

Ross and Enderlin, PA
Attorneys at Law

Derek J. Enderlin

Susannah C. Ross

September 8, 2016

The Honorable Scott S. Harris
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

RECEIVED

SEP 12 2016

RE: Charles Christopher Williams v. The State of South Carolina
Petition for Writ of Certiorari

S.C. SUPREME COURT

Dear Mr. Harris:

Enclosed, please find the original and ten (10) copies of a petition for writ of certiorari. In addition, there is one separate Certificate of Service pursuant to Rule 29 and a copy of the motion to proceed in forma pauperis which was mailed on June 1 with an extension request. If you need additional copies or documentation, please let me know.

Appendix A and B are in a separate box and have been mailed at the same time.

Sincerely,

Derek J. Enderlin

cc The Honorable Daniel E. Shearouse
Donald J. Zelenka, Esquire
Christopher Williams



330 East Coffee Street
Greenville, SC 29601

Phone: 864-647-7205
Email: derek@rossenderlin.com

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES CHRISTOPHER WILLIAMS, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

RECEIVED

SEP 12 2016

S.C. SUPREME COURT

ON PETITION FOR WRIT OF CERTIORARI TO
THE SOUTH CAROLINA CIRCUIT COURT

PETITION FOR WRIT OF CERTIORARI

DEREK J. ENDERLIN
Counsel of Record
ROSS AND ENDERLIN, PA
330 East Coffee Street
Greenville, SC 29601
864-647-7205
derek@rossenderlin.com
Attorney for Petitioner

September 9, 2016

CAPITAL CASE

QUESTIONS PRESENTED

Trial counsel admitted they failed to consider petitioner's severe organic brain damage caused by Fetal Alcohol Syndrome (FAS) as mitigation, despite numerous red flags, however, the State Post Conviction Judge held trial counsel made a strategic decision to not present FAS to the jury without explanation as to how he made that decision, and without specific findings of fact.

- I. Are state post-conviction courts required to make probing and specific findings of fact regarding both prongs of the *Strickland v. Washington* analysis?
- II. Did the post-conviction court properly weigh the prejudice of the failure to investigate and present fetal alcohol syndrome to the jury?

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES.....	iii
OPINIONS BELOW	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT.....	13
I. IN CAPITAL CASES, STATE POST-CONVICTION COURTS MUST MAKE PROBING AND SPECIFIC FINDINGS OF FACT REGARDING BOTH PRONGS OF THE <i>STRICKLAND V. WASHINGTON</i> ANALYSIS	13
II. THE PCR JUDGE FAILED TO MAKE SPECIFIC AND PROBING FINDINGS OF FACT IN WEIGHING PREJUDICE AS DICTATED IN <i>SEARS V. UPTON</i> , AND IN THE ALTERNATIVE, THIS CASE SHOULD BE REMANDED FOR FURTHER FINDINGS OF FACT.	22
CONCLUSION.....	26

INDEX TO APPENDICES

APPENDIX A	South Carolina Circuit Post Conviction Court, Order dismissing Post Conviction Relief, <i>Williams v. State</i> , 2010-CP-23-9792 (July 24, 2013); Order denying Motion to Reconsider (August 9, 2013).
APPENDIX B	South Carolina Supreme Court's order granting a petition for writ of certiorari, <i>Williams v. South Carolina</i> , No. 2013-001945 (August 20, 2015); Dismissal of the writ of certiorari as improvidently granted (April 13, 2016), <i>Williams v. South Carolina</i> , 2016 WL 1458174 (SC 2016)

