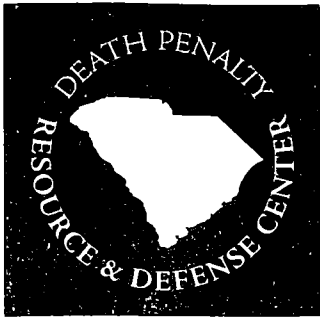




January 16, 2012

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

Re: *James Robertson v. South Carolina, 2011-CP-46-00072*

Dear Mr. Shearouse:

I am writing to report on the status of the above-referenced capital case. This Court assigned the Honorable Lee Alford to retain jurisdiction over this post-conviction relief matter by order issued May 31, 2011. Judge Alford granted the State's motion to dismiss the application, and Robertson filed a notice of appeal before this Court on January 6, 2012.

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

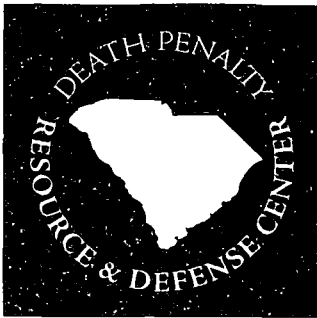
Sincerely yours,

Emily C. Paavola

RECEIVED

JAN 18 2012

S.C. SUPREME COURT



September 15, 2011

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

Re: *James Robertson v. South Carolina, 2011-CP-46-00072*

Dear Mr. Shearouse:

I am writing to report on the status of the above-referenced capital case. This Court assigned the Honorable Lee Alford to retain jurisdiction over this post-conviction relief matter by order issued May 31, 2011. On July 5, 2011, Judge Alford held an appointment hearing and appointed undersigned counsel to represent Mr. Robertson. The State has filed a motion to dismiss the PCR application. Mr. Robertson responded to this motion on July 25, 2011. Judge Alford recently sent a letter to the State directing them to draft an order dismissing the application.

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

Sincerely yours,

Emily C. Paavola

RECEIVED

SEP 16 2011

S.C. SUPREME COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

RECEIVED
USDC, CLERK, CHARLESTON, SC

2010 NOV -4 P 2: 20

James D. Robertson,

Petitioner,

v.

Jon Ozmint, Commissioner, South Carolina
Department of Corrections,

Respondent.

Misc. No. 6:10-mc-00158-SB-BHH

ORDER STAYING EXECUTION
OF SENTENCE OF DEATH

RECEIVED

NOV -5 2010

S.C. Supreme Court

This matter is before the Court upon the Petitioner's Motion for Stay of Execution, filed on October 27, 2010. The Petitioner has also filed a Motion to Appoint Counsel and a Motion for Leave to Proceed *In Forma Pauperis* in this case, which will be addressed in a separate order. The Petitioner is an inmate under a sentence of death, which was entered by the Court of General Sessions for York County in March of 1999. The Petitioner's sentence stems from convictions for two counts of murder, and he is scheduled to be executed on November 19, 2010.¹ The Respondent filed a response to the Petitioner's Motion for Stay of Execution on November 1, 2010. The Respondent does not oppose a stay in this matter.

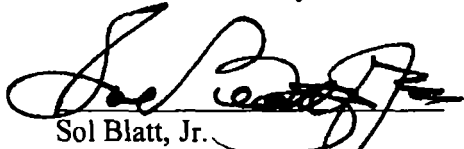
A stay of execution for a state sentence of death is governed by 28 U.S.C. § 2251(a)(3) and *McFarland v. Scott*, 512 U.S. 849 (1994).² "The federal habeas corpus statute grants any federal

¹ The Supreme Court of South Carolina issued an order notifying the Director of the Department of Corrections that pursuant to S.C. Code Ann. § 17-25-370, the execution is to take place "on the fourth Friday after the service upon you or receipt of this notice." The order was issued on October 27, 2010.

² Chapter 154 of Title 28 contains special habeas corpus procedures in capital cases if specified criteria are met. See 28 U.S.C. §§ 2261-2266. The USA Patriot Improvement and Reauthorization Act of 2005, Public Law 109-177, amended Chapter 154 to include the requirement of certification by the Attorney General of the United States. See 28 U.S.C. §

judge 'before whom a habeas corpus proceeding is pending' power to stay a state-court action 'for any matter involved in the habeas corpus proceeding.'" *McFarland*, 512 U.S. at 857 (citing 28 U.S.C. § 2251). Once a capital defendant invokes his right to appointed counsel under 18 U.S.C. § 3599, a federal court has jurisdiction under section 2251 to enter a stay of execution. *Id.* at 858. This Court has jurisdiction to issue a stay, and the Court finds that there is insufficient time before the scheduled execution for the Petitioner "meaningfully to research and present [his] habeas claims." *Id.* The Petitioner indicates that his federal habeas corpus petition will be filed by January 8, 2011. Therefore, the Court finds that the Petitioner is entitled to stay of execution pending his pursuit of federal habeas corpus relief.

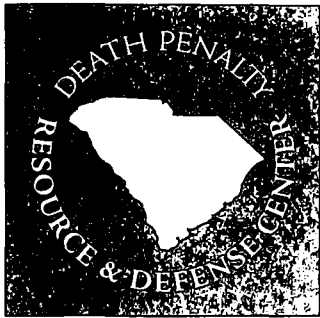
IT IS ORDERED that the Petitioner's Motion for Stay of Execution is GRANTED.


Sol Blatt, Jr.
Senior United States District Judge

November 4, 2010
Charleston, South Carolina

#2
8

2261(b). Chapter 154 further states that "[i]t shall apply only if the provisions of subsection (b) and (c) are satisfied." 28 U.S.C. § 2261(a). Those provisions have not been met, so Chapter 154 is inapplicable in this case.



RECEIVED

NOV 08 2010

S.C. SUPREME COURT

November 2, 2010

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

Re: *James Robertson v. Jon Ozmint, 6:10-mc-00158-SB-BHH*

Dear Mr. Shearouse:

I am writing to report on the status of the above-referenced capital case. Mr. Robertson's petition for post-conviction relief was denied by written order dated March 7, 2008. On October 6, 2010, the South Carolina Supreme Court denied Mr. Robertson's petition for a writ of certiorari. The South Carolina Supreme Court issued an execution order on October 27, 2010. That same day, Mr. Robertson filed a motion to stay his execution and for the appointment of counsel to represent him in the preparation and litigation of his first federal petition for a writ of habeas corpus. That motion is currently pending in the United States District Court for the District of South Carolina, Greenville Division.

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

Sincerely yours,

Emily C. Paavola

The Supreme Court of South Carolina

The State,

Respondent,,

v.

James D. Robertson,

Appellant.

The Honorable John C. Hayes, III

York County

Trial Court Case No. 1998-GS-46-1020

1998-GS-46-1021

ORDER

TO THE HONORABLE JON OZMINT, DIRECTOR,
DEPARTMENT OF CORRECTIONS:

This is to notify you that the sentence of death imposed in the case of The State v. James D. Robertson, from which an appeal has been taken has been affirmed and finally disposed of by the Supreme Court and the remittitur has been sent down to the Clerk of the Court of General Sessions of York County.

IT IS, THEREFORE, required of you by Section 17-25-370 of the Code of Laws of South Carolina to execute the judgment and sentence of death imposed on said appellant on the fourth Friday after the service upon you or receipt of this notice.

Let a copy of this notice be served immediately upon the appellant.


CLERK

Columbia, South Carolina

October 27, 2010

cc: Emily C. Paavola, Esquire
Senior Appellate Defender Joseph L. Savitz, III
Senior Assistant Attorney General William Edgar Salter, III
David M. Tatarsky, Esquire
South Carolina Department of Corrections

RECEIVED

OCT 28 2010

STATE OF SOUTH CAROLINA) S.C. SUPREME COURT
DORCHESTER COUNTY) AFFIDAVIT OF PERSONAL SERVICE

I, Wayne C. McCabe, Warden, at Lieber Correctional Institution, South Carolina Department of Corrections, hereby certify that I personally served a copy of the

Execution Order of The Supreme Court of South Carolina, dated October 27, 2010,

On JAMES D. ROBERTSON, #5067, at 2:21 8 M., on, October 27, 2010,

s/ Wayne C. McCabe

SWORN TO AND SUBSCRIBED before
me this 27 Day of October, 2010

Patty B. Porter
Notary Public for South Carolina

My Commission Expires: 5/1/2018

ACKNOWLEDGE RECEIPT OF ORDER.

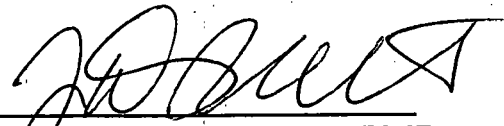
James D. Robertson, #5067

STATE OF SOUTH CAROLINA)

NOTICE OF ELECTION

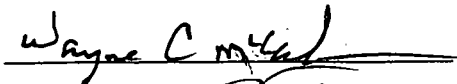
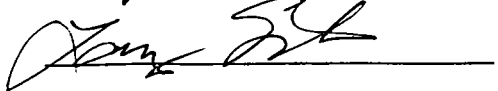
COUNTY OF DORCHESTER)

I, James D. Robertson, #5067, pursuant to Section 24-3-530,
South Carolina Code of Laws, 1976 as amended, hereby elect
lethal injection as the method for execution.

s/ 
James D. Robertson, #5067

Dated: 06/27/10

WITNESSES:



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

October 22, 2010

REMITTITUR

The Honorable David Hamilton
Clerk of Court, York County
1675 -1G York Highway
PO Box 649
York, SC 29745-0649

Re: Robertson, James D. v. State

Dear Mr. Hamilton:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,

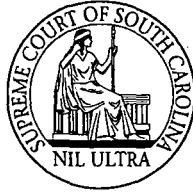


CLERK

DES/dmh

Enclosure

cc: Chief Appellate Defender Joseph L. Savitz, III
Senior Assistant Attorney General William Edgar Salter, III



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

October 6, 2010

Chief Appellate Defender Joseph L. Savitz, III
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: Robertson, James D. v. State

Dear Counsel:

The Court has issued the following Order on your Petition for a Writ of Certiorari in the above entitled matter:

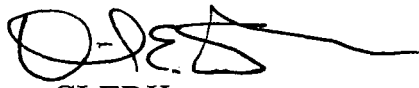
“Petition for Writ of
Certiorari Denied.

s/ Jean H. Toal C.J.
For the Court

October 6, 2010.”

The remittitur will be sent to the lower court as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,


CLERK

DES/dmh

Robertson, James D. v. State
Page Two
October 6, 2010

cc: Senior Assistant Attorney General William Edgar Salter, III

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

**Appeal From York County
Honorable John C. Few, Circuit Court Judge**

JAMES D. ROBERTSON,

Petitioner,

v.

THE STATE,

Respondent.

RECEIVED

JUL 15 2009

S.C. SUPREME COURT

RETURN TO PETITION FOR WRIT OF CERTIORARI

**HENRY D. McMASTER
Attorney General**

**JOHN W. McINTOSH
Chief Deputy Attorney General**

**DONALD J. ZELENKA
Assistant Deputy Attorney General**

**WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General**

**P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305**

**KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit
1675-1A York Hwy.
York, South Carolina 29745-7422
(803) 628-3020**

ATTORNEYS FOR RESPONDENT.

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This Court should deny certiorari because Robertson's claim that trial counsel was ineffective for advising Robertson that anything he revealed to Ms. Cascio, the defense social worker, was privileged against discovery by the State was not presented to or ruled upon by the PCR judge and Petitioner did not seek a ruling by filing a Rule 59(e), SCRCP, motion. Also, probative evidence supports the PCR judge's ruling that trial counsel was not ineffective for failing to object to discovery of Ms. Cascio's notes by the State and for calling Ms. Cascio as a witness. 5

A. Summary of Ms. Cascio's trial testimony.....	6
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PETITIONERS' QUESTION PRESENTED

Trial counsel was ineffective at sentencing (1) for advising Robertson that anything he revealed to Ms. Cascio - including theretofore undisclosed details about the crimes - was privileged against discovery by the State or (2) for failing to object to discovery of Ms. Cascio's notes by the State and (3) for calling Ms. Cascio as a witness under these circumstances.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether this Court should deny certiorari because Robertson's claim that trial counsel was ineffective for advising Robertson that anything he revealed to Ms. Cascio, the defense social worker, was privileged against discovery by the State was not presented to or ruled upon by the PCR judge and he did not seek a ruling by filing a Rule 59(e), SCRCP, motion?

Whether this Court should deny certiorari because probative evidence supports the PCR judge's ruling that trial counsel was not ineffective for failing to object to discovery of Ms. Cascio's notes by the State and for calling Ms. Cascio as a witness?

STATEMENT OF THE CASE

Petitioner, Robertson, is confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of a York County murder convictions and death sentences for killing his parents. The York County Grand Jury indicted Robertson at the April 23, 1998 term of court for two counts of murder (98-GS-46-1020 & 1021), one count of armed robbery, (98-GS-46-1022) and one count of financial transaction card fraud (98-GS-46-1023). **App. 3758-65.** On April 30, 1998, the State served him with a Notice of Intent to seek the death penalty, pursuant to S.C. Code Ann. § 16-3-20(A)(Supp. 2002). The State also gave notice at that time that it would rely upon the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon; larceny with the use of a deadly weapon; and physical torture, as well as the aggravating circumstances that the offender committed the murder for himself or another for the purpose of receiving money or a thing of value and that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. *See* S.C. Code Ann. § 16-3-20(C)(a)(1)(d), (e), and (h); (4); and (9) (Supp. 2007).

The South Carolina Supreme Court assigned the case to the Honorable John C. Hayes, III, and gave Judge Hayes exclusive jurisdiction over the case. James W. Hancock, Esquire, and James W. Boyd, Esquire, represented Robertson.¹ Sixteenth Circuit Solicitor Thomas E. Pope and Deputy Solicitor Kevin S. Brackett represented the State. Judge Hayes heard motion hearings on July 17, September 22 and 25, 1998; November 2 and 20, 1998; December 4 and 18, 1998; and on February

¹ Thad Lee Myers, Esquire, who had originally been appointed to represent Robertson, was relieved because of a conflict of interest.

12 and 19, 1999.²

Robertson's jury trial began on March 15, 1999. The jury convicted him of all of the indicted offenses; and a sentencing phase was conducted, after his exercise of the 24-hour statutory waiting period in § 16-3-20(B). In addition to the five statutory aggravating circumstances relied upon by the State, Judge Hayes instructed the jury on the statutory mitigating circumstances that Robertson did not have any prior convictions involving the use of violence against another person; that the murders were committed while he was under the influence of a mental or emotional disturbance; that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and his age and mentality at the time of the crimes. § 16-3-20(C)(b)(1)-(2), (6) and (7). The jury found each of the alleged statutory aggravating circumstances and sentenced Robertson to death for each of the murders. Judge Hayes affirmed their decision and imposed the death sentence for murder. **App. 1-3242.**

Robertson did not file a timely Notice of Appeal but Judge Hayes entered a Consent Order granting relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). At various points on appeal, Assistant Appellate Defender Robert M. Dudek and Deputy Chief Appellate Defender Joseph L. Savitz, III represented Robertson before the South Carolina Supreme Court.

On April 15, 2002, Mr. Savitz filed an Initial Brief of Appellant on Applicant's behalf.³ However,

² Robertson did not include the transcripts of the motion hearings in the Appendix, but his counsel has informed the undersigned that they will be included in a Supplemental Appendix.

³ The Initial Brief prepared by counsel presented three issues:

1. The judge erred by forcing appellant to submit to a state-sponsored psychological evaluation solely for the purpose of obtaining evidence to be used against him at sentencing, since neither competency to stand trial, guilty but mentally ill nor insanity were ever at issue in the case.
2. The judge erred by refusing to instruct the jury at sentencing that voluntary intoxication could be considered mitigating.
3. The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against appellant.

Robertson wrote a letter to the South Carolina Supreme Court on June 3, 2002, asking the Court to relieve Mr. Savitz and allow him to proceed *pro se*. Both Mr. Savitz and the State responded to his request. The South Carolina Supreme Court filed an Order on June 26, 2002, in which it remanded the matter to Judge Hayes for a hearing on Robertson's competency to appear *pro se*.

Judge Hayes held a hearing on his competency to appear *pro se* on October 10, 2002.⁴ On October 28, 2002, Judge Hayes signed a Report in the Supreme Court of South Carolina. He found that Robertson was competent to waive appellate counsel, and that Robertson's decision to waive counsel was knowing and voluntary. The South Carolina Supreme Court filed an Order on November 21, 2002, relieving Mr. Savitz and permitting Robertson to appear *pro se*.

Robertson thereafter filed a *pro se* Initial Brief of Appellant, dated July 25, 2003.⁵ The State

4/15/02 Initial Brief of Appellant at p. 1.

⁴ Robertson was present at the hearing and Bruce M. Poore, Esquire, represented him. Senior Assistant General William Edgar Salter, III, represented the State. Robertson was the only witness at the hearing.

⁵ This Brief presented seven issues for appellate review:

1. The judge erred in denying 3 separate motions for a directed verdict based on insufficient evidence and State's failure to meet the burden of proof as to first element of corpus delicti of murder at the conclusion of State's case.
2. The judge erred by forcing appellant to submit to a state-sponsored psychological evaluation solely for the purpose of obtaining evidence to be used against him at sentencing, since neither competency to stand trial, guilty but mentally ill nor insanity were ever at issue in the case.
3. The judge erred by denying the jury's request to take notes while being recharged as to the law during guilt phase deliberations.
4. The judge erred in revealing the location where the jurors were sequestered thereby denying appellant his constitutional right to a fair and impartial jury.
5. The judge erred in not allowing defense to define "life imprisonment" as it appears in the state statute to potential jurors during *voir dire*, thereby denying appellant a fair and impartial jury.
6. The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against appellant.
7. The judge erred in sentencing appellant to death.

filed the Initial Brief of Respondent on December 31, 2003. However, Robertson subsequently indicated to the South Carolina Supreme Court that he wished to abandon his right to direct appeal. In an Order dated November 22, 2004, the Court remanded the case to Judge Hayes for a full hearing on his competency to waive his right to direct appeal. The State submitted a Memorandum Regarding Petitioner's Right to Waive Direct Appeal on February 14, 2005.

The hearing was held before Judge Hayes on February 22, 2005, at the Moss Justice Center in York, South Carolina.⁶ In a February 23, 2005 Report to the Supreme Court, Judge Hayes found that Robertson was competent to waive his right to direct appeal. In an Order filed June 3, 2005, the Supreme Court of South Carolina agreed with Judge Hayes' finding that he was competent to waive his right to appellate review. The Court also conducted the proportionality review mandated by S.C. Code Ann. § 16-3-25 (2003), it dismissed the appeal and it directed the Clerk of that Court to issue an execution notice pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996).

On June 16, 2005, Robertson requested a Stay of Execution to file a Post Conviction Relief application. Over Respondent's opposition, the Supreme Court filed a July 7, 2005 Order granting a stay pursuant to *In Re: Stays of Execution*. The Court also appointed the Honorable John C. Few to preside over this case and directed Judge Few to hold a hearing to determine whether Robertson desired to have counsel appointed.

In accordance with *In Re: Stays of Execution*, the South Carolina Supreme Court's July 7, 2005 Order and S.C. Code Ann. § 17-27-160 (Supp. 2007), Judge Few held a hearing at the Greenville County Courthouse on September 23, 2005.⁷ Judge Few filed an Order Appointing

Pro Se Initial Brief of Appellant at p. 2.

⁶ Robertson appeared *pro se* and testified at the hearing. Mr. Salter represented the State.

⁷ Robertson was present at this hearing, as was Mr. Salter, who represented the State.

Counsel For Post-Conviction Relief dated September 9, 2005, appointing Michael Brown, Esquire, to represent Robertson. The Court later appointed Joseph David Matlock, Esquire, to assist in representing Robertson. Robertson filed his PCR Application on March 1, 2006. **App. 3244-51**. Respondent filed its Return on October 20, 2006. **App. 3252-62**.

Judge Few held an evidentiary hearing into the matter on January 29-31, 2007, at the Moss Judicial Center in York, South Carolina. Robertson was present at the hearing, and Messrs. Brown and Matlock, Esquires, represented him. Mr. Salter represented the State.⁸ At the outset of the PCR hearing, Robertson amended his Application and proceeded twelve specific grounds of ineffective assistance of counsel, including the following, relevant allegation (**App. 3658-59**):

Counsel was ineffective for presenting social worker Toni Cascio as an expert witness because (a) of Cascio's lack of experience; (b) counsel's agreement to provide Ms. Cascio's notes to the States; © counsel's failure to discover Applicant's admissions about the crime in enough time to permit counsel to employ a different social worker; and (d) Counsel's presentation of Ms. Cascio as a witness.

Judge Few denied relief in an Order of Dismissal filed on March 24, 2008. **App. 3652-3757**. Robertson served and filed a timely notice of appeal. He thereafter filed a Petition for Writ of Certiorari.

ARGUMENT

This Court should deny certiorari because Robertson's claim that trial counsel was ineffective for advising Robertson that anything he revealed to Ms. Cascio, the defense social worker, was

⁸ Robertson testified on his own behalf at the hearing. He also presented testimony from his trial counsel, James William Hancock, Jr., and James W. Boyd, Esquires. The State presented the current Sixteenth Circuit Solicitor, Kevin S. Brackett; the former Sixteenth Circuit Solicitor, Thomas E. Pope, Esquire; Michael Stobbe, the Branch Chief of Inmate Records at the South Carolina Department of Corrections (S.C.D.C.); and Ms. Merry Collins, an Investigator with the Sixteenth Circuit Solicitor's Office. **App. 3263-3650**. The Court also had before it the trial transcript (including pre-trial motions hearings); the records from Robertson's direct appeal to the South Carolina Supreme Court and the waiver of his appeal; the June 16, 2005 letter request for a stay of execution; Respondent's June 21, 2005 letter opposing the request for a stay of execution; the July 7, 2005 Order of the South Carolina Supreme Court granting the stay; the Order Appointing Counsel for Post-Conviction Relief; the York County Clerk of Court's records; the Post-Conviction Relief Application and the Return. **Order, App. 3652-53**.

privileged against discovery by the State was not presented to or ruled upon by the PCR judge and Petitioner did not seek a ruling by filing a Rule 59(e), SCRPC, motion. Also, probative evidence supports the PCR judge's ruling that trial counsel was not ineffective for failing to object to discovery of Ms. Cascio's notes by the State and for calling Ms. Cascio as a witness.

Robertson argues that trial counsel were ineffective, with respect to their representation in the sentencing phase “(1) for advising Robertson that anything he revealed to Ms. Cascio - including theretofore undisclosed details about the crimes - was privileged against discovery by the State or (2) for failing to object to discovery of Ms. Cascio's notes by the State and (3) for calling Ms. Cascio as a witness under these circumstances.” Respondent submits that this Court should deny certiorari because Robertson's claim that trial counsel was ineffective for advising Robertson that anything he revealed to Ms. Cascio, the defense social worker, was privileged against discovery by the State was not raised as a specific allegation, it was not ruled upon by the PCR judge and Petitioner did not seek a ruling by filing a Rule 59(e), SCRPC, motion. Also, certiorari should be denied as to the remaining arguments because the PCR judge's ruling thereon is supported by evidence of probative value, and it is not controlled by an error of law. *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

A. Summary of Ms. Cascio's trial testimony.

Ms. Toni Cascio, the defense social worker, was the last expert called by the defense. She gave a detailed social history assessment of Robertson. **App. 2852-3031.**⁹ Ms. Cascio testified that she “found that Jimmy came from a very chaotic home.” She found evidence of “physical abuse and emotional abuse. And . . . definitely mental illness throughout the family.” **App. 2858, ll. 4-8.** She

⁹ To do the assessment, she “looked at medical and psychological records from all members of the family.” Also, she interviewed Robertson and she “examined Earl Robertson's work documents; some of [Robertson's] incarceration documents; personal notebooks of Terry Robertson. And I also conducted about 13 interviews with people from a variety of areas in [Robertson's] life.” **App. 2857.**

then gave a detailed history of each member of the family.¹⁰ Robertson's grandmother described him to Ms. Casio as "a very happy outgoing child although he did have some delayed development." In particular, he was "slow to talk." She indicated that "there seemed to be poor attachment between Jimmy and his parents ... [a]t a very young age." She explained that children who are unable to form emotional attachments "have a lot of problems later on in life." Usually, they have "difficulty forming relationships because they just don't have a basis for it." Also, they "tend to be mistrustful" of others. They likewise tend to be angry and aggressive and after have self-control problems. **App. 2867-69.** She testified that Robertson began banging his head when he was one or two years old. She explained that this was "often a sign of poor attachment; and she opined that this is usually seen in children who are raised in institutional settings and orphanages. She further opined that "there is a very strong association between maternal depression," such as that experienced by Terry, and a child's poor attachment because depressed mothers tend to be less responsive to the child's needs and more involved with their own problems.¹¹ **App. 2869-73.**

Further, Ms. Cascio "found indications of physical abuse" with Robertson, including scars on his back and buttocks which he did not have a memory of receiving. "Both children confirmed that they were routinely beaten with a belt several times a week when they were pre-school and [in] grade school." Further, Robertson said that Earl, Sr., would often beat him with a belt to make him stop banging his head. Robertson's pediatric records from 1988 reflected that he was seen because

¹⁰ Ms. Cascio described the various problems that Terry Robertson had within her family as a child, including conflict with her mother, Terry's emotional and psychological problems, and Cascio opined that "a variety of indicators ... suggest that Terry was sexually abused as a child." Much of her testimony concerning Terry's childhood was corroborated, in her opinion by excerpts of Skip Meyer's notes. **Def.'s Exs. 21-22; 28; App. 2858-65; 2882-84.** Ms. Cascio testified that Earl, Sr., was very bright but ambitious and "very confrontational." She also testified that, in 1989, Spring Industries decided that he "was not leadership material." Also, many people to whom she spoke described him as "pushy and kind of domineering". **App. 2865-67.**

¹¹ Depressed mothers also do not spend as much time with a child; they use "more negative language," are more hostile, more irritable, and are more harsh or arbitrary in their discipline. Children, however, need consistency.

he had been hit with a fist.¹² **App. 2873-76.** Again, the multiple physical abuses, combined with psychological abuse, tends to create “negative outcomes for the children.” Through Ms. Cascio’s testimony and the extracts from Mr. Meyer’s notes, the defense established that: Terry was afraid of Earl’s temper and did not feel like she had done enough to protect her sons; there was a great deal of psychological abuse in the home, including degradation and name calling, Terry telling Robertson that she wished he had never been born and verbal abuse by Terry of both sons; the sons may have witnessed domestic violence by Terry attacking Earl; there was evidence that Chip hit women; Robertson had problems with his memory, which can be an indicator of trauma; and “everyone in the family had a history of mental illness.” Terry was diagnosed as having severe depression, bipolar disorder and obsessive-compulsive disorder. Earl was diagnosed as having depression, panic disorder and ADD. Robertson had bipolar disorder and ADD; and Chip had ADD and possibly bipolar disorder. All of these factors “set the stage for something to go wrong in adolescence.” **App. 2881-82; 2876-82; 2885, ll. 10-16. See also Def.’s Ex. 24.**¹³

In addition to Robertson’s problems that she had previously discussed, Ms. Cascio testified that Robertson “was often an outcast in school.” Other students teased him and did not quickly accept him. By the ninth grade, he was suicidal. He started using illegal drugs while he was at Georgia Tech University and was “very suicidal” at that time as well. He also started engaging in behavior that was consistent with mania, such as spending large sums of money and gambling.¹⁴

¹² She likewise relayed other incidents in which Earl, Sr., was physically abuse to Robertson and Chip. One incident with Chip was documented in Skip Meyer’s notes, which was introduced as Def.’s Ex. 23.

¹³ Likewise, through Cascio, counsel introduced three charts (**Def.’s Exs. 25-27**), which reflected psychiatric visits by the victims. These charts showed that Terry was seen in therapy roughly 170 times between 1995 and 1997, with a variety of problems, including hallucinations, self-mutilation, obsessive-compulsive disorder and suicide attempts. **App. 2881-86.**

¹⁴ Ms. Cascio discussed Dr. Hayne McMeekin’s 1994 diagnosis that he was depressed and his involuntary commitment to William S. Hall, following the 1995 D.U.I. At that time, he was diagnosed as bipolar, alcohol dependent and “having mental illness with severe family strife.”

Also, he did not have many friends. Ms. Cascio opined that “all of these factors [discussed by her], I believe, led him to start relying more heavily upon drugs which then in turn led to what happened later on.” **App. 2886-88.** She later explained on cross-examination that, in light of the various factors she found in Robertson’s life, “he might have felt [at the time of the murders] that [violence] was [his only alternative].” **App. 2949-52.**¹⁵ Finally, before the State began cross-examining Ms. Cascio about Robertson’s admissions related to the murders, she was specifically asked whether she took his statements about the crime into consideration informing her evaluation of him. She replied, “I was looking at early childhood history that could have led him to that point;” and she agreed that she factored his statements into her assessment. **App. 3010, ll. 10-22.**

B. PCR testimony.

Robertson testified that counsel had advised him to fully cooperate, and be honest with the defense experts because they could not know how to prepare a defense unless they knew everything about him. He also claimed that counsel told him that what he disclosed was “not going to wind up in the wrong hands.” So, he very candidly spoke about “very sensitive, intimate things” concerning his family and background and some of the “criminal aspects of the trial” with the defense experts, “no differently than” he did when he met with counsel. **App. 3292-95; 3314; 3581-82; 3605-06.**¹⁶

Mr. Hancock testified that counsel’s investigation¹⁷ led them to conclude that the prosecution

¹⁵ Ms. Cascio further testified that Robertson and Chip had a “close relationship,” and they often did things together, including criminal activity. She testified that Chip had similar problems with substance abuse, and he had experienced physical and psychological abuse. She also testified that Chip was incarcerated at the time of Robertson’s trial. **App. 2888-90.** Finally, the defense introduced several excerpts from Terry’s “notebook” that were contained in Mr. Meyer’s notes; and Ms. Cascio testified to the substance of the extracts. **App. 2892-95; Def.’s Exs. 30-32.**

¹⁶ When cross-examined about the murder and the statements he made to Cascio concerning the murder, he was permitted to invoke his Fifth Amendment privilege against self-incrimination, over objection, although he admitted to murdering his parents at one point. **See App. 3320-25; 3596-3063; 3606-07.**

¹⁷ Counsel’s qualifications and their investigation are discussed throughout the Order. Mr. Hancock had tried two capital cases and prepared for another. He also had tried eight non-capital murder cases, with six clients being acquitted. **App. 3414-16.** Mr. Boyd had practiced criminal law for almost thirty years. He had represented defendants in six capital trials (including Sylvester Adams twice) and he had prosecuted another case. **App. 3496-97.**

had overwhelming evidence of guilt, and counsel did not find anything which led to the conclusion that either Meredith Moon or anyone else committed the murder. “[W]e had one of the worse cases I’ve seen.” Therefore, counsel primarily focused on the sentencing phase of the trial and they attempted to secure a sentence of life imprisonment without parole (LWOP). Counsel got all of Robertson’s school, mental health and other records that they could locate,¹⁸ as well as the Robertson family counseling records from the Carolina Counseling Center, where he and his family were treated by Dr. McMeekin and family and marriage counselor Julius F. “Skip” Meyer, Jr.¹⁹ Mr. Meyer testified as a defense witness and counsel was able to introduce a substantial amount of evidence relating to the mental health counseling that Robertson and his family received. Counsel also introduced Mr. Meyer’s notes of the various therapy sessions as **Def.’s Ex. 18**. Counsel thereafter introduced a number of mental health records through Ms. Casio.²⁰ **App. 3329-39; 3343-44; 3348-49; 3374; 3390; 3419-34; 3439-43; 3451.**

Counsel were well aware of Ms. Cascio’s limited experience and that she had never testified as a forensic social worker. *See App.’s Ex. 4* (C.V. for Toni A. Cascio), **App. 2852-55**. However, Ms. Drucie Glass (another social worker, who had experience in capital cases) and the Center for Capital Litigation (C.C.L.), which specialized in providing assistance to defense lawyers trying

¹⁸ This included local school records; school records from records from California; the records from his Youthful Offender Act conviction for burglary; his records from an involuntary commitment to the Willis S. Hall Psychiatric Institution; his South Carolina Department of Corrections (SCDC) records; records from Kanawha Insurance Company; and records from Piedmont Mental Health Associates.

¹⁹ While it was Mr. Hancock’s impression that the defense obtained all of Dr. McMeekin’s records through Mr. Meyer, he had previously turned over his file to Robertson and did not have his file at the time of the hearing.

²⁰ Additionally, counsel employed several defense experts whom they developed with the assistance of the Center for Capital Litigation, in Columbia: Dr. Jonathan Pincus (a neurologist); Dr. James Evans (a neuro-psychologist); and Toni Cascio, a social worker. Each of these experts testified at trial. *See Tr. pp. 2458-2530* (Dr. Pincus); **pp. 2535-89** (Dr. Evans); **pp. 2610-2736** (Dr. Morton); **pp. 2852-3031** (Ms. Cascio). Counsel explained that “the parents were the cause. . . . [Also,] that the family was dysfunctional and because of that . . . Jimmy had turned to some alcohol, drugs, Ritalin, and that it was basically the parents’ fault for Jimmy having killed them.” At the same time, counsel had to balance this defense with “showing that there was some sympathetic problems that could be associated with the family” that might cause jurors find sympathy for Robertson. **App. 3434, ll. 6-22.**

capital cases, recommended that the defense hire Ms. Cascio as a social worker. Counsel obtained her C.V. They then interviewed her to determine whether she was qualified, and she assured them that she was qualified to help them. Nor were counsel tried but were unable to locate a more experienced social worker, and they were assured of her competence. So, they hired her. Also, counsel had met with her a number of times over the course of a year to prepare her testimony, and he did not report any problems in terms of her gathering information for the social history of Robertson. **App. 3340-43; 3380-82; 3421; 3426-28; 3436-37.**

Counsel told Robertson to be honest in discussing the case with the experts.²¹ At some point prior to trial, the defense received her notes. Mr. Hancock's recollection was that counsel had objected to production of Ms. Cascio's notes, which contained a number of admissions by Robertson with which Ms. Cascio was cross-examined by the State at trial. Both attorneys made the joint decision to present her as a witness even though they were aware that her notes would have to be disclosed to the prosecution and that she would be hurt on cross-examination because counsel felt that she was a necessary part of the defense's case in mitigation: she could "tie everything together [in mitigation]" to evoke some sympathy from at least one of the jurors. The jury had already heard "many of the operative facts" through the State's "massive amount of evidence" and, without her testimony, the other experts' testimony was largely based upon speculation.²² He also agreed that the admissions that were elicited on the State's cross-examination of her were cumulative to much of the Moon's testimony and the State's circumstantial evidence presented in the guilt phase. **App.**

²¹ Counsel felt that this was very important because counsel was afraid that the jury might figure out if the defense presented dishonest information. **App. 3349.**

²² In hindsight, Mr. Hancock was unhappy with the State's cross-examination of Ms. Cascio and he felt that her testimony was "harmful" to the defense. However, he testified that she had provided the jury with a good deal of mitigating evidence on direct examination.

