Hopkins, Debbie

From: Zelenka, Don
Sent: Monday, July 15, 2019 3:50 PM
To: David Alexander (dalexander@sccid.sc.gov); rvieth@hbvlaw.com; Caudy, Lara
Cc: Hopkins, Debbie; Melody Brown; Mike Ross
Subject: Marion Lindsey v. State - Death Penalty PCR - 07-CP-42-2848 - Order Denying Motion to Recuse and Rule 59 Motion - filed July 10, 2019
Attachments: Filed copy of Order Denying Motion to Recuse and Denying Motion to Alter of Amend (02017517xD2C78).PDF

David and Rick

I am in receipt from the Spartanburg Clerk of Court the written order denying the Rule 59 motion that we received July 12, 2019. I assume that you received a copy similarly. I am attaching the copy I received. By copy of the email, I am also providing a copy to the Supreme Court Clerk's office for their information on the status of this case.

Donald J. Zelenka
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State of South Carolina
The Circuit Court of the Fourth Judicial Circuit

Paul M. Burch
Judge

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July 8, 2019

Dear Clerk of Court,

Please find an order to be filed within the Spartanburg County Clerk of Court's Office. Please ensure that a copy is sent to both attorneys of record.

Sincerely,

Paul M. Burch

RECEIVED

JUL 15 2019

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)

MARION ALEXANDER LINDSEY, #6015) C/A No. 07-CP-42-2848
Applicant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

ORDER DENYING MOTION TO RECUSE AND ORDER DENYING MOTION TO ALTER OR AMEND PURSUANT TO RULE 59

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2019 JUL 10 PM 1:25

This Court denies the motion to recuse. This Court also denies the motion to alter and amend the October 5, 2015 Amended Order of this Court denying the application for post-conviction relief. This matter comes before this pursuant to the Order of the South Carolina Supreme Court on September 30, 2014 for an entry of an Order pursuant to Pruitt v. State, 310 S,E,2d 254, 423 S.E.2d 127(1992) and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). On October 5, 2015, the Court filed an Amended Order Denying Post-Conviction Relief.

On February 29, 2016, the Applicant filed a "Motion for Stay, For a New PCR Hearing Before a Different Judge, and Alternately, to Alter or Amend the Judgment Pursuant to Rule 59(E). On September 22, 2016 a motion hearing was held in Spartanburg. The Applicant was present and represented by appellate counsel David Alexander and Lara Caudy and original PCR counsel Richard Vieth. The Respondent was represented by Assistant Deputy Attorney General Donald Zelenka and Assistant Attorney General Alphonso Simon. At the conclusion of the

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hearing the Court requested memorandum of law. Each side supplied an initial post-memorandum.

On February 20, 2019, an additional status and motion hearing was held on the status of this matter in the Darlington County Courthouse. The Applicant was present and represented by David Alexander of the South Carolina Office of Appellate Defense. The Respondent was represented by Deputy Attorney General Donald Zelenka and Assistant Attorney General Michael Ross. Argument was heard in the matter again with the Court being provide a copy of the transcript of the earlier Rule 59 hearing. The Court requested post-hearing memorandum from both parties. The Court further requested a proposed order from the Respondent denying the Rule 59 Motion, over objection of the Applicant.

The Applicant provided a Post-hearing Supplemental Memorandum on March 22, 2019. Respondent submitted an Amended Post-Hearing Memorandum on March 26, 2019. This Order follows:

MOTION FOR RECUSAL OF JUDGE IS DENIED

The Court denies the Motion to Recuse. The October 5, 2015 order consists of the findings of fact and conclusions of law it agrees with after review of the materials presented during the proceedings. It is the intent of this Court to comply with the mandate of the South Carolina Supreme Court.

At the February 20, 2019 hearing, Applicant's counsel asserted that the Court should recuse itself because he contends that he did not follow the mandate of the Supreme Court to submit and order in compliance with Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335(2004). He provided the Court with the earlier hearing transcript to supplement his arguments. He further provided a memorandum on March

22, 2019 urging the Court to recuse itself. The Court indicated at the February 20, 2019 hearing that it did not intend to recuse itself. The motion to recuse is denied because there is no requirement for the Court to do so under these circumstances.

The essence of Applicant's argument is that the October 2015 Amended Order was not in compliance with the remand order of the Supreme Court because it only made superficial changes and contained no new legal or factual conclusions and no different case citations. The Applicant urges that the recent PCR order on remand deprived Lindsey of due process of law and claimed that he was entitled to have a second judge for the mere purpose of determining whether an assertion by the Court that he read the order before signing it was a credibility determination. Lindsey's counsel indicated that the tribunal's integrity was in question by its actions. The Applicant contended that the signing of a similar order from the original order violated both the letter and spirit of the 2014 remand and that it required the Court to create a different order "from scratch." Applicant further argued that the drafting of a new order over the passage of time was impossible and that there should be a hearing de novo.

This Court concludes that recusal is not appropriate and that the new order on remand did not violate that mandates of the remand from the South Carolina Supreme Court. In the September 30, 2014 Order, the Supreme Court issued a mandate to this Court "[I]n light of the Court's concern with the frequency and severity of the drafting errors in the Order of Dismissal, and this Court's admonishments to PCR judges in Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004)." It was as follows:

> "we vacate the Order of Dismissal and remand the matter to the circuit court for the issuance of an amended order that complies with Pruitt [v. State, 310 S.C. 254, 423 S.E.2d 127 (1992),] and Hall [v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004),, and with S.C. Code Ann. § 17-27-80 (2003), to include specific findings of fact and conclusions of law on each issue presented, based on accurate references to the record and the applicable law. Petitioner may serve and file a

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> new notice of appeal following the issuance of the amended order, or upon receipt of written notice of entry of an order ruling on any motion to alter or amend the judgment.

Marion Lindsey v. State, Appellate Case 2012-206087, Order (S.Ct.S.C September 30, 2014). This Court takes notice of the proceedings set out in the Respondent's March 26, 2019 memorandum at pages 4-10.

There is no basis for recusal. The Court prepared and reviewed the entirety of the amended order that it filed in this matter. In Applicant's pleadings and at the hearings, the Applicant concedes that numerous changes were made by the Court in the Amended Order from the earlier Proposed Order, but suggests the changes, even the substantive changes, were not significant enough to comply with the Supreme Court's mandate. He complains that the mandate was not to merely correct the frequency and severity of the original drafting errors in the State's initial proposed order, but implicitly that the PCR Hearing Judge could not agree and adopt the findings and conclusions made in the original order, but somehow was required to make different findings and conclusions in the matters before him; albeit on the same issues. In other words, it had to be a complete re-write bearing no similarity (or consistency) to the initial order. Under Applicant's theory, if the Court agreed with those findings and conclusions, he had violated the Court's mandate, apparently even if the original conclusions were consistent with his own findings.

The mere fact that the Court after remand requested a copy of proposed orders that had been submitted by both sides in 2011 does not evidence a "violation" of the Supreme Court's remand order. If fact, the Court had previously requested a copy of **Applicant's** proposed order granting relief in January 2015. Neither of these acts was in violation of the order of remand. To the contrary, the Court was gathering material to comply with the order of remand.

Similarly, the act of entering an amended order with numerous changes, albeit maintaining consistency with his original order's conclusions does not suggest either non-compliance with the Court mandate or violate the precepts of Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). In Hall, the Court did not forbid the action Applicant suggests was in violation of it:

> **Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases**, we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency. **In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it.**

Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004).

The Applicant's suggestion that this requires the this Court's removal and for a new evidentiary hearing to be held *de novo* is simply misreading those actions of the Court and the effect of the Supreme Court's remand, the decision in Hall and Pruitt and the subsequent order denying the initial petition for an extraordinary writ.

The fact the Court requested the 2011 proposed orders from each side in 2015 was not a basis for the Court to disqualify itself nor were other actions which occurred during the original PCR proceedings. What is initially extraordinary, is that - again in this Motion before the Court, the Applicant makes assertions challenging his impartiality at the PCR hearing.[1] *Petition for Extraordinary Relief*, p. 5, citing App.p. 2714[1]; *Renewed Petition for Extraordinary Relief*, p. 8.