TABLE OF CITED AUTHORITIES

Cases

<i>Adams v. Missouri</i> , 483 S.W.3d 480 (COA Div. 4, 2016)	17
<i>Alaska v. Zeciri</i> , 43 P.3d 169 (Alaska COA 2002) (6th Cir. 2007)	17
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	18, 25
<i>Blystone v. Horn</i> , 664 F.3d 397 (3rd Cir. 2011)	14
<i>Bond v. Beard</i> , 539 F.3d 256, 283 and 288 (3rd Cir. 2008)	24
<i>Brumfield v. Cain</i> , 13-1433 (2015)	17
<i>Caro v. Woodford</i> , 280 F.3d 1247, 1258 (9th Cir. 2002)	15
<i>Felix v. Mississippi</i> , 73 So.3d 1194 (Miss. COA 2011)	17
<i>Haliym v. Mitchell</i> , 492 F.3d 680, 718 (6th Cir. 2007).....	14
<i>Hall v. Florida</i> , ___ U.S. ___, 134 S.Ct. 1986 (2014).....	24, 25
<i>Hooks v. Workman</i> , 689 F.3d 1148, 1205 (10th Cir. 2012).....	14
<i>Hurst v. State</i> , 18 So. 3d 975, 1010–1011 (Fla. 2009).....	24
<i>In Re Andrews</i> , 52 P.3d 656 (Cal. 2002)	21
<i>In re Brett</i> , 16 P.3d 601, 604–607 (Wash. 2001).....	24
<i>Johnson v. Missouri</i> , 333 S.W.3d 459 (Mo. 2011).....	21
<i>Jones v. South Carolina</i> , 504 S.E.2d 822 (SC 1998).....	23
<i>McCray v. South Carolina</i> , 408 S.E.2d 241, 241 (SC 1991).....	17
<i>Palmer v. North Dakota</i> , 816 N.W.2d 807 (ND 2012).....	17
<i>Pennsylvania v. Montalvo</i> , 114 A.3d 401 (2015)	17
<i>Pigg v. Arkansas</i> , 486 S.W.3d 751 (Ark 2016)	17
<i>Porter v. McCollum</i> , 558 U.S. 30 (2009)	13, 14, 17, 22, 23
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005).....	14, 20, 22, 23
<i>Sears v. Upton</i> , 561 U.S. 945 (2010).....	14, 17, 18, 23
<i>Silva v. Woodford</i> , 279 F.3d 825, 847 n.17 (9th Cir. 2002).....	24
<i>Simpson v. Moore</i> , 367 S.C. 587, 627 S.E.2d 701 (2006)	39
<i>Strickland v. Washington</i> , 466 U.S. 668, 687 (1984)	13, 14, 22
<i>Tennard v. Dretke</i> , 542 U.S. 274, 287 (2004).....	14
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003).....	13, 14, 18, 20, 23

Wilson v. Simmons, 536 F.3d 1064, 1094 (10th Cir. 2008) 14

Other Authorities

Fetal Alcohol Syndrome: Diagnosis, Epidemiology, Prevention, and Treatment. Stratton K, Howe C, Battaglia F (editors) National Academy Press (Institute of Medicine (IOM)).....8, 11

Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis Centers for Disease Control (CDC).....8, 11

PETITION FOR WRIT OF CERTIORARI

Charles Christopher Williams respectfully petitions for a writ of certiorari to review the post-conviction judgment of the South Carolina Circuit Court.

OPINIONS BELOW

The post-conviction relief (PCR) order of the South Carolina Circuit Court, *Williams v. South Carolina*, 2010-CP-23-9792 (July 24, 2013), is unreported and is attached as Appendix A, along with that court's denial of a reconsideration (August 9, 2013). The South Carolina Supreme Court's order granting a petition for writ of certiorari, *Williams v. South Carolina*, No. 2013-001945 (SC August 20, 2015) is unreported and is attached as Appendix B. That Court's dismissal of the writ of certiorari as improvidently granted, (SC April 13, 2016) is also unreported and also attached as Appendix B. *Williams v. South Carolina*, 2016 WL 1458174 (SC 2016).

JURISDICTION

The dismissal of the writ of certiorari by the South Carolina Supreme Court was issued on April 13, 2016. *Williams v. South Carolina*, No. 2013-001945, 2013 WL 1458174 (SC 2016). On June 8, 2016, Chief Justice Roberts extended the time for filing this petition for writ of certiorari to and including September 9, 2016. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ... and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Procedural History

On February 15, 2005, Petitioner was convicted of murder and kidnapping; he was sentenced to death by the same jury on February 19, 2005. On direct appeal, his conviction was affirmed by the South Carolina Supreme Court. *State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010). This Court denied certiorari on October 4, 2010. *Williams v. South Carolina*, 562 U.S. 899 (2010). Petitioner timely filed for state post-conviction relief (PCR). Petitioner was denied relief by the PCR judge. Appendix A p. 36-47. The petition for writ of certiorari to the South Carolina Supreme Court was initially granted as to Question 1 on August 20, 2015; however, certiorari was dismissed as improvidently granted in a two sentence order dated April 13, 2016. Appendix B.