3350; 3381-83; 3386-91; 3436-39; 3450-55.²³

Mr. Boyd mistakenly thought that Mr. Hancock had already hired the defense experts before he was appointed, using the C.C.L. However, he testified that they never really discussed which one was lead counsel; and he agreed with the trial strategy to which Hancock testified for many of the same reasons. Also, he did not object to what had been done with regard to the experts. Ms. Cascio was hired to investigate Robertson's mental health history and his family history. In Mr. Boyd's estimation, it was important to develop Robertson's background and mental health problems, to find a reason for what had happened. He also testified that the defense received a copy of Ms. Cascio's report shortly before trial; and Robertson introduced App.'s Ex. 6, which is a March 1, 1999 letter from Ms. Cascio to Mr. Hancock providing counsel with a copy of the preliminary report. As to not objecting to production of her notes, he believed Rule 705 required production for cross-examination. **App. 3498-3515; 3526-31; 3536-43.**

Mr. Boyd further testified that Ms. Cascio was the last defense expert who testified. In hindsight, he felt that all of the other defense experts were good witnesses. Although Ms. Cascio was able to provide beneficial information to the jury on direct examination, he felt that this benefit was overshadowed by the damage resulting from the State's cross-examination of her. He may have known but did not recall that Cascio had never previously testified as an expert. However, he noted that sometimes it is not a good idea to hire someone with previous experience in testifying and this would not be his main reason for not using an expert witness. As with Mr. Hancock, Mr. Boyd did not recall consenting to the disclosure of her notes (**App.'s Ex. 7**). Nor did he recall when he

²³ Former Solicitor Pope characterized Ms. Cascio as the one defense expert who could pull together the various matters testified to by the other experts for the jury's benefit. **App. 3465-67**. He described her notes as a bonus (**App. 3481**), and he explained that many of Robertson's admissions merely confirmed or "shore[d] up" other evidence that the jury had heard as to guilt. **App. 3467**.

became aware of them; but he testified that he would have reviewed them before disclosing them to the State. Mr. Boyd testified that he met with Ms. Cascio on more than two occasions and that co-counsel was not present on at least one occasion. Counsel corroborated that he and co-counsel decided to use her as a witness at trial, even after they learned that they would have to disclose her notes, because of the importance of her testimony to the defense since she could tie the mitigation case together. Also, Ms. Glass was present and never suggested not using her. **App. 3524-35; 3547-52; 3556-58.**

C. Discussion.

1. Robertson's first issue is not preserved for appellate review.

Respondent submits that this Court should deny certiorari on Robertson's claim that trial counsel was ineffective for advising Robertson that anything he revealed to Ms. Cascio was privileged against discovery by the State because it is not properly before the Court, since it was not raised as a specific allegation, it was not ruled upon by the PCR judge and Petitioner did not seek a ruling by filing a Rule 59(e), SCRCR, motion.

In order to preserve an issue for review by this Court, it must be presented to and passed upon by the PCR court. *See State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"). Clearly, Robertson did raise this specific allegation (*see App. 3658-59*); and Respondent did not question counsel about whether they advised him that anything said to the experts was privileged. It is thus barred. Yet, even if the Court views this issue as adequately pled, there was no ruling thereon by the PCR judge. The PCR judge's failure to specifically rule on the issues precludes appellate review of the issues. *Pruitt v. State*, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992). To preserve an issue for review that is not specifically addressed in the PCR court's order, "[e]ither

party must timely file a Rule 59(e), SCRCF, motion to preserve for review any issues not ruled upon by the court in its order.” *Al-Shabazz v. State*, 338 S.C. 354, 364-65, 527 S.E.2d 742, 747 (2001) (citations omitted); *Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007). Thus, his argument is barred from review on certiorari.²⁴

2. Counsel’s failure to adequately object to producing Ms. Cascio’s notes.

This Court must deny certiorari to review Robertson’s remaining allegations because the PCR judge’s ruling thereon is supported by evidence of probative value, and it is not controlled by an error of law. *Suber*, 371 S.C. at 558-59, 640 S.E.2d at 886. To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. *See Wiggins v. Smith*, 539 U.S. 510 (2003). First, he must demonstrate that his attorneys’ “representation fell below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984). “Judicial scrutiny of counsel’s performance must be highly deferential,” and “every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel’s perspective as the time.” *Id.* at 689. *See also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (“[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight”). The inmate must also demonstrate that he was prejudiced by his attorneys’ ineffectiveness. *Id.* at 691 (“An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment”). In the context of a capital sentencing proceeding, he must prove that “there is a reasonable probability that ... the

²⁴ *See also Simpson v. Moore*, 367 S.C. 587, 600 n.3, 627 S.E.2d 701, 708 n.3 (2006); *Humbert v. State*, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001) (same). Alternatively, the Court should deny certiorari for the reasons discussed with respect to his remaining arguments. At worst, he failed to establish Sixth Amendment prejudice.

sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537; *Jones v. State*, 504 S.E.2d 822, 829-30 (S.C. 1998) (petitioner did not meet burden).

As discussed, Mr. Hancock recalled that the defense only disclosed the notes after the trial judge ruled that disclosure was required. A review of the pretrial motions hearings reflects that the defense did object to production of any reports of experts under the reciprocal discovery provisions act of Rule 5(b), SCRCrimP, until such time as the prosecution had fully complied with the defense’s request for discovery under Rule 5(a) and until the defense could complete their testimony. The transcript from those proceedings further reflect that the trial judge required reciprocal discovery. *See* 7/20/98 Tr. pp. 4-20; 2/12/99 Tr. pp. 3-4; 8/16; Tr. pp. 74-78 (9/25/98 hearing); 79-82; 86-87 (11/2/98 hearing); 90-103; 116 (12/4/98 hearing).

Before the state began its cross-examination of Dr. Pincus in the sentencing phase of the trial, Mr. Brackett asked for Dr. Pincus’ notes and underlying data. After the trial judge ordered trial counsel to provide them, the State requested a break to review those materials, to prepare for cross-examination; and the trial judge granted his request. Mr. Brackett then noted that, “for the sake of expediency,” the defense should produce any similar information for “any other experts that are going to testify.” The defense did not object and Mr. Boyd stated that “I thought we took a big box of all that stuff to your office the other day.” **App. 2505-06.**

After Dr. Pincus’ testimony, the trial judge asked if the State needed “any further help in getting what they are entitled to.” (Sic). Mr. Brackett, again, stated that if he could “get all of the information from any expert they have who is going to testify. I will have a change to review the other two over lunch and that will be plenty of time.” **App. 2531.** Mr. Hancock stated that the

defense was doing everything it could to provide the information. The trial judge stated that, if necessary, he would bring in the experts and Order then to determine whether they were going to testify. In response to the trial judge's inquiry, Mr. Hancock stated that "if we haven't, we will get them, your Honor." When the trial judge asked if Ms. Cascio's notes had been produced, Mr. Hancock said no, and the trial judge stated, "I think they've got a right to have it to cross-examine." **App. 2532 l. 2 – p. 2533, l. 23.**

During an *in camera* break after Dr. Evans had testified, then-Solicitor Pope noted that the State had not yet received Ms. Cascio's underlying data. Mr. Boyd explained that Ms. Cascio had left her notes in Columbia and had gone to get them and bring them to court. **App. 2604-05.**

Ms. Cascio testified the next day. Early in the State's cross-examination of her, Mr. Pope asked for and received a copy of her notes, without objection. **App. 2897, ll. 1-16.**

Rule 705, SCRE, provides that:

The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

The PCR judge found that:

Rule 705 "permits the cross-examination to require the expert to reveal otherwise inadmissible underlying information before the jury, subject to a Rule 403, SCRE prejudice analysis. *See United States v. A&S Council Oil Co., et al.*, 947 F2d 1128, 1134 (4th Cir. 1991). *See also State v. Slocumb*, 336 S.C. 619, 821 SE2d 507 (Ct. App. 1999). Moreover, the Court finds that the record demonstrates that the trial judge ordered production of all notes of the defense experts, for the purposes of the State's cross-examination, and that his ruling is consistent with this Court's construction of Rule 705. In other words, the underlying notes or other data must be produced if the expert witness testifies. Further, this Court would not permit any exception because the purpose of disclosure is to counteract the liberality of the Rule, *see A&S Council Oil*, 947 F2d at 1134; *United States v. Gillis*, 773 F2d 549, 553-54 (4th Cir. 1985) and Ms. Cascio clearly testified that the statements by Applicant pertaining to the murders, as reflected in her notes, was considered by her in arriving at her opinion. Tr. p. 3010, ll. 10-22.

Order, App. 3738-39.

Under these circumstances, the PCR judge found that Robertson had not shown deficient performance because disclosure of the notes was objectively reasonable under *Strickland*. **App. 3739**. Particularly in light of her testimony that she considered Robertson's statements pertaining to the murders in arriving at her opinion, **App. 3010**, this ruling is supported by evidence in the record. *See Slocumb*, 336 S.C. at 628-34, 821 SE2d at 514-15; and *Suber, supra*. Certainly, Petitioner cannot prove any prejudice under *Wiggins* and *Strickland* because there is no reasonable probability of a different result.²⁵

The PCR judge's further finding that it was not unreasonable for counsel to fail to anticipate that Ms. Cascio's work on the case would result in her asking Robertson questions concerning the case or for otherwise failing to instruct her as to how to conduct an appropriate social history assessment (**App. 3739-41**), is likewise supported by the record. The reason counsel employed her as an expert witness was to take advantage of her expertise in the area of performing a social history. The PCR court correctly found that *Strickland* does not require counsel to instruct defense experts on how they should conduct their evaluations in their areas of expertise. Nor was counsel ineffective in failing to anticipate that Ms. Cascio would seek information from Robertson about the facts of the crime in order to have enough information to formulate her opinion as to the social history, or that he would freely discuss the crime with her.²⁶ While an attorney can be expected to learn that the client has relayed potentially damaging information to an expert, counsel is not required to anticipate

²⁵ *Werts v. Vaughn*, 228 F.3d 178, 203 (3rd Cir.2000) ("counsel cannot be ineffective for failing to raise a meritless claim"); *Cedillos v. State*, 250 S.W.3d 145, 154 (Tex.App. 2008) (counsel cannot be found ineffective for failing to make an objection unless the record establishes that an objection would have been successful); *Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995) (counsel's failure to make an *in limine* motion was not ineffective because an *in limine* motion is inherently a strategic part of trial strategy).

²⁶ In this regard, Respondent submits that Robertson's complaints with Cascio may have simply resulted from his own decision to discuss the murder freely.

everything that can possibly go wrong in the client's interaction with an expert in the months before a trial.

Further, Robertson has characterized Ms. Cascio's inquiry into the facts of the case as going beyond the scope of her employment, *i.e.*, to perform a social history assessment of him, but *the only evidence* is Ms. Cascio's contrary testimony that his admissions relating to the murders were considered by her in formulating her opinion that at the time of the crimes, he might have felt like violence was his only alternative. *See Tr. pp. 2886-88; 2949-52; 3010, ll. 10-22.* Robertson likewise did not present testimony from any social worker that he or she would have been able to work on his case.

In the absence of any testimony that this information is unnecessary or not part of a proper social history in a capital case, the PCR court properly found that he had failed to prove either deficiency or prejudice resulting from counsel's failure to learn of his admissions earlier in time to hire another social worker or find a suitable alternative to presenting Ms. Cascio as a witness.²⁷ *See Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995).²⁸ Finally, the Court should note that two of Robertson's mental health witnesses, Dr. Pincus (**Tr. p. 2472**) and Dr. Evans (**Tr. pp. 2545-46**) relied upon the information gathered by Cascio, *at least in part*, in reaching their conclusions about his mental status at the time of the offense. Under the circumstances, the PCR court correctly held that he had not proven either deficient performance or prejudice under *Strickland, supra*.

3. Counsel's decision to present Cascio as a witness even though her notes were produced.

Finally, there is no merit to Robertson's claim that counsel were ineffective for presenting Ms. Casio as a witness after the trial judge order disclosure of her notes, since it was reasonably

²⁷ Again, counsel unsuccessfully attempted to hire a more experienced expert. **App. 3380-82.**

²⁸ The Court held in *Glover* that mere speculation and conjecture on the part of the applicant is insufficient to substantiate allegation that counsel's deficient performance was prejudicial.

foreseeable that the State would engage in the lines of cross-examination of which he complains. The PCR judge rejected this allegation (**App. 3741-57**) because he found that Robertson has failed to prove any prejudice resulting from the State's cross-examination of her. *See Strickland*, 466 U.S. at 687 ("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," and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed"). This Court should deny certiorari, since probative evidence supports his ruling.²⁹

Initially, the PCR judge found that:

Here, the Court finds that, upon discovering the existence of Ms. Cascio's notes, counsel was faced with the choice of either producing the notes and calling Ms. Cascio as a witness or not presenting her as a witness.Fn. 63 Moreover, if counsel was going to accomplish the previously determined strategy of having all of the evidence in mitigation tied together for the benefit of the sentencing jury, they had to call her as a witness. Thus, counsel was forced to weigh the benefit to the defense from presenting her as a mitigation witness against the potential harm to the defense resulting from the State's cross-examination of her about the admissions that [Robertson] had made. In this regard, the Court finds that counsel's decision was much like the decision this Court must make in determining whether there is prejudice under *Strickland*.Fn. 64 After this Court's review of the record, the Court finds that there is no reasonable probability of a different result but for counsel's decision to present Ms. Cascio as a witness.

Fn.63/ For the reasons set forth in this section as well as the reasons set forth in connection with the preceding sections of this allegation, the Court rejects [Robertson's] contention that counsel were ineffective for failing to move *in limine*

²⁹ The PCR judge expressly stated that he did not find that Robertson had proved deficient performance. **App. 3731 n. 62**. Also, the testimony of counsel (particularly Mr. Hancock's testimony) supports a finding that they made an objectively reasonable decision under *Strickland* to present her as a witness, even though they knew that the State would be able to elicit harmful evidence on its cross-examination of her, because they considered the positive aspects of her testimony more important to the defense than any potential harm, since she could tie the mitigation case together and much of the harmful information that would be elicited on cross-examination was cumulative to the State's lengthy guilt phase case that jury had already heard. **App. 3388, 3390-91, 3436-37, and 3450-54 (Hancock); 3549-50 (Boyd)**. Also, Mr. Hancock correctly observed that they were only required to sway the decision of one juror. *See Wiggins*, 539 U.S. at 537 (Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.

to bar production of the portion of the notes relating to [Robertson's] admissions to the crimes. Once the decision to call her was made, the notes had to be produced because the admissions to the murders formed part of the basis of her opinion on [Robertson's] social history assessment. See Tr. p. 3010, ll. 10-22.

Fn. 64/ In order to make such an assessment, counsel had to look at Moon's testimony, as well as Dr. Sexton's testimony and other evidence presented by the prosecution in both phases of the trial relating to proof of their client's guilt of the murders and the alleged statutory aggravating circumstances. This evidence included the manner in which [Robertson] committed the murders. Additionally, counsel had to consider that the State was going to be allowed to present Dr. McKee as a reply witness.

First, the Court finds that both lines of inquiry at issue in this allegation only took place after the State had already cross-examined Ms. Casio, at length, about her findings to which she had testified on direct examination. See Tr. pp. 2895-2955. Second, Ms. Casio's testimony was only part of a lengthy case in mitigation, but it served to tie all of the other evidence together. Third, the Court finds that the statements concerning his family's mental health and social history clearly were cumulative to other evidence in the record, including – but not limited to – Ms. Casio's testimony on direct examination, the testimony concerning his involuntary admission to the William S. Hall Institute, and the testimony of Mr. Meyer.

The record is replete with evidence of the strained, tumultuous and confrontational relationship [that Robertson] had with his parents, especially his father. Much of that history is discussed throughout this Order, and [Robertson] discussed similar evidence in his PCR testimony. Moreover, the Court finds that this was a proper line of cross-examination. The Court also finds that the State's inquiries concerning evidence of other bad acts was a proper topic for cross-examination because it reflected upon [Robertson's] character. See *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (in the penalty phase, the sole function of the jury is to decide which sentence to impose upon the defendant: either life or death. This determination must be based upon the specific circumstances of the case and the individual characteristics of the defendant). *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979) (same); see also *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *State v. Skipper*, 285 S.C. 42, 328 S.E.2d 58 (1985), rev'd. on other grds., 476 U.S. 1 (1986) ("What is essential is that the jury have before it all relevant information about the individual defendant whose fate it must determine") (internal quotes and citation omitted). Further, **the trial transcript clearly reflects that counsel objected when the State began cross-examining Ms. Casio about [Robertson's] involvement in prior stalking incidents. However, the trial judge overruled the objection and permitted the examination.** Also, Ms. Casio took this information into account in forming her opinion. *E.g.*, Tr. pp. 3000-3003.

Order, App. 3741-43 (emphasis in bold added).

The State submits that the PCR judge's findings are supported by probative evidence and a correct application of *Strickland* and its progeny. *See Suber, supra*. Furthermore, the PCR judge properly concluded that Robertson failed to prove show any conceivable prejudice resulting from the sentencing phase jury hearing this information. This evidence of other bad acts was cumulative to evidence of bad acts discussed elsewhere in the Order; and it was cumulative to evidence presented by the State that Robertson had previously burglarized his neighbor's home and stole over \$15,000.00 worth of valuables, including a car, blank checks and credit cards. **App. 2107-20.**³⁰ Also, the trial judge's sentencing phase charge included a limiting instruction, in which he instructed jurors that, before they considered any such evidence, they must first find that the State had proved that Robertson committed any bad acts beyond a reasonable doubt. Even if the jury found that the State had met its burden of proof, the evidence could only be considered as evidence of "his character in general." The evidence could not be considered as proof of any aggravating circumstances. **App. 3217-18.** He charged further that Robertson's prior convictions could only be considered as character evidence as well. **App. 3218.**

The trial judge further instructed the jury that, in considering whether to recommend a sentence of death, it must first find the existence of one or more aggravating circumstances beyond a reasonable doubt; and that jurors could only consider the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon,

³⁰ Based upon that crime and his subsequent activities with the credit cards, Robertson was charged with a series of offenses to which he pled guilty. The State introduced the indictments and subsequent sentencing sheets into evidence, as follows: State's Ex. 191, an indictment and sentencing sheet to burglary in the second degree; State's Ex. 192, an indictment for burglary in the first degree and guilty plea and sentencing sheet for burglary in the second degree; State's Ex. 193, an indictment and sentencing sheet for grand larceny; State's Ex. 194, an indictment and sentencing sheet for grand larceny; State's Ex. 195, an indictment and sentencing sheet for forgery; State's Ex. 196, an indictment and sentencing sheet for financial transaction card fraud; and State's Ex. 197, an indictment and sentencing sheet for financial transaction card fraud. **Tr. p. 2119.** Additionally, the jury heard that Robertson had given a statement to the police in which he attributed the crimes to a drug problem. **Tr. pp. 2117-19;** State's Ex. 190.

larceny with the use of a deadly weapon and physical torture, as well as the aggravating circumstances that the offender committed the murder for himself or another for the purpose of receiving money or a thing of value and that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. **App. 3203-26**. In light of the sentencing phase instructions, the PCR judge correctly found that the challenged evidence was not prejudicial.

Likewise, the Court PCR judge correctly found that Robertson was not prejudiced by the State's cross-examination concerning his admissions concerning the murders because the substance of the various admissions, including the information concerning how he committed the murders, was cumulative to other evidence in the record and already before the sentencing phase jury, including the guilt phase testimony of his co-defendant, Meredith Moon, who was present in his parents home when he murdered them and accompanied him when he left South Carolina and drove to Philadelphia, Pennsylvania (*See, e.g., App. 1575-1616; 1623-25; 1632-38; 1641-46*); the guilt and penalty phase testimony of Dr. Joel Sexton regarding his autopsy findings (*See, e.g., App. 1784-1808; 2249-2302*); the evidence recovered from the scene, the car Robertson and Moon had used to flee the State and locations provided by Moon; the results of the State's fingerprint, hair, DNA and other forensic testing of evidence in the case; and the other witnesses discussed in the Order. **App. 3744-56**.

As the PCR judge correctly found, a review of the graphic Dr. Sexton's testimony concerning his findings clearly demonstrates that he was able to both identify the many different blows and show these injuries to the jury through pictures and diagrams. When his testimony is viewed along with Moon's testimony, the DNA evidence and other forensic evidence discussed above, the PCR judge quite reasonably found that "the sentencing jury had already been presented with an overwhelmingly graphic and vivid picture of what had occurred at the time of the murders before Ms. Cascio testified.

The jury was, therefore, aware of both the heinous nature, not only of the crimes, but also of the defendant who committed it.” **App. 3756.**

As a result there is probative evidence to support the PCR judge’s conclusion that, “although [the] admissions testified to by Ms. Cascio are significant, they are not so strong that this Court can conclude that there is a reasonable probability of a different result but for the presentation of her testimony.” **App. 3756.** (Citing *Strickland*, 466 U.S. at 695 (defendant required to prove that “there is a reasonable probability that ... the sentencer ... [can] conclude [] that the balance of aggravating and mitigating circumstances [do] not warrant death”); *Wiggins*, 539 U.S. at 537).³¹

Respondent would further note that Robertson’s reliance upon *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002).³² Likewise, in arguing that he was prejudiced by counsel’s alleged errors,

³¹ Finally there cannot be any discernable prejudice from the State’s cross-examination of Cascio if Dr. McKee’s subsequent reply testimony is considered on this issue. See **App. 3067-72.** The PCR judge found that “his testimony presented the substance of [most], if not all of Ms. Cascio’s testimony on cross-examination; and he testified that the factual information provided to him by [Robertson] was virtually identical to those facts in the notes of Ms. Cascio. Tr. pp. 3066-67.” **Order, App. 3756.** Also, the PCR judge found that any challenge to the admissibility of McKee’s testimony about the information he received from Robertson, under *Hudgins v. Moore*, 337 S.C. 333, 524 S.E.2d 105 (1999), was not properly raised in PCR because the trial judge had overruled trial counsel’s objection, and ruled that Robertson’s statements were admissible. See **App. 3044-57.** “Thus, the question of his ruling could have been raised on direct appeal and is barred in PCR. See §17-27-20(b); *Drayton*, 312 SC at 9, 430 SE2d at 520 (issue that could have been raised at trial and on direct appeal cannot be asserted in PCR application, absent a claim of ineffective assistance of counsel). Alternatively, the Court finds that there was no violation of *Hudgins*” and that this objection was properly overruled. **Order, App. 3717 n. 45. See also App. 3756 n. 82.**

³² First, *Ingle* is a non-capital case; and the present allegation involves the reasonableness of counsel’s decision to present the testimony of a forensic social worker, who could testify to matters that neither the other defense experts nor lay witnesses could testify. Cf. *Wiggins, supra*. Second, the Court held in *Ingle* that counsel was ineffective because he called a witness (Afify) as a defense witness without interviewing her first to ascertain whether she would support petitioner’s theory of the defense, and, instead, relying solely on petitioner’s representation that she “would admit to having intercourse with petitioner on the morning of the alleged assault” and presuming that her testimony would be favorable to petitioner when she was not called as a witness by the State. *Id* at 471, 560 S.E.2d 403.

The Court found that petitioner was prejudiced by trial counsel’s deficient performance for several reasons. First, she was the first witness called in petitioner’s defense, but her testimony and the State was able to “elicit additional damaging testimony on cross-examination. The effect of Afify’s testimony, which totally contradicted petitioner’s defense, was heightened by the fact that Afify was called as petitioner’s first witness.” Also, this Court reasoned that reasonable doubt could have been established without her “denial that they had sexual intercourse on the morning in question” because “petitioner’s theory that his semen was transferred to the victim’s shorts via the bedsheets was not implausible;” and “other evidence called into question the credibility of the victim’s allegations.” *Id* at 471-72, 560 S.E.2d 403-04.

Here, however, Cascio was the last witness called; and she was a key witness in the case in mitigation, as

he mistakenly relies upon the Court's decisions in *State v. McClure*, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000), and *State v. Price*, 368 S.C. 494, 629 S.E.2d 363 (2006) (another non-capital case). The PCR judge relied upon the proper standard set forth in *Strickland*. See 466 U.S. at 695 (defendant required to prove that "there is a reasonable probability that ... the sentencer ... [can] conclude [] that the balance of aggravating and mitigating circumstances [do] not warrant death"). See also *Wiggins*, 539 U.S. at 537; *Jones v. State*, *supra*.

Finally, given that the United States Supreme Court's decision in *Wiggins* stresses the need to present a capital defendant's background and family history in many cases, as well as the importance of utilizing a social worker when that is the only way to present this evidence, and this Court's decision in *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008) (finding that trial counsel were ineffective for not presenting an adequate sentencing phase case in mitigation),³³ it cannot be said that Robertson was prejudiced by his attorney's decision to present Ms. Cascio's testimony.

opposed to the witness in *Ingle*. Further and contrary to *Ingle*, counsel in the sentencing phase was seeking one juror to vote for life. See *Wiggins*, 539 U.S. at 537 ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance"). Also, counsel had interviewed her extensively before presenting her; and they had both her report and her notes. They were thus aware of the beneficial evidence to which she could testify and the potential for damaging cross-examination by the State, and they weighed these counterbalancing factors before calling her to testify.

³³ Counsel in *Council* did not present any medical evidence or other testimony describing his mental health issues or that several of his immediate family members suffered from mental illness. Counsel also failed to present evidence that: Council's father was an extremely violent alcoholic, who was divorced by his mother on the ground of physical cruelty; he and his siblings resided in bad neighborhoods, lived in poverty, and often lived in homes without running water or indoor plumbing; he "and his siblings were neglected by their parents and, as a result, on one occasion [he] suffered severe burns while trying to cook without supervision;" Council had a significant drop in his I.Q. between the ages of seven and ten which may have been the result of a head injury or the onset of mental illness; that he began getting into trouble at the age of ten years most likely as the result of his violent family environment and negative influence of his siblings; his immediate family members had been diagnosed with mental illnesses such as schizophrenia, schizoid, bipolar disorder, depression, and borderline personality disorder; he had learning disabilities; DJJ caseworkers recognized his emotional and mental problems; he began using drugs and alcohol at sixteen years old; he attempted suicide in his twenties; he had a borderline I.Q. and frontal lobe brain dysfunction; and the onset of his current diagnosis of schizophrenia may have begun in early adolescence or childhood. *Id.* at 177, 670 S.E.2d at 365.

CONCLUSION

Based upon the foregoing reasons, Respondent respectfully submits that this Court should deny certiorari.

Respectfully submitted,

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By: _____


WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

July 15, 2009.

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

**Appeal From York County
Honorable John C. Few, Circuit Court Judge**

JAMES D. ROBERTSON,

Petitioner,

v.

THE STATE,

Respondent.

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Joseph L. Savitz, III, Esq., SCCID, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211-1589.

I further certify that all parties required by Rule to be served have been served.

This 15th day of July, 2009.


WILLIAM EDGAR SALTER, III

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ATTORNEY FOR RESPONDENT

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

John C. Few, Circuit Court Judge

RECEIVED

APR 15 2009

S.C. SUPREME COURT

JAMES D. ROBERTSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

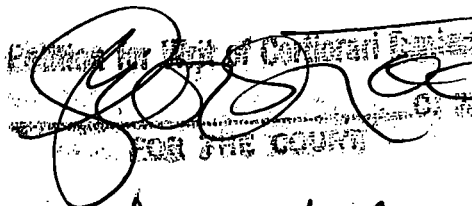
RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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FOR THE COURT

October 6, 2010

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ISSUE PRESENTED

Trial counsel was ineffective at sentencing (1) for advising Robertson that anything he revealed to Ms. Cascio – including theretofore undisclosed details about the crimes – was privileged against discovery by the State or (2) for failing to object to discovery of Ms. Cascio's notes by the State and (3) for calling Ms. Cascio as a defense witness at sentencing under these circumstances.

STATEMENT OF THE CASE

In March 1999 Jimmy Robertson stood trial in York County, before Judge John C. Hayes, III, and a jury, on indictments charging him with the murder of his parents, Terry and Earl Robertson, as well as a related armed robbery and credit card fraud. The Robertsons were beaten to death the morning of November 25, 1997.

The State sought the death penalty, relying on five statutory aggravators: (1) the murders were committed during armed robbery; (2) the murders were committed during larceny involving the use of a deadly weapon; (3) the murders involved physical torture; (4) the murders were committed for money; and (5) two people were murdered pursuant to one scheme. *S.C. Code Section 16-3-20(C)(a)*.

Earl Robertson was an executive at Springs Industries. The State asserted that Robertson had killed his parents so that he and his younger brother, Chip, would inherit their money before their father could invest it in a golf course he hoped to build after retiring from Springs. Robertson talked with Chip twice on the telephone before the homicides and was arrested outside his brother's Philadelphia apartment later that day.

Terry Robertson was beaten to death with a hammer as she lay in bed. Earl Robertson was attacked with the hammer and a baseball bat as he got out of the shower. Robertson's accomplice, Meredith Moon, claimed that he was drenched in his parents' blood when he was finished. Moon was the State's key witness. She and Robertson were arrested in Philadelphia before they could meet up with Chip.

The defense rested without presenting any evidence during the guilt phase. The jury found Robertson guilty as charged after deliberating less than two hours.

At sentencing, the State introduced a substantial amount of victim impact evidence, as well as evidence of Robertson's misbehavior in the years leading up to the homicides. Robertson had previously discussed killing his parents on a number of occasions. He was involuntarily committed to the State Hospital in 1995 because of growing concern that he would harm them, particularly his mother. He once told a roommate he wanted to kill his parents because "[t]hey have made my life a living hell."

Expert testimony suggested that something deeper than mere greed prompted these crimes. Intrafamily crimes of this type display remarkable similarities: mental illness, substance abuse, ancient resentments grown poisonous and a shocking level of violence. A review of "domesticated" homicides concludes that "in general murderous attacks tended ... to grow wilder as the relationship between victim and killer grew closer, as the fury of betrayal or years of anger were reflected in the number of shots, blows, or cuts inflicted, often on an already lifeless body." Roger Lane, *Murder in America* (1997), p. 259.

Referring to the condition of the victims' bodies in this case, one expert witness observed, "[H]e obliterated them." Robertson told another, "Twenty-two years of hatred came out." A seasoned SLED crime scene investigator testified, "[Y]ou look and see this type of mutilation and you think of anger, a lot of anger."

At sentencing, the defense introduced evidence that Robertson's psychological problems were exacerbated by his consumption of amphetamines before the homicides. A neurologist testified that Robertson was "out of control" at the time. A neuropsychologist stressed that the crimes were the product of a dysfunctional brain. (A State psychologist disagreed with these conclusions, finding Robertson merely antisocial.)

At the conclusion of sentencing, the judge refused a defense request to instruct the jury that “[e]vidence of voluntary intoxication is a proper matter for consideration ... and mitigation of punishment.” (He had previously charged the jury that “voluntary intoxication is never an excuse for ... a crime” in his guilt phase instructions.)

In addition to the five statutory aggravators previously listed, the judge instructed the jury on four statutory mitigators: (1) Robertson had no prior convictions involving the use of violence against another person; (2) the murders were committed while Robertson was under the influence of mental or emotional disturbance; (3) Robertson’s capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (4) Robertson’s age and mentality at the time of the crimes. *S.C. Code Section 16-3-20(C)(b)*.

The jury deliberated for just over three hours and thirty minutes, then sentenced Robertson to death for both murders after finding all five aggravators alleged by the State.

In April 2002, the undersigned filed an Initial Brief of Appellant on Robertson’s behalf presenting three issues, among them: “The judge erred by refusing to instruct the jury at sentencing that voluntary intoxication could be considered mitigating.” Robertson asked the Court to relieve counsel and permit him to appear *pro se*. After Judge Hayes found Robertson competent to waive appellate counsel on remand, the Supreme Court relieved the undersigned and allowed Robertson to proceed *pro se*. Robertson filed his own Initial Brief of Appellant, but omitted the issue addressing the mitigating effect of voluntary intoxication. Robertson subsequently moved to abandon his direct appeal. On remand, Judge Hayes found Robertson competent to waive his direct appeal. After conducting the proportionality review mandated by *S.C. Code Section 16-3-25*, the Court dismissed the appeal.

On March 1, 2006, counsel appointed to represent Robertson filed an application for post-conviction relief alleging that he had not received effective assistance of counsel. On January 29 through 31, 2007, Judge John C. Few held an evidentiary hearing. At the outset of the hearing, counsel amended the application to include twelve allegations of trial counsels' ineffectiveness, including:

Counsel was ineffective for presenting social worker Toni Cascio as an expert witness because of (a) Cascio's lack of experience; (b) counsels' agreement to provide Ms. Cascio's notes to the State; (c) counsels' failure to discover Robertson's admissions about the crime in enough time to permit counsel to employ a different social worker; and (d) counsels' presentation of Ms. Cascio as a witness.

Order of Dismissal, p. 8. The judge denied relief from the bench and later by written order (prepared by counsel for the State) dated March 7, 2008.

Robertson, through his (once again) undersigned counsel, now petitions the Supreme Court for Writ of Certiorari to review the denial of post-conviction relief.

ARGUMENT

Trial counsel were ineffective at sentencing (1) for advising Robertson that anything he revealed to Ms. Cascio – including theretofore undisclosed details about the crimes – was privileged against discovery by the State or (2) for failing to object to discovery of Ms. Cascio’s notes by the State and (3) for calling Ms. Cascio as a defense witness at sentencing under these circumstances.

Toni Cascio was hired by the defense “to conduct a social history assessment of Jimmy Robertson,” *not* “to get the details of the crime,” according to defense counsel. App. p. 2856, lines 4-18; PCR Tr. p. 289, lines 15-20. She testified as an expert for the first time ever at Robertson’s sentencing. App. p. 2854, line 24 – p. 2855, line 1. Cascio essentially obtained Robertson’s confession, including previously undisclosed details about the crimes. PCR Tr. p. 289, line 11 – p. 290, line 3.

Robertson testified that counsel had advised him “to be completely open and honest” with Cascio. PCR Tr. p. 31, line 9. “I was told to speak frankly with respect to what happened that evening,” Robertson testified at the PCR hearing. App. p. 31, lines 9-11. Counsel told Robertson that anything he told Cascio would be privileged, “as if I was speaking with my attorneys.” App. p. 32, lines 17-22.

Cascio was the last major defense witness at sentencing. PCR Tr. p. 220, lines 15-19. Prior to Cascio’s testimony, the Solicitor requested the notes of her interview with Robertson, which included the theretofore undisclosed circumstances of the crimes as related to Cascio by Robertson. App. p. 2604, lines 23-25. Defense counsel surrendered Cascio’s notes to the State without objection. App. p. 2605, lines 19-23; App. p. 2749, lines 12-171; PCR Tr. p. 187, lines 5-15.

As he reviewed Cascio's notes overnight, the Solicitor testified at the PCR hearing, he realized that he had been given a "gift ... [a]nd I was just hoping I didn't blow it." PCR Tr. p. 218, lines 9-16. He need not have worried. The Solicitor's cross-examination of Cascio was so damaging to Robertson that he thereafter used it to teach fledgling prosecutors. PCR Tr. p. 220, line 24 – p. 221, line 6.

Prior to the Solicitor's cross-examination of Cascio, Robertson had not directly incriminated himself. PCR Tr. p. 147, lines 17-20; PCR Tr. p. 221, lines 7-12. But "[i]t [was] as if Mr. Robertson was testifying against himself," one of his defense lawyers acknowledged at the PCR hearing, "when those notes were brought into trial." PCR Tr. p. 126, lines 12-17. Both defense counsel – and the PCR judge – agreed that Cascio's disclosure of Robertson's disturbing admissions was the most damaging evidence *in aggravation* adduced at sentencing. PCR Tr. p. 88, lines 16-20; PCR Tr. p. 262, lines 7-17; PCR Tr. p. 269, lines 6-10; PCR Tr. p. 380, lines 13-15.

The Solicitor's cross-examination of Cascio is reproduced in the Appendix on pages 2895 through 3025. The Court's attention is especially directed to the last ten pages. Among other things, Robertson reveals that he had decided not to use an autographed baseball bat to kill his father because it was valuable and "he didn't want to ruin it" and that he had also considered using an electric drill on his father "to end the matter." App. p. 3015, lines 10-21; App. p. 3019, line 7 – App. 3020, line 1. There is much more, which is summarized on pages 79 and 80 of the Order of Dismissal.

At the PCR hearing, the Solicitor understandably sought to downplay the importance of this evidence to the death sentence which resulted. He testified that it "really did no more than confirm what the physical evidence said. ... [I]f anything, it shored that up." PCR Tr. p. 204, lines 11-23.