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1 Lindsey's appellate PCR counsel suggested a brief reference during one witness's testimony in overruling the State's objection to the relevance of testimony, suggested some bias against the Applicant in favor of the State. This was a parsed and isolated comment in the context of the lengthy proceeding where fifteen (15) witnesses testified, 32 exhibits were submitted by the Applicant and 14 exhibits submitted by the Respondent. Subsequent to the hearing, the Court allowed counsel to wait for a transcript of the PCR hearing before post-hearing memorandum was received. App. 2933-2934. At conclusion of the hearing, the Court suggested briefing in 30 days after receipt of the transcript which was provided to Applicant's

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The direction by the Supreme Court to this Court was clear and unambiguous - "the issuance of an amended order that complies with Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992),] and Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004), and with S.C. Code Ann. § 17-27-80 (2003), to include specific findings of fact and conclusions of law on each issue presented, based on accurate references to the record and the applicable law." The actions of the Court in requesting prior pleadings made in the Court of Common Pleas during the original proceedings previously by each side and preparing his own order with a series of changes different from the initial proposed order and original order should not be deemed in direct violation of the Supreme Court's remand order nor suggest it was "flagrantly disobeyed" or in violation of the mandate of Hall v. Catoe.

The Applicant relies upon Anderson v. City of Bessemer, N.C., 470 U.S. 564 (1985) and Jefferson v. Upton, 560 U.S. 284 (2010) to support his conclusion that he should not have prepared an order similar to the prior order before the remand. First, Jefferson concerns a far different situation than Lindsey's case. In Jefferson, the Court applied the pre-AEDPA version of § 2254, holding that the state court had denied the death-penalty petitioner a full, fair, and adequate hearing, because: (1) the state court had adopted factual findings drafted exclusively by

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counsel by August 24, 2010 and the Applicant's post-hearing brief was filed October 26, 2010. Subsequent to request and the filing of requested proposed order from the Respondents on May 2, 2011, The Court allowed Applicant until July 27, 2011 to submit his proposed order. To characterize the Court's handling of the case as "impatience" is incorrect.

Applicant's complaint toward the Court about his alleged impatience with the case [suggesting an attitude against the Applicant] is more extraordinary and incorrect when considered in light of what occurred prior to the case. The Court appointed counsel Vieth and Collins on July 31, 2008 (after relieving prior appointments). An initial scheduling order was set on July 23, 2009 allowing for an amendment to be filed by August 1, 2009 (over one year after initial appointment) and setting January 1, 2010 for the hearing. Lindsey v. State, Scheduling Order, June 23, 2009. The Amended Application was filed August 6, 2009. App. 2210. On June 17, 2010, Respondents made a Return to the Amended Application and Second Rule 12(e) Motion for specificity. App. 2217. The hearing was convened July 19, 2010, nearly two years after counsel was appointed to represent the Applicant

the state's attorneys, pursuant to an *ex parte* request from the state court judge; (2) the state court did not notify the petitioner of the request made to opposing counsel; and (3) the findings proposed by the state recounted evidence from a non-existent witness. See 560 U.S. at 292. Lindsey's case is both legally and factually distinguishable from Jefferson.

In rejecting a similar claim in Jones v. GDCP Warden, the Eleventh Circuit held:

> First, *Jefferson* never could have held, nor did it presume to hold, that this kind of adopted order is not entitled to AEDPA deference. *Jefferson* addressed a claim arising under the pre-AEDPA version of § 2254; the *Jefferson* Court was therefore operating under a different statute than the one controlling this case. Moreover, even absent that legal distinction, the facts of this case are critically different from *Jefferson*. There, the state court adopted a proposed order that it had obtained *ex parte* from the State, without notice to Jefferson. Here, notably, the state court requested that both Jones and the State prepare proposed orders. The court conducted an evidentiary hearing in August and September 2004, at which Jones was represented ably by his habeas counsel, who presented several witnesses and 125 exhibits spanning about 5,000 pages. The state court then took a year and a half to consider the party's submissions and only issued its order denying habeas relief in March 2006. In stark contrast to *Jefferson*, the circumstances here demonstrate that Jones received a full and fair hearing on all of his habeas claims.

Jones, 815 F.3d 689, 715 (11th Cir. 2016). Simply put, Jones concluded that the legal analysis in Jefferson does not apply to the post-AEDPA version of § 2254. *See Jones*, 815 F.3d at 715 (declining to apply ***Jefferson*** because "the facts of this case are critically different from *Jefferson*").

Here, notably, the Court requested to be provided the prior proposed orders submitted by the parties prior to remand with notice to both parties. The Court then took a year after remand to consider the party's prior submissions and issued its order denying PCR relief in October 2015. In stark contrast to Jefferson, the circumstances here demonstrate that Lindsey received a

full and fair hearing on all of his habeas claims.[2]

The Applicant apparently asserts that the decision in Hall v. Catoe by the Supreme Court precludes assigned judges in post-conviction cases from either soliciting proposed orders from either party or adopting the order in full or part after a review. Hall does not stand for that proposition. Rather, Hall states: "we ***strongly encourage PCR judges to draft their own findings of fact and conclusions of law*** **in death penalty cases,**" but the opinion did not preclude it. Rather, in Hall, the Court pointed to the fact that "the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it." Here, as in Hall, the prior proposed orders were provided to this Court after remand in February 2015 and the order was not entered until October 2015. This Court spent a significant time reviewing and revising the order with his law clerk before signing it.

Here, nothing in the remand order prohibited the Court from re-soliciting the previously submitted orders from either or both counsel for its review. To the contrary, the Court could already take judicial notice of its records. Although Applicant's counsel indicated its position Respondent's counsel that the PCR court should not have been allowed to receive or review an

2 Respondents have pointed out to this Court that the adoption of the proposed order by a state court has been held to not deny due process of law in many similar situations. Subsequent to Jefferson, the Missouri Court upheld the practice in Prince v. State, 390 S.W.2d 225 (Mo. App. 2013). Similarly in Miller v. State, 99 So.3d 349 (Ala.Crim.App. 2011), the Alabama Court found no due process violation in the submission and adoption of the proposed order. Van Pelt v. State, 202 So.3d 707, 723 (Ala. Crim. App. 2015) ("The 'adversarial tone' of the adopted order and the typographical errors contained in it do not, in and of themselves, establish that the circuit court's order ... was not the product of the court's own independent judgment."), Groover v. State, 640 So.2d 1077 (Fla. 1994)(same – trial judge signs order three days after submission by prosecutor); Remsen v. State, 495 N.E.2d 184 (Ind. 1986) (same); State v. Combs, 100 Ohio App.3d 90, 652 N.E.2d 205 (1994) ("In the absence of demonstrated prejudice, it is not erroneous for the trial court to adopt, in verbatim form, findings of fact and conclusions of law which are submitted by the state."); Tharpe v. Warden, 834 F.3d 1323, 1334 (11th Cir. 2016) (affirming the district court's rejection of petitioner's argument that the state habeas court "had almost verbatim, and thus improperly, relied on the State's proposed order in issuing its own order") (citations omitted);

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previously submitted proposed order from the parties, this position did not prohibit the Court from requesting the original proposed orders of both parties for its own purpose. There was no prohibition in the remand order of the Supreme Court by any reasonable reading of it. The prior proposed orders by each side were provided to the Court and opposing counsel upon a specific request by the Court's law clerk. As stated in Pruitt v. State, each side had been given an opportunity to oppose the positions within the submissions prior to and after the order was signed.

This Court states that at the time of the submission of the earlier orders in 2011, he reviewed them too hastily and did not pick up the typographical errors. However, and importantly, the Court stated "but the base order was exactly as I saw the case that was presented to me." September 22, 2016 Hearing Tr. p. 19, l.10-11.

This Court further states that after the remand it spent a number of hours with his law clerk going over the order and instructed his law clerk not to make certain corrections on purpose to prove to everyone that could be concerned "that I was involved in redrafting that order and there were many changes made." September 22, 2016 Hearing Tr. p. 19, l. 16-19. This Court then initialed the pages that errors had purposely been left in to prove his point and advised the Supreme Court. Hearing Tr. 19-20. See Order, p. 21, 28, 84. Simply put, this Court is not in "flagrant disregard" of the Supreme Court's remand order as Applicant suggests. The Court made similar comments at the February 2019 hearing.

The Applicant has failed to show the Court has any bias against the Applicant. To justify recusal, "the alleged bias must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." See Berry v. State, 267 Ga. 605, 607–608(3), 481 S.E.2d 203 (1997). Thus, simply because the

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Court had approved the [disputed previous] order in this case would not show bias or prejudice so as to prevent his reviewing his action fairly and impartially. Otherwise, no judge could never rule on a motion to reconsider a previous order. Here the only bias alleged was that the Court, based on what he learned in the first evidentiary hearing and submission of an earlier proposed order, had previously ruled adversely to appellants' interests. As this was legally insufficient, the Court has correctly denied the motion to recuse. To accept this proposition, the use of Rule 59 would be a nullity in PCR actions.

