atypical for an exit wound in that it has a lot of bruising around it, The entrance wound into the arm is also atypical. It should be a nice round hole surrounded by an abrasion border There is somewhat of an abrasion border, but, in my opinion, that wound to the arm is caused by a tumbling bullet going into the arm and staying there after breaking the humerus, the large bone of the right upper arm.

App. 2327. Also,

due to the force of the bullet, he would of been down on the ground if not immediately, very close to immediately after being shot and passed out, became unconscious very quickly, and then died very quickly because every time the heart beat there was more and more blood going into that sac and compressing the heart so it couldn't beat any further. So, he was probably dead **in a matter of minutes.** I

³⁵ Dr. Conradi testified that she had reviewed the case notes from the trial; the autopsy report and trial testimony of Dr. Wren, the forensic pathologist who conducted the autopsy; Paul Dorman's trial testimony; Terry Hadden's statement; "Deputy Murphy's statement at trial;" crime scene and autopsy photographs; diagrams of the crime scene, and other matters in preparation for her testimony. **App. pp. 2325-26.**

can't give you the exact number, but ... **in the range of five to ten** I would say.

App. p. 2329 (emphasis added).

On cross-examination, Dr. Conradi admitted that she had not spoken to the defense's forensic pathologist, Dr. McMahon. More importantly, she testified that a crime scene photograph introduced at trial showed the presence of stippling slightly above the entrance wound to the victim's chest. This indicated "a fairly close range wound due to the powder put out by the gun and, and going through the shirt and stippling his skin. Although the gun used would have to be test-fired in order to determine an exact range, she opined that this shot was from "12 to 15 inches" from the victim. **App. pp. 2331-32.**

Moore likewise presented the testimony of Paul Dorman, the crime scene technician who processed the crime scene for the Spartanburg County Sheriff's Department. He was qualified at PCR only as an expert in crime scene investigation. **App. pp. 2182-86; 2230-31.** Dorman testified at the PCR hearing that, in his opinion, one of the shell casings found behind the counter must have come from someone firing the gun from behind the counter. **App. pp. 2186-2214; 2245-52.**

However, Dorman admittedly was not an expert in crime scene reconstruction or ballistics; and Moore did not qualify him as such at the PCR merit's hearing. Also, Dorman admitted that a firearms expert was better qualified to testify how or why one of the fired shell casings ended up behind the counter on the floor. **App. pp. 2229-30; 2252.**

According to Mr. Morin, the State's theory at trial was that Moore had entered the store with the intention of robbing the victim, but the State was unclear about whether he was armed when he entered or whether it was a strong armed robbery that escalated into an armed robbery after Moore's struggle with the victim, as the victim sought to defend himself. Counsel had a copy of a

investigative report prepared by an investigator from the Solicitor's Office, Rusty Clevenger, shortly after the incident (**Applicant's Ex. 25, App. pp. 2755-64**), which suggested that Moore was armed upon entering the store. **App. pp. 2348-52.**

Mr. Morin recalled that there were two guns used; that the evidence showed bullets were fired from both weapons; and that there were a number of shell casings found at the scene. He did not remember the paper bag on the counter with a bullet hole in it (**State's Exhibit 17** at trial). However, counsel felt that, to discredit Hadden, an expert "would have to not just say the bullet came from the .45, and not just say it came from that direction. He would have to say that it came from that side of the counter. ... And if he could say all that, then that would of discredited Mr. Hadden's testimony that he saw it." Nor did counsel feel that the location of the shell casings was necessarily determinative of the shooter's location because his experience from other trials was that too many factors can cause casings to bounce or roll. **App. pp. 2353-58; 2363-66; 2382; 2385; 2400-01.**

Also, Mr. Morin did not recall speaking with Mr. Dorman, but he had a copy of Dorman's report in his file. **App. pp. 2367-68; 2372.** The same was true of the other officers involved in the case. **App. p. 2539.**

Mr. Morin testified that he met with Moore on numerous occasions and that they had discussed his version of what had occurred. Mr. Kelly was also present in a number of these meetings. Moore repeatedly denied that he had intended to rob Nikki's when he entered the store, and he told counsel that he did not have a gun when he entered the store. However, he gave conflicting accounts about whether he had used crack that night. **App. pp. 2252-53; 2509-15; 2523-24; 2565-66.**

With respect to the shooting, he told counsel that:

he went into that store to buy ... beer and cigarettes. That he didn't have enough money. That he asked the clerk to let him slide because he was in there all the time. That the clerk made some offensive remarks to him and told him he'd have to leave or what have you. Mr. Moore didn't want to. That the clerk pulled out a gun and Mr. Moore immediately tried to disarm him for his own safety. That after he got that gun away from the, him, the clerk pulled out a second gun and shot him and he returned fire.

