

The Supreme Court of South Carolina

Kevin J. Mercer, Petitioner/Respondent,

v.

State of South Carolina, Respondent/Petitioner.

Appellate Case No. 2011-196608

ORDER

For good cause shown, the request for an extension to serve and file the State's Reply to Return to Petition for a Writ of Certiorari is granted and extended until May 21, 2012. Pursuant to the order of the Supreme Court of South Carolina dated March 18, 2009 (www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2009-03-18-01), any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

FOR THE COURT

By *Brenda L. Shealy*
Chief Deputy Clerk

Columbia, South Carolina

May 11, 2012

cc: Emily C. Paavola
Alphonso Simon, Jr.
Robert Michael Dudek



ALAN WILSON
ATTORNEY GENERAL

May 9, 2012

RECEIVED

MAY - 9 2012

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

S.C. Supreme Court

Re: Third Extension Request, Reply to Return to Petition for
Writ of Certiorari
Kevin Mercer v. State of South Carolina
Appeal from Lexington County, Capital Post-Conviction Relief Case

Dear Mr. Shearouse:

Please find enclosed the original and six (6) copies of Respondent-Petitioner's Motion for Extension of Time to File Reply to Return to Petition for Writ of Certiorari with Proof of Service.

I am informing opposing counsel of my request by copy of this letter.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd

Enclosures

cc: Emily Paavola, Esq. (w/two copies of encls.)

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAY - 9 2012

Appeal From Lexington County S.C. Supreme Court
The Honorable James R. Barber, III, Circuit Court Judge

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

**MOTION FOR THIRD EXTENSION OF TIME TO FILE
REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI**

The undersigned counsel for the State of South Carolina requests a third extension of ten (10) days within which to complete, serve and file the Reply to Return to Petition for Writ of Certiorari in the above-referenced appeal. The Reply is currently due to be served and filed today, May 9, 2012. This request is made in good faith and not for the purpose of delay.

The Court's March 18, 2009 Order *re: Extension Requests in Criminal Direct Appeals and Post-Conviction Relief Certiorari Proceedings* provides, in pertinent part, that:

(2) A third extension may be granted upon a showing of good cause. The facts supporting the good cause shall be set forth in the motion. If filed by the Division of Appellate Defense or the Office of the Attorney General,

the motion shall be signed by the attorney involved and his or her immediate supervisor. If filed by a private lawyer, the motion shall be signed by the attorney involved and, if lawyer is not a sole practitioner, by another member of the firm. The signatures on the motion shall be a certification by these attorneys that they believe that the extension is warranted and that there is good cause to seek the extension.

In compliance with that Order and in support of this motion, counsel would respectfully show the Court the following:

The undersigned attorney for the Respondent has had a number of state and federal matters to attend to since May 1, 2012. Specifically, counsel filed the Final Brief of Respondent in the matter of State v. Dadrin Jerome Johnson, a Spartanburg County direct appeal murder case pending before the South Carolina Court of Appeals. Counsel also filed a Motion for Summary Judgment and Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of Charles Gilbert, Jr., #254456 vs. Warden, Cartledge, C/A No. 2:12-663-MBS-BHH, a federal habeas matters pending before the United States District Court for the District of South Carolina.

Counsel also spent a significant amount of time handling discovery related matters in Norman Starnes v. State, a Lexington County capital post-conviction relief action. This included spending a day in Spartanburg at the Seventh Circuit Solicitor's Office reviewing their copies of available transcripts, motions and files regarding State v. Ernest Riddle, a former capital case that has become an issue in the Starnes PCR. Counsel has also spent a substantial amount of time researching and investigating the factual background to issues raised in Louis Winkler v. State, a capital post-

conviction relief action pending in Horry County that is currently set to be heard in mid-June.

Counsel also completed review of the transcript and research in preparation of the Initial Brief of Respondent in the Charleston County direct appeal murder case of State v. Jeffrey Herrmann which is now due on May 21, 2012.

Counsel has spent a substantial amount of time reviewing the Return and has drafted significant portions of the Reply. I understand the desire of the Court and petitioner/respondent's counsel for a speedy resolution of this case; however, due to Petitioner-Respondent's Return being forty-two (42) pages in length and with Petitioner-Respondent's inclusion of several alleged additional sustaining grounds, this extension is essential to allow me to complete the Reply to Return to Petition for Writ of Certiorari with reasonable effectiveness.

Due to these and counsel's involvement in other matters pending in state and federal court and counsel's bout with a pneumonia over the past week, counsel was unable to timely complete his research and properly prepare the Reply to Return to Petition for Writ of Certiorari in this case. This request is made in good faith, and not for the purposes of delay.

I am serving petitioner's counsel two (2) copies of this Motion via regular mail today. The ten (10) day extension requested will make the Reply to Return to Petition for Writ of Certiorari due on Monday, May 21, 2012 [May 19, 2012 is a Saturday].

Respectfully submitted,

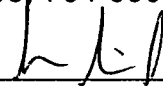
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General

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

BY: 

ALPHONSO SIMON, JR.
Assistant Attorney General


DONALD J. ZELENKA,
Assistant Deputy Attorney General

I support the finding of good cause.

ATTORNEYS FOR RESPONDENT/PETITIONER

May 9, 2012.

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

**Appeal From Lexington County
The Honorable James R. Barber, III, Circuit Court Judge**

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of May, 2012, a copy of the Respondent/Petitioner's Motion for Extension of Time to File Reply to Return to Petition for Writ of Certiorari was served on counsel for the Petitioner/Respondent by depositing two (2) copies of the same in the United States mail, postage prepaid, and addressed as follows:

Emily Paavola, Esq.
Death Penalty Resource & Defense Ctr.
900 Elmwood Avenue, Ste. #101
Columbia, SC 29201



ALPHONSO SIMON, JR.
Assistant Attorney General

The Supreme Court of South Carolina

Kevin J. Mercer, Petitioner/Respondent,

v.

State of South Carolina, Respondent/Petitioner.

Appellate Case No. 2011-196608

The Honorable James R. Barber, III
Lexington County
Trial Court Case No. 2009CP3205465

ORDER

For good cause shown, the request for an extension to serve and file the State's Reply to Return to Petition for a Writ of Certiorari is granted and extended until May 9, 2012. Pursuant to the order of the Supreme Court of South Carolina dated March 18, 2009 (www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2009-03-18-01), any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

May 7, 2012

cc: Emily C. Paavola
Alphonso Simon, Jr.
Robert Michael Dudek



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

APR 30 2012

April 30, 2012

S.C. Supreme Court

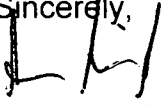
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Second Extension Request, Reply to Return to Petition for
Writ of Certiorari
Kevin Mercer v. State of South Carolina
Appeal from Lexington County, Capital Post-Conviction Relief Case

Dear Mr. Shearouse:

Please find enclosed the original and six (6) copies of Respondent-Petitioner's Motion for Extension of Time to File Reply to Return to Petition for Writ of Certiorari with Proof of Service.

I am informing opposing counsel of my request by copy of this letter.

Sincerely,


Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd
Enclosures
cc: Emily Paavola, Esq. (w/two copies of encls.)

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Lexington County
The Honorable James R. Barber, III, Circuit Court Judge

KEVIN J. MERCER,

RECEIVED

APR 30 2012

Petitioner/Respondent,

S.C. Supreme Court

vs.

STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

MOTION FOR SECOND EXTENSION OF TIME TO FILE
REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

The undersigned counsel for the State of South Carolina requests a second extension of nine (9) days within which to complete, serve and file the Reply to Return to Petition for Writ of Certiorari in the above-referenced appeal. The Reply is currently due to be served and filed today, April 30, 2012. This request is made in good faith and not for the purpose of delay.

The Court's March 18, 2009 Order *re: Extension Requests in Criminal Direct Appeals and Post-Conviction Relief Certiorari Proceedings* provides, in pertinent part, that:

(2) A second extension request may be granted upon a showing of good cause. The facts supporting good cause shall be set forth in the motion. The signature of the attorney on the motion shall be a certification that the

attorney believes that the extension is warranted and that there is good cause to seek the extension.

In compliance with that Order and in support of this motion, counsel would respectfully show the Court the following:

Counsel spent all available time on April 20-22 preparing for the evidentiary hearing in the Bobby Wayne Stone v. State, a capital post-conviction relief action pending in Sumter County. The main portion of the evidentiary hearing was heard by Judge Nettles on April 23-24, 2012. Three witnesses are scheduled to be heard at a later date. Counsel also spent a significant amount of time in the latter part of the week of April 23 addressing a discovery related matter in Norman Starnes v. State, a capital post-conviction relief action pending in Lexington County.

Counsel also nearly completed review of the transcript and research in preparation of the Initial Brief of Respondent in the Charleston County direct appeal murder case of State v. Jeffrey Herrmann. Counsel has also spent a substantial amount of time reviewing the file and has drafted significant portions of the Return to the federal habeas petition filed in the matter of Charles Gilbert, Jr., #254456 vs. Warden Cartledge, C/A No. 2:12-663-MBS-BHH.

Counsel has spent a substantial amount of time reviewing the Return and has drafted significant portions of the Reply. I understand the desire of the Court and petitioner/respondent's counsel for a speedy resolution of this case; however, due to Petitioner-Respondent's Return being forty-two (42) pages in length and with Petitioner-Respondent's inclusion of several alleged additional sustaining grounds,

this extension is essential to allow me to complete the Reply to Return to Petition for Writ of Certiorari with reasonable effectiveness.

Due to these and counsel's involvement in other matters pending in state and federal court, counsel was unable to timely complete his research and properly prepare the Reply to Return to Petition for Writ of Certiorari in this case. This request is made in good faith, and not for the purposes of delay.

I am serving petitioner's counsel two (2) copies of this Motion via regular mail today. The nine (9) day extension requested will make the Reply to Return to Petition for Writ of Certiorari due on May 9, 2012.

Respectfully submitted,

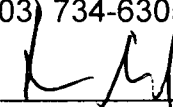
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General

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

BY: 

ALPHONSO SIMON, JR.
Assistant Attorney General

April 30, 2012.

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

**Appeal From Lexington County
The Honorable James R. Barber, III, Circuit Court Judge**

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

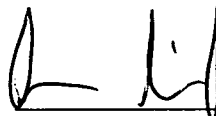
STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th day of April, 2012, a copy of the Respondent/Petitioner's Motion for Extension of Time to File Reply to Return to Petition for Writ of Certiorari was served on counsel for the Petitioner/Respondent by depositing two (2) copies of the same in the United States mail, postage prepaid, and addressed as follows:

Emily Paavola, Esq.
Death Penalty Resource & Defense Ctr.
900 Elmwood Avenue, Ste. #101
Columbia, SC 29201



ALPHONSO SIMON, JR.
Assistant Attorney General

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

The Honorable James R. Barber
Lexington County
Trial Court Case No. 2009-CP-32-05465

ORDER

The request for an extension to serve and file the State's Reply to the Return to Petition for a Writ of Certiorari is granted and extended until April 30, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Shrenda L. Shealy*
Chief Deputy CLERK

Columbia, South Carolina

April 20, 2012

cc: Chief Appellate Defender Robert M. Dudek
Emily C. Paavola, Esquire
Assistant Attorney General Alphonso Simon, Jr.



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

April 19, 2012

APR 19 2012

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

S.C. Supreme Court

Re: First Extension Request, Respondent-Petitioner's Reply to
Return to Petition for Writ of Certiorari
Kevin Mercer v. State of South Carolina
Appeal from Lexington County, Capital Post-Conviction
Relief Case

Dear Mr. Shearouse:

I hereby request an extension of ten (10) days in which to file the Reply to Return to Petition for Writ of Certiorari on behalf of the Respondent-Petitioner in the above-referenced case. The Reply is currently due to be served and filed today, April 19, 2012. However, because of my involvement in other matters in state and federal court, I am unable to timely complete the Reply.

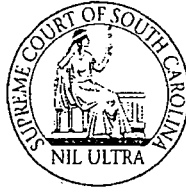
Therefore, I respectfully request this extension within which to serve and file the Reply to Return to Petition for Writ of Certiorari. I am informing opposing counsel of my request by copy of this letter.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS/dmd

cc: Emily Paavola, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

April 16, 2012

Emily C. Paavola
900 Elmwood Ave., Suite 101
Columbia SC 29201

Re: Mercer, Kevin v. The State
Appellate Case No. 2011-196608

Dear Counsel:

The following order has been endorsed on your Motion to Exceed Page Limits on the Return to the State's Petition for a Writ of Certiorari in the above matter.

"Granted.

s/ Costa M. Pleicones J.
For the Court

April 16, 2012."

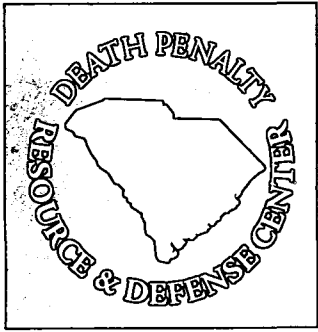
By copy of this letter we are advising opposing counsel of the action of the Court in this matter.

Very truly yours,

Daniel E. Shearouse
BS

CLERK

cc: Alphonso Simon, Jr.



April 9, 2012

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

RECEIVED

APR 13 2012

S.C. Supreme Court

Re: *Kevin Mercer v. State of South Carolina*

Dear Mr. Shearouse:

Please find enclosed for filing, with proof of service, the original and six copies of Petitioner/Respondent's Motion to Exceed Page Numbers and Return to Respondent/Petitioner's Petition for Writ of Certiorari in the above-referenced case.

If you should have any questions, please do not hesitate to contact me.

Sincerely,

Jill A. Rider
Paralegal

cc: Alphonso Simon, Jr., Esq

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

CA No.09-CP-32-5465

RECEIVED

APR 13 2012

S.C. Supreme Court

KEVIN MERCER. *Petitioner/Respondent,*

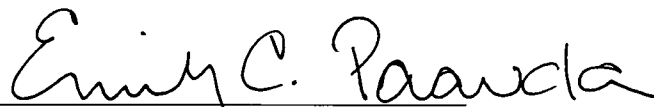
v.

STATE OF SOUTH CAROLINA *Respondent/Petitioner.*

PETITIONER/RESPONDENT'S MOTION TO EXCEED PAGE LIMITS

Petitioner-Respondent, Kevin J. Mercer, moves this Court for permission to file a Return to Respondent-Petitioner's Petition for Writ of Certiorari in excess of the page limitation of twenty-five (25) pages set forth in Rule 243(g), SCACR. In support of this motion, Mercer notes that this is a capital case involving a lengthy and complex record. For example, the PCR Order at issue is seventy-nine (79) pages long. The appendix in this case contains 4352 pages. Moreover, Mercer's Return raises numerous additional sustaining grounds on which the PCR court's order granting him a new sentencing proceeding should be affirmed. These additional grounds are factually and legally complex and reasonably require more than twenty-five (25) pages to adequately address. Thus, Mercer respectfully requests that he be allowed to file a Return not to exceed forty-five (45) pages.

Respectfully submitted,



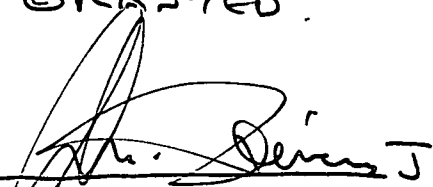
EMILY C. PAAVOLA

Death Penalty Resource & Defense Center
900 Elmwood Ave., Suite 101
Columbia, SC 29201
(803) 764-1044

ATTORNEY FOR PETITIONER

April 9, 2012

GRANTED.


For the Court

April 16, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

CA No.09-CP-32-5465

RECEIVED

APR 13 2012

S.C. Supreme Court

KEVIN MERCER. *Petitioner/Respondent,*

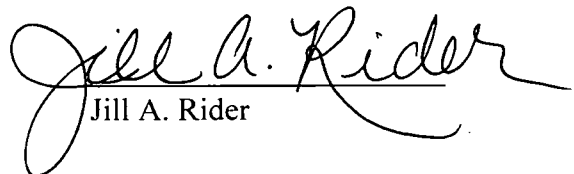
v.

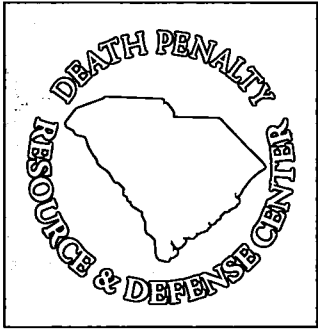
STATE OF SOUTH CAROLINA *Respondent/Petitioner.*

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner/Respondent's Motion to Exceed Page Limits was served today by first class United States mail, postage prepaid, this 9th day of April, 2012, upon the following:

Alphonso Simon, Jr.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill A. Rider



March 21, 2012

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*

Dear Mr. Shearouse:

Please find enclosed for filing, with proof of service, the original and seven copies of Petitioner/Respondent's Reply Brief in the above-referenced case. Please return the extra copy to me in the self addressed stamped envelope.

If you should have any questions, please do not hesitate to contact me.

Sincerely,

Jill A. Rider
Paralegal

RECEIVED
MAR 28 2012
S.C. SUPREME COURT

cc: Alphonso Simon, Jr., Esq



ALAN WILSON
ATTORNEY GENERAL

March 16, 2012

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

Re: *Kevin Mercer v. State of South Carolina*
Appeal from Lexington County, Capital Post-Conviction Relief Case

Dear Mr. Shearouse:

Enclosed please find an original and six (6) copies of Respondent-Petitioner's Return to Petition for Writ of Certiorari, together with Proof of Service regarding the above matter.

By copy of this letter I am serving two (2) copies of same upon Petitioner/Respondent's counsel and all interested parties.

Thank you for your assistance in this matter.

RECEIVED
MAR 22 2012
S.C. SUPREME COURT

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS/dmd

Enclosures

cc: Emily Paavola, Esquire (w/2 copies of encls.)
The Honorable Donald V. Myers, Solicitor, 11th Judicial Circuit (w/copy of encls.)
Sandi Wofford, Victim Services (w/copy of encls.)

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

The Honorable James R. Barber
Lexington County
Trial Court Case No. 2009-CP-32-05465

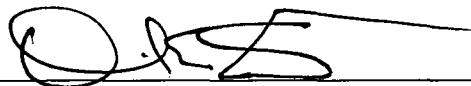
ORDER

For good cause shown, the request for an extension to serve and file the Return to the State's Petition for a Writ of Certiorari is granted and extended until April 9, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

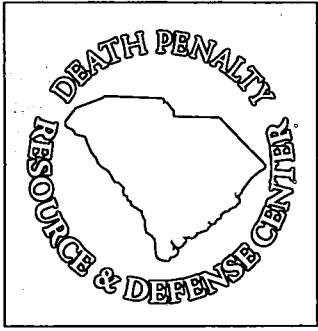


CLERK

Columbia, South Carolina

March 9, 2012

cc: Emily C. Paavola, Esquire
Assistant Attorney General Alphonso Simon, Jr.



March 8, 2012

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*

Dear Mr. Shearouse:

Please find enclosed for filing, with proof of service, the original and two copies of Petitioner's Second Motion for Extension of Time to File Return in the above-referenced case. Please return the second copy to me in the self addressed stamped envelope.

If you should have any questions, please do not hesitate to contact me.

Sincerely,

Jill A. Rider
Paralegal

cc: Alphonso Simon, Jr., Esq

RECEIVED

MAR 09 2012

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No.09-CP-32-5465

RECEIVED

S.C. SUPREME COURT

KEVIN MERCER. *Petitioner,*

v.

STATE OF SOUTH CAROLINA *Respondent.*

SECOND MOTION FOR EXTENSION OF TIME TO FILE RETURN

Petitioner/Respondent, Kevin J. Mercer, through undersigned counsel, for the reasons stated below, respectfully requests that this Court grant an extension of time for 30 days to file a Return to the State's Petition for Writ of Certiorari presently due for filing on March 9, 2012.

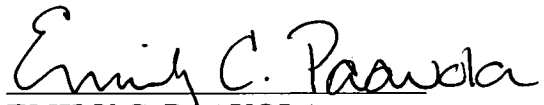
This request is based on counsel's heavy caseload and the complexity of the issues involved. Over the past thirty days, undersigned counsel has spent a substantial amount of time conducting mitigation investigation and making preparations for the capital post-conviction relief hearing in Bobby Wayne Stone v. South Carolina, which is currently scheduled to begin on April 23, 2012. Moreover, counsel has been preparing for an evidentiary hearing scheduled for March 26, 2012 in Kenneth Simmons v. South Carolina, which is also a capital PCR. Finally, counsel has been

engaged in investigation and case preparations for Louis Winkler v. South Carolina, a capital PCR scheduled for hearing in June 2012.

Further, this is a capital case which involves a number of factually and legally complex issues. In addition to his response to the State's question presented, Mr. Mercer intends to raise several additional sustaining grounds for the relief granted by the PCR court in this case, which require a substantial amount of time to properly research and brief. Undersigned counsel has a working draft in progress, but requires additional time to complete and file the Return. This request is made in good faith and not for the purposes of delay.

THEREFORE, given the complexity of this case and counsel's other professional commitments, Mr. Mercer respectfully requests that a thirty day extension of time be granted, thus making the Return due on April 9, 2012.

Respectfully submitted,

A handwritten signature in cursive script, reading "Emily C. Paavola".

EMILY C. PAAVOLA

Death Penalty Resource & Defense Center
900 Elmwood Ave., Suite 101
Columbia, SC 29201
(803) 765-1044

March 8, 2012.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No.09-CP-32-5465

KEVIN MERCER. *Petitioner,*

v.

STATE OF SOUTH CAROLINA *Respondent.*

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner's Second Motion for Extension of Time was filed today by first class United States mail, postage prepaid, this 8th day of March, 2012, upon the following:

Alphonso Simon, Jr.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill A. Rider

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

The Honorable James R. Barber
Lexington County
Trial Court Case No. 2009-CP-32-05465

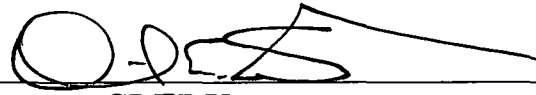
ORDER

For good cause shown, the request for an extension to serve and file the State's Return to Petition for a Writ of Certiorari is granted and extended until March 16, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

March 9, 2012

cc: Emily C. Paavola, Esquire
Assistant Attorney General Alphonso Simon, Jr.

ALAN WILSON
ATTORNEY GENERAL



March 5, 2012

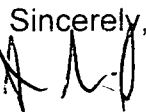
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Third Extension Request, Return to Petition for Writ of Certiorari
Kevin Mercer v. State of South Carolina
Appeal from Lexington County, Capital Post-Conviction Relief Case

Dear Mr. Shearouse:

Please find enclosed the original and six (6) copies of Respondent-Petitioner's Motion for Extension of Time to File Return to Petition for Writ of Certiorari with Proof of Service.

I am informing opposing counsel of my request by copy of this letter.

Sincerely,


Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd
Enclosures
cc: Emily Paavola, Esq. (w/two copies of encls.)

RECEIVED
MAR 07 2012
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Lexington County
The Honorable James R. Barber, III, Circuit Court Judge

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

MOTION FOR THIRD EXTENSION OF TIME TO FILE
RETURN TO PETITION FOR WRIT OF CERTIORARI

The undersigned counsel for the State of South Carolina requests a second extension of eleven (11) days within which to complete, serve and file the Return to Petition for Writ of Certiorari in the above-referenced appeal. The Return is currently due to be served and filed today, March 5, 2012. This request is made in good faith and not for the purpose of delay.

The Court's March 18, 2009 Order *re: Extension Requests in Criminal Direct Appeals and Post-Conviction Relief Certiorari Proceedings* provides, in pertinent part, that:

(3) A third extension may be granted upon a showing of good cause. The facts supporting the good cause shall be set forth in the motion. If filed by the Division of Appellate Defense or the Office of the Attorney General,

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MAR 07 2012

the motion shall be signed by the attorney involved and his or her immediate supervisor. If filed by a private lawyer, the motion shall be signed by the attorney involved and, if lawyer is not a sole practitioner, by another member of the firm. The signatures on the motion shall be a certification by these attorneys that they believe that the extension is warranted and that there is good cause to seek the extension.

In compliance with that Order and in support of this motion, counsel would respectfully show the Court the following:

Counsel has drafted and filed the Motions for Summary Judgment and Returns and Memoranda of Law in Support of Motion for Summary Judgment in the matters of Monica Hodge, #278872 v. Warden of Camille Griffin Graham Correctional Institution, C/A No. 3:11-2893-CMC-JRM; Michael W. Jeffcoat, #257930 vs. Warden of Broad River Correctional Institution, C/A No. 8:12-113-CMC-JDA; and Kevin Alexander, #322054 vs. Warden, Evans Correctional Institution, C/A No. 5:12-206-CMC-KDW all federal habeas matters pending before the United States District Court for the District of South Carolina. Counsel has also spent a substantial amount of time reviewing the file and drafting most of the Return in Elijah Battle, Jr., #306736 vs. Warden, Allendale Correctional Institution, C/A No. 8:11-3462-RMG-JDA, another federal habeas action pending before the United States District Court for the District of South Carolina.

Counsel spent a substantial amount of time drafting the Initial Brief of Respondent in the matter of State v. Dadrin Jerome Johnson, a Spartanburg County direct appeal murder case pending before the South Carolina Court of Appeals. Counsel also spent a substantial amount of time reviewing the transcript in State v.

Jeffrey Herrmann, a Berkeley County murder direct appeal pending before the South Carolina Court of Appeals. Counsel also filed the Final Brief of Respondent in State v. Devone Frazier, a Lancaster County murder direct appeal also pending before the South Carolina Court of Appeals.

Counsel also spent a significant amount of time reviewing files and transcripts from the capital murder trials in State v. Norman Starnes in preparation for the evidentiary hearing in Starnes post-conviction relief action, which was set to begin on March 1, 2012. Counsel has also had to address several discovery related matters in this case. A continuance has since been requested by the PCR Court.

Counsel has also spent a substantial amount of time reviewing the transcript and files and assisting in the drafting of the State's post-trial briefing in Mahdi v. State, a capital post-conviction relief action pending in Calhoun County. Counsel also spent a substantial amount of time reviewing the transcripts and files in the capital murder trials of State v. Bobby Wayne Stone, in preparation for the evidentiary hearing in Stone's capital post-conviction relief action currently set to be heard in April. Counsel also filed the Return to the Amended Application for Post-Conviction Relief in Louis Winkler v. State, a capital post-conviction relief action pending in Horry County.

Due to these and counsel's involvement in other matters pending in state and federal court, counsel was unable to timely complete his research and properly prepare the Return to Petition for Writ of Certiorari in this case. Counsel has completed a substantial amount of work on the Return, but counsel needs a few more days to complete the Return. This request is made in good faith, and not for the purposes of delay.

I am serving petitioner's counsel two (2) copies of this Motion via regular mail today. The eleven (11) day extension requested will make the Return to Petition for Writ of Certiorari due on March 16, 2012. I understand the desire of the Court and petitioner/respondent's counsel for a speedy resolution of this case, but I reasonably believe this extension is essential to allow me to complete the Return to Petition for Writ of Certiorari with reasonable effectiveness.

Respectfully submitted,

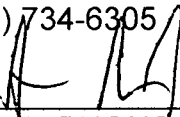
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General

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

BY: 

ALPHONSO SIMON, JR.
Assistant Attorney General


DONALD J. ZELENKA
Assistant Deputy Attorney General
*I support the finding of
good cause.*

March 5, 2012.

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

**Appeal From Lexington County
The Honorable James R. Barber, III, Circuit Court Judge**

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of March, 2012, a copy of the Respondent/Petitioner's Motion for Extension of Time to File Return to Petition for Writ of Certiorari was served on counsel for the Petitioner/Respondent by depositing two (2) copies of the same in the United States mail, postage prepaid, and addressed as follows:

Emily Paavola, Esq.
Death Penalty Resource & Defense Ctr.
900 Elmwood Avenue, Ste. #101
Columbia, SC 29201



ALPHONSO SIMON, JR.
Assistant Attorney General

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

The Honorable James R. Barber
Lexington County
Trial Court Case No. 2009-CP-32-05465

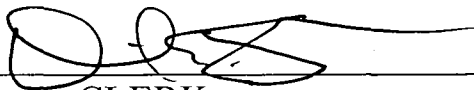
ORDER

For good cause shown, the request for an extension to serve and file the State's Return to Petition for a Writ of Certiorari is granted and extended until March 5, 2012 . Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

February 7, 2012

cc: Chief Appellate Defender Robert M. Dudek
Emily C. Paavola, Esquire
Assistant Attorney General Alphonso Simon, Jr.

ALAN WILSON
ATTORNEY GENERAL



February 2, 2012

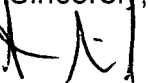
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Second Extension Request, Return to Petition for Writ of Certiorari
Kevin Mercer v. State of South Carolina
Appeal from Lexington County, Capital Post-Conviction Relief Case

Dear Mr. Shearouse:

Please find enclosed the original and six (6) copies of Respondent-Petitioner's Motion for Extension of Time to File Return to Petition for Writ of Certiorari with Proof of Service.

I am informing opposing counsel of my request by copy of this letter.

Sincerely,


Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd
Enclosures
cc: Emily Paavola, Esq. (w/two copies of encls.)

RECEIVED

FEB 06 2012

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Lexington County
The Honorable James R. Barber, III, Circuit Court Judge

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

RECEIVED
FEB 06 2012
S.C. SUPREME COURT

MOTION FOR SECOND EXTENSION OF TIME TO FILE
RETURN TO PETITION FOR WRIT OF CERTIORARI

The undersigned counsel for the State of South Carolina requests a second extension of thirty (30) days within which to complete, serve and file the Return to Petition for Writ of Certiorari in the above-referenced appeal. The Return is currently due to be served and filed today, February 2, 2012. This request is made in good faith and not for the purpose of delay.

The Court's March 18, 2009 Order *re: Extension Requests in Criminal Direct Appeals and Post-Conviction Relief Certiorari Proceedings* provides, in pertinent part, that:

(2) A second extension request may be granted upon a showing of good cause. The facts supporting good cause shall be set forth in the motion. The signature of the

attorney on the motion shall be a certification that the attorney believes that the extension is warranted and that there is good cause to seek the extension.

In compliance with that Order and in support of this motion, counsel would respectfully show the Court the following:

Counsel has drafted and filed the Motions for Summary Judgment and Returns and Memoranda of Law in Support of Motion for Summary Judgment in the matters of Nicholas Boan, #302151 v. Warden, Lee Correctional Institution, C/A No. 2:11-2078-RBH-BHH; Derrick L. Brice, #241502 v. Wayne McCabe, Warden, C/A No. 9:11-3172-GRA-BM; Garris E. Amerson, #327139 vs. Warden Stevenson, Broad River Correctional Institution, C/A No. 4:11-3266-CMC-TER; and Randy M. Fuewell, #279287 v. Mr. Leroy Cartledge, Warden, C/A No. 4:11-2757-RBH-TER, all federal habeas matters pending before the United States District Court for the District of South Carolina. Counsel has also spent a substantial amount of time reviewing the file and drafting significant portions of the Return in Monica Hodge, #278872 v. Warden of Camille Griffin Graham Correctional Institution, C/A No. 3:11-2893-CMC-JRM, another federal habeas action pending before the United States District Court for the District of South Carolina.

Counsel also reviewed the transcript and has spent a substantial amount of time drafting the Initial Brief of Respondent in the matter of State v. Dadrin Jerome Johnson, a Spartanburg County direct appeal murder case pending before the South Carolina Court of Appeals. Counsel also filed the Final Brief of Respondent in State v. Timmy Rogers, an Horry County murder direct appeal also pending before the South Carolina Court of Appeals.

Counsel also spent a significant amount of time reviewing files and transcripts from the capital murder trials in State v. Norman Starnes in preparation for the deposition of former Solicitor Harold "Trey" Gowdy, III in reference to the capital post-conviction relief action filed by Mr. Starnes. Gowdy was deposed on January 27, 2012. Counsel has also continued reviewing those files and investigating claims raised by Starnes in his PCR application in preparation for the evidentiary hearing in Starnes post-conviction relief action, which is currently set to begin on March 1, 2012.

Counsel has also spent a substantial amount of time reviewing the transcript and files and assisting in the drafting of the State's post-trial briefing in Mahdi v. State, a capital post-conviction relief action pending in Calhoun County. Counsel has also spent some time reviewing the transcripts in the capital murder trials of State v. Bobby Wayne Stone, in preparation for further investigation in preparation for the evidentiary in Stone's capital post-conviction relief action currently set to be heard in April.

Due to these and counsel's involvement in other matters pending in state and federal court, counsel was unable to timely complete his research and properly prepare the Return to Petition for Writ of Certiorari in this case. This request is made in good faith, and not for the purposes of delay.

I am serving petitioner's counsel two (2) copies of this Motion via regular mail today. The thirty (30) day extension requested will make the Return to Petition for Writ of Certiorari due on March 5, 2012.¹ I understand the desire of the Court and petitioner/respondent's counsel for a speedy resolution of this case, but I reasonably

¹ Thirty days from today would be Saturday, March 3, 2012. The next business day would be Monday, March 5, 2012.

believe this extension is essential to allow me to complete the Return to Petition for Writ of Certiorari with reasonable effectiveness.

Respectfully submitted,

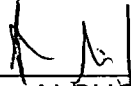
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General

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

BY: 

ALPHONSO SIMON, JR.
Assistant Attorney General

February 2, 2012.

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

**Appeal From Lexington County
The Honorable James R. Barber, III, Circuit Court Judge**

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of February, 2012, a copy of the Respondent/Petitioner's Motion for Extension of Time to File Return to Petition for Writ of Certiorari was served on counsel for the Petitioner/Respondent by depositing two (2) copies of the same in the United States mail, postage prepaid, and addressed as follows:

Emily Paavola, Esq.
Death Penalty Resource & Defense Ctr.
900 Elmwood Avenue, Ste. #101
Columbia, SC 29201



ALPHONSO SIMON, JR.
Assistant Attorney General

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

The Honorable James R. Barber
Lexington County
Trial Court Case No. 2009-CP-32-05465

ORDER

The request for an extension to serve and file the Return to the State's Petition for a Writ of Certiorari is granted and extended until March 9, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

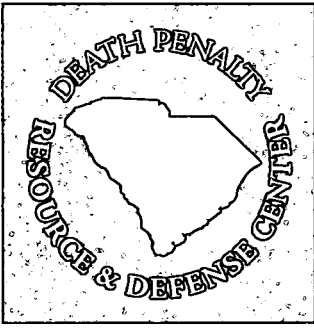


CLERK

Columbia, South Carolina

February 3, 2012

cc: Emily C. Paavola, Esquire
Assistant Attorney General Alphonso Simon, Jr.



February 1, 2012

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465
Capital PCR

Dear Mr. Shearouse:

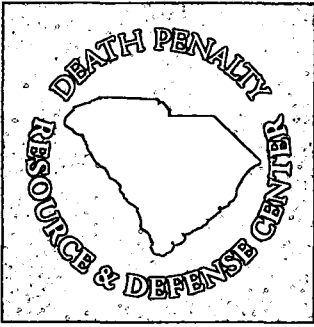
I am writing to request an extension of thirty (30) days in which to file the Return to Petition for Writ of Certiorari on behalf of Petitioner/Respondent in the above referenced case. This request for a continuance is based on counsel's heavy caseload and the complexity of the issues involved. Although Respondent/Petitioner's Petition for Writ of Certiorari was due to be filed and served on January 3, 2012, undersigned counsel did not receive service until January 10, 2012, when the brief arrived in an envelope post-marked on January 9, 2012. Thus, I am requesting an extension of thirty (30) days calculated by the date of actual service, making the Return due on March 9, 2012.

Moreover, please note that my mailing address has recently changed. I have previously provided written notice to the Court and to opposing counsel regarding this change, and I have updated my Attorney Information System information. My new mailing address is:

Emily C. Paavola
Death Penalty Resource & Defense Center
900 Elmwood Ave., Suite 101
Columbia, SC 29201

I am informing opposing counsel of my request by copy of this letter. If you should have any questions, please do not hesitate to contact me.

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FEB 01 2012
S.C. SUPREME COURT

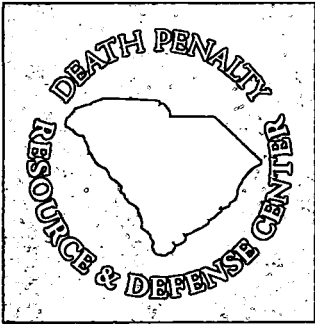


Sincerely yours,

Emily C. Paavola

Emily C. Paavola

cc: Alphonso Simon, Esq.