Petitioner specifically raised these issues in his pre-trial memorandum, at trial, in his post-trial brief, motion for reconsideration, his State petition for writ of certiorari and subsequent brief. It was also raised by amicus briefs of the Federal Republic of Germany.

II. Facts

“Around 10:00 a.m. on September 3, 2003, [Petitioner] entered a Bi-Lo grocery store in Greenville where his former girlfriend, Maranda Williams (Victim), worked. [Petitioner] accosted Victim and forced her into an office in the bakery/deli. Victim called 911 from her cell phone. During the ninety-minute phone call, hostage negotiators tried to convince Petitioner to release Victim. When Victim attempted to escape [Petitioner] chased, shot, and killed her. Hearing the shots, law enforcement entered the store and apprehended [Petitioner]. Shortly after his arrest, Petitioner gave a statement in which he confessed to the crimes for which he was later charged. [Petitioner] was tried and found guilty of murder, kidnapping, and possession of a firearm during the commission of a violent crime.” *South Carolina v. Williams*, 690 S.E.2d 62 (SC 2010). The jury found one aggravating circumstance, kidnapping.

The trial attorneys presented two expert psychiatrists. One testified that he was not a forensic psychiatrist and that Williams was a complicated case: “I’d say that his primary diagnosis is bipolar disorder, type one or type two. I’d lean towards type one, probably with rapid cycling mixed features.”

App. p. 1965. He also diagnosed him with obsessive compulsive disorder (OCD). App. p. 1967. On cross-examination, he testified that he was not sure about the legal standard for competence at trial, nor the mental standard to stand trial in South Carolina. App. p. 1991 - 1992. He did not know whether Williams could conform his actions to the requirements of the law or whether he was competent to assist his attorneys. App. p. 1992. The other psychiatrist testified that Williams had a major depressive episode and was OCD. App. p. 2309. He testified that Williams capacity to conform his behavior was somewhat impaired. App. p. 2319.

At trial, the prosecutor emphasized the fact that the expert psychiatrists could not agree on a diagnosis and regardless did not provide an explanation worthy to save the Petitioner's life. App. P. 2374. He argued that Petitioner's mental illness was not the reason the victim was killed, because no one testified it was and because Williams could conform his behavior. App.p. 2375.

The trial attorneys also hired Jim Evans, a neuropsychologist who performed cognitive testing on the Petitioner that indicated almost the exact deficits the PCR expert found. App. p. 3553. Dr. Evans did not testify, but notes of his interview in trial counsel's files indicate that information did not appear to crossover from one side of Williams' brain to the other, "as tho[sic]

no corpus callosum". App. p. 4278.¹ The week before trial, the attorneys hired a neurologist, Dr. David Griessemar, who reported on the results of an MRI days before trial. Dr. Giessemar submitted an affidavit for the PCR that he was not given adequate history or testing by trial counsel; that he specifically asked trial counsel for the same type of testing that had already been completed by Dr. Evans, but he never saw that information, and if he had seen Dr. Evan's testing or if he had been informed that the mother drank during pregnancy, he would have advised the team to consider FAS. App. p. 4851.

TRIAL ATTORNEYS' TESTIMONY

The PCR judge found, trial counsel "made a strategic decision to not present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (though trial counsel was unable to articulate the reasons for that strategic decision)." ² Appendix A, p. 44. In contrast, the trial attorneys testified that they knew about the mother's drinking during pregnancy, they had Dr. Evan's report, that these were "red flags", that they knew about the ABA Guidelines mandating investigation into FAS, but that they never discussed FAS. They never considered it, they never ruled it in or ruled it out,

¹ The corpus callosum is the area of the brain most commonly damaged by Fetal Alcohol Syndrome (FAS).