App. p. 2511. *See also App. p. 2433.*

To assist him in dealing with the guilt phase evidence, Mr. Morin retained a forensic pathologist, Dr. Carol McMahon, a crime scene expert, former SLED Agent Donald Girndt, and a private investigator, Pete Skidmore. Mr. Morin hired Skidmore because the Public Defender's Office did not have an investigator skilled at interviewing people. Also, counsel and Skidmore met at the Sheriff's Department and reviewed the State's evidence on July 23, 2001. **App. pp. 2532-35.**

A billing statement from Mr. Skidmore, **Respondent's Exhibit 1**, reflects that Mr. Skidmore met with Mr. Morin and Mr. Moore for 5.5 hours on July 2, 2001, and he reviewed the case file on July 23-24, 2001. Thereafter, either Mr. Skidmore or his associate

- prepared a list of people who need to be interviewed;
- again met with Moore;
- spoke to Ann Yarborough (a Nikki's employee);
- spoke to Lynda Byrd;
- (5) after repeatedly unsuccessful attempts to locate and speak to Terry Hadden, interviewed him;
- interviewed several of Moore's former co-workers;
- attempted to locate Gibson at Perry Correctional Institution and at Kirkland Correctional Institution on October 12, 2001, and discovered that Gibson was in the Spartanburg County jail "waiting to be transported;"

- spoke to another potential witness;
- met with Mr. Morin and reviewed the physical evidence; and .
- attended trial on October 19, 2001, where he again interviewed Gibson, reviewed his statement and ascertained that Gibson's "answers seemed fairly consistent with report.

App. pp. 2800-03.

Mr. Morin mainly employed Mr. Girndt

to try and determine ... what the evidence was showing where Mr. Mahoney and Mr. Moore were at the time of the shooting. Where the bullets were going, who was holding where, who was standing where, to try to get a clear picture of ... the [State's evidence], and, ... in the event that Mr. Dorman or Mr. Clevenger were gonna present their interpretation of it, I would be able to adequately cross-examine them as to where these people were standing aside from what Mr. Moore had told me. ... I needed to be able to have somebody telling me what their professional opinion was so that, when I got to the point where I was gonna be faced with cross-examining them, I would have some education as to what that evidence may reflect.

App. pp. 2358-62; p. 2541-42. Based upon his notes, he thought that he had effectively used Girndt.

App. p. 2363.

Mr. Morin initially did not recall what information he provided to Girndt or whether he had provided Girndt with Moore's version of the shooting. **App. pp. 2368-69; 2371-72; 2441.** However, he later testified that Girndt had received Dorman's report, the crime scene photos and a video; and that he had told Girndt Moore's version of what occurred. **App. p. 2540.** He was sure Dr. McMahon had the autopsy report. **App. p. 2450.**

Mr. Morin explained that he had met with both Dr. McMahon and Girndt, together, at Mr. Girndt's residence on August 21, 2001.³⁶ They both indicated that, in their opinion, the fatal shot was

³⁶ Mr. Morin had previously spoken to Girndt on August 14th as well. He had likewise met with Dr. McMahon earlier on the 21st. **App. pp. 2437-38.**

fired from behind the counter and inside the kitchen door. Dr. McMahon's opinion was that the victim was "six to eighteen inches from gun." She likewise noticed the presence of stippling. Counsel did not want to present the jury with these opinions because they were consistent with the State's evidence and inconsistent with Moore's account. **App. pp. 2365-72; 2401; 2436-39; 2545-46.**

Mr. Morin was satisfied that the experts he used were competent; he did not consider the physical evidence in this case as overly-complex; and he did not see the need for employing another expert. **App. pp. 2437; 2441; 2449-50; 2544-45.** Mr. Morin testified that he repeatedly discussed with Moore whether Moore would testify in the guilt phase. Counsel explained that the only hope at getting instructions on voluntary manslaughter or self-defense was if Moore testified. However, Moore refused because of his prior record. **App. pp. 2454; 2456-57; 2532; 2546-51.**