January 23, 2012

RECEIVED
JAN 20 2012
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

RE: *Kevin J. Mercer, SK6021 v. State of South Carolina*

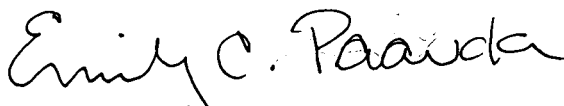
Dear Mr. Shearouse:

Please be advised that my office has relocated. My telephone number remains the same, but my new mailing address is:

900 Elmwood Avenue
Suite 101
Columbia, SC 29201

If you should have any questions, please do not hesitate to contact me.

Very truly yours,


Emily C. Paavola

cc: Alphonso Simon, Jr.
Beth Carrigg, Clerk of Court

ALAN WILSON
ATTORNEY GENERAL



RECEIVED
JAN 10 2012
S.C. SUPREME COURT

January 3, 2012

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

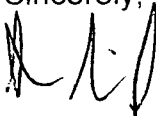
Re: *Kevin Mercer v. State of South Carolina*
Appeal from Lexington County, Capital Post-Conviction Relief Case

Dear Mr. Shearouse:

Enclosed please find an original and six (6) copies of Respondent-Petitioner's Petition for Writ of Certiorari, together with Proof of Service regarding the above matter.

By copy of this letter I am serving two (2) copies of same upon Petitioner/Respondent's counsel and all interested parties.

Thank you for your assistance in this matter.

Sincerely,


Alphonso Simon, Jr.
Assistant Attorney General

AS/dmd
Enclosures
cc: Emily Paavola, Esquire (w/2 copies of encls.)

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

The Honorable James R. Barber
Lexington County
Trial Court Case No. 2009-CP-32-05465

ORDER

The request for an extension to serve and file the State's Return to Petition for a Writ of Certiorari is granted and extended until February 2, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

January 4, 2012

cc: Emily C. Paavola, Esquire
Assistant Attorney General Alphonso Simon, Jr.

ALAN WILSON
ATTORNEY GENERAL



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JAN - 3 2012

January 3, 2012

S.C. Supreme Court

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

Re: First Extension Request, Return to Petition for Writ of
Certiorari
Kevin Mercer v. State of South Carolina
Appeal from Lexington County, Capital Post-Conviction
Relief Case

Dear Mr. Shearouse:

I hereby request an extension of thirty (30) days in which to file the Return to Petition for Writ of Certiorari on behalf of the Respondent-Petitioner in the above-referenced case. The Return is currently due to be served and filed today, January 3, 2012. However, because of my involvement in other matters in state and federal court, I am unable to timely complete the Return.

Therefore, I respectfully request this extension within which to serve and file the Return to Petition for Writ of Certiorari. I am informing opposing counsel of my request by copy of this letter.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS/dmd

cc: Emily Paavola, Esquire

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

The Honorable James R. Barber
Lexington County
Trial Court Case No. 2009-CP-32-05465

ORDER

For good cause shown, the request for an extension to serve and file the petition for a writ of certiorari on behalf of respondent/petitioner is granted and extended until January 3, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

December 5, 2011

cc: Emily C. Paavola, Esquire
Assistant Attorney General Alphonso Simon, Jr.

ALAN WILSON
ATTORNEY GENERAL



December 2, 2011

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DEC - 2 2011

S.C. Supreme Court

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

Re: *Third Extension Request - Respondent-Petitioner's
Petition for Writ of Certiorari*
Kevin Mercer vs. State of South Carolina
Appeal from Lexington County, Capital Post-Conviction Relief Case

Dear Mr. Shearouse:

Please find enclosed the original and six (6) copies of Respondent-Petitioner's Motion for Extension of Time to File Petition for Writ of Certiorari and Appendix with Proof of Service.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd

Enclosures

cc: Emily Paavola, Esq. (w/two copies of encls.)
Robert Dudek, Esq.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

DEC - 2 2011

Appeal From Lexington County
The Honorable James R. Barber, III, Circuit Court Judge, Supreme Court

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

MOTION FOR THIRD EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

The undersigned counsel for the State of South Carolina requests a third extension of thirty (30) days within which to complete, serve and file the Petition for Writ of Certiorari and Appendix in the above-referenced appeal. The Petition is currently due to be served and filed today, December 2, 2011. This request is made in good faith and not for the purpose of delay.

The Court's March 18, 2009 Order *re: Extension Requests in Criminal Direct Appeals and Post-Conviction Relief Certiorari Proceedings* provides, in pertinent part, that:

(2) A third extension may be granted upon a showing of good cause. The facts supporting the good cause shall be set forth in the motion. If filed by the Division of

Appellate Defense or the Office of the Attorney General, the motion shall be signed by the attorney involved and his or her immediate supervisor. If filed by a private lawyer, the motion shall be signed by the attorney involved and, if lawyer is not a sole practitioner, by another member of the firm. The signatures on the motion shall be a certification by these attorneys that they believe that the extension is warranted and that there is good cause to seek the extension.

In compliance with that Order and in support of this motion, counsel would respectfully show the Court the following. Counsel has filed the Motions for Summary Judgment and Returns and Memoranda of Law in Support of Motion for Summary Judgment in the matter of Quinton Bates, #297338 v. Warden, M.C.I. Leroy Cartledge, C/A No. 3:11-02198-TMC-JRM, Edward Lee Pennington, # 267380 v. Robert M. Stevenson, III, Warden Broad River Corr. Inst.; State of South Carolina, C/A No. 2:11-2274-JFA-BHH, and James Cabbagestalk, #295567 a/k/a Shaheen Cabbagestalk v. Warden, Michael McCall, Jr., C/A No. 3:11-2665-SB-JRM, all federal habeas matters pending before the United States District Court for the District of South Carolina. Counsel has also reviewed the files and drafted portions of the Returns and Memoranda of Law in Support of Motions for Summary Judgment in Mark Anthony Owens, #281410 v. Robert M. Stevenson, III, Warden of Broad River Correctional Institution, C/A No. 8:11-2397-RMG-JDA, Vernard Jerome Mathis, #297034 v. Leroy Cartledge, Warden, McCormick Correctional Institution, C/A No. 1:11-02383-RMG-SVH, Nicholas Boan, #302151 v. Warden, Lee Correctional Institution, C/A No.: 2:11-2078-RBH-BHH, Brian Wilson, #319443 v. Leroy Cartledge, C/A. No. 2:11-02672-MBS-BHH, and Samuel Hepburn, #243604 v. Warden Willie L. Eagleton, C/A No.: 6:11-2016-RMG-KFM, all federal habeas actions pending before

the United States District Court for the District of South Carolina.

Counsel has completed and filed the Initial Brief of Respondent in the matter of State v. Timmy Rogers; and has also completed review of the transcript, done a substantial amount of research, and drafted most of the Initial Brief of Respondent in State v. Devone F. Frazier. Both are direct appeals pending before the South Carolina Court of Appeals. Counsel also spent a substantial amount of time reviewing documents and part of the Record on Appeal for the capital trial in preparation for depositions and other discovery matters in Norman Starnes v. State, a Lexington County capital post-conviction relief hearing. Counsel also presented oral argument on behalf of the State before the South Carolina Court of Appeals in State v. Harold Lee Jackson, a direct appeal in a Beaufort County murder case, on November 15, 2011.

Counsel has begun preparation of the Petition for Writ of Certiorari in this matter. Counsel received the nine (9) volumes of the Appendix on November 30, 2011. In light of the complexity of the factual and legal issues in this case, counsel for Respondent submits that a complete review of the Appendix is needed before the Petition can be properly prepared.

Counsel has been in contact with counsel for Petitioner-Respondent, Emily Paavola. Ms. Paavola has indicated she has no objection to this request. I am serving petitioner's counsel two (2) copies of this Motion via regular mail today. The thirty (30) day extension requested will make the Petition for Writ of Certiorari due on January 2, 2011. I understand the desire of the Court and petitioner/respondent's counsel for a speedy resolution of this case, but I reasonably believe this extension

is essential to allow me to complete the Return to Petition for Writ of Certiorari and Appendix with reasonable effectiveness.

Respectfully submitted,

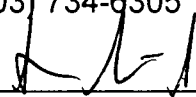
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General

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

BY: 

ALPHONSO SIMON, JR.
Assistant Attorney General

December 2, 2011.

BY: 

DONALD J. ZELENKA
Assistant Deputy Attorney General

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

**Appeal From Lexington County
The Honorable James R. Barber, III, Circuit Court Judge**

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of December, 2011, a copy of the Respondent/Petitioner's Motion for Extension of Time to File Petition for Writ of Certiorari and Appendix was served on counsel for the Petitioner/Respondent by depositing two (2) copies of the same in the United States mail, postage prepaid, and addressed as follows:

Emily Paavola, Esq.
Death Penalty Resource & Defense Ctr.
P.O. Box 11311
Columbia, SC 29211



ALPHONSO SIMON, JR.
Assistant Attorney General

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

The Honorable James R. Barber
Lexington County
Trial Court Case No. 2009-CP-32-05465

ORDER

For good cause shown, the request for an extension to serve and file the Petition for a Writ of Certiorari on behalf of petitioner/respondent is granted and extended until December 2, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY


Chief Deputy Clerk

Columbia, South Carolina

November 4, 2011

cc: Chief Appellate Defender Robert M. Dudek
Emily C. Paavola, Esquire
Assistant Attorney General Alphonso Simon, Jr.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No.09-CP-32-5465

RECEIVED

NOV 3 2011

S.C. SUPREME COURT

KEVIN MERCER. *Petitioner,*

v.

STATE OF SOUTH CAROLINA *Respondent.*

SECOND MOTION FOR EXTENSION OF TIME

Petitioner, through undersigned counsel, for the reasons stated below, respectfully requests that this Court grant an extension of time for 30 days to file the Petition for Writ of Certiorari and the Appendix presently due for filing on November 2, 2011.

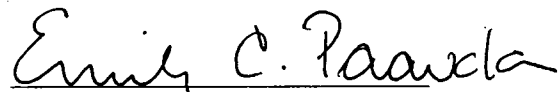
1. In accordance with this Court's instructions by letter dated August 26, 2011, undersigned counsel and counsel for respondent have jointly agreed on the items to be included in the single Appendix for this consolidated appeal. Undersigned counsel has delivered those items to the Division of Appellate Defense, which remains associated for costs, and the Division is in the process of preparing the Appendix for printing. However, the Appendix is not yet available, and the Division has advised that it may take an additional two to three weeks to complete.

2. Furthermore, Mr. Mercer's case concerns complex factual and legal issues that require thorough record review, research and analysis. Undersigned counsel has a heavy workload, including assisting with investigation and preparing three other capital post-conviction cases for hearing, either as counsel or as a mitigation investigator, and completing a number of research and writing projects for the federal government.

3. Undersigned counsel has contacted counsel for respondent, Alphonso Simon, about this request for an extension of time. Although Mr. Simon has not yet responded, undersigned counsel anticipates no objection from respondent, given that the joint appendix is not yet available for filing.

THEREFORE, given the complexity of this case, the delay in obtaining the appendix, and counsel's other professional commitments, petitioner respectfully requests that a thirty day extension of time be granted thus making the petition for writ of certiorari due on December 2, 2011.

Respectfully submitted,



EMILY C. PAAVOLA

Death Penalty Resource & Defense Center

P.O. Box 11311

Columbia, SC 29211

(803) 765-1044

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No.09-CP-32-5465

KEVIN MERCER. *Petitioner,*

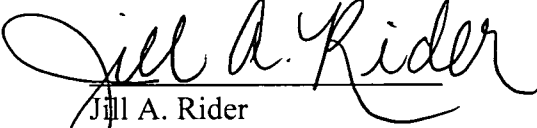
v.

STATE OF SOUTH CAROLINA *Respondent.*

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner's Second Motion for Extension of
Time was filed today by first class United States mail, postage prepaid, this 1st day of
November, 2011, upon the following:

Alphonso Simon, Jr.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill A. Rider

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

The Honorable James R. Barber
Lexington County
Trial Court Case No. 2009-CP-32-05465

ORDER

For good cause shown, the request for an extension to serve and file the Petition for a Writ of Certiorari on behalf of respondent/petitioner is granted and extended until December 2, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda L. Shealy
Chief Deputy Clerk

Columbia, South Carolina

November 4, 2011

cc: Chief Appellate Defender Robert M. Dudek
Emily C. Paavola, Esquire
Assistant Attorney General Alphonso Simon, Jr.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

NOV 2 2011

Appeal From Lexington County S.C. Supreme Court
The Honorable James R. Barber, III, Circuit Court Judge

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

MOTION FOR SECOND EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

The undersigned counsel for the State of South Carolina requests a second extension of thirty (30) days within which to complete, serve and file the Petition for Writ of Certiorari and Appendix in the above-referenced appeal. The Petition is currently due to be served and filed today, November 2, 2011. This request is made in good faith and not for the purpose of delay.

The Court's March 18, 2009 Order *re: Extension Requests in Criminal Direct Appeals and Post-Conviction Relief Certiorari Proceedings* provides, in pertinent part, that:

(2) A second extension request may be granted upon a showing of good cause. The facts supporting good cause shall be set forth in the motion. The signature of the

attorney on the motion shall be a certification that the attorney believes that the extension is warranted and that there is good cause to seek the extension.

In compliance with that Order and in support of this motion, counsel would respectfully show the Court the following. Counsel has filed the Motion for Summary Judgment and Return and Memoranda of Law in Support of Motions for Summary Judgment in the matter of James A. Bryant, #315781 v. Warden, Broad River C.I. C/A No. 4:11-1315-RBH-TER. Counsel has also reviewed the files and begun preparation of the Returns and Memoranda of Law in Support of Motions for Summary Judgment in Mark Anthony Owens, #281410 vs. Robert M. Stevenson, III, Warden of Broad River Correctional Institution, C/A No. 8:11-2397-RMG-JDA, Samuel Hepburn, #243604 v. Warden Willie L. Eagleton, C/A No. 6:11-2016-RMG-KFM, Edward Lee Pennington, #267380 vs. Robert M. Stevenson, III, Warden Broad River C.I.; State of South Carolina, C/A No. 2:11-2274-JFA-BHH, Quinton Bates, #297338 vs. Warden, M.C.I. Leroy Cartledge, C/A No. 3:11-02198-TMC-JRM, and Nicholas Boan, #302151 vs. Warden, Lee Correctional Institution, C/A No. 2:11-2078-RBH-BHH, all federal habeas actions pending before the United States District Court for the District of South Carolina.

On October 6, 2011 counsel presented oral argument before the South Carolina Court of Appeals on behalf of the State in In the Interest of Jamal G., a Minor, a direct appeal in a family court delinquency proceeding in which the defendant was found delinquent for murder in Charleston County. Counsel also filed the Final Brief of Respondent in State v. Taurus Watts, a direct appeal in a Richland County murder case pending before the South Carolina Court of Appeals. Counsel also filed

the Return to Petition for Writ of Certiorari in James Nathaniel Bryant, III v. State of South Carolina, an Horry County capital post-conviction relief action pending before the South Carolina Supreme Court. Counsel has also reviewed the entire transcript and completed research for drafting the Initial Brief of Respondent in State v. Timmy Rogers, a direct appeal pending before the South Carolina Court of Appeals in a Beaufort County murder case. Counsel has also completed review of the transcript and done a substantial amount of research for drafting the Initial Brief of Respondent in State v. Devone Frazier, a direct appeal pending before the South Carolina Court of Appeals in a Lancaster County murder case. Counsel was also out of the office on November 1, 2011 and part of today due to illness.

Counsel has begun preparation of the Petition for Writ of Certiorari in this matter. However, as noted by counsel for Petitioner-Respondent in her Motion for an extension, the parties are still awaiting the printing of the Appendix in this case. In light of the complexity of the factual and legal issues in this case, counsel for Respondent submits that the Appendix is needed before the Petition can be completed.

Counsel has been in contact with counsel for Petitioner-Respondent, Emily Paavola. Ms. Paavola has indicated she has no objection to this request. I similarly have no objection to Petitioner-Respondent's request for an extension.

I am serving petitioner's counsel two (2) copies of this Motion via regular mail today. The thirty (30) day extension requested will make the Petition for Writ of Certiorari due on December 2, 2011. I understand the desire of the Court and petitioner/respondent's counsel for a speedy resolution of this case, but I reasonably

believe this extension is essential to allow me to complete the Return to Petition for Writ of Certiorari and Appendix with reasonable effectiveness.

Respectfully submitted,

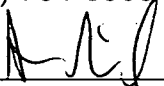
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General

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

BY: 

ALPHONSO SIMON, JR.
Assistant Attorney General

November 2, 2011.

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

**Appeal From Lexington County
The Honorable James R. Barber, III, Circuit Court Judge**

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

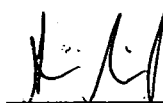
STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of November, 2011, a copy of the Respondent/Petitioner's Motion for Extension of Time to File Petition for Writ of Certiorari and Appendix was served on counsel for the Petitioner/Respondent by depositing two (2) copies of the same in the United States mail, postage prepaid, and addressed as follows:

Emily Paavola, Esq.
Death Penalty Resource & Defense Ctr.
P.O. Box 11311
Columbia, SC 29211



ALPHONSO SIMON, JR.
Assistant Attorney General



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

NOV 2 2011

November 2, 2011

S.C. Supreme Court

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

Re: *Second Extension Request - Respondent-Petitioner's
Petition for Writ of Certiorari*
Kevin Mercer vs. State of South Carolina
Appeal from Lexington County, Capital Post-Conviction Relief Case

Dear Mr. Shearouse:

Please find enclosed the original and (1) copy of Respondent-Petitioner's Motion for Extension of Time to File Petition for Writ of Certiorari and Appendix with Proof of Service.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd

Enclosures

cc: Emily Paavola, Esq. (w/two copies of encls.)
Robert Dudek, Esq.

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

The Honorable James R. Barber
Lexington County
Trial Court Case No. 2009-CP-32-05465

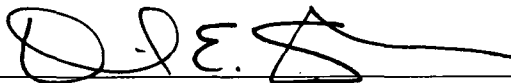
ORDER

The request for an extension to serve and file the Petition for a Writ of Certiorari on behalf of respondent/petitioner is granted and extended until November 2, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

October 4, 2011

cc: Chief Appellate Defender Robert M. Dudek
Emily C. Paavola, Esquire
Assistant Attorney General Alphonso Simon, Jr.



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

OCT - 3 2011

October 3, 2011

S.C. Supreme Court

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

Re: First Extension Request, Respondent-Petitioner's Petition for
Writ of Certiorari
Kevin Mercer v. State of South Carolina
Appeal from Lexington County, Capital Post-Conviction
Relief Case

Dear Mr. Shearouse:

I hereby request an extension of thirty (30) days in which to file the Petition for Writ of Certiorari on behalf of the Respondent-Petitioner in the above-referenced case. The Petition is currently due to be served and filed today, October 3, 2011. However, because of my involvement in other matters in state and federal court, I am unable to timely complete the Petition.

Therefore, I respectfully request this extension within which to serve and file the Petition for Writ of Certiorari. I am informing opposing counsel of my request by copy of this letter.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS/
cc: Emily Paavola, Esquire

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

The Honorable James R. Barber
Lexington County
Trial Court Case No. 2009-CP-32-05465

ORDER

For good cause having been shown, the time for serving and file
Petitioner's Writ of Certiorari and Appendix in the above entitled matter is
hereby extended until November 2, 2011.

IT IS SO ORDERED.

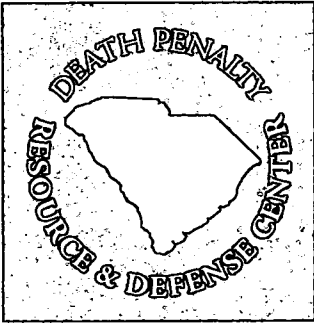
JEAN H. TOAL, CHIEF JUSTICE

BY *Andrea J. Shealy*
Chief Deputy CLERK

Columbia, South Carolina

September 29, 2011

cc: Chief Appellate Defender Robert M. Dudek
Emily C. Paavola, Esquire
Assistant Attorney General Alphonso Simon, Jr.



September 28, 2011

RECEIVED

SEP 28 2011

S.C. SUPREME COURT
PM 9-28-11

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465
Capital PCR

Dear Mr. Shearouse:

Dear Mr. Shearouse:

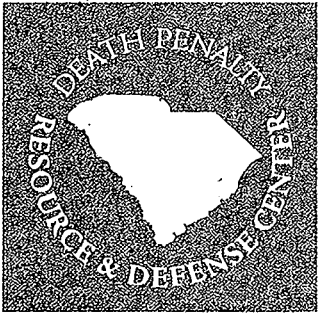
I am writing to request an extension of thirty (30) days in which to file Petitioner's Writ of Certiorari and Appendix in the above referenced case. The Petition and Appendix are currently due to be filed, October 3, 2011. This request for a continuance is based on counsel's heavy caseload and the complexity of the issues involved.

I am informing opposing counsel of my request by copy of this letter. If you should have any questions, please do not hesitate to contact me.

Sincerely yours,

Emily C. Paavola

cc: Alphonso Simon, Esq.



September 2, 2011

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211
VIA FAX: (803) 734-1499

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465
Capital PCR

Dear Mr. Shearouse:

I am writing regarding the above captioned case. Chief Appellate Defender, Robert Dudek has informed me that the Court issued an order yesterday appointing me to represent Mr. Mercer in this appeal, due to Mr. Dudek's conflict of interest. I am happy to accept this appointment. I am simply writing to confirm my understanding that all briefing deadlines were held in abeyance pending the outcome of Mr. Dudek's motion for the appointment of outside counsel. The transcript of the post-conviction proceedings in this case became available on or about August 4, 2011, before either party filed a notice of appeal. However, since I have just been appointed to represent Mr. Mercer in this proceeding, I would respectfully request that the Court issue a briefing schedule requiring Mr. Mercer to serve and file his petition for writ of certiorari within thirty days.

If you have any questions or require any additional information, please do not hesitate to contact me.

Sincerely yours,

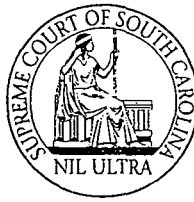
Emily C. Paavola

RECEIVED

SEP 02 2011

cc: Alphonso Simon, Esq.

S.C. SUPREME COURT



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 1, 2011

Chief Appellate Defender Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: Mercer, Kevin v. The State

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

By copy of this letter we are advising counsel of record the Petitions' for a Writ of Certiorari and one (1) Appendix on behalf of both parties shall be served and filed within thirty (30) days of the date of this letter.

Very truly yours,

CLERK

DES/dmh

Enclosure

cc: Emily C. Paavola, Esquire
Assistant Attorney General Alphonso Simon, Jr.

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

ORDER

Upon the filing of the notices of appeal in this matter, the Commission on Indigent Defense, Division of Appellate Defense assumed representation of petitioner/respondent. The Division of Appellate Defense now moves to be relieved as counsel and to have outside counsel appointed based on a conflict of interest. The State has not filed a return to the motion.

The motion is granted and Emily C. Paavola, Esquire, who represented petitioner/respondent in this matter before the circuit court, is hereby appointed to represent petitioner/respondent. The Division of Appellate Defense shall remain associated for the limited purpose of paying for any necessary transcript(s) and providing copies of the petition, appendix and briefs.

IT IS SO ORDERED.


C.J.
FOR THE COURT

Columbia, South Carolina
September 11, 2011
NL 11733



ALAN WILSON
ATTORNEY GENERAL

August 29, 2011

RECEIVED

AUG 31 2011

S.C. SUPREME COURT

Robert M. Dudek, Esq.
SCCID/Division of Appellate Defense
1330 Lady St., Ste. #401
Columbia, SC 29201

Re: *Kevin J. Mercer vs. State of South Carolina*
2009-CP-32-5465 (Capital PCR Action)

Dear Mr. Dudek:

Please find enclosed a copy of a letter that we sent to Mr. Shearouse today in response to his letter dated August 26, 2011. You were inadvertently not copied on our original letter.

If you have any questions please do not hesitate to contact me.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd

cc: The Honorable Daniel E. Shearouse



ALAN WILSON
ATTORNEY GENERAL

August 29, 2011

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

Re: *Kevin J. Mercer vs. State of South Carolina*
2009-CP-32-5465 (Capital PCR Action)

Dear Mr. Shearouse:

Please be advised that our office received the transcript in *Kevin Mercer vs. State of South Carolina*, 2009-CP-32-5465. (heard January 31, 2011-February 1, 2011) from court reporter Carol M. Thueme, on August 4, 2011. We had previously received the transcript for the March 18, 2011 portion of the evidentiary hearing from court reporter Elizabeth Harris on April 6, 2011. I am advising opposing counsel by copy of this letter.

If you have any questions please do not hesitate to contact me.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd

cc: Emily C. Paavola, Esq.
Jason P. Peavy, Esq.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Honorable James R. Barber, III, Circuit Court Judge

 ORIGINAL

RECEIVED

AUG 16 2011

S.C. Supreme Court

KEVIN MERCER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

MOTION FOR APPOINTMENT
OF OUTSIDE COUNSEL

The undersigned respectfully moves this Court for the appointment of outside counsel for petitioner, Kevin Mercer, based on a conflict of interest. In support of this motion, the undersigned would show this Court:

(1) Petitioner was indicted at the February, 2003 term of the Lexington County grand jury for the offenses of murder, armed robbery, possession of a firearm during the commission of a violent crime, and criminal conspiracy.

(2) The state sought the death penalty on the murder charge. The criminal conspiracy count was nol prossed and co-defendant Marcus Thompson, who was not tried with petitioner,

subsequently, upon information and belief, is currently serving a twenty-eight year prison term for armed robbery. Petitioner's case came on for trial on April 17, 2006 before the Honorable John Cannon Few, and a jury. Cameron B. Littlejohn, Jr. and Melissa J. Kimbrough represented petitioner. Donald V. Myers, S. Rick Hubbard, III, D. Shawn Graham, and Marion Moses were the solicitors. At the conclusion of the guilt phase of the trial the jury found petitioner guilty of these three offenses.

(3) A penalty phase trial was then held. At the conclusion of the penalty phase the jury recommended that petitioner be sentenced to death. Judge Few then imposed the death sentence. Petitioner appealed his convictions and sentences, and he was represented by now Chief Appellate Defender Robert M. Dudek. This Court affirmed on January 12, 2009, finding one legal error in the exclusion of expert testimony harmless as cumulative. State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009). Rehearing was denied on February 19, 2009.

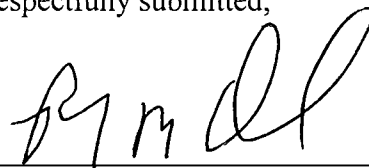
(4) Petitioner was granted a stay of execution by this Court to pursue a writ of certiorari from the United States Supreme Court. The petition for writ of certiorari was denied on October 5, 2009. See Kevin Mercer v. South Carolina, 130 S.Ct. 104 (2009).

(5) Petitioner filed an application for post-conviction relief in the Lexington County Court of Common Pleas. Emily Paavola and Jason Peavy were appointed by the Honorable James R. Barber to represent petitioner. At the PCR hearing, petitioner raised issues of ineffectiveness of appellate counsel in addition to ineffective assistance of trial counsel. Chief Appellate Defender Robert M. Dudek testified during the evidentiary hearing. The order of dismissal makes specific lengthy findings regarding the issue of ineffective assistance of appellate counsel and denies relief on that basis on pages 70 through 77. Those pages are attached as exhibit "A."

(6) The undersigned submits that since he could not ethically handle the appeal from the denial of post-conviction relief where allegations of ineffective assistance of appellate counsel were pled against him, where he testified at the evidentiary hearing, and findings on that issue were made in the order of dismissal, one of the Appellate Defenders that he supervises should not, most respectfully, be appointed in this case either. Counsel respectfully submits that he was bound by the Sixth Amendment and ethically to provide effective representation on appeal and petitioner has alleged in post-conviction that he was denied that effective representation, and that could be an issue on appeal to this Court, that outside counsel should be appointed. See McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 436 (1988); Evitts v. Lucey, 469 U.S. 387 (1985).

Respectfully, for the above reasons, the undersigned counsel requests that this Court appoint outside counsel for petitioner.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

Attorney for Petitioner

This 16th day of August, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Honorable James R. Barber, III, Circuit Court Judge

KEVIN MERCER,

PETITIONER,

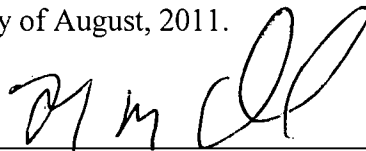
V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

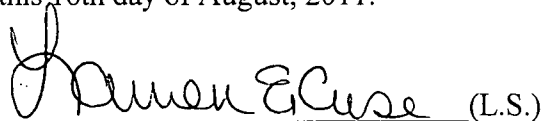
The undersigned attorney hereby certifies that a true copy of the Motion for Appointment of Outside Counsel in the above referenced case has been served upon opposing counsel, Donald J. Zelenka, Esquire and Kevin Mercer, this 16th day of August, 2011.



Robert M. Dudek
Chief Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 16th day of August, 2011.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: August 23, 2014

EXHIBIT

“A”

Kevin Fuller. Johnston had indicated that Fuller was lying in an attempt to receive assistance with his charges. Hubbard testified that Johnston never said that Thompson indicated he was the shooter. To the contrary, Johnston's impression of Thompson was that he was afraid of prison, and he was seeking advice from his two cell mates who had more experience with the system. Further, Johnston indicated that Fuller would say anything. Assistant Solicitor ~~Shawn Graham~~ also indicated that Johnston told them that Fuller would say anything. Graham's testimony indicates that Johnston's testimony at the motion for new trial hearing was consistent with what he told them prior to the hearing.

"Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial." Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977)(quoting State v. Mayfield, 235 S.C. 11, 34–35, 109 S.E.2d 716, 729 (1959)). Applicant, who has the burden of proof, has offered no reliable evidence to show he is entitled to relief upon this claim. The only evidence comes from the ever evolving testimony from Mr. Johnston, and even he acknowledges that he does not know which, if any, of the alleged statements he heard from Thompson are true. This Court finds Applicant has failed to carry his burden of proof in this proceeding. As a result, this claim for relief is denied.

Ground E: Ineffective assistance of appellate counsel

Applicant's claim in Ground E is denied. In Ground E, Applicant asserts appellate counsel was ineffective in three regards. First, Applicant argues appellate counsel should have argued on appeal that juror Deborah Lucas was improperly

qualified. Second, Applicant argues appellate counsel should have argued that juror Phillip Lofollette was also improperly qualified. Third, Applicant argues appellate counsel should have argued that juror Michael Sponhour was improperly disqualified. Applicant has not shown that appellate counsel was deficient in not raising these arguments on appeal. Further, Applicant has not shown that he was prejudiced as a result of counsel not raising these issues on appeal. Thus, this Court finds Applicant has not met his burden in establishing that appellate counsel was ineffective in this regard.

These claims are without merit. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). A PCR applicant has the burden of proving appellate counsel's performance was deficient. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004), as "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." Jones v. Barnes, 463 U.S. 745, 752 (1983). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Id.

To obtain relief a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 615-16, 524 S.E.2d 833, 836 (1999). In other words, the applicant is required to demonstrate "that his counsel was objectively unreasonable in

failing" to identify and argue present significant and obvious issues on appeal, and "a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." Smith v. Robbins, 528 U.S. 259, 285 (2000) (citation omitted). Although recognizing that "[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 528 U.S. at 288. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). See also Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc).

In a capital case, the proper standard in determining the qualification of a prospective juror is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. State v. Green, 301 S.C. 347, 392 S.E.2d 157, cert. denied, 498 U.S. 881, 111 S.Ct. 229, 112 L.Ed.2d 183 (1990) (citing Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 853, 83 L.Ed.2d 841 (1985)); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996), cert. denied 520 U.S. 1123, 117 S.Ct. 1261, 137 L.Ed.2d 340 (1997). The determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and is not reviewable on appeal unless wholly unsupported by the evidence. State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), cert. denied, 508 U.S. 915, 113 S.Ct. 2355, 124 L.Ed.2d 263 (1993). When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire voir dire. State v. Green, supra. The ultimate consideration is that the juror be unbiased, impartial and able to carry out the law as explained to him. Id.

State v. Bennett, 328 S.C. 251, 256-57, 493 S.E.2d 845, 848 (1997).

At the evidentiary hearing, appellate counsel Robert M. Dudek testified that he read the full voir dire. He raised one juror issue in his appellate briefs. He noted that he

would have considered all issues that were preserved for review. However, he did contend that he would not have made a strategic decision not to raise a winning issue. Mr. Dudek testified that the appellate courts give due deference or great deference to the findings of trial courts regarding whether a juror is qualified to serve. The only case in which he could recall that an appellant prevailed on a juror claim was in *State v. ~~Johnny Bennett~~*. He noted that with the juror who was disqualified, the court did have specific concerns about whether the juror was applying a higher burden of proof beyond the reasonable doubt standard. Mr. Dudek indicated that he was not aware of any juror who served who had previously been challenged for cause during the voir dire process.

Applicant's claims relating to jurors Deborah Lucas and Phillip Lofollette were without merit. "[A]ny claim that a jury was not impartial must focus on the jurors who ultimately sat at trial." *State v. Tucker*, 324 S.C. 155, 162-63, 478 S.E.2d 260, 264 (1996)(citing *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273(1988)); *see State v. Green*, 301 S.C. 347, 353, 392 S.E.2d 157, 160 (1990)(holding Both jurors Lucas and Lofollette were struck by the defense during the jury strike. (R. 1258, 1260). Only one regular juror was seated after the defense exhausted its peremptory strikes: Vicky Mills. (R. 1262). She was not challenged by the defense during either the voir dire process or during the jury strike. (R. 784-801, 1262-63). In light of the fact that none of the jurors who sat on Applicant's jury were objectionable, this Court finds Applicant received a fair trial.⁹ Thus, this claim would have been found to be without merit on appeal. *See*

⁹ This court also finds that the transcript of the jurors' voir dire support the trial court's findings the jurors were qualified.

Green, supra. As a result, Applicant has failed to meet his burden of showing counsel was ineffective in not challenging the qualifications of Jurors Lucas and Lofollette on appeal. United States v. Wilkes, 20 F.3d 651 (5th Cir.1994)(appellate counsel not deficient for not raising legally meritless claim on appeal); see United States v. Kirsh, 54 F.3d 1062, 1071 (2d Cir. 1995)(noting the failure to make a meritless argument does not rise to the level of ineffective assistance of counsel). _____

This Court also finds the third claim for relief in this ground to be without merit. Appellate counsel was not ineffective in not arguing on appeal that juror Sponhour was improperly disqualified. A review of the transcript of the juror Sponhour's voir dire shows that trial court did not abuse its discretion in dismissing Sponhour. In the early portion of the voir dire, when Sponhour is asked by Judge Few if he could vote to impose the death penalty if he felt it was the appropriate punishment, Sponhour responded "I have trouble giving you a yes or no answer on that. It is a bit unlikely that I would be willing to do that." (R. 598). Sponhour had maintained that he did not think he fit into one of the three categories for jurors. During examination by the solicitor, Sponhour indicated that he would be very troubled about voting for the death penalty because there were too many cases where "it's been shown that people have been sent to death and the facts were later found to liberalize it." (R. 599). He also indicated that he probably could not sign a death verdict. (R. 600). While Sponhour did not have a moral opposition to the concept of the death penalty, he asserted that he was more concerned about the fallibility of death sentences. (R. 601). He noted that those concerns would be at the forefront of his mind. (R. 602). In responding to Mr.

Littlejohn's questions on voir dire, Sponhour indicated that he was not completely opposed to the death penalty, but he was troubled by the "inherent fallibility of human institutions like the judicial system." (R. 605).

After the examination of Sponhour concluded, the trial court indicated it was concerned that Sponhour indicated he would be applying a different burden of proof to the State before he would be willing to consider the death penalty. (R. 606). Specifically, the trial court was concerned that if a guilty verdict was entered by the jury, Sponhour would still question guilt during the sentencing phase. (See R. 607-09).

Sponhour was brought back in for further voir dire. During this questioning, Sponhour testified that he could see himself not considering the death penalty in the sentencing phase because he still had questions about the defendant's guilt. (R. 610-14).