A judge's partiality is to be evaluated on an objective basis and recusal is required where there is an appearance of bias or prejudice. Liteky v. United States, 510 U.S. 540, 548, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Recusal is required where "an objective, disinterested observer fully informed of the underlying facts [would] entertain significant doubt that justice would be done absent recusal." Diamondstone v. Macaluso, 148 F.3d 113, 120–21 (2d Cir.1998). Where, however, the motion to recuse is based upon the argument that the judge is ill equipped to review his own rulings in the case in which the motion is made, there is generally no basis to grant the motion to recuse. United States v. Arena, 180 F.3d 380, 398 (2d Cir.1999); see Liteky, 510 U.S. at 555, 114 S.Ct. 1147 ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion").

Here, the motion to recuse is based not upon an allegation of personal bias against Lindsey. Instead, it is argued that this Court's impartiality is to be questioned because the remand motion specifically required the court to review its prior conduct. As a motion that calls upon the court to review its own ruling, it does not constitute a sufficient basis for automatic recusal. See Arena, 180 F.3d at 398. In conclusion, this Court reviewed the Order of Dismissal on remand and the findings of facts and conclusions of law made within the Order, as well as the

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corrections are the Court's own. The Court denies the motion to recuse.

REMAINING ISSUES OF THE RULE 59 MOTION

This Court further finds that the remainder of the Rule 59 motion should be denied. The Applicant has failed to show that the Court misunderstood, failed to fully consider, or failed to rule on an argument or issue or an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. Our rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion:(1) a party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider to rule on it; and (2) a party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). As set forth below, the Motion must be denied.

A.

In his earlier written motion on February 29, 2016, counsel for the Applicant counsel set forth specific objections on four general grounds for relief. The Court will address each in the order presented:

1. **Trial counsel rendered ineffective assistance, in derogation of the Sixth. Eighth. and Fourteenth Amendments to the United States Constitution by failing to conduct an adequate mitigation investigation and failing to prepare and present an adequate mitigation case at trial. (Motion, p. 4-10.)**

In his motion, he set forth his factual claims in items (a) through (g). Denial of the Rule 59 is appropriate.

a.

In particular, concerning whether Mr. Bartosh waited too long to begin preparations for the trial and sentencing proceeding (a), the Court addressed the claim at Order at pages 171-176.

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The brief conclusory statement in the motion does not address any specific reason, other than a request for reconsideration. Motion, p. 4 – 5. Upon review of the order the reconsideration request should be denied.

In this allegation, the Applicant has merely asserted a general claim that counsel must meet the checklist that he claims the A.B.A. has established as a requirement. While it appears that counsel did not retain a mitigation investigator until months before the trial, he has not proven that no mitigation investigation was done. He has failed to show that the investigation was unreasonable. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691, 104 S.Ct. 2052 (emphasis added). He failed to prove either deficiency or prejudice based on his "time spent" argument.

b.

In this portion, Applicant contends that counsel failed to adequately prepare Dr. Melikian and failed to request a continuance so that she would be ready for trial. Motion, p. 5. This issue was addressed in the Order, p. 64-86. The Court finds that further fact-finding or reconsideration is not necessary.

He specifically asserts that the Court should reconsider whether counsel should have sought a continuance so that Dr. Melikian could have been better prepared. The Court addressed this also in §IV of the Order at pages 84 – 86. As the Court found "[T]he Applicant has only shown that she wanted more time, but not that counsel was deficient in failing to make the request nor any likelihood that it would have been granted." Order, p. 85. The Court found that even with the period of time since the trial Dr. Melikian's opinion of the particular diagnosis did not change, only an opinion – "driven in part by a revelation that Lindsey was intentionally

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feigning mental illness in 2003 and 2004 - that it suggested the severity of his depression was more severe in 2002" - the Applicant has made no probative showing that there was a reasonable probability that the result of the proceeding would have been a life sentence - nor even that Judge Few would have granted a continuance. To the contrary, the evidence was that he would have likely denied it - through her own testimony - and that she was directed by Mr. Bartosh to get the job done." These conclusions and findings do not require reconsideration in light of the record support.

c.

In this subsection, Applicant re-asserts that counsel "allowed" Lindsey to follow the advice of a jailhouse lawyer to feign mental illness. Motion, p. 5. This issue was addressed in Order at pages 34-57 as allegation I (A). The Court found that the Applicant had failed in his burden of showing counsel's deficiency in failing to thwart these actions. Under a Strickland analysis, the matter must be viewed from trial counsel's perspective at the time of the trial in 2004. The Court reasonably found that the fiction of "Jimmy" was imbedded into the meetings between counsel and Lindsey throughout the relationship from 2002 through the trial, as revealed through counsel Brannon and Lenora Topp's credible testimony. As revealed in the trial testimony and questioning of Dr. Melikian and the pretrial testimony of Dr. Narayan (ROA 133-135), there was evidence of malingering and evidence from testing done by Dr. Brawley and the state hospital that reflected he was not malingering - other than the vision of Jimmy. In fact, at that pretrial competency hearing, Dr. Narayan stated that morning: "we didn't find any evidence of his malingering symptoms today. There's no evidence of that. But we did find evidence of that on the three occasions that Mr. Lindsey came to our institution." ROA 137, l. 13-16. Although Lindsey has now recanted, the blame does not rest at prior counsel's feet as current counsel now

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speculate. Neither does the fact that Dr. Melikian's speculation or hope that had she spent more time with Lindsey, he would have eliminated his lie of Jimmy's existence. Order, p. 55-58. Reconsideration of the Court's well founded conclusion is without merit because Applicant failed in his burden of proof of any deficiency by his defense counsel in failing to make Applicant reveal to them that he had recently concocted his imaginary friend "Jimmy" to feign mental illness in the hopes of avoiding a death sentence at the suggestion of other jail inmates.

d.

In his motion section I. (d), he again contends that counsel failed to spend sufficient time to learn of Lindsey's intent to feign mental illness. Motion, p. 5. This issue was addressed by facts and conclusions set forth in the Order, p. 55-57. As noted above, there is factual support for the legal conclusions made previously. Reconsideration is denied.

e.

In subsection (e), Applicant asserts that trial counsel failed to respond to the issue of whether Lindsey was malingering during the penalty phase, specifically related to forensic psychologist Brawley's evaluation and testimony. Motion, p. 5-6. This issue was addressed by the Court within the Order, pages 57-60. Applicant has not asserted how the conclusion reached previously requires reconsideration. His complaint that Dr. Brawley was not called as a witness on the issue of malingering cannot be deemed to be ineffective. Her results were presented to the jury on the testing that was done and relied upon by Dr. Melikian. Although admissible, it would have been cumulative to the decision to call Dr. Melikian. Dr. Brawley stated that she had been advised prior to the trial that she would not be testifying and prepared her written report for use by Dr. Melikian - consistent with her oral consultation with her. This was not neglect by counsel, but reflects a conscious decision on counsel Bartosh's part on this

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issue. The evidence was admitted concerning both of Dr. Brawley's malingering tests as well as the conclusion that the state examiner's objective testing did not show malingering. Counsel cannot be deemed deficient under those circumstances. Similarly the failure to present the cumulative evidence from Dr. Brawley cannot be deemed prejudicial under the Sixth Amendment and Strickland v. Washington. The request is without merit to alter or amend.

f.

In subsection (f), Lindsey contends that counsel Bartosh failed to preserve evidence or call Rod Tullis at trial. Motion, p. 6. The Court addressed Mr. Tullis's testimony in the Order at pages 140-145. Applicant asserts that former counsel Tullis had collected suicide notes and that Applicant's trial counsel Bartosh allegedly lost a tape received from Tullis containing a telephone message from Lindsey hours before the shooting. He complains that this reflected his state of mind before the killing and would have been useful if disclosed to his mental health experts as reflecting Lindsey was distressed and distraught and emotionally down on the message. PCR Tr. 169-170. Tullis testified that he had provided the tape and some suicide notes to the Public Defender's office and advised the prosecution of it. PCR TR. 172-173, 187-189. Tullis stated he had not given the tape or copy to the prosecution. Hearing Tr.p. 189-190. Dr. Melikian testified that she was aware of suicide notes, but had not seen them. Similarly, she stated she was not aware of the telephone call message to Rod Tullis and claimed it would have been useful to understand his mental state close to the time of the offense. PCR Tr. 621-22. Evidence also was present that Lindsey had told Dr. Brawley of suicide attempts which she shared with Dr. Melikian prior to the trial. PCR 87- 88. Importantly, Doug Brannon testified that he did not have a tape from Tullis when he handled the case. PCR Tr.p. 66.

As noted within the Order evidence of the Applicant's mental state was being evaluated

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prior to the trial. In making a conclusion concerning Dr. Melikian, the Court concluded:

> This Court finds that her 2010 PCR diagnosis of mental illness under Axis I, II, III, IV would be the same as her earlier conclusion, only that the degree of the severity of the depression was greater than she earlier thought. PCR Tr. 621. Similarly, although she was not aware of the telephone call to Rod Tullis, Dr. Melikian was not aware that there was no additional evidence from Lindsey himself that he ever made the call and no evidence that anyone - other than allegedly Tullis - had actually heard the alleged call, including her own discussion with Lindsey.