² While the trial judge used the term FAS, technically Fetal Alcohol Spectrum Disorder (FASD) is more correct; however, the experts, society, this petition, and even some of the scientific literature, use the generic term FAS. As will be discussed infra, the cognitive deficits are the same, regardless the term or technical diagnosis.

they had no explanation why they did not consider it, and they would have liked to have had it before the jury.³

The following is how it was put to William N. Nettles, the second chair and at the time of the PCR and until recently, the United States Attorney for the District of South Carolina: Question: "Okay. So I think we've beat this horse enough. It was just never, ever brought up, to your knowledge, of FAS?" Nettles Answer: "Right. It wasn't ever brought up. It wasn't discussed. It wasn't ruled in; it wasn't ruled out." App. P. 3274.

The lead trial attorney was John I. Mauldin, the Chief Public Defender since 1992, who has tried numerous death penalty cases and has lectured across the country on death penalty defense. He was even more adamant in his testimony. He testified that after being shown PCR evidence and exhibits he was "dumbfounded" as to why a certain course of action did not occur – that a natural course would be to bring in a neurologist and tell him they had evidentiary information to suspect FAS and they needed whatever testing needed to be done to determine whether it existed. App. pp. 3367-8. That he was aware the circumference of the head at birth had a correlation with FAS and one expert was requesting those records and therefore suggesting the expert suspected some symptoms or review of FAS, but Attorney Mauldin did not connect that; he didn't "have an explanation for why [he] was missing

³ These admissions span several pages in the record. App.p. 3269-3274; 3293-3294; 3310; 3331-3332; 3359-3362; 3367-3368; 3381.

those kinds of indicators. But apparently - - looking back, [he] was.” App. pp. 3359-60. He would have wanted a guilty but mentally ill diagnosis. App. p. 3333. He would certainly want evidence that the defendant suffers from brain damage before the jury. App. p. 3362. If FAS had been discussed it would have been noted on his checklist. App. p. 3347. That he had no explanation why he did not follow up with experts about the fact that the mother drank during pregnancy. App. p. 3348. That he had no explanation why an MRI was not done until the week before trial considering he was on notice the mother drank during pregnancy. App. p. 3368. And when asked if he ever went to any experts about the problem of the mother drinking, he responded, “And what could possibly have lead me to not conduct some sort of follow-up is just beyond my – I don’t have an explanation for it. I just don’t know. ... I surely didn’t do it intentionally. I will assure you, I did not do that intentionally. I think that would be horrible.” App. p. 3381. “And why in the world I didn’t, with these memos being provided me, why didn’t I further take the course of action that I described to [the Attorney General] about a neurological evaluation as to that specific issue, I just – I don’t know. I can’t explain that.” App. p. 3382.

The PCR judge failed to discuss any of this testimony. Instead, he made the finding the trial attorneys made a strategic decision not to present FAS. Indeed, at oral arguments before the South Carolina Supreme Court, Justice Hearn remarked that the PCR judge’s finding that the trial attorneys

made this strategic decision was troubling and, “it’s really clear from reading [the trial attorneys’] testimony, that they just missed fetal alcohol syndrome. They didn’t make a strategic decision not to present evidence on it.”⁴

The mitigation investigator testified she did discuss the mother’s drinking during pregnancy with the trial attorneys; she also testified that FAS was never eliminated as a risk factor. App. P. 3211. She testified she was not an expert in FAS. App. p. 3249. She testified she gave evidence of the mother’s drinking to the experts, except the neurologist, whom she had no contact with. App. p. 3219; 3257-3258.