At trial, however, the Solicitor had repeatedly exploited his cross-examination of Cascio throughout his closing argument. App. pp. 3125-3172.

At the PCR hearing, both defense counsel agreed that, as a mitigation witness, Cascio fell somewhere along the continuum between “bad” and “a disaster.” PCR Tr. p. 189, lines 8-14; PCR Tr. p. 271, lines 6 and 7. They also acknowledged that calling Cascio as a witness under these circumstances had been a prejudicial mistake. PCR Tr. p. 148, line 21 – p. 149, line 6; PCR Tr. p. 270, line 22 – p. 271, line 2.

The PCR judge agreed “that once the notes were made aware (*sic*) to the lawyers they should have done everything they could to keep those notes from being turned over to the State.” PCR Tr. p. 378, lines 5-8. He denied Robertson’s PCR application because of his belief that, under *Rule 705, SCRE*, “the underlying notes or other data must be produced if the expert witness testifies” and because he further believed that “Robertson was not prejudiced by the State’s cross-examination concerning Robertson’s admissions concerning the murders because the substance of the various admissions, including the information concerning how he committed the murders, was cumulative to other evidence in the record and already before the sentencing phase jury.” Order of Dismissal, pp. 88 and 93.

Rule 5, SCRCrimP, governs discovery in criminal cases. Subsection (b)(2) of that rule states:

Except as to scientific or medical reports, this [role] does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statement made by the defendant, or by prosecution or defense witnesses, or by perspective prosecution or defense witnesses, to the defendant, his agents or attorneys.

Rule 705, SCRE, one of four rules dealing with expert testimony, provides:

The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

“There is no right to discovery in a criminal case unless permitted by statute or court rule.” *State v. Miller*, 289 S.C. 316, 345 S.E.2d 489, 490 (1986).

In *State v. Trotter*, 322 S.C. 537, 473 S.E.2d 452, 455 (1996), a case interpreting *Rule 5*, the Court recognized that the role of an expert such as Ms. Cascio is “not to investigate crimes or the occurrence in question.” More to the point:

There is nothing in the language of the rule that requires [a party] to produce an expert’s *notes* of an examination. [Citation omitted.] The notes taken during an interview ... are merely the raw data from which the expert may later draw the conclusions that are noted in a report or test result.

Nor does *Rule 5* “authorize the trial judge to require parties to generate written reports solely for the benefit of the opponent.” *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873, 878 (2007).

Rule 705 does not appear to have been the subject of significant judicial interpretation in this State. See, for example, *State v. Slocumb*, 336 S.C. 619, 521 S.E.2d 507 (Ct. App. 1999).

In any case, both rules are subject to *Rule 403, SCRE*, which states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

A PCR applicant alleging that trial counsel was ineffective must show (1) counsel's performance was deficient and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008). "[W]hen a defendant's conviction is challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt'." *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590, 596 (2007), quoting *Strickland v. Washington*, 466 U.S. at 695. On the other hand, "the evaluation of the consequences of an error in the sentencing phase of a capital case are more difficult because of the discretion that is given to the sentencing jury." *State v. McClure*, 342 S.C. 403, 537 S.E.2d 273, 275 (2000).

If Cascio's notes containing Robertson's damaging admissions were (as the State contends) discoverable under either *Rule 5* or *Rule 705*, then defense counsel were ineffective for advising Robertson that anything he revealed to Cascio was not subject to discovery by the State. "Failure to inform a client of his Fifth Amendment rights and the *consequences of exercise and waiver of those rights* falls below an objective standard of reasonable representation." *Brown v. State*, 340 S.C. 590, 533 S.E.2d 308, 311 (2000) (emphasis added). If her notes were not discoverable under those rules, then counsel were ineffective for consenting to their disclosure. In either case, counsel were ineffective for calling Cascio as a defense witness at sentencing under these circumstances. See, for example, *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002).

Defense counsels' deficiency in this regard could not possibly have been harmless at sentencing. At the conclusion of the PCR hearing, the judge himself observed:

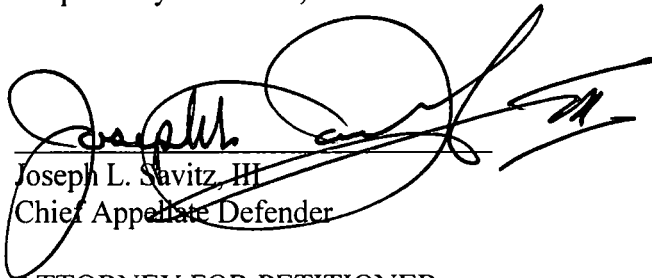
Meredith Moon has already testified about a lot of things that Dr. Cascio quotes Robertson as having said. Undoubtedly, the way that Robertson presents it to Cascio – the way it comes out through Cascio – is significantly more damaging than it was coming through Meredith Moon. But nevertheless, a lot of that testimony is already in the record to some extent.

PCR Tr. p. 380, lines 11-17. In the Order of Dismissal, he wrote, “Robertson was not prejudiced by the State’s cross-examination concerning Robertson’s admissions [to Cascio] concerning the murders because the substance of the various admissions, including the information concerning how he committed the murders, was cumulative to other evidence in the record and already before the sentencing phase jury.” But, even without considering *State v. McClure*, that is not the test: The admission of improper evidence is harmless only where the evidence is *merely* cumulative to other evidence. *State v. Price*, 268 S.C. 494, 629 S.E.2d 363 (2006). The PCR judge himself acknowledged that the information contained in Cascio’s notes concerning the details of the homicides was not merely cumulative, but was in fact the most damaging evidence in aggravation adduced at sentencing.

CONCLUSION

At the PCR hearing, Robertson satisfied his burden of establishing that defense counsel were prejudicially deficient at sentencing. For this reason, the Court should grant certiorari, allow full briefing of this important issue and, ultimately, reverse Robertson's death sentence and remand for resentencing.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Joseph L. Savitz, III', is written over a horizontal line.

Joseph L. Savitz, III
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of April, 2009.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County
John C. Few, Circuit Court Judge

JAMES D. ROBERTSON,

PETITIONER,

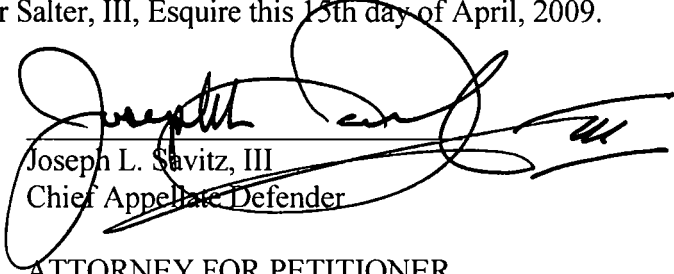
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on William Edgar Salter, III, Esquire this 15th day of April, 2009.



Joseph L. Savitz, III
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of April, 2009.

Karen D. Elliott (L.S.)
Notary Public for South Carolina

My Commission Expires: March 19, 2017.



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED
JUL 15 2009
S.C. SUPREME COURT

July 15, 2009

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

Re: *James D. Robertson v. State of South Carolina*

Dear Mr. Shearouse:

Enclosed for filing please find the original and six (6) copies of the Return to Petition for Writ of Certiorari, along with proof of service in the above-referenced case.

Thank you for your assistance in this matter.

Sincerely,


William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd
Enclosures

cc: Joseph L. Savitz, III, Esq. (w/two (2) copies of encls.)
Merry A. Collins, Investigator, 16th Judicial Circuit Solicitor's Office (w/copy of encls.,
via email)
Honorable Kevin S. Brackett, Solicitor, Sixteenth Judicial Circuit (w/copy of encls.)
Ms. Sandi Wofford, Victim Services (w/copy of encls.)

The Supreme Court of South Carolina

James D. Robertson,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable John C. Few
York County
Trial Court Case No. 2008-CP-46-00532

ORDER

Respondent seeks a second extension of time to serve and file the Return to Petition for a Writ of Certiorari in the above entitled matter. The request for an extension is granted until July 15, 2009. No further extensions of time will be granted absent the showing of extraordinary circumstances.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

CLERK

Columbia, South Carolina

June 16, 2009

cc: Chief Appellate Defender Joseph L. Savitz, III
Senior Assistant Attorney General William Edgar Salter, III



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED

JUN 16 2009

S.C. SUPREME COURT

June 16, 2009

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

Re: *James D. Robertson v. The State*,

Dear Mr. Shearouse:

Enclosed for filing in your office is the original and six (6) copies of the second page of the Motion for Extension of Time to File Brief of Respondent in the above-referenced case, along with an Amended Certificate of Service.

Thank you for your assistance in this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES/
Enclosures

cc: Joseph L. Savitz, III, Esq. (w/two copies of encls.)

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From York County
Honorable John C. Few, Circuit Court Judge

RECEIVED

JUN 15 2009

S.C. SUPREME COURT

JAMES D. ROBERTSON,

Petitioner,

v.

THE STATE,

Respondent.

MOTION FOR 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 matter. The Return is due to be filed today, June 15, 2009. In accordance with this Court's March 18, 2009 Order *Re: Extension Requests in Criminal Direct Appeals and Post-Conviction Relief Certiorari Proceedings*, the undersigned would set forth the following as a showing for cause to support this extension request.

This request is made in good faith and not for the purpose of delay. Rather, the undersigned believes it is necessitated by the fact that counsel was out of the office with the flu on May 28-June 3, 2009; and the undersigned has had the following state and federal matters to which he has attended.

1. The undersigned appeared at a status conference in the death penalty Post-Conviction relief case of *Mar-Reece Hughes v. State*, on June 4, 2009, before the Hon. L. Casey Manning;
2. The undersigned represented the Respondent at oral argument before this Court on June 10, 2009, in the consolidated appeals of *State v. Jason Sinatra Edwards, Maceo Latonya Edwards and Jonas Edwards*; and
3. On June 10, 2009, the undersigned moved for Summary Judgment and filed a 33 page Return and memorandum in Support of Summary Judgment in *Michael Adolf Gambrell, 227643 v. Warden, MCCI, C/A No. 4:09-329-HFF-TER*.

I am informing opposing counsel of my request by service of two copies of this Motion. The thirty day extension requested will make the Return to Petition for Writ of Certiorari due on July 15, 2009. I understand the desire of the Court and petitioner'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.

RECEIVED

JUN 16 2009

S.C. SUPREME COURT

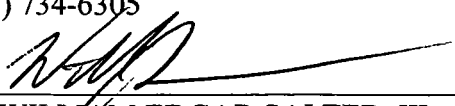
Respectfully submitted,

HENRY D. McMASTER
Attorney General
JOHN W. McINTOSH
Chief Deputy Attorney General
DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

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

June 15, 2009

BY: 

WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

BY: 
WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

June 15, 2009.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From York County
Honorable John C. Few, Circuit Court Judge

JAMES D. ROBERTSON,

Petitioner,

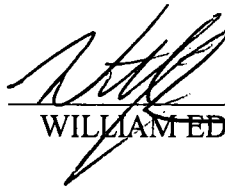
v.

THE STATE,

Respondent.

AMENDED CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of June, 2009, a copy of the Respondent's Motion for Extension of Time to File Return to Petition for Writ of Certiorari was served on counsel for the Petitioner Joseph L. Savitz, III, Esq., SCCID, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211-1589. A copy of the amended page 2 and the Amended Certificate of Service have also been served upon Mr. Savitz at this address on the 16th day of June, 2009.



WILLIAM EDGAR SALTER, III

The Supreme Court of South Carolina

James D. Robertson,

Petitioner,

V.

State of South Carolina,

Respondent.

The Honorable John C. Few
York County
Trial Court Case No. 2008-CP-46-00532

ORDER

For good cause having been shown, the time for serving and filing the
Petition for Writ of Certiorari and Appendix in the above entitled matter is
hereby extended until June 15, 2009.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

CLERK

Columbia, South Carolina

May 18, 2009

cc: Chief Appellate Defender Joseph L. Savitz, III
Senior Assistant Attorney General William Edgar Salter, III



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED

MAY 15 2009

S.C. SUPREME COURT

May 15, 2009

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

Re: *James D. Robertson v. State of South Carolina*

Dear Mr. Shearouse:

The Return to Petition for Writ of Certiorari is due today, May 15, 2009 in the above matter. Respondent respectfully requests an extension of thirty (30) days to submit same. This request is being made for the following reasons:

1. The undersigned attorney for the Respondents has had and is scheduled to have a number of state and federal matters to attend to, specifically, counsel appeared yesterday in the Supreme Court for a hearing in the matter of *State v. Johnny Rufus Belcher*; and
2. Counsel for Respondent is currently preparing a Return to Petition for Writ of Certiorari for Donald J. Zelenka, Esq., Assistant Deputy Attorney General in his absence for the matter entitled *The State v. Amos Mattison*.

I am informing opposing counsel of my request by copy of this letter. Thank you for your consideration.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd

cc: Joseph L. Savitz, III, Esq.

The Supreme Court of South Carolina

James D. Robertson, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable John C. Few
York County
Trial Court Case No. 2008-CP-46-00532

ORDER

Petitioner seeks a seventh extension of time until April 15, 2009 to serve and file the Petition for Writ of Certiorari and Appendix, and asserts that extraordinary circumstances justify this extension. The opposing party consents to the extension.

The request for an extension is granted. 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.



J.

For the Court

Columbia, South Carolina

April 6, 2009

cc: Chief Appellate Defender Joseph L. Savitz, III
Senior Assistant Attorney General William Edgar Salter, III

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County

John C. Few, Circuit Court Judge

RECEIVED
APR - 1 2009
S.C. SUPREME COURT

JAMES D. ROBERTSON,

PETITIONER,

V.

THE STATE,

RESPONDENT

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR WRIT OF CERTIORARI
AND APPENDIX

Counsel for James D. Robertson respectfully requests a final extension of two weeks, until April 15, 2009, in which to file the petition for writ of certiorari and appendix in this death penalty case. Counsel has previously received six thirty-day extensions and one two-week extension in connection with this step in the process. Counsel will request no additional extensions in connection with any step in this appeal. In support of this request, counsel shows:

(1) He was on leave November, December and most of January due to his brother's death, which meant he has requested an uncharacteristic number of extensions during that period and into 2009.

(2) Since January 2009, counsel has filed briefs or certiorari petitions in the following cases:

State v. Theodore David Wills

State v. Troy Lavern Pearson
Kenneth J. Butler v. State
State v. Michael Adam Bailey
State v. Reginald R. Latimore
State v. Ron Finklea (capital appeal)
State v. Christopher A. Woody
Krista McDaniel v. State
The State v. Randall Smith
The State v. Myra Christenbury

He has also orally argued the following cases:

William Rhett Snowdon
James Bodenstedt
Kevin Lamar Grant
Anthony Woods (capital appeal)
Clinton Roberson
Arthur Franklin Smith
Hernandez, Guerrero, Avila-Arjona
Larry Ferguson
Roger Johnson

(3) Counsel is working on getting the older cases which have more extensions completed.

(4) Counsel believes that extraordinary circumstances warrant this extension, as required by the Supreme Court's order of March 18, 2009, concerning Extension Requests in Criminal Direct Appeals and Post-Conviction Relief Certiorari Proceedings. Appellate Defense agrees that extensions should be kept to a minimum for several reasons, not least of which is the need for finality felt by the victims, the defendants and their families. But regrettably, we only have 8 attorneys to handle approximately 1,000 appeals per year. The Spangenberg Report on Appellate Defense (February 2008) concluded, among other things, that Appellate Defense had too few attorneys handling too many cases. Counsel has brought the Supreme Court's order on extensions to the attention of the Commission on Indigent Defense and recommended that we explore the possibility of ceasing to handle probation revocation and sexually violent predator appeals until the Division is adequately funded. The Commission has taken these

recommendations under advisement. Until then, counsel is seeking to bring Appellate Defense into compliance with the resources at hand.

(5) As indicated by signature below, William Edgar Salter, III, of the Attorney General's Office, does not object to this request.

(6) Counsel makes this request in the utmost good faith and not for purposes of delay.

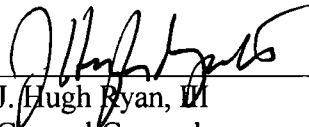
For these reasons, counsel for Mr. Robertson petitions the Court for an additional extension of two weeks until April 15, 2009, in which to file the petition for writ of certiorari and appendix in this case.

Respectfully submitted,



Joseph L. Savitz, III
Chief Appellate Defender

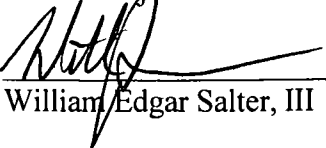
Attorney for Appellant



J. Hugh Ryan, III
General Counsel

This 1st day of April, 2009

I do not object:



William Edgar Salter, III

The Supreme Court of South Carolina

James D. Robertson,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable John C. Few
York County
Trial Court Case No. 2008-CP-46-00532

ORDER

Petitioner seeks an extension until April 1, 2009 to serve and file the Petition for Writ of Certiorari and Appendix, and asserts that extraordinary circumstances justify this extension. The opposing party consents to the extension.

The request for an extension is granted. 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.



For the Court C.J.

Columbia, South Carolina

March 19, 2009

cc: Chief Appellate Defender Joseph L. Savitz, III
Senior Assistant Attorney General William Edgar Salter, III

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County
John C. Few, Circuit Court Judge

RECEIVED

MAR 18 2009

JAMES D. ROBERTSON,

S.C. SUPREME COURT

PETITIONER,

V.

THE STATE,

RESPONDENT

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR WRIT OF CERTIORARI
AND APPENDIX

Counsel for James D. Robertson respectfully requests an additional two weeks, until April 1, 2009, in which to file the petition for writ of certiorari and appendix in this death penalty case. Counsel has previously received five thirty-day extensions in connection with this step in the process. Counsel will request no additional extensions in connection with any step in this appeal. In support of this request, counsel shows:

(1) Counsel was on leave November, December and most of January due to his brother's death.

(2) In addition to filings in his non-capital caseload and administrative responsibilities, counsel filed the initial brief in the capital appeal of *State v. Ron Finklea* on February 27, 2009.

(3) In addition to this, Counsel had oral arguments this month on the following dates:

March 4, 2009 Supreme Court (*State v. Hernandez, Guerrero, Avila-Arjona*)

March 17, 2009 Supreme Court (*Larry Ferguson v. State*)

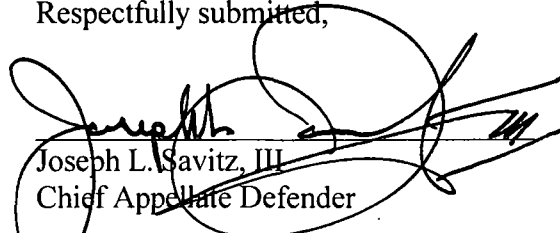
March 18, 2009 Court of Appeals (*State v. Roger Johnson*)

(4) As indicated by signature below, William Edgar Salter, III, of the Attorney General's Office, does not object to this request.

(5) Counsel makes this request in the utmost good faith and not for purposes of delay.

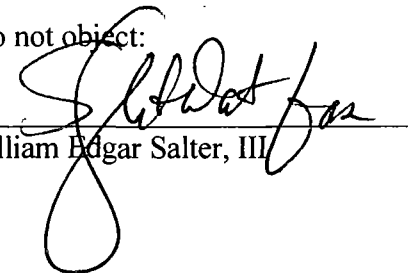
For these reasons, counsel for Mr. Robertson petitions the Court for an additional two weeks until April 1, 2009, in which to file the petition for writ of certiorari and appendix in this case.

Respectfully submitted,


Joseph L. Savitz, III
Chief Appellate Defender
Attorney for Appellant

This 18th day of March, 2009

I do not object:


William Edgar Salter, III

The Supreme Court of South Carolina

James D. Robertson,

Petitioner,

V.

State of South Carolina,

Respondent.

The Honorable John C. Few
York County
Trial Court Case No. 2008-CP-46-00532

ORDER

For good cause having been shown, the time for serving and filing the
Petition for Writ of Certiorari and Appendix in the above entitled matter is
hereby extended until March 18, 2009.

IT IS SO ORDERED.



For the Court

Columbia, South Carolina

February 18, 2009

cc: Chief Appellate Defender Joseph L. Savitz, III
Senior Assistant Attorney General William Edgar Salter, III

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County
John C. Few, Circuit Court Judge

ORIGINAL

RECEIVED

FEB 17 2009

S.C. SUPREME COURT

JAMES D. ROBERTSON,

PETITIONER,

V.

THE STATE,

RESPONDENT

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR WRIT OF CERTIORARI
AND APPENDIX

Counsel for James D. Robertson respectfully requests an additional thirty days, until March 19, 2009, in which to file the petition for writ of certiorari and appendix in this death penalty case. Counsel has previously received four thirty-day extensions in connection with this step in the process. Counsel will request no additional extensions in connection with any step in this appeal unless absolutely unavoidable. In support of this request, counsel shows:

(1) Counsel is unable to complete the petition for writ of certiorari and appendix within the allotted time because of his present workload of capital and non-capital appeals and his concurrent administrative duties.

(2) Counsel was out of the office most of November, December and due to his brother's death and has only recently returned to work fulltime.

(3) Counsel argued cases in the Supreme Court (*State v. Anthony Woods*) February 3, (*State v. Clinton Roberson*) February 5, and has arguments scheduled (*State v. Arthur Franklin Smith*) February 19 and (*State v. Hernandez, Guerrero and Avila-Arjona*) March 4.

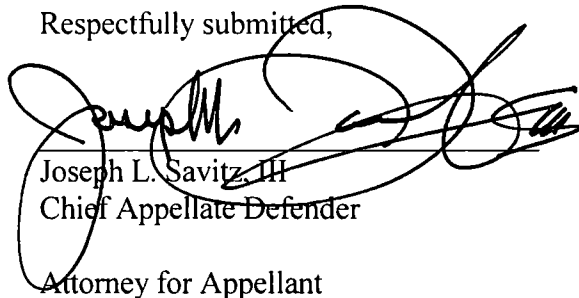
(4) Counsel anticipates that his caseload will return to a manageable level by the end of February. He sincerely appreciates the Court's cooperation and consideration during the past few months.

(5) As indicated by signature below, William Edgar Salter, III, of the Attorney General's Office, does not object to this request.

(6) Counsel makes this request in the utmost good faith and not for purposes of delay.

For these reasons, counsel for Mr. Robertson petitions the Court for an additional thirty days until March 18, 2009, in which to file the petition for writ of certiorari and appendix in this case.

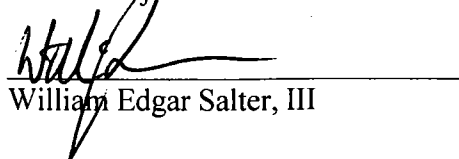
Respectfully submitted,



Joseph L. Savitz, III
Chief Appellate Defender
Attorney for Appellant

This 17th day of February, 2009

I do not object:



William Edgar Salter, III

The Supreme Court of South Carolina

James D. Robertson,

V.

State of South Carolina, Respondent.

The Honorable John C. Few
York County
Trial Court Case No. 2008-CP-46-00532

ORDER

For good cause having been shown, the time for serving and filing the
Petition for Writ of Certiorari and Appendix in the above entitled matter is
hereby extended until February 16, 2009.

IT IS SO ORDERED.



For the Court

Columbia, South Carolina

January 21, 2009

cc: Chief Appellate Defender Joseph L. Savitz, III
Senior Assistant Attorney General William Edgar Salter, III

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County

John C. Few, Circuit Court Judge

ORIGINAL

RECEIVED

JAN 16 2009

JAMES D. ROBERTSON,

PETITIONER, S.C. SUPREME COURT

V.

THE STATE,

RESPONDENT

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR WRIT OF CERTIORARI
AND APPENDIX

Counsel for James D. Robertson respectfully requests an additional thirty days, until February 16, 2009, in which to file the petition for writ of certiorari and appendix in this death penalty case. Counsel has previously received three thirty-day extensions in connection with this step in the process. Counsel will request no additional extensions in connection with any step in this appeal unless absolutely unavoidable. In support of this request, counsel shows:

(1) Counsel is unable to complete the petition for writ of certiorari within the allotted time because of his present workload of capital and non-capital appeals and his concurrent administrative duties.

(2) Counsel was out of the office most of November and December due to his brother's death and only recently returned to work on January 5.

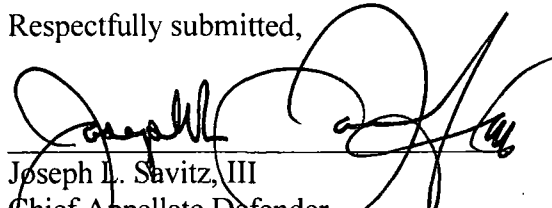
(3) Counsel also argued a case in the Supreme Court (*State v. William Rhett Snowden*) January 6 and argued a case in the Court of Appeals (*State v. Kevin Lamar Grant*) January 8.

(4) As indicated by signature below, William Edgar Salter, III, of the Attorney General's Office, does not object to this request.

(5) Counsel makes this request in the utmost good faith and not for purposes of delay.

For these reasons, counsel for Mr. Robertson petitions the Court for an additional thirty days until February 16, 2009, in which to file the petition for writ of certiorari and appendix in this case.

Respectfully submitted,

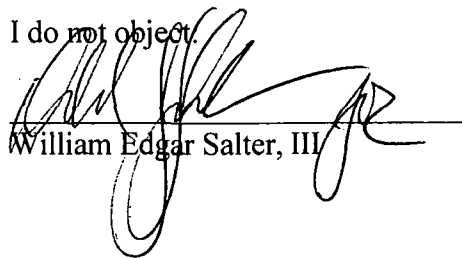


Joseph L. Savitz, III
Chief Appellate Defender

Attorney for Appellant

This 16th day of January, 2009

I do not object.



William Edgar Salter, III



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

December 18, 2008

Chief Appellate Defender Joseph L. Savitz, III
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: Robertson, James D. v. State

Dear Counsel:

The following Order has been endorsed on your Motion for an Extension of Time in Which to File the Petition for Writ of Certiorari and Appendix in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.
For the Court

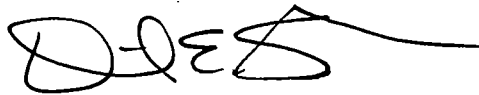
By s/ Daniel E. Shearouse
Clerk

December 18, 2008.”

Please be advised the Petition for Writ of Certiorari and Appendix should be served and filed on or before January 16, 2009.

Chief Appellate Defender Joseph L. Savitz, III
Page Two
December 18, 2008

Very truly yours,

A handwritten signature in black ink, consisting of the letters 'DES' followed by a long, horizontal, slightly wavy line extending to the right.

CLERK

DES/dmh

cc: Senior Assistant Attorney General William Edgar Salter, III

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County

John C. Few, Circuit Court Judge

RECEIVED

DEC 17 2008

S.C. SUPREME COURT

JAMES D. ROBERTSON,

PETITIONER,

V.

THE STATE,

RESPONDENT

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR WRIT OF CERTIORARI
AND APPENDIX

Counsel for James D. Robertson respectfully requests an additional thirty days, until January 16, 2009, in which to file the petition for writ of certiorari and appendix in this death penalty case. Counsel will request no additional extensions in connection with any step in this appeal unless absolutely unavoidable. In support of this request, counsel shows:

(1) Counsel had planned on filing the petition for writ of certiorari and appendix today. As the Court is aware, the night of November 1, 2008, counsel's youngest brother suffered a stroke and consequent head trauma and was pronounced legally dead one week later. His funeral was held on November 14. Since the beginning of November, counsel has effectively been on extended leave from Appellate Defense, helping his family face a fairly bleak

(Counsel's brother left behind a wife and two small children, as well as his mother and another brother.)

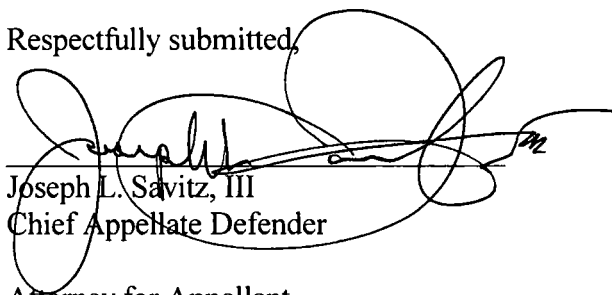
(2) In addition to this, counsel has been ill with a virus since December 14 and has mostly been absent on sick leave this week.

(3) As indicated by signature below, William Edgar Salter, III, of the Attorney General's Office, does not object to this request

(4) Counsel makes this request in the utmost good faith and not for purposes of delay. He would also like to thank the Court for its consideration during this difficult time.

For these reasons, counsel for Mr. Robertson petitions the Court for an additional thirty days until January 16, 2009, in which to file the petition for writ of certiorari and appendix in this case.

Respectfully submitted,

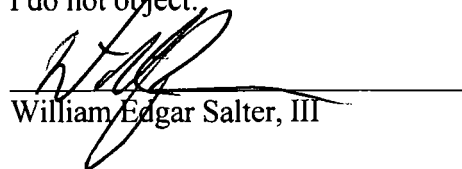


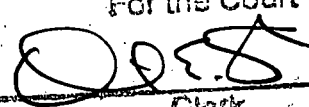
Joseph L. Savitz, III
Chief Appellate Defender

Attorney for Appellant

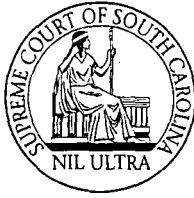
This 17th day of December, 2008

I do not object:


William Edgar Salter, III

GRANTED
Jean H. Toal C.J.
For the Court
By  Clerk

December 18, 2008



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

November 19, 2008

Chief Appellate Defender Joseph L. Savitz, III
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: Robertson, James D. v. State

Dear Counsel:

The following Order has been endorsed on your Motion for an Extension of Time in Which to File the Petition for Writ of Certiorari and Appendix in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.
For the Court

By s/ Daniel E. Shearouse
Clerk

November 19, 2008.”

Please be advised that the Petition for Writ of Certiorari and Appendix should be served and filed on or before December 17, 2008.

Chief Appellate Defender Joseph L. Savitz, III

Page Two

November 19, 2008

Very truly yours,

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a series of loops and a long horizontal stroke extending to the right.

CLERK

DES/dmh

cc: Senior Assistant Attorney General William Edgar Salter, III

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County

John C. Few, Circuit Court Judge

JAMES D. ROBERTSON,

PETITIONER,

V.

THE STATE,

RESPONDENT

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR WRIT OF CERTIORARI
AND APPENDIX

Counsel for James Robertson respectfully requests an additional thirty days (until December 17) in which to file the petition for writ of certiorari and appendix in this death penalty case. Counsel has previously received one thirty-day extension in connection with this step in the process. In support of this request, counsel shows:

- (1) Counsel is handling a heavy caseload of other capital and noncapital appeals along with various administrative duties.
- (2) Counsel has been out of the office for two weeks due to his brother's death and will not be returning until the end of this week.
- (3) Counsel makes this request in good faith and not for purposes of delay.

ORIGINAL

RECEIVED

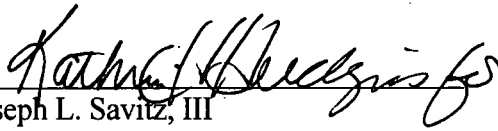
NOV 17 2008

S.C. SUPREME COURT

(4) As indicated by signature below, William Edgar Salter, III, of the Attorney General's Office, does not object to this request

WHEREFORE, counsel for petitioner requests an additional thirty days (until December 17) in which to file the petition for writ of certiorari and appendix in this death penalty case.

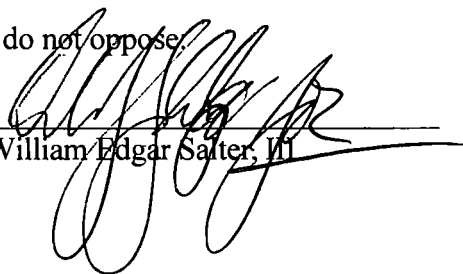
Respectfully submitted,


Joseph L. Savitz, III
Chief Appellate Defender

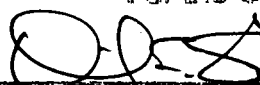
Attorney for Appellant

This 17th day of November, 2008

I do not oppose.


William Edgar Salter, III

GRANTED.


Jean H. Toal
For the Court
By 
Clerk

November 19, 2008



HENRY McMASTER
ATTORNEY GENERAL

October 22, 2008

RECEIVED

OCT 22 2008

S.C. SUPREME COURT

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

RE: *James D. Robertson vs. State of South Carolina*

Dear Mr. Shearouse:

I am in receipt of the Supreme Court's Order granting the Petitioner's counsel an extension to serve and file the Petition for Writ of Certiorari and Appendix regarding the above matter. This letter is to advise that I represent the State in this matter, and any and all further correspondence should be directed to my attention.

Thank you for your kind consideration in this regard, and if you have any questions, please contact me.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd

cc: Joseph L. Savitz, III, Chief Appellate Defender

The Supreme Court of South Carolina

James D. Robertson,

Petitioner,

V.

State of South Carolina,

Respondent.

The Honorable John C. Few
York County
Trial Court Case No. 2008-CP-46-00532

ORDER

For good cause having been shown, the time for serving and filing the Petition for Writ of Certiorari and Appendix in the above entitled matter is hereby extended until November 17, 2008.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

CLERK

Columbia, South Carolina

October 20, 2008

cc: Chief Appellate Defender Joseph L. Savitz, III
Assistant Deputy Attorney General Donald J. Zelenka



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

October 17, 2008

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

RECEIVED
OCT 17 2008
S.C. SUPREME COURT

Re: James D. Robertson v. The State

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in this capital are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting an extension until November 17, 2008 in which to serve and file the petition.

By copy of this letter, I am informing Donald J. Zelenka, of the Attorney General's Office, of my request.

Sincerely,

Joseph L. Savitz, III
Chief Appellate Defender

JLS,III/kde

cc: Donald J. Zelenka



SCCID

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ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

August 19, 2008

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

RECEIVED

AUG 19 2008

S.C. SUPREME COURT

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

James D Robertson v. State of South Carolina

8/18/2008

I would appreciate you beginning our time limits from the above dates, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Melinda W. Long
Legal Assistant



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) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

July 24, 2008

RECEIVED

JUL 24 2008

S.C. SUPREME COURT

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Phyllis S. Barrett	7/4/08	James D Robertson

Trial Date: January 29 - 31, 2007

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office



The Supreme Court of South Carolina

TITLE OF
CASE

(James D. Robertson
(
(
(v. 2008CP4600532
(
(
(State of South Carolina
(
(

RECEIVED

JUL 17 2008

SC Court of Appeals

NOTICE

Upon request and for good cause shown, Phyllis Barrett, Court Reporter, is hereby granted an extension up to and including August 10, 2008 to prepare and deliver the Transcript of Record in the above case.

Desiree Allen

Court Services Manager
South Carolina Court Administration

Columbia, South Carolina
7/14/2008

cc: Division of Appellate Defense
Office of the Attorney General
Phyllis Barrett

RECEIVED

JUL 18 2008

S.C. SUPREME COURT



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

May 5, 2008

Ms. Phyllis S. Barrett
Circuit Court Reporter
P. O. Box 642
Rock Hill, SC 29731-0642

RECEIVED

MAY 5 2008

S.C. SUPREME COURT

Dear Ms. Barrett:

Our office has been requested to perfect the appeal arising out of:

James D. Robertson v. The State

Indictment #: 2006-CP-46-00532

County: York

Date of Trial: January 29 - 31, 2007

Presiding Judge: John C. Few

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

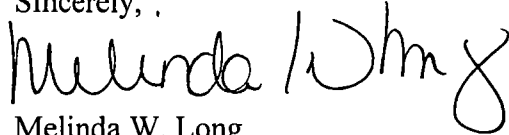
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Phyllis S. Barrett
May 5, 2008
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely, .

A handwritten signature in cursive script, appearing to read "Melinda W. Long".

Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APR 28 2008

S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas – Non Jury

John c. Few, Circuit Court Judge

Case No.: 2008-CP-46-00532

James D. Robertson,

Appellant,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby acknowledges that a true and correct copy of the NOTICE OF APPEAL and ORDER was hereby forwarded on April 21, 2008 via regular mail, postage prepaid, addressed to the following:

David Hamilton
Deputy Clerk of Court
General Sessions Court
P.O. Box 649
York, South Carolina 29745-0649



LORRI M. RODGERS, Paralegal
Law Offices of Michael L. Brown, Jr.
P.O. Box 1025
Rock Hill, South Carolina 29731
(803) 328.8822
(803) 328.0523 (via facsimile)

April 21, 2008

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APR 28 2008

S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas – Non Jury

John c. Few, Circuit Court Judge

Case No.: 2008-CP-46-00532

James D. Robertson,

Appellant,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

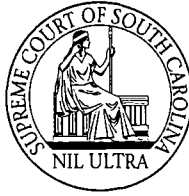
The undersigned hereby acknowledges that a true and correct copy of the NOTICE OF APPEAL was hereby forwarded on April 21, 2008 via regular mail, postage prepaid, addressed to the following:

Henry Dargan McMaster
S.C. Attorney Generals Office
Post Office Box 11549
Columbia, South Carolina 29201



LORRI M. RODGERS, Paralegal
Law Offices of Michael L. Brown, Jr.
P.O. Box 1025
Rock Hill, South Carolina 29731
(803) 328.8822
(803) 328.0523 (via facsimile)

April 21, 2008



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

April 24, 2008

Michael Langford Brown, Jr., Esquire
P.O. Box 1025
Rock Hill, SC 29731

Re: Robertson, James D. v. State
Case Tracking No. 2008-88786

Dear Mr. Brown:

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

CLERK

DES/dmh

Enclosure

Michael Langford Brown, Jr., Esquire

Page Two

April 24, 2008

cc: Division of Appellate Defense
Office of the Attorney General

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APR 24 2008

APPEAL FROM YORK COUNTY
Court of Common Pleas – Non Jury

S.C. SUPREME COURT

John c. Few, Circuit Court Judge

Case No.: 2008-CP-46-00532

James D. Robertson,

Appellant,

v.

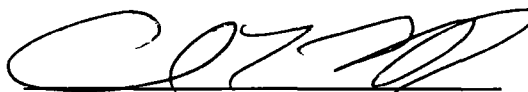
State of South Carolina,

Respondent.

NOTICE OF APPEAL

James D. Robertson appeals the order (judgment) of the Honorable John C. Few dated March 7, 2008. Appellant received written notice of entry of this order (judgment) on March 26, 2008.

April 18, 2008



MICHAEL L. BROWN, JR.

Law Offices of Michael L. Brown, Jr.
P.O. Box 1025
Rock Hill, South Carolina 29731
(803) 328.8822
(803) 328.0523 (via facsimile)

Other Counsel of Record:
Henry Dargan McMaster
S.C. Attorney Generals Office
Post Office Box 11549
Moss Justice Center
1675 York Highway
Columbia, South Carolina 29201

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APR 24 2008

APPEAL FROM YORK COUNTY
Court of Common Pleas – Non Jury

S.C. SUPREME COURT

John c. Few, Circuit Court Judge

Case No.: 2008-CP-46-00532

James D. Robertson,

Appellant,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby acknowledges that a true and correct copy of the NOTICE OF APPEAL and ORDER was hereby forwarded on April 21, 2008 via regular mail, postage prepaid, addressed to the following:

Daniel E. Shearhouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211



LORRI M. RODGERS, Paralegal
Law Offices of Michael L. Brown, Jr.
P.O. Box 1025
Rock Hill, South Carolina 29731
(803) 328.8822
(803) 328.0523 (via facsimile)

April 21, 2008

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2006CP4600532

James D Robertson vs. South Carolina State Of

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: _____

IT IS ORDERED AND ADJUDGED:

☒ See attached order;

☐ Statement of Judgment by the Court:

ORDER OF DISMISSAL

Dated at York, South Carolina, this 7th day of March, 2008.

Court Reporter:

S/JOHN C. FEW

PRESIDING JUDGE - JOHN C. FEW

This judgment was entered on the 24th day of March, 2008, and a copy mailed first class this 24th day of March, 2008, to attorneys of record or to parties (when appearing pro se) as follows:

✓ **Michael L Brown Jr** P O Box 1025 Rock Hill,
SC 29731

ATTORNEY(S) FOR THE PLAINTIFF(S)

Henry Dargan McMaster S.C. Attorney
Generals Ofc. P.O. Box 11549 Columbia, SC
29201

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

SCRCP APP-24/FORM 4

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

James D. Robertson, #5067,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

C. A. No. 06-CP-46-532

ORDER OF DISMISSAL

DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

2008 MAR 24 PM 1:01

FILED-RECEIVED

This matter is before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed on March 1, 2006. Respondent submitted its Return on October 20, 2006. The Court held an evidentiary hearing on January 29-31, 2007 at the Moss Judicial Center in York, South Carolina.

Applicant testified on his own behalf at the hearing. He also presented testimony from his trial counsel, James William Hancock, Jr. and James W. Boyd. The State presented testimony from the current Sixteenth Circuit Solicitor, Kevin S. Brackett; the former Sixteenth Circuit Solicitor, Thomas E. Pope; Michael Stobbe, the Branch Chief of Inmate Records at the South Carolina Department of Corrections (SCDC); and Ms. Merry Collins, an Investigator with the Sixteenth Circuit Solicitor's Office. The Court also had before it: the trial transcript (including pre-trial motions hearings); the records from Applicant's direct appeal to the South Carolina Supreme Court and the waiver of his appeal; the June 16, 2005 letter requesting a stay of execution; Respondent's June 21, 2005 letter opposing the request for a stay of execution; the July 7, 2005 Order of the South Carolina Supreme Court granting the stay; the Order Appointing Counsel for Post-Conviction Relief; the York County Clerk of Court's records; and the Post-



Conviction Relief Application and the Return. For the following reasons, Post-Conviction Relief is denied.

The Applicant, James D. Robertson, presently is confined at the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) pursuant to commitment orders from the York County Clerk of Court. The York County Grand Jury indicted Robertson at the April 23, 1998 term of court for two counts of murder (98-GS-46-1020 & 1021), one count of armed robbery (98-GS-46-1022), and one count of financial transaction card fraud (98-GS-46-1023). On April 30, 1998, the State served a Notice of Intent to seek the death penalty on Robertson, pursuant to S.C. Code Ann. § 16-3-20(A)(Supp. 2002). At that time, the State also gave notice that it would rely upon the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon; larceny with the use of a deadly weapon; and physical torture, as well as the aggravating circumstances that the offender committed the murder for himself or another for the purpose of receiving money or a thing of value, and that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. See S.C. Code Ann. § 16-3-20(C)(a)(1)(d), (e), and (h); (4); and (9) (Supp. 2007).

The South Carolina Supreme Court assigned the case to the Honorable John C. Hayes, III, and gave Judge Hayes exclusive jurisdiction over the case. James W. Hancock and James W. Boyd represented Robertson at trial.¹ Sixteenth Circuit Solicitor Thomas E. Pope and Deputy Solicitor Kevin S. Brackett represented the State. Judge Hayes heard motions on July 17,

¹ Thad Lee Myers was originally appointed to represent Robertson but was relieved because of a conflict of interest.

September 22 and 25, 1998; November 2 and 20, 1998; December 4 and 18, 1998; and on February 12 and 19, 1999.

Robertson's jury trial began on March 15, 1999. The jury found him guilty of each of the indicted offenses. A sentencing phase was conducted following Robertson's exercise of the 24-hour statutory waiting period in § 16-3-20(B). In addition to the five statutory aggravating circumstances relied upon by the State, Judge Hayes instructed the jury on the statutory mitigating circumstances that Robertson did not have any prior convictions involving the use of violence against another person, that the murders were committed while he was under the influence of a mental or emotional disturbance, that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, and his age and mentality at the time of the crimes. § 16-3-20(C)(b)(1)-(2), (6) and (7). The jury found each of the alleged statutory aggravating circumstances and sentenced Robertson to death for both murders. Judge Hayes affirmed their decision and imposed the death sentence.

Robertson did not file a timely Notice of Appeal, but Judge Hayes entered a Consent Order granting relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). At various points on appeal, Assistant Appellate Defender Robert M. Dudek and Deputy Chief Appellate Defender Joseph L. Savitz, III represented Robertson before the South Carolina Supreme Court.

On April 15, 2002, Mr. Savitz filed an Initial Brief of Appellant on Robertson's behalf, which presented three issues:

1. The judge erred by forcing Robertson to submit to a state-sponsored psychological evaluation solely for the purpose of obtaining evidence to be used against him at sentencing, since neither competency to stand trial, guilty but mentally ill nor insanity were ever at issue in the case.

3


2. The judge erred by refusing to instruct the jury at sentencing that voluntary intoxication could be considered mitigating.
3. The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against Robertson.

4/15/02 Initial Brief of Appellant at p. 1.

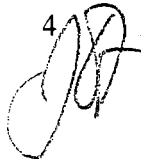
However, Robertson wrote the South Carolina Supreme Court on June 3, 2002 and asked the Court to relieve Mr. Savitz and allow Robertson to proceed *pro se*. Both Mr. Savitz and the State responded to his request. The South Carolina Supreme Court filed an Order on June 26, 2002, in which it remanded the matter to Judge Hayes for a hearing on Robertson's competency to appear *pro se*. Judge Hayes held a hearing on his competency to appear *pro se* on October 10, 2002. Bruce M. Poore represented Robertson at the hearing. Senior Assistant General William Edgar Salter, III represented the State. Robertson was the only witness at the hearing.

On October 28, 2002, Judge Hayes signed a Report to the Supreme Court of South Carolina, in which he found that Robertson was competent to waive appellate counsel, and that Robertson's decision to waive counsel was knowing and voluntary. The South Carolina Supreme Court filed an Order on November 21, 2002, relieving Mr. Savitz and permitting Robertson to appear *pro se*.

Robertson thereafter filed a *pro se* Initial Brief of Appellant, dated July 25, 2003. He presented seven issues for appellate review:

1. The judge erred in denying three separate motions for a directed verdict based on insufficient evidence and State's failure to meet the burden of proof as to first element of corpus delicti of murder at the conclusion of State's case.
2. The judge erred by forcing Robertson to submit to a state-sponsored psychological evaluation solely for the purpose of

4



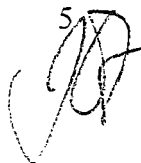
obtaining evidence to be used against him at sentencing, since neither competency to stand trial, guilty but mentally ill nor insanity were ever at issue in the case.

3. The judge erred by denying the jury's request to take notes while being recharged as to the law during guilt phase deliberations.
4. The judge erred in revealing the location where the jurors were sequestered, thereby denying Robertson his constitutional right to a fair and impartial jury.
5. The judge erred in not allowing defense to define "life imprisonment" as it appears in the state statute to potential jurors during *voir dire*, thereby denying Robertson a fair and impartial jury.
6. The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against Robertson.
7. The judge erred in sentencing Robertson to death.

Pro Se Initial Brief of Appellant at p. 2. The State filed the Initial Brief of Respondent on December 31, 2003.

However, Robertson subsequently indicated to the South Carolina Supreme Court that he wished to abandon his right to direct appeal. In an Order dated November 22, 2004, the Court remanded the case to Judge Hayes for a full hearing on his competency to waive his right to direct appeal. The State submitted a Memorandum Regarding Petitioner's Right to Waive Direct Appeal on February 14, 2005.

The hearing was held before Judge Hayes on February 22, 2005 at the Moss Justice Center in York, South Carolina. Robertson appeared *pro se* and testified at the hearing. Mr. Salter again represented the State. In a Report to the Supreme Court dated February 23, 2005, Judge Hayes found that Robertson was competent to waive his right to direct appeal. In an Order

5


dated June 3, 2005, the Supreme Court of South Carolina agreed with Judge Hayes' finding that Robertson was competent to waive his right to appellate review. The Court also conducted the proportionality review mandated by S.C. Code Ann. § 16-3-25 (2003) and concluded that

the death penalty was not the result of passion, prejudice, or other arbitrary factors, and the evidence supports the jury's finding of aggravating circumstances. The death sentence is not excessive or disproportionate to the penalty imposed in similar cases. *See State v. Williams*, 321 S.C. 327, 468 S.E.2d 626, *cert. denied*, 519 U.S. 891 (1996); *State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997); *State v. Powers*, 331 S.C. 37, 501 S.E.2d 116, *cert. denied*, 525 U.S. 1043 (1998).

Therefore, the Court dismissed the appeal and directed the Clerk of that Court to issue an execution notice pursuant to *In re: Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996).

On June 16, 2005, Robertson requested a Stay of Execution to file a Post-Conviction Relief application. Respondent opposed the request by way of a June 21, 2005 letter, but the Supreme Court granted a stay pursuant to *In Re: Stays of Execution in Capital Cases*, in a July 7, 2005 Order. In the same Order, the Supreme Court appointed this Court to preside over this case and directed this Court to hold a hearing to determine whether Robertson desired to have counsel appointed.

In accordance with *In Re: Stays of Execution*, the South Carolina Supreme Court's July 7, 2005 Order and S.C. Code Ann. § 17-27-160 (Supp. 2007), this Court held a hearing at the Greenville County Courthouse on September 23, 2005. The Court filed an Order Appointing Counsel for Post-Conviction Relief dated September 9, 2005, in which the Court appointed Michael Brown to represent Robertson. Thereafter, the Court appointed Joseph David Matlock to assist in representing Robertson.

6


Robertson raised the following ground for relief in his March 1, 2006 Application:

1. Ineffective assistance of counsel - specifics to be amended later.

Robertson amended his Application at the outset of the PCR hearing and proceeded on the following specific grounds of ineffective assistance of counsel:

1. Counsel failed to present Dr. Hayne McMeekin as a witness and failed to develop evidence that Dr. McMeekin over-prescribed Ritalin;
2. Counsel failed to present Chip Robertson as a defense witness;
3. Counsel failed to pursue a verdict of guilty but mentally ill (GBMI), either by advising Robertson to enter such a plea or by requesting a verdict of GBMI at the trial;
4. Counsel failed to spend an adequate amount of time with Robertson prior to trial;
5. Counsel never pursued a proposed plea bargain allegedly offered by the State;
6. Counsel erroneously advised Robertson not to testify in the sentencing phase of his trial;
7. Counsel failed to present evidence that Robertson is adaptable to prison life;
8. Counsel failed to cross-examine Robertson's co-defendant, Meredith Moon about a statement in which she allegedly agreed to "keep quiet" about the murders in exchange for \$50,000.00;
9. Counsel failed to request removal of a juror where the juror had made statements on *voir dire*;
10. Counsel did not adequately advise Robertson before he was evaluated by the prosecution's psychologist, Dr. Geoffrey McKee;
11. Counsel failed to adequately present evidence of the Robertson family's mental health history; and

12. Counsel was ineffective for presenting social worker Toni Cascio as an expert witness because of (a) Cascio's lack of experience; (b) counsel's agreement to provide Ms. Cascio's notes to the States; (c) counsel's failure to discover Robertson's admissions about the crime in enough time to permit counsel to employ a different social worker; and (d) Counsel's presentation of Ms. Cascio as a witness.

GROUND 10(a)(1)

Robertson's first allegation is that trial counsel was ineffective for failing to present Dr. Hayne McMeekin, a psychiatrist who had seen Robertson and his family for several years, as a defense witness. Robertson contends that counsel's failure to present Dr. McMeekin was prejudicial because counsel could have established further evidence that Dr. McMeekin overprescribed Ritalin. The Court finds that Robertson has failed to prove either deficient performance or resulting prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

Both of the attorneys who represented Robertson at trial testified that Mr. Hancock was lead counsel, but both attorneys shared the responsibility of representing Robertson. Both attorneys also testified as to their experience in handling capital and non-capital murder cases. Based upon that testimony and the reasons that follow, the Court finds that counsel were eminently qualified to represent Robertson and that they did so in a professional manner that was consistent with the requirements of *Strickland* and its progeny.

Mr. Hancock testified that counsel's investigation led them to conclude that the prosecution had overwhelming evidence of guilt, and counsel did not find anything which led to the conclusion that either Meredith Moon or anyone else committed the murder. Therefore, counsel primarily focused on the sentencing phase of the trial, and they attempted to secure a sentence of life imprisonment without parole (LWOP). Counsel obtained all of Robertson's school records which they could locate (including records from California); the records from his

Youthful Offender Act conviction for burglary; Robertson's records from an involuntary commitment to the Willis S. Hall Psychiatric Institution; Robertson's SCDC records; records from Kanawha Insurance Company; records from Piedmont Mental Health Associates; and the Robertson family counseling records from the Carolina Counseling Center, where Robertson and his family were treated by Dr. McMeekin and family and marriage counselor Julius F. "Skip" Meyer, Jr. It was Mr. Hancock's impression that the defense obtained all of Dr. McMeekin's records through Mr. Meyer.²

Mr. Meyer testified as a defense witness, and counsel was able to introduce a substantial amount of evidence relating to the mental health counseling that Robertson and his family received. Counsel also introduced Mr. Meyer's notes of the various therapy sessions as Defendant's Ex. 18. Counsel thereafter introduced a number of mental health records through Ms. Cascio. Additionally, counsel employed several defense experts with the assistance of the Center for Capital Litigation in Columbia: Dr. Jonathan Pincus (a neurologist); Dr. James Evans (a neuropsychologist); and Toni Cascio, a social worker. Each of these experts testified at trial. *See* Tr. pp. 2458-2530 (Dr. Pincus); pp. 2535-89 (Dr. Evans); pp. 2610-2736 (Dr. Morton); pp. 2852-3031 (Ms. Cascio). Mr. Hancock testified that counsel made all of the records that the defense had available to each of the experts, counsel did not deliberately withhold any records from their experts, and none of the experts indicated that he or she needed additional mental health information in order to form his or her opinion.

Mr. Hancock testified that the defense was aware that Dr. McMeekin was treating the entire Robertson family but stated that Mr. Meyer was doing most of the counseling. Counsel

² However, Mr. Hancock had previously turned over his file to Robertson and did not have his file at the time of the hearing.

did not consult a psychiatrist to determine whether Dr. McMeekin was over-prescribing Ritalin. However, counsel did consult with Dr. Morton, who was of the opinion that Robertson had never received proper treatment for his drug abuse and that Dr. McMeekin has prescribed too much Ritalin and other drugs as well. Also, counsel was aware that Dr. McMeekin had a disciplinary infraction against his license that was affirmed by an Administrative Law Judge approximately a year before Robertson's trial.

Counsel felt that the disciplinary action would create a problem for the defense if they elected to call Dr. McMeekin as a defense witness. Moreover, if counsel presented Dr. McMeekin as a witness, Dr. McMeekin would be given an opportunity to undermine Dr. Morton's opinion by explaining his treatment. Counsel made a strategic decision to present Dr. Morton and not Dr. McMeekin. In addition, both attorneys testified that they were not sure that the jury would have considered as mitigating evidence several notes from Dr. McMeekin's treatment of Terry Robertson, which made no mention of problems with her children.

Co-counsel, Mr. Boyd, testified that there was overwhelming evidence of guilt and that a mental health based defense was important to the defense. Although it was Mr. Boyd's recollection that Mr. Hancock had already lined up the various defense experts (through the Center for Capital Litigation) before he was appointed, Boyd testified that he worked most closely with Dr. Morton. He met with Dr. Morton on several occasions before Robertson's trial, and Boyd testified that the defense had made a strategic decision to call Dr. Morton as a witness. Counsel also testified that they made the strategic decision to present Dr. Morton as a witness because they believed his opinions were beneficial to the defense's case in mitigation.

Dr. Morton testified at trial that he was unclear as to whether Robertson was experiencing a manic episode at the time of the crimes. However, Dr. Morton analogized Ritalin abuse with abuse of amphetamine and cocaine. He explained, “[p]eople that use these drugs get psychotic and get paranoid.” Dr. Morton also described behavioral problems associated with Ritalin abuse. Tr. pp. 2640-41; pp. 2653-56; pp. 2665-67; p. 2702.

Dr. Morton further testified that Ritalin abuse would make a pre-existing mental illness worse. Tr. pp. 2641-42. He emphasized that people who use as much Ritalin as Robertson claimed to have used on the night before and morning of the murders (30-60 milligrams as a time) can become psychotic and paranoid, and it may result in unprovoked violence. In Robertson’s discussions with Dr. Morton, Robertson described a sense of a great deal of energy, some paranoia, and “he described the crime almost like he was depersonalized.” Dr. Morton testified that these statements were consistent with a toxic state of Ritalin intoxication, and Dr. Morton believed that Robertson had Ritalin intoxication at the time of the murders. Tr. pp. 264-67. Dr. Morton testified that Ritalin abuse “was a major factor that influenced what happened to his parents.” Tr. p. 2667, ll. 14-16. Dr. Morton concluded that Robertson did not or could not control the impulse to kill his parents. Tr. pp. 2648-51; 2667-94.³

In Dr. Morton’s expert opinion,

I don’t think [Robertson] ever received treatment for his drug problems. I think it was talked about. It was talked about that he should quit drinking when he came out of the state hospital. It was talked about various therapists, that he should stop drinking, he should attend an AA meeting. I don’t know that he was ever given an ultimatum to go into a treatment to go into a treatment program. I don’t know that he was ever forced into a treatment program with consequences, if you don’t do this, then you can’t do that.

³ See **Ground 10(a)(3)**, *infra*.

Tr. pp. 2665-66. Dr. Morton explained that, if left untreated, the results of Ritalin abuse get worse, and one might see more paranoia, which could progress to a psychotic state with time. Tr. pp. 2666-67.

Later, Dr. Morton also expressed his opinion that Robertson did not receive appropriate treatment of his bipolar disorder:

Unfortunately, one out of three people receive appropriate treatment. That was not Jimmy; he didn't receive appropriate treatment. I'm not sure his doctor could deliver appropriate treatment. And I'm not sure that this is the place to raise who is going to deal with the doctor who prescribed all these drugs, but hopefully someone here will be concerned about what this man and his family were receiving and the amounts of drugs that they were receiving.

Tr. p. 2269, ll. 14-23.⁴ Dr. Morton later revisited this opinion and explained that "[i]n my professional judgment, he never received proper treatment for his bipolar disorder until he was ... incarcerated here."⁵

Dr. Morton further testified that the pharmacy records of the Robertson family (Defense Exs. 9-14) as well as notes from Dr. McMeekin showed that a "pretty impressive" quantity of drugs were coming into Robertson's home, including large amounts of Ritalin and anti-depressants. Specifically, Dr. Morton noted that Ritalin had been prescribed for both Robertson's father and his brother, Chip. Also, Dr. McMeekin continued to prescribe Ritalin to

⁴ The trial transcript reflects that the trial judge sustained the State's objection when Dr. Morton expressed his concern about the amount of drugs prescribed, and the trial judge instructed defense counsel to "go on and ask the next question." Tr. p. 2669, l. 24 – p. 2670, l. 4.

⁵ Dr. Morton also explained that a study had concluded that certain types of substance abuse make bipolar disorder worse, Tr. pp. 2680-83, and he later testified that Dr. McMeekin had prescribed Lithium for Robertson's bipolar disorder but had not prescribed a sufficient dosage to have a positive effect. Tr. p. 2686.

Chip even though another doctor had taken Chip off of Ritalin after discovering Chip's abuse of the drug. Dr. McMeekin's records reflected that Chip needed Ritalin to go back to school, despite the fact Dr. McMeekin's own records reflected that Chip was snorting Ritalin. Finally, Dr. Morton reviewed the various mental health diagnoses for each of the family members that were reflected in the records he reviewed and the defense introduced a chart reflecting those diagnoses. Tr. pp. 2684-2703; Defense Ex. 15.

To establish that he received ineffective assistance of counsel, an applicant must make a two-fold showing. See *Wiggins v. Smith*, 539 U.S. 510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective at the time." *Id.* at 689. See also *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Further, there is a strong presumption that the actions taken by counsel were sound trial strategy. *Strickland*, 466 U.S. at 690.

Even if an applicant establishes that counsel's performance was deficient, he is only entitled to relief if he can also demonstrate that he was prejudiced by his attorneys' ineffectiveness, *i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. See also *Florida v. Nixon*, 543 U.S. 175 (2004); *Palacio v. State*, 333 S.C. 506, 511 S.E.2d 62 (1999). In the context of a capital sentencing proceeding, the applicant must prove that "there is a reasonable

probability that ... the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537; *Jones v. State*, 333 S.C. 329, 333, 504 S.E.2d 822, 823 (1998) (petitioner did not meet burden).

Applying these principles to the present case, the Court finds that Robertson’s argument lacks merit. The Court finds that trial counsel’s testimony concerning this allegation (and those which follow) is credible, and the Court rejects Robertson’s arguments to the contrary. Based upon the credible evidence, the Court finds that counsel’s decision to present evidence through Dr. Morton that Dr. McMeekin had over-prescribed Ritalin, rather than present Dr. McMeekin as a witness, reflects a reasonable, strategic choice under *Strickland*.

The Court finds that Dr. McMeekin’s credibility would have been subject to impeachment with the disciplinary infraction discussed at the hearing before this Court. The Court further finds that if counsel had presented Dr. McMeekin as a witness, he would have had an opportunity to explain and defend his treatment of the Robertson family and dispute Dr. Morton’s expert opinion concerning the over-prescription of Ritalin and other drugs to the various members of the Robertson family. This would have created a “battle” among the defense’s experts that could have been exploited by the State. The Court finds that it was not unreasonable to avoid presenting an expert who could undermine the defense’s case in mitigation by creating such a battle of defense experts. *Lytle v. Jordan*, 22 P.3d 666, 679 (N.M. 2001) (“Defense counsel may simply have concluded that a battle of experts would not be beneficial to

the defense or that it would have unduly emphasized or inadvertently reinforced the State's evidence"); see also *Smith v. Angelone*, 111 F.3d 1126, 1132-33 (4th Cir. 1997).

Even assuming *arguendo* that trial counsel's performance was somehow deficient, the Court finds that Robertson failed to prove that he was prejudiced by counsel's error. First, while Robertson did present evidence before this Court of portions of Dr. McMeekin's notes that were not elicited at trial, a review of Dr. Morton's testimony clearly reflects that Dr. Morton relied, at least in part, upon records from Dr. McMeekin in reaching his conclusions. The Court also finds that at least some of Dr. McMeekin's notes were also relied upon by Ms. Cascio, who prepared three charts "marking all of the psychological visits with either Skip Meyer or Dr. McMeekin for Terry and Earl during" 1995 through 1997. Ms. Cascio testified about those diagnoses, as well as a 1994 diagnosis by Dr. McMeekin that Robertson was depressed. Defendant's Ex. 25-27. *E.g.*, Tr. pp. 2882-87.

It is unclear whether Dr. Pincus, the neurologist employed by the defense, also reviewed Dr. McMeekin's records as part of "the medical records" that he reviewed (Tr. p. 2472), but it appears that he was familiar with and testified about the records of Robertson's treatment for bipolar disorder and his abuse of Ritalin. Tr. pp. 2493-99.⁶

Moreover, Dr. McMeekin did not testify at the PCR hearing. Therefore, the Court finds that Robertson cannot prove any prejudice because he did not present any evidence upon which this Court can find that there "is a reasonable probability that, but for counsel's unprofessional

⁶ Dr. Pincus testified that Robertson was abusing Ritalin, which had been prescribed for his brother, Chip, when Chip "was probably misdiagnosed as having attention deficit disorder of the kind that would respond to Ritalin." Although it did not help Chip's problems, the Robertson family "was able to get, apparently legal shipments of [Ritalin]" and Robertson abused it. Tr. pp. 2494-95.

errors, the result of the proceeding would have been different.” *Srtickland*, 466 U.S. at 694. *See Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005) (“A PCR applicant cannot show that he was prejudiced by counsel’s failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence”); *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998) (PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial); *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (applicant’s mere speculation what witness’ testimony would have been cannot, by itself, satisfy the applicant’s burden of showing prejudice). *See generally Beaver v. Thompson*, 93 F.3d 1186, 1195 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present mitigation evidence through the testimony of family members, where there was no proffer of this testimony).⁷

GROUND 10(a)(2)

Robertson next alleges that trial counsel were ineffective for failing to call Robertson’s brother, Chip Robertson, as a defense witness. Robertson contends that Chip could have testified concerning (1) his own involvement in the murder, and (2) the family’s mental health history. The Court finds that Robertson has failed to prove either deficient performance or Sixth Amendment prejudice resulting from counsel’s failure to present Chip as a witness.

⁷ This same rule applies in federal habeas corpus proceedings. “Complaints of uncalled witnesses are not favored in federal habeas review.” *Murray v Maggio*, 736 F.2d 279, 282 (5th Cir. 1984). “Therefore, if potential witnesses are not called, it is incumbent on the petitioner to explain their absence and demonstrate, with some precision, the content of the testimony they would have given at trial.” *United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1016 (7th Cir. 1987). *See also Beaver*, 93 F.3d at 1195.

Robertson testified at the PCR hearing that he had a "fairly tenuous" relationship with his family around the time of the murders and that the family was not the typical American family that it appeared to be. He stated that most of his parent's family problems centered on him and Chip. When Chip and Robertson were on a break from school, they would use marijuana and alcohol. Later, they snorted Ritalin. Robertson indicated that Chip had a prescription for Ritalin.

Mr. Hancock testified that he did not think that anyone from the defense team spoke to Chip Robertson because Chip was represented by counsel and was being investigated in connection with the murder of his parents. Although Mr. Hancock was aware that Robertson and Chip were close at the time of the murders, he described their relationship as that of "partners in crime, in their attitude and action, their drug use and their attitudes about their parents." Counsel was unable to develop information that Chip prompted or encouraged Robertson to harm his parents.

Mr. Hancock testified that he had heard "street rumors" that Chip had taken people on a tour of the house where Terry and Earl Robertson were murdered and was having parties. Mr. Hancock felt that Chip could not help the defense because whatever information the defense could develop through him would have been more harmful than beneficial to Robertson's case. Also, Robertson did not want trial counsel to go after Chip.

Mr. Boyd testified that Chip had a drug problem at the time of the offense. Mr. Boyd approached Chip's attorney, but Chip was not cooperative with his brother's defense. In Mr. Boyd's estimation, even if they presented Chip and he testified concerning his own involvement in the murder, this would only give weak evidence of another mitigating circumstance. In fact, it would make the murders appear even more pre-planned.

The two prosecutors in the case, Solicitor Brackett and former-Solicitor Pope, testified that the State investigated Chip Robertson as a possible suspect in his parents' murders. However, the State was unable to develop sufficient evidence to indict him in connection with this case.

The Court finds that Robertson has failed to prove either deficient performance or resulting prejudice on this allegation as well. First, it does not appear that testimony from Chip concerning his involvement in the murders would have been admissible in the guilt phase of the trial because it is not inconsistent with Robertson's guilt.

In *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941), the South Carolina Supreme Court set forth the rule governing the admissibility of evidence offered by the defendant to establish that someone else committed the offense with which he was charged. This rule for the admission of "third party guilt" was stated as follows:

[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible..... [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.

198 S.C. at 104-105, 16 S.E.2d at 534-35 (quoting 16 C.J., *Criminal Law* § 1085, p. 560 (1918) and 20 Am.Jur., *Evidence* § 265, p. 254 (1939); footnotes omitted).

In *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 1733 (2006), the United States Supreme Court held that the South Carolina Supreme Court in *State v. Gay*, 343 S.C. 543, 541 S.E.2d 541 (2001) and *State v. Holmes*, 361 S.C. 333, 605 S.E.2d 19 (2005), vacated and

remanded, 547 U.S. 319 (2006) “had radically changed and extended the rule.” The Court explained that

In *Gay*, after recognizing the standard applied in *Gregory*, the court stated that “[i]n view of the strong evidence of appellant’s guilt – especially the forensic evidence – ... the proffered evidence ... did not raise ‘a reasonable inference’ as to appellant’s own innocence.” *Gay*, 343 S.C. at 550, 541 S.E.2d at 545 (*quoting Gregory*, 198 S.C. at 104, 16 S.E.2d at 534, in turn *quoting* 16 C.J., § 1085, at 560). Similarly, in the present case, as noted, the State Supreme Court applied the rule that “where there is strong evidence of [a defendant’s] guilt,... the proffered evidence about a third party’s alleged guilt” may (or perhaps must) be excluded. 361 S.C. at 342, 605 S.E.2d at 24.

126 S.Ct. at 1733-34. The Supreme Court found that the modification of *Gregory* enunciated in *Gay* and *Holmes* rule was “‘arbitrary’ in the sense that it does not rationally serve the end that the *Gregory* rule and other similar third-party guilt rules were designed to further. Nor has the State identified any other legitimate end that the rule serves. It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant’s right to have ‘a meaningful opportunity to present a complete defense.’” 126 S.Ct. at 1734 (citations omitted).

Applying the rule set forth in *Gregory*, this Court finds that it has not been presented with any evidence of Chip’s involvement in the murders, which is inconsistent with Robertson’s guilt, that was not already before the jury.⁸ For instance, there was no testimony presented at the PCR hearing that Chip was involved. Also, Chip had not given any statements to law enforcement,

⁸ Based upon the cross-examination of the State’s DNA expert, the defense was able to argue in closing (as part of the argument that Moon’s testimony was not corroborated) that a bloodstain found on a moccasin that was in the bag with the murder weapons and other items seized in Maryland, which was not matched to Robertson, might have been Chip’s DNA. Also, the defense noted the absence of any testimony of Chip’s whereabouts at the time of the murders. *See* Tr. p. 1938, ll. 1-21.

and the Court has not been presented with any supposed admissions by Chip. The Court has only been presented with speculation as to any involvement by Chip in the murders.

Thus, the Court finds that evidence Chip may have been involved in the murders is inadmissible under *Gregory*. See 98 S.C. at 104-105, 16 S.E.2d, at 534-535. See also *Holmes*, 126 S.Ct. at 1732-33 (recognizing that “rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged” are “widely accepted” and Constitutional).⁹

Second, and assuming its admissibility in the sentencing phase, the Court finds that Robertson cannot show deficient performance by his trial counsel because Chip was unavailable to the defense, not based upon any deficient performance on the part of Robertson’s attorneys, but because his attorney refused to permit counsel to talk to him when counsel inquired. See *United States v. Kamel*, 965 F.2d 484, 497 (7th Cir. 1992) (trial counsel’s failure to interview defendant’s brother-in-law to determine if he and codefendant were solely responsible for fire was not deficient performance in arson prosecution, where defendant “fully and knowingly participated in the decision to adopt a joint *alibi* strategy” with co-defendant, and brother-in-law was unavailable at time of trial). Under these circumstances, the Court finds that Robertson’s counsel made reasonable efforts to interview Chip and that they were ethically prevented from any further attempts to interview him after Chip’s attorney refused to make him available to the

⁹ The Court further finds that Robertson had admitted his guilt to both of his attorneys, and that counsel were limited in their ability to present contrary evidence that Chip committed the murders. See Rule 407, SCACR, Rule 3.3(a) (3) (a lawyer shall not knowingly offer evidence that the lawyer knows to be false); *Lucas v. State*, 352 S.C. 1, 572 S.E.2d 274 (2002) (“an attorney has an ethical duty not to perpetrate a fraud upon the court by knowingly presenting perjured testimony”). See also *Nix v. Whiteside*, 475 U.S. 157 (1986) (criminal defendant’s sixth amendment right to effective assistance of counsel was not violated when the attorney refused to cooperate with the defendant in presenting perjured testimony at trial).

defense. See Rule 407, SCACR, Rule 4.2, RPC (“[A] lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter....”).

The Court also finds that Robertson’s current allegation is inconsistent with his stated desire at the time of trial, as testified to by Mr. Hancock, for trial counsel not to go after Chip in connection with the murders. The Court further finds that what Chip would have testified to, had he been called as a witness, is unknown because, to date, he has not testified, and the Court has not been presented with any incriminating statements that he has made concerning the murders.