After questioning, the solicitor argued the juror was not qualified to serve. He noted that the juror's answers indicated he would not follow the law in the guilt phase because he was looking for more than beyond reasonable doubt. Further, in the sentencing phase, he would be in direct violation of United States Supreme Court precedent in that he would consider residual doubt. The Solicitor argued:

So I think he's disqualified in the guilt phase because he needs proof beyond all doubt. I think he's certainly disqualified in the penalty phase because that's bleeding over into it, and he's bringing in an arbitrary and a capricious manner into that deliberation. Under Wainwright versus Witt I agree, your honor. We think that his views substantially impair – they would prevent him from the performance of his duties in accordance with his instruction and his oath and the law that would be charged to him.

(R. 616).

In response, trial counsel argued that the jury could give life for any reason or no reason at all, and the fact that the juror wants to be clear about his decision making process means that he is just doing his duty. Further, counsel noted that it was clear that Sponhour was not fundamentally opposed to capital punishment. Counsel argued that Sponhour did not say that he would hold the State to a standard where he could not give the death penalty. "He didn't say, well, there's no circumstance under which - - no burden that the state could meet such that I would never give a death sentence." (R. 618).

After hearing arguments, the trial court disqualified Sponhour for service on the jury for two reasons. First, the trial court found Sponhour indicated he would hold the State to a higher burden of proof, which was impermissible. (R. 618). While Sponhour did not state what that burden would be, it was clear that it was higher than beyond a reasonable doubt. The trial court found that would interfere with the juror's ability to follow the court's instructions. Second, the trial court found that Sponhour's views about the fallibility of the justice system and discussion about the number of times that individuals sentenced to death would later be found not guilty would interfere with his ability to follow the court's instructions. Thus, Sponhour was disqualified.

The trial court's findings in disqualifying juror Sponhour were supported by the record. As a result, the disqualification of juror Sponhour would not have been reversed on appeal. Since the disqualification of the juror would not have been reversed, Applicant failed to show that appellate counsel was deficient because this issue was not clearly stronger than the issues raised by appellate counsel on appeal. Further,

Applicant fails to establish he was prejudiced as a result of appellate counsel not raising this issue on appeal because the outcome would on appeal would not have been different had counsel raised this issue. As a result, this claim for post-conviction relief is denied.

Ground F: Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that he is mentally retarded.

Applicant's claim in Ground F is denied because it is not an appropriate claim for post-conviction relief. In Ground F, Applicant raises a freestanding claim that Applicant's death sentence violates the Eighth Amendment prohibition of cruel and unusual punishment based upon the fact Applicant is mentally retarded. S.C. Code Ann. § 17-27-20(b) (1986) specifically provides that the remedy of Post-Conviction Relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The South Carolina Supreme Court has consistently and repeatedly held that issues that either were or could have been raised at trial and on direct appeal may not be raised in PCR. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979).

Applicant's trial occurred after the United States Supreme Court's decision in Atkins v. Virginia, 536 U.S. 306 (2002) and after the South Carolina Supreme Court's decision in Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003). In Franklin, the



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

AUG 29 2011

S.C. Supreme Court

August 29, 2011

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

Re: *Kevin J. Mercer vs. State of South Carolina*
2009-CP-32-5465 (Capital PCR Action)

Dear Mr. Shearouse:

Please be advised that our office received the transcript in *Kevin Mercer vs. State of South Carolina*, 2009-CP-32-5465 (heard January 31, 2011-February 1, 2011) from court reporter Carol M. Thueme, on August 4, 2011. We had previously received the transcript for the March 18, 2011 portion of the evidentiary hearing from court reporter Elizabeth Harris on April 6, 2011. I am advising opposing counsel by copy of this letter.

If you have any questions please do not hesitate to contact me.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd

cc: Emily C. Paavola, Esq.
Jason P. Peavy, Esq.



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

August 16, 2011

RECEIVED
AUG 16 2011
S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
PO Box 11330
Columbia, SC 29211

Re: Kevin Mercer v. State of South Carolina

Dear Mr. Shearouse:

Enclosed are an original and six copies of the Motion for Appointment of Outside Counsel in the above-captioned case. Thank you for your assistance in this matter.

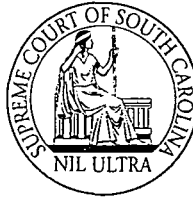
Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/lec

Enclosure

cc: Donald J. Zelenka, Esquire
Mr. Kevin Mercer



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

August 26, 2011

Emily C. Paavola, Esquire
Death Penalty Resource & Defense Center
PO Box 11311
Columbia, SC 29211

Assistant Attorney General Alphonso Simon, Jr.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Mercer, Kevin v. The State

Dear Counsel:

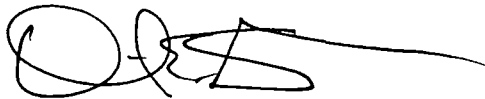
We have received a Notice of Appeal from each of you in the above entitled matter. Unless notified by you to the contrary, these appeals will be consolidated for consideration by the Court under the South Carolina Appellate Court Rules, and we anticipate receiving only one appendix.

When appeals are consolidated, the party filing the first Notice of Appeal, Kevin Mercer, has been designated as the Petitioner/Respondent and the party filing the second Notice of Appeal, State of South Carolina, has been designated as the Respondent/Petitioner.

Please notify this Court upon receipt of the trial transcript from the Court Reporter. Each party is allowed to serve and file a Petition for Writ of Certiorari and Return as provided for in Rule 243 of the South Carolina Appellate Court Rules.

Mercer, Kevin v. The State
Page Two
August 26, 2011

Very truly yours,



CLERK

DES/dmh

cc: Division of Appellate Defense

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas (PCR)
The Honorable James R. Barber, III, Circuit Court Judge

Case No. 2009-CP-32-5465
(Capital PCR Action)

KEVIN MERCER #6021,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner

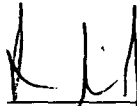
RECEIVED

AUG 26 2011

S.C. SUPREME COURT

NOTICE OF APPEAL

The State of South Carolina hereby appeals from the Order of the Honorable James R. Barber, III, dated July 29, 2011, filed July 25, 2011 and received by the State on July 28, 2011, in the matter of *Kevin Mercer #6021 v. State of South Carolina*, Case No. 2009-CP-32-5465, in which the Respondent's, State of South Carolina, Motion to Alter or Amend Judgment Pursuant to Rule 59(e) was denied. The appeal is also from the Order granting a new sentencing hearing dated June 27, 2011, filed June 29, 2011, and received July 5, 2011, which granted a new sentencing phase and denied with prejudice claims related to the guilt phase.



ALPHONSO SIMON JR.
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
(803) 734-6305

August 23, 2011.

OTHER COUNSEL OF RECORD:

Emily C. Paavola, Esquire
Jason P. Peavy, Esquire

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas (PCR)
The Honorable James R. Barber, III, Circuit Court Judge

Case No. 2009-CP-32-5465
(Capital PCR Action)

KEVIN MERCER #6021,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner

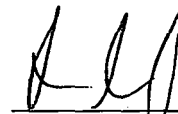
PROOF OF SERVICE

I, Alphonso Simon Jr., hereby certify that a true copy of the Notice of Appeal with Order attached has been served upon opposing counsel by depositing copies in the United States mail, postage prepaid, to the following:

Emily C. Paavola, Esquire
Death Penalty Resource & Defense Center
Post Office Box 11311
Columbia, SC 29211

Jason P. Peavy, Esquire
Law Office of Jason P. Peavy, LLC
1720 Main Street, Suite 301
Columbia, SC 20201

This 23rd day of August, 2011.



ALPHONSO SIMON JR.
Assistant Attorney General

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF RICHLAND

CASE NO: 2009CP3205465

IN THE COURT OF COMMON PLEAS

Kevin Mercer

vs.

State of South Carolina

Plaintiff

Defendant

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☐ See attached order;☐ Statement of Judgment by the Court:

Applicant's and State's Motions to Alter or Amend Judgment are denied without oral argument.

Dated at Columbia, South Carolina, this 29 day of July, 2011.James H. Earl
PRESIDING JUDGEThis judgment was entered on the 11A day of 11A, 2011, and a copy mailed first class this 21st day of July, 2011, to attorneys of record or to parties (when appearing pro se) as follows:Emily Paavola
Jason Peavy

Alphonso Simon

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF LEXINGTON

CASE NO: 2009CP3205465

IN THE COURT OF COMMON PLEAS

Kevin Mercer #6021 vs. State Of South Carolina

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy:
- ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- ☐ Other: _____

IT IS ORDERED AND ADJUDGED:

☒ See attached order;

☐ Statement of Judgment by the Court:

PRESIDING JUDGE -

This judgment was entered on the 29th day of June 2011, and a copy mailed first class this 30th day of June 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Emily C Paavola Po Box 11311 Columbia, SC 29211
Jason Paul Peavy Attorney At Law 1720 Main St., Suite 301 Columbia, SC 29201

Alphonso Simon Office Of South Carolina Atty. General P O Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/wh

SCRPC APP-24/FORM 4

Beth A. Carrigg - Clerk of Court

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

Kevin Mercer, #6021,)

Applicant,)

v.)

The State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

C/A No. 2009-CP-32-5465

ORDER GRANTING POST
CONVICTION RELIEF

(Capital Case)

CLERK OF COURT
LEXINGTON COUNTY

2011 JUN 29 AM 10:54

FILE

This matter is before this Court on the application for post-conviction relief ("APCR") filed by Kevin Mercer ("Applicant"), who was convicted of murder, armed robbery, possession of a firearm while in the commission of a violent crime, and criminal conspiracy.

Procedural History

During the February 2003 term of the Lexington County Court of General Sessions, the Lexington County Grand Jury indicted Applicant, Kevin Mercer, for murder, armed robbery, possession of a firearm while in the commission of a violent crime, and criminal conspiracy (2003-GS-32-409). (R. 2729-36). The state gave notice of intent to seek the death penalty, and served notice of evidence in aggravation.

The trial judge in this case was the Honorable John Few, Circuit Court Judge. Applicant was represented at the trial level by Cameron B. Littlejohn, Jr., Esquire, and Melissa J. Kimbrough, Esquire. Eleventh Circuit Solicitor Donald V. Myers, Esquire, Assistant Solicitor S. Rick Hubbard, III, Esquire, Assistant Solicitor D. Shawn Graham,

Esquire, and Assistant Solicitor Marion Moses, Esquire prosecuted the case for the State.

Jury selection took place from April 10-13, 2006. Trial began before Judge Few and a jury on April 17, 2006, and on April 19, 2006, Applicant's jury convicted him of all charges. (R. 1708-09).

Applicant exercised his right to the 24-hour cooling-off period in subsection 16-3-20(B) of the Code of Laws for South Carolina. The sentencing phase of his trial began on April 20, 2006. Judge Few submitted the following aggravating factor to the jury:

Murder was committed while in the commission of robbery while armed with a deadly weapon.

(R. 2413). The following mitigating factors were submitted to the jury:

- (1) The murder was committed while the Defendant was under the influence of mental or emotional disturbance.
- (2) The capacity of the Defendant to appreciate the criminality of his conduct was substantially impaired.
- (3) The age or mentality of the Defendant at the time of the crime.

(R. 2416-17).

On April 22, 2006, Applicant's jury found the aggravating factor and recommended a sentence of death. (R. 2431-34). Judge Few then sentenced Applicant to death for murder, thirty (30) years for armed robbery consecutive to the

sentence Applicant was serving for ABIK,¹ and five (5) years consecutive for possession of a weapon. (R. 2434-35).

A timely Notice of Appeal was filed and served with the South Carolina Supreme Court on April 24, 2006. On appeal, Applicant was represented by Robert M. Dudek, Deputy Chief Attorney for Capital Appeals with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, and Melissa Jane Reed Kimbrough, Esquire. By Order of the South Carolina Supreme Court filed July 10, 2006, Applicant's case was remanded back to the Honorable John C. Few, Circuit Court Judge, to hear Applicant's motion for a new trial based on after discovered evidence. In an Order filed September 26, 2006, Judge Few denied the Motion for a New Trial Based on After-Discovered Evidence. A timely Notice of Appeal was filed on Applicant's behalf on October 4, 2006. On June 26, 2008, Dudek and Kimbrough filed with the state supreme court the Final Brief of Appellant, in which they asserted the following issues on behalf of Applicant:

(1) The court erred by refusing to authorize funds so that an expert could analyze Thompson's gloves, which were found on him minutes after the murder, for gunshot residue. If Thompson's gloves were positive for gunshot residue, where it was known appellant's hands did not test positive for the existence of gunshot residue, there was a stronger likelihood the outcome of the guilt or penalty phase would have been different during a future trial. Further, this testing was necessary to an informed resolution of the new trial motion given the after-discovered evidence of Thompson's confession.

(2) The court erred by excluding the expert opinion of neurologist Dr. John Steedman that appellant suffered from a specific brain abnormality since

¹ Applicant had previously been convicted of assault and battery with intent to kill on March 13, 2006.

Dr. Steedman's opinion that the abnormality might affect appellant's behavior was very probative of his penalty phase mitigation, and the court erred by excluding this evidence under Rule 403, SCRE.

(3) The court erred by excluding the expert testimony of Dr. John Steedman that disorders such as post-traumatic stress disorder and brain impairments can cause poor judgment, paranoia, and other negative consequences. Dr. Steedman was qualified by his experience as a neurologist to give this opinion, he was board certified in psychiatry, and the state's objection that this was psychiatric testimony went to the weight and not the admissibility of the expert's opinion.

(4) Juror Kyzer was a Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985) qualified juror. The court committed reversible error by excusing this qualified juror for cause.

(5) The court erred by refusing to grant appellant a new trial based on after-discovered evidence where co-defendant Marcus Thompson's cellmate, Kevin Fuller, testified that Thompson bragged to him that he was the one who killed the decedent, and bragged that appellant received the death penalty for his crime. Fuller's testimony probably would have changed the result of the trial. This is especially true in regard to the penalty phase since appellant only had to convince one juror not to vote for the death penalty to change the result of the penalty phase.

(6) The court erred by excluding the testimony of David Farrell that co-defendant Thompson was charged as only an accessory after the fact and that he was released on bond since this evidence was relevant to appellant's defense that the state failed to investigate Thompson and fully ignored his role in the crime. Further, the court erroneously excluded this evidence as inadmissible evidence of third-party guilt.

The State, through Senior Assistant Attorney General S. Creighton Waters, Esquire, filed its Final Brief of Respondent on June 24, 2008. Applicant, through Mr. Dudek and Ms. Kimbrough, filed his Final Reply Brief of Appellant on June 26, 2008.

Oral argument in the case was held before the state supreme court on October 7, 2008. The South Carolina Supreme Court issued an opinion affirming the convictions and death sentence on January 12, 2009. State v. Mercer, 381 S.C. 149, 672 S.E.2d

556 (2009). Appellate counsel for Applicant filed a Petition for Rehearing on January 27, 2009. The petition for rehearing was denied by the South Carolina Supreme Court on February 19, 2009. The Remittitur was also issued on February 19, 2009.

On March 18, 2009, the South Carolina Supreme Court granted a stay of execution so that Applicant could pursue certiorari review before the United States Supreme Court. Applicant, through Mr. Dudek, filed a Petition for Writ of Certiorari with the United State Supreme Court dated May 20, 2009. The State, through Assistant Attorney General Waters, filed its Brief in Opposition to the Petition for Writ of Certiorari on June 10, 2009. The United States Supreme Court denied the petition for writ of certiorari by order dated October 5, 2009.

Applicant filed a second Petition for Stay of Execution. The State filed a letter in response to the Petition for Stay of Execution on October 15, 2009. By Order filed November 4, 2009, the Supreme Court of South Carolina granted Applicant's Petition for Stay of Execution. In the Order, the South Carolina Supreme Court appointed the Honorable James R. Barber, III, Circuit Court Judge, to hear this post-conviction relief action. An appointment of counsel hearing was held by this Court on November 24, 2009. Applicant was present, and he was represented at the hearing by Robert M. Dudek, Deputy Chief Attorney for Capital Appeals with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, and Elizabeth Franklin-Best, Assistant Appellate Defender with the Commission on Indigent Defense, Division of Appellate Defense. At the hearing, the State was represented by Senior Assistant Attorney General S. Creighton Waters and Assistant Attorney General Alphonso Simon,

Jr. Applicant, through Mr. Dudek, filed his initial Application for Post-Conviction Relief on December 4, 2009. By Order of this Court filed December 9, 2009, Emily C. Paavola, Esquire, and Jason Paul Peavy, Esquire, were appointed as counsel for Applicant.

Applicant then filed the instant Application for Post-Conviction Relief ("APCR") in January of 2010. Following a number of pretrial proceedings and motions, Applicant eventually filed his Third Amended Application for Post-Conviction Relief, which was the subject of the evidentiary hearing in this case that took place on January 31-February 1, 2011, and March 18, 2011. Applicant was present at all hearings and represented by Emily Paavola, Esquire, and Jason Peavy, Esquire. The State was represented by Assistant Attorney General Alphonso Simon and Senior Assistant Attorney General Melody Brown. Both sides called witnesses and introduced exhibits.

This Court has heard the testimony and reviewed the record and now rules as follows.

Grounds for Relief

As will be seen, almost all of Applicant's grounds for relief are not sufficient for relief. Pursuant to the familiar doctrine in Strickland v. Washington, Applicant must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. 466 U.S. 668 (1984). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Strickland, 466 U.S. at 689; Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000).

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598 (4th Cir. 1996). The Court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996). The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

In addition to deficient performance, Applicant must also establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. Id. at 693. "The Petitioner bears the 'highly demanding' and 'heavy burden' in establishing actual prejudice. Williams v. Taylor, 120 S.Ct. 1495, 1513-14 (2000).

A PCR Applicant has the burden of proving his claims for relief by a preponderance of the evidence. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992).

Ground A: Ineffective Assistance of Counsel During the Guilt Phase

Allegation #1: Trial Counsel was Ineffective in Not Impeaching Terry Brown, with evidence of personal bias and animosity against Applicant due to a physical altercation that Brown and Applicant had been involved in prior to Brown's offer to testify on behalf of the State.

Ground 10(a)(1) of Applicant's APCR is denied. Applicant failed to show that counsel was ineffective. Counsel's testimony indicates his decision not to impeach Terry Brown using the prior confrontation between Applicant and Brown was a reasonable tactical decision. Further, Applicant cannot establish that counsel was deficient. Finally, Applicant failed to establish that he was prejudiced. As a result, this Court denies relief upon this claim.

In Ground 10(a)(1), Applicant asserts trial counsel should have impeached Terry Brown with evidence that Brown had a personal bias against Applicant. This bias stemmed from a prior physical altercation between Brown and Applicant while both were housed at the Lexington County Detention Center. That confrontation led to Applicant's conviction for Assault and Battery with Intent to Kill.

Terry Brown was one of Applicant's cell mates at the Lexington County Detention Center. (R. 1543). During the guilt phase of Petitioner's trial, Brown testified that while at the Lexington County Detention Center, Applicant told him about the murder. According to Brown, Mercer told him that on the night of the murder he went with another guy looking for a truck. Mercer and the other guy drove around. They later parked in a parking lot in an apartment complex. When the person with the truck (i.e. the victim, Tracy Davis) arrived, Mercer and the other guy approached the victim and asked for the keys. (R. 1544). Mercer told Brown that the victim gave him the keys to the truck, and Mercer told the guy to get down on his knees. Mercer stated the other guy got into the passenger's side of the truck. Shortly thereafter, Mercer turned around and shot the victim in the head and then got into the truck. (R. 1544, 1546).

Brown noted that Mercer indicated he drove either a Bonneville or a Cadillac to the apartment complex. (R. 1545). Brown also indicated that Applicant stated he was the only one with a weapon at the scene. (R. 1545). Brown testified that Applicant told him they were heading to Atlanta for "Freak Neak," a large weekend party for high school and college students. (R. 1546). Brown also indicated Applicant told him that he did not make it to Atlanta because of a flat tire. (R. 1546-47). According to Brown, Applicant asserted the police stopped him shortly after the flat tire. (R. 1547).

During cross examination, defense counsel asked Brown about his prior convictions. (R. 1550-51). Brown testified during cross examination that the conversation he had with Applicant occurred in December 2003. (R. 1551). Brown admitted he did not report the conversation to one of the corrections officers or anyone else. Further, Brown admitted he did not take any notes about the conversation at the time. He agreed that it was not until February 2006 that he told an investigator about the conversation. He testified that he did not report the conversation until someone asked him about it. (R. 1554). Brown noted that his testimony was that Applicant made the victim kneel, and that Applicant shot the victim while he was on his knees. (R. 1554). Brown also agreed that Applicant indicated he had a flat tire that evening. (R. 1554). Brown also acknowledged he had talked with other inmates about other people's cases. (R. 1555).

At the PCR hearing, Cam Littlejohn testified that he was aware of the past animosity between Applicant and Brown. (March 18, 2011 Tr. pg. 25). Littlejohn further testified that he did not ask Brown about the prior animosity him, because

I knew the version we would get from Mr. Brown would be what he testified to as to Kevin assaulting which we didn't want that to come out in front of the jury. We realized that Kevin in all likelihood would not testify, so he was not a position to refute it. So, you had to make kind of a trial decision as to whether the -- whether bringing that out, you know, outweighed not bringing it out.

(Tr. 25-6). Counsel noted that they had determined it was better to not have that information be revealed to the jury during the guilt phase of Applicant's trial. (Tr. 26).

"In hindsight, there are a few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would past muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980). Here, counsel vigorously cross-examined Brown. Further, the record reflects that counsel had a clear plan for his cross-examination. Counsel was able to establish that Brown's version of Applicant's story did not match the evidence of the crime. Counsel also impeached Brown using his prior convictions. Counsel established Brown made no effort to report his conversation with Applicant in a timely fashion, and that Brown had no notes for a conversation that occurred two years prior to his testimony at trial.

In all, this Court finds Applicant has failed to establish that counsel was deficient in his cross-examination of Terry Brown in the guilt phase of Applicant's trial. This Court finds the testimony of counsel on this issue to be credible, and affords counsel's testimony great weight. Trial counsel's decision not to attempt to impeach Brown by asking about the past physical encounter between him and Applicant was clearly the

result of reasonable trial strategy. Further, Applicant has not established that he was prejudiced by counsel's purported failures in cross-examination. As a result, this claim for relief is denied.

Allegation #2: Ineffective assistance of counsel for failing to move pre-trial for gunshot residue testing to be conducted on gloves found in possession of Marcus Thompson

Applicant's claim for relief in Ground 10(a)(2) is also denied. Counsel's decision not to subject the co-defendant's gloves to gunshot residue testing was the result of a reasonable strategic decision on the part of trial counsel.

At trial, Dennis Stazer, the officer who stopped Applicant and his co-defendant on the highway, testified that when he pulled Applicant's co-defendant, Marcus Thompson, out of the car, gloves and a bag of shells fell out of Thompson's pants' leg. (R. 1392). During cross, Stazer indicated the glove was black knit. (R. 1403). He turned it into evidence. (R. 1407). Stazer did not find any other gloves on Thompson during the patdown. (R. 1407).

Jennifer Stoner, the SLED analyst who analyzed the gunshot residue tests conducted on Applicant and Thompson testified that she did not receive any gloves for testing. (R. 1537-38). Jeffrey Hollifield, the defense expert on gunshot residue analysis, testified cloth gloves can be tested for gunshot residue. (R. 1624). Candy Kyzer, an evidence custodian, testified that gloves were retrieved from Marcus Thompson's pants after he was booked at the Lexington County Detention Center. (R. 1627-30). After arguments regarding the relevance of the admission of the gloves, the

defense entered the gloves retrieved during the investigation into evidence as Defense Exhibit 4. (R. 1631-32).

During closing arguments, Mr. Littlejohn argued the State could not establish that Applicant was the one who pulled the trigger because they did not analyze the gloves found on Marcus Thompson. (R. 1677, 1678, 1679-81).

At the motion for new trial hearing, counsel requested the gloves be tested. Defense counsel noted that they were requesting permission to have the gloves of Applicant's co-defendant, Marcus Thompson, tested for gunshot residue. (R. p. 2686). Counsel presented testimony from Kevin Fuller, a former cell mate of Mr. Thompson who claimed that Thompson admitted to shooting and killing Sgt. Davis. According to Fuller's testimony, Thompson indicated that he and Applicant had been shooting a gun all day. (R. p. 2629). Further, Fuller stated that Thompson admitted to shooting Davis behind the ear, and Thompson bragged that not getting caught because no one tested the inside of the gloves. (R. 2630). Fuller noted that Thompson had indicated he had been wearing the gloves turned inside outwards all day. (R. 2634).

Marcus Thompson also testified at the hearing. He testified that he did not participate in the murder. (R. 2605). He also stated that he did not tell Fuller that he shot Sgt. Davis, or that he was wearing knit gloves turned inside out when he killed Sgt. Davis. (R. 2607). Thompson admitted to handling the gun after the shooting. (R. 2612). Thompson noted that he was wearing gloves when he picked up the gun because he did not want to leave his fingerprints on the gun. (R. 2612).

The trial court denied defense counsel's request for testing the gloves for gunshot residue. (R. 2726).

At the evidentiary hearing, Cam Littlejohn testified that they did not really consider having the gloves tested for gunshot residue. He noted the State had not tested the gloves. (Tr. 26). "That was part of our argument, the lack of evidence that pointed to Kevin Mercer. And that was a shining example of evidence that the state did not pursue and did not develop, and left a hole in the case." (Tr. 26). He further noted they used the lack of testing by the State to Applicant's advantage. (Tr. 26-7). Littlejohn also indicated that they did not know what would show up on the gloves. (Tr. 27).

Agent Jennifer Stoner of the State Law Enforcement Division ("SLED") also testified. She analyzed the gloves in question for gunshot residue. No gunshot residue was found on any of the gloves submitted for testing. State's Exhibit 13.

In her deposition, Lisa Armstrong testified that the defense did not have the gloves tested because they did not want to risk limiting their ability to argue the gloves could have gunshot residue on them by testing them. (Depo. 92). They determined that they were better off not having the gloves tested. (Depo. 93). She also acknowledged that at trial, they argued the State could not prove its case because the State had not tested the gloves. Id. Armstrong indicated they could not have made that argument had they tested the gloves and no gunshot residue was found on the gloves because that would have constituted a fraud upon the court. (Depo. 93-4). That was

not a concern when they learned about the allegation that the Thompson may have had the gloves on inside out when he handled the gun. (Depo. 92, 94).

This court finds the testimony of trial counsel on the issue of the gunshot residue testing credible, and affords it great weight. This court further finds that trial counsel's testimony clearly reflects the decision not to have the gloves found on Applicant's co-defendant was reflective of reasonable trial strategy. Counsel clearly did not request the gloves be tested before trial because it allowed them to safely argue the State did not meet its burden of proof by not having the gloves tested. This Court finds this strategic decision was reasonable. Thus, Applicant is not entitled to relief upon this claim. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision cannot be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy); Smith v. Stewart, 140 F.3d 1263, 1272 (9th Cir.1998) (rejecting petitioner's claim that court's refusal to grant continuance to allow for processing of a neutron activation test violated due process by emphasizing, among other things, that "the test could have sunk [petitioner's] defense that he did not commit the murder"); Grisby v. Blodgett, 130 F.3d 365, 373 (9th Cir.1997) (in finding no prejudice in counsel's failure to test blood found at

crime scene, noting that "it was plausible that, having considered the matter, defense counsel made a strategic decision not to pursue this line of evidence because they feared that [petitioner's] blood would be found").

The reasonableness of trial counsel's strategy is buttressed by the fact that upon testing of the gloves, no gunshot residue was found. Thus, Petitioner also failed to establish he was prejudiced by counsel not having the gloves tested for gunshot residue. This claim for relief is denied.

Allegation #3: Ineffective assistance of counsel for not securing the assistance and testimony of an expert in eyewitness identification.

Ground 10(a)(3) is also denied. Applicant did not establish that trial counsel was ineffective in not presenting an expert witness in eyewitness identification.

During the guilt phase of Applicant's trial, the victim's roommate, Clifton Magwood, testified that shortly before the shooting, he heard sounds of a disturbance or argument outside, and he thought he heard the victim's voice. (R. 1333). That led Magwood to look outside through his bedroom window. (R. 1333). Magwood testified:

I seen a -- my roommate as he looked like he was being taken against his will to the back of the vehicle by a male, heavy set, anywhere from 5'11" to 6 feet tall, broad shoulders, had on a dark outfit, could be jean or denim or some type of dark outfit with a dark hat. He had his hand up, what appeared to be a weapon to his hand, walking the roommate to the back of the vehicle against his will.

(R. 1334). He further described the person he saw through his window as being pretty large, anywhere from 5'11" and 6'2" tall, and dark complexion. (R. 1337). Magwood indicated the man was between 215 and 225 pounds. The man was also wearing dark, loose fitting clothing, maybe some form of denim or jeans. (R. 1337). Magwood also

noted the man was wearing a dark baseball cap. (R. 1338). During cross-examination, Mr. Littlejohn extensively questioned Magwood about the circumstances around his viewing of the confrontation between the victim and his assailant. (R. 1345-52, 1355).

At the evidentiary hearing, Mr. Littlejohn testified he did not see a reason to call an eyewitness identification expert. (Tr. 16). He noted that since there was not a facial identification, he did not think it would have done the defense any good to call an eyewitness identification expert. (Tr. 16, 27).

Ms. Armstrong testified at her deposition that she could not think of a situation where she had hired an eyewitness identification expert to testify when the defendant was not specifically identified. (Depo. 88). Armstrong testified that she and Mr. Littlejohn never discussed hiring an eyewitness identification expert. (Depo. 30-1). She noted that she may have thought at the time that this was not a case for one, but she could not recall any specific conversations about the matter. (Depo. 31).

Applicant also presented the testimony of Dr. Lori Van Wallendael, a psychologist who focuses on memory and eyewitness identification. Van Wallendael testified there were a number of variables that should be used in assisting in the evaluation of an eyewitness identification. Those included how long the witness had to view, the lighting, the stress level of the witness, whether the witness was focused on a weapon, and whether there were other distractions present. She noted that stress was a very important variable. She also testified there is a misperception that police officers and members of the military are better at making eyewitness identifications because of their training. Van Wallendael testified there were several factors at play in the

"identification" made by the victim's roommate in Applicant's case. First, she maintained the description could have been more accurate if Magwood was under less stress. She noted there was no mention of seeing a gun in Magwood's statement, but the presence of a weapon was implied. Van Wallendael also noted that a sense of heightened awareness does not necessarily translate into more accurate identification. Van Wallendael also indicated that the lighting conditions can influence one's visual perceptions. She remarked that the lighting conditions probably played a role in the accuracy of Magwood's "identification" in this case. Van Wallendael did acknowledge that this was not a case of cross-racial identification, and there was no line up in this case. She also acknowledged that the description of the perpetrator given by Magwood was consistent with the photograph taken of Applicant on the night of the murder. She also noted that the initial description given by an eyewitness is the purest reflection of what the witness actually saw.

This Court finds that Applicant has not met its burden of establishing ineffective assistance of counsel upon this claim. Counsel was not deficient in not obtaining the services of an eyewitness identification expert. In other cases, this Court has seen how an eyewitness expert can serve as a useful tool for a jury in considering eyewitness identification issues. This Court believes this was not a case where it would have been of any assistance to a jury. There was no eyewitness identification presented at trial. Sgt. Magwood only gave a very general description of the person he saw accost his roommate in the apartment complex parking lot. He never specifically identified Applicant as the assailant. The description Magwood gave was consistent with the

clothing Applicant was wearing when he was arrested shortly after the shooting. In all, this Court finds trial counsel was not deficient in not presenting the testimony of an eyewitness identification expert. Further, this Court finds that Applicant was not prejudiced by counsel not presenting an eyewitness identification expert. Since this testimony would not have undermined the description provided by Magwood, it would not have led to a different result at trial. E.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1999). As a result, this claim for relief is denied and dismissed.

Ground B: Ineffective Assistance of Trial Counsel in the Sentencing Phase.

Allegation #1: Failure to Present Evidence that more than one perpetrator was at the scene.

This Court finds Applicant's claim in Ground 10(b)(1) is without merit. Applicant has not shown by a preponderance of the evidence that trial counsel was deficient in not presenting evidence that two individuals were at the scene. Further, Applicant has not established that he was prejudiced as a result.

In this ground, Applicant asserts that trial counsel should have presented testimony and evidence to support a finding that a second person was at the scene when the murder occurred. In support of this argument, Applicant introduced the coroner's incident report (Applicant's Exhibit 2); a 911 dispatch open incident report (Applicant's Exhibit 3); a statement of Neysa Williams (Sgt. Davis' girlfriend) (Applicant's Exhibit 4); a statement of Tracie L. Ondera (Applicant's Exhibit 5); a Lexington County Sheriff's Office Supplemental Incident Report (Applicant's Exhibit 6); a Lexington County Sheriff's Office news release (Applicant's Exhibit 7); and two investigative reports from the Lexington County Sheriff's Office (Applicant's Exhibits 8 and 9).

During the guilt phase of Applicant's trial, Deputy Stazer testified he recalled being informed there were two suspects involved in the carjacking. (R. 1382, 1384). When Applicant was arrested, Marcus Thompson, his co-defendant, was also arrested in the vehicle. (R. 1384-92). Also, Terry Brown, Applicant's former cell mate, testified that Applicant told him about the carjacking. Brown testified that Applicant and another male were involved in the carjacking, but Applicant was the one with the gun. (R. 1544-47).

This Court finds that Applicant has failed to establish that trial counsel was deficient in not presenting evidence of two perpetrators being at the scene when the murder occurred. First, Applicant has not presented admissible evidence that supports the allegation. The statement in the coroner's report would have been inadmissible hearsay. It further did not provide any underlying basis regarding from whom the coroner learned there may have been two at the scene when the shooting occurred. The 911 dispatch open incident report makes no mention of two perpetrators being at the scene of the crime. Neysa Williams' statement also would have been inadmissible hearsay. Ms. Williams did not testify at Applicant's trial or at the evidentiary hearing in this action. Williams was not at the scene when the crime occurred. Ondera's statement was similarly inadmissible hearsay. Further, Applicant did not indicate how any of the documentation from the Lexington County Sheriff's Office would have been admissible at Applicant's trial. Since Applicant has not established that the documents he asserts supported a finding that there were two perpetrators at the scene would have been admissible at trial, Applicant cannot establish counsel was deficient in this regard.

Further, this Court finds Applicant was not prejudiced by counsel not presenting these documents that purportedly support the notion that there were two perpetrators at the scene when the murder occurred. The jury heard testimony in the guilt phase that indicated Applicant was not the only perpetrator at the scene through the testimony of Deputy Stazer and Terry Brown. The testimony and evidence presented in the guilt phase was available for the jury to consider in the sentencing phase of Applicant's trial. Thus, this additional documentation would have been cumulative to testimony already in the record. As a result, this Court finds Applicant has not shown there was a reasonable probability the result at trial would have been different had counsel presented these documents. See Edwards v. State, Op. No. 26977 (S.C. Sup. Ct. filed May 23, 2011) (Shearouse Adv. Sh. No. 17 at 25); see also Jackson v. State, 329 S.C. 345, 351, 495 S.E.2d 768, 771 (1998) (denying claim of ineffective assistance of counsel where applicant did not show testimony would have provided additional information). This claim for relief is therefore denied.

Allegation #2: Failure to object to the State's improper cross examination of Dr. Steedman, and improper statements in closing arguments.

Applicant's claim in Ground 10(b)(2) is denied. In Ground 10(b)(2), Applicant contends trial counsel was ineffective in not objecting to portions of the cross examination of Dr. Steedman. At trial, Dr. Steedman was not allowed to testify regarding a specific finding he made regarding the SPECT scan done on Applicant. During Dr. Steedman's cross-examination, the State repeatedly noted in its questions that the radiologist's impression of the scan was that there was a questionable abnormality. (See R. 2307, 2309-10). During the closing arguments, the State again

referred to the findings in the SPECT scan as reflecting questionable abnormalities.. (R. 2379-80). Applicant appears to assert that these questions and argument were improper in light of the trial court's limitation upon Dr. Steedman's testimony.

This claim is without merit. In addressing the admissibility of Dr. Steedman's testimony regarding the SPECT scan, the South Carolina Supreme Court found that the trial court abused its discretion in not admitting Dr. Steedman's testimony. Mercer, 381 S.C. 149, 160, 672 S.E.2d 556, 561 (2009). In reviewing Dr. Steedman's testimony on direct appeal, the South Carolina Supreme Court found that the trial court's error in not admitting the testimony was harmless:

When the entirety of the record is considered, the exclusion of Dr. Steedman's proffered testimony of an abnormality juxtaposed to the radiologist's notation of a "questionable abnormality" resulted in no prejudice to Mercer. Despite the erroneous ruling, a review of the record demonstrates that Dr. Steedman testified at length concerning Mercer's cognitive deficiencies. Dr. Steedman's unchallenged testimony included reference to the SPECT Scan results as "confirmatory" of Mercer's learning disorder. More to the point, the same evidence the State successfully and erroneously challenged-the SPECT Scan abnormality-was already in evidence without objection.