Order, p. 83. This implicitly suggests that no one had heard the telephone message other than Rod Tullis or that Lindsey had ever confirmed making such a call. Nevertheless, the diagnosis remained the same. The Court does not need to resolve the factual conflict between Mr. Tullis who claimed he received a phone message and cassette tape of the message and counsel Brannon who stated that they did not have such a tape during his representation. Since evidence that Lindsey was allegedly suicidal several weeks before the incident was presented to the jury, even if such a cassette tape existed at some point, it was not presented at the proceeding or to any evaluators either at the time of the trial or since.

The Court finds that the failure to call Tullis was not ineffective where 6th Amendment prejudice cannot be shown. Similar evidence was presented through Dr. Melikian and other lay witnesses about the Applicant's mental state surrounding the incident and the basis for it arising from the separation from his children. She further testified about his expressed intent to commit suicide that date. App.p. 2012-2013. Evidence was also presented that Applicant was in a suicidal state due to the events around the time of the incident. During the guilt phase, it was developed through Celeste Nesbitt about the relationship between the Applicant and the victim and her intent to divorce Lindsey. ROA 1540, 1557-61. Further, it was developed that Nell was not allowing for Lindsey to see the children and that she had blocked his telephone calls. ROA App.p. 1675-76. Counsel developed that there was a head injury to Lindsey at the incident and

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he had declared that he had shot himself in the head. ROA App.p. 1674. Respondent submits that the jury had a reasonable understanding from expert and lay witnesses about the Applicant's mental state at the time. Although there is a factual issue concerning the existence and receipt of an answering machine tape, evidence supports that Tullis indicated to counsel Bartosh that Lindsey had called his office at some point and threatened to commit suicide. In light of the other evidence presented, including the evidence of his self-inflicted head wound on that date, the absence of Tullis's testimony does not undermine confidence in the verdict, applying the Strickland standard.

The Applicant failed in his burden of proof of showing the tapes existence and the impact, if any of its value. To suggest otherwise is pure speculation. Reconsideration must be denied.

g.

In his motion at (g), he makes a contention that the reconsideration is proper because the Court erred in concluding that the counsel adequately presented the history of mental illness and impairment in Lindsey's own family, by not adequately interviewing them to learn of their own illnesses and failing to present them with a basis for admission of the evidence in mitigation. Motion, p. 6-7. This issue was addressed fully in the Order at pages 86-87, 99-168. Other than conclusory statements, Applicant has failed to state with specificity any matter missed or mistaken fact relied upon. There is record evidence to support the Court's conclusions 163-168. This portion of the motion must be denied.

h.

In this portion of the motion (h), Applicants reasserts a claim related to failing to prepare witnesses to testify. Motion, p. 7. In particular, he claims it relates to a failure to present

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witnesses to request mercy and present arguments related to such a request. Id. Initially, he asserts it related to paramedic Vincent Bell. The Court addressed his testimony at Order, p. 168-171. Apparently, he contends that he wanted the jury to hear comments he made to Bell at the scene about the crime because his wife was fooling around with somebody, the fact he shot himself, and to let him die. PCR Tr. 168-169. The Court reasonably concluded it was not deficient or prejudicial. Order, p. 170-171.

In the next portion of the motion related to witnesses, he points to Bill and Patsy Burton. Motion, p. 7. These witnesses were addressed in the Order at pages 25-26, 60-64, 99-102,107, 136-140, 145, 147-149, 151, 157, 161-162. As to Bill Burton, he testified before the jury and requested: "please have mercy on him." ROA 2076. Concerning Patsy Burton who was not called and would have testified similarly, the Court's earlier conclusions support a finding that deficient performance was not shown by the failure to call her as a witness. The Court concluded that "As in Sapp, there is cumulative evidence of family and friends requesting mercy. He has failed to establish Sixth Amendment prejudice. . . ." Order, p. 64. See also, Order, p. 164. This Court finds the request to alter in reconsideration must be denied.

Concerning his mother, Virginia Lindsey, her trial testimony and post-conviction testimony was addressed in the Order at pages 22-24, 62, n. 11, 63, 86, 103-105, 108-109, 110-126, 144-146, 158-159. Virginia Lindsey testified to the 2004 jury that: "Marion is my son. I love him very much. And I ask mercy for my son not to be sentenced to death. I know that somebody else's child's life was took. But I don't want my child sentenced to death" ROA 2060. Virginia Lindsey testified that she did talk to the defense team and "they did" prepare her to request the jury to have mercy on her son. PCR 368, l. 14-18. However, she felt she was not prepared to make a mercy request at trial. She claimed that if she was prepared, she would have

asked for mercy on her son because she had lost a son and "would ask for mercy that he not get the death penalty." She stated that he had to be punished, but not the death penalty because it hurts to lose someone. She said she not only lost a son, but that she lost a daughter, a son, and two grandsons. PCR Tr. 369, ll. 1-8. However, the record reflected that she did make that request. ROA 2060.

The Court reasonably denied this allegation in its Order, p. 62-63. See also, Order, p. 86. The Court reasonably also concluded that "a review of the trial testimony of Virginia Lindsey (guilt and penalty), cousin Chris Wilkens (guilt and penalty) and the penalty phase testimony of friend Bill Burton, Leon McDowell and Steve Pilgrim reveal that the essential family background was revealed to the jury. Importantly, concerning the depth of the investigation, the summaries of the interviews that Ms. Topp had with Marion Lindsey and Marion Lindsey's mother in 2004, buttressed by Ms. Topp's own PCR testimony about what she learned in 2004 are virtually in the same detail that the post-conviction evidence from the family members and Jan Vogelsang's testimony in the PCR hearings." Order, p. 157-158. The request for reconsideration is denied.

In his next specification, he makes the same assertions about Bessie Smith's trial and PCR testimony. The Court earlier addressed Ms. Smith, the Applicant's aunt, in the Order at pages 27, 62-63, n.17, 86-87, 99-100, 104, 108, 109-110,116-118, 120-127, 129-130, 132-134, 145, 149-150, 153, 159, 163-164. The Court found "that the investigation concerning the social history of the family was constitutionally adequate. In addition to this information, the 2004 defense team was aware that there had been mental health concerns for Bessie Smith who had tried to commit suicide, and Steve Pilgrim who at least had nerve and anxiety problems." And that 6th Amendment prejudice had not been proven. Order, p. 163-164. The Court had also held

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that "at the PCR hearing, the Applicant present a series of family members and friends who testified concerning the family history and their knowledge of Lindsey's life and worth. Implicitly, the Applicant was claiming that such evidence would assist in presenting a background to a social historian and could have been presented in more detail or in a more persuasive manner. However, contrasted with the information that counsel had in 2004 and what was used at trial; it reflects a reasonable decision not to use it in the unpersuasive and inconsistent detail that was presented at the PCR hearing. Additionally, the failure to present it in the manner did not show a reasonable probability that the result of the proceeding would have been different under the Strickland test." Order, p. 109-110. The Court properly applied Strickland to the facts of the case. The motion for reconsideration and altering judgment must be denied.

In the next specification, he makes similar assertions about Steve Pilgrim and Timothy Sims. The Order addressed Pilgrim's trial and PCR testimony at pages 23, 33, 63, 63, n. 16, 86, 111, 116, 122, 126-131, 145-146, 150, 155, 157, 163-164. The Order addressed Timothy Sims pages 33, 105, 113, 118-119, 131-136, 145, 149, 160. As with the other family members, the Court concluded "that the essential family background was revealed to the jury. Importantly, concerning the depth of the investigation, the summaries of the interviews that Ms. Topp had with Marion Lindsey and Marion Lindsey's mother in 2004, buttressed by Ms. Topp's own PCR testimony about what she learned in 2004 are virtually in the same detail that the post-conviction evidence from the family members and Jan Vogelsang's testimony in the PCR hearings." Order, p. 117-118. See also Order, p. 163 (finding investigation concerning the family history was adequate where it revealed nerve and anxiety problems of Pilgrim). Reconsideration is not warranted where the record supports that Strickland was properly applied to find neither

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deficient performance or prejudice.

Finally on this assertion, Applicant notes generally that the counsel failed to adequately argue or preserve the record concerning mercy. Motion, p. 7 (h). This issue was specifically addressed in the Order at pages 60-64. The Applicant has failed to show how reconsideration is appropriate or required. It must be denied.

i.