Moreover, the Court finds that if Chip had been asked about his own culpability as to the murders, he would have had the protection of the privilege against self-incrimination, and there is nothing in the record to suggest that he would have been willing to waive his privilege. Again, the Court finds that Robertson’s showing is merely speculative and does not entitle him to relief under *Strickland*. See *Eisemann v. Herbert*, 401 F.3d 102 (2d Cir. 2005);¹⁰ *Stewart v. Wolfenbarger*, 468 F.3d 338 (6th Cir. 2006). See also *Fletcher v. Mann*, No. 97-2137, 1998 WL 743744, at *4 (2d Cir. Oct. 21, 1998) (unpublished table opinion) (finding no ineffective

¹⁰ In *Eisemann*, a father and son were charged with various counts of sexual abuse. The father was charged with abusing a girl and her twin brother; the son was charged with abusing only the girl. The father and son hired the same attorney, Holtman. *Id.* at 105. In 1985, the father pled guilty to the charges. The son went to trial, represented by Holtman and another attorney. The jury found the son guilty on several charges. *Id.* In federal habeas corpus, the son argued that his counsel provided ineffective assistance, as a conflict of interest prevented counsel from calling the father to testify that he had committed the acts of which the son was accused. *Id.* at 108. The Second Circuit Court of Appeals, however, rejected that argument. That court first found that it was unknown what the father would have testified to, if he had been called as a witness. *Id.* at 109. Further, even if the father was asked about his own culpability as to the charges against the son, the father “would have had the protection of the privilege against self-incrimination, and nothing in the record suggests that he was willing to waive his privilege.” *Id.*

assistance of counsel where the witnesses whom counsel failed to subpoena, who counsel also represented, "were virtually certain" to invoke the right against self-incrimination).

Further, the Court agrees with Mr. Boyd's assessment at the PCR hearing that although presenting evidence that Chip was involved in his parents' murders would have given the defense another statutory mitigating circumstance, *see* § 16-3-20(C)(b)(5) ("The defendant acted under duress or under the domination of another person"), this would have been a relatively weak mitigating circumstance. On the other hand, evidence that Chip was an accomplice or conspirator would have strengthened the prosecution's case in aggravation of punishment, and it would have been inconsistent with the evidence from the experts who testified at trial that Robertson's actions were caused, at least in large part, by his bipolar personality disorder and his use and abuse of Ritalin. Therefore, the Court finds that Robertson has failed to prove that trial counsel were deficient for not presenting Chip Robertson to testify about his possible involvement in the murder of his parents. *See United States v. Guerrero*, 938 F.2d 725, 730 (7th Cir. 1991) (there is no ineffective assistance of counsel even where the attorney chooses one reasonable strategy to the exclusion of another); *United States v. Adamo*, 882 F.2d 1218, 1227-28 (7th Cir. 1989).

Because Chip did not testify either at trial or at the PCR hearing, the Court finds that it is likewise speculative as to whether Chip would have provided information about the Robertson family background or the family's mental health history that was generally consistent with the mitigation case at trial and Robertson's showing in PCR, or whether he would testify contrary to counsel's reasonable presentation of evidence in mitigation of punishment concerning the

family's social history and mental health history.¹¹ Therefore, the Court finds that Robertson has failed to prove deficient performance on this allegation.

Even assuming that counsel were deficient, the Court finds that Robertson has failed to prove any prejudice. In addition to the reasons already stated, the Court finds that it is impossible for the Court to conclude that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" under *Strickland* because Robertson did not present testimony from Chip concerning his involvement in the murders or the family background and mental health history. See *Dempsey*, 363 S.C. at 369, 610 S.E.2d at 814 ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence"); *Bannister*, 333 S.C. at 303, 509 S.E.2d at 809 ("PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial."). *United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1016 (7th Cir. 1987). Particularly in light of the State's overwhelming evidence of Robertson's guilt of the murders and the statutory aggravating circumstances, the Court finds that Robertson has failed to prove that "there is a reasonable probability that ... the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537; *Jones*, 332 S.C.

¹¹ For the reasons stated in connection with **Ground 10(a)(7) & (12)-(13)**, the Court finds that trial counsel's investigation for and presentation of evidence concerning the mental health history of Robertson and his family was objectively reasonable under *Strickland*, and that Robertson did not prove any prejudice resulting from counsel's performance.

at 332, 504 S.E.2d at 823 (concluding that petitioner did not meet burden).¹² *Cf. Timberlake v. Davis*, 409 F.3d 819, 824 (7th Cir. 2005) (“Coerced testimony dragged out of truculent family members is unlikely to persuade a jury that a defendant has redeeming features”).

GROUND 10(a)(3)

Robertson further alleges that trial counsel were ineffective because they neither advised him to plead guilty but mentally ill (GBMI) nor requested that the trial judge submit a verdict of GBMI to the jury. The Court disagrees and finds that Robertson has not met his burden of proving deficient performance or resulting prejudice as to either allegation.

As previously discussed, trial counsel employed three experts who eventually testified as to Robertson’s mental state at the time of the murders. Dr. Pincus, the neurologist who performed both a neurological¹³ and physical examination of Robertson, testified that his testing revealed that Robertson had frontal lobe damage. He explained that the frontal lobes provide judgment and the inhibition of impulses. Tr. pp. 2480-91; 2509-10.

Dr. Pincus testified that his testing supported the earlier diagnosis of bipolar disorder. Robertson reported abusing Ritalin and alcohol to self-medicate, and Dr. Pincus testified that this was common for persons with bipolar disorder. Tr. pp. 2458-80; 2494-96. Dr. Pincus explained that Robertson did something on the night of the murders that he had planned for some time. Tr. pp. 2490-91.

¹² The Court further finds that evidence that Chip may have been a conspirator or an accomplice in his parents’ murders would only strengthen the case in aggravation and would not lead the Court, to “conclude[] that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695.

¹³ Dr. Pincus saw Robertson on two occasions: on November 1, 1998, and on the morning of his testimony. Tr. pp. 2471-72. Also, he did not perform a “very complete examination,” which he estimated might take “a day or two.” Tr. p. 2480.

With respect to Robertson's mental state at the time of the murders, Dr. Pincus testified that:

[t]he history that he gave me indicated that he does indeed have manic depressive illness.

And the history that I found in the records confirms that. So, *I believe that he is manic depressive and he was probably having an episode of mania ... at the time of the murder[s].*

Tr. p. 2497 (emphasis added).

Dr. Pincus based his opinion on evidence that Robertson was not sleeping and had not had more than three hours sleep in the twenty-four to thirty-six hours before the murders; Robertson's history of gambling, running up debts and not being able to concentrate (even though he could concentrate when Dr. Pincus examined him); and his treatment for bipolar disorder at the time. Tr. pp. 2497-99. Dr. Pincus testified that Robertson reported using 250 mgs. of Ritalin on the night of the murders, which is "an enormous overdose of Ritalin" and ten times the amount that Dr. Pincus would prescribe.

Dr. Pincus also testified that:

The combination of the urge that he had been controlling up to that time to kill his parents, under the influence of a mania and the drug Ritalin which exacerbates the symptoms of mania, reproduces them, accentuates them, I think that is the reason that at that time he did that.

I also base that on the fact of what he did. This was no assassination; he obliterated them. He was in the grip of a colossal emotion.

Tr. p. 2699, ll. 11-20. Dr. Pincus added that Robertson had an urge to kill his parents that was stimulated by his drug use. This was "unchecked by the functioning of his frontal lobe at that

time which was not working well because of [his drug and alcohol use] and because of the status of his brain to begin with." Tr. p. 2500, ll. 6-13.

Dr. Pincus testified that his opinion would not be affected by evidence of efforts to cover up the murders. However, he admitted that if there was evidence that Robertson had written notes on the day of the murder, then "there would have to be a presumption of planning." Tr. pp. 2501-02. Also, Dr. Pincus agreed that Robertson was making choices about the medications he would take and the order he would do so at the time of the murder; and he had been advised of the effects of drug and alcohol use on his bipolar disorder. Tr. p. 2517.

Moreover, Robertson reported to Dr. Pincus that the only times he thought of killing his parents was when he was taking Ritalin, cocaine or "speed." Tr. pp. 2520-22. The Court finds that this information is inconsistent with other information available to trial counsel (and testified to by a number of State's witnesses) that Robertson often talked of killing his parents for the insurance money.¹⁴

Dr. Evans, the defense neuropsychologist, testified that Robertson's full scale I.Q. was 112.¹⁵ However, neuropsychological testing and a quantitative E.E.G. (Q.E.E.G.) administered by Dr. Evans revealed that Robertson had damage to the right hemisphere of his brain and/or frontal lobe dysfunction.¹⁶ Dr. Evans explained that Robertson had previously been diagnosed

¹⁴ For instance, his co-defendant, Moon, testified in the guilt phase that Robertson had previously told her on many occasions that he planned to kill his parents, both when he was sober and when he was drunk. Also, he explained that his motive was the insurance money, which Moon said was "a couple of million" dollars. Tr. pp. 1592-93; see also Tr. pp. 1632-33; 1642. Other witnesses testified to similar comments in the sentencing phase. *E.g.*, Tr. pp. 2155-57; 2163-65; 2177-78; 2187-89; 2202-03; 2219; 2222; 2228.

¹⁵ His verbal I.Q. was 118, but his non-verbal I.Q. was 102.

¹⁶ The frontal lobes are the portion of the brain that allows humans to have executive functioning, plan ahead and restrain impulses.

with bipolar disorder and attention deficit hyperactivity disorder (ADHD), the latter of which “most people today believe is a brain based disorder, especially with most cases being frontal lobe related.” Tr. pp. 2546-69; 2577-78.

According to Dr. Evans, Robertson described having periods of disassociation, and Dr. Evans testified that both prior diagnoses of ADHD and bipolar disorder were correct and supported by his testing. However, Dr. Evans did not know what Robertson’s mental state was at the time of the crime, and he could not say that Robertson had a disassociative episode at the time of the crime because Robertson never claimed that he had one when the murders occurred. Indeed, Dr. Evans did not discuss the facts of the crime with Robertson. He likewise admitted that Robertson could have fabricated the report of disassociative episodes to create a mental health defense. Tr. pp. 2569-70; 2575; 2584; 2586.

Dr. Morton, the defense expert in psycho-pharmacology, agreed with the diagnoses previously given to Robertson. He also testified that Robertson met the diagnostic criteria for alcohol abuse and dependence, as well as poly-substance abuse – based on Robertson’s stimulant abuse and marijuana abuse. The primary stimulant that he abused was methylphenidate, which is sold under the trade name of Ritalin. According to Dr. Morton, “[d]rug-induced psychiatric disturbances are probably more prevalent among abusers of CNS stimulants [such as Ritalin] than any other type of drug.” Tr. pp. 2613-37.

The difficulties caused by these disturbances can include manic-like states, “serious psychoses resembling schizophrenia, depressions that are almost identical to major affective disorders, especially during withdrawal, and other types of anxiety disorders. However, most of the psychotic states caused by abuse of these stimulants are transitory, “just lasting a brief period

of time, and will usually disappear, whether its hours or weeks.” Tr. p. 2636. See also Tr. pp. 2638-39; 2652-67.¹⁷

Robertson reported using between 240 and 300 mgs. of Ritalin. Dr. Morton analogized Ritalin abuse with abuse of amphetamine and cocaine. He explained that “[p]eople that use these drugs get psychotic and get paranoid.” Dr. Morton testified that a person would have impaired judgment, and “extreme anger with the threat of acting out aggressive behavior” may occur. Also, paranoid ideation and auditory as well as tactile¹⁸ hallucinations may occur, and Dr. Morton described behavioral problems associated with Ritalin abuse. Tr. pp. 2640-48; 2653-56; 2665-67; 2680-83; 2702.

Dr. Morton testified that he was unclear as to what affect Robertson’s bipolar disorder had at the time of the crimes. However, he testified that Ritalin abuse would make a pre-existing mental illness worse. Dr. Morton emphasized that people who use as much Ritalin as Robertson claimed to have used on the night before and morning of the murders (30-60 milligrams as a time) can become psychotic and paranoid, and it may result in unprovoked violence. In Robertson’s discussions with Dr. Morton, he described a sense of a great deal of energy, some paranoia, and “he described the crime almost like he was depersonalized.” Dr. Morton believed that these statements were consistent with a toxic state of Ritalin intoxication, and Dr. Morton believed that Robertson had Ritalin intoxication at the time of the murders. Tr. pp. 2654-67.

¹⁷ Dr. Morton testified people that “use these drugs get psychotic and get paranoid.” They have “[l]oose associations” which do not make sense, and they develop behavioral problems. Tr. pp. 2640-41.

¹⁸ Tactile hallucinations refer to a person experiencing the feeling that something is crawling on him.

In Dr. Morton's opinion, Ritalin abuse "was a major factor that influenced what happened to his parents," Tr. p. 2667, ll. 14-16, and Dr. Morton testified that Robertson did not or could not control the impulse to kill his parents. Tr. pp. 2648-51; 2667-94. Dr. Morton based his conclusions upon his experience in treating those who abuse stimulants; Robertson's self-reporting to him about the night of the murders; and the literature concerning the effects of such large amounts of stimulants on individuals. Tr. pp. 2641-42; 2709; 2711-13; 2730-31.

Mr. Hancock testified that he thought the defense discussed the possibility of a plea of GBMI, but the State never offered such a plea.¹⁹ Also, a GBMI plea would have required that a trial judge sentence Robertson. *See State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992). Robertson, however, was never interested in a guilty plea and always wanted a jury trial. Likewise, counsel did not want Robertson to be sentenced by a trial judge. Rather, they preferred to take their chances with a jury, and they so advised their client.

Mr. Hancock further testified that he did not think the opinions of the defense experts would support a GBMI plea under the statute. Although these experts would suggest a finding of mental illness, they did not support a conclusion that Robertson had the inability to conform his conduct to the requirements of the law because of the mental illness. *See S.C. Code Ann. §17-24-20(A) (Supp. 2006)*.

In addition, there is no evidence to suggest that the State would have been willing to waive its right to a trial by jury on the question of whether Robertson had the inability to conform his conduct to the requirements of the law. Mr. Boyd testified that he thought he asked

¹⁹ Both Solicitor Brackett and then-Solicitor Pope testified that the State wanted to seek the death penalty against Robertson in this case at all times and that there were never any serious offers of a negotiated plea.

Solicitor Pope about a possible guilty plea for Robertson, but Mr. Pope said no. Also, Mr. Boyd corroborated Mr. Hancock's testimony that trial counsel wanted a jury to sentence Robertson, as opposed to a trial judge, and a GBMI plea would have taken away Robertson's right to jury sentencing. With respect to a verdict of GBMI, Mr. Boyd testified that counsel would have had to concede Robertson's guilt, and Robertson did not want to concede guilt, even though he was aware that he would be found guilty. According to Mr. Boyd, the possibility of an LWOP sentence was not appealing to Robertson. Further, Mr. Boyd would not concede that such a verdict would have been the best course for the defense but admitted it was a viable option.

Both attorneys agreed that Robertson was mentally ill. However, Mr. Hancock clearly testified that he felt Robertson knew the difference between right and wrong, and both attorneys felt like he understood their discussions with him. Also, both indicated that he admitted his guilt to them, and Mr. Hancock testified that Robertson explained why he had committed the murders.

Robertson testified that counsel never discussed a possible plea with him but admitted that he never inquired and only changed his mind about the desirability of a guilty plea to capital murder after he got onto death row. When asked questions about his guilt of the murders or any admissions which he may have made relating to the murders, Robertson invoked his Fifth Amendment privilege against self-incrimination. See **Ground 10(a)(6)**, *infra*. Robertson did not present additional expert testimony on this issue.

Based upon the present record, the Court finds that counsel were not deficient for failing to advise Robertson to plead GBMI. In South Carolina,

[a] defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17- 24-10(A), but because of mental

disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

See S.C. Code Ann. § 17-24-20(A) (Supp. 2006); *see also* *Wilson*, 306 S.C. at 504-05, 413 S.E.2d at 23; *State v. Bell*, 293 S.C. 391, 398, 360 S.E.2d 706, 710 (1987).²⁰ To warrant submission of a GBMI verdict, “the burden of proof is upon the State to prove beyond a reasonable doubt to the trier of fact that the defendant committed the crime, and the burden of proof is upon the defendant to prove by a preponderance of evidence that when he committed the crime he was mentally ill as defined in subsection (A).” § 17-24-20(B).

The purposes for the enactment of the GBMI statute are “(1) to reduce the number of defendants being completely relieved of criminal responsibility and (2) to insure mentally ill inmates receive treatment for their benefit as well as society’s benefit while incarcerated.” *State v. Hornsby*, 326 S.C. 121, 126, 484 S.E.2d 869, 872 (1997). Section 17-24-20 makes clear that a GBMI verdict is still a guilty verdict. *Hornsby*, 326 S.C. at 126, 484 S.E.2d at 872 (a finding of GBMI “does not absolve a defendant of guilt”).²¹ If there is evidence of mental illness and

²⁰ In an unpublished decision, the Fourth Circuit Court of Appeals has found that counsel was not ineffective for failing to investigate adequately the possibility that a South Carolina death row inmate might possess a viable GBMI defense. *See Atkins v. Moore*, 139 F.3d 887 (4th Cir. 1998) (Unpublished) (“counsel were aware of the existence of the GBMI defense and consulted with various mental health experts regarding Atkins’ mental state. These consultations revealed only that Atkins abused alcohol and that he suffered from symptoms of post-traumatic stress disorder. In short, counsel’s investigation revealed nothing on which to base a GBMI claim. Under these circumstances, we cannot say that the performance of Atkins’ counsel fell outside the broad range of professionally competent assistance”).

²¹ As the court explained in *Hornsby*, this statute “simply recognizes the continuum in the law regarding mental illness and provides a guide for a jury when considering whether a defendant is not guilty; not guilty by reason of insanity (incapable of determining right from wrong); guilty but mentally ill (incapable of conforming his conduct to the requirements of the law but capable of distinguishing right from wrong); or guilty (suffers no mental illness).” Also, “a conviction of GBMI provides a signal to the Department of Corrections that a new prisoner may have a mental illness and should be treated before integrating him into the general prison population.” *Hornsby*,

evidence that a criminal defendant lacked sufficient capacity to conform his conduct to the requirements of law, a jury must be instructed on the forms of verdict of guilty, GBMI, not guilty, and not guilty by reason of insanity. *State v. Rimert*, 315 S.C. 527, 446 S.E.2d 400 (1994) (citing S.C. Code Ann. § 17-24-30).²²

The Court finds that the only credible evidence in this case is that counsel preferred for Robertson to be tried and sentenced by a jury, rather than a trial judge, and a GBMI plea would have required a judge to impose the sentence. *See Wilson*, 306 S.C. at 502, 413 S.E.2d at 21. *See also State v. Truesdale*, 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982) (“Pleas of guilty are unconditional, and if an accused attempts to attach any condition or qualification thereto, the trial court should direct a plea of not guilty”); *State v. Patterson*, 278 S.C. 319, 321-22, 295 S.E.2d 264, 265 (1982) (guilty plea and sentence vacated where “a significant inducement for entering the plea was the condition that the jury determine punishment, an impermissible condition under the statutory mandate that the trial judge alone determines punishment when a defendant pleads guilty to murder”). Also, the Court finds that, at the time of his trial, Robertson wanted a jury trial and would not have entered a guilty plea of any description. The Court further finds that there is no evidence that the State would have agreed to a GBMI plea. Instead, the only evidence is that the State was not interested in a plea bargain but wished to seek the death penalty. Therefore, Robertson has failed to prove either deficient performance or prejudice under *Strickland*.

326 S.C. at 126-27, 484 S.E.2d at 872. *See also State v. Downs*, 361 S.C. 141, 145-46, 604 S.E.2d 377, 379-80 (2004) (recognizing that the principal difference between guilty and GBMI pertains only to post-sentencing medical treatment).

²² In *Wilson*, the Court held that the “must” in § 17-24-30 concerning the submission to the jury was mandatory. In *Rimert*, the Court concluded that a GBMI form could not be waived once he raised the issue of his sanity. 315 S.C. at 530-31, 446 S.E.2d at 401-02.

The Court likewise finds that the decision not to seek a GBMI verdict at trial was reasonable under *Strickland*. The focus of the case was Robertson's mental illness and drug abuse and how the mental illness and drug abuse mitigated his conduct. Counsel made a reasonable, strategic decision to present the defense evidence in the sentencing phase. To paraphrase Mr. Hancock's testimony, if counsel had presented their evidence in the guilt phase, they would have "fired all of their guns" in the guilt phase.²³

More importantly, the Court finds that pursuit of a GBMI verdict would have required counsel to pursue a verdict that was inconsistent with their chosen strategy of not conceding guilt in the guilt phase.²⁴ Again, the strategy actually followed, as opposed to that now suggested, was consistent with Robertson's desire to receive a jury trial and sentencing. See *Hornsby*, 326 S.C. at 126, 484 S.E.2d at 872; *Strickland*, 466 U.S. at 689 (although defendant's consent to trial strategy does not alone vitiate all ineffective assistance claims, his consent is probative both of the reasonableness of the chosen strategy and of counsel's performance); cf. *Nixon*, 543 U.S. at

²³ Further, GBMI, or irresistible impulse, has never been accepted in South Carolina as a complete defense to crime. "It will be a sad day for this state when uncontrollable impulse shall dictate a rule of action to our courts." *State v. Levelle*, 34 S.C. 120, ___, 13 S.E. 320, 321 (1891). And the Court has further stated: "It is a matter that is not susceptible of proof, and to allow a person to escape the consequences of his criminal act by asserting that he acted under an impulse which he could not restrain, although he knew his act to be unlawful, would be dangerous, if not destructive, to the peace of society." See *State v. Bundy*, 24 S.C. 439, 445 [58 Am.Rep. 263] (1886). See also *State v. Gilstrap*, 205 S.C. 412, 32 S.E.2d 163 (1944) ("After mature consideration, we firmly adhere to the rule so forcibly expressed in *State v. Levelle*, [34 S.C. 120, 13 S.E. 320]; and we may add that the doctrine that a criminal act may be excused or mitigated because prompted by an irresistible impulse, where the offender has the mental capacity to appreciate his legal and moral duty in respect to it, has no place in the law"). Similarly, South Carolina has always rejected diminished capacity as a defense. *State v. Gill*, 346 S.C. 209, 552 S.E.2d 26 (2001) (flatly rejecting as a defense testimony that defendant's borderline intellect and antisocial personality prevented him from being able to formulate malice aforethought).

²⁴ The Court finds that counsel's strategy was reasonable even though Mr. Hancock further testified that the defense did not wish to mount such a vigorous and futile defense in the guilt phase that the attorneys might lose credibility with the jury.

189-92 (counsel's concession of guilt in the guilt phase of a capital murder trial, made after consultation with the client but without his express approval, did not constitute deficient performance where counsel's strategy was reasonable under *Strickland* and counsel's strategy did not "rank as a 'fail[ure]' to function in any meaningful sense as the Government's adversary") (footnote omitted); *Bell v. Evatt*, 72 F.3d 421, 427-30 (4th Cir. 1995) (concluding that – given overwhelming evidence of guilt – counsel's concession of defendant's guilt to kidnapping charge and pursuing GBMI verdict for murder and kidnapping charges in spite of the defendant's denial that he committed the crime was objectively reasonable trial strategy to which defendant consented, and observing that "neither Bell nor any other aggrieved defendant can manipulate this forum to construe a reasonable, but ultimately unsuccessful strategy in his favor. Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel").

Alternatively, the Court finds that Robertson has not met his burden of proving that he was prejudiced by counsel's failure to pursue a GBMI verdict. First, the Court finds that the opinions of the three defense experts did not support a GBMI verdict. *See Laws v. Armontrout*, 863 F.2d 1377, 1389 (8th Cir. 1988) (en banc) (counsel's failure to pursue psychiatric evidence was not objectively unreasonable when "[n]othing made known to counsel during his representation of [defendant] ... suggested to counsel that presenting evidence of [defendant's] psychiatric state would be of any benefit in his defense") (internal quotation marks omitted).

Dr. Pincus testified that Robertson was "*probably having an episode of mania* ... at the time of the murder[s]." Tr. p. 2497. His opinion as to Robertson's mental state, however, is predicated upon both the mental illness and Robertson's reported abuse of alcohol and Ritalin.

Also, neither he nor the other experts ever testified that Robertson met the criteria for a GBMI verdict, as defined as defined in § 17-24-20(A).²⁵

The Court finds that Dr. Evans could not conclude that Robertson had a disassociative episode at the time of the murders because Robertson never claimed that he had one when the murders occurred, and Dr. Evans could not give an opinion as to Robertson's mental state at the time of the murders because he did not question Robertson about the facts of the crime. Tr. pp. 2569-70; 2575; 2584; 2586.

Finally, Dr. Morton's opinion was not that Robertson "lacked sufficient capacity to conform his conduct to the requirements of the law" because of a "mental disease or defect," as required for submission of a GBMI verdict. See § 17-24-20(A). Rather, he based his opinion on the drug and alcohol abuse. While Dr. Morton testified that use of Ritalin and alcohol makes a pre-existing mental illness worse, he admitted that he is not a psychiatrist and does not diagnose. Tr. p. 2615, ll. 21-22. More importantly, he candidly admitted that he did not "know what part [Robertson's] manic depressive illness played in this." Tr. p. 2656, ll. 6-7.

Further, Dr. Morton did not testify that the Ritalin and alcohol abuse "had caused permanent and irreversible brain damage which manifests itself in a mental illness." *Contra State v. Hartfield*, 300 S.C. 469, 473, 388 S.E.2d 802, 804 (1990) (defendant was entitled to present defense of insanity or attempt to obtain GBMI verdict where there was expert testimony his drug use "had caused permanent and irreversible brain damage which manifests itself in a mental illness").

²⁵ The State introduced a copy of his report at trial, as State's Ex. 284. Dr. Pincus does not indicate in that report that Robertson is GBMI.

Thus, the Court finds that none of the opinions from the defense's experts supported a GBMI verdict. *See State v. Harris*, 318 S.C. 178, 181, 456 S.E.2d 433, 435 (Ct. App. 1995) (observing in *dicta* that even if appellant's therapist had been qualified to give expert testimony on defendant's state of mind at the time of the incident, "this testimony would not have supported a verdict of guilty but mentally ill; therefore, the trial court's refusal to allow the jury to hear it did not prejudice [defendant]" because the therapist "only vaguely opined [defendant]'s judgment was impaired and he was out of control at the time of the incident"). *Cf. State v. Thorne*, 239 S.C. 164, 121 S.E.2d 623 (1961) (upholding guilty verdict where there was no testimony the defendant was insane or mentally defective to the extent he did not know right from wrong, notwithstanding testimony he suffered from moody spells and engaged in displays of temper); *State v. Lewis*, 328 S.C. 273, 277, 494 S.E.2d 115, 116 (1997) (expert testimony that, because of his severe depression, appellant was unable to conform his conduct to the requirements of the law supported GBMI verdict).²⁶

Even assuming *arguendo* that the testimony of one or more of the experts who testified at trial would have supported a GBMI verdict, the Court finds that there is still no reasonable probability that the result of the proceeding would have been different, but for counsel's errors. *Strickland*, 466 U.S. at 694. A finding of GBMI "does not absolve a defendant of guilt." *See Hornsby*, 326 S.C. at 126, 484 S.E.2d at 872. Likewise, it would not have prevented the State from seeking a death sentence, as *Wilson* and *Bell* make clear.

²⁶ Robertson argues that Dr. McMeekin's records support a GBMI verdict. However, the records introduced by Robertson do not support this conclusion. Also, Dr. McMeekin was not presented as a witness in PCR, and there is no evidence before this Court that he ever concluded that Robertson is GBMI, as defined in § 17-24-20(A).

Nor would Robertson have been allowed to inform the guilt phase jury of the consequences of a finding of GBMI. *Bell*, 293 S.C. at 399-400, 360 S.E.2d at 710; *Rimert*, 315 S.C. at 530, 446 S.E.2d at 401 (trial judge was not required to instruct jury on effect of GBMI and not guilty by reason of insanity verdicts). Also, the State would have been allowed to rebut the defense's presentation of evidence concerning Robertson's mental illness by presenting Dr. McKee in the guilt phase of the trial. The defense fought hard to prevent any evaluation or presentation of Dr. McKee's opinion in the sentencing phase, and the Court finds that Robertson was not prejudiced by counsel's failure to allow this testimony to be presented in the guilt phase of his trial.

Further, the State could have exploited any inconsistencies in the opinions of Robertson's three experts, as well as Dr. Evans' concessions that Robertson "certainly ha[d] a strong motive not to tell [me] the truth," Tr. p. 2586, ll. 8-10, and Robertson could have fabricated the report of disassociative episodes to create a mental health defense. Tr. p. 2575, ll. 4-14. Therefore, the Court finds that Robertson has failed to prove any Sixth Amendment prejudice under *Strickland* and its progeny.

GROUND 10(a)(4)

Robertson maintains that his attorneys were ineffective because they failed to spend an adequate amount of time with him in preparation for the trial. However, the Court finds that Robertson has not proved either that counsel's performance was deficient or that he was prejudiced by counsel's failure to spend more time with him before the trial.

Robertson testified that his attorneys only spent approximately four or five hours discussing the case with him before his trial. He described the first interview as fairly lengthy,

and they discussed the crimes. The remaining time counsel spent with him, they discussed the mental health history of Robertson and his family. Robertson provided them with as much detail concerning the mental health history as he could.

Mr. Hancock testified that he could not recall the precise amount of time he spent with Robertson before the trial, but he indicated it could have been approximately ten hours or so. In their conversations with Robertson, he admitted that he had murdered his parents and he explained why he had done so.

Mr. Boyd testified that he likewise did not remember how much time he spent with Robertson prior to trial but recalled that there were a number of lengthy meetings. Robertson was able to discuss matters rationally, and he understood counsel's discussions with him. Mr. Boyd recalled going over the details of what happened and the mental health history at length. Mr. Boyd also testified that Robertson admitted to killing his parents. Counsel also discussed whether Robertson should testify, and both attorneys testified that they advised Robertson not to testify.

Strickland applies great deference to decisions by defense attorneys out of concern that a rigid set of guidelines or rules would "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 689. See also *United States v. Cronin*, 466 U.S. 648, 658 n.23, 659 n.26 (1984) (because reviewing courts must "presume that the lawyer is competent to provide the guiding hand that the defendant needs," the defendant must prove a constitutional violation which undermines competence in the outcome of his trial).

"Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise prepare for trial violates a defendant's Sixth Amendment right to counsel." *Morris v. Slappy*, 461 U.S. 1, 11 (1983). Further, Robertson's mere assertion that counsel only met with him four or five times is insufficient to overcome the presumption that counsel rendered reasonable assistance. *United States v. Henry*, 933 F.2d 553, 561 (7th Cir. 1991) (defendant's allegation that he met with his public defender for only ten to fifteen minutes before he pleaded guilty was insufficient to overcome presumption of reasonable assistance).

Moreover, the Court finds that the credible evidence is that counsel met with Robertson on a number of occasions and, following a constitutionally reasonable investigation into the facts of the case,²⁷ counsel made the strategic decision to focus primarily upon the sentencing phase of the case in mitigation. To this end, they hired a number of experts. Each expert met with

²⁷ In *Strickland*, the Court stated that "strategic decisions made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." 466 U.S. at 690-91. See also *Wiggins*, 539 U.S. at 525 (further investigation is excusable where counsel has evidence suggesting it would be fruitless); *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (concluding that limited investigation was reasonable because all witnesses brought to counsel's attention provided predominantly harmful information).

In addition to Robertson's admission of his guilt to counsel, counsel otherwise thoroughly investigated the facts of the case: although both attorneys had extensive major felony trial experience and had tried both non-capital and capital murder cases, they consulted other attorneys experienced in trying capital cases; they hired a DNA expert; they had an investigator and a paralegal to assist them; they reviewed the State's evidence; and Mr. Hancock went to the crime scene with the investigator and ascertained that it was possible for Ms. Moon to have heard the matters she described in her statement. Also, they employed the mental health experts referenced throughout the Order and were unable to develop evidence of insanity or GBMI.

Robertson on one or more occasions and gathered any additional information he or she felt was necessary and relevant directly from him and the various records acquired by the defense team.

The Court finds that the decision to utilize experts to gather and present information to the jury was reasonable since it is the experts who have to lay the foundation for the jury to understand Robertson's mental illness and the mental health history of his family. *Cf. Florida v. Nixon*, 543 U.S. 175, 191 (2004) ("Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. ... In such cases, 'avoiding execution [may be] the best and only realistic result possible.'... Counsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared." (Citations and footnotes omitted).

The Court further finds that Robertson was in apparent agreement with counsel's strategy, and, rather than voicing any objection to that strategy, he cooperated fully with the defense experts and counsel's efforts to present a case in mitigation of punishment. Nor has Robertson demonstrated anything else that counsel could have done in gathering information about Robertson or his family that they failed to do as the result of following the strategy they employed.

Yet, even if Robertson could prove that counsel were deficient, the Court finds that he has totally failed to prove any resulting prejudice. *See Strickland*, 466 U.S. at 691; *United States v. Goudy*, 792 F.2d 664, 672 (7th Cir. 1986) (counsel's failure to meet with client in months immediately preceding trial does not amount to ineffective assistance, absent a showing of

prejudice). Again, the Court finds that Robertson has not presented any evidence that the outcome of the case could have been any different if counsel had spent more time with him.

The Court further finds that Robertson's suggestion that he could have weighed in on the strategic decisions made by his attorneys if they had met with him more often is misplaced. The Supreme Court recently stated that "[A]n attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy ... That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.'" *Nixon*, 543 U.S. at 187 (citing *Strickland*, 466 U.S. at 688 and *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988) (an attorney has authority to manage most aspects of the defense without his client's approval). *See also Faretta v. California*, 422 U.S. 806, 820-21 (1975) ("when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to counsel the power to make binding decisions of trial strategy in many areas"). Further, the Court finds, as noted, that Robertson consented to counsel's strategy and did not voice any complaint such as that raised before this Court. Therefore, he has failed to prove any prejudice on this allegation.

GROUND 10(a)(5)

Robertson also maintains that his attorneys were ineffective for failing to pursue a supposed plea bargain offered by the prosecution, whereby Robertson would be allowed to plead guilty to the murders and receive a life sentence if his bother, Chip, agreed to donate the proceeds of their parents' estates to a charity. The Court finds that the credible evidence before it is that the "offer" referred to by Robertson was merely a comment made in jest by Mr. Brackett to Chip's attorney. Robertson has not proved that counsel was deficient or resulting

prejudice because counsel made reasonable inquiries concerning a plea, but then-Solicitor Pope was not interested in a plea and wished to seek the death penalty for the murders at all relevant times.

Robertson testified that his attorneys never discussed a plea bargain with him during his March 1999 trial. Later, he read a newspaper article stating that then-Deputy Solicitor Brackett had proposed a plea offer to Chip's attorney, in which the State would agree to allow Robertson to plead guilty to the murders and receive a life sentence if Chip would agree to donate the proceeds from their parents' estates to charity. When Robertson later discussed the matter with Chip, Chip indicated that he would not agree to such an offer.

Mr. Hancock testified that he was aware of the discussion between Mr. Brackett and Chip's attorney. He characterized this as "hall talk" and was not a serious offer. Further, Robertson was not interested in a plea and wanted a jury trial, despite admitting his guilt to his attorneys.

Mr. Boyd testified that he attempted to negotiate a plea bargain on Robertson's behalf, but no agreement was ever reached. He thought he asked then-Solicitor Pope about a guilty plea in exchange for a life sentence, but was told "no". Mr. Boyd became aware of the conversation that Mr. Brackett had with Chip's attorney. Although he did not take it as a serious plea bargain, he inquired of the Solicitor's Office during Robertson's trial, and Mr. Brackett told him that the discussion was part of a joke and was not a serious offer. Also, it was Mr. Boyd's understanding that Solicitor Pope would have had to approve any plea bargain, and there was no indication that Solicitor Pope would accept a plea.