PCR EXPERTS’ TESTIMONY

The testimony concerning Petitioner’s organic brain damage was undisputed. It was presented by a team of experts who relied on the criteria of the Centers for Disease Control (CDC)⁵ and the Institute of Medicine (IOM)⁶. Both were mandated by the United States Congress to establish those criteria.⁷ Testimony showed the Petitioner’s corpus callosum was thinned by more than

4 Video Portal, Oral Arguments of South Carolina Supreme Court, (March 22, 2016: Minute 19:20 and again at 20:18), <http://media.sccourts.org/videos/2013-001945.mp4>

5 *Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis* Center for Disease Control(CDC)

6 Fetal Alcohol Syndrome: Diagnosis, Epidemiology, Prevention, and Treatment. Stratton K, Howe C, Battaglia F (editors) National Academy Press (IOM)

7 Technically, the Petitioner has Partial Fetal Alcohol Syndrome based on the criteria in the IOM; he meets all of the criteria for FAS under the CDC and IOM, except for one of the facial features. App. p. 3638-43; 4573. Furthermore, the facial features are developed in a very short window of the gestational period and are known to disappear into adulthood. IOM, p. 75; App. p. 4903. Finally, the IOM is clear that the designation PFAS does not mean it is less severe; it has nothing to do with the actual brain damage, and in reality, it can put an individual at a much higher risk. App. p. 3707, 4906.

50%. App. p. 3660. The corpus colosum is the largest portion of white matter in the brain. It connects the left and right side of the brain. App. p. 3524. It is often damaged by FAS. As noted, the trial attorneys had indications from their neurologist that information did not appear to crossover from one side of Williams' brain to the other, "as tho[sic] no corpus callosum". App. p. 4278. A PCR expert spoke to Dr. Evans about his tests and conclusions and noted it was a huge red flag. App. p. 3653-4. When shown the notes, the trial attorneys did not know what the corpus callosum meant and had no explanation about the corpus callosum and brain damage references by Dr. Evans. App. p. 3215-6, 3272, 3337. Petitioner's cingulated gyrus was also abnormal; the abnormality was described as medium or kiwi sized. App. p. 3656-3667.

The State made repeated references in their arguments to the South Carolina Supreme Court that the trial team's mitigation investigator said the mother denied drinking during pregnancy. The mother's drinking during pregnancy was admitted by the state's expert witness during the penalty phase at trial and is replete in the record.⁸ Furthermore, the PCR expert testified he considered it confirmed based on the evidence in 2004. App. p. 3629-3630. Regardless, there is a diagnosis of FAS without confirmation of alcohol use in

⁸ App. pp. 1877, 1978, 2179, 2180, 2182, 2214, 2236, 2237, 2252, 2262, 2331, 2336. The mother admitted heavy drinking during pregnancy at the PCR. App. p. 3412.

the IOM manual. App. p. 4904. Most importantly, the PCR judge never made a finding the Petitioner did not suffer from FAS.

The team also noted Petitioner's significant cognitive deficits; three cognitive deficits out of ten are required for a diagnosis. App. pp. 3517. Petitioner had eight out of eleven. App. pp. 3703. The experts testified that these are the same cognitive deficits that would make the Petitioner mentally retarded, but for his IQ. App. p. 3446. The experts noted that people with FASD do much worse than you would expect from their IQ: "They're essentially functioning at a level of somebody who's mentally retarded, even though their IQ is in the average range. Their day to day functioning is so impaired." App. p. 3474. For example some mentally retarded people can pass a driver's license test; Williams had to take the test 5-6 times. App. p. 3832. Williams' school history is another example - he has an IQ that should be sufficient, but he is in special education early on, fails eighth grade, and eventually drops out of ninth. App. p. 3850. In fact, Dr. Natalie Novick-Brown testified she had never seen a child repeat kindergarten and first grade and Williams' disability was entirely consistent with FASD. App. p. 3865. Indeed, people with normal IQs and FAS often have more trouble because they are able to hide their disabilities and they never receive treatment. App. p. 3833. She also testified that the standardized testing placed Williams at the maturity level of a nine year old. App. p. 3837-8.

The experts testified how Petitioner's organic brain damage effects executive functioning – self regulation, behavior control, and thought and emotion control. It effects the frontal lobe's ability to control information resulting in problematic behavioral difficulties. App. p. 3818. Petitioner's executive functioning is significantly impaired – learning from experience, linking cause and effect and being able to understand and foresee consequences and take those into account when planning; all people with FASD plan, but their plans are impaired by the brain damage. Petitioner has significant impulse control problems. App. p. 3821 – 3824. Dr. Brown ultimately opined that Williams met the South Carolina definition of Guilty But Mentally Ill in that he lacked sufficient capacity to conform his conduct to the requirements of the law. App. p. 3901.