In allegation (i), he contends that the counsel failed to adequately prepare or present EMS workers related to Lindsey's state of mind after the shooting. Motion, p. 7-8. The Court specifically addressed this issue at Order, pages 168-171. The Court found that neither deficient performance or prejudice was shown under Strickland. Order, p. 170-171. Applicant has not suggested in any manner why reconsideration or altering the judge is required. It must be denied.

j.

In specification (j), Applicant contends the Court erred in concluding the argument only concerned the amount of time counsel spent in investigating and preparing a mitigation defense, where it was related to the evidence the jury never heard or the manner the witnesses testified. Motion, p. 8. First, the Applicant ignores that the portion of the Order Applicant appears to be complaining about Order, p. 171-178, was a judicial response to the briefing in the Post-Hearing Memorandum of Law by the Applicant's PCR counsel, at Applicant's October 26, 2011 Post-Trial Memorandum, pages 54-58, which was limited to an argument concerning "time-spent." Further, the Applicant neglects that his concerns in his present motion were actually addressed in the Order at pages 157-167 which also addressed investigative preparation and presentation of the witnesses and whether deficient performance and prejudice had been

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shown. Reconsideration is not required where the matters were addressed in other portions of the Order from a reasonable reading, rather than a parsed reading.

k.

In item (k), Applicant contends the Court ignored the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. Motion, p. 8-9. To the contrary, the Court specifically addressed the guidelines in the Order, p. 14-16, 176. The Applicant continues to assert that the guidelines are a mandatory checklist rather than a guide. Motion, p. 8-9. The Court concluded that the investigation was not deficient. Order, p. 176-177. The United States Supreme Court has "explicitly approved" using the ABA Guidelines "on attorney performance in effect at the time of a defendant's trial as 'guides to determining what is reasonable' performance by counsel." Padilla v. Kentucky, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). Accord, Stone v. State, 419 S.C. 370, 397, 798 S.E.2d 561, 576, cert. denied, 138 S. Ct. 392, 199 L. Ed. 2d 290 (2017). The Court has also clarified that "'[ABA] standards and the like' are 'only guides' to what reasonableness means, not its definition." Bobby v. Van Hook, 558 U.S. 4, 8, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009), quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052, 80 L.Ed.2d 674. It is clear that this Court was aware of the guidelines as a guide cited by Applicant during the presentation. In assessing whether counsel's performance was deficient, courts look to such factors as what counsel did to prepare for sentencing, what mitigation evidence he had accumulated, what additional "leads" he had, and what results he might reasonably have expected from those leads. The reasonableness of counsel's investigation involves "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins v. Smith, 539 U.S. 510, 527 (2003). "[C]ounsel should consider presenting...[the defendant's] medical history,

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educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." Id. at 524 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 11.8.6, at 133 (1989)). The Supreme Court stated in Wiggins that the "investigation into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence." Id. However, it is also clear the Court determined its application of Strickland based upon the totality of the evidence. Reconsideration is not required.[3]

I.

In item (I), he makes a broad contention that the Court erred in concluding that Applicant had failed to show prejudice under Strickland, Motion, p. 9-10. He contends that the Court's determination was based upon a claim that the Court found that because counsel presented some evidence it was *ipso facto* not prejudicial. Motion, p. 9. However, Applicant fails to point to any portion of the Order where the Court made that simplistic assessment. To the contrary, it clear that Court weighed the evidence, where any deficiency was found or asserted, the evidence that was actually presented to the jury with the evidence that was shown that it could have been presented to the jury and whether or not if the evidence have been presented whether there was a reasonable probability the result would have been different. Applicant's generalized characterization of the Court's conclusion is not supported by a reading of the Order.

2. **Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a social work expert who could testify regarding Marion Lindsey's horrible upbringing, his awful family history, and the effect this had on his mental state at the time of the shooting. Had trial counsel called an expert like Jan Vogelsang, the result of the proceeding would have been different. [Motion, p. 10-12]**

3 This issue was also briefed in the Applicant's Post-Hearing Supplemental Memorandum (October 21, 2016), p. 6-8.

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In this portion of the Motion, Applicant contends that counsel was ineffective in failing to hire a social worker who could have testified at trial about Lindsey's life and development. He asserts that the Court's emphasis about Lenora Topp was misplaced concerning her investigation because she did not testify at the sentencing. He further contends that the concern about Vogelsang's potential testimony in hindsight is a red herring because the State was already allowed to present evidence in aggravation in the penalty phase. Motion, p. 11. The Court addressed this issue in its Order at pages 99-168. In particular, the Court found that "the PCR testimony of Social Worker Vogelsang presented the particular dangers of presenting family background testimony" and revealed why the Applicant had failed to satisfy the prejudice prong of Strickland. Order, p. 145. Simply put, there was a plethora of negative information revealed by Vogelsang's PCR testimony. This was emphasized in the portion of the Order set forth at pages 164-168 where the Court determined that the prejudice prong had not been satisfied. New PCR counsel representing Lindsey may not have been sensitive to the probative power of this finding by the Court who heard the testimony of Ms. Vogelsang and how it undermined the value of her testimony in this particular case:

> Further, as pointed out in the cross-examination, the danger of using a social worker who relies frequently on anecdotal hearsay risks making a difficult case even worse. It would have presented an additional opportunity to focus upon certain errors in her presentation and negative factors related to Lindsey that would make a death sentence even more likely. In the questioning concerning her expertise in child custody matters, she admitted that a person with the characteristics of Lindsey should not have been allowed to have visitation without court supervision, if at all, even though he had to be reminded that there was evidence that Lindsey had feed beer to his baby son in a baby bottle. PCR Tr. 563. See ROA 1820 (Lindsey gave son a beer in a baby bottle). PCR Tr. 565, ll. 7-20. She was inconsistent on what family members - uncles or cousins - he was running drugs. PCR Tr. 578. She also reiterated Lindsey had a record of violence, not only toward Nell, but toward other females, including those he claimed to love. PCR Tr. 589. In confirming that his risk factors made it a high risk that he would end up committing the very act he committed, she also admitted that the risk factors she found are not treated in the prison system. PCR Tr. 593-94.

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Order, p. 166-167. The Court then applied the appropriate standard that Applicant asked to be applied for prejudice. "To assess the probability [of a different outcome under Strickland], we consider the totality of the available mitigation evidence both that adduced at trial, and the evidence adduced in the habeas proceeding and reweigh it against the evidence in aggravation." Sears v. Upton, 561 U.S. 945, 130 S.Ct. 3259, 3266, 177 L.Ed.2d 1025 (2010). As the Court concluded: "Here, the sentencing profile was not altered by the additional testimony of Ms. Vogelsang. Although she presented a social history of known poverty and lack of a father-figure - **known to the sentencing jury** - she also confirmed that he had become a controlling and violent person. Against the trial backdrop including the evidence in aggravation, as well as the family mitigation the jury actually heard, the burden of proof has not been met by Applicant." Order, p. 167-168. This ignores the fact that probative power of that negative evidence by Ms. Vogelsang was not presented to a jury at the trial – not that it could have otherwise been presented as Applicant suggests.[4] Simply put, Strickland confidence in the verdict was not undermined by the failure to present Vogelsang at the sentencing hearing. Her testimony would have made a death verdict more likely. Reconsideration must be denied.

3. **Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by hiring an inexperienced forensic psychiatrist one month before trial and failing to prepare her to testify. Margaret Melikian was ill-prepared in all respects for this trial. Trial counsel's decision to hire her and failure to prepare her was constitutionally deficient and prejudiced Lindsey. [Motion, p. 12-15].**

In his motion, he initially contends that counsel was deficient in retaining Dr. Melikian only a month before trial and failed to give her complete records and violate the ABA

4 Applicant also complains about the lengthy presentation about Lenora Topp's investigation and questions it relevance. This issue was addressing investigation of mitigating factors as well as presentation of the factors at the sentencing proceeding.

guidelines concerning her late retention and limited preparation. As noted above at pages 21-22, this issue was generally raised in Section IV of the order at pages 64-87. The Applicant complains specifically the Court's conclusion that Applicant failed to show deficient performance because of a lack of specificity concerning the information she received and the lack of preparation as not being supported by the record. Motion, p. 13. Applicant claims that Dr. Melikian did not see the suicide notes written three weeks before,[5] did not know about the purported call to Mr. Tullis,[6] did not see photographs or pictures and had incomplete incident reports about Lindsey's self-inflicted injuries at the Detention Center.[7] Motion, p. 13.