Another defense expert previously testified that the SPECT Scan revealed an abnormality. Dr. Donna Schwartz-Watts, a defense psychiatrist, testified that she "ordered what's called a SPECT Scan. And what a SPECT Scan is, this is one of the newer tests in medicine and it shows brain function.... But what it does, it's a ... picture of how your brain functions, and that test came back abnormal. There's a ... small area that's not normal on there...." Later, as Dr. Schwartz-Watts began to sum up her testimony, she again talked about the SPECT Scan. Referring to Mercer, she said that "it's already a bad brain in the sense that he's got a learning disability and ... we even know that on a SPECT Scan there's an abnormality." Thus, the very "SPECT Scan abnormality" testimony Mercer sought to admit through Dr. Steedman was presented to the jury without objection through Dr. Schwartz-Watts.

Mercer, 381 at 149, 161-2, 672 S.E.2d at 562-3. Further, in addressing Dr. Steedman's psychiatric testimony, the South Carolina Supreme Court found:

[t]he excluded evidence was presented to the jury through other witnesses, especially Dr. Schwartz-Watts, without objection. Even defense counsel acknowledged that the proffered psychiatric opinion testimony of Dr. Steedman "certainly ... mirrors [and] dove-tail[s]" with Dr. Schwartz-Watts. As a result, Mercer sustained no prejudice from the exclusion of this cumulative evidence. State v. Graham, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994) (noting that a harmless error analysis depends upon a host of factors, one of which is whether the excluded evidence was cumulative).

Id. at 163, 672 S.E.2d at 563.

The South Carolina Supreme Court reviewed the proffered testimony, and found that Dr. Steedman's proffered testimony regarding the results of his analysis of the SPECT scan was cumulative to Dr. Schwartz-Watts' testimony at trial. In light of the fact that Dr. Schwartz-Watts testified before Dr. Steedman, and the SPECT scan information was presented to the jury, the State's cross-examination of Dr. Steedman and the State's closing argument were not improper. The issues raised by the SPECT scan were in evidence. Thus, this case is clearly distinguishable from Tennard v. Dretke, 542 U.S. 274, 124 S. Ct. 2562 (2004), and Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, (U.S.S.C. 1986). As a result, Applicant has not shown that counsel was deficient in this regard. Furthermore, Applicant has not shown that he was prejudiced as a result of counsel not objecting to either the cross-examination or the closing argument. This claim is therefore denied and dismissed with prejudice.

Allegation #3

Sub-allegation (a): Trial counsel failed to uncover and present all available evidence of Applicant's mental retardation and/or low intellectual functioning and deficits in adaptive behavior prior to the age of eighteen.

Applicant's application for post-conviction relief is granted on this claim. This Court held an evidentiary hearing on January 31 to February 2, 2011, in Lexington County. At the hearing, the parties stipulated to the admission of the deposition of Ms. Lisa Armstrong, Esq., taken on January 3, 2011 (*Applicant's PCR Exhibit 11*), a number of exhibits from Ms. Armstrong's deposition (*Applicant's PCR Exhibits 1-10 and Respondent's PCR Exhibits 1-10*), and several affidavits (*Applicant's PCR Exhibit 12*). Subsequently, additional testimony was entered into the PCR record through the testimony of Mr. Cameron Littlejohn, Esq. on March 18, 2011.

Applicant bears the burden of proof as to all claims in the PCR Application. This Court has applied the preponderance of evidence test to the information presented. This Court has examined the evidence presented to determine which evidence is of greater weight – or more convincing. The degree of proof which this Court has applied in determining if Applicant has met his burden of proof is whether the evidence, when viewed as a whole, demonstrated the fact to be proved is more probably true than not. The burden of proof never shifted from the Applicant. After full consideration of the testimony, evidence and arguments by counsel, in light of the appropriate burden of proof, this Court grants relief on Ground 9(b) & 10(b)(3). Specifically, this Court finds that applicant's trial counsel were ineffective in failing to investigate and raise the issue of applicant's mental retardation at trial. Therefore, the Court hereby vacates

Applicant's death sentence and remands the case to the Lexington County Court of General Sessions for a new sentencing trial. This Court's findings of fact and conclusions of law regarding this claim are set forth in detail below.

I. LEGAL FRAMEWORK.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. U.S. CONST. AMEND. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). The United States Supreme Court has adopted a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and, (2) the applicant was prejudiced by the deficient performance. *Strickland*, 466 U.S. at 687; *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

Here, Applicant alleges that his trial counsel were ineffective for failing to investigate and raise the issue of his mental retardation at trial. In 2002, the United States Supreme Court ruled that the Eighth Amendment to the United States Constitution prohibits the execution of persons with mental retardation. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). The Eighth Amendment, in part, prohibits the government from inflicting cruel and unusual punishment. The United States Supreme

Court categorically excluded from execution mentally retarded persons and mandated such a categorical exemption as part of this nation's death penalty jurisprudence.²

In *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), the South Carolina Supreme Court held that the applicable definition of mental retardation is found in the current death penalty statute, which defines mental retardation as:

significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

Id. at 278-79, 588 S.E.2d at 605. Thus, the definition of mental retardation consists of three prongs: (1) subaverage intellectual functioning; (2) deficits in adaptive behavior; and, (3) a manifestation of these attributes before age eighteen.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A. APPLICANT'S TRIAL COUNSEL PROVIDED DEFICIENT PERFORMANCE.

Applicant was represented by Mr. Cameron Littlejohn and Ms. Melissa Armstrong (formerly Kimbrough) at trial. Both attorneys testified in these proceedings and they candidly admitted that they failed to: (a) obtain Applicant's special education records from the Philadelphia School System; (b) hire an expert in mental retardation; (c) otherwise investigate a mental retardation claim; and, (d) provide all available social history information to their own experts and to the Department of Disabilities and

² The Supreme Court held that "by definition, [mentally retarded persons] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* at 318.

Special Needs (DDSN).³ Trial counsel have further admitted that they had no strategic reason for this failure. Rather, it was simply a mistake.

Even if trial counsel had not admitted that their performance was deficient, it is also apparent from their actions before trial. Mr. Littlejohn was appointed to represent Applicant on or about February 9, 2004. Mr. Littlejohn's timesheets reflect that shortly after his appointment, he met with applicant's mother, Diane Mercer. Through Ms. Mercer, Mr. Littlejohn was or should have been aware that Applicant had lived the majority of his life in Philadelphia, Pennsylvania, and that he had previously been diagnosed by the Philadelphia school system as mentally retarded. Despite this knowledge, no one on the defense team even requested Applicant's Philadelphia school records until nearly two years later, and less than three months before Applicant's capital trial began. Ms. Armstrong was substituted as Mr. Littlejohn's co-counsel, in place of Ms. Lisa McPherson, on January 13, 2006. See *Applicant's PCR Exhibit 11, Armstrong Deposition, at p.8*. Under Ms. Armstrong's direction, a defense team investigator requested Applicant's school records from the Philadelphia School System

³ The PCR Application includes a specific allegation that trial counsel failed to provide DDSN with all of the necessary information. This Court finds that this allegation is not a separate legal claim, but rather, a factual allegation that is included in Applicant's overall claim that trial counsel were ineffective in failing to thoroughly investigate and present evidence of his mental retardation. As stated herein, trial counsel have admitted that this factual allegation is true.

on January 20, 2006. *Id. at p.25.* Applicant's capital trial began on April 10, 2006. *Id. at p.11.*⁴

Although trial counsel did eventually obtain some school records from the Philadelphia School System, it was apparent from these records that there was additional information to be investigated. First, the Philadelphia school records clearly indicate that Applicant had been tested and placed in special education in the second grade. The records reference several occasions when Applicant was administered an intelligence quotient (IQ) test, but the scores and reports from those tests are conspicuously absent from the records. The absence of these scores should have caused counsel to seek out the records where the scores were documented, but counsel never made such a request. Second, although the Philadelphia school records indicate that Applicant was a special education student, they lack many legally required documents such as Individual Education Placement (IEP) plans and testing reports. This should have been even more obvious to counsel since they did obtain Applicant's special education records from the Richland County School System and those records do contain IEP reports and other similar documents from that school system. Finally, trial counsel also obtained a copy of Applicant's social security records. These records likewise indicated that he had been in special education, consistently received very low

⁴ Although trial counsel eventually did hire a social worker – Ms. Marti Loring – to help with trial preparations, trial counsel did not secure her services until very shortly before trial. In fact, Ms. Loring's time sheets reflect that she did not begin billing for work on the case until March 31, 2006 (approximately 10 days before the trial began). See *Respondent's PCR Exhibit 4*.

marks, and failed multiple grades. Thus, counsel should have been alerted to potential evidence of mental retardation.

It is not uncommon for special education records to be kept separately from regular school records. Ms. Cassandra Brown, the Special Education Secretary at Overbrook High School in Philadelphia, Pennsylvania explained in her affidavit that all trial counsel would have had to do to get Applicant's special education records was request them from her office. See *Applicant's PCR Exhibit 12, Affidavit of Cassandra Brown*. Ms. Armstrong admitted that applicant's defense team simply failed to take that step:

Q: Did you request [applicant's] special education records from the Philadelphia School System?

A: No, I did not.

Q: Did anyone else on the team request his special education records from Philadelphia?

A: No. I've subsequently learned that you have to make a special request. That was not done.

Q: If you had obtained a copy of those records, would they be in your file?

A: Yes.

Q: And to your knowledge, are they in your file?

A: Nope, they are not.

Armstrong Deposition at p.26. Mr. Littlejohn testified that Ms. Armstrong was primarily responsible for preparing for the penalty phase of the trial and that he could not recall much about those preparations. He did, however, admit that he is aware that the

defense team failed to obtain Applicant's special education records and that trial counsel had no strategic reason for failing to get these records and pursue a mental retardation claim.

Trial counsel have further admitted that if they had obtained Applicant's special education records, they would have believed it important to provide them to any of their mental health experts. See *Armstrong Deposition at pp. 45-46*. They have also acknowledged that the trial court instructed the defense team to provide DDSN with any documents necessary to perform their evaluation. See *Record on Appeal at p. 2444-45*. Despite this instruction, trial counsel failed to provide DDSN with applicant's social security records (which they did have) as well as applicant's special education records (which they failed to obtain). See *Armstrong Deposition at p. 43-46*. As a result, DDSN never conducted a mental retardation evaluation. See *Applicant's PCR Exhibit 10*. Finally, trial counsel have admitted that they never hired an expert in mental retardation and did not otherwise investigate the possibility of a mental retardation claim. See *Armstrong Deposition at p. 42*; see also, *Applicant's PCR Exhibit 12, Affidavit of Dr. Donna Schwart-Watts at ¶ 5* ("I am not an expert in mental retardation. I was not asked to evaluate Kevin Mercer to determine if he has mental retardation").

The United States Supreme Court and the South Carolina Supreme Court have repeatedly recognized that trial counsel has a duty to conduct an adequate investigation into a capital defendant's life and background, including but not limited to: medical history, educational history, and family and social history. See, e.g., *Sears v. Upton*, 130 S.Ct. 3259 (2010) (trial counsel's failure to discover evidence of low cognitive

functioning due to brain damage was constitutionally inadequate on its face); *Porter v. McCollum*, 130 S.Ct. 447 (2009) (defense counsel's failure to uncover and present evidence regarding defendant's mental health, family background or military service was deficient); *Wiggins v. Smith*, 539 U.S. 510 (2003) (although trial counsel obtained a pre-sentencing report and DSS records which revealed a tumultuous childhood and low IQ, they failed to investigate further, constituting deficient performance); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2009) (counsel's failure to adequately investigate and present mitigating evidence was deficient performance and analogous to *Wiggins*); *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006) (noting the holding in *Wiggins* and concluding defense counsel should have, among other things, investigated and presented evidence of defendant's troubled childhood and mental illness); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2005) (concluding case was sufficiently analogous to *Wiggins* where trial counsel failed to adequately investigate and present evidence of severe depression and failed to provide expert witnesses with crucial medical records).

Here, trial counsel have not attempted to articulate a strategic reason for their failure to investigate and present a mental retardation claim. Rightly so, since "strategic choices made by counsel after an incomplete investigation are reasonable only to the extent that reasonable professional judgment supports the limitation on the investigation." *Council*, 380 S.C. at 175, 670 S.E.2d at 354; see also *Strickland*, 466 U.S. at 609-91(same); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (rejecting any suggestion that a decision to focus on one potentially reasonable trial strategy was

"justified by a tactical decision" when "counsel did not fulfill their obligation to conduct a thorough investigation into the defendant's background"). This Court finds that trial counsel's failure to investigate and present evidence of Applicant's mental retardation was not reasonable; it flew in the face of prevailing professional norms and blatantly ignored evidence of low intellectual functioning and adaptive functioning deficits that clearly indicated a need for additional investigation.

B. APPLICANT WAS PREJUDICED BY TRIAL COUNSEL'S DEFICIENT PERFORMANCE.

This Court further finds that Applicant was prejudiced by trial counsel's deficient performance. Prejudice exists under *Strickland* if there is a "reasonable probability" that, but for trial counsel's deficient performance, the outcome of the applicant's trial would have been different. 466 U.S. at 694. Applicant alleges that he is mentally retarded and thus, had trial counsel investigated and presented this fact, he would have been deemed ineligible for the death penalty under *Atkins v. Virginia*, 436 U.S. 306 (2002), and *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). Applicant offered testimony from Dr. Brad Fisher, an expert in mental retardation, as well as testimony from Applicant's mother, father, ex-wife and high school football coach. Applicant also offered affidavits from two of his special education teachers and a former employer. Specifically, Applicant presented the following evidence relevant to his mental retardation claim.

1. SIGNIFICANT SUBAVERAGE INTELLECTUAL FUNCTIONING.

The first prong of a mental retardation diagnosis requires an individual to display subaverage intellectual functioning. A person's intellectual functioning is measured

primarily with intelligence quotient ("IQ") tests. IQ tests measure intelligence, which is defined as "a general mental ability. It includes reasoning, planning, solving problems, thinking abstractly, comprehending complex ideas, learning quickly, and learning from experience." INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS, 31 (American Association on Intellectual and Developmental Disabilities, 11th ed. 2010) [hereafter AAIDD MANUAL].

A person with mental retardation has an IQ score that is "approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations." *Id.* at 31. Most standardized IQ tests are normalized so that the average score is 100 with a standard deviation of 15. Therefore, an IQ score two standard deviations below the mean is approximately 70. However, the standard error of measurement (SEM) in IQ assessments is approximately 5 points, therefore, raising the operational definition of mental retardation to 75. *Id.* at 36; *see also*, American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41-42 (4th ed. text rev. 2000) (hereafter, DSM-IV-TR) ("it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior"). Thus, a person has significantly subaverage intellectual functioning if, after appropriate consideration of all relevant factors, his IQ is 75 or below.

Applicant's IQ was first evaluated with a clinically acceptable standardized test (a WISC-R) in 1986, during his second attempt at the second grade. *Fisher Report at pp.*

9-10; Applicant's PCR Exhibit 14, *Special Education Records* (hereafter "*Special Ed. Records*"). He was 8 years old. Applicant's full scale IQ was reported as a 73. Following this test, the Philadelphia School District placed Applicant in special education classes. The school district tested Applicant's IQ again on November 26, 1991 (again with the WISC-R), when he was fourteen years old and attending ninth grade. *Fisher Report* at pp. 9-10. Applicant's full scale IQ was a 70. Less than one month later, Applicant was evaluated again by Dr. Sol Barenbaum, a doctor commissioned by the Department of Social Security. *Fisher Report* at pp. 9-10. Dr. Barenbaum administered the same test that the school district had used *less than one month earlier* (the WISC-R) and obtained a full scale IQ of 74.⁵

In 1993, at age sixteen, Applicant moved to South Carolina where he continued high school. Upon entering his new school, his IQ was tested for a fourth time. This time, Applicant was given the WAIS-R, and the results of this test were completely

⁵ This IQ score was likely artificially inflated due to the practice effect because Applicant had taken the same exact test less than one month before. *Fisher Report* at pp. 9-10. Practice effect refers to gains in IQ scores on tests of intelligence that result from a person being retested on the same or similar test. See *AAIDD Manual* at 38. "For this reason, established clinical practice is to avoid administering the same intelligence test within the same year to the same individual because it will often lead to an overestimate of the examinee's true intelligence." *Id.* The average artificial increase on the full-scale IQ score due to practice effect is 5 points, although it can be as high as 15 points. See Kaufman, A.S., *Practice Effects*, 2 *Encyclopedia of Human Intelligence*, 828-833 (1994). The impact of practice effect has also been recognized by numerous courts. See, e.g., *Holladay v. Allen*, 555 F.3d 1346, 1357 (11th Cir. 2009) (crediting expert testimony that one of the petitioner's IQ scores was "probably artificially high because of practice effect," since the test was administered only eight months after he had taken the same test); *United States v. Davis*, 611 F.Supp.2d 472 (stating that the AAIDD Manual instructs clinicians to recognize the impact of practice effect).

inconsistent with the previous four IQ tests he had taken. The school records report a full scale IQ of 88. This score was a fourteen-point jump from Applicant's last IQ test less than two years prior. Dr. Brad Fisher, an expert in mental retardation, testified during the PCR hearing that there are a number of reasons to question the accuracy of this score.

First, the score is entirely inconsistent with the results that Applicant achieved both before and after this test. Moreover, the score is inconsistent with all of the information collected about Applicant's deficits in adaptive functioning. Dr. Fisher testified that it is important to consider all three prongs of the test as a whole. One cannot rule out the possibility of mental retardation simply because of a single score, or by analyzing a single prong of the test. As explained below, Dr. Fisher found (and additional PCR evidence supports) that Applicant suffers from significant deficits in his adaptive functioning. This finding on prong two is more consistent with all of the other historical IQ scores (apart from this single score). Thus, the evidence of Applicant's deficits in adaptive functioning also suggests that this single score is unreliable.

Second, as Dr. Fisher explained, Applicant took the WAIS-R for the first time in 1993. Prior to this test, his IQ had been tested using the WISC-R, which was designed for children under the age of 16. *Fisher Report at p. 10*. Research has confirmed that individuals tested on the WISC-R experienced an artificial ten-point inflation in their IQ score when they were tested for the first time using the WAIS-R. *Id. at pp. 10 and 12*. After this phenomenon was documented, the most recent version of the adult WAIS, the WAIS-III, was designed to correct this issue. *Id. at p. 10*. Because this problem had not

been corrected at the time of Applicant's 1993 test, it is possible that his score was inflated by ten points simply because of the test he was given.

Third, Dr. Fisher also attempted to understand Applicant's 1993 test score by readministering several portions of the exact same test to determine if the results were the same. *Fisher Report at p. 10.* They were not. Dr. Fisher's results on the subsections of the WAIS-R that he administered were consistently within the range of Applicant's other IQ scores, all of which demonstrated subaverage intellectual functioning. *Id. at p. 11.* Based on these results, the research regarding the scoring discrepancies between the WISC-R and the WAIS-R, and the 1993 test score's complete and inexplicable incongruence with Applicant's other four IQ scores obtained throughout his life, Dr. Fisher concluded that this test score should be given little to no weight in determining whether Applicant is a person with mental retardation. *Id. at p. 10.*

Finally, Applicant was administered a fifth IQ test prior to his PCR hearing (the Stanford Binet V). This test, administered and scored by Dr. Daniel Grant, resulted in a full scale IQ of 71, and demonstrates that Applicant has consistently scored within the range of subaverage intellectual functioning. In fact, Applicant's four reliable IQ scores have varied by only 4 points over the past 25 years. All except one of these tests were administered well before Applicant was charged with a capital crime. Applicant asserts that the context of these tests and their great consistency over time establish that he has significantly subaverage intellectual functioning.

2. DEFICITS IN ADAPTIVE BEHAVIOR.

The second requirement for a diagnosis of mental retardation looks at the *expression* of intellectual deficits in the life of an individual. "Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives." AAIDD Manual at 43.

South Carolina's definition of mental retardation refers without elaboration to "deficits in adaptive behavior." S.C. Code Ann. § 16-3-20(C)(b)(10)(2003). Similarly, the *Atkins* opinion refers to "significant limitations in adaptive skills such as communication, self-care, and self-direction." *Atkins*, 546 U.S. at 318. A footnote in *Atkins* approvingly quotes two definitions, the first of which was adopted by the American Association on Mental Retardation (AAMR) in 1992. *Id.* at 308 n.3. The 1992 AAMR definition requires limitations in two (2) or more of the following ten (10) applicable skill areas:

- Communication
- Self-care
- Home living
- Social skills
- Community use
- Self-direction
- Health and safety
- Functional academics
- Leisure
- Work

AAMR Manual (10th ed.) at 22. The American Psychiatric Association's phrasing of the adaptive functioning requirement, also quoted by the United States Supreme Court, is virtually identical. See DSM-IV-TR at 41. More recently, the AAMR has updated both the name of their organization and their definition of adaptive functioning. The current definition contains three general categories of adaptive functioning – conceptual, social, and practical skills – into which the prior ten (10) fall, and requires significant limitations

in one of these three areas. INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS, 5 (AAIDD, 11th ed. 2010). All three definitions, the AAMR, the DSM-IV and the AAIDD, are designed to measure how an individual with significantly subaverage intelligence functions and can be used interchangeably to determine whether the individual in question suffers from deficits in adaptive behavior.

To determine whether Applicant suffers from deficits in adaptive behavior Dr. Fisher reviewed Applicant's social history records, including school records, medical records, social security records, and special education records. Dr. Fisher also interviewed Applicant's mother and father, his former wife, a middle school teacher, his high school football coach, and Applicant himself. Dr. Fisher also consulted with colleagues, reviewed literature in his field, and reviewed relevant affidavits entered as Applicant's PCR Exhibit Number 12.⁶ Dr. Fisher testified extensively about Applicant's adaptive behavior and his deficits in many areas, including functional academics, home-living, self direction, and work. Ultimately, Dr. Fisher concluded that Applicant has significant limitations in all three areas of adaptive functioning identified in the AAIDD definition of mental retardation, and also meets prong two under either the AAMR or the DSM-IV criteria as well as South Carolina's statutory definition. Dr. Fisher's testimony regarding adaptive behavior was corroborated by testimony from Applicant's mother, his father, his ex-wife, his high school football coach, and affidavits from his former

⁶ This includes the Affidavit of Ms. Kathryn Cook (one of Applicant's special education teachers); the Affidavit of Ms. Linda McCombs (another special education teacher); and Dr. Albert Humphrey (a medical doctor and distant relative of Applicant's who hired him to do odd jobs).

teachers and one employer. The following chart summarizes some of the most significant evidence offered at the PCR hearing regarding Applicant's deficits in each of these areas.

Skill Area	Summary of Deficit
CONCEPTUAL	• Applicant failed Kindergarten. • Applicant failed the second grade. • After Applicant repeated second grade, he was placed in special education. He remained in special education for the rest of his schooling. • During his first year in special education, Applicant took the 1988 Tests of Essential Learning Skills: He scored a 22.0% in reading. The national average was 77.3%. He scored a 29.2% in math. The national average was 79.5%. • In seventh grade, Applicant functioned at the second grade level, and had been tested as much as 9 years below his grade level on other tests. • In eighth grade, Applicant was administered a citywide achievement test. He tested at a fourth grade level for reading and a third grade level for math. • Applicant failed ninth grade. • During his second attempt at ninth grade, Applicant failed three out of his seven classes. • In ninth grade an evaluator noted that Applicant performed "well within retarded expectation." • When Applicant enrolled in tenth grade at Columbia High School, his reading skills and written expression were described as far below his grade level. • In eleventh grade, Applicant's IEP included testing modifications which allowed for him to have his exams administered orally due to his reading difficulties. • Applicant's grades were very poor throughout his entire school history. • In 1996, Applicant received a special education certificate from Columbia High School. He was ranked 180 in a class of 181 students, and his GPA was a .956. • During a DDSN Mental Status Exam, conducted after his arrest, Applicant was asked questions to test his Orientation to Date. He did not know what month it was. • During a DDSN Mental Status Exam, Applicant could not tell the evaluator what time it was on an analog watch. • DDSN evaluated Applicant through an oral examination because of his limitations in reading and writing. • According to the DDSN report, Applicant could not remember anything after ten minutes. He could not perform some basic

	money calculations. He believed that there are eight dimes in a dollar. • According to a report from a pre-trial evaluation by the Department of Mental Health, Applicant could not read (much less understand) "criminal" and "responsibility." • Applicant's technical school experience included temporary class attendance for trucking and electrical work. His wife had to help him with all of his homework, but he often grew frustrated and was not able to complete the work. • Applicant's mother had to repeat things to him, often holding his head to face hers to make sure he heard. This was even for simple instructions that the other children had understood easily (e.g., making up a bed). • As a child, Applicant had difficulty learning the alphabet and took several years to learn basic color differentiation. His mother tried "hooked on phonics" to address his deficits but this didn't work either.
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SOCIAL	• School records document that at age 8, "Kevin is starting to perceive that he is experiencing difficulty with his academic work," and that "as a result, he is starting to develop some feelings of inadequacy and question his capabilities at times. This is primarily due to the comparisons he makes between himself and the other members of the class." • Social Security Records report that Applicant's mother stated: "When I tell him about the things I want him to do or give him instructions, I have to look at him directly and tell him what I want as well as get him to repeat the instructions I have given him before I am sure he understands. If I were to tell him these same things in a casual manner without forcing he many times won't understand me. If I am relating basic instructions like clean the kitchen, I have to break each individual task involved". • School records and social security records indicate that Applicant was shy and subject to a lot of teasing as a child by his peers. • Special education records indicate that Applicant had very limited self control. • In seventh grade, Applicant's teacher observed that his attention span was extremely short. • Applicant's teachers and family members consistently reported that he tried hard to appear normal and was teased by others because he was slow. He never stood up for himself. He had a generally poor sense of self-direction. He pretended to know things so that other would not know that he had difficulty understanding. • Applicant's wife, mother and football coach all described him as very gullible. He never had the judgment to know that people were taking advantage of him. He was a complete follower, and thought everyone was his friend. • Applicant's father and football coach explained that he was unable to understand the complexities of most sports, which led to his assignment as waterboy (basketball) and defensive blocker (football). • On the football team, Applicant was placed as a defensive blocker, whose only assignment was to block a space and keep anyone from coming through, because he could not understand other positions. Applicant's football coach he had to physically put his hands on Applicant's shoulders and move him to the spot and point in the direction of where the opposition would be coming.
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	• The other players on Applicant's football team called him "brain lock."
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PRACTICAL	• Applicant has never lived independently for any significant period of time. • In 11th grade, Applicant's adapted goals on his IEP included acquiring basic life skills such as math for daily living and using public transportation. • While he did obtain a driver's license, Applicant did so only after taking the oral exam and it appears that he ultimately lost it through suspensions and revocations on at least four occasions. • Applicant was only ever able to obtain non-skilled labor employment. Even then, he had difficulty maintaining jobs and was frequently fired or quit out of frustration when he could not perform simple tasks. • Applicant had his then girlfriend (future wife), Naomi, added to a bank account his mother set up for him. After that, Naomi managed his finances. • Applicant's wife filled out written job applications for him, which he always brought home. • Applicant had great difficulty in counting money, to the point where he would just hand the money over and have the receiver (or his wife) do the counting. • Applicant could not cook, do laundry, or do any of the shopping when he was married. Once he tried to get baby formula when his wife was sick, and not only failed in finding the right formula, he also got lost on his way home. • As a child and young teen, Applicant's mother would send his brother with him on errands to prevent him from getting lost.
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3. ONSET OF DEVELOPMENTAL DEFICITS BEFORE AGE EIGHTEEN.

Much of the information Applicant offered at the PCR hearing relates to his intellectual and adaptive functioning before age eighteen. Applicant's IQ was measured on several occasions before his eighteenth birthday. Beginning at age eight, his IQ scores have demonstrated significantly subaverage intellectual functioning. Additionally, all of the information contained in Applicant's school records and the overwhelming majority of the information from Applicant's family members and football coach relates to his functioning before the age of eighteen.

Dr. Fisher's evaluation of Applicant focused on the pre-eighteen period and revealed that Applicant consistently struggled in school, in sports and in social situations throughout his life. Applicant's school and social security records contain many examples of his difficulties with functional academics prior to the age of eighteen. They also confirm that Applicant was severely deficient in many social and practical skills during that time. Applicant's mother testified that even as a toddler he was much slower to obtain milestones such as walking and reciting his ABC's. As a child, Applicant's father found it difficult to give him chores or even play with him because of his difficulties with understanding directions. Applicant's high school football coach testified about his struggles during his teen years, when he was unable to understand the plays his other teammates had learned, resulting in the nickname "Brain Lock." Finally, Applicant's ex-wife confirmed that his struggles continued into adulthood where she "covered" for him constantly because he had been unable to learn basic living skills during his childhood.

C. RESPONDENT'S ARGUMENTS ARE NOT PERSUASIVE.

After carefully considering the entirety of the evidence as a whole, this Court finds, by a preponderance of the evidence, that Applicant has presented substantial evidence that he has mental retardation and thus, there is a reasonable probability that the outcome of his capital trial would have been different had trial counsel investigated and raised a mental retardation claim. Accordingly, this Court finds that Applicant was prejudiced by his trial counsel's failure to raise the issue of his mental retardation at trial. It is difficult to conceive of any failure more prejudicial than trial counsel's failure to discover and present evidence that their client may be categorically exempt from the death penalty.

Respondent argues that Applicant has not proven deficient performance nor prejudice because, prior to trial, neither DDSN nor any defense expert, including Dr. Donna Schwartz-Watts and Dr. Tora Brawley, found that Applicant was mentally retarded. But, of course, this is precisely the point since Applicant's claim is that his trial counsel failed to collect the necessary social history information, hire an expert in mental retardation, and otherwise pursue a mental retardation claim. Dr. Schwartz-Watts specifically averred in her affidavit that she is not an expert in mental retardation and that she never had access to Applicant's special education records. Respondent called Dr. Schwartz-Watts to testify at the PCR hearing where she reiterated these facts and also explained that any questions about the proper assessment for a mental retardation diagnosis would have to be answered by *someone else* with specific

expertise in that field. Additionally, Dr. Tora Brawley is a neuropsychologist who was asked by the defense team to look for brain damage. She is not an expert in mental retardation and, even if she was, there is no dispute that trial counsel failed to adequately investigate evidence of Applicant's mental retardation and provide that information to any experts that they did have.

Respondent also argues that Applicant's claim basically asserts that trial counsel was ineffective for not obtaining the special education records from the Philadelphia School System. This is incorrect. The special education records were indeed very critical records because they contained several historical IQ scores and other important information relevant to mental retardation. However, this Court finds that, even without the missing special education records, trial counsel knew or should have known about information that should have caused them to investigate further into Applicant's mental retardation. Applicant presented a great deal of evidence at the PCR hearing, apart from the special education records themselves, in support of his mental retardation claim. This evidence was readily available to trial counsel, but they simply failed to investigate and present that information. For example, this Court finds the testimony of Mr. Charles Macaluso, Applicant's former football coach, to be particularly credible. Mr. Macaluso is not related to Applicant, and he has over thirty years of experience as an educator and coach. This Court finds his testimony persuasive on the issues of Applicant's deficits in adaptive functioning. Mr. Macaluso was available to Applicant's trial counsel and actually volunteered to testify at the sentencing phase of the trial. Despite Mr. Macaluso's efforts to help, however, trial counsel failed to question him

about these issues or prepare him to testify to facts relevant to a mental retardation claim.

Finally, Respondent asserts that Dr. Fisher's findings are not credible. This Court disagrees. Dr. Fisher is a clinical psychologist with extensive clinical, teaching and research experience. He has been qualified as an expert in numerous state and federal courts. More importantly, Dr. Fisher's findings were extensively corroborated by testimony from Applicant's mother, father, ex-wife and football coach, and documents from Applicant's school and special education performance and his history with the Social Security Administration.

III. CONCLUSION.

The Court finds, by a preponderance of the evidence, that Applicant has met his burden of proof in demonstrating that his trial attorneys rendered deficient performance by failing to investigate and present the issue of his mental retardation. Further, the Court finds that Applicant was prejudiced by his trial counsel's deficient performance because there exists, at a minimum, a reasonable probability of a different outcome had trial counsel properly investigated and presented a mental retardation claim. Accordingly, the sentence of death is vacated and this matter is remanded to the Court of General Sessions in Lexington County for a new sentencing trial. In accordance with *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), Applicant is entitled to a pre-trial determination by the trial judge concerning whether or not Applicant is mentally retarded by a preponderance of the evidence offered at the pre-trial hearing. If the trial judge finds Applicant is mentally retarded, then Applicant is not eligible for the death

penalty and shall be resentenced. *Id.* at 279, 588 S.E.2d at 606. If, however, the trial judge does not find that Applicant is mentally retarded, Applicant is nonetheless entitled to submit evidence of his mental retardation for the jury's consideration as a mitigating factor. *Id.* If the jury finds that mitigating factor, then a death sentence will not be imposed. *Id.*

Sub-allegation (b): Failed to thoroughly investigate and present all available evidence of Applicant's neurological damage.

Applicant's third claim for relief in Ground 10(b)(3) is denied. In this claim, Applicant asserts that trial counsel should have further investigated and presented more evidence of Applicant's neurological damage at Applicant's trial. Applicant has failed to establish he is entitled to relief upon this claim. First, no testimony or evidence supporting this claim was presented by Applicant. Thus, Applicant has not shown how counsel was deficient in this regard. Further, since there was no evidence of neurological damage presented at the evidentiary hearing, Applicant has failed to show that he was prejudiced by counsel not presenting such evidence. As a result, this claim for relief is denied.

Sub-allegation (c): Failed to prepare sentencing phase lay witnesses to ask for mercy.

Applicant's fourth claim for relief in Ground 10(b)(3) is denied. In this claim, Applicant asserts trial counsel was ineffective in not preparing the sentencing phase lay witnesses to ask the jury for mercy. This Court finds that Applicant has not established by a preponderance of the evidence that counsel was deficient in this regard. Further, Applicant has not shown that he was prejudiced as a result.

During the sentencing phase, the defense presented several lay witnesses on Applicant's behalf. His mother, Diane Mercer, testified about her pregnancy with Applicant, Applicant's upbringing in Philadelphia, and Applicant's problems in school. She further testified about her observations of Applicant's attempts at obtaining gainful employment. Mrs. Mercer also told the jury about how Applicant attempted to protect her from his father, and how Applicant was abused by his father as a child. She also discussed her observations of Applicant's interactions with his children. Mrs. Mercer concluded her testimony by discussing her relationship with Applicant. She noted their relationship was one of the best. She stated he always tried to provide for her, even when he was not making a lot of money. (R. 2332-49). She described Applicant as "a good man and he does love people. He would not hurt you. He just want to smile at you." (R. 2350).

Applicant's father, Leroy Mercer, agreed that Mrs. Mercer's recollection of what occurred in Philadelphia was fairly accurate. He testified that he was more harsh towards Applicant because he was not aware of what he described as Applicant being slow. He also noted that Applicant did attempt to protect his mother on occasion. Mr. Mercer also testified about his observations of Applicant with his wife and children. (R. 2351-58). He described his relationship with Applicant to be "[w]onderful" and "loving." (R. 2358). Mr. Mercer also noted that he loved his daughter-in-law and grandchildren, and that he would do anything for them.

Applicant's wife testified about her relationship with Applicant. She asserted that Applicant was "the best male role model" she ever had, and that they were best friends.

(R. 2328). She noted that Applicant was always there for her and their children, and that their children never went without. She also talked about their children, and how excited they were to see their father. Applicant's wife also discussed her observations of the impact that the death of Applicant's grandmother had on him. (R. 2327-32).

Applicant's youngest sister, Ebony Mercer, testified that Applicant was always there for her and the other members of their family. She described him as a very giving person, and he was the type of person who everyone would like to be around. She also stated that Applicant was her best friend, and he was always around to help her with her problems. She also indicated that the family's life in Philadelphia was rough, and that Applicant took the brunt of their father's abuse. (R. 2320-23).