Mr. Pope testified that during the time he was Solicitor of the Sixteenth Circuit, and he had to personally approve any plea bargains in capital cases. Although he was aware of the discussions Mr. Brackett had with Chip's attorney, he characterized the discussion as a joke. He emphasized that he always intended to seek the death penalty for the murders in this case and that he never had any intention of accepting a guilty plea in exchange for a life sentence.

Solicitor Brackett testified that there were never any serious plea negotiations in this case and that the discussion alleged by Robertson was merely a joke made by him to Chip's attorney. He corroborated that then-Solicitor Pope would have had to approve any plea bargain in a capital case, and that Mr. Pope did not approve any plea bargain in this case.

Based upon the current record, the Court finds that counsel took reasonable steps to bring about a plea bargain. However, there was never any credible evidence that a plea bargain was ever offered by the State. To the contrary, the only credible evidence is that the State was not willing under any circumstances to take the notice of intent to seek the death penalty off of the table and allow Robertson to receive a sentence of LWOP. The Court further finds that the plea bargain referred to in this allegation was not meant as a serious offer by the State but was merely part of a conversation by Mr. Brackett which he intended to be humorous. Therefore, the Court finds that Robertson has failed to prove either deficient performance or resulting prejudice under *Strickland*.

GROUND 10(a)(6)

Robertson next claims that counsel was ineffective because they advised him not to testify in the sentencing phase of his trial, and that he was not allowed to make his own decision as to whether or not to testify. As to the first part of this allegation, the Court finds that

Robertson has failed to prove either deficient performance or resulting prejudice. As to his contention that he was not permitted to make his own decision about testifying, the Court finds that the allegation is not appropriate in Post-Conviction Relief because it is an allegation that could have been raised at trial and on direct appeal. *See* S.C. Code Ann. §17-27-20(b) (1985).

1. Counsel's advice for Robertson not to testify.

Robertson testified that he wanted to testify in the sentencing proceeding after he heard the testimony of Ms. Cascio, the social worker (*See* Tr. pp. 2852-3031) because he felt that what she had divulged was about the same as if he had testified about the crimes. However, both of his attorneys advised him not to testify, and he followed their advice. When the State asked him substantive questions about the offenses and his guilt or innocence at the PCR hearing, he invoked his Fifth Amendment privilege against self incrimination.²⁸

Mr. Hancock testified that he and co-counsel had a heated conversation with Robertson about whether or not he would testify in the sentencing phase. Although Mr. Hancock felt that some damage had been done to the defense's case by Ms. Cascio's testimony, Mr. Hancock did not think the defense stood any chance of a life sentence if Robertson testified. In his assessment, Mr. Hancock believe that Robertson – who had admitted to counsel that he murdered his parents and only he did so – would have been a very bad witness, and any cross-examination

²⁸ The only exception occurred when he was cross-examined by the State in his testimony on reply. Although he answered a question concerning his guilt or innocence, he sought to invoke his Fifth Amendment privilege with respect to the details of the murders. However, this Court found, after an objection by PCR counsel and another colloquy between the Court and Robertson, that he had not knowingly and voluntarily waived his right to assert the Fifth Amendment because he did not adequately understand the scope of it and the effect of any waiver.

by Solicitor Pope would have been devastating. Mr. Pope testified that he was prepared for and wanted Robertson to testify. Thus, his testimony corroborates that of Mr. Hancock.

Mr. Boyd testified, consistently with Mr. Hancock, that Robertson had admitted to counsel that he murdered his parents. He also corroborated that there was a lengthy discussion about whether Robertson should testify in sentencing and respond to the testimony from Ms. Cascio. He agreed that the State's cross-examination of Ms. Cascio had hurt the defense but felt that Robertson would have made a bad witness because the State could have impeached him and cross-examined him about the facts of the case.

Based upon the testimony of trial counsel and Mr. Pope, the Court finds that Robertson has failed to prove that counsel were deficient. First, it is clear that Robertson was aware of his right to testify. In addition to the testimony offered at PCR, the record reflects that Judge Hayes' on-the-record waiver of Robertson's right to testify in the sentencing phase ensured Robertson understood that this was a right personal to him – as was his right to remain silent – and that Robertson made a knowing and intelligent waiver of his right to testify. *See* Tr. pp. 3041-43.

Second, the Court finds that trial counsel made a reasonable, tactical decision to advise Robertson not to testify. The Court finds that it was quite reasonable for counsel to conclude that it would be unwise for Robertson to testify in the sentencing phase: he had previously admitted to counsel that he had murdered his parents and his reasons for doing so; and he would have been subject to lengthy cross-examination by the State concerning the facts of the murder. Also, counsel's decision is supported by Mr. Hancock's assessment of Robertson's demeanor and counsel's assessment of the prosecutors in the case. *See Daniels v. Lee*, 316, F.2d 477, 491-92 (4th Cir. 2003) (petitioner failed to prove either deficient performance or prejudice resulting

from counsel's failure to compel him to testify in the sentencing phase of his capital trial where counsel made a tactical decision that petitioner should not testify). *Cf. Carter v. Lee*, 283 F.3d 240, 249 (4th Cir. 2002) ("[T]he advice provided by a criminal defense lawyer on whether his client should testify is a paradigm of the type of tactical decision that cannot be challenged as evidence of ineffective assistance") (internal quotations and citations omitted).

The Court further finds that Robertson has totally failed to prove any prejudice whatsoever arising from trial counsel's advice that he should not testify. Although he testified both in his case-in-chief and in reply to the State's case at the PCR hearing, he asserted his privilege against self-incrimination when asked any questions by the State concerning his guilt of the murders. Although the Court allowed him to assert this right, the Court can draw an adverse inference from his assertion of the privilege. *Baxter v. Palmigiano*, 425 U.S. 308, 316-19 (1976) (holding that it was permissible to draw adverse inference from inmate's assertion of Fifth Amendment privilege in prison disciplinary proceedings and observing that "[o]ur conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment does not preclude the inference where the privilege is claimed by a party to a Civil case."). *Bean v. Calderon*, 166 F.R.D. 452, 453-55 (E.D. Cal. 1996) (adverse inference could be drawn from capital defendant's invocation of Fifth Amendment in deposition by the State taken during habeas corpus proceeding). *Cf. Griffith v. Griffith*, 332 S.C. 630, 640-41, 506 S.E.2d 526, 532 (Ct. App. 1998) (it is permissible for factfinder to draw an adverse inference in a civil case against a party invoking the Fifth Amendment privilege against self-incrimination).

Furthermore, Robertson's failure to respond to the State's cross-examination at PCR means that there is no evidence before this Court from which it can conclude that there is a reasonable probability of a different result in the sentencing proceeding but for counsel's errors under *Strickland* because he has not provided this Court with any evidence he would have offered if he had testified at trial. See 466 U.S. at 694. See also *Brown v. Artuz*, 124 F.3d 73 (2nd Cir. 1997) (while court could not say habeas corpus applicant was aware that he personally possessed the ultimate decision on whether to testify, applicant cannot show prejudice in any event, because his proposed testimony did not satisfy the elements of the state law self-defense); *LaVigne v. State*, 812 P.2d 217 (Alaska 1991) (defendant challenging his trial based on attorney's denial of his right to testify has initial burden of showing he would have offered relevant testimony at trial). Cf. *Engelen v. United States*, 68 F.3d 238 (8th Cir. 1995) (rejecting claim of prejudice from trial counsel's alleged ineffectiveness in failing to recommend a plea of guilty because the habeas petitioner continued to proclaim his innocence and did not indicate he would have pled guilty).

2. Robertson was not permitted to make his own decision about testifying.

The Court finds that Robertson's contention that counsel compelled him not to testify in the sentencing phase and he, therefore, was not permitted to make his own decision is not an appropriate ground of PCR because it could have been raised at trial and on direct appeal.

After the sentencing phase testimony of defenses witness Dr. Ronald Pryor, the trial judge addressed Robertson. He explained that Robertson had the right to present evidence of "mitigating circumstances" and he defined that phrase for Robertson. The trial judge then explained to Robertson that he would be subject to cross-examination by the State if he testified.

However, if Robertson chose not to testify, the trial judge stated that he would charge jurors that they could not hold Robertson's exercise of this right against him, that it could not factor into their deliberations in determining the appropriate sentence to impose and they could not even discuss it in the jury room or "factor that into their own mind." Tr. pp. 2416, l. 21 – 2417, l. 24.

Robertson indicated that he understood this explanation and the trial judge's explanation of his right to make a closing argument. Robertson also indicated that he did not have any questions. Both of his trial attorneys indicated that they had discussed this with Robertson and believed that he understood it. Neither trial counsel nor the State asked the trial judge to cover anything else with Robertson at that time. Tr. pp. 2417, l. 21 – 2418, l. 23.

Following Ms. Cascio's testimony, the trial judge conducted an on-the-record waiver of Robertson's right to testify in the sentencing phase. *Accord State v. Orr*, 304 S.C. 185, 403 S.E.2d 623 (1991). The trial judge first explained that Robertson had the right to testify, and he had the right to remain silent and not testify. The trial judge explained that if Robertson testified, he would be subject to cross-examination by the State, he could be impeached with any prior offenses and "they can use certain things regarding your past that are indicative of your character." The trial judge further explained that, if Robertson elected not to testify, "I will again as I did in the guilt phase tell the jury they cannot consider that, discuss that or factor that into their deliberation on the punishment to be imposed in any way whatsoever." Tr. pp. 3041, l. 22 – 3042, l. 19.

The following colloquy then occurred between the trial judge and Robertson:

THE COURT: Mr. Robertson, what is your decision?

MR. ROBERTSON: I waive my right to testify at this time.

THE COURT: You say at this time, this is the time.

MR. ROBERTSON: I waive my right to testify.

Tr. p. 3042, ll. 20-25.

Based upon the responses, the trial judge found that Robertson had “freely, voluntarily, knowingly and intelligently, understood his right to testify and his right to remain silent, waives his right to testify and exercised his constitutional right to remain silent.” Tr. p. 3043, ll. 1-6.

Because there was an on-the-record waiver of Robertson’s right to testify in the sentencing phase, the Court finds that the current allegation could have been raised, if at all, at trial and on direct appeal. *Cf. State v. Rocheville*, 310 S.C. 20, 24-25, 425 S.E.2d 32, 34-35 (1993) (in capital cases tried after *State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991), review of whether there was knowing and voluntary waiver of right to testify is best resolved in PCR where record is silent.). Because the current allegation could have been raised at trial and on appeal, it is not an appropriate allegation for PCR. *See* S.C. Code Ann. §17-27-20(b) (1985); *Drayton v. Evatt*, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993) (issue that could have been raised at trial and on 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)

Even viewing this allegation as one of ineffective assistance of counsel, the Court finds that it lacks merit for the reasons described: counsel made a reasonable strategic decision that Robertson should not testify, and he agreed with that decision, albeit reluctantly, at the time of trial. Nor has he met his burden of showing prejudice for the stated reasons.

GROUND 10(a)(7)

Robertson contends that trial counsel were ineffective for failing to adequately present evidence that he was adaptable to life in prison. Again, the Court finds that he has failed to prove either prong necessary for relief under *Strickland*.

The defense did not present any witness who testified that Robertson was adaptable to life in prison. However, counsel established through Dr. Morton that Robertson's bipolar disorder and Ritalin abuse – to which all of the defense experts greatly attributed the murders – could be and were successfully treated in SCDC. Tr. pp. 2703-04. Indeed, it was Dr. Morton's opinion that Robertson had never been properly treated for his Ritalin abuse or bipolar disorder until his incarceration. Tr. pp. 2665-69; 2675-76.

The defense also presented Michael J. Stobbe, the SCDC records custodian. The defense elicited that Dr. Ed Bradley had diagnosed Robertson on September 3, 1996 as having a bipolar manic-depressant disorder. Also, Dr. Bradley's comments indicated that Robertson was not capable of vigorous physical activity. Another SCDC medical record (Defendant's Ex. 17) reflected that, as of December 12, 1998, he was in a therapy group for treatment. The records further established that he was responding favorably to the treatment he was receiving. Tr. pp. 2740-45.

Mr. Hancock testified at the PCR hearing that the defense did not present a witness to testify to Robertson's adaptability to prison life, but counsel did establish that Robertson had not misbehaved in prison since correctly diagnosed. Mr. Hancock further recalled that Robertson had several infections, and Mr. Hancock believed his mental health evidence in mitigation was strong. Mr. Boyd testified that the defense probably discussed the question of Robertson's

adaptability to prison but he did not recall the discussions. He confirmed that the defense did not present any expert testimony on this issue.

The Court finds that Robertson has failed to prove deficient performance. *Skipper v. South Carolina*, 476 U.S. 1 (1976) (evidence of defendant's food behavior in prison is admissible in mitigation of punishment as relevant to future adaptability), and the cases applying it simply hold that a capital defendant may present evidence of his adaptability to prison life in mitigation of his sentence. See, e.g., *State v. Tucker*, 324 S.C. 115, 478 S.E.2d 260 (1996) (defendant's future dangerousness and his adaptability are relevant in the sentencing phase of a capital trial); *State v. Matthews*, 291 S.C. 339, 353 S.E.2d 444 (1986) (exclusion of expert opinion relative to defendant's adaptability to prison life constituted reversible error under *Skipper*). However, neither *Skipper* nor *Strickland* require trial counsel to present whatever evidence of adaptability counsel may find, in order to provide constitutionally adequate representation. See *Drayton*, 312 S.C. at 10-11, 430 S.E.2d at 521-22 (defendant failed to prove deficient performance or prejudice under *Strickland* resulting from counsel's failure to present evidence of adaptability where counsel had information of "unfavorable psychiatric evaluations and poor disciplinary reports compiled during Drayton's confinement as a juvenile in a detention facility as well as some accounts of misconduct during his prior incarceration as an adult."); *Howard v. Moore*, 131 F.3d 399 (4th Cir. 1997) (en banc) (rejecting ineffectiveness claim based upon failure to offer evidence of adaptability to prison and agreeing with the state PCR court that inmate's past prison record presented a "double[-]edge[d] sword" in that any further evidence of [inmate]'s prior federal prison experience may have detrimentally highlighted his past criminal record"). See also *Lusk v. Dugger*, 890 F.2d 332, 339 (11th Cir. 1989) (defendant did not show

that he was prejudiced by trial counsel's failure to present evidence of his adaptability to prison based upon record which included evidence that he committed the murder for which he was on trial while in prison); *Commonwealth of Pennsylvania v. Wharton*, 811 A.2d 978, 988 (Pa. 2002).²⁹

Further, counsel is not ineffective for pursuing a reasonable trial strategy, even if that strategy is pursued to the exclusion of another reasonable strategy. *See Guerrero*, 938 F.3d at 730; *Cf. Strickland*, 466 U.S. at 690-91. Here, the Court does not find anything suspect in counsel's failure to present evidence of Robertson's adaptability. The Court finds that the sentencing phase transcript supports Mr. Hancock's recollection of Robertson's prior infractions.

As part of the State's case in aggravation of punishment, it presented evidence of Robertson's previous incarceration and evidence of his misconduct while incarcerated on that occasion. For instance, while Robertson was incarcerated at the York County Detention Center in 1996, he submitted an inmate service telephone form bearing his name (State's Ex. 200). Tr. pp. 2120-23.³⁰ Over an *in camera* objection of Mr. Boyd (Tr. pp. 2123-24), the State presented Ms. Carole Sarn, a Rock Hill resident. She identified the telephone number on State's Ex. 200 as her telephone number. She also published State's Ex. 200. On that form, Robertson listed Sarn's Rock Hill phone number, and stated that "[r]elatives were in process of moving when I

²⁹ In *Wharton*, the Court rejected the appellant's claim that his trial counsel was constitutionally obliged under *Skipper* to obtain and introduce – and, therefore, ineffective under *Strickland* for not presenting – evidence of his adaptability to prison occurring during the seven years between his first and second penalty hearings: “Properly speaking, the issue before this Court is not whether appellant's prison adjustment was relevant mitigation evidence that the trial court erred in excluding [under *Skipper*]. Instead, the issue is whether appellant's counsel was ineffective for failing to introduce evidence of that adjustment as mitigation evidence to convince the jury that he had made a positive adjustment to prison.” *Wharton*, 811 A.2d at 102; *see also Keen v. State*, 2006 WL 1540258 at *41 (Tenn. Crim. App. June 5, 2006).

³⁰ This exhibit was admitted over Mr. Hancock's objection.

was incarcerated and had not yet received new phone number and have since written with New York phone number. These relatives could be influential in helping me make bond." Tr. pp. 2125-26.

Ms. Sarn testified that the relatives listed on State's Exhibit 200 were the aunt and uncle. However, she said that she was not Robertson's aunt, that she had the telephone number for twenty-three years, and that Robertson's aunt and uncle had never lived with her. Tr. p. 2126.

The State also presented Mr. Stobbe, SCDC's records custodian.³¹ Through him, the State introduced evidence that, between Robertson's admission on September 3, 1996 and his conditional release on Youthful Offender Act parole on July 31, 1997, he had a December 15, 1996 conviction for "damage, destroying property" (State's Ex. 201); a February 11, 1997 conviction for fighting without a weapon (State's Ex. 202); a February 11, 1997 conviction for lying to an employee and damage, destroying property (State's Ex. 203); and a September 11, 1998 conviction for refusing or failing to obey (State's Ex. 204). Tr. pp. 2130-33; 2141-43.³²

³¹ The trial judge overruled Mr. Hancock's objection that the records concerning misconduct by Robertson while incarcerated were hearsay narratives. In response to an objection that the incident dated October 3, 1996 was dismissed, the State agreed to inquire only about infractions for which he was convicted. Tr. pp. 2127-30.

³² Mr. Hancock established on cross-examination that the charge of fighting without a weapon, reflected in State's Ex. 202, was "a minor infraction;" and that no one actually saw a fight. Rather, a correctional officer apparently heard a loud noise and, upon going into the dayroom to investigate, saw Robertson getting up off of the floor with a small cut on his cheek and swelling under his eye. There also was nothing in the report that said he hit or beat or threatened anyone else. Tr. pp. 2133-35.

Mr. Hancock's cross-examination also established that the charges in State's Exhibit 203 included possession of contraband, which was cigarettes, and the damage to property charge resulted from the fact Robertson tore a hole in his jacket so that he could hide the cigarettes. Counsel also established that the incident documented by State's Ex. 201 resulted from Robertson breaking a window on a door by knocking too hard on the door. (The trial judge sustained the State's objection when counsel attempted to establish Robertson's motive for knocking on the door was to get assistance for another inmate). Tr. pp. 2136-43.

The State also presented Scott Williams, from the South Carolina Department of Probation, Parole and Pardon Service. Mr. Williams supervised Robertson while he was on the Y.O.A. conditional release on parole. Supervision began on July 31, 1997, and was supposed to have run until August 1, 2002. However, the conditional parole was revoked on April 28, 1998, and Robertson was admitted to SCDC. Tr. pp. 2144-49. Cross-examination by Mr. Hancock established that Robertson violated parole merely by changing his residence when he moved back into his parents' home. This was only discovered after he was charged with murder. Tr. pp. 2150-51.

Further, at least some of the evidence presented in mitigation of punishment to support the mental health defense is inconsistent with the idea that Robertson is adaptable to prison because this evidence – which defense experts attributed to his mental illness, his substance abuse and the absence of proper treatment for either of these – showed that Robertson would challenge authority. *E.g.*, Tr. pp. 2828-35.

Based upon the Court's own experience in presiding over both capital trials and capital PCRs, it is the Court's conclusion that evidence of adaptability to life in prison is not very valuable as evidence in mitigation of punishment. Regardless of whether it is effective evidence in mitigation, however, based upon the present record, the Court cannot find that Robertson's attorneys were deficient for not presenting evidence of his adaptability and instead, pursuing a much stronger mental health case in mitigation. *See Drayton*, 12 S.C. at 10-11, 430 S.E.2d at 521-22; *Wharton*, 811 A.2d at 988-89 (finding that counsel were not deficient and defendant failed to prove prejudice); *Commonwealth v. Spatz*, 896 A.2d 1191, 1235-36 (Pa. 2006).

Alternatively, the Court finds that Robertson has failed to prove that he was prejudiced by trial counsel's failure to present evidence of his adaptability to prison life because he failed to present any evidence at the PCR hearing which demonstrates that he is, in fact, adaptable to prison life. To the contrary, Robertson admitted on cross-examination by the State at the PCR hearing that he had been convicted of several disciplinary infractions while on death row,³³ and he only disputed a charge of loan sharking. Therefore, the Court finds that the only evidence in the record is that he has not been able to adapt to incarceration, even though housed in the strict confines of death row.

Also, trial counsel did establish that much of the State's evidence of misconduct in prison involved relatively minor offenses. *Id. See also Bell v. State*, 879 So.2d 423, 444 (Miss. 2004) (trial counsel not deficient for failing to present mitigating evidence regarding defendant's adaptation to prison in sentencing phase of capital murder trial, where defendant failed to cite what evidence of good behavior in prison should have been presented and how such evidence would have affected the outcome of his sentencing proceeding); *Crawford v. State*, 867 So.2d 196, 217-18 (Miss. 2003); *Cf. McNeill v. Polk*, 476 F.3d 206, 217 (4th Cir. 2007) (petitioner could not prove prejudice resulting from counsel's presentation of evidence of an infraction he committed while in prison, where petitioner did not present any admissible evidence in support of his position that he did not commit the infraction, and the infraction was presented in the context of overwhelmingly positive testimony regarding McNeill's time in prison).

³³ For instance, he admitted that he had been found guilty of several charges of possession of contraband (including marijuana) and or being under the influence. The Court disallowed extrinsic evidence concerning his disciplinary history.

In light of the evidence before the jury (both in aggravation and mitigation of punishment), the Court finds that it is highly unlikely that the sentencing jury would have been swayed to impose a life sentence based upon Robertson's evidence of "adaptability." This is particularly true since the State did not argue Robertson's future dangerousness. See Tr. pp. 3125-72 and, instead, focused upon whether the jury believed the defense's case in mitigation or that Robertson was "the spoiled rich kid who could not wait to receive his inheritance." Tr. p. 3134, ll. 4-14. Based on his failure of proof, he cannot prove a reasonable probability of a different result but for counsel's failure to present evidence of his adaptability. See *Drayton*. See also *Strickland, supra*. See also *Wilkinson v. Polk*, ___ F.3d ___, 2007 WL 1051436 at ** 8 n. 3 (4th Cir., April 5, 2007) (Unpublished).³⁴

GROUND 10(a)(8)

Robertson further alleges that trial counsel were ineffective because they failed to impeach his co-defendant, Meredith Moon, with a statement that she allegedly made, in which she agreed to "keep quiet" about the murders in exchange for \$50,000.00.³⁵ The Court finds that Robertson has failed to establish deficient performance or prejudice under *Strickland, supra*.

First, the Court finds that there is no credible evidence that Moon ever made such a statement. There was absolutely no evidence this statement was ever made to a member of law

³⁴ In connection with this allegation, the Court would note that the South Carolina Supreme Court has recently cautioned both the prosecution and the defense bar about the presentation of evidence concerning prison confinement unrelated to the specific defendant. See *State v. Burkhardt*, ___ S.C. ___, 640 S.E.2d 450 (2007); *State v. Bowman*, 366 S.C. 495, 623 S.E.2d 378 (2005).

In light of these cases, it is clear that any evidence of adaptability must be strictly confined to evidence pertaining to the specific defendant, as to prison condition, generally. Again, the only evidence presented at PCR was that Robertson is not adaptable to confinement.

³⁵ The trial transcript reflects that Mr. Hancock cross-examined Moon in the guilt phase of Robertson's trial. Tr. pp. 1618-39; 1644-46.

enforcement or that counsel should have learned of the statement after a reasonable investigation. Also, Robertson did not present a taped, handwritten or typed copy of this alleged statement. The only evidence that such a statement exists comes from Robertson, and the Court finds that his testimony is not credible.

The Court further finds that Robertson has not proved any prejudice resulting from counsel's failure to impeach Moon with the alleged statement. First, while cross-examination of Moon about this alleged statement would have provided some additional impeachment of her testimony,³⁶ the statement would have further strengthened the State's case in aggravation of punishment. Second, Robertson did not present Moon as a witness at the PCR hearing. Therefore, the Court finds that there is no indication of how she would respond if asked whether she, in fact, made the statement attributed to her by Robertson. In the absence of any evidence as to how she would testify, the Court finds that Robertson has failed to prove a reasonable probability of a different result, but for trial counsel's failure to impeach her with the alleged statement. *See Glover*, 318 S.C. 496, 458 S.E.2d 538 (1995); *Beaver*, 93 F.3d 1186 (4th Cir. 1996).

GROUND 10(a)(9)

Robertson has specifically waived his contention that counsel were ineffective for failing to move for dismissal of a petit juror based upon comments made by the juror. The Court finds that he has freely and voluntarily made a knowing and intelligent decision to abandon this allegation.

³⁶ Robertson has not alleged counsel's cross-examination was otherwise deficient, and the Court does not find any deficiency. Further, counsel did impeach Moon within the permissible parameters of ethical representation, given Robertson's statement to counsel admitting that he murdered his parents and telling counsel why he did so.

GROUND 10(a)(10)

Next, Robertson contends that trial counsel were ineffective for failing to adequately and properly advise him before he was evaluated by the State's psychologist, Dr. Geoffrey McKee. The Court, again, finds that he has failed to prove any deficiency in counsel's performance or, more importantly, any resulting prejudice.

At a September 25, 1998, motions hearing, the State noted that the defense had not yet provided notice of whether it would rely on either insanity or GBMI as a defense.³⁷ Robertson's counsel argued that the State's request was "somewhat premature" because the defense had not yet determined whether it was going to rely upon either defense. Counsel stated that a neuropsychologist had examined Robertson on the previous day and that there was a defense psychiatrist who had to review the records before they could make this determination. Tr. pp. 67-72.

The State then argued that the purpose of requiring notice of an insanity defense was to allow the State to prepare and respond to it. Because of the amount of mental health records involved in the case, the State asked the trial judge to determine if Robertson needed to be evaluated.³⁸ In response to the trial judge's inquiry, counsel indicated that he could determine

³⁷ The State had filed a motion requesting notice of insanity or GBMI on July 8, 1998. Tr. p. 69. It had previously indicated at a September 22, 1998 motions hearing that it intended to ask the trial judge to consider a court-ordered competency evaluation. Tr. p. 55.

³⁸ The State explained that Robertson had "intermittently" seen a psychiatrist between 1993 and 1997; he had been involuntarily committed to the William S. Hall Psychiatric Institute in 1995; and other witnesses said that Robertson had previously boasted of being able to malingering and convince psychiatrists of their findings. Tr. pp. 74-76.

whether GBMI or insanity were at issue by November 1, 1998. The trial judge deferred ruling until then. Tr. pp. 74-77.³⁹

The issue was revisited at a November 20, 1998 hearing, wherein the State argued its November 19, 1998 motion to request an independent psychiatric and/or psychological evaluation for purposed of determining Robertson's mental condition.⁴⁰ Defense counsel argued that counsel had not received ten days notice of the State's motion and stated that competency was not yet at issue. The trial judge gave Robertson ten days within which to respond, 11/20 Tr. pp. 24-25, and counsel responded on November 30, 1998.

The trial judge heard further arguments on the issue at a December 4 motions hearing. Counsel conceded that S.C. Code Ann. § 44-23-410 (Supp. 1998) allowed the trial court to order an evaluation but only upon a showing that was not met in this case, since Robertson had not asserted a mental health defense or asserted that he was incompetent to stand trial. Counsel argued that this was a fishing expedition to determine Robertson's mental state; and that if any such information came in during the sentencing phase, it would violate his Fifth Amendment privilege against self-incrimination. Also, counsel argued that he State's experts could perform a competency evaluation within ten minutes. Tr. pp. 103-05.

³⁹ The issue was again raised by the State at a November 2, 1998 motions hearing, but the trial judge did not rule because he felt there must be a showing first. Tr. pp. 86-87.

⁴⁰ The State argued that the defense had not yet disclosed any reports by its experts and that under *State v. Sloan*, 278 S.C. 435, 298 S.E.2d 92 (1982), Robertson had a right to refuse to submit to an evaluation. However, he would waive his right to present experts concerning his mental status if he did so because he could not interject a mental health issue and prevent the State from either confirming or rebutting his evidence. Further, the State asserted that it would take time to have an evaluation done and for the State to adequately review it. Also, it would be impractical to allow the evaluation to take place during the course of the trial when Robertson finally introduced his mental health evidence. Finally, the State claimed that the matter was one of fairness and the State's opportunity to prepare. 11/20 Tr. pp. 4-5; pp. 21-23.

The State asserted that § 44-23-420 recognizes the inherent power of the trial court to order a competency or insanity evaluation.⁴¹ Further, the only way for the State to effectively cross-examine the defense experts on mental health issues was to require an evaluation on competency, *McNaughten*, and GBMI. The State disputed the claim there had not been a showing that required an evaluation, noting Robertson's prior involuntary commitment. Also, the State maintained that a "chain of evaluations" by his experts had taken place and that mental health issues were present. Again, the State argued that an evaluation was necessary as a matter of justice, and so that the case could progress in a timely fashion, while protecting both Robertson's and the State's rights. Tr. pp. 105-10.

Defense counsel again asserted that the State's motion was premature because he had not yet received the reports from his experts. He noted that mental health issues may arise in the sentencing phase but not in the guilt phase, and asserted Fifth Amendment problems with a court-ordered evaluation. The trial judge observed that Robertson's response during the interview could be prohibited. However, he took the matter under advisement and said he would issue a written order. Tr. pp. 110-115; p. 120.

The trial judge initially denied the State's request in an Order filed on December 18, 1998. However, he entertained the State's motion to reconsider his previous ruling at a hearing on February 12, 1999. The State argued that Robertson had indicated he would potentially use at least three experts who had evaluated him, including Dr. Pincus, Dr. Evans and Ms. Cascio (who had prepared a psycho-social history). The State stated that it had yet to receive copies of reports from any of these experts, and it again noted that at the time of the previous involuntary

⁴¹ Again, the State recognized that Robertson could refuse to cooperate in the evaluation but under *Sloan* would be barred from presenting expert testimony in mental health issues.

commitment in August 1995, Robertson was diagnosed as having bipolar disorder, manic; the potential for acting out; and depression. The State requested an evaluation, so that it could either confirm or rebut what the defense may present at trial, and asserted that it was logistically impractical to keep a jury sequestered and have an evaluation during the course of a trial. The State also presented a copy of a psychiatric report (introduced as Court's Exhibit 1 at the hearing) and asserted that this exhibit alone warranted a court ordered evaluation. 2/12/99 Tr. pp. 8-15. Trial counsel, once again, opposed the State's motion to reconsider and asserted that an evaluation would violate Robertson's Fifth Amendment privilege against self-incrimination. The trial judge agreed to take the matter under advisement. 2/12/99 Tr. pp. 14-16. Both parties then briefed the issue.

On February 17, 1999, the trial judge filed an Order for Evaluation as to Competency and Criminal Responsibility, in which he reconsidered the previous Order and ordered Robertson to submit to an independent psychiatric examination relating to his mental capacity by examiners designated by the State. *See State v. Locklair*, 341 S.C. 352, 364, 535 S.E.2d 420, 426 (2000) (rejecting defendant's argument the trial judge abridged his Fifth Amendment rights by ordering him to submit to a psychiatric examination where he did not assert an insanity defense and did not give notice that he would plead GBMI and holding that "[t]he trial judge in this case has the inherent, discretionary authority to order an independent psychiatric evaluation of Locklair if he believed Locklair was not fit to stand trial or if he believed that Locklair's mental competency would be an issue at trial. The mental competency of the defendant to stand trial is a baseline inquiry by the court. In order to protect the legal process and preserve the integrity of the trial, a trial judge has the authority to order a psychiatric evaluation of the defendant when his or her

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competency may be in question"). Judge Hayes based his decision upon his review of records relating to the involuntary commitment to the Hall Institute in 1995, as well as trial counsel's representation that the defense may present testimony relevant to Robertson's mental status through Dr. Pincus, Dr. Evans and Ms. Cascio, in either the guilt or penalty phase of the trial.⁴² Judge Hayes further found that fundamental fairness dictated that the State be allowed the opportunity to verify or rebut evidence presented by defense experts regarding Robertson's mental status; that an adequate rebuttal could not be made without independent examination; and that an independent psychiatric examination under these circumstances "is a distinct aid in the determination and the administration of justice in order to confirm a claim of mental illness, discover fraudulent claims or to rebut psychiatric testimony which can only reasonably be accomplished by the presentation of expert testimony."

The trial judge further ordered that any report from the evaluation be made to the State and the trial court within five days of the completion of the examination and that it should contain a diagnosis of Robertson's mental condition, as well as clinical findings bearing on the issues of (1) whether Robertson was competent to stand trial; (2) whether Robertson was criminally responsible at the time of the offense under *McNaughten*; and (3) whether or not Robertson was GBMI at the time of the offense. The trial judge further ordered that neither the results of the examinations nor any communications by Robertson during the evaluation should be admissible in any criminal proceedings against him unless the defense first interjected his mental status as an issue in either the guilt or sentencing phases of the trial or the evidence was necessary to rebut testimony or evidence offered by Robertson. Finally, the trial judge's order

⁴² However, he observed that Robertson had asserted that he did not intend to present GBMI or insanity "at this time."

stated that "[n]othing in this Order shall be construed to abridge the defendant's Fifth Amendment right to remain silent."

Dr. Geoffrey McKee, a forensic psychologist, thereafter examined Robertson pursuant to this Order and later testified – in response to Robertson's mental health witness – as a reply witness in the sentencing phase of the trial. Tr. pp. 3059-72; 3079-83.

Before Dr. McKee's testimony, Mr. Boyd unsuccessfully renewed his objection *in camera*, and the trial judge held an *in camera* hearing to determine the admissibility of any statements Robertson made to Dr. McKee during the evaluation. Tr. pp. 3044-55. The trial judge found that the statements made by him were admissible. The trial judge further found that Robertson had been advised of his rights under the Fifth and Sixth Amendments and advised as a constitutional safeguard provided by *Miranda v. Arizona*, 384 U.S. 436 (1966). The trial judge also found that, before the interview took place, counsel had represented Robertson for some time; and that counsel was aware of the interview and its potential use at trial. He further found that Robertson was aware of his right to remain silent as well as his other *Miranda* rights but intelligently waived those rights. Therefore, the trial judge found that the evidence could be presented in rebuttal. Tr. pp. 3055-57.

Dr. McKee testified that he reviewed witness statements, incident reports, statements by people who were in or around the scene at the time of the murders, medical reports and medical records before he saw Robertson. Specifically, he reviewed Robertson's medical records from his pediatrician, a psychiatrist that Robertson had seen, the records from the 1995 commitment to Hall Institute and records of medical and psychiatric treatment while Robertson was incarcerated for the present crimes. He then saw Robertson for a clinical interview and administered a

psychological test on March 5, 1999. He later saw Robertson for a four hour interview and administered three other psychological tests. Tr. pp. 3059-63.

Dr. McKee advised Robertson of his *Miranda* rights before they began the interviews; and it was Dr. McKee's opinion that he understood his rights. Dr. McKee testified that Robertson did suffer from bipolar disorder, manic, but without psychotic features.⁴³ Also, the bipolar disorder was in full remission at the times he interviewed Robertson. Likewise, Robertson also suffered from alcohol dependence, which was also in remission. Robertson relayed a history of marijuana and amphetamine (specific Ritalin) abuse prior to his arrest for the murders and had a history of poly-substance intoxication, including cocaine, LSD, Xanax and inhalants. He also had a history of ADHD. Also, it was Dr. McKee's opinion that Robertson had features of borderline antisocial personality traits. Tr. pp. 3062-64.