Therefore, Morin felt the best strategy was to try and discredit the State's witnesses on cross-examination. He was unable to get a manslaughter charge based on the evidence presented. **App. pp. 2546-47.**

Although Mr. Kelly was primarily responsible for the sentencing phase, he testified that the decision was made for him to cross-examine the State's ballistics expert because he has a great deal of experience with and knowledge of the use of firearms, he owns several weapons, he is ex-military and he was qualified in the military as an expert with a .45. Strategically, he attempted to attack the ballistic expert's theory of the case, but he could not recall his precise strategy at the time of his testimony. **App. pp. 2642-43.**

He concurred with Mr. Morin's assessment that Donald Girndt's findings "were negative to us. They were very adverse to us." He explained that "Mr. Girndt's theory of the case would of fit

right in with the government's theory in that all the shooting took place behind that counter and we absolutely could not use that.” Mr. Kelly also recalled expressly asking Mr. Girndt not to send a report to counsel. **App. pp. 2643-44.**

C. The PCR judge’s ruling.

The PCR judge found that “counsel's investigation to ‘prepare to confront and rebut the State's alleged physical evidence’ was objectively reasonable, and that they had the services of a forensic pathologist, a crime scene expert and a private investigator to assist them in their efforts. Mr. Morin thought that both were competent. He did not see the need for employing another expert and was unsure that funding would be approved for such a request. Also, Mr. Kelly has a great deal of experience with and knowledge of the use of firearms.” **App. p. 2897.**

The PCR judge further found that counsel had reviewed the State’s physical evidence with both his crime scene expert and his private investigator, and that the investigator, Mr. Skidmore, had done the various matters discussed, *supra*. Both the discovery provided to the defense by the State and the opinion of the defense experts was that revealed that Moore did not have a handgun on him when he entered the store. Rather, both the murder weapon, the .45 caliber handgun, and the .44 caliber revolver “originated with the victim.” **App. pp. 2897-98.**

Also, “[t]here were a number of shots fired at the store and a number of shell casings. [Mr. Morin] had his experts to assist him in reviewing the physical evidence and determining what the physical evidence indicated as to the relative positions of Moore and Jamie Mahoney and what had occurred. ... Also, Mr. Morin reviewed the physical evidence with his crime scene expert, Donald Girndt, and he provided Mr. Girndt with crime scene photographs. Mr. Morin met with both his pathologist and his crime scene expert, at the same time, to discuss their findings.” **App. pp. 2898.**

The PCR judge further found that counsel did not perceive the case as overly complex in terms of the physical evidence, and that counsel made a reasonable strategic decision “to attack the credibility of the State's witnesses and attempt to use those witnesses to demonstrate that Moore was in the heat of passion when the shooting occurred.” In reaching this conclusion, the PCR judge found that there was overwhelming evidence of Moore’s guilt, including Mr. Hadden’s eyewitness testimony identifying him; that the motive for the crime was “clearly robbery;” that Moore had taken the money from the store to purchase crack from Gibson; and that Moore’s PCR testimony about the shooting was not credible. **App. pp. 2898-2902.**

Likewise, the PCR judge found that counsel was not deficient for not presenting a defense forensic pathologist because counsel had retained Dr. McMahon, who had given her opinion as to the autopsy findings. The PCR judge also found that it was reasonable for counsel to rely upon her findings, and not seek another expert. He further found that counsel made a reasonable decision not to present her because her findings would have been damaging to the defense in both phases of the trial, since she opined that the shooting occurred behind the counter. **App. pp. 2901-02.**

The PCR judge found that there was neither deficiency nor prejudice from the failure to present Dr. Conradi’s testimony. There was no prejudice because Dr. Conradi’s opinion that stippling was present would have placed “Moore going through the doorway leading to the area behind the counter and shooting Mahoney in the side after Moore entered the door-way to the area behind the counter. The significance of this testimony is that it would demonstrate that Moore was not going behind the counter to see if Mahoney was dead. He was going behind the counter to murder Mahoney and to steal the store's money.” The PCR judge found that her opinion was credible in this regard and that it demonstrated that Moore’s version was not credible. **App. pp. 2902-04.**

The PCR judge further found that counsel was not ineffective for not retaining an independent crime scene expert because they had retained Girndt, who had rendered an unfavorable opinion, and because Moore had not presented such an expert. **App. pp. 2904-05.**