In the order the Court addressed the limited as follows:

> . It is apparent that there was a difference in the quantity of material that Dr. Melikian reviewed in 2004 contrasted with this hearing. PCR 603. ***However, she was unable to state with any clarity what particular information she lacked in 2004 was critical to a revision in her assessment.*** In 2004, she had his medical records, the records from a psychiatric hospitalization when he was a teenager, the records from a head injury when he was an infant, his neurological records, and his school records. ROA 2003. She also had the reports from Hall Institute. PCR 601. She also had consulted with Dr. Brawley who did a series of neuro-psychological testing and received and reviewed her written report. PCR 602. **Although she complained in hindsight that she had not been provided all the information that the 2004 defense team acquired (PCR 603), Dr. Melikian was unable to cogently express what material made a difference to her conclusions, other than it would be corroborative evidence concerning information that she had learned and relied upon in 2004.** Much of her renewed analysis did not concern the way she gave in rendering a mental health opinion, but was more directed toward a characterization that was being made of the Applicant by the state's evidence of his character. PCR 607 (information about arrests that she was not aware in 2004).
>
> The problem with her retrospective analysis of her own testimony is that it ignored the danger that her review of the additional material presented and allowed the Respondent in this proceeding to additionally develop the negative

5 See Order, p. 39, citing PCR Tr. 607-608 about suicide note.

6 See Order, p. 43, citing PCR Tr. p. 621-22 where Dr. Melikian testified that she was not aware of a telephone call to Tullis and opined that it would have been useful to understand his mental state close to the crime.

7 See Order, p. 42, citing PCR Tr. 615 concerning her testimony that she learned of the injury in the Detention Center from Lindsey, but did not see photographs.

evidence - as the prosecution would have been developed at trial, and as it was similarly done with the proffered social work testimony of Jan Vogelsang. In cross-examination, based upon her review and reliance upon information both developed by the original trial team and then enhanced by the collateral team, Dr. Melikian had to address the bad as well as the beneficial because of her reliance of the extensive, but limited data.

This Court finds that her 2010 PCR diagnosis of mental illness under Axis I, II, III, IV would be the same as her earlier conclusion, only that the degree of the severity of the depression was greater than she earlier thought. PCR Tr. 621. Similarly, although she was not aware of the telephone call to Rod Tullis, Dr. Melikian was not aware that there was no additional evidence from Lindsey himself that he ever made the call and no evidence that anyone - other than allegedly Tullis - had actually heard the alleged call, including her own discussion with Lindsey.

Although she now wished Lindsey had seen a behavioral neurologist rather than a clinical general neurologist, there is no evidence of what such an expert would have revealed that could have transformed her opinion. Although Dr. Melikian claimed she had limited school records , she admitted she received 18 pages of school records faxed to her on May 4, 2004. PCR Tr. 624. She pointed to the fact she now had better evidence of his weight loss but that it was consistent with her testimony. PCR Tr. 633.

Similarly, this Court concludes that had she been exposed and relied upon the material presented through Jan Vogelsang, the likelihood of a death verdict became even more enhanced. Although she met with investigator Lenora Topp, who prepared extensive summaries of the family history from her interviews with Lindsey, his mother and aunt, Dr. Melikian could not recall the specifics of the information she was provided about Lindsey's family and Topp's interview with Lindsey prior to her trial testimony. PCR Tr. 635. Her ultimate conclusion in 2004 and now is the same - Lindsey met the diagnostic criteria for "major depression" whether she looked at those earlier records and still feel he does after reviewing more records given to her since the trial. PCR Tr. 635-37.

Even if we assume that counsel was ineffective in getting certain unidentified material to Dr. Melikian, the alleged deficiency has failed to show prejudice or even a different presentation. See Wong v. Belmontes, _ U.S. _, 130 S.Ct. 383, 386, 175 L.Ed.2d 328 (2009) (per curiam) (assuming, for purposes of analysis, that counsel's performance was deficient when prejudice inquiry was dispositive). This allegation must be denied.

Order, p. 82-83 (emphasis added).

As with some of the earlier assertions in the Motion, this Order was in response to the earlier Applicant's October 26, 2011 Post-Trial Memorandum, page 49, wherein Applicant limited his argument in the following conclusory fashion

> Dr. Melikian needed information and documents related to Marion Lindsey's history in order to properly evaluate him and present her testimony during the sentencing phase of the trial. The defense team failed to perform a proper investigation to identify and locate the information needed by Dr. Melikian.
>
> Further, the failed to provide Dr. Melikian with the limited information they did have available to them. The defense team's failure to investigate Mr. Lindsey's background and to provide the information obtained to Dr. Melikian constituted ineffective assistance of counsel. There is a reasonable probability that the outcome of the sentencing phase of the trial would have been different if the defense team had not committed this error.

Applicant's October 26, 2011 *Post-Trial Memorandum*, page 49, As noted, the Applicant therein did not identify with any specificity any particular item of information or document. Further, during her trial testimony, Dr. Melikian identified the materials that she had reviewed which allowed her to give an opinion to a reasonable degree of medical certainty. ROA 2063, See Order, p. 76-77. Within the Order, the Court summarized Dr. Melikian's PCR and trial testimony. Order, p. 66-82. The Court fully considered the evidence and the Order was in context to the manner the allegation was raised in the post-PCR hearing briefing. Reconsideration is denied.

In this portion, the Applicant re-asserts that the defense team failed to prepare Dr. Melikian concerning "Jimmy" and accusations of malingering and allegedly failed to provide Dr. Melikian with prison record's that "Jimmy had taken over his body and was responsible for the shooting,"[8] among other things concerning his interaction with counsel about "Jimmy."[9] Motion, p. 13-14, The Court specifically addressed the "Jimmy" and malingering issue in the Order at pages 34-60. This same assertion was addressed above at pages 13-14, The proper assessment was fully addressed in the Order in the analysis of Dr. Melikian and the Applicant's

8 This was noted in the Order at page 41-42 in summarizing Dr. Melikian's testimony at PCR Tr.p. 615, ll. 6-16.
9 This was addressed in the Order, p. 41 and particular p. 41, n.7 summarizing Dr. Melikian's testimony at 614-615 and Doug Brannon's testimony at PCR Tr.p. 343-36, 613.

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malingering in the creation of "Jimmy." Order, p. 55-57. Since these matters were addressed and considered by the Court in the Order, reconsideration and amendment of the original judgment was not required.

Further, Applicant seeks reconsideration of the Court's "double-edge sword" assessment. Motion, p. 14. This is a reference to the Order at page 65-66. The Court's order addressed the fact that Dr. Melikian's restructured testimony at the PCR hearing additionally presented evidence that was more aggravating about the Applicant's character. Although at the sentencing, the State was able to impeach and mitigate the effect of her testimony, the restructured PCR testimony presented significant opportunity to again challenge her findings and conclusions as previously addressed within the Order. The Applicant's current speculation that delay would have allowed her to better withstand cross-examination is not the test where her ultimate diagnosis remained the same. As stated earlier, at the time, "Jimmy" existed from counsel's and Dr. Melikian's perspective at the time of the trial and was part of that diagnosis that the defense had. The suggestion to recast the facts as Applicant now wants to do is not what counsel was dealing with in the sentencing proceeding. The Court's assessment properly applied the mandates of Strickland in denying relief where prejudice was not proven by the Applicant by their retrospective assertion. Reconsideration and amendment of the Order and judgment is not necessary.

4 Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a prison adaptability expert who could dispute the State's aggravation evidence. Trial counsel presented nothing to counter the State's evidence that Lindsey posed a future danger.

In the final portion of the Motion, page 15-17, the Applicant contends that counsel was ineffective in failing to present a prison adaptability expert. The Applicant contends that the

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Court erred in concluding that there was "no showing" that Lindsey would have been adaptable to prison, claiming the Court disregarded James Aiken's testimony and speculated regarding the existence of a trial strategy in failing to put up such evidence. Motion, p. 16, ¶ 1. The Court addressed the issue in the Order at pages 87 through 99. Applicant claims that Aiken's opinion – standing alone – that Lindsey was adaptable to prison – was sufficient to demonstrate prejudice. He claims that because his case which involved the shooting of his wife in a public place "met only the bare minimum of qualification under the statutory aggravator" and therefore the evidence could have made a difference. Motion, p. 17.

The Court's order addressed each of the assertions. First, the Order addressed the lack of proof that Lindsey would have been adaptable specifically at Order, p. 87-88, 93-99. The Court properly denied this 6th Amendment claim. Deficient performance has not been shown. The Court finds that evidence concerning prison adaptability by lay or expert witnesses as a response to claims of future dangerousness and the Applicant's character under Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) is admissible in mitigation in death penalty cases and should be considered by reasonable counsel.[10] Although defense counsel did not retain an expert in this area, it is clear that the defense team ***considered*** the issue.