Dr. McKee testified that there is no difference between a psychosis resulting from a severe mental illness, such as schizophrenia or bipolar disorder, and a drug induced psychosis. Both types of psychoses are similar in that "there's a presence of delusions and/or hallucinations." However, he testified that Robertson was not experiencing a psychotic episode at the time of the crimes on November 25, 1997. Robertson did have bipolar disorder during this time, but Dr. McKee testified that Robertson was not experiencing the symptoms of his bipolar disorder at the time he committed the offenses. Dr. McKee testified that the facts relayed to him

⁴³ Dr. McKee explained that psychoses is the presence of symptoms of delusions (fixed false beliefs); and hallucinations (false sensory experiences). Tr. pp. 3065-66.

by Robertson were virtually identical to those in the notes of Robertson's social worker, Ms. Cascio. Tr. pp. 3066-67.⁴⁴

Dr. McKee further testified that Robertson knew right from wrong at the time of the crimes. Dr. McKee based this conclusion upon evidence that Robertson put socks over his hands before the crimes in order to cover his fingerprints; he took the phone off the hook in his mother's bedroom before attacking her; he waited until his father was in the shower before attacking his mother; during the attack on his mother, he went and checked to see if his father was still in the shower on two separate occasions; he waited outside his father's bathroom door with a bottle of Tilex and with a hammer to use it when his father came out of the shower; and he sprayed his father with Tilex before hitting him with the hammer. Also, after the incident, Robertson told Moon to put the bloody clothes, socks, the bat and the knife in a bag; he showered for approximately twenty-five minutes to remove blood from his person; he checked to see whether his neck was scraped because of his concern there might have been blood if his father scraped his neck; and he decided to use his father's credit card rather than writing checks because he was worried that he and Moon might be observed on bank cameras. Following the offense Robertson poked a hole in the glass on the door in an effort to make the incident appear as if it were a robbery; he took the bag of clothes, bat and knife with him; he placed his bag in the trunk of the car and disposed of it in a dumpster in Maryland; and, once on the road, he called back to his house and got the answering machine. This indicated to Robertson that someone had placed the phone back on the hook, and that made him anxious. Each of these actions in Dr.

⁴⁴ Trial counsel withdrew a previous objection when it became clear that the information related by Dr. McKee – although consistent with Robertson told Ms. Cascio – came from his own notes. Tr. pp. 3073-75.

McKee's estimation indicated that Robertson could distinguish right from wrong. Tr. pp. 3067-70.⁴⁵

Dr. McKee testified that Robertson had the capacity to conform his conduct to the requirements of the law because these same actions showed that Robertson could control any impulse, as did evidence that Robertson discussed his plan with Moon; he obtained two knives, a hammer, a baseball bat and Tilex before the crimes. Also, following the attack on his father but before using a baseball bat on him, Robertson had gone and checked to see if his mother was still alive; and after his assault of his father, he twice returned to assault his father after hearing his father breathing. Again, his conduct after the incidents reflected a capacity to conform his conduct to the requirements of the law. Tr. pp. 3071-72.

Finally, Dr. McKee stated "And then at arrest [he had] enough control to not make a statement during his interrogation." At that point, Mr. Boyd objected, and, during an *in camera* hearing, moved for a mistrial. The trial judge denied the motion for a mistrial but agreed to give a curative instruction, Tr. pp. 3072-75, which he subsequently gave to the jury. The trial judge instructed jurors that Robertson "had an absolute constitutional right to remain silent, and the

⁴⁵ Any alleged impropriety of Dr. McKee's testimony about the information he received from Robertson under *Hudgins v. Moore*, 337 S.C. 333, 524 S.E.2d 105 (1999), is not properly before this Court because the trial judge overruled trial counsel's objection, and ruled that the statements made by Robertson were admissible. See Tr. pp. 3044-57. Thus, the question of his ruling could have been raised on direct appeal and is barred in PCR. See §17-27-20(b); *Drayton*, 312 SC at 9, 430 SE2d at 520 (issue that could have been raised at trial and on direct appeal cannot be asserted in PCR application, absent a claim of ineffective assistance of counsel). Alternatively, the Court finds that there was no violation of *Hudgins*.

exercise of that right cannot and must not be used against him in any fashion whatsoever. So, disregard [Dr. McKee's] statement." Tr. p. 3078, ll. 13-22.⁴⁶

Robertson testified at the PCR hearing that his attorneys met with him before the evaluation by Dr. McKee. They advised him that he should meet with Dr. McKee and talk with him. Otherwise, they would not have a defense. Robertson later spoke to Dr. McKee.

As to Robertson's claim that counsel should have advised him not to discuss the facts of the case with Dr. McKee, the Court finds that the credible evidence presented before it is that trial counsel made a strategic decision to present a mental health defense and eventually presented extensive evidence concerning the mental health history of Robertson and his family. Moreover, Robertson agreed with this decision to present such a defense. The Court further finds that counsel met with Robertson and explained that the State had the right to have him evaluated if the defense wished to present evidence of his mental health in mitigation, *see Sloan*, 278 S.C. 435, 298 S.E.2d 92, and that Robertson consented to the evaluation by Dr. McKee.

Also, the Court finds that Robertson was well aware of his right to remain silent. Apart from evidence concerning the advice that counsel gave him, the transcript clearly reflects that Dr. McKee advised him of his *Miranda* rights, including his right to remain silent, before Dr. McKee evaluated him. However, Robertson nevertheless voluntarily discussed the facts of the crimes with Dr. McKee. Also, his statements to Dr. McKee were consistent with Ms. Cascio's notes of her conversations with Robertson. Therefore, the Court finds that Robertson failed to prove either deficient performance with respect to the advice given by counsel or any resulting prejudice.

⁴⁶ On appeal, Robertson initially raised the failure to grant a mistrial as his second Issue. However, he voluntarily abandoned his direct appeal.

Robertson further contends that, following their advice to him, counsel should have done more to ensure that Robertson did not discuss the facts of the case with Dr. McKee. The Court, however, rejects this argument as well. Counsel could not have been deficient in this regard because the trial judge's Order authorizing the evaluation by Dr. McKee did not permit counsel to be present during the evaluation. Here, counsel did all that they could when they gave their advice to Robertson before Dr. McKee's evaluation. Further, the Court finds that there is no probability of a different result but for counsel's alleged error, since Dr. McKee also administered *Miranda* warnings to Robertson before speaking to him. Robertson was, therefore, aware of his right to remain silent but knowingly, intelligently and voluntarily waived it and discussed the facts surrounding the murders with Dr. McKee.⁴⁷

Moreover, while Dr. McKee's testimony was clearly relevant to rebutting Robertson's case in mitigation, Dr. McKee was limited to giving his opinion that Robertson was neither insane nor GBMI at the time of the murders; that he was not psychotic at the time; and giving the reasons for these opinions. Dr. McKee was not permitted to answer the State's questions concerning whether Robertson's behavior was consistent with a layman's understanding of "psychopath." Tr. pp. 3075-78.

Also, the defense experts did not dispute that Robertson was not GBMI. Thus, the trial judge's ruling in this regard was consistent with *Sloan* and *State v. Locklair*, 341, S.C. 352, 363-65, 535 SE2d 420, 426-27 (2000). Finally, the Court finds that the statements attributed to

⁴⁷ Because the trial judge ruled that Dr. McKee could testify concerning the statements Robertson made to him in answering questions related to Robertson's mental health status at the time of the murders, the propriety of his ruling is not properly before this Court. Rather, it could have been challenged on direct appeal, but for Robertson's decision to abandon his appeal.

Robertson by Dr. McKee were cumulative of the testimony of Ms. Cascio. *See* Tr. pp. 3010-31.

Therefore, Robertson has failed to prove prejudice under *Strickland*.

GROUND 10(a)(11)

Robertson further contends that counsel were ineffective because they did not introduce sufficient evidence of the mental health history of the Robertson family. The Court finds that this claim is without merit, and that Robertson has not met his burden of proving either prong for relief under *Strickland*.

It was clear from reviewing the trial transcript that each of the defense's mental health experts – Drs. Pincus, Evans and Morton – relied upon the various records they received. Also, none of these experts testified that he had an insufficient amount of information to reach his opinion as to Robertson's mental illness and drug and alcohol abuse.

Further, counsel presented Skip Meyer as a defense witness. Tr. pp. 2750-2817. Mr. Meyer testified about his counseling of Robertson and his parents. Mr. Meyer testified that the most of his counseling "was done in connections with [Robertson]." Tr. p. 2753, ll. 8-11. He thereafter testified at length concerning his counseling of Robertson and his family. While most of his testimony centered on therapy sessions with Robertson and Terry Robertson and their mental health issues, he did testify about several sessions that involved Earl Robertson, Sr. *See* Tr. pp. 2759-65.

Among the matters covered by the defense in Meyer's testimony, he testified:

- Robertson's dislike of his father because his father was verbally abusive towards him;
- Robertson's report that Earl, Sr.'s parents were planning to reduce the amount of their estates that they would leave to him and increase the amount that they will leave to Robertson and Chip;

- Robertson's manic behavior and the effects of it on his parents;
- The disagreement between Robertson's parents on how lenient to be with him;
- Mental health problems Terry had, which first surfaced in childhood, and Meyer's suspicion that she may have been sexually abused;
- Robertson's efforts to maintain employment, as well as the effects of his manic states on his work (principally, this resulted in his working exceptionally long hours at a time and having impaired judgment of what he could do because of his extremely positive self concept);
- That conflicts within the family seemed to arise when Robertson and Chip got together;
- Earl, Sr.'s frustrations with his children's irresponsible behavior;
- Earl's worry that the family was falling apart and the financial and psychological cost of his children's behavior on him and Terry;
- The anger, embarrassment, shame and humiliation he felt as the result of his children's behavior;
- Earl's feeling that his life had been ruined by Robertson;
- Terry's depression resulting from her belief that "she has bad children;"
- The movement of the Robertson family to Michigan, California and back to South Carolina;
- Terry's statement that the children overwhelm her, and her fear and guilt of not being able to say "no" to them;
- Various problems between Robertson's parents stemming from their relationship as husband and wife – including a horrible fight(s) (which Meyer thought was isolated);
- Suicidal thoughts and superficial suicide "attempts" by Terry;
- Violent behavior of Earl, Sr. toward Chip when the family was on a vacation;
- Obsessive-compulsive behavior and depression by Terry; and

- That Terry had been diagnosed as bipolar – and at times had described visual hallucinations (which may have been caused by medications that she had been taking).

Tr. pp. 2753-89.

Further, Mr. Meyer described Terry as a “very depressed person.” This resulted from her having very strict parents, her mother’s illness, conflicts in the home, the father not being emotionally available, being an only child, and the pressure of the lifestyle she and Earl had lived. Mr. Meyer described Earl as a good person that was troubled by “[w]hat was going on with his family.” Tr. pp. 2789-90. Finally, trial counsel introduced a copy of Mr. Meyer’s notes as Defendant’s Ex. 18. See Tr. pp. 2806-07.⁴⁸

Ms. Cascio testified as the last expert called by the defense. Ms. Cascio gave a detailed social history assessment of Robertson. Tr. pp. 3852-3031. To do the assessment, she “looked at medical and psychological records from all members of the family.” Also, Ms. Cascio interviewed Robertson, and she “examined Earl Robertson’s work documents; some of [Robertson’s] incarceration documents; personal notebooks of Terry Robertson. And I also conducted about 13 interviews with people from a variety of areas in [Robertson’s] life.” Tr. p. 2857.

Ms. Cascio testified that she “found that Jimmy came from a very chaotic home” and there “were a variety of things going on. For example, physical abuse and emotional abuse. And there is definitely mental illness throughout the family.” Tr. p. 2858, ll. 4-8. Ms. Cascio then gave a detailed history of each member of the family. Ms. Cascio described the various

⁴⁸ The State’s cross-examination of Mr. Meyer also elicited further evidence of his counseling of Earl, Sr., and problems Earl, Sr., had with his sons. Tr. pp. 2797-99.

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problems that Terry had within her family as a child, including conflict with mother, Terry's emotional and psychological problems, and Cascio testified that "a variety of indicators ... suggest that Terry was sexually abused as a child." Much of Ms. Cascio's testimony concerning Terry's childhood was corroborated, in her opinion, by excerpts of Skip Meyer's notes. Defendant's Exs. 21-22; Defendant's Ex. 28; Tr. pp. 2858-65; 2882-84.

With respect to Earl, Sr., Ms. Cascio testified that he was very bright but ambitious and "very confrontational." She also testified that, in 1989, Spring Industries decided that he "was not leadership material." Also, many people to whom she spoke described him as "pushy and kind of domineering". Tr. pp. 2865-67.

Ms. Cascio indicated that Robertson's grandmother described him as "a very happy outgoing child although he did have some delayed development." In particular, he was "slow to talk." She indicated that "there seemed to be poor attachment between Jimmy and his parents ... [a]t a very young age." Ms. Cascio explained that children who are unable to form emotional attachments "have a lot of problems later on in life." Usually, they have "difficulty forming relationships because they just don't have a basis for it." Also, they "tend to be mistrustful" of others. They likewise tend to be angry and aggressive and after have self-control problems. Tr. pp. 2867-69.

Ms. Cascio testified that Robertson began banging his head when he was one or two years old, and she explained that this was "often a sign of poor attachment." Tr. p. 2869.⁴⁹ Ms. Cascio further testified that "there is a very strong association between maternal depression," such as that experienced by Terry, and a child's poor attachment because depressed mothers tend

⁴⁹ In her opinion, this is usually seen in children who are raised in institutional settings and orphanages.

to be less responsive to the child's needs and more involved with their own problems. Depressed mothers also do not spend as much time with a child; they use "more negative language," are more hostile, more irritable, and are more harsh or arbitrary in their discipline. Children, however, need consistency. Tr. pp. 2869-73.

Ms. Cascio further testified that she "found indications of physical abuse" with Robertson. These included scars on his back and buttocks which he did not have a memory of receiving. Also, "both children confirmed that they were routinely beaten with a belt several times a week when they were "pre-school and [in] grade school." Further, Robertson said that Earl, Sr., would often beat him with a belt to make him stop banging his head. She likewise relayed other incidents in which Earl, Sr., was physically abuse to Robertson and Chip. One incident with Chip was documented in Skip Meyer's notes, which was introduced as Defendant's Ex. 23. Robertson's pediatric records from 1988 reflected that he was seen because he had been hit with a fist. Tr. pp. 2873-76.

Again, the multiple physical abuses, combined with psychological abuse, tend to create "negative outcomes for the children." Through Ms. Cascio's testimony and the extracts from Mr. Meyer's notes, the defense established that: (1) Terry was afraid of Earl's temper and did not feel like she had done enough to protect her sons; (2) there was a great deal of psychological abuse in the home;⁵⁰ (3) the sons may have witnessed domestic violence by Terry attacking Earl; (4) there was evidence that Chip hit women; (5) Robertson had problems with his memory, which can be an indicator of trauma; and (6) "everyone in the family had a history of mental

⁵⁰ This abuse included degradation and name calling; Terry telling Robertson that she wished he had never been born; and verbal abuse by Terry of both sons.

illness.”⁵¹ Tr. pp. 2876-81. *See also* Defendant’s Ex. 24. All of these factors “set the stage for something to go wrong in adolescence.” Tr. p. 2885, ll. 10-16.

Likewise, counsel introduced three charts (Defendant’s Exs. 25-27), which reflected psychiatric visits by the victims. These charts showed that Terry was seen in therapy roughly 170 times between 1995 and 1997, with a variety of problems, including hallucinations, self-mutilation, obsessive-compulsive disorder and suicide attempts. Tr. pp. 2881-86.

In addition to Robertson’s problems that she had previously discussed, Ms. Cascio testified that Robertson “was often an outcast in school.” Other students teased him and did not quickly accept him. By the ninth grade, he was suicidal. He started using illegal drugs while he was at Georgia Tech University and was “very suicidal” at that time as well. He also started engaging in behavior that was consistent with mania, such as spending large sums of money and gambling. Ms. Cascio also discussed Dr. McMeekin’s 1994 diagnosis that he was depressed and his involuntary commitment to William S. Hall, following the 1995 D.U.I. At that time, he was diagnosed as bipolar, alcohol dependent and “having mental illness with severe family strife. Also, he did not have many friends. Ms. Cascio testified that “all of these factors [discussed by her], I believe, led him to start relying more heavily upon drugs which then in turn led to what happened later on.” Tr. pp. 2886-88. She later explained on cross-examination that, in light of the various factors she found in Robertson’s life, “he might have felt [at the time of the murders] that [violence] was [his only alternative]” See Tr. pp. 2949-52.

⁵¹ Terry was diagnosed as having severe depression, bipolar disorder and obsessive-compulsive disorder. Earl was diagnosed as having depression, panic disorder and ADD. Robertson had bipolar disorder and ADD; and Chip had ADD and possibly bipolar disorder. Tr. pp. 2881-82.

Ms. Cascio further testified that Robertson and Chip had a "close relationship," and they often did things together, including criminal activity. She testified that Chip had similar problems with substance abuse, and he had experienced physical and psychological abuse. She also testified that Chip was incarcerated at the time of Robertson's trial. Tr. pp. 2888-90. Finally, the defense introduced several excerpts from Terry's "notebook," which were contained in Mr. Meyer's notes; and Ms. Cascio testified to the substance of the extracts. Tr. pp. 2892-95; Defendant's Exs. 30-32.

As discussed in Ground 10(a)(1), *supra*, Mr. Hancock testified that the defense attempted to get all of the records concerning Robertson that they could locate. They got all of Robertson's school records which they could locate (including records from California); the records from his Youthful Offender Act conviction for burglary; Robertson's records from an involuntary commitment to the Willis S. Hall Psychiatric Institution; Robertson's SCDC records; records from Kanawha Insurance Company; records from Piedmont Mental Health Associates;⁵² and the Robertson family counseling records from the Carolina Counseling Center, where Robertson and his family were treated by Dr. McMeekin and family and marriage counselor "Skip" Meyer, Jr. It was Mr. Hancock's impression that the defense obtained all of Dr. McMeekin's records through Mr. Meyer. Counsel were assisted in their efforts to garner records by their social worker, Ms. Cascio.

Mr. Hancock testified that the parents began therapy after their sons started acting out. He was aware that Dr. McMeekin was treating the family and that Skip Meyer was doing the counseling. Although he could not remember why he did not extensively examine Mr. Meyer

⁵² The State introduced two Orders requiring the production of records from Kanawha Insurance Company and Piedmont Metal Health Associates as Respondent's Exhibits 3 and 4, respectively.

about Earl, Sr.'s treatment, he recalled that Earl was treated for a shorter period of time and later than the rest of the family. Also, much of the records from Meyer related to Terry and her problems. Apart from the matters testified to by Ms. Cascio, Mr. Hancock indicated that the defense did not discover any evidence of physical abuse by Earl.

Both attorneys testified about their other steps to develop a mental health defense, and both were clear that they provided each of their experts with the records in their possession; they never withheld any records from their experts; and none of their experts ever claimed that he or she could not reach an opinion without additional records or information. Robertson did not present any expert testimony in support of this allegation, although he did introduce additional mental health records as Applicant's Exs. 1-3.

Based upon the present record, the Court finds that Robertson has not established either deficient performance or resulting prejudice under *Strickland*. First, the Court finds that Robertson's attorneys – with the assistance of their social worker – made an objectively reasonable investigation into the mental health history of both Robertson and his family, as required by *Strickland*, 466 U.S. at 690-91. *See also Wiggins*, 539 U.S. at 521-22. The Court likewise finds that counsel made an objectively reasonable presentation of this evidence.

While trial counsel could have presented the jury with a more complete picture of the family's mental health history, the presentation made was quite extensive. Further, the Court finds that it was reasonable for them to rely upon their experts to develop and focus upon the most salient aspects of the mental health history. The principal witness that counsel chose to

develop this information through was Ms. Cascio.⁵³ The Court does not find any reason to believe that the decision to present no more of the family's mental health history than counsel presented was deficient performance.

The Court also finds that Robertson has failed to prove any prejudice with respect to the current allegation. The only credible evidence is that all of the records counsel had were provided to their experts, and that no expert complained that he or she lacked sufficient records upon which to reach an opinion. The Court further finds that Applicant's Exs. 1-3 do not provide it with a sufficient basis to conclude that Robertson has proved prejudice under *Strickland*.⁵⁴ Moreover, there was overwhelming evidence of Robertson's guilt for both murders and proof of the statutory aggravating circumstances.

Also, the evidence presented at the PCR hearing does not support any additional statutory or non-statutory mitigating circumstance apart from those which were submitted to the jury, as the result of the evidence presented by trial counsel. See § 16-3-20(c)(b) (1) – (2), (6) and (7). Therefore, the Court finds that Robertson has not established that “there is a reasonable probability that ... the sentencer ... [can] conclude[] that the balance of aggravating and mitigating circumstances [do] not warrant death.” *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537.

GROUND 10(a)(12)

⁵³ Therefore, the Court finds that the present allegation and the ineffectiveness claims relating to Ms. Cascio are intertwined.

⁵⁴ One of the primary matters focused upon by Robertson at this hearing was that the notes for some sessions in Applicant's Exs. 1-3 did not reflect any complaints by the victims centered on Robertson or Chip. In that regard, the Court finds that this position is not only inconsistent with the recollection of trial counsel and the extensive trial testimony discussed *supra*, it is also inconsistent with Robertson's own testimony before this Court.

Robertson's remaining allegation is that trial counsel were ineffective for presenting Ms. Cascio as an expert witness. Robertson raised several issues about counsel's decision to employ Ms. Cascio at the PCR hearing. Aside from her lack of experience in testifying, his principal complaints concerned the information elicited by the State on its cross-examination of her about notes of her conversations with Robertson. It was Robertson's position that the cross-examination by the State should have been reasonably foreseeable to counsel. For the following reasons, the Court finds that each of his claims relating to counsel's decision to call Ms. Cascio are without merit.

The State began its cross-examination of Ms. Cascio by focusing upon remarks Robertson made to her during a November 30, 1998, interview about other bad acts and the family social history. Robertson contends that the prosecution was able to elicit evidence concerning prior bad acts, such as stalking (*e.g.*, Tr. pp. 3000-3003); that his parents were "clueless" about his drug abuse (Tr. p. 2962); that he had a bad work history; that he stole his father's credit cards; that he and his father were, at one point, about to have a confrontation involving the use of knives; Robertson did not like college, it was forced upon him and he rebelled against it; "he [my father] put the work ethic in me [but] wanted to take it out of me by sending me to college;" that his parents' ideal was for him to attend college from eighteen to twenty-two and marry and have children by age twenty-five; by the time his parents realized that he would not do the great things they wanted him to do, it was too late; he failed out of college to prove a point; "what hurt most was his [father's] image;" "she (his mother) always tried to look out for me;" "she used to subsidize my income straight out of her pocket;" "love was financial in

terms to [his father];" and other comments concerning the social history, such as the turbulent relationship he had with Earl, Sr. Tr. pp. 2955-70; 2979-3008.

Robertson also complains of the damage to the defense's case by the State's cross-examination regarding admissions he made to Ms. Cascio concerning the facts of the crime and his activities around the time of the murder, including admissions that:

- he had taken 250-280 mg of Ritalin over the course of the previous evening and the morning of the murders;
- Meredith Moon and Erin Savage were at the residence for approximately two hours that morning;
- he and Moon snorted 40 mgs. of Ritalin at that time;
- he continued to use Ritalin after they left;
- he talked to Chip for about two hours about coming home for Thanksgiving, and that Chip was dropping out of school;
- he later called Moon and spoke to her on two or three occasions;
- he asked Moon to give him \$ 75.00 to get Chip home and, although she wouldn't give him money, she agreed to drive up and get Chip;
- Moon was infatuated with him and would have done anything he asked;
- After Moon came to his house, they began talking about the problems surrounding Chip coming home and "somehow it led to I'm going to do it;"
- he discussed which bat to use;
- he decided not to use the wooden one because it was autographed and he did not want to ruin it;
- he condensed two bottles of Tilex;
- he sat in his room and waited for his father to get in the shower before killing his mother because there would be noise;
- he took the phone off of the hook and laid a knife in the hallway in case his father came in;
- he went in the bedroom and started struggling with his mother, who began screaming for his father;
- "it was getting at me to hear her screaming;"
- he was "in a rage like a maniac;"
- he came downstairs and said "one down, one to go;"
- he laid the bat at the top of the stairs, sat and waited with the hammer "like I was standing on the other side of myself watching me;"
- it was "like someone else committing the crime and I was watching;"
- he sprayed Tilex in his father's eyes and buried the hammer in his head;
- his father "put up a fight with the hammer stuck in his head;"

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- eventually, his father fell to the ground and Petitioner hit him 200 times with the hammer and bat;
- he said that "22 years of hatred came out;"
- it was "overkill" and he "went on and on and on and on;"
- he then went into the bedroom and checked on his mother;
- he hit his mother in the head with the hammer to make sure that she was dead;
- Moon thought he was going to kill her;
- he later heard a noise upstairs and it was his father breathing into the carpet;
- he wondered "how is he still breathing;"
- he "went to find the drill to end the matter;"
- he then took the bat upstairs to beat his father again and he kicked him with his toe to make sure he was dead;
- he cleaned up, took the money and car keys and packed stuff to dump;
- he said that "Meredith's testimony wasn't good enough by itself;"
- he broke the window downstairs to make it look like a robbery;
- a man pulled up across the street and he waived then got in car and left;
- he explained how he used his father's credit card, and how he stopped and bought Neosporin for his finger;
- he was going to get Chip and bring him to South Carolina, where they would discover his parents;
- no one would notice that his parents were missing;
- what he had done would not be a surprise to his brother;
- he called home and realized that someone had found the bodies and put the phone back on the hook;
- he thought he was "too smart to let this happen," meaning getting caught;
- Meredith was "running her mouth" but he never confessed; and
- he killed his mother because he couldn't live with her knowing that he killed his father.

Tr. pp. 3009-25.

Finally, the Court would note that, before the State began cross-examining Ms. Cascio about Robertson's admissions related to the murders, she was specifically asked whether she took Robertson's statements about the crime into consideration informing her evaluation of him. Ms. Cascio replied, "I was looking at early childhood history that could have led him to that point;" and she agreed that she factored Robertson's statements into her assessment. Tr. p. 3010, ll. 10-22.

Mr. Hancock testified that Ms. Drucie Glass and the Center for Capital Litigation, which specialized in providing assistance to defense lawyers trying capital cases, recommended that the defense hire Ms. Cascio as a social worker and they hired her. Counsel were well aware of her limited experience and that she had never testified as a forensic social worker. *See Applicant's Ex. 4 (curriculum vitae for Toni A. Cascio), Tr. pp. 2852-55.* However, another social worker with experience (Ms. Glass) and the Center for Capital Litigation had recommended Ms. Cascio. Also, counsel had met with Ms. Cascio a number of times over the course of a year to prepare her testimony, and Mr. Hancock did not report any problems in terms of her gathering information for the social history of Robertson. Nor were counsel able to locate a more experienced social worker.

It was Mr. Hancock's recollection that counsel objected to production of Ms. Cascio's notes, which contained a number of admissions by Robertson with which Ms. Cascio was cross-examined by the State at trial. Both attorneys, however, made the joint decision to present her as a witness even though they were aware that her notes would have to be disclosed to the prosecution because counsel felt that she was a necessary part of the defense's case in mitigation. Mr. Hancock was not happy with the State's cross-examination of Ms. Cascio and felt that she hurt the defense. However, he testified that she had provided the jury with a good deal of mitigating evidence on direct examination.⁵⁵

⁵⁵ Mr. Pope characterized Ms. Cascio as the one defense expert who could pull together the various matters testified to by the other experts for the jury's benefit.

As discussed, Mr. Boyd mistakenly thought that Mr. Hancock had already hired the defense experts before he was appointed.⁵⁶ However, Mr. Boyd testified that he did not object to what had been done with regard to the experts. Ms. Cascio was hired to investigate Robertson's mental health history and his family history. In Mr. Boyd's estimation, it was important to develop Robertson's background and mental health problems in order to find a reason for what had happened. Mr. Boyd also testified that the defense received a copy of Ms. Cascio's report shortly before trial; and Robertson introduced Applicant's Ex. 6, which is a March 1, 1999 letter from Ms. Cascio to Mr. Hancock providing counsel with a copy of the preliminary report.

Mr. Boyd further testified that Ms. Cascio was the last defense expert who testified. He felt that all of the other defense experts were good witnesses. Although Ms. Cascio was able to provide beneficial information to the jury on direct examination, Mr. Boyd felt that this benefit was overshadowed by the damage resulting from the State's cross-examination of her.

Mr. Boyd did not recall whether he was aware, at the time of the trial, that Ms. Cascio had never testified before Robertson's trial. However, Mr. Boyd noted that sometimes it is not a good idea to hire someone with previous experience in testifying and this would not be his main reason for not using an expert witness. As with Mr. Hancock, Mr. Boyd did not recall consenting to the disclosure of Ms. Cascio's notes (Applicant's Ex. 7). Likewise, Mr. Boyd did not recall when he became aware of the notes;⁵⁷ but he testified that he would have reviewed them before disclosing them to the State. Mr. Boyd testified that he met with Ms. Cascio on

⁵⁶ Both the Order appointing Mr. Hancock and the Order appointing Mr. Boyd were filed in the York County Clerk of Court's Office on the same date. See Respondent's Exs. 1-2.

⁵⁷ Mr. Boyd's recollection was that he became aware of the admissions in the notes either shortly before or during the trial, and he did not recall any conversations with Ms. Cascio between December 1998 (the date of her last interview with Robertson) and March 1999, but admitted that Ms. Cascio may have told him about the notes.

more than two occasions and that co-counsel was not present on at least one occasion. Counsel corroborated that he and co-counsel decided to use her as a witness at trial, even after they learned that they would have to disclose her notes, because of the importance of her testimony to the defense.

Robertson testified that counsel had advised him to fully cooperate, and be honest with the defense experts, and he did so.

A. Cascio's lack of experience.

Robertson's first complaint is that counsel were ineffective for employing Ms. Cascio because she had never testified before his trial. The Court rejects this allegation. In *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), the Supreme Court held that under some circumstances, a state must assure an indigent defendant "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."

However, Robertson did not have a constitutional right to insist on the appointment of any particular expert. See *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985); *Walton v. Angelone*, 321 F.3d 442, 464 (4th Cir. 2003); *Wilson v. Greene*, 155 F.3d 396, 401-02 (4th Cir. 1998). Also, "[t]he Constitution does not entitle a criminal defendant to the effective assistance of an expert witness." *Wilson*, 155 F.3d at 401; see also *Joseph v. Angelone*, 184 F.3d 320, 327 (4th Cir. 1999); *Pruett v. Thompson*, 996 F.2d 1560, 1573 n.12 (4th Cir.1993); *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992); *Waye v. Murray*, 884 F.2d 765, 766-67 (4th Cir. 1989) (per curiam), cert. denied, 492 U.S. 936 (1989).⁵⁸

⁵⁸ Even if this Court were to conclude that such a right exists under the Constitution, it would be prohibited by *Teague v. Lane*, 489 U.S. 288, 311-13 (1989), from applying the rule here. See *Fisher v. Angelone*, 163 F.3d at 853. See also *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167,

Further, even though *Ake* refers to an “appropriate” evaluation, this Court finds that it is doubtful “that the Due Process Clause prescribes a malpractice standard for a court appointed psychiatrist's performance. Rather, the decision in *Ake* reflects primarily a concern with ensuring a defendant access to a psychiatrist or psychologist, not with guaranteeing a particular substantive result.” *Wilson*, 155 F.3d at 401. Yet, “[e]ven if *Ake* 's use of the term ‘appropriate’ suggests that an examination must satisfy some minimal level of professional competence,” the Court finds that Ms. Cascio’s met that standard here. *See Wilson*, 155 F.3d at 402.

The Court finds that Robertson cannot meet his burden of proving deficient performance by merely relying on the fact Ms. Cascio had not testified before her testimony in Robertson’s case or was otherwise inexperienced. The Court finds that experts are not advocates. Rather, they present medical, technical, scientific or other opinions related to their field of expertise. Nor is Robertson correct in asserting that it cannot be a reasonable under *Strickland* for counsel to employ an expert who is qualified in his or her field of expertise but legally inexperienced.

The Court finds that there are both advantages and disadvantages to employing experienced expert witnesses. Some expert witnesses, who have testified in numerous death penalty cases, are open to effective cross-examination by the State about the biases and prejudices that the witnesses bring into a trial of this nature. On the other hand, an expert who does not have a “track record” may not be subject to similar impeachment.

178 (1990) (“In order to ensure the uniform application of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights, we have consistently required that state courts adhere to our retroactivity decisions”); *Gibson v. State*, 355 S.C. 429, 586 S.E.2d 119 (2003) (applying *Teague* to determine whether *Sandstrom v. Montana*, 442 U.S. 510 (1979), should be applied retroactively on collateral review).

Moreover, if Robertson's reasoning is followed to its logical conclusion, then counsel could not employ any social worker (or other expert), who had not previously testified in capital cases. This is an unworkable rule, and the Court finds that it is not required by the Constitution. Indeed, the United States Supreme Court rejected a similar claim in the context of the inmate's ineffective assistance of counsel claim in *Cronic*, 466 U.S. 648. The Court in *Cronic* refused to apply a presumption of prejudice to the representation by a young, inexperienced attorney whose principal practice was in real estate, and who was participating in his first jury trial. In doing so, the Court observed that "[e]very experienced criminal defense attorney once tried his first criminal case." *Cronic* 466 U.S. at 665.

Even assuming *arguendo* that Robertson had established that counsel were ineffective for hiring Ms. Cascio based solely upon her lack of experience, the Court finds that Robertson has failed to prove any prejudice because he did not present a social worker or any other evidence of mitigating information that a more experienced social worker would have found which was not discovered by Ms. Cascio. In the absence of evidence to support any additional statutory or non-statutory mitigating circumstance(s), apart from those which were submitted to the jury as the result of the evidence presented by trial counsel (*see* § 16-3-20(c)(b) (1) – (2), (6) and (7)) the Court finds that Robertson has not established that "there is a reasonable probability that ... the sentencer ... [can] conclude[] that the balance of aggravating and mitigating circumstances [do] not warrant death." *Strickland*, 466 U.S. at 695; *see also Wiggins*, 539 U.S. at 537.

B. Counsel's agreement to provide Ms. Cascio's notes to the State.

Robertson contends that trial counsel were ineffective for agreeing to provide and providing Ms. Cascio's handwritten notes to the prosecution. As discussed, it was Mr.

Hancock's recollection that the defense opposed producing the notes but that the trial judge ordered the defense to produce them.

As discussed, Mr. Hancock recalled that the defense only disclosed the notes after the trial judge ruled that disclosure was required. A review of the pretrial motions hearings reflects that the defense did object to production of any reports of experts under the reciprocal discovery provisions act of Rule 5(b), S.C. R. Crim. P., until such time as the prosecution had fully complied with the defense's request for discovery under Rule 5(a) and until the defense could complete their testimony. The transcript from those proceedings further reflect that the trial judge required reciprocal discovery. *See* 7/20/98 r. pp. 4-20; 2/12/99 Tr. pp. 3-4; 8/16; Tr. pp. 74-78 (9/25/98 hearing); 79-82; 86-87 (11/2/98 hearing); 90-103; 116 (12/4/98 hearing).

Before the state began its cross-examination of Dr. Pincus in the sentencing phase of the trial, Mr. Brackett asked for Dr. Pincus' notes and underlying data. After the trial judge ordered that they be provided, the State requested a break to review those materials, in order to prepare for cross-examination; and the trial judge granted his request. Mr. Brackett then noted that, "for the sake of expediency," that the defense should produce any similar information for "any other experts that are going to testify." The defense did not object, and Mr. Boyd stated that "I thought we took a big box of all that stuff to your office the other day." Tr. pp. 2505-06.