The PCR judge further found that counsel was not ineffective in failing to adequately cross-examine Dorman, the crime scene technician, who was not a ballistics expert. The PCR judge found that Dorman's testimony on the specific issue of whether one of the shell casings found behind the counter must have come from someone firing the gun from behind the counter was not credible in light of the evidence presented as to the incident and he concluded that "[t]he shell casing could have landed on the counter and been knocked to the floor by either Moore or Mahoney, or the shell casing could have simply bounced off the counter and rolled onto the floor behind the counter[,] or ... depending on the position of the gun at the time it was fired by Moore, the shell casing could have landed on the floor behind the counter. This was in essence the testimony of the qualified ballistics expert at trial, and this Court finds that the ballistics experts' testimony is credible, given his qualifications and all of the evidence and the record in this case." **App. pp. 2905-06.**

Moreover, the PCR judge also found that Dorman's testimony would not be admissible at trial because there was not an adequate foundation for his conclusions, and he noted Dorman's admission that a ballistics expert was the more appropriate witness to render such an opinion. Finally, the PCR judge found that there was no prejudice from not presenting Dorman's "opinion." **App. pp. 2506-07.**

D. Discussion.

This Court must deny certiorari because there is evidence to support the PCR judge's findings. First, nothing in the record refutes the PCR judge's finding that counsel's testimony was

credible. To the contrary, the testimony of both attorneys is internally consistent, and it is circumstantially corroborated by counsel's notes that are referenced in their testimony, as well as **Respondent's Exhibit 1** and other exhibits presented in the PCR court. Likewise, the record supports the finding that Moore's testimony as to the events that night was not credible. Indeed, Respondent submits it would be preposterous to accept, as credible, his claims that: (1) the victim would have gotten into an argument with him over less than a quarter that would lead to a shooting; (2) that the victim used a racial slur during the argument, but went out of his way to accommodate another African American customer; (3) that he was not using crack that night and that he did not tell anyone he had done so; (4) that his blood was not drawn that night; (5) and, that instead of traveling the short distance to the hospital after the shooting, he went in the opposite direction to Gibson's house, supposedly to seek treatment for his wound, from a crack dealer with no medical training

Based upon this credible evidence, the PCR judge correctly found that "counsel's investigation to 'prepare to confront and rebut the State's alleged physical evidence' was objectively reasonable, and that they had the services of a forensic pathologist, a crime scene expert and a private investigator to assist them in their efforts. Mr. Morin thought that both were competent. He did not see the need for employing another expert and was unsure that funding would be approved for such a request. Also, Mr. Kelly has a great deal of experience with and knowledge of the use of firearms." **App. p. 2897.**

Contrary to Moore's allegations, trial counsel had made reasonable efforts to challenge the forensic evidence against Moore by retaining and their private investigator and their experts in crime scene analysis and forensic pathology. Unfortunately for Moore, both experts rendered opinions that

were unfavorable to Moore. Further, counsel was entitled to rely upon the conclusions of each of their experts, and their failure to shop for a more favorable opinion was objectively reasonable under *Strickland*. E.g., *Poyner v. Murray*, 964 F.2d 1404, 1418-19 (4th Cir.1992) (holding that there is no right to effective assistance of expert witnesses exists distinct from the right to effective assistance of counsel, and that the Constitution does not require attorneys to “shop around” for more favorable expert testimony); *Pruett v. Thompson*, 996 F.2d 1560, 1574 (4th Cir. 1993) (counsel was entitled to rely on the information he obtained from his retained experts and not second-guess this information just because the experts he had retained and had evaluated petitioner rendered an unfavorable or less than desirable opinion); *Walton v. Angelone*, 321 F.3d 442, 464-66 (4th Cir. 2003) (counsel was not constitutionally required to continue looking for an expert, or “shop” for an expert, just because the experts he had retained and had evaluated petitioner rendered an unfavorable or less than desirable opinion); *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995) (“If an attorney has the burden of reviewing the trustworthiness of a qualified expert's conclusion before the attorney is entitled to make decisions based on that conclusion, the role of the expert becomes superfluous”). See also *Reynolds v. Bagley*, 498 F.3d 549, 557 (6th Cir.2007) (defense counsel is not obligated to shop for “the ‘best’ experts” who will testify in the most advantageous way possible); *Sidebottom v. Delo*, 46 F.3d 744, 753 (8th Cir.1995) (finding that defense counsel did not render ineffective assistance by not seeking a “second opinion” where counsel reasonably relied on the results of a psychological examination).