Applicant's other sister, Iesha Mercer, testified that most of the areas they lived in Philadelphia were bad, and Applicant was picked on when they were at school. She recalled he was in special education classes. She also testified that she and Applicant used to joke a lot. She noted that both were called Smiley because they smiled a lot. Iesha testified that Applicant's parents were always arguing, and Applicant caught the most abuse of the children. She further stated that all in the family loved Applicant dearly, and Applicant had a heart of gold. She concluded by asserting Applicant was a good man and a good father, and that they all loved him. (R. 2323-27).

During closing arguments, the solicitor noted that none of Applicant's family members asked for mercy. (R. 2391). During Applicant's closing arguments, Ms. Armstrong contended that the family's testimony adequately gave the jury a specific basis for giving mercy. (R. 2407). She further argued that the best reasons for giving

mercy were his three children, who were present in the courtroom. (R. 2407). Armstrong noted that while Applicant was flawed as a man, there was never any question that he was a good father. Id. Further, she contended that having him alive would make an impact on those children's lives. Id.

At the evidentiary hearing, Diana Mercer, Leroy Mercer, and Naomi Stackhouse all testified that they would have asked for mercy had they been asked a question regarding mercy. Further, Applicant also presented the affidavits of his two sisters, and both indicated in the affidavit that they would have asked for mercy.

In her deposition, Ms. Armstrong testified she recalled the solicitor's argument that Applicant's family did not ask for mercy. (Depo. 51). She noted that in preparing his family to testify, they talked with them a great deal about their testimony. Depo. 51; 118).

Well, I discussed with them what their role was, which was to, number one, help the jury understand that Kevin was human and that he had these deficits and that he was loved and that you didn't want him to die. But I didn't specifically say – obviously, didn't specifically say ask for mercy.

(Depo. 118). She further conceded that it was apparent from their testimony that the defense never asked the family members to use the specific wording of asking for mercy. (Depo. 51). She noted that she thought they family members were going to ask for mercy. Id. Armstrong also indicated that they were not asked a specific question regarding mercy. (Depo. 51-2).

Mr. Littlejohn testified that he also recalled that none of the family witnesses asked for mercy, and that fact was pointed out by the solicitor. (Tr. 17). Littlejohn noted

that he thought it was tricky of the solicitor to make that point in closing arguments. (Tr. 17). He could not recall specifically if they instructed the family members to ask for mercy, but "it was pretty much implicit in their testimony that the reason they were there was to ask for mercy and to . . . try and persuade the jury not to give Kevin the death penalty." (Tr. 17-18).

After reviewing the testimony and arguments at both trial and the evidentiary hearing, this Court finds that counsel was not deficient in not specifically asking Applicant's family to specifically ask the jury for mercy at trial. This Court believes, as was expressed by trial counsel in their testimony and by counsel's closing argument, that it was implicit in the family's testimony that they wanted the jury to spare Applicant's life. See State v. Johnson, 338 S.C. 114, 126-27, 525 S.E.2d 519, 525 (2000). Furthermore, this Court finds Applicant has not established that he was prejudiced by the fact his family members did not explicitly ask for mercy. As already noted, it was implicit in their testimony that they wanted the jury to spare Applicant's life. In light of the fact that the request was implicit in the testimony, counsel argued for mercy, and Applicant requested mercy in his allocution, this Court finds that Applicant has failed to show that the testimony at trial would have created a reasonable probability of a different result. As a result, this claim for relief is denied.

Allegation #4: Victim impact evidence

Sub-allegation (a): Failed to object to testimony regarding the effect of the victim's death on the United States Army generally and on various members of the U.S. Army in particular.

This Court finds the first allegation in Ground 10(b)(4) is without merit. In this claim, Applicant asserts trial counsel was ineffective in not objecting to the testimony regarding the impact the victim's death had on the U.S. Army and on various members of the U.S. Army. Applicant has not shown that counsel was deficient in this regard. Much of the testimony contested by Applicant consisted of a description of the medals that the victim had earned in his military career, not how his death impacted upon the Army. Further, the testimony that was presented regarding how his death affected the U.S. Army was very limited. Further, Applicant has not established that he was prejudiced. As a result, this claim for relief is denied.

Applicant pointed to two portions of the record in support of this claim. First, he asserts that the testimony contained on R. pp. 2078-2083 was inappropriate. Second, he argues that a statement made on R. p. 2101 was also inappropriate.

In her deposition, Ms. Armstrong testified that she believed the testimony of the four soldiers regarding the victim's loss on themselves and the Army generally was properly admissible victim impact testimony. (Depo. 53). She felt the State had some latitude under which it could present the testimony of people who knew the victim and his qualities. (Depo. 54). Mr. Littlejohn also testified that he did not believe that Judge Few would have excluded any of the testimony had an objection been made. (Tr. 19). The testimony contained on R. pp. 2078-83 was properly admitted at trial. This was the testimony of Command Sergeant Major Martin Wells, U.S. Army. Much of his testimony explained the various medals and ribbons that were earned by the victim prior to his death. This was properly admitted victim impact testimony. See Payne v. Tennessee,

501 U.S. 808, 827, 111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720 (1991) ("A State may legitimately conclude that **evidence about the victim** and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated."). State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) (adopting Payne); see generally State v. Hughey, 339 S.C. 439, 457, 529 S.E.2d 721, 730 (2000) overruled on other grounds by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009) ("Victim impact evidence is admissible in the sentencing phase to demonstrate the 'uniqueness' of the victim and the specific harm committed by the defendant."). The same was also true for Wells' statement that Sgt. Davis personified the ideals captured in the creed for all non-commissioned officers. Since this testimony focused solely on the character of the victim, it was properly admitted testimony. Similarly, Clifton Magwood's response to the question regarding the memorial service at Fort Jackson ¹ on R. p. 2101 was also properly admissible. Since this testimony was properly admissible, counsel was not deficient in not objecting to it. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

¹There was only one question and answer regarding why Fort Jackson would have hosted the memorial service. (See R. 2101).

There was nothing particularly heartwrenching about this testimony; it was pretty much what someone would expect and delivered in a professional and matter-of-fact manner. Thus, given the limited nature of the testimony during the course of a large proceeding and the lack of any undue prejudice, it cannot be said it rendered Applicant's trial fundamentally unfair or its absence alone would create a reasonable probability of a different result given the extremely egregious nature of this crime as well as Applicant's other violent run-ins throughout his life. See, e.g. Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (improper argument not reversible where it was but 10 lines in transcript); Ketterman v. South Carolina Farm Bureau Mut. Ins. Co., 302 S.C. 276, 395 S.E.2d 187 (Ct. App.1990) (impermissible argument covering less than a page in the entire transcript was not sufficiently prejudicial for reversal).

To the extent Applicant alleges that the testimony of Robert Ames, Clifton Magwood, David O'Garro, and Martin Wells was improper victim impact testimony, this Court finds this claim is without merit. It was established by their testimony that Robert Ames, Clifton Magwood, and David O'Garro were all close friends of the victim, Sergeant Davis. Martin Wells indicated that he was Davis' immediate superior officer at Fort Jackson. The admission of fellow workers statements have been deemed admissible as proper victim impact evidence under Payne v. Tennessee as showing the uniqueness of the individual. See, U.S. v. Barnard, 299 F.3d 467 (5th Cir 2002); Franklin v. State, 965 So. 2d 79 (Fla. 2007) ("designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death"); Wesley v. State, 112 Nev. 503, 520, 916 P.2d 793, 804 (Nev.1996)

(victim impact evidence from neighbors and co-worker appropriate under Payne where each witness's testimony was relevant to the impact of Wesley's actions); U.S. v. Wilson, 493 F. Supp. 2d 364 (E.D.N.Y.2006) (victim impact testimony admissible from colleagues and co-workers in police department; where the testimony of NYPD coworkers will be presented to demonstrate "the chilling effect" these murders had specifically on undercover detectives within the NYPD and the fact that as a result of these murders, undercover detectives were "refusing to go out on the street, do these operations because of the danger, how some even retired from undercover work, said 'I'll be a police officer but I will not do undercover work anymore.'"); U.S. v. Battle, 173 F.3d 1343 (11th Cir. 1999) (prison officials testifying about the impact the prison murder had upon the prison guards admissible impact evidence). "Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant" People v. Valencia, 43 Cal.4th 268, 300, 74 Cal.Rptr.3d 605, 639 (Cal.,2008). But see U.S. v. Fields, 516 F.3d 923 (10th Cir. 2007).

Payne authorizes the admission of evidence under the Eighth Amendment which focuses on demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide. This Court finds that Applicant has not established that the testimony of the victim's friends and superior officer was inappropriate victim impact testimony. As a result, he has not shown that counsel was deficient in not objecting to their testimony. Further, since the testimony was admissible victim impact testimony, Applicant was not prejudiced by counsel not objecting. This claim for relief is thus denied.

Sub-allegation (b): Failed to object to video shown at victim's funeral and testimony concerning an Army "roll call" that took place at the funeral.

Applicant's second claim in Ground 10(b)(4) is denied. In this claim, Applicant asserts trial counsel should have objected to the presentation of the video that was shown at the victim's funeral and to the testimony regarding an Army "roll call" that was presented by the State. This Court finds trial counsel was not deficient in not objecting. This evidence was admissible victim-impact evidence under Payne. Further, Applicant has not established that he was prejudiced by the presentation of the video and the testimony. As a result, this claim for relief should be denied and dismissed.

At trial, David O'Garro testified that at the funeral, a roll call was done.

The roll call is - - any squad or platoon that loses a member, in honor of that member or to show that that member is no longer with that group, we do a roll call, and what happens is our division chief, our leader, you know, he'll call the names of everybody in the group, and the last person's name to be called was - - would be the one that was missing. And so Tracy's name was the last to be called, and it's repeated three times. You know, so they called, you know, me. Sergeant O'Garro. Here. And then Sergeant Magwood. Here. You know, Sergeant Evans. Here. And you go down the line and got to Sergeant Davis and there would be no answer. And Sergeant Davis. Then: Sergeant First Class Tracy L. Davis. There would be no answer. Stricken from the rolls.

(R. 2118-19). Shortly thereafter, the State played a video of photographs set to song.

(R. 2119, see R. 2116-17).

At the evidentiary hearing, Ms. Armstrong testified that she did not consider objecting to the video, but now believes she should have. (Depo. 54). She had watched the video on a laptop, but noted the presentation had a different impact when played on the larger screen in the courtroom with the lights dimmed. (Depo. 54-55).

She indicated that if she had the opportunity to do it again, she would request to see the video as it was intended to be presented to the jury (i.e. in the courtroom). (Depo. 55). She noted that had she viewed the video as it was intended to be presented, she would have likely objected to its presentation. (Depo. 55). Mr. Littlejohn testified that he considered lodging an objection, but did not. (Tr. 19, 30). He indicated that once the video started, it was a little too late to object to it. (Tr. 19, 30). He also noted that he did not believe that Judge Few would have excluded the video. (Tr. 19, 30).

This Court finds that Applicant has not shown that counsel was deficient in not objecting to the testimony regarding the roll call done at the funeral or the funeral video. Payne authorizes the admission of evidence under the Eighth Amendment which focuses on demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." The evidence of the video that Applicant now challenges gave that brief glimpse of Sergeant Davis and his loss and its impact on his community - his family and his friends. In addition, testimony, prior to the admission revealed the community acknowledgment of the deaths - the video only confirmed it and bread more life into those static comments.

The video played at the funeral expressed no outrage, contained no clarion call for vengeance, but may have implied sadness. See, People v. Kelly, 68 Cal.Rptr 3d 531 (2008), cert. denied 129 S.Ct. 564 (2008) (particular video montage admissible under Payne); cf. State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010), cert. denied (Apr. 25, 2011)(finding no error in admission of video of funeral slain law enforcement officer). Here, the video supplemented but did not duplicate any of the witnesses' testimony.

While Applicant may suggest that revealing emotional effect demands exclusion of the evidence, that is not the test where Payne allows the admission of the impact of the victim's death upon the survivors. Altogether, this Court finds the testimony regarding the roll call and the funeral video were admissible as victim impact evidence at Applicant's trial. Thus, counsel was not deficient in not objecting to either the roll call testimony or the funeral video as improper victim impact evidence. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial); Anderson v. Goeke, 44 F.3d 675, 680 (8th Cir. 1995) ("[T]he 'performance of an attorney is not deficient for failure to object to admissible evidence.'")(quoting Russell v. Jones, 886 F.2d 149, 152 (8th Cir.1989)). As a result, this claim for relief is denied.

Furthermore, this Court finds that Applicant was not prejudiced by counsel not objecting to the roll call testimony or the funeral video. Since the evidence was admissible victim impact evidence, an objection based upon those grounds would have been denied. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

Sub-allegation (c): Failed to object to trial judge allegedly crying in front of jury.

Applicant's third claim in Ground 10(b)(4) is denied. Trial counsel expressed a valid strategic reason for not raising an objection to address whether the trial court had an emotional response to the presentation of victim impact evidence during the sentencing phase. Further, Applicant cannot show that he was prejudiced by counsel's decision not to object. As a result, this claim for relief is denied.

In this allegation, Applicant asserts the trial judge cried in front of the jury while the funeral video was presented to the jury. This was not reflected in the trial court's record. At her deposition, Ms. Armstrong testified that she was not aware of the trial judge's reaction to the video while it was occurring. (Depo. 55). She indicated that she heard after the fact that he was crying. (Depo. 55-6, 99-100, 133). At the evidentiary hearing, Mr. Littlejohn testified that it appeared that the trial judge had gotten emotional about the funeral video. (Tr. 19-20). He further noted that he considered objecting:

[T]hat was kind of a difficult issue to deal with. I was, I was in hopes that the jury didn't see him; I didn't care if anyone else saw him, but I was in hopes the jury didn't see him. And I was afraid if I objected to it at that point or later, I didn't know whether a curative instruction might be more damaging than if the jury had just seen him get emotional like they did.

(Tr. 20, ll 7-13). Mr. Littlejohn also noted that it appeared that the trial judge's reaction was limited to during the video, and not after. (Tr. 31). Littlejohn also testified that he thought it was more of a risk to discuss a curative instruction because he felt there was a strong possibility the jury did not see any response from the judge, and he did not want to risk bringing such a response to their attention. (Tr. 31-2).

This court finds counsel's decision not to raise an objection to the trial court's response to the funeral video was the result of reasonable trial strategy. Counsel clearly thought it was a risky proposition to ask for a curative instruction regarding the judge's response during the video. Counsel noted that it was unlikely the jurors saw the trial judge's response to the video, and he did not want to bring it to their attention if they had not seen it. In light of those concerns, this court finds the decision was reasonable. Furthermore, this Court finds that Applicant could not establish that he was prejudiced in any way by trial counsel's decision not to object or request a curative instruction regarding the trial judge's reaction to the funeral video. At the beginning of the jury charge in the sentencing phase, the trial court instructed the jury as follows:

Now, as I explained to you earlier in the first phase of the trial, only the jury can make the findings of fact in this case and I am not permitted to indicate to you how I might feel about the facts. So if I have said anything or done anything during the course of this phase of the trial that might lead you to believe that I have an opinion about the facts or about what the sentence should be, then you should disregard that.

(R. 2409-10). Jurors are presumed to follow the law as instructed to them. State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999). Applicant has not presented any basis upon which this Court should find the jury did not follow this instruction. Since the jury would have disregarded any reaction the trial judge may have had during the presentation of the funeral video based upon this instruction, Applicant cannot establish he was prejudiced. As a result, this Court finds this claim is without merit. It is therefore denied and dismissed with prejudice.

Allegation #5: Ineffective assistance of counsel for not asking their expert witnesses to prepare reports.

Applicant's claim for relief in Ground 10(b)(5) is denied. In this Ground, Applicant asserts trial counsel was ineffective in not having their experts prepare reports. This court finds trial counsel's decision to not have their experts prepare reports was the result of reasonable trial strategy. As a result, Applicant cannot establish counsel was ineffective in this regard.

This claim stems primarily from the fact the defense did not have one of their primary testifying experts, Dr. Donna Schwartz-Watts, prepare a report of her findings. Prior to trial, there was a discussion on the record between defense counsel and the solicitors trying the case regarding the defense's experts' opinions. (R. 1175-79). During that conversation, it was noted that Dr. Schwartz-Watts, the forensic psychiatrist retained by the defense, had not drafted a written report. It was also noted that the neurologist had not had an opportunity to draft a report because he was still examining the SPECT scans. (R. 1177-78). During the sentencing phase, Dr. Schwartz-Watts was cross-examined on the fact she did not draft a written report. (R. 2169-73).

In her deposition, Ms. Armstrong testified that at the time of Applicant's trial, it was her practice to generally not request reports from experts in preparation for trial. (Dep. 98). She noted that the defense is not obligated to produce a report, and she did not feel like it was the defense's job to make the State's job any easier. Id.

This court finds trial counsels' decision not to request some of their experts to prepare reports was the result of a reasonable strategic decision. Counsel's testimony indicates they were aware that they would have to turn over any reports drafted to the

State. Counsel believed it was to their strategic advantage for the State to not have a report from Dr. Schwartz-Watts to use in preparation for cross-examination. This belief was reasonable. Thus, this Court finds Applicant is not entitled to relief upon this claim. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision cannot be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Allegation #6: Ineffective assistance of counsel for not preparing their sentencing-phase expert witnesses to explain how their opinions had any bearing on the jury's decision.

Applicant's claim for relief in Ground 10(b)(6) is denied. In this Ground, Applicant asserts trial counsel was ineffective in not preparing the defense experts to testify how their opinions bore on the jury's decision. Applicant has not shown that counsel was deficient in this regard. Further, Applicant has not shown that he was prejudiced as a result of the alleged deficiency of counsel. As a result, this Court finds this claim is without merit.

As a preliminary matter, this Court finds this claim is without merit as to the testimony of Dr. Alexander Morton, Dr. Marti Loring, Dr. John Steedman, and James Aiken. Applicant has not presented any testimony or evidence as to how these four

witnesses' testimony would have been different had counsel prepared them in the way that Applicant asserts should have been done in this ground. See 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 burden of producing admissible testimony in accordance with the rules of evidence); Cf. generally Beaver v. Thompson, 93 F.3d 1186, 1995 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present mitigation evidence, where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069. Since Applicant cannot show that he was prejudiced by any alleged deficiency of counsel in this regard as to these witnesses, this claim for relief as it relates to the testimony of those experts is denied.

To the extent that Applicant asserts trial counsel was ineffective in not having Dr. Schwartz-Watts testify regarding how her findings related to the jury's determination, this Court finds this claim is without merit. At the evidentiary hearing, Dr. Schwartz-Watts testified that the reason she could not relate her findings regarding Applicant's post-traumatic stress disorder and her other diagnoses was because Applicant always maintained he was absolutely innocent of the charges he faced when she met with him.

Applicant has not established that he was prejudiced. As was acknowledged by Schwartz-Watts' testimony, she could not testify regarding her opinion as to how Applicant's mental conditions would have impacted on his involvement in the murder and carjacking because Applicant maintained he was completely innocent in his discussions with Schwartz-Watts. While she may have been able to hypothesize how Applicant's diagnosed conditions would have impacted him if he was present at the scene, Schwartz-Watts could not directly connect those hypotheses with Applicant's actual responses at the scene because in her examination of Applicant, he always maintained he was completely innocent. This Court finds this testimony would have been of very limited benefit to Applicant. This Court further finds that had counsel presented such testimony, it would not have created a reasonable probability of a different result. Thus, this claim for relief is denied.

Allegation #7: Ineffective assistance of counsel for waiving the trial judge's proposed charge that the jury could not consider prior bad acts when determining whether the State had proven an aggravating circumstance, and that the State had proven Applicant was the shooter.

Applicant's claim for relief in Ground 10(b)(7) is denied. In this Ground, Applicant argues trial counsel was ineffective when they chose to waive a proposed jury instruction based upon State v. Stewart, 283 S.C. 104, 320 S.E.2d 447 (1984). This court finds trial counsel's decision to waive the additional jury instruction was the result of a reasonable strategic decision by trial counsel. As a result, Applicant is not entitled to post-conviction relief upon this claim.

In giving the jury charge in the sentencing phase of Applicant's trial, the trial court did not give a Stewart charge. State v. Stewart, 283 S.C. 104, 107-08, 320 S.E.2d 447,

450 (1984). A Stewart charge instructs the jury that prior convictions and evidence of prior bad acts can not be used to establish an aggravating circumstance. Id. at 107-08, 320 S.E.2d at 450. After the jury charge, the solicitor brought the omission to the trial court's attention. (R. 2242). The trial court asked defense counsel if they wanted the jury to receive a Stewart charge. (R. 2423). It allowed defense counsel to consult with Applicant about the matter. (R. 2424). After further discussion, the trial court also indicated it would also charge the jury that it could not consider Applicant's criminal record in deciding whether Applicant was in fact the shooter. (R. 2425).

Defense counsel declined. Mr. Littlejohn specifically noted that the defense did not believe any of Applicant's prior crimes could even bear on whether Applicant was the triggerman. (R. 2426). Both trial counsel indicated to the trial court they thought Applicant would be more prejudiced from giving the charge separately than if the charge was not given. (R. 2428-29). Applicant also informed the trial court that he had discussed the matter with counsel, and he was fine with the decision. (R. 2429).

At the evidentiary hearing, Mr. Littlejohn testified that the defense decided to decline the trial court's offer for a Stewart charge because they "thought that that charge would just bring more attention to all the evidence that had been brought out by the state about all these bad acts that Kevin had previously been involved in." Tr. 33, ll 12-15. In her deposition, Ms. Armstrong also indicated the defense did not want to have Applicant's bad acts specifically brought up again with the Stewart charge.

This court finds that counsels' testimony and the record of the discussion regarding the Stewart charge reflect that defense counsel's waiver of the charge was a

matter of trial strategy. This court finds that strategy was reasonable under the circumstances. Thus, Applicant is not entitled to relief upon this claim. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision cannot be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Ground C: Sixth, Eighth and Fourteenth Amendment violations by the State's presentation of victim impact evidence.

Applicant's claim in Ground 10(c) is denied. In Ground C, Applicant argues that his Sixth, Eighth, and Fourteenth Amendment rights were violated by the State presenting of "victim impact evidence - which included a video set to music that was shown at the victim's memorial and testimony concerning an army 'roll call' that took place during the victim's funeral" and "by the fact that the trial judge cried in front of the jury during this presentation." This court finds this claim is procedurally barred.

S.C. Code Ann. § 17-27-20(b) (1986) specifically provides that the remedy of Post-Conviction Relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The South Carolina Supreme Court has consistently and repeatedly held that issues that either were or could have been raised at trial and on direct appeal may not be raised in

PCR. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979).

This claim could have been presented at trial. Trial counsel chose not to object to the victim impact evidence challenged here. Since this argument could have been raised at trial and on direct appeal, it is not an appropriate claim for post-conviction relief. As a result, this claim for relief is denied.

Ground D: Due process violation in denying motion for new trial because motion was denied based upon false testimony

Applicant's claim in Ground 10(d) is denied. In Ground D, Applicant argues Timothy Johnston perjured himself by testifying that Applicant's co-defendant, Marcus Thompson, had never confessed to shooting the victim when, in fact, Thompson had stated to Timothy Johnston that he (Thompson) was the one who shot and killed the victim.⁷ To the extent this is a claim cognizable for post-conviction relief, this court finds the claim is without merit.⁸ Timothy Johnston's testimony at the evidentiary hearing was

⁷ This claim was initially raised as a Brady/Napue prosecutorial misconduct claim. However, after the evidentiary hearing, Applicant moved to amend the ground to conform with the evidence. In the motion to amend, Applicant conceded that after the testimony at the evidentiary hearing, there was no evidence to support the Brady/Napue claim.

⁸ Applicant has not explained why this claim, one step removed from trial, should be evaluated as a trial issue. Even so, this Court finds this claim is easily addressed on a lack of prejudice.

not credible. Applicant has not shown that Timothy Johnston perjured himself at the motion for new trial hearing. As a result, this claim for relief is denied.

At the motion for new trial hearing, Timothy Johnston testified he was one of Marcus Thompson's cell mates in May 2006. (R. 2688-89). He recalled Thompson talking about his charges. (R. 2689). Johnston testified that Thompson told him what had happened, and Thompson was asking his cellmates what he thought they [the State] would do to him. (R. 2689-90). Thompson's focus was on his murder charge. (R. 2690). Johnston testified that both he and their third cellmate, Kevin Fuller, both had been to prison before. (R. 2690). Thompson had not. (R. 2690).

Johnston testified that Thompson told him that he had dropped Applicant off at an apartment complex. Applicant used a cut to go through and get a truck. Thompson told Johnston that the guy got killed, but the guy's girlfriend was on the telephone and heard everything. Thompson was concerned because she heard two car doors shut, and the police were using that to say Thompson was at the scene when the murder occurred. Thompson maintained he was at the other apartment complex. Thompson also told Johnston that he ended up at a local motel. (R. 2691-93).

Johnston also testified about a second time Thompson told him about the crime. During this second conversation, Kevin Fuller was asleep. Thompson told Johnston the same story. However, this time, Thompson told him he was in the stolen truck when they were stopped. (R. 2693-94). Johnston further testified that Thompson never said anything about pulling the trigger. (R. 2698-99). Johnston did ask Thompson about the gloves found on Thompson when he was arrested. Thompson informed Johnston that

the gloves were from his job. (R. 2699-700). Thompson never told Johnston about the pistol or target practice. (R. 2700).

Johnston acknowledged on cross-examination that he had prior convictions for criminal domestic violence, shoplifting, failure to stop, and a couple of driving under suspensions. He also noted that he had pending charges for first degree burglary and second degree burglary. However, he was not seeking assistance with the first-degree burglary charge because it was already set to be dismissed. He testified that the complaining witness had already informed law enforcement that he had permission to enter the residence, and he was in a dispute with the solicitor's office as to whether the charges were still pending. (R. 2702-04). He also testified he was pleading guilty to the second-degree burglary. (R. 2709).

At the evidentiary hearing, Johnston testified that Thompson had told him a third version of the events on the night of the shooting. In the third version, which Johnston asserted he did not share with the solicitor's office, Johnston alleged that Thompson was the one who shot Sgt. Davis. Johnston testified that he had never told anyone else that Thompson had told him he was the shooter. Johnston also testified that he lied at the motion for new trial hearing because Thompson grew up in the same area as Johnston and his family. Johnston claimed that Thompson threatened to "reach out and touch" Johnston's family. Johnston also testified that he did not know which of the three versions of the story were true.

Deputy Solicitor Samuel R. Hubbard testified that when the Solicitor's Office met with Johnston, he started by indicating they would not like what he had to say about

Kevin Fuller. Johnston had indicated that Fuller was lying in an attempt to receive assistance with his charges. Hubbard testified that Johnston never said that Thompson indicated he was the shooter. To the contrary, Johnston's impression of Thompson was that he was afraid of prison, and he was seeking advice from his two cell mates who had more experience with the system. Further, Johnston indicated that Fuller would say anything. Assistant Solicitor Shawn Graham also indicated that Johnston told them that Fuller would say anything. Graham's testimony indicates that Johnston's testimony at the motion for new trial hearing was consistent with what he told them prior to the hearing.

"Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial." Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977)(quoting State v. Mayfield, 235 S.C. 11, 34–35, 109 S.E.2d 716, 729 (1959)). Applicant, who has the burden of proof, has offered no reliable evidence to show he is entitled to relief upon this claim. The only evidence comes from the ever evolving testimony from Mr. Johnston, and even he acknowledges that he does not know which, if any, of the alleged statements he heard from Thompson are true. This Court finds Applicant has failed to carry his burden of proof in this proceeding. As a result, this claim for relief is denied.

Ground E: Ineffective assistance of appellate counsel

Applicant's claim in Ground E is denied. In Ground E, Applicant asserts appellate counsel was ineffective in three regards. First, Applicant argues appellate counsel should have argued on appeal that juror Deborah Lucas was improperly

qualified. Second, Applicant argues appellate counsel should have argued that juror Phillip Lofollette was also improperly qualified. Third, Applicant argues appellate counsel should have argued that juror Michael Sponhour was improperly disqualified. Applicant has not shown that appellate counsel was deficient in not raising these arguments on appeal. Further, Applicant has not shown that he was prejudiced as a result of counsel not raising these issues on appeal. Thus, this Court finds Applicant has not met his burden in establishing that appellate counsel was ineffective in this regard.

These claims are without merit. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). A PCR applicant has the burden of proving appellate counsel's performance was deficient. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004), as "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." Jones v. Barnes, 463 U.S. 745, 752 (1983). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Id.

To obtain relief a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 615-16, 524 S.E.2d 833, 836 (1999). In other words, the applicant is required to demonstrate "that his counsel was objectively unreasonable in

failing" to identify and argue present significant and obvious issues on appeal, and "a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." Smith v. Robbins, 528 U.S. 259, 285 (2000) (citation omitted). Although recognizing that "[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 528 U.S. at 288. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). See also Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc).

In a capital case, the proper standard in determining the qualification of a prospective juror is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. State v. Green, 301 S.C. 347, 392 S.E.2d 157, cert. denied, 498 U.S. 881, 111 S.Ct. 229, 112 L.Ed.2d 183 (1990) (citing Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 853, 83 L.Ed.2d 841 (1985)); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996), cert. denied 520 U.S. 1123, 117 S.Ct. 1261, 137 L.Ed.2d 340 (1997). The determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and is not reviewable on appeal unless wholly unsupported by the evidence. State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), cert. denied, 508 U.S. 915, 113 S.Ct. 2355, 124 L.Ed.2d 263 (1993). When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire voir dire. State v. Green, supra. The ultimate consideration is that the juror be unbiased, impartial and able to carry out the law as explained to him. Id.

State v. Bennett, 328 S.C. 251, 256-57, 493 S.E.2d 845, 848 (1997).

At the evidentiary hearing, appellate counsel Robert M. Dudek testified that he read the full voir dire. He raised one juror issue in his appellate briefs. He noted that he

would have considered all issues that were preserved for review. However, he did contend that he would not have made a strategic decision not to raise a winning issue. Mr. Dudek testified that the appellate courts give due deference or great deference to the findings of trial courts regarding whether a juror is qualified to serve. The only case in which he could recall that an appellant prevailed on a juror claim was in *State v. Johnny Bennett*. He noted that with the juror who was disqualified, the court did have specific concerns about whether the juror was applying a higher burden of proof beyond the reasonable doubt standard. Mr. Dudek indicated that he was not aware of any juror who served who had previously been challenged for cause during the voir dire process.

Applicant's claims relating to jurors Deborah Lucas and Phillip Lofollette were without merit. "[A]ny claim that a jury was not impartial must focus on the jurors who ultimately sat at trial." State v. Tucker, 324 S.C. 155, 162-63, 478 S.E.2d 260, 264 (1996)(citing Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273(1988)); see State v. Green, 301 S.C. 347, 353, 392 S.E.2d 157, 160 (1990)(holding Both jurors Lucas and Lofollette were struck by the defense during the jury strike. (R. 1258, 1260). Only one regular juror was seated after the defense exhausted its peremptory strikes: Vicky Mills. (R. 1262). She was not challenged by the defense during either the voir dire process or during the jury strike. (R. 784-801, 1262-63). In light of the fact that none of the jurors who sat on Applicant's jury were objectionable, this Court finds Applicant received a fair trial.⁹ Thus, this claim would have been found to be without merit on appeal. See

⁹ This court also finds that the transcript of the jurors' voir dire support the trial court's findings the jurors were qualified.

Green, supra. As a result, Applicant has failed to meet his burden of showing counsel was ineffective in not challenging the qualifications of Jurors Lucas and Lofollette on appeal. United States v. Wilkes, 20 F.3d 651 (5th Cir.1994)(appellate counsel not deficient for not raising legally meritless claim on appeal); see United States v. Kirsh, 54 F.3d 1062, 1071 (2d Cir. 1995)(noting the failure to make a meritless argument does not rise to the level of ineffective assistance of counsel).

This Court also finds the third claim for relief in this ground to be without merit. Appellate counsel was not ineffective in not arguing on appeal that juror Sponhour was improperly disqualified. A review of the transcript of the juror Sponhour's voir dire shows that trial court did not abuse its discretion in dismissing Sponhour. In the early portion of the voir dire, when Sponhour is asked by Judge Few if he could vote to impose the death penalty if he felt it was the appropriate punishment, Sponhour responded "I have trouble giving you a yes or no answer on that. It is a bit unlikely that I would be willing to do that." (R. 598). Sponhour had maintained that he did not think he fit into one of the three categories for jurors. During examination by the solicitor, Sponhour indicated that he would be very troubled about voting for the death penalty because there were too many cases where "it's been shown that people have been sent to death and the facts were later found to liberalize it." (R. 599). He also indicated that he probably could not sign a death verdict. (R. 600). While Sponhour did not have a moral opposition to the concept of the death penalty, he asserted that he was more concerned about the fallibility of death sentences. (R. 601). He noted that those concerns would be at the forefront of his mind. (R. 602). In responding to Mr.

Littlejohn's questions on voir dire, Sponhour indicated that he was not completely opposed to the death penalty, but he was troubled by the "inherent fallibility of human institutions like the judicial system." (R. 605).

After the examination of Sponhour concluded, the trial court indicated it was concerned that Sponhour indicated he would be applying a different burden of proof to the State before he would be willing to consider the death penalty. (R. 606). Specifically, the trial court was concerned that if a guilty verdict was entered by the jury, Sponhour would still question guilt during the sentencing phase. (See R. 607-09).

Sponhour was brought back in for further voir dire. During this questioning, Sponhour testified that he could see himself not considering the death penalty in the sentencing phase because he still had questions about the defendant's guilt. (R. 610-14).

After questioning, the solicitor argued the juror was not qualified to serve. He noted that the juror's answers indicated he would not follow the law in the guilt phase because he was looking for more than beyond reasonable doubt. Further, in the sentencing phase, he would be in direct violation of United States Supreme Court precedent in that he would consider residual doubt. The Solicitor argued:

So I think he's disqualified in the guilt phase because he needs proof beyond all doubt. I think he's certainly disqualified in the penalty phase because that's bleeding over into it, and he's bringing in an arbitrary and a capricious manner into that deliberation. Under Wainwright versus Witt I agree, your honor. We think that his views substantially impair -- they would prevent him from the performance of his duties in accordance with his instruction and his oath and the law that would be charged to him.

(R. 616).

In response, trial counsel argued that the jury could give life for any reason or no reason at all, and the fact that the juror wants to be clear about his decision making process means that he is just doing his duty. Further, counsel noted that it was clear that Sponhour was not fundamentally opposed to capital punishment. Counsel argued that Sponhour did not say that he would hold the State to a standard where he could not give the death penalty. "He didn't say, well, there's no circumstance under which - - no burden that the state could meet such that I would never give a death sentence." (R. 618).

After hearing arguments, the trial court disqualified Sponhour for service on the jury for two reasons. First, the trial court found Sponhour indicated he would hold the State to a higher burden of proof, which was impermissible. (R. 618). While Sponhour did not state what that burden would be, it was clear that it was higher than beyond a reasonable doubt. The trial court found that would interfere with the juror's ability to follow the court's instructions. Second, the trial court found that Sponhour's views about the fallibility of the justice system and discussion about the number of times that individuals sentenced to death would later be found not guilty would interfere with his ability to follow the court's instructions. Thus, Sponhour was disqualified.

The trial court's findings in disqualifying juror Sponhour were supported by the record. As a result, the disqualification of juror Sponhour would not have been reversed on appeal. Since the disqualification of the juror would not have been reversed, Applicant failed to show that appellate counsel was deficient because this issue was not clearly stronger than the issues raised by appellate counsel on appeal. Further,

Applicant fails to establish he was prejudiced as a result of appellate counsel not raising this issue on appeal because the outcome would on appeal would not have been different had counsel raised this issue. As a result, this claim for post-conviction relief is denied.

Ground F: Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that he is mentally retarded.

Applicant's claim in Ground F is denied because it is not an appropriate claim for post-conviction relief. In Ground F, Applicant raises a freestanding claim that Applicant's death sentence violates the Eighth Amendment prohibition of cruel and unusual punishment based upon the fact Applicant is mentally retarded. S.C. Code Ann. § 17-27-20(b) (1986) specifically provides that the remedy of Post-Conviction Relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The South Carolina Supreme Court has consistently and repeatedly held that issues that either were or could have been raised at trial and on direct appeal may not be raised in PCR. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979).