THE PCR JUDGE'S FINDINGS

The PCR judge's order concerning FAS can be found on pages 36 to 48 in Appendix A. One of his few findings, other than the trial attorneys' "strategic decision", was "we are just beginning to understand the role that Fetal Alcohol Syndrome (FAS) plays in human behavior in general and criminal activity in particular." Appendix A, p. 37. The PCR judge was given a 317 page Appendix before trial with articles discussing the numerous scientific and medical studies regarding FAS and human behavior and criminal activity. App. p. 4531. He was also given the CDC manual listed in Footnote 5 and the 200 page IOM manual listed in Footnote 6. Plaintiff's

Exhibit 31. In the pre-trial memorandum submitted to the PCR judge it was noted that all of the publications (Except an article on morphometrics, App. p. 4816) note FAS causes poor impulse control and puts the individual at heightened risk for criminal activity.⁹

The PCR judged did find,

[T]rial counsel had evidence that Petitioner's mother drank during pregnancy, and that trial counsel was aware of the resulting complications, including brain damage. Trial counsel also had evidence that Petitioner possibly suffered brain damage, based on Dr. Evans reports. Trial counsel presented this information along with other mitigation evidence, to the defense experts.

Appendix A, page 44. This ignores, and the State has conceded, that Dr. Griessemer, the neurologist, did not have this evidence. State's Brief on Certiorari, p. 16.

The PCR judge made few other findings. The PCR judge made no findings regarding whether Williams has FAS. He made no findings regarding whether Williams fit South Carolina's definition of Guilty but Mentally Ill. He made no findings about whether Williams had brain damage, cognitive deficits, or impulse control problems. He failed to discuss the PCR experts' testimony or materials submitted at PCR. He failed to discuss the trial attorneys' testimony. Instead, he found the PCR evidence was simply a "fancier mitigation case". Appendix A, p.46.

⁹ App. pp. 4538, 4542, 4568-4570, 4607, 4614-4615, 4621, 4642-4643, 4648-4652, 4674-4677, 4686-4689, 4717, 4745-4746, 4781-4790, 4792-4793, 4841-4851.

REASONS FOR GRANTING THE WRIT

I. IN CAPITAL CASES, STATE POST-CONVICTION COURTS MUST MAKE PROBING AND SPECIFIC FINDINGS OF FACT REGARDING BOTH PRONGS OF THE *STRICKLAND V. WASHINGTON* ANALYSIS.

The crux of this case is that trial attorneys candidly admitted they failed to discuss or investigate Fetal Alcohol Syndrome (FAS) despite numerous red flags; however, the PCR judge failed to even mention the trial attorneys' testimony regarding FAS. Instead he found, without explanation, that they made a strategic decision not to put forward FAS, despite their multiple and adamant admissions to the contrary. This Court should make clear that capital PCR courts must make probing and specific findings of fact in both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984). A probing review of the evidence of Petitioner's organic brain damage makes it clear that it is the type of evidence this Court has held could have swayed one juror to fail to vote for death.

THE *STRICKLAND* STANDARD

Ineffective assistance of counsel claims are reviewed under the familiar two-prong test established by *Strickland*, which requires a Petitioner to show that: (1) trial counsel's performance was deficient; and, (2) the deficiency resulted in prejudice. *See also, Porter v. McCollum*, 130 S.Ct. 447, 452 (2009); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Whether an attorney's performance was deficient is determined by a standard of "reasonableness