Moore does not currently assert that counsel were ineffective in not offering the unfavorable opinions of either Dr. McMahon or Mr. Girndt. Also, the record supports the PCR judge’s rejection of Moore’s ineffectiveness claim based upon counsel’s failure to present their testimony. **App. pp.**

2901-02.

On certiorari, however, Moore asserts that “[Mr.] Morin did not even tell Dr. McMahon and Donald Girndt petitioner's “consistent,” --Morin's words - version of what occurred in Nikki's store that morning.” **Petition for Writ of Certiorari, p. 55. See also id at 56.** There is also a finding to this effect in the Order of Dismissal (**App. 2898**), and Mr. Morin initially testified Mr. Morin that he did not recall what information he provided to Girndt or whether he had told Girndt Moore's version of the shooting. **App. pp. 2368-69; 2371-72; 2441.** However, Mr. Morin later testified that his notes would have more accurately reflected what he did. Those notes showed that Girndt had received Dorman's report, crime scene photos and a video, and that he had told Girndt Moore's version of what occurred. **App. p. 2540.**³⁷ Thus, Moore's assertion is wrong.

Although the PCR judge's finding is likewise incorrect and not supported by the record, Moore is not entitled to relief based upon this error. To the contrary, it appears that counsel did what Moore contends he should have done by informing Girndt of Moore's account. Even though provided with this information, Girndt did not provide a favorable analysis of the physical evidence found at the scene.

Respondent further submits that the PCR judge correctly found neither deficient performance nor prejudice in counsel's failure to seek out DR. Conradi's opinion. Their failure to search out her opinion or that of another favorable forensic pathologist was not deficient because counsel was entitled to rely upon the expert opinions of Girndt and Dr. McMahon, and they were not required to “expert shop.” *Poyner*, 964 F.2d at 1418-19; *Pruett*, 996 F.2d at 1574; *Walton*, 321 F.3d at 464-66. Also, under *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), Moore “had no constitutional right to insist

³⁷ Mr. Morin was also sure Dr. McMahon had the autopsy report. **App. p. 2450.**

on the appointment of any particular expert,” such as Dr. Conradi. *Walton*, 321 F.3d at 464.

Also, Moore did not prove any prejudice from counsel’s failure to present her opinion. First, her findings that there was a single gunshot that caused both wounds found on the victim’s body (**App. p. 2327**) and that the victim would have died within five or ten minutes of the shooting (**App. p. 2329**) were merely cumulative to Dr. Wrenn’s trial testimony that all of Jamie's injuries could have been caused by a single gunshot if his body had been positioned in such a manner in which that could have occurred and that he would have died within six to ten minutes after receiving this wound. **App. pp. 1491-1502**. More importantly and as the PCR judge correctly found, Dr. Conradi’s opinion “further incriminated and damned applicant Moore.” **App. p. 2903**.

As discussed and found by the PCR judge (**App. p. 2903**), Dr. Conradi opined that there was stippling around the fatal wound to the victim's left side. She further opined that Moore would had to have been within 12" to 15" of the victim when he fired the fatal shot into the victim because the victim was wearing a shirt at the time he was shot, and the stippling penetrated the outer clothing of the victim, which is visible on the autopsy photograph introduced as State’s Exhibit 17 at trial. **App. pp. 2331-32**. Thus, the record support’s PCR judge’s conclusion that:

Dr. Conradi’s testimony would place Moore going through the doorway leading to the area behind the counter and shooting Mahoney in the side after Moore entered the door-way to the area behind the counter. The significance of this testimony is that it would demonstrate that Moore was not going behind the counter to see if Mahoney was dead. He was going behind the counter to murder Mahoney and to steal the store’s money.

App. pp. 2903-04.