Applicant's trial occurred after the United States Supreme Court's decision in Atkins v. Virginia, 536 U.S. 306 (2002) and after the South Carolina Supreme Court's decision in Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003). In Franklin, the

South Carolina Supreme Court addressed how the issue of mental retardation should be handled after the United States Supreme Court's decision in Atkins:

Regarding the procedures to be used in making the mental retardation determination in post-Atkins cases, we conclude the trial judge shall make the determination in a pre-trial hearing, if so requested by the defendant or the prosecution, after hearing evidence, including expert testimony, from both the defendant and the State. The defendant shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence. Cf. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998) (defendant bears burden of proving incompetence by preponderance of evidence); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998)4 (same).

If the judge finds the defendant to be mentally retarded by a preponderance of the evidence in the pre-trial hearing, the defendant will not be eligible for the death penalty. If, however, the judge finds the defendant is not mentally retarded and the jury finds the defendant guilty of the capital charge, the defendant may still present mitigating evidence that he or she had mental retardation at the time of the crime. See S.C.Code Ann. § 16-3-20(C)(b)(10) (2003). If the jury finds this mitigating circumstance, then a death sentence will not be imposed.

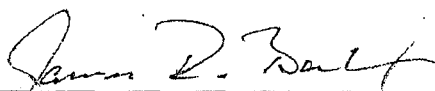
Franklin, 356 S.C. at 279, 588 S.E.2d at 605 (footnotes omitted); see State v. Laney, 367 S.C. 639, 627 S.E.2d 726 (2006). Clearly, the procedures outlined by the South Carolina Supreme Court show that mental retardation as a freestanding claim can only be properly raised before the trial court in post-Franklin trials. Applicant had an opportunity to raise this claim at trial. Since this issue could have been raised at trial, it is procedurally barred from review in post-conviction relief. As a result, this claim for relief is dismissed.

Conclusion

For the reasons stated above, this Court grants post-conviction relief on the ground that Applicant's trial counsel were ineffective in failing to investigate and present

all available evidence of his mental retardation and/or low intellectual functioning and deficits in adaptive behavior prior to the age of eighteen. Accordingly, Applicant's sentence of death is vacated and this matter is remanded to the Court of General Sessions of Lexington County for a new sentencing trial. This Court denies relief on all other grounds alleged in Applicant's PCR Application.

AND IT IS SO ORDERED.



Honorable James R. Barber, III

Circuit Court Judge

Presiding by Appointment of the Supreme Court

June 21, 2011

FILED
JUN 29 AM 10:55
CLERK OF COURT
LEXINGTON



ALAN WILSON
ATTORNEY GENERAL

August 23, 2011

RECEIVED

AUG 26 2011

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

S.C. SUPREME COURT

Re: Notice of Appeal
Kevin Mercer, #6021 v. State of South Carolina;
09-CP-32-5465 (Capital PCR Action).

Dear Mr. Shearouse:

Enclosed for filing please find a notice of appeal in the above-referenced case. Also, attached is a copy of the Order of the Honorable James R. Barber, III granting a new sentencing proceeding, dated June 27, 2011, and a copy of the Order denying Applicant's and Respondent's Motions to Alter or Amend Judgment dated July 29, 2011 and filed on July 25, 2011, which we are appealing. I have also attached a certificate of service for filing in your office.

By copy of this letter, we are serving opposing counsel with this Notice today as well as forwarding a copy to the Clerk of Court for Lexington County for filing in their office.

Also, please be advised that the transcript of the evidentiary hearing has already been ordered and received.

Sincerely,

Alphonso Simon Jr.
Assistant Attorney General

AS/dd

Enclosures

cc: Emily C. Paavola, Esquire
Jason P. Peavy, Esquire
Beth A. Carrigg, Clerk of Court, Lexington County
David M. Tatarsky, Esq., South Carolina Department of Corrections
Sandi Wofford, Victims Assistance

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 2009-CP-32-5465

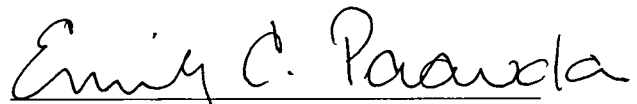
Kevin J. Mercer, #6021,

v.

State of South Carolina.

NOTICE OF APPEAL

The applicant, Kevin J. Mercer, hereby appeals from the order of the Circuit Court, Hon. James R. Barber, presiding judge, entered on June 27, 2011. On August 2, 2011, Appellant received written notice that his Motion to Alter or Amend the Judgment was denied without oral argument.



EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
P.O. Box 11311
Columbia, SC 29211
(803) 765-1044
Counsel for Petitioner

August 8, 2011

RECEIVED

AUG - 8 2011

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 09-CP-32-5465

Kevin J. Mercer, SK6021

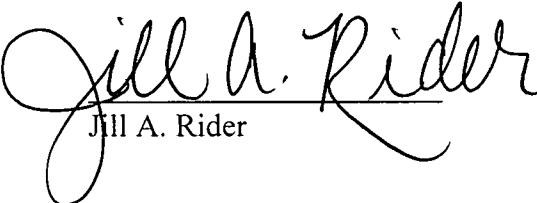
v.

State of South Carolina

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Notice of Appeal, was served by first class United States mail, postage prepaid, this 8th day of August, 2011, upon the following:

Alphonso Simon, Jr.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill A. Rider

RECEIVED

AUG - 8 2011

S.C. Supreme Court

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2009CP3205465

Kevin Mercer

vs.

State of South Carolina

Plaintiff

Defendant

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☐ See attached order;☐ Statement of Judgment by the Court:

Applicant's and State's Motions to Alter or Amend Judgment are denied without oral argument.

Dated at Columbia, South Carolina, this 29 day of July, 2011.James R. Earl
PRESIDING JUDGEThis judgment was entered on the 11/1 day of 11/1, 2011, and a copy mailed first class this 21st day of July, 2011, to attorneys of record or to parties (when appearing pro se) as follows:Emily Paavola
Jason Peavy

ATTORNEY(S) FOR THE PLAINTIFF(S)

Alphonso Simon

ATTORNEY(S) FOR THE DEFENDANT(S)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	
	)	
Kevin Mercer, #6021,	)	C/A No. 2009-CP-32-5465
	)	
Applicant,	)	
	)	ORDER GRANTING POST-
v.	)	CONVICTION RELIEF
	)	
The State of South Carolina,	)	
	)	(Capital Case)
	)	
Respondent.	)	
	)	

This matter is before this Court on the application for post-conviction relief ("APCR") filed by Kevin Mercer ("Applicant"), who was convicted of murder, armed robbery, possession of a firearm while in the commission of a violent crime, and criminal conspiracy.

Procedural History

During the February 2003 term of the Lexington County Court of General Sessions, the Lexington County Grand Jury indicted Applicant, Kevin Mercer, for murder, armed robbery, possession of a firearm while in the commission of a violent crime, and criminal conspiracy (2003-GS-32-409). (R. 2729-36). The state gave notice of intent to seek the death penalty, and served notice of evidence in aggravation.

The trial judge in this case was the Honorable John Few, Circuit Court Judge. Applicant was represented at the trial level by Cameron B. Littlejohn, Jr., Esquire, and Melissa J. Kimbrough, Esquire. Eleventh Circuit Solicitor Donald V. Myers, Esquire, Assistant Solicitor S. Rick Hubbard, III, Esquire, Assistant Solicitor D. Shawn Graham,

Esquire, and Assistant Solicitor Marion Moses, Esquire prosecuted the case for the State.

Jury selection took place from April 10-13, 2006. Trial began before Judge Few and a jury on April 17, 2006, and on April 19, 2006, Applicant's jury convicted him of all charges. (R. 1708-09).

Applicant exercised his right to the 24-hour cooling-off period in subsection ~~16-3-~~ 20(B) of the Code of Laws for South Carolina. The sentencing phase of his trial began on April 20, 2006. Judge Few submitted the following aggravating factor to the jury:

Murder was committed while in the commission of robbery while armed with a deadly weapon.

(R. 2413). The following mitigating factors were submitted to the jury:

- (1) The murder was committed while the Defendant was under the influence of mental or emotional disturbance.
- (2) The capacity of the Defendant to appreciate the criminality of his conduct was substantially impaired.
- (3) The age or mentality of the Defendant at the time of the crime.

(R. 2416-17).

On April 22, 2006, Applicant's jury found the aggravating factor and recommended a sentence of death. (R. 2431-34). Judge Few then sentenced Applicant to death for murder, thirty (30) years for armed robbery consecutive to the

sentence Applicant was serving for ABIK,¹ and five (5) years consecutive for possession of a weapon. (R. 2434-35).

A timely Notice of Appeal was filed and served with the South Carolina Supreme Court on April 24, 2006. On appeal, Applicant was represented by Robert M. Dudek, Deputy Chief Attorney for Capital Appeals with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, and Melissa Jane Reed Kimbrough, Esquire. By Order of the South Carolina Supreme Court filed July 10, 2006, Applicant's case was remanded back to the Honorable John C. Few, Circuit Court Judge, to hear Applicant's motion for a new trial based on after discovered evidence. In an Order filed September 26, 2006, Judge Few denied the Motion for a New Trial Based on After-Discovered Evidence. A timely Notice of Appeal was filed on Applicant's behalf on October 4, 2006. On June 26, 2008, Dudek and Kimbrough filed with the state supreme court the Final Brief of Appellant, in which they asserted the following issues on behalf of Applicant:

(1) The court erred by refusing to authorize funds so that an expert could analyze Thompson's gloves, which were found on him minutes after the murder, for gunshot residue. If Thompson's gloves were positive for gunshot residue, where it was known appellant's hands did not test positive for the existence of gunshot residue, there was a stronger likelihood the outcome of the guilt or penalty phase would have been different during a future trial. Further, this testing was necessary to an informed resolution of the new trial motion given the after-discovered evidence of Thompson's confession.

(2) The court erred by excluding the expert opinion of neurologist Dr. John Steedman that appellant suffered from a specific brain abnormality since

¹ Applicant had previously been convicted of assault and battery with intent to kill on March 13, 2006.

Dr. Steedman's opinion that the abnormality might affect appellant's behavior was very probative of his penalty phase mitigation, and the court erred by excluding this evidence under Rule 403, SCRE.

(3) The court erred by excluding the expert testimony of Dr. John Steedman that disorders such as post-traumatic stress disorder and brain impairments can cause poor judgment, paranoia, and other negative consequences. Dr. Steedman was qualified by his experience as a neurologist to give this opinion, he was board certified in psychiatry, and the state's objection that this was psychiatric testimony went to the weight and not the admissibility of the expert's opinion.

(4) Juror Kyzer was a Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985) qualified juror. The court committed reversible error by excusing this qualified juror for cause.

(5) The court erred by refusing to grant appellant a new trial based on after-discovered evidence where co-defendant Marcus Thompson's cellmate, Kevin Fuller, testified that Thompson bragged to him that he was the one who killed the decedent, and bragged that appellant received the death penalty for his crime. Fuller's testimony probably would have changed the result of the trial. This is especially true in regard to the penalty phase since appellant only had to convince one juror not to vote for the death penalty to change the result of the penalty phase.

(6) The court erred by excluding the testimony of David Farrell that co-defendant Thompson was charged as only an accessory after the fact and that he was released on bond since this evidence was relevant to appellant's defense that the state failed to investigate Thompson and fully ignored his role in the crime. Further, the court erroneously excluded this evidence as inadmissible evidence of third-party guilt.

The State, through Senior Assistant Attorney General S. Creighton Waters, Esquire, filed its Final Brief of Respondent on June 24, 2008. Applicant, through Mr. Dudek and Ms. Kimbrough, filed his Final Reply Brief of Appellant on June 26, 2008.

Oral argument in the case was held before the state supreme court on October 7, 2008. The South Carolina Supreme Court issued an opinion affirming the convictions and death sentence on January 12, 2009. State v. Mercer, 381 S.C. 149, 672 S.E.2d

556 (2009). Appellate counsel for Applicant filed a Petition for Rehearing on January 27, 2009. The petition for rehearing was denied by the South Carolina Supreme Court on February 19, 2009. The Remittitur was also issued on February 19, 2009.

On March 18, 2009, the South Carolina Supreme Court granted a stay of execution so that Applicant could pursue certiorari review before the United States Supreme Court. Applicant, through Mr. Dudek, filed a Petition for Writ of Certiorari with the United State Supreme Court dated May 20, 2009. The State, through Assistant Attorney General Waters, filed its Brief in Opposition to the Petition for Writ of Certiorari on June 10, 2009. The United States Supreme Court denied the petition for writ of certiorari by order dated October 5, 2009.

Applicant filed a second Petition for Stay of Execution. The State filed a letter in response to the Petition for Stay of Execution on October 15, 2009. By Order filed November 4, 2009, the Supreme Court of South Carolina granted Applicant's Petition for Stay of Execution. In the Order, the South Carolina Supreme Court appointed the Honorable James R. Barber, III, Circuit Court Judge, to hear this post-conviction relief action. An appointment of counsel hearing was held by this Court on November 24, 2009. Applicant was present, and he was represented at the hearing by Robert M. Dudek, Deputy Chief Attorney for Capital Appeals with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, and Elizabeth Franklin-Best, Assistant Appellate Defender with the Commission on Indigent Defense, Division of Appellate Defense. At the hearing, the State was represented by Senior Assistant Attorney General S. Creighton Waters and Assistant Attorney General Alphonso Simon,

Jr. Applicant, through Mr. Dudek, filed his initial Application for Post-Conviction Relief on December 4, 2009. By Order of this Court filed December 9, 2009, Emily C. Paavola, Esquire, and Jason Paul Peavy, Esquire, were appointed as counsel for Applicant.

Applicant then filed the instant Application for Post-Conviction Relief ("APCR") in January of 2010. ~~Following~~ a number of pretrial proceedings and motions, Applicant eventually filed his Third Amended Application for Post-Conviction Relief, which was the subject of the evidentiary hearing in this case that took place on January 31-February 1, 2011, and March 18, 2011. Applicant was present at all hearings and represented by Emily Paavola, Esquire, and Jason Peavy, Esquire. The State was represented by Assistant Attorney General Alphonso Simon and Senior Assistant Attorney General Melody Brown. Both sides called witnesses and introduced exhibits.

This Court has heard the testimony and reviewed the record and now rules as follows.

Grounds for Relief

As will be seen, almost all of Applicant's grounds for relief are not sufficient for relief. Pursuant to the familiar doctrine in Strickland v. Washington, Applicant must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. 466 U.S. 668 (1984). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Strickland, 466 U.S. at 689; Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000).

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598 (4th Cir. 1996). The Court should “decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial.” Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996). The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

In addition to deficient performance, Applicant must also establish prejudice by showing “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. 668, 694 (1984). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. Id. at 693. “The Petitioner bears the ‘highly demanding’ and ‘heavy burden’ in establishing actual prejudice. Williams v. Taylor, 120 S.Ct. 1495, 1513-14 (2000).

A PCR Applicant has the burden of proving his claims for relief by a preponderance of the evidence. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992).

Ground A: Ineffective Assistance of Counsel During the Guilt Phase

Allegation #1: Trial Counsel was Ineffective in Not Impeaching Terry Brown, with evidence of personal bias and animosity against Applicant due to a physical altercation that Brown and Applicant had been involved in prior to Brown's offer to testify on behalf of the State.

Ground 10(a)(1) of Applicant's APCR is denied. Applicant failed to show that counsel was ineffective. Counsel's testimony indicates his decision not to impeach Terry Brown using the prior confrontation between Applicant and Brown was a reasonable tactical decision. Further, Applicant cannot establish that counsel was deficient. Finally, Applicant failed to establish that he was prejudiced. As a result, this Court denies relief upon this claim.

In Ground 10(a)(1), Applicant asserts trial counsel should have impeached Terry Brown with evidence that Brown had a personal bias against Applicant. This bias stemmed from a prior physical altercation between Brown and Applicant while both were housed at the Lexington County Detention Center. That confrontation led to Applicant's conviction for Assault and Battery with Intent to Kill.

Terry Brown was one of Applicant's cell mates at the Lexington County Detention Center. (R. 1543). During the guilt phase of Petitioner's trial, Brown testified that while at the Lexington County Detention Center, Applicant told him about the murder. According to Brown, Mercer told him that on the night of the murder he went with another guy looking for a truck. Mercer and the other guy drove around. They later parked in a parking lot in an apartment complex. When the person with the truck (i.e. the victim, Tracy Davis) arrived, Mercer and the other guy approached the victim and asked for the keys. (R. 1544). Mercer told Brown that the victim gave him the keys to the truck, and Mercer told the guy to get down on his knees. Mercer stated the other guy got into the passenger's side of the truck. Shortly thereafter, Mercer turned around and shot the victim in the head and then got into the truck. (R. 1544, 1546).

Brown noted that Mercer indicated he drove either a Bonneville or a Cadillac to the apartment complex. (R. 1545). Brown also indicated that Applicant stated he was the only one with a weapon at the scene. (R. 1545). Brown testified that Applicant told him they were heading to Atlanta for "Freak Neak," a large weekend party for high school and college students. (R. 1546). Brown also indicated Applicant told him that he did not make it to Atlanta because of a flat tire. (R. 1546-47). According to Brown, Applicant asserted the police stopped him shortly after the flat tire. (R. 1547).

During cross examination, defense counsel asked Brown about his prior convictions. (R. 1550-51). Brown testified during cross examination that the conversation he had with Applicant occurred in December 2003. (R. 1551). Brown admitted he did not report the conversation to one of the corrections officers or anyone else. Further, Brown admitted he did not take any notes about the conversation at the time. He agreed that it was not until February 2006 that he told an investigator about the conversation. He testified that he did not report the conversation until someone asked him about it. (R. 1554). Brown noted that his testimony was that Applicant made the victim kneel, and that Applicant shot the victim while he was on his knees. (R. 1554). Brown also agreed that Applicant indicated he had a flat tire that evening. (R. 1554). Brown also acknowledged he had talked with other inmates about other people's cases. (R. 1555).

At the PCR hearing, Cam Littlejohn testified that he was aware of the past animosity between Applicant and Brown. (March 18, 2011 Tr. pg. 25). Littlejohn further testified that he did not ask Brown about the prior animosity him, because

I knew the version we would get from Mr. Brown would be what he testified to as to Kevin assaulting which we didn't want that to come out in front of the jury. We realized that Kevin in all likelihood would not testify, so he was not a position to refute it. So, you had to make kind of a trial decision as to whether the -- whether bringing that out, you know, outweighed not bringing it out.

(Tr. 25-6). Counsel noted that they had determined it was better to not have that information be revealed to the jury during the guilt phase of Applicant's trial. (Tr. 26).

"In hindsight, there are a few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would past muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980). Here, counsel vigorously cross-examined Brown. Further, the record reflects that counsel had a clear plan for his cross-examination. Counsel was able to establish that Brown's version of Applicant's story did not match the evidence of the crime. Counsel also impeached Brown using his prior convictions. Counsel established Brown made no effort to report his conversation with Applicant in a timely fashion, and that Brown had no notes for a conversation that occurred two years prior to his testimony at trial.

In all, this Court finds Applicant has failed to establish that counsel was deficient in his cross-examination of Terry Brown in the guilt phase of Applicant's trial. This Court finds the testimony of counsel on this issue to be credible, and affords counsel's testimony great weight. Trial counsel's decision not to attempt to impeach Brown by asking about the past physical encounter between him and Applicant was clearly the

result of reasonable trial strategy. Further, Applicant has not established that he was prejudiced by counsel's purported failures in cross-examination. As a result, this claim for relief is denied.

Allegation #2: Ineffective assistance of counsel for failing to move pre-trial for gunshot residue testing to be conducted on gloves found in possession of Marcus Thompson

____ Applicant's claim for relief in Ground 10(a)(2) is also denied. Counsel's decision not to subject the co-defendant's gloves to gunshot residue testing was the result of a reasonable strategic decision on the part of trial counsel.

At trial, Dennis Stazer, the officer who stopped Applicant and his co-defendant on the highway, testified that when he pulled Applicant's co-defendant, Marcus Thompson, out of the car, gloves and a bag of shells fell out of Thompson's pants' leg. (R. 1392). During cross, Stazer indicated the glove was black knit. (R. 1403). He turned it into evidence. (R. 1407). Stazer did not find any other gloves on Thompson during the patdown. (R. 1407).

Jennifer Stoner, the SLED analyst who analyzed the gunshot residue tests conducted on Applicant and Thompson testified that she did not receive any gloves for testing. (R. 1537-38). Jeffrey Hollifield, the defense expert on gunshot residue analysis, testified cloth gloves can be tested for gunshot residue. (R. 1624). Candy Kyzer, an evidence custodian, testified that gloves were retrieved from Marcus Thompson's pants after he was booked at the Lexington County Detention Center. (R. 1627-30). After arguments regarding the relevance of the admission of the gloves, the

defense entered the gloves retrieved during the investigation into evidence as Defense Exhibit 4. (R. 1631-32).

During closing arguments, Mr. Littlejohn argued the State could not establish that Applicant was the one who pulled the trigger because they did not analyze the gloves found on Marcus Thompson. (R. 1677, 1678, 1679-81).

At the motion for new trial hearing, counsel requested the gloves be tested. Defense counsel noted that they were requesting permission to have the gloves of Applicant's co-defendant, Marcus Thompson, tested for gunshot residue. (R. p. 2686). Counsel presented testimony from Kevin Fuller, a former cell mate of Mr. Thompson who claimed that Thompson admitted to shooting and killing Sgt. Davis. According to Fuller's testimony, Thompson indicated that he and Applicant had been shooting a gun all day. (R. p. 2629). Further, Fuller stated that Thompson admitted to shooting Davis behind the ear, and Thompson bragged that not getting caught because no one tested the inside of the gloves. (R. 2630). Fuller noted that Thompson had indicated he had been wearing the gloves turned inside outwards all day. (R. 2634).

Marcus Thompson also testified at the hearing. He testified that he did not participate in the murder. (R. 2605). He also stated that he did not tell Fuller that he shot Sgt. Davis, or that he was wearing knit gloves turned inside out when he killed Sgt. Davis. (R. 2607). Thompson admitted to handling the gun after the shooting. (R. 2612). Thompson noted that he was wearing gloves when he picked up the gun because he did not want to leave his fingerprints on the gun. (R. 2612).

The trial court denied defense counsel's request for testing the gloves for gunshot residue. (R. 2726).

At the evidentiary hearing, Cam Littlejohn testified that they did not really consider having the gloves tested for gunshot residue. He noted the State had not tested the gloves. (Tr. 26). "That was part of our argument, the lack of evidence that pointed to Kevin Mercer. And that was a shining example of evidence that the state did not pursue and did not develop, and left a hole in the case." (Tr. 26). He further noted they used the lack of testing by the State to Applicant's advantage. (Tr. 26-7). Littlejohn also indicated that they did not know what would show up on the gloves. (Tr. 27).

Agent Jennifer Stoner of the State Law Enforcement Division ("SLED") also testified. She analyzed the gloves in question for gunshot residue. No gunshot residue was found on any of the gloves submitted for testing. State's Exhibit 13.

In her deposition, Lisa Armstrong testified that the defense did not have the gloves tested because they did not want to risk limiting their ability to argue the gloves could have gunshot residue on them by testing them. (Depo. 92). They determined that they were better off not having the gloves tested. (Depo. 93). She also acknowledged that at trial, they argued the State could not prove its case because the State had not tested the gloves. Id. Armstrong indicated they could not have made that argument had they tested the gloves and no gunshot residue was found on the gloves because that would have constituted a fraud upon the court. (Depo. 93-4). That was

not a concern when they learned about the allegation that the Thompson may have had the gloves on inside out when he handled the gun. (Depo. 92, 94).

— This court finds the testimony of trial counsel on the issue of the gunshot residue testing credible, and affords it great weight. This court further finds that trial counsel's testimony clearly reflects the decision not to have the gloves found on Applicant's co-defendant was reflective of reasonable trial strategy. Counsel clearly did not request the gloves be tested before trial because it allowed them to safely argue the State did not meet its burden of proof by not having the gloves tested. This Court finds this strategic decision was reasonable. Thus, Applicant is not entitled to relief upon this claim. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision cannot be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy); Smith v. Stewart, 140 F.3d 1263, 1272 (9th Cir. 1998) (rejecting petitioner's claim that court's refusal to grant continuance to allow for processing of a neutron activation test violated due process by emphasizing, among other things, that "the test could have sunk [petitioner's] defense that he did not commit the murder"); Grisby v. Blodgett, 130 F.3d 365, 373 (9th Cir. 1997) (in finding no prejudice in counsel's failure to test blood found at

crime scene, noting that "it was plausible that, having considered the matter, defense counsel made a strategic decision not to pursue this line of evidence because they feared that [petitioner's] blood would be found").

The reasonableness of trial counsel's strategy is buttressed by the fact that upon testing of the gloves, no gunshot residue was found. Thus, Petitioner also failed to establish he was prejudiced by counsel not having the gloves tested for gunshot residue. This claim for relief is denied.

Allegation #3: Ineffective assistance of counsel for not securing the assistance and testimony of an expert in eyewitness identification.

Ground 10(a)(3) is also denied. Applicant did not establish that trial counsel was ineffective in not presenting an expert witness in eyewitness identification.

During the guilt phase of Applicant's trial, the victim's roommate, Clifton Magwood, testified that shortly before the shooting, he heard sounds of a disturbance or argument outside, and he thought he heard the victim's voice. (R. 1333). That led Magwood to look outside through his bedroom window. (R. 1333). Magwood testified:

I seen a -- my roommate as he looked like he was being taken against his will to the back of the vehicle by a male, heavy set, anywhere from 5'11" to 6 feet tall, broad shoulders, had on a dark outfit, could be jean or denim or some type of dark outfit with a dark hat. He had his hand up, what appeared to be a weapon to his hand, walking the roommate to the back of the vehicle against his will.

(R. 1334). He further described the person he saw through his window as being pretty large, anywhere from 5'11" and 6'2" tall, and dark complexion. (R. 1337). Magwood indicated the man was between 215 and 225 pounds. The man was also wearing dark, loose fitting clothing, maybe some form of denim or jeans. (R. 1337). Magwood also

noted the man was wearing a dark baseball cap. (R. 1338). During cross-examination, Mr. Littlejohn extensively questioned Magwood about the circumstances around his viewing of the confrontation between the victim and his assailant. (R. 1345-52, 1355).

At the evidentiary hearing, Mr. Littlejohn testified he did not see a reason to call an eyewitness identification expert. (Tr. 16). He noted that since there was not a facial identification, he did not think it would have done the defense any good to call an eyewitness identification expert. (Tr. 16, 27).

Ms. Armstrong testified at her deposition that she could not think of a situation where she had hired an eyewitness identification expert to testify when the defendant was not specifically identified. (Depo. 88). Armstrong testified that she and Mr. Littlejohn never discussed hiring an eyewitness identification expert. (Depo. 30-1). She noted that she may have thought at the time that this was not a case for one, but she could not recall any specific conversations about the matter. (Depo. 31).

Applicant also presented the testimony of Dr. Lori Van Wallendael, a psychologist who focuses on memory and eyewitness identification. Van Wallendael testified there were a number of variables that should be used in assisting in the evaluation of an eyewitness identification. Those included how long the witness had to view, the lighting, the stress level of the witness, whether the witness was focused on a weapon, and whether there were other distractions present. She noted that stress was a very important variable. She also testified there is a misperception that police officers and members of the military are better at making eyewitness identifications because of their training. Van Wallendael testified there were several factors at play in the

"identification" made by the victim's roommate in Applicant's case. First, she maintained the description could have been more accurate if Magwood was under less stress. She noted there was no mention of seeing a gun in Magwood's statement, but the presence of a weapon was implied. Van Wallendael also noted that a sense of heightened awareness does not necessarily translate into more accurate identification. Van Wallendael also indicated that the ~~lighting conditions can influence one's~~ visual perceptions. She remarked that the lighting conditions probably played a role in the accuracy of Magwood's "identification" in this case. Van Wallendael did acknowledge that this was not a case of cross-racial identification, and there was no line up in this case. She also acknowledged that the description of the perpetrator given by Magwood was consistent with the photograph taken of Applicant on the night of the murder. She also noted that the initial description given by an eyewitness is the purest reflection of what the witness actually saw.

This Court finds that Applicant has not met its burden of establishing ineffective assistance of counsel upon this claim. Counsel was not deficient in not obtaining the services of an eyewitness identification expert. In other cases, this Court has seen how an eyewitness expert can serve as a useful tool for a jury in considering eyewitness identification issues. This Court believes this was not a case where it would have been of any assistance to a jury. There was no eyewitness identification presented at trial. Sgt. Magwood only gave a very general description of the person he saw accost his roommate in the apartment complex parking lot. He never specifically identified Applicant as the assailant. The description Magwood gave was consistent with the

clothing Applicant was wearing when he was arrested shortly after the shooting. In all, this Court finds trial counsel was not deficient in not presenting the testimony of an eyewitness identification expert. Further, this Court finds that Applicant was not prejudiced by counsel not presenting an eyewitness identification expert. Since this testimony would not have undermined the description provided by Magwood, it would not have led to a different result at trial. E.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1999). As a result, this claim for relief is denied and dismissed.

Ground B: Ineffective Assistance of Trial Counsel in the Sentencing Phase.

Allegation #1: Failure to Present Evidence that more than one perpetrator was at the scene.

This Court finds Applicant's claim in Ground 10(b)(1) is without merit. Applicant has not shown by a preponderance of the evidence that trial counsel was deficient in not presenting evidence that two individuals were at the scene. Further, Applicant has not established that he was prejudiced as a result.

In this ground, Applicant asserts that trial counsel should have presented testimony and evidence to support a finding that a second person was at the scene when the murder occurred. In support of this argument, Applicant introduced the coroner's incident report (Applicant's Exhibit 2); a 911 dispatch open incident report (Applicant's Exhibit 3); a statement of Neysa Williams (Sgt. Davis' girlfriend) (Applicant's Exhibit 4); a statement of Tracie L. Ondera (Applicant's Exhibit 5); a Lexington County Sheriff's Office Supplemental Incident Report (Applicant's Exhibit 6); a Lexington County Sheriff's Office news release (Applicant's Exhibit 7); and two investigative reports from the Lexington County Sheriff's Office (Applicant's Exhibits 8 and 9).

During the guilt phase of Applicant's trial, Deputy Stazer testified he recalled being informed there were two suspects involved in the carjacking. (R. 1382, 1384). When Applicant was arrested, Marcus Thompson, his co-defendant, was also arrested in the vehicle. (R. 1384-92). Also, Terry Brown, Applicant's former cell mate, testified that Applicant told him about the carjacking. Brown testified that Applicant and another male were involved in the carjacking, but Applicant was the one ~~with the gun.~~ (R. 1544-47).

This Court finds that Applicant has failed to establish that trial counsel was deficient in not presenting evidence of two perpetrators being at the scene when the murder occurred. First, Applicant has not presented admissible evidence that supports the allegation. The statement in the coroner's report would have been inadmissible hearsay. It further did not provide any underlying basis regarding from whom the coroner learned there may have been two at the scene when the shooting occurred. The 911 dispatch open incident report makes no mention of two perpetrators being at the scene of the crime. Neysa Williams' statement also would have been inadmissible hearsay. Ms. Williams did not testify at Applicant's trial or at the evidentiary hearing in this action. Williams was not at the scene when the crime occurred. Ondera's statement was similarly inadmissible hearsay. Further, Applicant did not indicate how any of the documentation from the Lexington County Sheriff's Office would have been admissible at Applicant's trial. Since Applicant has not established that the documents he asserts supported a finding that there were two perpetrators at the scene would have been admissible at trial, Applicant cannot establish counsel was deficient in this regard.

Further, this Court finds Applicant was not prejudiced by counsel not presenting these documents that purportedly support the notion that there were two perpetrators at the scene when the murder occurred. The jury heard testimony in the guilt phase that indicated Applicant was not the only perpetrator at the scene through the testimony of Deputy Stazer and Terry Brown. The testimony and evidence presented in the guilt phase was available ~~for the jury to consider~~ in the sentencing phase of Applicant's trial. Thus, this additional documentation would have been cumulative to testimony already in the record. As a result, this Court finds Applicant has not shown there was a reasonable probability the result at trial would have been different had counsel presented these documents. See Edwards v. State, Op. No. 26977 (S.C.Sup.Ct. filed May 23, 2011) (Shearouse Adv.Sh. No. 17 at 25); see also Jackson v. State, 329 S.C. 345, 351, 495 S.E.2d 768, 771 (1998) (denying claim of ineffective assistance of counsel where applicant did not show testimony would have provided additional information). This claim for relief is therefore denied.

Allegation #2: Failure to object to the State's improper cross examination of Dr. Steedman, and improper statements in closing arguments.

Applicant's claim in Ground 10(b)(2) is denied. In Ground 10(b)(2), Applicant contends trial counsel was ineffective in not objecting to portions of the cross examination of Dr. Steedman. At trial, Dr. Steedman was not allowed to testify regarding a specific finding he made regarding the SPECT scan done on Applicant. During Dr. Steedman's cross-examination, the State repeatedly noted in its questions that the radiologist's impression of the scan was that there was a questionable abnormality. (See R. 2307, 2309-10). During the closing arguments, the State again

referred to the findings in the SPECT scan as reflecting questionable abnormalities. (R. 2379-80). Applicant appears to assert that these questions and argument were improper in light of the trial court's limitation upon Dr. Steedman's testimony.

This claim is without merit. In addressing the admissibility of Dr. Steedman's testimony regarding the SPECT scan, the South Carolina Supreme Court found that the trial court abused its discretion in not admitting Dr. Steedman's testimony. Mercer, 381 S.C. 149, 160, 672 S.E.2d 556, 561 (2009). In reviewing Dr. Steedman's testimony on direct appeal, the South Carolina Supreme Court found that the trial court's error in not admitting the testimony was harmless.

When the entirety of the record is considered, the exclusion of Dr. Steedman's proffered testimony of an abnormality juxtaposed to the radiologist's notation of a "questionable abnormality" resulted in no prejudice to Mercer. Despite the erroneous ruling, a review of the record demonstrates that Dr. Steedman testified at length concerning Mercer's cognitive deficiencies. Dr. Steedman's unchallenged testimony included reference to the SPECT Scan results as "confirmatory" of Mercer's learning disorder. More to the point, the same evidence the State successfully and erroneously challenged-the SPECT Scan abnormality-was already in evidence without objection.

Another defense expert previously testified that the SPECT Scan revealed an abnormality. Dr. Donna Schwartz-Watts, a defense psychiatrist, testified that she "ordered what's called a SPECT Scan. And what a SPECT Scan is, this is one of the newer tests in medicine and it shows brain function.... But what it does, it's a ... picture of how your brain functions, and that test came back abnormal. There's a ... small area that's not normal on there...." Later, as Dr. Schwartz-Watts began to sum up her testimony, she again talked about the SPECT Scan. Referring to Mercer, she said that "it's already a bad brain in the sense that he's got a learning disability and ... we even know that on a SPECT Scan there's an abnormality." Thus, the very "SPECT Scan abnormality" testimony Mercer sought to admit through Dr. Steedman was presented to the jury without objection through Dr. Schwartz-Watts.

Mercer, 381 at 149, 161-2, 672 S.E.2d at 562-3. Further, in addressing Dr. Steedman's psychiatric testimony, the South Carolina Supreme Court found:

[t]he excluded evidence was presented to the jury through other witnesses, especially Dr. Schwartz-Watts, without objection. Even defense counsel acknowledged that the proffered psychiatric opinion testimony of Dr. Steedman "certainly ... mirrors [and] dove-tail[s]" with Dr. Schwartz-Watts. As a result, Mercer sustained no prejudice from the exclusion of this cumulative evidence. State v. Graham, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994) (noting ~~that a harmless error analysis~~ depends upon a host of factors, one of which is whether the excluded evidence was cumulative).

Id. at 163, 672 S.E.2d at 563.

The South Carolina Supreme Court reviewed the proffered testimony, and found that Dr. Steedman's proffered testimony regarding the results of his analysis of the SPECT scan was cumulative to Dr. Schwartz-Watts' testimony at trial. In light of the fact that Dr. Schwartz-Watts testified before Dr. Steedman, and the SPECT scan information was presented to the jury, the State's cross-examination of Dr. Steedman and the State's closing argument were not improper. The issues raised by the SPECT scan were in evidence. Thus, this case is clearly distinguishable from Tennard v. Dretke, 542 U.S. 274, 124 S. Ct. 2562 (2004), and Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, (U.S.S.C. 1986). As a result, Applicant has not shown that counsel was deficient in this regard. Furthermore, Applicant has not shown that he was prejudiced as a result of counsel not objecting to either the cross-examination or the closing argument. This claim is therefore denied and dismissed with prejudice.