The evidence concerning the defense team consideration of the prison adaptability issue is shown by the fact that counsel Karen Quimby had included in her notes and summaries that future adaptability to prison life was a statutory mitigating factor. App.p. 2583, PCR 249. (Respondent Exhibit 18). In fact, at some point, the reference to prison adaptability evidence was

[10] *See generally* Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (evidence of good behavior in prison admissible in mitigation as relevant to future adaptability); State v. Shafer, 352 S.C. 191, 573 S.E.2d 796 (2002) (evidence of violent behavior in prison relevant to future dangerousness); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) (defendant's future dangerousness and his adaptability to prison life are legitimate interests in the penalty phase of a capital case).

crossed out, suggesting consideration and rejection. See, App.p. 3071. Also included in the defense team material were the records of SCDC concerning the earlier incarceration and records from the Spartanburg Detention Center concerning his disciplinary history. App.p. 2566 - 67; PCR 282-283. In addition, counsel Quimby noted that evidence of prison adaptability could be introduced from a clinical psychologist. App.p. 2546; PCR 262. Counsel Brannon stated that he was aware that evidence of prison adaptability was a proper matter for mitigation in a capital case from the seminars that he had attended. App.p. 2335-37; PCR 51, 53. Counsel was aware of the jail disciplinaries that Lindsey had been involved in from the records and his own visits in the jail where he was locked down. App.p. 2336; PCR 52.

The fact that Bartosh is not available due to his intervening death to explain his decision on why he not specifically retains a correctional expert for trial does not shift the burden of proof. As recognized in Harrington, although courts may not indulge "post hoc rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). See Burt v. Titlow, 571 U.S. at 12, 22-23 (2013) ("We have said that counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,' ... and that the burden to 'show that counsel's performance was deficient' rests squarely on the defendant ... . The Sixth Circuit turned that presumption of effectiveness on its head. It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance'"). See also Romine v. Head, 253 F.3d 1349, 1357 (11th Cir. 2001) (trial counsel's "I

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don't remember" responses will not satisfy a petitioner's burden of proof and overcome the strong presumption of reasonable assistance); Fretwell v. Norris, 133 F.3d 621, 623-24 (8th Cir. 1998) (reversing the district court's grant of the writ based in part on counsel's inability to recall because this is contrary to the presumption of reasonable assistance).

What is undisputed is that the defense team was aware of the potential for the admission of evidence of prison adaptability, acquired records of his current and prior incarceration. These records included evidence of his actions in jail, which included gassing, segregation and anger management courses. Further, the evidence is undisputed that as the defense team created witness lists- with the understanding prison adaptability was a potential mitigating evidence basis. They did not include any witness on the list - jail or prison guards - to testify about this area. Additionally, Brannon opined that this decision would have been left up to Mr. Bartosh.

The failure to investigate or retain a prison adaptability expert in this case is supported by reasonable professional judgment. See Strickland, 466 U.S. at 690-91, 104 S.Ct. 2052 (stating that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"). Importantly, as in Harrington, the proffered evidence revealed the two-edge sword that any seasoned trial lawyer like Bartosh would have recognized as a high risk of harmless information and emphasis by a prosecutor lay in wait for this type of evidence to be presented due to inconsistent history on being adaptable.

The Court concluded a trial counsel's not presenting this expert future dangerousness testimony "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Order, p. 95. There is support for the Court's conclusion in the record.

First, the Court concluded that Aiken's opinion that Lindsey would not be an

unreasonable risk to harm guards or fellow inmates in prison was based in large part on the fact that prison authorities would classify him as a maximum security inmate based on his murder conviction. Order, p. 96. His opinion did not focus on any mitigating lack of propensity to violence in his character - because as shown he had propensity for violence and anger- but instead on the fact that the structured, maximum security prison setting likely would control Lindsey and not permit him to act on any desires to escape or commit acts of violence to other inmates or guards, even though he had done so previously and while awaiting trial (as well as with two other death row inmates since his sentence). [11] PCR Tr.p. 216- 224. The evidence also served to emphasize the point, not favorable to Lindsey, that the prison system would classify him as a high security inmate because it would consider him to present a potential for violence. PCR Tr. 216-217. Aiken clarified that his opinion was only that Lindsey could be managed not to create an unreasonable risk of harm. PCR Tr. 224. Aiken noted that Lindsey "has issues in controlling his anger" just like many other inmates. PCR Tr.p. 225.

The Court reasonably concluded that a reasonable defense attorney could [illegible] conclude that the adaptability experts' core opinion - that he could be managed and not be an unreasonable risk of harm to inmates, guards and the public - in spite of his having recently violently attacked a jailer and a history of jail incidents - was weak and would not persuade Lindsey's jurors. Additionally, a reasonable lawyer would have known the Aiken adaptability evidence focused more on the prison's ability to control Lindsey and all inmates, rather than Lindsey own character. It was shown before this Court that the prosecution would have focused upon Lindsey's violent incidents while in custody - with the underlying knowledge of

[11] Similar testimony may be inadmissible in some other states, including Virginia. See, Morva v. Commonwealth, 278 Va. 329, 351, 683 S.E.2d 553, 565 - 566 (Va.,2009) ("Whether offered by an expert, or anyone else, evidence of prison life and the security measures used in a prison environment are not relevant to future dangerousness unless it connects the specific characteristics of a particular defendant to his future adaptability in the prison environment").

his violence against others - male and female - in and out of custody. A decision to prevent or limit that comparison against the weakened evidence of prison administration would not be unreasonable. A reasonable attorney could decide that under the particular facts of this case the future dangerousness testimony concerning prison adaptability would not be helpful.[12]

Further, the Court correctly determined that Sixth Amendment prejudice was not shown by the failure to present similar testimony by James Aiken in 2004. Order, p. 97. As shown in the cross-examination before the PCR Court, the benefit in mitigation of such testimony was weakened and could have made a death sentence more likely rather than less likely. The risks of this generalized adaptability testimony was evident where:

- Aiken noted that you can never say never, but the vast majority of prisoners in SCDC can be incarcerated. App.p. 2496; PCR 212.
- The best predictor of future behavior is past behavior.
    - the prior correctional records of the crime of assault and battery with intent to kill revealed circumstances where there was an altercation on a highway where shots were fired and the victim was wounded. It was then emphasized - like the present case - that he shot into a vehicle! App.p. 2498; PCR Tr. 214.
    - Lindsey had also been arrested for criminal domestic violence.
    - Aiken never met with Lindsey about his other arrests and crimes of violence he committed and only based his opinion on paperwork. App.p. 2499; PCR Tr. 215, ll. 5-11.

[12]We note that this is not a case in which the State introduced expert testimony about the defendant's future dangerousness and the defendant was denied an opportunity to directly rebut that testimony with his own expert. *See Clisby v. Jones*, 960 F.2d 925, 929 n. 7 (11th Cir.1992). Nor is this a case like *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), in which the State's two experts testified there was a "high probability" that Williams posed a serious continuing security threat and defendant's attorneys failed to elicit: (1) evidence of Williams's "nightmarish childhood," including criminal neglect by his parents, severe abuse by his father, and his time in an abusive foster home; (2) that correctional officers were willing to testify Williams would not pose a danger while incarcerated; (3) that Williams received prison commendations for breaking up a drug ring and returning an officer's wallet; and (4) an admission *from the State's testifying future dangerousness experts* that the defendant would not pose a threat in the future if kept in a structured environment. *Id.* at 368-71, 373 & n. 4, 395-98, 120 S.Ct. at 1500-02 & n. 4, 1514-15.

- Aiken also admitted "the potential for violence is certainly there" and had failed to mention in direct - that he saw in the prison records that he was recommended for "anger management." App.p. 2499; PCR Tr. 215, ll. 21-22.

- His prior prison record reflected violence with fights and indications he acted violently towards others which had not been emphasized at the 2004 trial where the adaptability testimony had not been proffered. App.p. 2500; PCR Tr. 216.

    - The March 24, 1996 inmate fight at Dutchman Correctional Institution.

    - A Spartanburg Detention Center violent assault in the jail when he got into another altercation with an inmate and an officer. App.p. 2501; PCR Tr. 217.

        - Lindsey received 20 days segregation and Lindsey got gassed by the officers to control his behavior.

- Aiken clarified that his opinion was only that he could be managed not to create an ***unreasonable*** risk of harm, not that he would not be harmful to others. App.p. 2508; PCR Tr. 224.