Her finding corroborates “trial counsel's expert pathologist and trial counsel's forensic expert that the fatal shooting of the deceased victim in this case occurred when Moore and the victim were

both in the area behind the counter and in the kitchen area. ... [I]f trial counsel had called Dr. Conradi to the stand, this damaging testimony would have been elicited on cross-examination by the State, as it was by the Attorney General at PCR.” **App. p. 2904.** As a result, there can be neither deficiency nor prejudice. *See Byram*, 339 F.3d at 210 (counsel's strategic decision not to present psychological evidence, where experts' findings contained suggestions of antisocial behavior that could have been harmful to client's defense “was a reasonable one because such evidence 'is a double-edged sword that might as easily have condemned [defendant] to death as excused his actions.’”) (citation omitted); *Miller*, 255 F.3d at 459 (“The clearest respect in which the lawyer's representation fell below the minimum level was the decision to put the psychologist on the stand, knowing what the lawyer knew”); *Bonin*, 59 F.3d at 834 (counsel's presentation of childhood mitigation evidence was reasonable since expert testimony would have been of “slight value at best” and it “would have opened the door to precisely the type of cross-examination that [counsel] sought to avoid by refusing to call psychiatric experts-another recitation of all of Bonin's atrocities for the purpose of determining whether, in the expert's opinion, such behavior is the likely product of such abuse”).

Counsel had already made an objectively reasonable strategic decision not to present Dr. McMahon’s or Mr. Girndt’s findings and such cross-examination of Dr. Conradi would have undermined this reasonable strategy and it “would have been devastating to Moore's guilt phase defense and to his mitigation presentation during the sentencing phase. Therefore, Moore cannot show any prejudice from failing to present Dr. Conradi's testimony. *Strickland*[.] *See also Belmontes*, 130 S.Ct. at 386].” **App. p. 2904.**

Moore’s remaining contention is that counsel in failing to properly cross-examine the State's crime-scene technician, Paul Dorman. Respondent submits that the record supports the PCR judge’s

rejection of this claim. **App. pp. 2905-07.** As observed by the PCR judge, Moore repeatedly referred to the crime-scene technician as "the State's expert" during the PCR hearing and he continues to do so before the Court. However, this distorts the record because "Dorman was not the State's expert at trial or at PCR." **App. p. 2905.**

Rather, he was called "at trial as a crime scene technician, *i.e.* to testify about where he located particular pieces of evidence and his retrieval of the same." As such, "he was simply the person from the Sheriff's Office who was designated to film the crime-scene, photograph it, and recover all of the physical evidence found at the scene." **App. p. 2905.** Also, Dorman was Moore's witness at the PCR hearing, and he was only qualified as an expert in "crime scene investigation." **App. pp. 2186; 2905.**

Over Respondent's objection, Dorman was allowed to testify "at the PCR hearing that, in his opinion, one of the shell casings found behind the counter must have come from someone firing the gun from behind the counter. Moore argued that this indicated that the victim shot at him first with the .45, and that trial counsel was ineffective in failing to cross-examine Mr. Dorman on this specific issue." The PCR judge found that Dorman's opinion about how the shell casing ended up behind the counter was not credible. **App. pp. 2905-06.** Again, his finding is supported by the record.

Dorman clearly admitted that he is not an expert in crime scene reconstruction or ballistics, and he admitted that a firearms expert was more qualified to testify how or why one of the fired shell casings ended up behind the counter on the floor. **App. pp. 2229-30; 2252.** The PCR judge also correctly found that "[t]he record shows *the firearms expert* did so testify at trial. The forensic firearms examiner testified at trial that there were a myriad of ways in which the fired shell casing found behind the counter could have ended up behind the counter. **R. pp. 1419-50.**" **App. p. 2906.**

Moore repeatedly and disparagingly attacks the PCR judge's finding that Dorman's opinion on this limited issue was not credible. However, Dorman's opinion is at odds with the opinion of the expert whom he admitted was the appropriate witness to explain this issue. The PCR judge merely resolved the credibility issue adversely to Moore, and this finding is supported by the record.

See Cherry, supra.

The trial testimony of the ballistic's expert supports the PCR judge's findings that:

There are a myriad of ways that the shell casing could have ended up behind the counter and in the location it was found. The shell casing could have landed on the counter and been knocked to the floor by either Moore or Mahoney, or the shell casing could have simply bounced off the counter and rolled onto the floor behind the counter.

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

App. p. 2906.