Allegation #3

Sub-allegation (a): Trial counsel failed to uncover and present all available evidence of Applicant's mental retardation and/or low intellectual functioning and deficits in adaptive behavior prior to the age of eighteen.

Applicant's application for post-conviction relief is granted on this claim. This Court held an evidentiary hearing on January 31 to February 2, 2011, in Lexington County. At the hearing, the parties stipulated to the admission of the deposition of Ms. Lisa Armstrong, Esq., taken on January 3, 2011 (*Applicant's PCR Exhibit 11*), a number of exhibits from Ms. Armstrong's deposition (*Applicant's PCR Exhibits 1-10 and Respondent's PCR Exhibits 1-10*), and several affidavits (*Applicant's PCR Exhibit 12*). Subsequently, additional testimony was entered into the PCR record through the testimony of Mr. Cameron Littlejohn, Esq. on March 18, 2011.

Applicant bears the burden of proof as to all claims in the PCR Application. This Court has applied the preponderance of evidence test to the information presented. This Court has examined the evidence presented to determine which evidence is of greater weight – or more convincing. The degree of proof which this Court has applied in determining if Applicant has met his burden of proof is whether the evidence, when viewed as a whole, demonstrated the fact to be proved is more probably true than not. The burden of proof never shifted from the Applicant. After full consideration of the testimony, evidence and arguments by counsel, in light of the appropriate burden of proof, this Court grants relief on Ground 9(b) & 10(b)(3). Specifically, this Court finds that applicant's trial counsel were ineffective in failing to investigate and raise the issue of applicant's mental retardation at trial. Therefore, the Court hereby vacates

Applicant's death sentence and remands the case to the Lexington County Court of General Sessions for a new sentencing trial. This Court's findings of fact and conclusions of law regarding this claim are set forth in detail below.

I. LEGAL FRAMEWORK.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. U.S. CONST. AMEND. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). The United States Supreme Court has adopted a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and, (2) the applicant was prejudiced by the deficient performance. *Strickland*, 466 U.S. at 687; *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

Here, Applicant alleges that his trial counsel were ineffective for failing to investigate and raise the issue of his mental retardation at trial. In 2002, the United States Supreme Court ruled that the Eighth Amendment to the United States Constitution prohibits the execution of persons with mental retardation. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). The Eighth Amendment, in part, prohibits the government from inflicting cruel and unusual punishment. The United States Supreme

Court categorically excluded from execution mentally retarded persons and mandated such a categorical exemption as part of this nation's death penalty jurisprudence.²

In *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), the South Carolina Supreme Court held that the applicable definition of mental retardation is found in the current death penalty statute, which defines mental retardation as:

~~significantly~~ subaverage intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

Id. at 278-79, 588 S.E.2d at 605. Thus, the definition of mental retardation consists of three prongs: (1) subaverage intellectual functioning; (2) deficits in adaptive behavior; and, (3) a manifestation of these attributes before age eighteen.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A. APPLICANT'S TRIAL COUNSEL PROVIDED DEFICIENT PERFORMANCE.

Applicant was represented by Mr. Cameron Littlejohn and Ms. Melissa Armstrong (formerly Kimbrough) at trial. Both attorneys testified in these proceedings and they candidly admitted that they failed to: (a) obtain Applicant's special education records from the Philadelphia School System; (b) hire an expert in mental retardation; (c) otherwise investigate a mental retardation claim; and, (d) provide all available social history information to their own experts and to the Department of Disabilities and

² The Supreme Court held that "by definition, [mentally retarded persons] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* at 318.

Special Needs (DDSN).³ Trial counsel have further admitted that they had no strategic reason for this failure. Rather, it was simply a mistake.

Even if trial counsel had not admitted that their performance was deficient, it is also apparent from their actions before trial. Mr. Littlejohn was appointed to represent Applicant on or about February 9, 2004. Mr. Littlejohn's timesheets reflect that shortly after his appointment, he met with applicant's mother, Diane Mercer. ~~Through Ms. Mercer,~~ Mr. Littlejohn was or should have been aware that Applicant had lived the majority of his life in Philadelphia, Pennsylvania, and that he had previously been diagnosed by the Philadelphia school system as mentally retarded. Despite this knowledge, no one on the defense team even requested Applicant's Philadelphia school records until nearly two years later, and less than three months before Applicant's capital trial began. Ms. Armstrong was substituted as Mr. Littlejohn's co-counsel, in place of Ms. Lisa McPherson, on January 13, 2006. *See Applicant's PCR Exhibit 11, Armstrong Deposition, at p.8.* Under Ms. Armstrong's direction, a defense team investigator requested Applicant's school records from the Philadelphia School System

³ The PCR Application includes a specific allegation that trial counsel failed to provide DDSN with all of the necessary information. This Court finds that this allegation is not a separate legal claim, but rather, a factual allegation that is included in Applicant's overall claim that trial counsel were ineffective in failing to thoroughly investigate and present evidence of his mental retardation. As stated herein, trial counsel have admitted that this factual allegation is true.

on January 20, 2006. *Id. at p.25.* Applicant's capital trial began on April 10, 2006. *Id. at p.11.*⁴

Although trial counsel did eventually obtain some school records from the Philadelphia School System, it was apparent from these records that there was additional information to be investigated. First, the Philadelphia school records clearly indicate that Applicant had ~~been tested and~~ placed in special education in the second grade. The records reference several occasions when Applicant was administered an intelligence quotient (IQ) test, but the scores and reports from those tests are conspicuously absent from the records. The absence of these scores should have caused counsel to seek out the records where the scores were documented, but counsel never made such a request. Second, although the Philadelphia school records indicate that Applicant was a special education student, they lack many legally required documents such as Individual Education Placement (IEP) plans and testing reports. This should have been even more obvious to counsel since they did obtain Applicant's special education records from the Richland County School System and those records do contain IEP reports and other similar documents from that school system. Finally, trial counsel also obtained a copy of Applicant's social security records. These records likewise indicated that he had been in special education, consistently received very low

⁴ Although trial counsel eventually did hire a social worker – Ms. Marti Loring – to help with trial preparations, trial counsel did not secure her services until very shortly before trial. In fact, Ms. Loring's time sheets reflect that she did not begin billing for work on the case until March 31, 2006 (approximately 10 days before the trial began). See *Respondent's PCR Exhibit 4*.

marks, and failed multiple grades. Thus, counsel should have been alerted to potential evidence of mental retardation.

It is not uncommon for special education records to be kept separately from regular school records. Ms. Cassandra Brown, the Special Education Secretary at Overbrook High School in Philadelphia, Pennsylvania explained in her affidavit that all ~~that~~ counsel would have had to do to get Applicant's special education records was request them from her office. See *Applicant's PCR Exhibit 12, Affidavit of Cassandra Brown*. Ms. Armstrong admitted that applicant's defense team simply failed to take that step:

Q: Did you request [applicant's] special education records from the Philadelphia School System?

A: No, I did not.

Q: Did anyone else on the team request his special education records from Philadelphia?

A: No. I've subsequently learned that you have to make a special request. That was not done.

Q: If you had obtained a copy of those records, would they be in your file?

A: Yes.

Q: And to your knowledge, are they in your file?

A: Nope, they are not.

Armstrong Deposition at p.26. Mr. Littlejohn testified that Ms. Armstrong was primarily responsible for preparing for the penalty phase of the trial and that he could not recall much about those preparations. He did, however, admit that he is aware that the

defense team failed to obtain Applicant's special education records and that trial counsel had no strategic reason for failing to get these records and pursue a mental retardation claim.

Trial counsel have further admitted that if they had obtained Applicant's special education records, they would have believed it important to provide them to any of their mental health experts. See *Armstrong Deposition at pp. 45-46*. They have also acknowledged that the trial court instructed the defense team to provide DDSN with any documents necessary to perform their evaluation. See *Record on Appeal at p.2444-45*. Despite this instruction, trial counsel failed to provide DDSN with applicant's social security records (which they did have) as well as applicant's special education records (which they failed to obtain). See *Armstrong Deposition at p. 43-46*. As a result, DDSN never conducted a mental retardation evaluation. See *Applicant's PCR Exhibit 10*. Finally, trial counsel have admitted that they never hired an expert in mental retardation and did not otherwise investigate the possibility of a mental retardation claim. See *Armstrong Deposition at p. 42*; see also, *Applicant's PCR Exhibit 12, Affidavit of Dr. Donna Schwart-Watts at ¶ 5* ("I am not an expert in mental retardation. I was not asked to evaluate Kevin Mercer to determine if he has mental retardation").

The United States Supreme Court and the South Carolina Supreme Court have repeatedly recognized that trial counsel has a duty to conduct an adequate investigation into a capital defendant's life and background, including but not limited to: medical history, educational history, and family and social history. See, e.g., *Sears v. Upton*, 130 S.Ct. 3259 (2010) (trial counsel's failure to discover evidence of low cognitive

functioning due to brain damage was constitutionally inadequate on its face); *Porter v. McCollum*, 130 S.Ct. 447 (2009) (defense counsel's failure to uncover and present evidence regarding defendant's mental health, family background or military service was deficient); *Wiggins v. Smith*, 539 U.S. 510 (2003) (although trial counsel obtained a pre-sentencing report and DSS records which revealed a tumultuous childhood and low IQ, they failed to investigate further, constituting deficient performance); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2009) (counsel's failure to adequately investigate and present mitigating evidence was deficient performance and analogous to *Wiggins*); *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006) (noting the holding in *Wiggins* and concluding defense counsel should have, among other things, investigated and presented evidence of defendant's troubled childhood and mental illness); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2005) (concluding case was sufficiently analogous to *Wiggins* where trial counsel failed to adequately investigate and present evidence of severe depression and failed to provide expert witnesses with crucial medical records).

Here, trial counsel have not attempted to articulate a strategic reason for their failure to investigate and present a mental retardation claim. Rightly so, since "strategic choices made by counsel after an incomplete investigation are reasonable only to the extent that reasonable professional judgment supports the limitation on the investigation." *Council*, 380 S.C. at 175, 670 S.E.2d at 354; see also *Strickland*, 466 U.S. at 609-91(same); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (rejecting any suggestion that a decision to focus on one potentially reasonable trial strategy was

"justified by a tactical decision" when "counsel did not fulfill their obligation to conduct a thorough investigation into the defendant's background"). This Court finds that trial counsel's failure to investigate and present evidence of Applicant's mental retardation was not reasonable; it flew in the face of prevailing professional norms and blatantly ignored evidence of low intellectual functioning and adaptive functioning deficits that clearly indicated a need for additional investigation.

B. APPLICANT WAS PREJUDICED BY TRIAL COUNSEL'S DEFICIENT PERFORMANCE.

This Court further finds that Applicant was prejudiced by trial counsel's deficient performance. Prejudice exists under *Strickland* if there is a "reasonable probability" that, but for trial counsel's deficient performance, the outcome of the applicant's trial would have been different. 466 U.S. at 694. Applicant alleges that he is mentally retarded and thus, had trial counsel investigated and presented this fact, he would have been deemed ineligible for the death penalty under *Atkins v. Virginia*, 436 U.S. 306 (2002), and *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). Applicant offered testimony from Dr. Brad Fisher, an expert in mental retardation, as well as testimony from Applicant's mother, father, ex-wife and high school football coach. Applicant also offered affidavits from two of his special education teachers and a former employer. Specifically, Applicant presented the following evidence relevant to his mental retardation claim.

1. SIGNIFICANT SUBAVERAGE INTELLECTUAL FUNCTIONING.

The first prong of a mental retardation diagnosis requires an individual to display subaverage intellectual functioning. A person's intellectual functioning is measured

primarily with intelligence quotient ("IQ") tests. IQ tests measure intelligence, which is defined as "a general mental ability. It includes reasoning, planning, solving problems, thinking abstractly, comprehending complex ideas, learning quickly, and learning from experience." INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS, 31 (American Association on Intellectual and Developmental Disabilities, 11th ed. 2010) [~~hereafter AAIDD MANUAL~~].

A person with mental retardation has an IQ score that is "approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations." *Id.* at 31. Most standardized IQ tests are normalized so that the average score is 100 with a standard deviation of 15. Therefore, an IQ score two standard deviations below the mean is approximately 70. However, the standard error of measurement (SEM) in IQ assessments is approximately 5 points, therefore, raising the operational definition of mental retardation to 75. *Id.* at 36; *see also*, American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41-42 (4th ed. text rev. 2000) (hereafter, DSM-IV-TR) ("it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior"). Thus, a person has significantly subaverage intellectual functioning if, after appropriate consideration of all relevant factors, his IQ is 75 or below.

Applicant's IQ was first evaluated with a clinically acceptable standardized test (a WISC-R) in 1986, during his second attempt at the second grade. *Fisher Report at pp.*

9-10; Applicant's PCR Exhibit 14, Special Education Records (hereafter "Special Ed. Records"). He was 8 years old. Applicant's full scale IQ was reported as a 73. Following this test, the Philadelphia School District placed Applicant in special education classes. The school district tested Applicant's IQ again on November 26, 1991 (again with the WISC-R), when he was fourteen years old and attending ninth grade. *Fisher Report at pp. 9-10.* Applicant's full scale IQ was a 70. Less than one month later, Applicant was evaluated again by Dr. Sol Barenbaum, a doctor commissioned by the Department of Social Security. *Fisher Report at pp. 9-10.* Dr. Barenbaum administered the same test that the school district had used *less than one month earlier* (the WISC-R) and obtained a full scale IQ of 74.⁵

In 1993, at age sixteen, Applicant moved to South Carolina where he continued high school. Upon entering his new school, his IQ was tested for a fourth time. This time, Applicant was given the WAIS-R, and the results of this test were completely

⁵ This IQ score was likely artificially inflated due to the practice effect because Applicant had taken the same exact test less than one month before. *Fisher Report at pp. 9-10.* Practice effect refers to gains in IQ scores on tests of intelligence that result from a person being retested on the same or similar test. See *AAIDD Manual at 38.* "For this reason, established clinical practice is to avoid administering the same intelligence test within the same year to the same individual because it will often lead to an overestimate of the examinee's true intelligence." *Id.* The average artificial increase on the full-scale IQ score due to practice effect is 5 points, although it can be as high as 15 points. See Kaufman, A.S., *Practice Effects*, 2 Encyclopedia of Human Intelligence, 828-833 (1994). The impact of practice effect has also been recognized by numerous courts. See, e.g., *Holladay v. Allen*, 555 F.3d 1346, 1357 (11th Cir. 2009) (crediting expert testimony that one of the petitioner's IQ scores was "probably artificially high because of practice effect," since the test was administered only eight months after he had taken the same test); *United States v. Davis*, 611 F.Supp.2d 472 (stating that the AAIDD Manual instructs clinicians to recognize the impact of practice effect).

inconsistent with the previous four IQ tests he had taken. The school records report a full scale IQ of 88. This score was a fourteen-point jump from Applicant's last IQ test less than two years prior. Dr. Brad Fisher, an expert in mental retardation, testified during the PCR hearing that there are a number of reasons to question the accuracy of this score.

First, the score is entirely ~~inconsistent with~~ the results that Applicant achieved both before and after this test. Moreover, the score is inconsistent with all of the information collected about Applicant's deficits in adaptive functioning. Dr. Fisher testified that it is important to consider all three prongs of the test as a whole. One cannot rule out the possibility of mental retardation simply because of a single score, or by analyzing a single prong of the test. As explained below, Dr. Fisher found (and additional PCR evidence supports) that Applicant suffers from significant deficits in his adaptive functioning. This finding on prong two is more consistent with all of the other historical IQ scores (apart from this single score). Thus, the evidence of Applicant's deficits in adaptive functioning also suggests that this single score is unreliable.

Second, as Dr. Fisher explained, Applicant took the WAIS-R for the first time in 1993. Prior to this test, his IQ had been tested using the WISC-R, which was designed for children under the age of 16. *Fisher Report at p. 10*. Research has confirmed that individuals tested on the WISC-R experienced an artificial ten-point inflation in their IQ score when they were tested for the first time using the WAIS-R. *Id. at pp. 10 and 12*. After this phenomenon was documented, the most recent version of the adult WAIS, the WAIS-III, was designed to correct this issue. *Id. at p. 10*. Because this problem had not

been corrected at the time of Applicant's 1993 test, it is possible that his score was inflated by ten points simply because of the test he was given.

Third, Dr. Fisher also attempted to understand Applicant's 1993 test score by readministering several portions of the exact same test to determine if the results were the same. *Fisher Report at p. 10.* They were not. Dr. Fisher's results on the subsections of the WAIS-R that he administered were consistently within the range of Applicant's other IQ scores, all of which demonstrated subaverage intellectual functioning. *Id. at p. 11.* Based on these results, the research regarding the scoring discrepancies between the WISC-R and the WAIS-R, and the 1993 test score's complete and inexplicable incongruence with Applicant's other four IQ scores obtained throughout his life, Dr. Fisher concluded that this test score should be given little to no weight in determining whether Applicant is a person with mental retardation. *Id. at p. 10.*

Finally, Applicant was administered a fifth IQ test prior to his PCR hearing (the Stanford Binet V). This test, administered and scored by Dr. Daniel Grant, resulted in a full scale IQ of 71, and demonstrates that Applicant has consistently scored within the range of subaverage intellectual functioning. In fact, Applicant's four reliable IQ scores have varied by only 4 points over the past 25 years. All except one of these tests were administered well before Applicant was charged with a capital crime. Applicant asserts that the context of these tests and their great consistency over time establish that he has significantly subaverage intellectual functioning.

2. DEFICITS IN ADAPTIVE BEHAVIOR.

The second requirement for a diagnosis of mental retardation looks at the *expression* of intellectual deficits in the life of an individual. “Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives.” AAIDD Manual at 43.

South Carolina’s definition of mental ~~retardation~~ ~~refers~~ without elaboration to “deficits in adaptive behavior.” S.C. Code Ann. § 16-3-20(C)(b)(10)(2003). Similarly, the *Atkins* opinion refers to “significant limitations in adaptive skills such as communication, self-care, and self-direction.” *Atkins*, 546 U.S. at 318. A footnote in *Atkins* approvingly quotes two definitions, the first of which was adopted by the American Association on Mental Retardation (AAMR) in 1992. *Id.* at 308 n.3. The 1992 AAMR definition requires limitations in two (2) or more of the following ten (10) applicable skill areas:

- Communication
- Self-care
- Home living
- Social skills
- Community use
- Self-direction
- Health and safety
- Functional academics
- Leisure
- Work

AAMR Manual (10th ed.) at 22. The American Psychiatric Association’s phrasing of the adaptive functioning requirement, also quoted by the United States Supreme Court, is virtually identical. See DSM-IV-TR at 41. More recently, the AAMR has updated both the name of their organization and their definition of adaptive functioning. The current definition contains three general categories of adaptive functioning – conceptual, social, and practical skills – into which the prior ten (10) fall, and requires significant limitations

in one of these three areas. INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS, 5 (AAIDD, 11th ed. 2010). All three definitions, the AAMR, the DSM-IV and the AAIDD, are designed to measure how an individual with significantly subaverage intelligence functions and can be used interchangeably to determine whether the individual in question suffers from deficits in adaptive behavior.

~~To determine whether~~ Applicant suffers from deficits in adaptive behavior Dr. Fisher reviewed Applicant's social history records, including school records, medical records, social security records, and special education records. Dr. Fisher also interviewed Applicant's mother and father, his former wife, a middle school teacher, his high school football coach, and Applicant himself. Dr. Fisher also consulted with colleagues, reviewed literature in his field, and reviewed relevant affidavits entered as Applicant's PCR Exhibit Number 12.⁶ Dr. Fisher testified extensively about Applicant's adaptive behavior and his deficits in many areas, including functional academics, home-living, self direction, and work. Ultimately, Dr. Fisher concluded that Applicant has significant limitations in all three areas of adaptive functioning identified in the AAIDD definition of mental retardation, and also meets prong two under either the AAMR or the DSM-IV criteria as well as South Carolina's statutory definition. Dr. Fisher's testimony regarding adaptive behavior was corroborated by testimony from Applicant's mother, his father, his ex-wife, his high school football coach, and affidavits from his former

⁶ This includes the Affidavit of Ms. Kathryn Cook (one of Applicant's special education teachers); the Affidavit of Ms. Linda McCombs (another special education teacher); and Dr. Albert Humphrey (a medical doctor and distant relative of Applicant's who hired him to do odd jobs).

teachers and one employer. The following chart summarizes some of the most significant evidence offered at the PCR hearing regarding Applicant's deficits in each of these areas.

Skill Area	Summary of Deficit
CONCEPTUAL	• Applicant failed Kindergarten. • Applicant failed the second grade. • After Applicant repeated second grade, he was placed in special education. He remained in special education for the rest of his schooling. • During his first year in special education, Applicant took the 1988 Tests of Essential Learning Skills: He scored a 22.0% in reading. The national average was 77.3%. He scored a 29.2% in math. The national average was 79.5%. • In seventh grade, Applicant functioned at the second grade level, and had been tested as much as 9 years below his grade level on other tests. • In eighth grade, Applicant was administered a citywide achievement test. He tested at a fourth grade level for reading and a third grade level for math. • Applicant failed ninth grade. • During his second attempt at ninth grade, Applicant failed three out of his seven classes. • In ninth grade an evaluator noted that Applicant performed "well within retarded expectation." • When Applicant enrolled in tenth grade at Columbia High School, his reading skills and written expression were described as far below his grade level. • In eleventh grade, Applicant's IEP included testing modifications which allowed for him to have his exams administered orally due to his reading difficulties. • Applicant's grades were very poor throughout his entire school history. • In 1996, Applicant received a special education certificate from Columbia High School. He was ranked 180 in a class on 181 students, and his GPA was a .956. • During a DDSN Mental Status Exam, conducted after his arrest, Applicant was asked questions to test his Orientation to Date. He did not know what month it was. • During a DDSN Mental Status Exam, Applicant could not tell the evaluator what time it was on an analog watch. • DDSN evaluated Applicant through an oral examination because of his limitations in reading and writing. • According to the DDSN report, Applicant could not remember anything after ten minutes. He could not perform some basic

	money calculations. He believed that there are eight dimes in a dollar. • According to a report from a pre-trial evaluation by the Department of Mental Health, Applicant could not read (much less understand) "criminal" and "responsibility." • Applicant's technical school experience included temporary class attendance for trucking and electrical work. His wife had to help him with all of his homework, but he often grew frustrated and was not able to complete the work. • Applicant's mother had to repeat things to him, often holding his head to face hers to make sure he heard. This was even for simple instructions that the other children had understood easily (e.g., making up a bed). • As a child, Applicant had difficulty learning the alphabet and took several years to learn basic color differentiation. His mother tried "hooked on phonics" to address his deficits but this didn't work either.
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SOCIAL	• School records document that at age 8, "Kevin is starting to perceive that he is experiencing difficulty with his academic work," and that "as a result, he is starting to develop some feelings of inadequacy and question his capabilities at times. This is primarily due to the comparisons he makes between himself and the other members of the class." • Social Security Records report that Applicant's mother stated: "When I tell him about the things I want him to do or give him instructions, I have to look at him directly and tell him what I want as well as ~~get him to repeat~~ the instructions I have given him before I am sure he understands. If I were to tell him these same things in a casual manner without forcing he many times won't understand me. If I am relating basic instructions like clean the kitchen, I have to break each individual task involved". • School records and social security records indicate that Applicant was shy and subject to a lot of teasing as a child by his peers. • Special education records indicate that Applicant had very limited self control. • In seventh grade, Applicant's teacher observed that his attention span was extremely short. • Applicant's teachers and family members consistently reported that he tried hard to appear normal and was teased by others because he was slow. He never stood up for himself. He had a generally poor sense of self-direction. He pretended to know things so that other would not know that he had difficulty understanding. • Applicant's wife, mother and football coach all described him as very gullible. He never had the judgment to know that people were taking advantage of him. He was a complete follower, and thought everyone was his friend. • Applicant's father and football coach explained that he was unable to understand the complexities of most sports, which led to his assignment as waterboy (basketball) and defensive blocker (football). • On the football team, Applicant was placed as a defensive blocker, whose only assignment was to block a space and keep anyone from coming through, because he could not understand other positions. Applicant's football coach he had to physically put his hands on Applicant's shoulders and move him to the spot and point in the direction of where the opposition would be coming.
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	• The other players on Applicant's football team called him "brain lock."
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PRACTICAL	• Applicant has never lived independently for any significant period of time. • In 11th grade, Applicant's adapted goals on his IEP included acquiring basic life skills such as math for daily living and using public transportation. • While he did obtain a driver's license, Applicant did so only after taking the oral exam and it appears that he ultimately lost it through suspensions and revocations on at least four occasions. • Applicant was only ever able to obtain non-skilled labor employment. Even then, he had difficulty maintaining jobs and was frequently fired or quit out of frustration when he could not perform simple tasks. • Applicant had his then girlfriend (future wife), Naomi, added to a bank account his mother set up for him. After that, Naomi managed his finances. • Applicant's wife filled out written job applications for him, which he always brought home. • Applicant had great difficulty in counting money, to the point where he would just hand the money over and have the receiver (or his wife) do the counting. • Applicant could not cook, do laundry, or do any of the shopping when he was married. Once he tried to get baby formula when his wife was sick, and not only failed in finding the right formula, he also got lost on his way home. • As a child and young teen, Applicant's mother would send his brother with him on errands to prevent him from getting lost.
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3. ONSET OF DEVELOPMENTAL DEFICITS BEFORE AGE EIGHTEEN.

Much of the information Applicant offered at the PCR hearing relates to his intellectual and adaptive functioning before age eighteen. Applicant's IQ was measured on several occasions before his eighteenth birthday. Beginning at age eight, his IQ scores have demonstrated significantly subaverage intellectual functioning. Additionally, all of the information contained in Applicant's school records and the overwhelming majority of the information from Applicant's family members and football coach relates to his functioning before the age of eighteen.

Dr. Fisher's evaluation of Applicant focused on the pre-eighteen period and revealed that Applicant consistently struggled in school, in sports and in social situations throughout his life. Applicant's school and social security records contain many examples of his difficulties with functional academics prior to the age of eighteen. They also confirm that Applicant was severely deficient in many social and practical skills during that time. Applicant's mother testified that even as a toddler he was much slower to obtain milestones such as walking and reciting his ABC's. As a child, Applicant's father found it difficult to give him chores or even play with him because of his difficulties with understanding directions. Applicant's high school football coach testified about his struggles during his teen years, when he was unable to understand the plays his other teammates had learned, resulting in the nickname "Brain Lock." Finally, Applicant's ex-wife confirmed that his struggles continued into adulthood where she "covered" for him constantly because he had been unable to learn basic living skills during his childhood.

C. RESPONDENT'S ARGUMENTS ARE NOT PERSUASIVE.

After carefully considering the entirety of the evidence as a whole, this Court finds, by a preponderance of the evidence, that Applicant has presented substantial evidence that he has mental retardation and thus, there is a reasonable probability that the outcome of his capital trial would have been different had trial counsel investigated and raised a mental retardation claim. Accordingly, this Court finds that Applicant was prejudiced by his trial counsel's failure to raise the issue of his mental retardation at trial. It is difficult to conceive of any failure more prejudicial than trial counsel's failure to discover and present evidence that their client may be categorically exempt from the death penalty.

Respondent argues that Applicant has not proven deficient performance nor prejudice because, prior to trial, neither DDSN nor any defense expert, including Dr. Donna Schwartz-Watts and Dr. Tora Brawley, found that Applicant was mentally retarded. But, of course, this is precisely the point since Applicant's claim is that his trial counsel failed to collect the necessary social history information, hire an expert in mental retardation, and otherwise pursue a mental retardation claim. Dr. Schwartz-Watts specifically averred in her affidavit that she is not an expert in mental retardation and that she never had access to Applicant's special education records. Respondent called Dr. Schwartz-Watts to testify at the PCR hearing where she reiterated these facts and also explained that any questions about the proper assessment for a mental retardation diagnosis would have to be answered by *someone else* with specific

expertise in that field. Additionally, Dr. Tora Brawley is a neuropsychologist who was asked by the defense team to look for brain damage. She is not an expert in mental retardation and, even if she was, there is no dispute that trial counsel failed to adequately investigate evidence of Applicant's mental retardation and provide that information to any experts that they did have.

Respondent also argues that Applicant's claim basically asserts that trial counsel was ineffective for not obtaining the special education records from the Philadelphia School System. This is incorrect. The special education records were indeed very critical records because they contained several historical IQ scores and other important information relevant to mental retardation. However, this Court finds that, even without the missing special education records, trial counsel knew or should have known about information that should have caused them to investigate further into Applicant's mental retardation. Applicant presented a great deal of evidence at the PCR hearing, apart from the special education records themselves, in support of his mental retardation claim. This evidence was readily available to trial counsel, but they simply failed to investigate and present that information. For example, this Court finds the testimony of Mr. Charles Macaluso, Applicant's former football coach, to be particularly credible. Mr. Macaluso is not related to Applicant, and he has over thirty years of experience as an educator and coach. This Court finds his testimony persuasive on the issues of Applicant's deficits in adaptive functioning. Mr. Macaluso was available to Applicant's trial counsel and actually volunteered to testify at the sentencing phase of the trial. Despite Mr. Macaluso's efforts to help, however, trial counsel failed to question him

about these issues or prepare him to testify to facts relevant to a mental retardation claim.

Finally, Respondent asserts that Dr. Fisher's findings are not credible. This Court disagrees. Dr. Fisher is a clinical psychologist with extensive clinical, teaching and research experience. He has been qualified as an expert in numerous state and federal courts. More importantly, ~~Dr. Fisher's findings~~ were extensively corroborated by testimony from Applicant's mother, father, ex-wife and football coach, and documents from Applicant's school and special education performance and his history with the Social Security Administration.

III. CONCLUSION.

The Court finds, by a preponderance of the evidence, that Applicant has met his burden of proof in demonstrating that his trial attorneys rendered deficient performance by failing to investigate and present the issue of his mental retardation. Further, the Court finds that Applicant was prejudiced by his trial counsel's deficient performance because there exists, at a minimum, a reasonable probability of a different outcome had trial counsel properly investigated and presented a mental retardation claim. Accordingly, the sentence of death is vacated and this matter is remanded to the Court of General Sessions in Lexington County for a new sentencing trial. In accordance with *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), Applicant is entitled to a pre-trial determination by the trial judge concerning whether or not Applicant is mentally retarded by a preponderance of the evidence offered at the pre-trial hearing. If the trial judge finds Applicant is mentally retarded, then Applicant is not eligible for the death

penalty and shall be resentenced. *Id.* at 279, 588 S.E.2d at 606. If, however, the trial judge does not find that Applicant is mentally retarded, Applicant is nonetheless entitled to submit evidence of his mental retardation for the jury's consideration as a mitigating factor. *Id.* If the jury finds that mitigating factor, then a death sentence will not be imposed. *Id.*

Sub-allegation (b): Failed to thoroughly investigate and present all available evidence of Applicant's neurological damage.

Applicant's third claim for relief in Ground 10(b)(3) is denied. In this claim, Applicant asserts that trial counsel should have further investigated and presented more evidence of Applicant's neurological damage at Applicant's trial. Applicant has failed to establish he is entitled to relief upon this claim. First, no testimony or evidence supporting this claim was presented by Applicant. Thus, Applicant has not shown how counsel was deficient in this regard. Further, since there was no evidence of neurological damage presented at the evidentiary hearing, Applicant has failed to show that he was prejudiced by counsel not presenting such evidence. As a result, this claim for relief is denied.

Sub-allegation (c): Failed to prepare sentencing phase lay witnesses to ask for mercy.

Applicant's fourth claim for relief in Ground 10(b)(3) is denied. In this claim, Applicant asserts trial counsel was ineffective in not preparing the sentencing phase lay witnesses to ask the jury for mercy. This Court finds that Applicant has not established by a preponderance of the evidence that counsel was deficient in this regard. Further, Applicant has not shown that he was prejudiced as a result.

During the sentencing phase, the defense presented several lay witnesses on Applicant's behalf. His mother, Diane Mercer, testified about her pregnancy with Applicant, Applicant's upbringing in Philadelphia, and Applicant's problems in school. She further testified about her observations of Applicant's attempts at obtaining gainful employment. Mrs. Mercer also told the jury about how Applicant attempted to protect her from his father, and how Applicant was abused by his father as a child. She also discussed her observations of Applicant's interactions with his children. Mrs. Mercer concluded her testimony by discussing her relationship with Applicant. She noted their relationship was one of the best. She stated he always tried to provide for her, even when he was not making a lot of money. (R. 2332-49). She described Applicant as "a good man and he does love people. He would not hurt you. He just want to smile at you." (R. 2350).

Applicant's father, Leroy Mercer, agreed that Mrs. Mercer's recollection of what occurred in Philadelphia was fairly accurate. He testified that he was more harsh towards Applicant because he was not aware of what he described as Applicant being slow. He also noted that Applicant did attempt to protect his mother on occasion. Mr. Mercer also testified about his observations of Applicant with his wife and children. (R. 2351-58). He described his relationship with Applicant to be "[w]onderful" and "loving." (R. 2358). Mr. Mercer also noted that he loved his daughter-in-law and grandchildren, and that he would do anything for them.

Applicant's wife testified about her relationship with Applicant. She asserted that Applicant was "the best male role model" she ever had, and that they were best friends.

(R. 2328). She noted that Applicant was always there for her and their children, and that their children never went without. She also talked about their children, and how excited they were to see their father. Applicant's wife also discussed her observations of the impact that the death of Applicant's grandmother had on him. (R. 2327-32).

Applicant's youngest sister, Ebony Mercer, testified that Applicant was always ~~there for her and the other~~ members of their family. She described him as a very giving person, and he was the type of person who everyone would like to be around. She also stated that Applicant was her best friend, and he was always around to help her with her problems. She also indicated that the family's life in Philadelphia was rough, and that Applicant took the brunt of their father's abuse. (R. 2320-23).

Applicant's other sister, Iesha Mercer, testified that most of the areas they lived in Philadelphia were bad, and Applicant was picked on when they were at school. She recalled he was in special education classes. She also testified that she and Applicant used to joke a lot. She noted that both were called Smiley because they smiled a lot. Iesha testified that Applicant's parents were always arguing, and Applicant caught the most abuse of the children. She further stated that all in the family loved Applicant dearly, and Applicant had a heart of gold. She concluded by asserting Applicant was a good man and a good father, and that they all loved him. (R. 2323-27).

During closing arguments, the solicitor noted that none of Applicant's family members asked for mercy. (R. 2391). During Applicant's closing arguments, Ms. Armstrong contended that the family's testimony adequately gave the jury a specific basis for giving mercy. (R. 2407). She further argued that the best reasons for giving

mercy were his three children, who were present in the courtroom. (R. 2407). Armstrong noted that while Applicant was flawed as a man, there was never any question that he was a good father. Id. Further, she contended that having him alive would make an impact on those children's lives. Id.

At the evidentiary hearing, Diana Mercer, Leroy Mercer, and Naomi Stackhouse all testified that they would have asked for mercy had they ~~been asked a question~~ regarding mercy. Further, Applicant also presented the affidavits of his two sisters, and both indicated in the affidavit that they would have asked for mercy.

In her deposition, Ms. Armstrong testified she recalled the solicitor's argument that Applicant's family did not ask for mercy. (Depo. 51). She noted that in preparing his family to testify, they talked with them a great deal about their testimony. Depo. 51, 118).

Well, I discussed with them what their role was, which was to, number one, help the jury understand that Kevin was human and that he had these deficits and that he was loved and that you didn't want him to die. But I didn't specifically say – obviously, didn't specifically say ask for mercy.

(Depo. 118). She further conceded that it was apparent from their testimony that the defense never asked the family members to use the specific wording of asking for mercy. (Depo. 51). She noted that she thought they family members were going to ask for mercy. Id. Armstrong also indicated that they were not asked a specific question regarding mercy. (Depo. 51-2).

Mr. Littlejohn testified that he also recalled that none of the family witnesses asked for mercy, and that fact was pointed out by the solicitor. (Tr. 17). Littlejohn noted

that he thought it was tricky of the solicitor to make that point in closing arguments. (Tr. 17). He could not recall specifically if they instructed the family members to ask for mercy, but "it was pretty much implicit in their testimony that the reason they were there was to ask for mercy and to . . . try and persuade the jury not to give Kevin the death penalty." (Tr. 17-18).