After Dr. Pincus' testimony, the trial judge asked if the State needed "any further help in getting what they are entitled to." (Sic). Mr. Brackett, again, stated that, "if [he] could get all of the information from any expert they have who is going to testify, [he] will have a chance to review the other two over lunch and that will be plenty of time." Tr. pp. 2531. Mr. Hancock stated that the defense was doing everything it could to provide the information. The trial judge

indicated that, if judicial intervention was necessary, he would bring in the experts and Order them to determine whether they were going to testify. In response to the trial judge's inquiry, Mr. Hancock stated that "if we haven't, we will get them, your Honor." When the trial judge asked if Ms. Cascio's notes had been produced, Mr. Hancock said no, and the trial judge stated, "I think they've got a right to have it to cross-examine." Tr. pp. 2532 l. 2 – p. 2533, l. 23.

During an *in camera* break after Dr. Evans had testified, then-Solicitor Pope noted that the State had not yet received Ms. Cascio's underlying data. Mr. Boyd explained that Ms. Cascio had left her notes in Columbia and had gone to get them and bring them to court. Tr. pp. 2604-05.

Ms. Cascio testified the next day. Early in the State's cross-examination of her, Mr. Pope asked for and received a copy of her notes, without objection. Tr. pp. 2897, ll. 1-16.

Rule 705, SCRE, provides that:

The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.⁵⁹

Thus, the Court finds that Rule 705 "permits the cross-examination to require the expert to reveal otherwise inadmissible underlying information before the jury, subject to a Rule 403, SCRE prejudice analysis. See *United States v. A&S Council Oil Co., et al.*, 947 F.2d 1128, 1134 (4th Cir. 1991). See also *State v. Slocumb*, 336 S.C. 619, 821 SE2d 507 (Ct. App. 1999). Moreover, the Court finds that the record demonstrates that the trial judge ordered production of

⁵⁹ The notes to Rule 705 state that "The rule is identical to the federal rule. It differs from former Rule 43(m)(4), SCRCP, and former Rule 24(d), SCRCP, which contained the phrase 'without prior disclosure of' in place of the phrase 'without first testifying to.'"

all notes of the defense experts, for the purposes of the State's cross-examination, and that his ruling is consistent with this Court's construction of Rule 705. In other words, the underlying notes or other data must be produced if the expert witness testifies. Further, this Court would not permit any exception because the purpose of disclosure is to counteract the liberality of the Rule, see *A&S Council Oil*, 947 F.2d at 1134; *United States v. Gillis*, 773 F.2d 549, 553-54 (4th Cir. 1985),⁶⁰ and Ms. Cascio clearly testified that the statements by Robertson pertaining to the murders, as reflected in her notes, was considered by her in arriving at her opinion. Tr. p. 3010, ll. 10-22. Under these circumstances, the Court finds that Robertson cannot show any deficient performance because disclosure of the notes was objectively reasonable under *Strickland*.

C. Counsel's failure to discover Robertson's admissions about the crime in enough time to permit counsel to employ a different social worker.

Robertson contends that counsel was ineffective for failing to discover Robertson's damaging admissions about the crime in enough time to permit counsel to employ a different social worker. The Court, however, finds that Robertson has not proved that trial counsel's performance was deficient in this regard. The only evidence before the Court is that counsel only learned about the notes shortly before trial. However, the Court finds that it was not unreasonable for counsel to fail to anticipate that Ms. Cascio's work on the case would result in her asking Robertson questions concerning the case or for otherwise failing to instruct her as to how to conduct an appropriate social history assessment. To the contrary, the reason counsel employed her as an expert witness was to take advantage of her expertise in the area of

⁶⁰ This construction of Rule 705 appears to be consistent with the changes discussed in the Notes to Rule 708, SCRE. Also, the Court would note that both *A&S Council Oil* and *Gillis* were cited with approval in *Slocumb*, 336 S.C. 619, 821 SE2d 507.

performing a social history. The Court finds that *Strickland* does not require counsel to instruct defense experts on how they should conduct their evaluations in their areas of expertise.

Nor was counsel ineffective in failing to anticipate that Ms. Cascio would seek information from Robertson about the facts of the crime in order to have enough information to formulate her opinion as to the social history, or that he would freely discuss the crime with her.⁶¹ While an attorney can be expected to learn that the client has relayed potentially damaging information to an expert, counsel is not required to anticipate everything that can possibly go wrong in the client's interaction with an expert in the months before a trial.

Further, while Robertson has characterized Ms. Cascio's inquiry into the facts of the case as going beyond the scope of her employment, *i.e.*, to perform a social history assessment of Robertson, the only evidence is Ms. Cascio's contrary testimony that Robertson's admissions relating to the murders were considered by her in formulating her opinion that at the time of the crimes, Robertson might have felt like violence was his only alternative. *See* Tr. pp. 2886-88; 2949-52; 3010, ll. 10-22. Robertson likewise did not present testimony from any social worker that he or she would have been able to work on Robertson's case. In the absence of any testimony that this information is unnecessary or not part of a proper social history in a capital case, the Court finds that Robertson has failed to prove either deficiency or prejudice resulting from counsel's failure to learn of Robertson's admissions earlier in time to hire another social worker or find a suitable alternative to presenting Ms. Cascio as a witness. *See Glover*, 318 S.C. 496, 458 S.E.2d 538. Finally, the Court notes that two of Robertson's mental health witnesses, Dr. Pincus (Tr. p. 2472) and Dr. Evans (Tr. pp. 2545-46) relied upon the information gathered by

⁶¹ In this regard, the Court would note that Robertson's current allegation may have simply resulted from his own decision to discuss the murder freely.

Ms. Cascio, at least in part, in reaching their conclusions about his mental status at the time of the offense. Under the circumstances, the Court finds that Robertson has not proven either deficient performance or prejudice under *Strickland*.

D. Counsel's presentation of Ms. Cascio as a witness.

Robertson contends that it was reasonably foreseeable that the State would engage in the lines of cross-examination discussed above; and, therefore, counsel were ineffective for presenting Ms. Cascio as a witness. The Court rejects this allegation because the Court finds that Robertson has failed to prove any prejudice resulting from the State's cross-examination of her. *See Strickland*, 466 U.S. at 687 ("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," and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed").⁶²

Here, the Court finds that, upon discovering the existence of Ms. Cascio's notes, counsel was faced with the choice of either producing the notes and calling Ms. Cascio as a witness or not presenting her as a witness.⁶³ Moreover, if counsel was going to accomplish the previously determined strategy of having all of the evidence in mitigation tied together for the benefit of the sentencing jury, they had to call her as a witness. Thus, counsel was forced to weigh the benefit

⁶² The Court does not find that Robertson has met his burden of proving that counsel's performance was deficient; and, in light of the facts discussed throughout this allegation, the Court specifically finds that counsel were not deficient. However, the remaining portions of this Order only discuss the lack of prejudice.

⁶³ For the reasons set forth in this section as well as the reasons set forth in connection with the preceding sections of this allegation, the Court rejects Robertson's contention that counsel were ineffective for failing to move *in limine* to bar production of the portion of the notes relating to Robertson's admissions to the crimes. Once the decision to call her was made, the notes had to be produced because the admissions to the murders formed part of the basis of her opinion on Robertson's social history assessment. *See Tr. p. 3010, ll. 10-22.*

to the defense from presenting her as a mitigation witness against the potential harm to the defense resulting from the State's cross-examination of her about the admissions that Robertson had made. In this regard, the Court finds that counsel's decision was much like the decision this Court must make in determining whether there is prejudice under *Strickland*.⁶⁴ After this Court's review of the record, the Court finds that there is no reasonable probability of a different result but for counsel's decision to present Ms. Cascio as a witness.

First, the Court finds that both lines of inquiry at issue in this allegation only took place after the State had already cross-examined Ms. Cascio, at length, about her findings to which she had testified on direct examination. *See* Tr. pp. 2895-2955. Second, Ms. Cascio's testimony was only part of a lengthy case in mitigation, but it served to tie all of the other evidence together. Third, the Court finds that the statements concerning his family's mental health and social history clearly were cumulative to other evidence in the record, including – but not limited to – Ms. Cascio's testimony on direct examination, the testimony concerning his involuntary admission to the William S. Hall Institute, and the testimony of Mr. Meyer.

The record is replete with evidence of the strained, tumultuous and confrontational relationship Robertson had with his parents, especially his father. Much of that history is discussed throughout this Order, and Robertson discussed similar evidence in his PCR testimony. Moreover, the Court finds that this was a proper line of cross-examination. The Court also finds that the State's inquiries concerning evidence of other bad acts was a proper topic for cross-

⁶⁴ In order to make such an assessment, counsel had to look at Moon's testimony, as well as Dr. Sexton's testimony and other evidence presented by the prosecution in both phases of the trial relating to proof of their client's guilt of the murders and the alleged statutory aggravating circumstances. This evidence included the manner in which Robertson committed the murders. Additionally, counsel had to consider that the State was going to be allowed to present Dr. McKee as a reply witness.

examination because it reflected upon Robertson's character. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987) (in the penalty phase, the sole function of the jury is to decide which sentence to impose upon the defendant: either life or death. This determination must be based upon the specific circumstances of the case and the individual characteristics of the defendant). *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979); *see also Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *State v. Skipper*, 285 S.C. 42, 328 S.E.2d 58 (1985), *rev'd. on other grounds.*, 476 U.S. 1 (1986) ("What is essential is that the jury have before it all relevant information about the individual defendant whose fate it must determine") (internal quotes and citation omitted). Further, the trial transcript clearly reflects that counsel objected when the State began cross-examining Ms. Cascio about Robertson's involvement in prior stalking incidents. However, the trial judge overruled the objection and permitted the examination. Also, Ms. Cascio took this information into account in forming her opinion. *E.g.*, Tr. pp. 3000-3003.

Moreover, Robertson cannot show any conceivable prejudice resulting from the sentencing phase jury hearing this information. This evidence of other bad acts was cumulative to evidence of bad acts discussed elsewhere in the Order. It was likewise cumulative to evidence presented by the State that Robertson had previously burglarized his neighbor's home and stole over \$15,000.00 worth of valuables, including a car, blank checks and credit cards, Tr. pp. 2107-20.⁶⁵ Also, the trial judge's sentencing phase charge included a limiting instruction, in which he

⁶⁵ Based upon that crime and his subsequent activities with the credit cards, Robertson was charged with a series of offenses to which he pled guilty. The State introduced the indictments and subsequent sentencing sheets into evidence, as follows: State's Ex. 191, an indictment and sentencing sheet to burglary in the second degree; State's Ex. 192, an indictment for burglary in the first degree and guilty plea and sentencing sheet for burglary in the second degree; State's Ex. 193, an indictment and sentencing sheet for grand larceny; State's Ex. 194, an indictment and sentencing sheet for grand larceny; State's Ex. 195, an indictment and sentencing sheet for

instructed jurors that, before they considered any such evidence, they must first find that the State had proved that Robertson committed any bad acts beyond a reasonable doubt. Even if the jury found that the State had met its burden of proof, the evidence could only be considered as evidence of "his character in general." The evidence could not be considered as proof of any aggravating circumstances. Tr. pp. 3217-18. He charged that prior convictions could only be considered as character evidence as well. Tr. p. 3218.

The trial judge further instructed the jury that, in considering whether to recommend a sentence of death, it must first find the existence of one or more aggravating circumstances beyond a reasonable doubt. He also instructed jurors that they could only consider the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon, larceny with the use of a deadly weapon and physical torture, as well as the aggravating circumstances that the offender committed the murder for himself or another for the purpose of receiving money or a thing of value and that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. Tr. pp. 3203-26. In light of the sentencing phase instructions, the Court finds that the challenged evidence was not prejudicial.

The Court further finds that Robertson was not prejudiced by the State's cross-examination concerning Robertson's admissions concerning the murders because the substance of the various admissions, including the information concerning how he committed the murders, was cumulative to other evidence in the record and already before the sentencing phase jury. His

forgery; State's Ex. 196, an indictment and sentencing sheet for financial transaction card fraud; State's Ex. 197, an indictment and sentencing sheet for financial transaction card fraud. Tr. p. 2119. Robertson gave a statement to the police in which he attributed the crimes to a drug problem. Tr. pp. 2117-19; State's Ex. 190.

co-defendant, Meredith Moon testified in the guilt phase that she met Robertson “[a]bout mid-’95,” when he was dating her friend Erin. They “partied together” and “hung out at his apartment.” She began to get to know him better in the fall of 1997, when they worked together at Dinkins in the food court at Winthrop. Tr. pp. 1575-76.

On the morning of Monday, November 24, 1997, Moon picked up Robertson, and they went to Charlotte, North Carolina, where they shopped. That night, she and another friend went to the Outback Steakhouse and ate. There, she saw her friend Erin, sometime between 11:30 p.m. and 12:30 a.m. on November 25. Later, Erin came by her house, picked her up and the two women went to Erin’s. They “hung out” for several minutes before they went to Robertson’s house. Tr. pp. 1576-78.

When she first went to visit him in the early morning of November 25,⁶⁶ his parents were upstairs and she did not see them. Neither she nor Robertson were drinking but they snorted “[a] couple of lines” of Ritalin. She and Erin eventually left and Erin drove her home after Moon retrieved her purse from Erin’s apartment.⁶⁷ Tr. pp. 1578-81.

Moon could not sleep because of the effects of the Ritalin. Between 3:00 and 3:30 a.m., she received a call from Robertson, who wanted to use Moon’s mother’s credit card so that he could buy a bus or plane ticket for this brother, Chip, and bring Chip home for Thanksgiving.

⁶⁶ By then, she estimated that it was between 12:30 and 1:30 a.m. Erin wanted to show Robertson a pool stick that she had bought as a gift for her boyfriend’s birthday. Tr. p. 1579.

⁶⁷ The Court finds that her testimony is substantially corroborated by the guilt phase testimony of Erin Savage. Savage added that they parked off to the side of the house on the left-hand side of the road, in order not to wake anyone. She and Moon entered the house through the downstairs door leading to the basement. Robertson was “cleaning” when they arrived. Tr. pp. 1537-42.

Moon, however, told him no.⁶⁸ Moon subsequently received another call from Robertson around 5:00 a.m. He told her to come to his house and "bring some traveling clothes." She was under the impression that they were going to Philadelphia to bring Chip home. Tr. pp. 1581-82. After telling her father a lie about where she was headed, she drove to Robertson's home in her Honda Accord. Again, she entered the home through the rear door, where Robertson was waiting for her. Tr. pp. 1582-85.

She sat down on the sofa in the basement, and they talked. During their conversation, Moon saw a note on the coffee table that had a list of things to do.⁶⁹ Also, Robertson revealed his plan to kill his parents. He told her that he was going to wait until his father's alarm clock rang and his father got into the shower. Then, he was going to kill his mother. Moon unsuccessfully tried to talk him out of this plan, but he would not listen. Instead, he told her to put socks on her hands, "take two bottles of Tilex and pour them into one" bottle. Moon did as she was told, and the two snorted Ritalin. She did not know how much they snorted but agreed that it impaired her judgment. Tr. pp. 1584-97; 1623-28; 1644-46.⁷⁰

⁶⁸ Erin had received a call "probably around 3:30" from Robertson. He wanted to know if Moon was there, and Erin said no. He then asked if Moon's father would be home if he called her house, and Erin did not know. Tr. p. 1542.

⁶⁹ This list (State's Ex. 25) had several things listed on it, such as "trash bags" and "need to scrub out the shower for blood." Tr. pp. 1624; 1636. She further testified that, at Robertson's direction, she also later wrote a list of things to do, such as "alarm clock, wipe blood from downstairs doorknob and dispose of yard rake. She stated that these were things Robertson planned to do. Tr. pp. 1636-38; 1643.

⁷⁰ Robertson had previously told her on many occasions that he planned to kill his parents, both when he was sober and when he was drunk. Also, he explained that his motive was the insurance money, which Moon said was "a couple of million" dollars. As discussed in **Ground 10(a)(3)**, *supra*, a number of sentencing phase witnesses testified about similar conversations. Tr. pp. 2155-57; 2163-68; 2177-78; 2187-89; 2202-03; 2219; 2222; 2228. He had also often told Moon that he did not have the same type of freedom as his peers enjoyed in high school to go out, party and do things with his friends. Tr. pp. 1642-43.

Moon testified that Robertson was not always with her throughout the ensuing time, and she did know where he went when he left her.⁷¹ She was alone and sitting on the couch in Robertson's bedroom when she heard the alarm clock ring and the shower start running. "In a couple of minutes," she heard a struggle commence. During the struggle, she heard Terry Robertson screaming for Earl, and saying, "no, Jimmy; no, Jimmy." This lasted for about a minute or so, and she could hear even though she had her hands over her ears. She went outside, smoked a cigarette and returned to Robertson's room. She testified on cross-examination that she did not leave because she was scared. Tr. pp. 1597-99; pp. 1625-27.

Shortly thereafter, she went upstairs at his direction and saw him covered with blood. She went downstairs and, unable to leave through the garage, retrieved a knife from the kitchen and gave it to him. Following his instructions, she went back to his bedroom and sat on the couch. Within minutes, the shower stopped running and she heard a loud thumping noise for about a minute.⁷² Robertson then came downstairs and again was covered in blood. Because "he thought he heard something upstairs," he went back upstairs for about five minutes. Upon his return, he took off all of his clothes and showered. Tr. pp. 1599-1602; p. 1616.

Once he had showered, he put the bloody clothes in a garbage bag that was in front of the fireplace. He also placed other items in the bag, but Moon did not see what they were.⁷³ By now, it was between 7:30 and 8:00 a.m. Again following his instructions, Moon grabbed the bag and they went outside through the downstairs door, which he then broke with the end of a rake.

⁷¹ In her estimation, "he was a little more hyper, but he was acting pretty much the way he always does." Tr. 1596.

⁷² She said that the noise sounded "like a hand beating on a pillow." Tr. p. 1601.

⁷³ She did, however, remember seeing Earl's wallet and Terry's purse on the pool table in the basement; and she saw Robertson take Earl's credit card from the wallet. Tr. pp. 1615-16; 1635.

Next, they walked up to the driveway and she put the bag in the trunk of a red Mazda.⁷⁴ They waved to a neighbor who saw them. Tr. pp. 1602-04; pp. 1615-16.⁷⁵

After the car was loaded, they got on I-77 and headed north. They stopped at the Peach stand in Fort Mill, where they bought gasoline, as well as Neosporin and some band-aids because Robertson had "cut his finger pretty badly" when he broke the glass on the window to the back door.⁷⁶ They used Earl's credit card to pay for these items. Tr. pp. 1604-06. Also, Moon called Savage and told her that she was on her way to Philadelphia. Tr. pp. 1542-43; 1605-06.⁷⁷ Following this stop, they got back onto I-77 North and drove until they reached I-85 North. They then drove until they reached I-95 North and headed to Philadelphia.⁷⁸ Tr. pp. 1606-07.

During their ten hour trip to Philadelphia, Robertson repeatedly said that his brother was going to be proud of him, and he told Moon that he had broken off a knife blade in his mother's neck during the course killing her. He said that he was glad that it was over, and that he was going to use the insurance money to buy a house on the lake and renovate a local club. Finally, he told her the plan was to pick up Chip, return home, discover the bodies and call 911. Tr. pp. 1609-16; pp. 1632-33; pp. 1641-42.

Also, they stopped at a rest area in Virginia and at a rest area called the Chesapeake House in Maryland. While at the Chesapeake House, Robertson got the garbage bag containing

⁷⁴ Another witness testified that the Mazda was registered to Chip. Tr. p. 1409.

⁷⁵ This neighbor was Wayne Langley, Sr., and he corroborated this portion of Moon's testimony. Tr. pp. 1423-28.

⁷⁶ Photographs taken after Robertson's arrest reflect that he his index finger had abrasions and injuries, and he had an abrasion on his elbow. Tr. pp. 1486-88; State's Ex. 138.

⁷⁷ Glenda Johnson, the cashier at the Peach Stand corroborated their stop at the store, as did a receipt for their purchases (State's Ex. 90), a surveillance videotape from the store (State's Ex. 89) and still photographs from the tape (State's Exs. 123-124). Tr. pp. 1428-35; 1438-42.

⁷⁸ They took turns driving. At some point, they stopped at a rest area, where Robertson telephoned work and told his employer that he would not be coming to work. Tr. p. 1606.

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the bloody clothes and other items out of the trunk, and he threw it in a dumpster. They eventually went on to Philadelphia and were arrested outside of Chip's apartment. Tr. pp. 1607-15; 1632-33; 1641-42.

Based upon information provided by Moon, law enforcement officers from other jurisdictions located a credit card receipt for the purchase of gasoline on Earl's credit card at a Shell station in Lady Smith, Virginia (State's Ex. 91), and officers recovered the garbage bag and its contents from a dumpster at the Chesapeake House exit off I-95 in Maryland. Among the items in the bag were a beach towel; a gray t-shirt intertwined with a maroon sweatshirt; a small roll of toilet paper; a white t-shirt; a pair of yellow Union Bay pants; two prescription bottles of Ritalin with Chip Robertson's name on them; the Eaton aluminum baseball bat and the Craftsman claw hammer used by Robertson on his parents; a bottle of Zydol dry powder; a kitchen towel; a serrated, wooden handled knife; a file with a wooden handle and a scalpel with a black plastic handle; a pair of moccasins; two check receipts with the name of Robertson on them; check numbers 5219 and 5220; a check receipt and check number 6111, with the name Robertson on it; a kitchen hand towel. Tr. pp. 1442-78; 1530-31.

Subsequent to Robertson's arrest in Philadelphia, an officer from the University of Pennsylvania Police Department recovered Robertson's wallet (State's Ex. 88) from Robertson's back pocket. Tr. pp. 1468-73. Inside the wallet, the officer found a South Carolina identification card with Robertson's name on it (State's Ex. 88.1); a NationsBank Visa card in Earl Sr.'s name (State's Ex. 88.2); and a receipt from the Peach Stand (State's Ex. 88.3). Tr. pp. 1478-80.

The investigation at the crime scene revealed that the back door was open and the glass in the window had been broken, in the condition that Moon described, a yard rake with a broken

handle was found in Robertson's back yard. Subsequent testing by SLED's trace evidence department revealed that a smear on the rake handle was consistent with paint on the rear door. Tr. pp. 1347; 1657-59; 1748-51.

Inside the house, there was broken glass on the floor near the back door. Earl was found, clad only in his underwear, in a hallway at the top of the stairs. He was lying face down in a large pool of blood, and his hands were underneath his body. There was blood "all about the upper portion of the staircase" and in the hallway. Terry was found just to the right of the bed in the master bedroom. The sheets were pulled on top of her. Both "multiple wounds" and blood "all over the bed" were clearly present. A knife with a broken tip was found in the bed and the tip of the knife was found under Terry. A towel with blood on it (State's Ex. 13) was found under the couch downstairs. Tr. pp. 1354-55; 1397-1400; 1659-66; 1675-77; 1689; 1700; 1710-11; 1715-16.

On Earl's underwear, SLED Agent Bret Baker, an expert witness in latent prints and crime scene analysis, found what appeared to be an impression made by the heel of a shoe of some other object after the other had come into contact with blood. See State's Ex. 3.1. However, the impression was "too partial for him to render a meaningful conclusion." Tr. pp. 1679-80. An impression on a floral sheet found near Earl's body, similar to the one found on his underwear, was consistent with the fabric weave of several pairs of socks retrieved from the dumpster in Maryland. Tr. pp. 1691-95. Likewise, the top fitted sheet off of Terry's bed had impressions which were consistent with the fabric weave of three of the socks found in the dumpster in Maryland. Tr. pp. 1700-03. Earl's wallet was found at the end of the hallway, and

Terry's purse — with the "contents somewhat hanging out" was found in the bedroom. Tr. pp. 1707-09.

Downstairs, Agent Baker found a note in the kitchen, in which Robertson told his parents that he had "gone to get Chip in his car. Sorry, but he needs me right now. Love, Jim." (State's Ex. 24). His right palm print was on the note. Agent Baker found a pad with a "to do" list (State's Ex. 25) from a table in the basement. Subsequent handwriting analysis revealed that Robertson wrote State's Ex. 24.

Agent Baker gave blood spatter opinion evidence in the sentencing phase, which he supported with photographs (State's Exs. 206-37) and a videotape (State's Ex. 279).⁷⁹ He testified that the blood spatter patters he found in the hallway were indicative of a beating and he opined that Earl had been hit at least four times with a circular, long, cylindrical object. Most of the blood spatter was 18-24" from the floor, indicating that Earl was on the floor throughout most of the beating. Also, he found a piece of brain matter and skull. He likewise gave opinion evidence concerning the blood spatter found in the bedroom around Terry. He found transfer blood on the purse and a blood smear on a Tilex bottle at the top of the stairs, near Earl's body. He also testified, in both phases of the trial that he could smell the odor of Tilex in the hallway. Tr. pp. 2379-83; 2386-2415.

In a search of the red Mazda conducted pursuant to a search warrant, Tr. pp. 1485-86; 1496-98; 1653, Agent Baker collected a number of items. Of particular relevance were a receipt from a Shell station in Ladysmith, Virginia; a Fred Pryor seminar manual with a list written on the back of it; check number 5233, on Earl and Terry Robertson's account (and a duplicate); a

⁷⁹ The jurors were not shown the victims on this video.

check on Earl and Terry's account, number 5221 (and a duplicate) which "was partially written out beginning with" Robertson's name and the date November 10, and both Moon's and Robertson's fingerprints. Tr. pp. 1726-32. Subsequent handwriting analysis revealed that Robertson wrote the note on the Fred Pryor manual. Tr. pp. 1820-24.⁸⁰

Other testimony showed that three Caucasian head hairs recovered at autopsy from Earl's right hand were consistent with his hair, as were numerous grey and brown Caucasian head hairs recovered from the upstairs bathroom. Numerous brown Caucasian head hairs recovered from the claw hammer (State's Ex. 64) were consistent with either Terry or Earl. Moreover, a number of Caucasian head hair fragments recovered from the socks retrieved from the dumpster were similar to those of the victims, and they could not be eliminated as the source of those hairs. However, the fragments were too small to make further analysis of them. Tr. pp. 1751-56; 1758-59.

Restriction Fragment Length Polymorphism (RFLP) DNA analysis was performed on a number of items recovered in the case. Cuttings from one of the white socks and the yellow Union Bay pants retrieved from the dumpster in Maryland matched Earl's DNA. The probability of selecting an unrelated person at random having a DNA profile matching the DNA on these items is one in 35,000,000,000 blacks and "one in four point seventy billion caucasians." Blood found on the Tilex bottle and a cutting from another white sock found in the dumpster also matched Earl's DNA. The DNA found on cuttings from the sheet, a swab of the purse strap, a swab from the end of the knife blade, a cutting from the Union Bay pants, cuttings from two socks retrieved from the dumpster and a cutting from the kitchen towel found in the dumpster, all

⁸⁰ Handwriting analysis also linked Robertson to a check seized from the dumpster (State's Ex. 85). Tr. pp. 1824-25.

matched Terry's DNA profile. The probability of selecting an unrelated person at random with DNA profile matching the DNA on those items is approximately "one in one hundred and eighty-eight billion blacks and one in five point five trillion caucasians." Tr. pp. 1830-37; 1839-51; State's Ex. 189 (RFLP results work sheet); State's Ex. 187 (report of DNA expert).

DNA from stains found on the green pillowcase and a white pillow cover also matched Earl's DNA; and the probability of selecting someone at random with a matching DNA profile is approximately "one in one point nine trillion blacks and one in one hundred and ninety billion caucasians." The DNA profile from a stain on the "low end" of the claw hammer was consistent with either Earl or Robertson's DNA, which was "not uncommon in this case because the suspect.... is the sons of the victims." The DNA profile of a cutting from a beige sock retrieved from the dumpster and a stain found on the tip of the bat was consistent with being a mixture of different individuals, and neither Earl, Terry nor Robertson could be eliminated as the source of these stains. However, Moon was eliminated as a contributor. Tr. pp. 1851-57; State's Exs. 186-187.

Dr. Joel Sexton, the forensic pathologist who performed the autopsies on Terry and Earl Robertson, testified at length in both phases of the trial about his findings. His sentencing phase testimony involved opinion evidence, relevant to the statutory aggravating circumstance of physical torture, concerning whether the victims were conscious throughout the attacks, whether they may have suffered pain and whether any of the knife wounds were deliberately inflicted after the victim's were immobilized. Tr. pp. 1784-1808; 2249-2302.

His sentencing phase findings as to Terry Robertson were that she had three pairs of hammer tine marks on the left side of her head, where most of her injuries were located. Tr. p.

2277, ll. 3-8. There were also three deep lacerations on her back associated with hammer tines (Tr. p. 2278, ll. 8-16) and a tine mark on her shoulder. Tr. p. 2281, ll. 22-23. An injury to the back of her right hand was caused either by the tines or a knife. Tr. p. 2288, ll. 6-10.

Dr. Sexton also found injuries that were consistent with the lateral edge of a hammer. There were two such lacerations on the left side of Terry's head (Tr. p. 2277, ll. 9-14), one on the back of her neck (Tr. p. 2278, ll. 22-24) and another on the side of her head. Tr. p. 2278, l. 25 – p. 2279, l. 1. Additionally, he found injuries consistent with knife wounds. One was on the back of Terri's neck (Tr. p. 2279, l. 25 – p. 2280, l. 6); three lacerations were found on the front of her shoulder (Tr. p. 2280, ll. 23-24); a "very shallow wound" across her wrist was found that "runs parallel to a much deeper incised wound" (Tr. p. 2284, ll. 3-5); there were four cuts on the left forearm (Tr. p. 2285, ll. 17-25); one on the back of her left wrist (Tr. p. 2286, ll. 22-24); three stab wounds in her lower right back (Tr. p. 2288, ll. 25-p. 2289, l. 12);⁸¹ a cut across the left cheek and jaw (Tr. p. 2291, ll. 9-7); multiple cuts on her neck (Tr. p. 2291, l. 10); and a "mutilating injury" across the right side of her face. Tr. p. 2292, ll. 14-19. Dr. Sexton characterized a number of the knife wounds as "deliberate" and opined that they were inflicted after Terry was immobilized or no longer moving. Some were inflicted after her heart had stopped. Tr. p. 2284, l. 17 – p. 2285, l. 14.

The various injuries Dr. Sexton found on Terry were all detailed in diagrams which were introduced as State's Ex. 267. Dr. Sexton opined that most of the knife wounds were perimortem; and he described them as "superficial" because they did not cause her death. The fatal wounds were "the ones that are in the left temporal region where there were multiple

⁸¹ One wound was close to "an actually impacted the spine. This wound was only 2¼." Two did not enter the abdominal cavity but only went about "four inches into the soft tissue of the back."

fractures in the skull." This included a "pair of marks" on the left ear and two more above the left ear, as well as "deeper lacerations that extend around to the back side and had [multiple fractures] underlying them." Tr. pp. 2294-96; State's Ex. 268.

Dr. Sexton gave similar testimony regarding the injuries that he found on Earl Robertson's body. He testified that he found a number of hammer tines injuries. He found one penetrating on the head (Tr. p. 2258, ll. 14-25); two pairs of injuries on the left side of the head (Tr. p. 2259, ll. 20-24); and tines marks on the temple (which actually could have been caused by "the blunt edge of the hammer turned sideways") that pinched part of the ear off (Tr. p. 2260, ll. 6-12). He found similar injuries on the right shoulder (Tr. p. 2262, ll. 11-19); the right side of Earl's neck (Tr. p. 226358, ll. 13-15); on the back of Earl's left hand (Tr. p. 2265, ll. 11-215); and on the back of Earl's right hand. Tr. p. 2265, ll. 18-23.

Dr. Sexton further testified that he found two linear abrasions consistent with the baseball bat on the top of the spine (Tr. p. 2253, ll. 22-24); one on the left side of Earl's back (Tr. p. 2254, ll. 7-10); and one on the upper right back. Tr. p. 2254, ll. 21-22. Dr. Sexton likewise found another injury consistent with the hammer on Earl's ear. Tr. p. 2260, ll. 7-11. There was a stab wound, consistent with being caused by a knife, on Earl's hand (Tr. p. 2252, l. 17); a cut from a knife or other sharp object on the right back side of Earl's neck (Tr. p. 2252, ll. 18-20); a perimortem knife injury "just above the left knee" (Tr. p. 2264, ll. 3-9); and another injury on the ride side of the neck. Tr. p. 2263, ll. 15-16.

As with the injuries to Terry, Dr. Sexton utilized several diagrams (State's Ex. 267) to illustrate Earl's various injuries. Again, he indicated that the knife wounds were superficial because they were not fatal. However, many would have been painful. Tr. pp. 2269-72; State's

Ex. 267. He further testified that the head injuries would not have caused immediate unconsciousness or immediate death. Also, the blow that "caused the most damage" and was the most likely cause of death was the one on the top of the head, which he testified was consistent with a bat. Tr. pp. 2274-76; State's Ex. 267.

After reviewing the graphic nature of Dr. Sexton's testimony, it is clear that he was able to both identify the many different blows and show these injuries to the jury through pictures and diagrams. When this testimony is viewed in combination with Moon's testimony, the DNA evidence and other forensic evidence discussed above, the Court finds that the sentencing jury had already been presented with an overwhelmingly graphic and vivid picture of what had occurred at the time of the murders before Ms. Cascio testified. The jury was, therefore, aware of both the heinous nature, not only of the crimes, but also of the defendant who committed them.

Thus, the Court finds that, although admissions testified to by Ms. Cascio are significant, they are not so strong that this Court can conclude that there is a reasonable probability of a different result but for the presentation of her testimony. *See Strickland*, 466 U.S. at 695 (to prove that "there is a reasonable probability that ... the sentencer ... [can] conclude[] that the balance of aggravating and mitigating circumstances [do] not warrant death"); *see also Wiggins*, 539 U.S. at 537. The obvious lack of any discernable prejudice from cross-examination is manifestly clear when Dr. McKee's subsequent reply testimony is considered on this issue. *See* Tr. pp. 3067-72.⁸² The Court finds that his testimony presented the substance of many, if not all

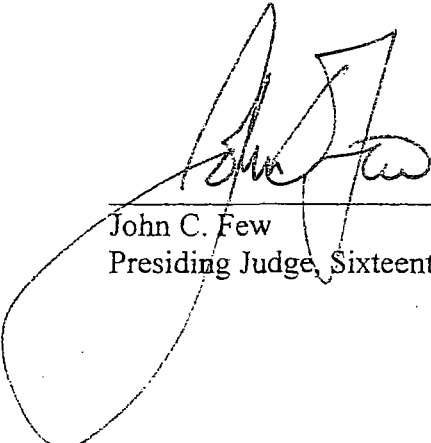
⁸² Again, any supposed impropriety of Dr. McKee's testimony about the information he received from Robertson under *Hudgins* is not properly before this Court because the trial judge overruled trial counsel's objection, and ruled that the statements made by Robertson were admissible. Tr.

of Ms. Cascio's testimony on cross-examination; and he testified that the factual information provided to him by Robertson was virtually identical to those facts in the notes of Ms. Cascio. Tr. pp. 3066-67. For the above-stated reasons, the Court finds that this allegation is without merit.

IT IS, THEREFORE, ORDERED:

1. That the Application for Post-Conviction Relief in this matter is dismissed with prejudice; and
2. That Robertson is remanded to the custody of Respondent.

IT IS SO ORDERED.



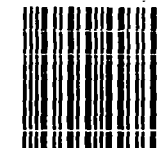
John C. Few
Presiding Judge, Sixteenth Judicial Circuit

March 7, 2008

pp. 3044-57. Thus, the question of his ruling could have been raised on direct appeal and is barred in PCR. *See* § 17-27-20(b); *Drayton*, 312 S.C. at 9, 430 SE2d at 520 (issue that could have been raised at trial and on direct appeal cannot be asserted in PCR application, absent a claim of ineffective assistance of counsel). Moreover, the Court concludes, in the alternative, that this objection was properly overruled.



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