Likewise, the record supports the PCR judge's rejection of Dorman's opinion because his "testimony on this specific issue ... does not meet the standard of admissibility required for admission of such evidence at a trial before a jury ... [since] Mr. Dorman did not perform specific testing of the weapon fired in this case to determine how this specific weapon ejects shell casings, the distance this specific weapon would eject shell casings, and in what direction it would eject shell casings depending on the angle the gun was held when fired. Mr. Dorman's testimony on this issue is thus speculative." Given this record, the PCR judge correctly reasoned that "trial counsel was not ineffective in failing to cross-examine him on his personal opinion regarding how the shell casing could have ended up on the floor behind the counter because this was outside of his expertise and,

by his own admission, the firearms examiner was person qualified to testify to such matters.” **App. pp. 2906-07.** See, e.g., *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998) (state's failure to object to hearsay testimony as to what another witness's testimony might have been does not relieve applicant of the burden of producing admissible evidence in accordance with the rules of evidence); *State v. Schumpert*, 312 S.C. 502, 505, 435 S.E.2d 859, 861 (1993) (“The party offering the expert has the burden of showing his witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony”); *Nelson v. Taylor*, 347 S.C. 210, 218, 553 S.E.2d 488, 492 (Ct.App. 2001) (permitting an expert witness to testify beyond the scope of his or her expertise can constitute reversible error); *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541 (Tenn. 1992) (finding that physical therapist was not qualified to give expert opinion on medical causation in worker's compensation case); *First United Fin. Corp. v. U.S. Fid. & Guar. Co.*, 96 F.3d 135, 136 (5th Cir.1996) (noting that expert testimony was properly rejected by the court because the “opinion of dishonesty goes beyond the scope of expertise”); *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir.1994) (“[t]he issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question”), *cert. denied*, 513 U.S. 1111 (1995); *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 516 F.2d 33, 37 (10th Cir. 1975) (trial court’s rejection of “expert opinion” testimony of witness offered by purchaser of pipe as to whether pipe violated the institute standards specified in purchase order was not an abuse of discretion in absence of showing that witness possessed expertise that would have qualified him to render an opinion as to what in fact the institute intended its standards to mean and in view of the fact that trial court had before it the institute's own official interpretation of its standards). Indeed, the only person who could render such an opinion was the firearms

examiner, Agent Whittler, who would have obviously disagreed with Dorman's non-expert "opinion." *Id.*

Finally, the record supports the PCR judge's conclusion that, even if Dorman's opinion was admissible, Moore failed to establish how he was prejudiced by counsel's failure to elicit it. **App. p. 2907.** First, there was overwhelming evidence that Moore was guilty of murder and armed robbery. *See Strickland*, 466 U.S. at 694. Moreover, Dorman's "opinion" was subject to thorough impeachment for the reasons set forth, *supra*. Third and as found by the PCR judge,

Given that (1) there are several other factors that could have contributed to or caused the shell casing to have ended up on the floor behind the counter; (2) Dorman's admission that the firearms examiner was qualified person to explain how the shell casing could have ended up behind the counter; (3) the firearms examiner testified it was impossible to tell how the shell casing ended up behind the counter; (4) the implausibility of Moore's version of the shooting; (5) Moore's own expert, Dr. Conradi, testified that Moore would had to have been behind the counter when he fired the fatal shot given the stippling around the victim's wound; and (6) the overwhelming evidence of Moore's guilt of these crimes, the Court finds that Moore was not prejudiced by counsel's alleged deficient performance in this regard. Moore has failed to show that had this testimony been admitted there is a reasonable probability the result of the proceeding would have been different. *Strickland*.FN13

FN13/ By this time, he had taken the .45 caliber semi-automatic from the victim, which would explain how one fired shell casing ended up behind the counter, i.e., he was behind the counter when he fatally shot the victim.

App. p. 2907.

In the absence of prejudice under *Strickland*, this claim lacks merit.

CONCLUSION

Respondent submits that the Court should deny the Petition for Writ of Certiorari for the above-stated reasons.

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November 16, 2012.

By: 
ATTORNEYS FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

November 16, 2012

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED

NOV 16 2012

S.C. Supreme Court

Re: *Richard Bernard Moore v. State of South Carolina*
Appellate Case No. 2011-198472

Dear Mr. Shearouse:

Enclosed for filing please find the original and six (6) copies of the Return to Petition for Writ of Certiorari, along with proof of service in the above-referenced case. Also enclosed is an original and six (6) copies of a Motion to Allow the Filing of a Return to Petition for Writ of Certiorari Exceeding the Twenty-Five Page limit.

Respondent has contacted Petitioner's counsel to obtain consent to this motion.

Thank you for your assistance in this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd
Enclosures

cc: Robert Dudek, Esq. (w/two (2) copies of encls.)
Honorable Barry J. Barnette, Solicitor, 7th Judicial Circuit (w/copy of encls.)
Ms. Sandi Wofford, Victim Services (w/copy of encls.)