After reviewing ~~the testimony~~ and arguments at both trial and the evidentiary hearing, this Court finds that counsel was not deficient in not specifically asking Applicant's family to specifically ask the jury for mercy at trial. This Court believes, as was expressed by trial counsel in their testimony and by counsel's closing argument, that it was implicit in the family's testimony that they wanted the jury to spare Applicant's life. See State v. Johnson, 338 S.C. 114, 126-27, 525 S.E.2d 519, 525 (2000). Furthermore, this Court finds Applicant has not established that he was prejudiced by the fact his family members did not explicitly ask for mercy. As already noted, it was implicit in their testimony that they wanted the jury to spare Applicant's life. In light of the fact that the request was implicit in the testimony, counsel argued for mercy, and Applicant requested mercy in his allocution, this Court finds that Applicant has failed to show that the testimony at trial would have created a reasonable probability of a different result. As a result, this claim for relief is denied.

Allegation #4: Victim impact evidence

Sub-allegation (a): Failed to object to testimony regarding the effect of the victim's death on the United States Army generally and on various members of the U.S. Army in particular.

This Court finds the first allegation in Ground 10(b)(4) is without merit. In this claim, Applicant asserts trial counsel was ineffective in not objecting to the testimony regarding the impact the victim's death had on the U.S. Army and on various members of the U.S. Army. Applicant has not shown that counsel was deficient in this regard. Much of the testimony contested by Applicant consisted of a description of the medals that the victim had earned in his military career, not how his death impacted upon the Army. Further, the testimony that was presented regarding how his death affected the U.S. Army was very limited. Further, Applicant has not established that he was prejudiced. As a result, this claim for relief is denied.

Applicant pointed to two portions of the record in support of this claim. First, he asserts that the testimony contained on R. pp. 2078-2083 was inappropriate. Second, he argues that a statement made on R. p. 2101 was also inappropriate.

In her deposition, Ms. Armstrong testified that she believed the testimony of the four soldiers regarding the victim's loss on themselves and the Army generally was properly admissible victim impact testimony. (Depo. 53). She felt the State had some latitude under which it could present the testimony of people who knew the victim and his qualities. (Depo. 54). Mr. Littlejohn also testified that he did not believe that Judge Few would have excluded any of the testimony had an objection been made. (Tr. 19). The testimony contained on R. pp. 2078-83 was properly admitted at trial. This was the testimony of Command Sergeant Major Martin Wells, U.S. Army. Much of his testimony explained the various medals and ribbons that were earned by the victim prior to his death. This was properly admitted victim impact testimony. See Payne v. Tennessee,

501 U.S. 808, 827, 111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720 (1991) ("A State may legitimately conclude that **evidence about the victim** and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated."). State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) (adopting Payne); see generally State v. Hughey, 339 S.C. 439, 457, 529 S.E.2d 721, 730 (2000) overruled on other grounds by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009)("Victim impact evidence is admissible in the sentencing phase to demonstrate the 'uniqueness' of the victim and the specific harm committed by the defendant."). The same was also true for Wells' statement that Sgt. Davis personified the ideals captured in the creed for all non-commissioned officers. Since this testimony focused solely on the character of the victim, it was properly admitted testimony. Similarly, Clifton Magwood's response to the question regarding the memorial service at Fort Jackson ¹ on R. p. 2101 was also properly admissible. Since this testimony was properly admissible, counsel was not deficient in not objecting to it. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

¹There was only one question and answer regarding why Fort Jackson would have hosted the memorial service. (See R. 2101).

There was nothing particularly heartwrenching about this testimony; it was pretty much what someone would expect and delivered in a professional and matter-of-fact manner. Thus, given the limited nature of the testimony during the course of a large proceeding and the lack of any undue prejudice, it cannot be said it rendered Applicant's trial fundamentally unfair or its absence alone would create a reasonable ~~probability~~ of a different result given the extremely egregious nature of this crime as well as Applicant's other violent run-ins throughout his life. See, e.g. Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (improper argument not reversible where it was but 10 lines in transcript); Ketterman v. South Carolina Farm Bureau Mut. Ins. Co., 302 S.C. 276, 395 S.E.2d 187 (Ct. App.1990) (impermissible argument covering less than a page in the entire transcript was not sufficiently prejudicial for reversal).

To the extent Applicant alleges that the testimony of Robert Ames, Clifton Magwood, David O'Garro, and Martin Wells was improper victim impact testimony, this Court finds this claim is without merit. It was established by their testimony that Robert Ames, Clifton Magwood, and David O'Garro were all close friends of the victim, Sergeant Davis. Martin Wells indicated that he was Davis' immediate superior officer at Fort Jackson. The admission of fellow workers statements have been deemed admissible as proper victim impact evidence under Payne v. Tennessee as showing the uniqueness of the individual. See, U.S. v. Barnard, 299 F.3d 467 (5th Cir 2002); Franklin v. State, 965 So. 2d 79 (Fla. 2007) ("designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death"); Wesley v. State, 112 Nev. 503, 520, 916 P.2d 793, 804 (Nev.1996)

(victim impact evidence from neighbors and co-worker appropriate under Payne where each witness's testimony was relevant to the impact of Wesley's actions); U.S. v. Wilson, 493 F. Supp. 2d 364 (E.D.N.Y.2006) (victim impact testimony admissible from colleagues and co-workers in police department, where the testimony of NYPD coworkers will be presented to demonstrate "the chilling effect" these murders had specifically on undercover detectives within the NYPD ~~and the fact that~~ as a result of these murders, undercover detectives were "refusing to go out on the street, do these operations because of the danger, how some even retired from undercover work, said I'll be a police officer but I will not do undercover work anymore."); U.S. v. Battle, 173 F.3d 1343 (11th Cir. 1999) (prison officials testifying about the impact the prison murder had upon the prison guards admissible impact evidence). "Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant" People v. Valencia, 43 Cal.4th 268, 300, 74 Cal.Rptr.3d 605, 639 (Cal.,2008). But see U.S. v. Fields, 516 F.3d 923 (10th Cir. 2007).

Payne authorizes the admission of evidence under the Eighth Amendment which focuses on demonstrating the loss to the victim's family and *to society* which has resulted from the defendant's homicide. This Court finds that Applicant has not established that the testimony of the victim's friends and superior officer was inappropriate victim impact testimony. As a result, he has not shown that counsel was deficient in not objecting to their testimony. Further, since the testimony was admissible victim impact testimony, Applicant was not prejudiced by counsel not objecting. This claim for relief is thus denied.

Sub-allegation (b): Failed to object to video shown at victim's funeral and testimony concerning an Army "roll call" that took place at the funeral.

Applicant's second claim in Ground 10(b)(4) is denied. In this claim, Applicant asserts trial counsel should have objected to the presentation of the video that was shown at the victim's funeral and to the testimony regarding an Army "roll call" that was presented by the State. This Court finds trial counsel was not deficient in not objecting. This evidence was admissible victim-impact evidence under Payne. Further, Applicant has not established that he was prejudiced by the presentation of the video and the testimony. As a result, this claim for relief should be denied and dismissed.

At trial, David O'Garro testified that at the funeral, a roll call was done.

The roll call is - - any squad or platoon that loses a member, in honor of that member or to show that that member is no longer with that group, we do a roll call, and what happens is our division chief, our leader, you know, he'll call the names of everybody in the group, and the last person's name to be called was - - would be the one that was missing. And so Tracy's name was the last to be called, and it's repeated three times. You know, so they called, you know, me. Sergeant O'Garro. Here. And then Sergeant Magwood. Here. You know, Sergeant Evans. Here. And you go down the line and got to Sergeant Davis and there would be no answer. And Sergeant Davis. Then: Sergeant First Class Tracy L. Davis. There would be no answer. Stricken from the rolls.

(R. 2118-19). Shortly thereafter, the State played a video of photographs set to song.

(R. 2119, see R. 2116-17).

At the evidentiary hearing, Ms. Armstrong testified that she did not consider objecting to the video, but now believes she should have. (Depo. 54). She had watched the video on a laptop, but noted the presentation had a different impact when played on the larger screen in the courtroom with the lights dimmed. (Depo. 54-55).

She indicated that if she had the opportunity to do it again, she would request to see the video as it was intended to be presented to the jury (i.e. in the courtroom). (Depo. 55). She noted that had she viewed the video as it was intended to be presented, she would have likely objected to its presentation. (Depo. 55). Mr. Littlejohn testified that he considered lodging an objection, but did not. (Tr. 19, 30). He indicated that once the video started, it was a little too late to object to it. (Tr. 19, 30). He also ~~noted that he did not~~ believe that Judge Few would have excluded the video. (Tr. 19, 30).

This Court finds that Applicant has not shown that counsel was deficient in not objecting to the testimony regarding the roll call done at the funeral or the funeral video. Payne authorizes the admission of evidence under the Eighth Amendment which focuses on demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." The evidence of the video that Applicant now challenges gave that brief glimpse of Sergeant Davis and his loss and its impact on his community - his family and his friends. In addition, testimony, prior to the admission revealed the community acknowledgment of the deaths - the video only confirmed it and bread more life into those static comments.

The video played at the funeral expressed no outrage, contained no clarion call for vengeance, but may have implied sadness. See, People v. Kelly, 68 Cal.Rptr 3d 531 (2008), cert. denied 129 S.Ct. 564 (2008) (particular video montage admissible under Payne); cf. State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010), cert. denied (Apr. 25, 2011)(finding no error in admission of video of funeral slain law enforcement officer). Here, the video supplemented but did not duplicate any of the witnesses' testimony.

While Applicant may suggest that revealing emotional effect demands exclusion of the evidence, that is not the test where Payne allows the admission of the impact of the victim's death upon the survivors. Altogether, this Court finds the testimony regarding the roll call and the funeral video were admissible as victim impact evidence at Applicant's trial. Thus, counsel was not deficient in not objecting to either the roll call testimony or the funeral video ~~as improper~~ victim impact evidence. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial); Anderson v. Goeke, 44 F.3d 675, 680 (8th Cir. 1995) ("[T]he 'performance of an attorney is not deficient for failure to object to admissible evidence.'")(quoting Russell v. Jones, 886 F.2d 149, 152 (8th Cir.1989)). As a result, this claim for relief is denied.

Furthermore, this Court finds that Applicant was not prejudiced by counsel not objecting to the roll call testimony or the funeral video. Since the evidence was admissible victim impact evidence, an objection based upon those grounds would have been denied. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

Sub-allegation (c): Failed to object to trial judge allegedly crying in front of jury.

Applicant's third claim in Ground 10(b)(4) is denied. Trial counsel expressed a valid strategic reason for not raising an objection to address whether the trial court had an emotional response to the presentation of victim impact evidence during the sentencing phase. Further, Applicant cannot show that he was prejudiced by counsel's decision not to object. As a result, this claim for relief is denied.

In this allegation, Applicant asserts the trial judge cried in front of the jury while the funeral video was presented to the jury. This was not reflected in the trial court's record. At her deposition, Ms. Armstrong testified that she was not aware of the trial judge's reaction to the video while it was occurring. (Depo. 55). She indicated that she heard after the fact that he was crying. (Depo. 55-6, 99-100, 133). At the evidentiary hearing, Mr. Littlejohn testified that it appeared that the trial judge had gotten emotional about the funeral video. (Tr. 19-20). He further noted that he considered objecting:

[T]hat was kind of a difficult issue to deal with. I was, I was in hopes that the jury didn't see him; I didn't care if anyone else saw him, but I was in hopes the jury didn't see him. And I was afraid if I objected to it at that point or later, I didn't know whether a curative instruction might be more damaging than if the jury had just seen him get emotional like they did.

(Tr. 20, ll 7-13). Mr. Littlejohn also noted that it appeared that the trial judge's reaction was limited to during the video, and not after. (Tr. 31). Littlejohn also testified that he thought it was more of a risk to discuss a curative instruction because he felt there was a strong possibility the jury did not see any response from the judge, and he did not want to risk bringing such a response to their attention. (Tr. 31-2).

This court finds counsel's decision not to raise an objection to the trial court's response to the funeral video was the result of reasonable trial strategy. Counsel clearly thought it was a risky proposition to ask for a curative instruction regarding the judge's response during the video. Counsel noted that it was unlikely the jurors saw the trial judge's response to the video, and he did not want to bring it to their attention if they had not seen it. In light of those concerns, ~~this court finds the decision~~ was reasonable. Furthermore, this Court finds that Applicant could not establish that he was prejudiced in any way by trial counsel's decision not to object or request a curative instruction regarding the trial judge's reaction to the funeral video. At the beginning of the jury charge in the sentencing phase, the trial court instructed the jury as follows:

Now, as I explained to you earlier in the first phase of the trial, only the jury can make the findings of fact in this case and I am not permitted to indicate to you how I might feel about the facts. So if I have said anything or done anything during the course of this phase of the trial that might lead
3 you to believe that I have an opinion about the facts or about what the sentence should be, then you should disregard that.

(R. 2409-10). Jurors are presumed to follow the law as instructed to them. State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999). Applicant has not presented any basis upon which this Court should find the jury did not follow this instruction. Since the jury would have disregarded any reaction the trial judge may have had during the presentation of the funeral video based upon this instruction, Applicant cannot establish he was prejudiced. As a result, this Court finds this claim is without merit. It is therefore denied and dismissed with prejudice.

Allegation #5: Ineffective assistance of counsel for not asking their expert witnesses to prepare reports.

Applicant's claim for relief in Ground 10(b)(5) is denied. In this Ground, Applicant asserts trial counsel was ineffective in not having their experts prepare reports. This court finds trial counsel's decision to not have their experts prepare reports was the result of reasonable trial strategy. As a result, Applicant cannot establish counsel was ineffective in this regard.

This claim stems primarily from the fact the defense did not have one of their primary testifying experts, Dr. Donna Schwartz-Watts, prepare a report of her findings. Prior to trial, there was a discussion on the record between defense counsel and the solicitors trying the case regarding the defense's experts' opinions. (R. 1175-79). During that conversation, it was noted that Dr. Schwartz-Watts, the forensic psychiatrist retained by the defense, had not drafted a written report. It was also noted that the neurologist had not had an opportunity to draft a report because he was still examining the SPECT scans. (R. 1177-78). During the sentencing phase, Dr. Schwartz-Watts was cross-examined on the fact she did not draft a written report. (R. 2169-73).

In her deposition, Ms. Armstrong testified that at the time of Applicant's trial, it was her practice to generally not request reports from experts in preparation for trial. (Dep. 98). She noted that the defense is not obligated to produce a report, and she did not feel like it was the defense's job to make the State's job any easier. Id.

This court finds trial counsels' decision not to request some of their experts to prepare reports was the result of a reasonable strategic decision. Counsel's testimony indicates they were aware that they would have to turn over any reports drafted to the

State. Counsel believed it was to their strategic advantage for the State to not have a report from Dr. Schwartz-Watts to use in preparation for cross-examination. This belief was reasonable. Thus, this Court finds Applicant is not entitled to relief upon this claim. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision cannot be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Allegation #6: Ineffective assistance of counsel for not preparing their sentencing-phase expert witnesses to explain how their opinions had any bearing on the jury's decision.

Applicant's claim for relief in Ground 10(b)(6) is denied. In this Ground, Applicant asserts trial counsel was ineffective in not preparing the defense experts to testify how their opinions bore on the jury's decision. Applicant has not shown that counsel was deficient in this regard. Further, Applicant has not shown that he was prejudiced as a result of the alleged deficiency of counsel. As a result, this Court finds this claim is without merit.

As a preliminary matter, this Court finds this claim is without merit as to the testimony of Dr. Alexander Morton, Dr. Marti Loring, Dr. John Steedman, and James Aiken. Applicant has not presented any testimony or evidence as to how these four

witnesses' testimony would have been different had counsel prepared them in the way that Applicant asserts should have been done in this ground. See 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 burden of producing admissible testimony in accordance with the rules of evidence); Cf. generally Beaver v. Thompson, 93 F.3d 1186, 1995 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present mitigation evidence, where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony). "[A] a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069. Since Applicant cannot show that he was prejudiced by any alleged deficiency of counsel in this regard as to these witnesses, this claim for relief as it relates to the testimony of those experts is denied.

To the extent that Applicant asserts trial counsel was ineffective in not having Dr. Schwartz-Watts testify regarding how her findings related to the jury's determination, this Court finds this claim is without merit. At the evidentiary hearing, Dr. Schwartz-Watts testified that the reason she could not relate her findings regarding Applicant's post-traumatic stress disorder and her other diagnoses was because Applicant always maintained he was absolutely innocent of the charges he faced when she met with him.

Applicant has not established that he was prejudiced. As was acknowledged by Schwartz-Watts' testimony, she could not testify regarding her opinion as to how Applicant's mental conditions would have impacted on his involvement in the murder and carjacking because Applicant maintained he was completely innocent in his discussions with Schwartz-Watts. While she may have been able to hypothesize how Applicant's diagnosed conditions would have impacted him if he was present at the scene, Schwartz-Watts could not directly connect those hypotheses with Applicant's actual responses at the scene because in her examination of Applicant, he always maintained he was completely innocent. This Court finds this testimony would have been of very limited benefit to Applicant. This Court further finds that had counsel presented such testimony, it would not have created a reasonable probability of a different result. Thus, this claim for relief is denied.

Allegation #7: Ineffective assistance of counsel for waiving the trial judge's proposed charge that the jury could not consider prior bad acts when determining whether the State had proven an aggravating circumstance, and that the State had proven Applicant was the shooter.

Applicant's claim for relief in Ground 10(b)(7) is denied. In this Ground, Applicant argues trial counsel was ineffective when they chose to waive a proposed jury instruction based upon State v. Stewart, 283 S.C. 104, 320 S.E.2d 447 (1984). This court finds trial counsel's decision to waive the additional jury instruction was the result of a reasonable strategic decision by trial counsel. As a result, Applicant is not entitled to post-conviction relief upon this claim.

In giving the jury charge in the sentencing phase of Applicant's trial, the trial court did not give a Stewart charge. State v. Stewart, 283 S.C. 104, 107-08, 320 S.E.2d 447,

450 (1984). A Stewart charge instructs the jury that prior convictions and evidence of prior bad acts can not be used to establish an aggravating circumstance. Id. at 107-08, 320 S.E.2d at 450. After the jury charge, the solicitor brought the omission to the trial court's attention. (R. 2242). The trial court asked defense counsel if they wanted the jury to receive a Stewart charge. (R. 2423). It allowed defense counsel to consult with Applicant about the matter. (R. 2424) After further discussion, the trial court also indicated it would also charge the jury that it could not consider Applicant's criminal record in deciding whether Applicant was in fact the shooter. (R. 2425).

Defense counsel declined. Mr. Littlejohn specifically noted that the defense did not believe any of Applicant's prior crimes could even bear on whether Applicant was the triggerman. (R. 2426). Both trial counsel indicated to the trial court they thought Applicant would be more prejudiced from giving the charge separately than if the charge was not given. (R. 2428-29). Applicant also informed the trial court that he had discussed the matter with counsel, and he was fine with the decision. (R. 2429).

At the evidentiary hearing, Mr. Littlejohn testified that the defense decided to decline the trial court's offer for a Stewart charge because they "thought that that charge would just bring more attention to all the evidence that had been brought out by the state about all these bad acts that Kevin had previously been involved in." Tr. 33, ll 12-15. In her deposition, Ms. Armstrong also indicated the defense did not want to have Applicant's bad acts specifically brought up again with the Stewart charge.

This court finds that counsels' testimony and the record of the discussion regarding the Stewart charge reflect that defense counsel's waiver of the charge was a

matter of trial strategy. This court finds that strategy was reasonable under the circumstances. Thus, Applicant is not entitled to relief upon this claim. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision cannot be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Ground C: Sixth, Eighth and Fourteenth Amendment violations by the State's presentation of victim impact evidence.

Applicant's claim in Ground 10(c) is denied. In Ground C, Applicant argues that his Sixth, Eighth, and Fourteenth Amendment rights were violated by the State presenting of "victim impact evidence - which included a video set to music that was shown at the victim's memorial and testimony concerning an army 'roll call' that took place during the victim's funeral" and "by the fact that the trial judge cried in front of the jury during this presentation." This court finds this claim is procedurally barred.

S.C. Code Ann. § 17-27-20(b) (1986) specifically provides that the remedy of Post-Conviction Relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The South Carolina Supreme Court has consistently and repeatedly held that issues that either were or could have been raised at trial and on direct appeal may not be raised in

PCR. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979).

This claim could have been presented at trial. Trial counsel chose not to object to the victim impact evidence challenged here. Since this argument could have been raised at trial and on direct appeal, it is not an appropriate claim for post-conviction relief. As a result, this claim for relief is denied.

Ground D: Due process violation in denying motion for new trial because motion was denied based upon false testimony

Applicant's claim in Ground 10(d) is denied. In Ground D, Applicant argues Timothy Johnston perjured himself by testifying that Applicant's co-defendant, Marcus Thompson, had never confessed to shooting the victim when, in fact, Thompson had stated to Timothy Johnston that he (Thompson) was the one who shot and killed the victim.⁷ To the extent this is a claim cognizable for post-conviction relief, this court finds the claim is without merit.⁸ Timothy Johnston's testimony at the evidentiary hearing was

⁷ This claim was initially raised as a Brady/Napue prosecutorial misconduct claim. However, after the evidentiary hearing, Applicant moved to amend the ground to conform with the evidence. In the motion to amend, Applicant conceded that after the testimony at the evidentiary hearing, there was no evidence to support the Brady/Napue claim.

⁸ Applicant has not explained why this claim, one step removed from trial, should be evaluated as a trial issue. Even so, this Court finds this claim is easily addressed on a lack of prejudice.

not credible. Applicant has not shown that Timothy Johnston perjured himself at the motion for new trial hearing. As a result, this claim for relief is denied.

At the motion for new trial hearing, Timothy Johnston testified he was one of Marcus Thompson's cell mates in May 2006. (R. 2688-89). He recalled Thompson talking about his charges. (R. 2689). Johnston testified that Thompson told him what had happened, and Thompson was asking his cellmates what he thought they [the State] would do to him. (R. 2689-90). Thompson's focus was on his murder charge. (R. 2690). Johnston testified that both he and their third cellmate, Kevin Fuller, both had been to prison before. (R. 2690). Thompson had not. (R. 2690).

Johnston testified that Thompson told him that he had dropped Applicant off at an apartment complex. Applicant used a cut to go through and get a truck. Thompson told Johnston that the guy got killed, but the guy's girlfriend was on the telephone and heard everything. Thompson was concerned because she heard two car doors shut, and the police were using that to say Thompson was at the scene when the murder occurred. Thompson maintained he was at the other apartment complex. Thompson also told Johnston that he ended up at a local motel. (R. 2691-93).

Johnston also testified about a second time Thompson told him about the crime. During this second conversation, Kevin Fuller was asleep. Thompson told Johnston the same story. However, this time, Thompson told him he was in the stolen truck when they were stopped. (R. 2693-94). Johnston further testified that Thompson never said anything about pulling the trigger. (R. 2698-99). Johnston did ask Thompson about the gloves found on Thompson when he was arrested. Thompson informed Johnston that

the gloves were from his job. (R. 2699-700). Thompson never told Johnston about the pistol or target practice. (R. 2700).

Johnston acknowledged on cross-examination that he had prior convictions for criminal domestic violence, shoplifting, failure to stop, and a couple of driving under suspensions. He also noted that he had pending charges for first degree burglary and second degree burglary. However, he was not seeking assistance with the first degree burglary charge because it was already set to be dismissed. He testified that the complaining witness had already informed law enforcement that he had permission to enter the residence, and he was in a dispute with the solicitor's office as to whether the charges were still pending. (R. 2702-04). He also testified he was pleading guilty to the second-degree burglary. (R. 2709).

At the evidentiary hearing, Johnston testified that Thompson had told him a third version of the events on the night of the shooting. In the third version, which Johnston asserted he did not share with the solicitor's office, Johnston alleged that Thompson was the one who shot Sgt. Davis. Johnston testified that he had never told anyone else that Thompson had told him he was the shooter. Johnston also testified that he lied at the motion for new trial hearing because Thompson grew up in the same area as Johnston and his family. Johnston claimed that Thompson threatened to "reach out and touch" Johnston's family. Johnston also testified that he did not know which of the three versions of the story were true.

Deputy Solicitor Samuel R. Hubbard testified that when the Solicitor's Office met with Johnston, he started by indicating they would not like what he had to say about

Kevin Fuller. Johnston had indicated that Fuller was lying in an attempt to receive assistance with his charges. Hubbard testified that Johnston never said that Thompson indicated he was the shooter. To the contrary, Johnston's impression of Thompson was that he was afraid of prison, and he was seeking advice from his two cell mates who had more experience with the system. Further, Johnston indicated that Fuller would say anything. Assistant Solicitor ~~Shawn Graham~~ also indicated that Johnston told them that Fuller would say anything. Graham's testimony indicates that Johnston's testimony at the motion for new trial hearing was consistent with what he told them prior to the hearing.

“Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial.” Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977)(quoting State v. Mayfield, 235 S.C. 11, 34–35, 109 S.E.2d 716, 729 (1959)). Applicant, who has the burden of proof, has offered no reliable evidence to show he is entitled to relief upon this claim. The only evidence comes from the ever evolving testimony from Mr. Johnston, and even he acknowledges that he does not know which, if any, of the alleged statements he heard from Thompson are true. This Court finds Applicant has failed to carry his burden of proof in this proceeding. As a result, this claim for relief is denied.

Ground E: Ineffective assistance of appellate counsel

Applicant's claim in Ground E is denied. In Ground E, Applicant asserts appellate counsel was ineffective in three regards. First, Applicant argues appellate counsel should have argued on appeal that juror Deborah Lucas was improperly

qualified. Second, Applicant argues appellate counsel should have argued that juror Phillip Lofollette was also improperly qualified. Third, Applicant argues appellate counsel should have argued that juror Michael Sponhour was improperly disqualified. Applicant has not shown that appellate counsel was deficient in not raising these arguments on appeal. Further, Applicant has not shown that he was prejudiced as a result of counsel not raising these issues on appeal. Thus, this Court finds Applicant has not met his burden in establishing that appellate counsel was ineffective in this regard.

These claims are without merit. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). A PCR applicant has the burden of proving appellate counsel's performance was deficient. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004), as "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." Jones v. Barnes, 463 U.S. 745, 752 (1983). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Id.

To obtain relief a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 615-16, 524 S.E.2d 833, 836 (1999). In other words, the applicant is required to demonstrate "that his counsel was objectively unreasonable in

failing" to identify and argue present significant and obvious issues on appeal, and "a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." Smith v. Robbins, 528 U.S. 259, 285 (2000) (citation omitted). Although recognizing that "[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 528 U.S. at 288. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). See also Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc).

In a capital case, the proper standard in determining the qualification of a prospective juror is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. State v. Green, 301 S.C. 347, 392 S.E.2d 157, cert. denied, 498 U.S. 881, 111 S.Ct. 229, 112 L.Ed.2d 183 (1990) (citing Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 853, 83 L.Ed.2d 841 (1985)); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996), cert. denied 520 U.S. 1123, 117 S.Ct. 1261, 137 L.Ed.2d 340 (1997). The determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and is not reviewable on appeal unless wholly unsupported by the evidence. State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), cert. denied, 508 U.S. 915, 113 S.Ct. 2355, 124 L.Ed.2d 263 (1993). When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire voir dire. State v. Green, supra. The ultimate consideration is that the juror be unbiased, impartial and able to carry out the law as explained to him. Id.

State v. Bennett, 328 S.C. 251, 256-57, 493 S.E.2d 845, 848 (1997).

At the evidentiary hearing, appellate counsel Robert M. Dudek testified that he read the full voir dire. He raised one juror issue in his appellate briefs. He noted that he

would have considered all issues that were preserved for review. However, he did contend that he would not have made a strategic decision not to raise a winning issue. Mr. Dudek testified that the appellate courts give due deference or great deference to the findings of trial courts regarding whether a juror is qualified to serve. The only case in which he could recall that an appellant prevailed on a juror claim was in *State v. ~~Johnny Bennett~~*. He noted that with the juror who was disqualified, the court did have specific concerns about whether the juror was applying a higher burden of proof beyond the reasonable doubt standard. Mr. Dudek indicated that he was not aware of any juror who served who had previously been challenged for cause during the voir dire process.

Applicant's claims relating to jurors Deborah Lucas and Phillip Lofollette were without merit. "[A]ny claim that a jury was not impartial must focus on the jurors who ultimately sat at trial." *State v. Tucker*, 324 S.C. 155, 162-63, 478 S.E.2d 260, 264 (1996)(citing *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273(1988)); see *State v. Green*, 301 S.C. 347, 353, 392 S.E.2d 157, 160 (1990)(holding Both jurors Lucas and Lofollette were struck by the defense during the jury strike. (R. 1258, 1260). Only one regular juror was seated after the defense exhausted its peremptory strikes: Vicky Mills. (R. 1262). She was not challenged by the defense during either the voir dire process or during the jury strike. (R. 784-801, 1262-63). In light of the fact that none of the jurors who sat on Applicant's jury were objectionable, this Court finds Applicant received a fair trial.⁹ Thus, this claim would have been found to be without merit on appeal. See

⁹ This court also finds that the transcript of the jurors' voir dire support the trial court's findings the jurors were qualified.

Green, supra. As a result, Applicant has failed to meet his burden of showing counsel was ineffective in not challenging the qualifications of Jurors Lucas and Lofollette on appeal. United States v. Wilkes, 20 F.3d 651 (5th Cir.1994)(appellate counsel not deficient for not raising legally meritless claim on appeal); see United States v. Kirsh, 54 F.3d 1062, 1071 (2d Cir. 1995)(noting the failure to make a meritless argument does not rise to the level of ineffective assistance of counsel). _____

This Court also finds the third claim for relief in this ground to be without merit. Appellate counsel was not ineffective in not arguing on appeal that juror Sponhour was improperly disqualified. A review of the transcript of the juror Sponhour's voir dire shows that trial court did not abuse its discretion in dismissing Sponhour. In the early portion of the voir dire, when Sponhour is asked by Judge Few if he could vote to impose the death penalty if he felt it was the appropriate punishment, Sponhour responded "I have trouble giving you a yes or no answer on that. It is a bit unlikely that I would be willing to do that." (R. 598). Sponhour had maintained that he did not think he fit into one of the three categories for jurors. During examination by the solicitor, Sponhour indicated that he would be very troubled about voting for the death penalty because there were too many cases where "it's been shown that people have been sent to death and the facts were later found to liberalize it." (R. 599). He also indicated that he probably could not sign a death verdict. (R. 600). While Sponhour did not have a moral opposition to the concept of the death penalty, he asserted that he was more concerned about the fallibility of death sentences. (R. 601). He noted that those concerns would be at the forefront of his mind. (R. 602). In responding to Mr.

Littlejohn's questions on voir dire, Sponhour indicated that he was not completely opposed to the death penalty, but he was troubled by the "inherent fallibility of human institutions like the judicial system." (R. 605).

After the examination of Sponhour concluded, the trial court indicated it was concerned that Sponhour indicated he would be applying a different burden of proof to the State before he would be willing to consider the death penalty. (R. 606). Specifically, the trial court was concerned that if a guilty verdict was entered by the jury, Sponhour would still question guilt during the sentencing phase. (See R. 607-09).

Sponhour was brought back in for further voir dire. During this questioning, Sponhour testified that he could see himself not considering the death penalty in the sentencing phase because he still had questions about the defendant's guilt. (R. 610-14).

After questioning, the solicitor argued the juror was not qualified to serve. He noted that the juror's answers indicated he would not follow the law in the guilt phase because he was looking for more than beyond reasonable doubt. Further, in the sentencing phase, he would be in direct violation of United States Supreme Court precedent in that he would consider residual doubt. The Solicitor argued:

So I think he's disqualified in the guilt phase because he needs proof beyond all doubt. I think he's certainly disqualified in the penalty phase because that's bleeding over into it, and he's bringing in an arbitrary and a capricious manner into that deliberation. Under Wainwright versus Witt I agree, your honor. We think that his views substantially impair – they would prevent him from the performance of his duties in accordance with his instruction and his oath and the law that would be charged to him.

(R. 616).

In response, trial counsel argued that the jury could give life for any reason or no reason at all, and the fact that the juror wants to be clear about his decision making process means that he is just doing his duty. Further, counsel noted that it was clear that Sponhour was not fundamentally opposed to capital punishment. Counsel argued that Sponhour did not say that he would hold the State to a standard where he could not give the death penalty. "He didn't say, well, there's no circumstance under which - - no burden that the state could meet such that I would never give a death sentence." (R. 618).

After hearing arguments, the trial court disqualified Sponhour for service on the jury for two reasons. First, the trial court found Sponhour indicated he would hold the State to a higher burden of proof, which was impermissible. (R. 618). While Sponhour did not state what that burden would be, it was clear that it was higher than beyond a reasonable doubt. The trial court found that would interfere with the juror's ability to follow the court's instructions. Second, the trial court found that Sponhour's views about the fallibility of the justice system and discussion about the number of times that individuals sentenced to death would later be found not guilty would interfere with his ability to follow the court's instructions. Thus, Sponhour was disqualified.

The trial court's findings in disqualifying juror Sponhour were supported by the record. As a result, the disqualification of juror Sponhour would not have been reversed on appeal. Since the disqualification of the juror would not have been reversed, Applicant failed to show that appellate counsel was deficient because this issue was not clearly stronger than the issues raised by appellate counsel on appeal. Further,

Applicant fails to establish he was prejudiced as a result of appellate counsel not raising this issue on appeal because the outcome would on appeal would not have been different had counsel raised this issue. As a result, this claim for post-conviction relief is denied.

Ground F: Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that he is mentally retarded.

Applicant's claim in Ground F is denied because it is not an appropriate claim for post-conviction relief. In Ground F, Applicant raises a freestanding claim that Applicant's death sentence violates the Eighth Amendment prohibition of cruel and unusual punishment based upon the fact Applicant is mentally retarded. S.C. Code Ann. § 17-27-20(b) (1986) specifically provides that the remedy of Post-Conviction Relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The South Carolina Supreme Court has consistently and repeatedly held that issues that either were or could have been raised at trial and on direct appeal may not be raised in PCR. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979).

Applicant's trial occurred after the United States Supreme Court's decision in Atkins v. Virginia, 536 U.S. 306 (2002) and after the South Carolina Supreme Court's decision in Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003). In Franklin, the

South Carolina Supreme Court addressed how the issue of mental retardation should be handled after the United States Supreme Court's decision in Atkins:

Regarding the procedures to be used in making the mental retardation determination in post-Atkins cases, we conclude the trial judge shall make the determination in a pre-trial hearing, if so requested by the defendant or the prosecution, after hearing evidence, including expert testimony, from both the defendant and the State. The defendant shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence. Cf. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998) (defendant bears burden of proving incompetence by preponderance of evidence); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998)4 (same).

If the judge finds the defendant to be mentally retarded by a preponderance of the evidence in the pre-trial hearing, the defendant will not be eligible for the death penalty. If, however, the judge finds the defendant is not mentally retarded and the jury finds the defendant guilty of the capital charge, the defendant may still present mitigating evidence that he or she had mental retardation at the time of the crime. See S.C.Code Ann. § 16-3-20(C)(b)(10) (2003). If the jury finds this mitigating circumstance, then a death sentence will not be imposed.

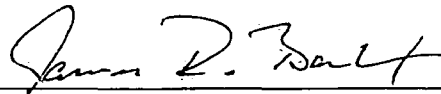
Franklin, 356 S.C. at 279, 588 S.E.2d at 605 (footnotes omitted); see State v. Laney, 367 S.C. 639, 627 S.E.2d 726 (2006). Clearly, the procedures outlined by the South Carolina Supreme Court show that mental retardation as a freestanding claim can only be properly raised before the trial court in post-Franklin trials. Applicant had an opportunity to raise this claim at trial. Since this issue could have been raised at trial, it is procedurally barred from review in post-conviction relief. As a result, this claim for relief is dismissed.

Conclusion

For the reasons stated above, this Court grants post-conviction relief on the ground that Applicant's trial counsel were ineffective in failing to investigate and present

all available evidence of his mental retardation and/or low intellectual functioning and deficits in adaptive behavior prior to the age of eighteen. Accordingly, Applicant's sentence of death is vacated and this matter is remanded to the Court of General Sessions of Lexington County for a new sentencing trial. This Court denies relief on all other grounds alleged in Applicant's PCR Application.

AND IT IS SO ORDERED. _____



Honorable James R. Barber, III
Circuit Court Judge
Presiding by Appointment of the Supreme Court

June 21, 2011