The Court's similar and earlier findings were not unreasonable nor do they require amendment. Even if counsel Bartosh's performance was allegedly deficient for not presenting such an expert, no prejudice resulted. There is no reasonable probability that the outcome would have been different had such an expert testified because any possible benefit from such expert testimony would pale in comparison to Lindsey's actual behavior both prior to and after his arrest. The mixed impact it could have had in this particular supports the conclusion that counsel was not ineffective. See Parker v. Sec'y for the Dep't of Corr., 331 F.3d 764, 788-89 (11th Cir.2003) ("Given the strength of the aggravating factors and the relative weakness of the mitigating evidence Parker argues should have been presented, there is no reasonable probability that, absent the deficient performance, the outcome of the proceedings would have been different. The aggravating factors in this case are substantial."). "Moreover, we have rejected prejudice arguments where mitigation evidence was a 'two-edged sword' or would have opened

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the door to damaging evidence." Wood v. Allen, 542 F.3d 1281, 1313 (11th Cir.2008), cert. granted, — U.S. ----, 129 S.Ct. 2389, 173 L.Ed.2d 1291 (2009) (citing Gaskin v. Sec'y, Dep't of Corr., 494 F.3d 997, 1004 (11th Cir.2007); Grayson v. Thompson, 257 F.3d 1194, 1227 (11th Cir.2001)); see Wong v. Belmontes , 130 S.Ct. at 387-90 (finding no prejudice where proposed mitigation evidence was either cumulative of evidence already presented at penalty phase, or would have opened door to damaging testimony). The failure to present similar evidence from Aiken has been found by other courts to not be ineffective assistance of counsel. See Brant v. State, 197 So. 3d 1051, 1070 (Fla. 2016), reh'g denied, No. SC14-2278, 2016 WL 4446453 (Fla. Aug. 23, 2016) (Specific testimony that Brant was generally a nonviolent person and a good prisoner who would likely be able to adapt to prison life without causing any further harm to anyone would have added little to the evidence that was presented).

In his October 21, 2016 Post-Hearing Supplemental Memorandum, Applicant asserts for the first time that prejudice from the failure to call a similar witness to Aiken was present because in the penalty phase of the trial, the State called James Sligh concerning that Lindsey would have had access to the yard, possibly gone to school and other matters. This evidence was summarized by the Court in the Order at pages 32-33, citing ROA _ p. 1908-1917. He complains that the failure to call Aiken enhanced the potential prejudice from the evidence that he claims was a violation of the post-trial decisions in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005) and State v. Burkhart, 271 S.C. 482, 640 S.E.2d 450 (2007).[13] [See, e.g.,

13 The Applicant's case was tried May 2004. The Applicant now notes that counsel did not object to the testimony in 2004 based upon an argument similar to Burkhart which was decided in 2007. An issue concerning the failure to object to the evidence was not presented at any time prior to this Rule 59 motion. To the extent he is attempting to raise a new ground of ineffective assistance of counsel which was never litigated at the time of the hearing or within any application, it is not properly before this Court. A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not. Dixon v. Dixon, 362 S.C. 388, 608 S.E.2d 849 (2005) (issue raised for first time in Rule 59, SCRCP, motion is not preserved for review). See Brailsford v. Brailsford, 380 S.C. 443,

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Kornahrens v. Evatt, 66 F.3d 1350, 1360 (4th Cir.1995) ("[T]he case law is clear than an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law."); see also Johnson v. Armontrout, 923 F.2d 107, 108 (8th Cir.1991) (stating that "counsel's failure to anticipate a change in existing law is not ineffective assistance of counsel")].

However, in his motion, counsel pointed out that Supreme Court had granted cert and was considering a similar issue in Marion Bowman v. State. The South Carolina Supreme Court has recently clarified that Burkhart, which found a statutory violation on direct appeal, does not support an automatic finding of prejudice once an arbitrary factor has been introduced. Bowman v. South Carolina, 809 S.E.2d 232, 245–46 (S.C. 2018) (Bowman II). Rather, collateral review of an ineffective assistance of counsel claim is subject to Strickland's prejudice prong. Id. at 246 (upholding the PCR court's finding of no prejudice under Strickland where the evidence of guilt and aggravating factors were overwhelming).

In Bowman II, the court described Bowman's claim as one "that trial counsel was deficient in failing to object to the State's cross-examination of prison-adaptability expert James Aiken[,]" where "Aiken's testimony transitioned from a discussion of prison adaptability into one about general prison conditions...." 809 S.E.2d at 234, 238. Bowman's trial counsel had testified that he elicited testimony from Aiken that Bowman "was not going to a 'kiddy camp' and that he would not be 'mollycoddled' [as] a strategic choice, and counsel acknowledged that he expected the solicitor to respond with questions about some of the less harsh conditions of confinement." Id. at 244. The solicitor did, in fact, elicit testimony from Aiken that prisoners could play basketball and exercise on their own and that they had access to libraries, movies, television, and other recreational activities. Id. at 238– 39. The South Carolina Supreme Court

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448, 669 S.E.2d 342, 345 (Ct.App.2008) (holding issue is not preserved for appeal where it was never presented to the trial court prior to the filing of the motion to alter or amend); Baddy v. Oliver, 345 S.C. 39, 44, 545 S.E.2d 830, 833 (Ct.App.2001) (a party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial).

discussed at length "the unique distinction South Carolina jurisprudence has drawn between evidence of prison adaptability, which [the court has] held is relevant and admissible, and evidence of general prison conditions, which [the court has] held is not." Id. at 241. Bowman's trial, like Petitioner's trial, occurred after Plath and Kelly v. South Carolina, 534 U.S. 246 (2002) but before the cases declaring evidence of prison conditions to be arbitrary under state law. Id. at 244.

The South Carolina Supreme Court stated, in Bowman II, that Bowman's counsel's performance was not deficient and denied post-conviction relief, stating:

> By myopically considering our state's nuanced and unique distinction between prison adaptability and general prison condition evidence, it might appear a finding of deficient representation is warranted. While we acknowledge that a close question is presented, in light of the state of the law at the time of Petitioner's trial and the narrowly tailored scope of the prison conditions evidence elicited, we find there is evidence in the record to support the PCR court's finding. There is evidence that counsel articulated a valid reason for employing this strategy, and because the State's response was proportional and confined to the topics to which counsel had opened the door, we affirm the finding that counsel was not deficient in failing to object to the State's line of questioning.
>
> FN. We reiterate that the prison adaptability versus general prison condition distinction is a creation of state law and is not mandated by the Eighth Amendment or other constitutional provision.

Bowman II, 809 S.E.2d at 244 (citations omitted). At the time of Petitioner's trial, South Carolina law had not yet called conditions of confinement evidence an arbitrary factor. The PCR Court was right to note that "Strickland does not require counsel to anticipate changes in...the law, and thus counsel is not required to have foreseen the State Supreme Court would subsequently call conditions evidence arbitrary."

The Applicant also contends that Aiken's testimony was not seriously challenged at the PCR hearing. This is a misreading of the record. The Court's conclusion's recognized the weakness of the potential Aiken evidence in contrast to what the jury heard and the problems

with the opinion. As noted, Aiken unsuccessfully attempted to mitigate the fact of Lindsey being in a prison anger management program and his prior history of violence in the prison, including being gassed to control his behavior which was developed in his testimony. PCR Tr.p. 216 -218. Aiken also based his ultimate opinion on the fact that Lindsey had not previously been in a "security threat group" or "gang" based upon his information before his death sentence. Based upon the fact that he was not in a gang, he thought SCDC could manage him. However, Applicant ignored that Aiken's ability to render an appropriate opinion was impeached when he acknowledged that since his sentence, he had been in two fights with inmates on death row when SCDC was unable to manage Lindsey and prevent violence, contrary to Aiken's mistaken prediction. PCR Tr.p. 223-224. The Court was reasonable in questioning that Lindsey's prior prison violence history equated with an opinion that he would be adaptable to prison in the future when he had not been in the past.

Available counsel confirmed their awareness of the admissibility of prison adaptability evidence. Counsel also confirmed their knowledge of Lindsey's prison disciplinary records and violent history. Although the precise reasoning why counsel Bartosh did not pursue adaptability evidence is not known due to his death, his failure to automatically seek out an expert who would state that the prison system can manage all inmate who are not members of a prison gang, when the client had been involved in prior prison and jail violence, including situations involving being gassed is not surprising and certainly not deficient.

The Court reasonably assessed the thorough presentation of the horrific evidence in aggravation with the omission of proffered prison adaptability evidence and determined that it would not have undermined confidence in the death sentence verdict. He has failed to show on this unique record which included a plethora of evidence about his criminal character and incident of violence and misbehavior in a detention setting that there is a reasonable probability

that the result of the proceeding would have been different under Strickland. Further reconsideration and an amended order under this Motion is not required.

CONCLUSION

WHEREFORE, this Court finds that the Motion to Recuse and Motion to Alter and Amend dated February 29, 2016 to the Order of the Court filed October 2, 2015 are denied.

AND SO ORDERED THIS 8th day of July, 2019

HONORABLE PAUL M. BURCH
Presiding Circuit Court Judge

Pageland, South Carolina