under prevailing professional norms.” *Strickland*, 466 U.S. at 688. In capital cases, the professional norms require counsel to conduct a thorough investigation into “*all reasonably available* mitigating evidence.” *Wiggins*, 539 U.S. at 524 (emphasis in original). It is well-established that trial counsel should be particularly diligent to investigate evidence of mental impairments, such as organic brain damage, because of its powerful mitigating effect. *See, e.g., Sears v. Upton*, 130 S.Ct. 3259, 3261 (2010) (holding evidence of brain damage was “significant mitigating evidence a constitutionally adequate investigation would have uncovered”); *Porter*, 130 S.Ct. at 454 (finding evidence of brain damage and cognitive deficits in reading, writing and memory were part of “the kind of troubled history we have declared relevant to assessing a defendant’s moral culpability.”) (quoting *Wiggins*, 539 U.S. at 535); *Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (holding trial counsel was ineffective for failing to discover and present evidence of organic brain damage caused by fetal alcohol syndrome); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (holding evidence of impaired intellectual functioning is inherently mitigating in the penalty phase of a capital case); *Wiggins*, 539 U.S. at 535 (stating that a competent attorney, aware of the defendant’s history of diminished mental capacities, among other things, would have introduced it in the capital sentencing proceeding).¹⁰

¹⁰ Numerous lower courts have likewise recognized that brain damage is uniquely mitigating. *See, e.g., Hooks v. Workman*, 689 F.3d 1148, 1205 (10th Cir. 2012); *Wilson v. Sirmons*, 536 F.3d 1064, 1094 (10th Cir. 2008); *Blystone v. Horn*, 664 F.3d 397 (3rd Cir. 2011); *Haliym v. Mitchell*, 492 F.3d 680, 718 (6th Cir.

FAILURE TO MAKE FINDINGS

The PCR court requested post trial memoranda be submitted April 15, 2013. App. p. 4014. He granted an extension to June 10, 2013, noting it would likely be the last one. Despite that warning, and despite the fact the PCR judge submitted a draft order on July 17, 2013, the State never provided the judge with a post-trial brief; the State also failed to submit a post-trial motion to reconsider his order and therefore the PCR court ruled without input from the State. App. p. 5073-5078. In its arguments to the South Carolina Supreme Court, the State repeatedly made arguments that the PCR judge made certain specific findings, when in reality it did not. For example, the State has repeatedly alleged the PCR judge found the mitigation investigator credible, presumably over trial counsel. This is simply not what the PCR judge's order says. It makes no mention of trial attorneys' testimony.

The clearest example of this failure to make specific findings, and the importance of that duty, can be seen in the inability of the State to answer one fundamental question: It was repeatedly noted in Petitioner's filings, and was asked again by Justice Hearn: "Are you saying [the PCR judge] found trial counsels' testimony not credible?"¹¹ To this date, the State has never answered this question, and cannot based on the PCR judge's order.

2007); *Caro v. Woodford*, 280 F.3d 1247, 1258 (9th Cir. 2002).

¹¹ Video Portal, Oral Arguments of South Carolina Supreme Court, (March 22, 2016: Minute 20:18), <http://media.sccourts.org/videos/2013-001945.mp4>

This failure to make specific findings of fact makes it impossible to adequately evaluate the PCR judge's weighing of prejudice. If the PCR judge believed the US Attorney, the Chief Public Defender, and the neurologist all lied regarding their investigation into FAS, he should have put that in his order. If on the other hand, the PCR judge did not doubt the veracity of their testimony, justice would demand giving strong consideration to this candid and open analysis from such experienced attorneys. Regardless, without these and other specific findings, it is impossible to understand the PCR judge's evaluation of the impact of FAS.

In a motion to reconsider to the PCR judge, Petitioner specifically pointed out, "The order fails to acknowledge trial counsels' failure to investigate FAS and instead finds trial counsel made a strategic decision not to present FAS. This contradicts both attorneys' testimony. PCR at 92-100, 104, 119-121, 136-137, 155 - 160, 169 - 170, 174, 180 - 182, 186 - 194, 207 - 208." App. 4225. The PCR judge dismissed Petitioner's motion to reconsider two days after it was filed, in an order that was slightly over a page, saying he adequately addressed the issues and, "Fortunately, our judicial system provides appellate courts, which are waiting to review this decision and will have the opportunity, with a deeper insight from an impassive record of trial, to provide wise analysis for this case." App. 4229 - 4230.

If the trial attorneys knew of the mother's drinking and the resulting brain damage, but did not follow up with their experts, that is clearly a failure

to investigate. Again, without specific findings, it is impossible to determine whether the PCR judge understood that trial counsel cannot, as a matter of law, make an informed strategic decision about whether to present certain information when they do not know what that information is. *See, e.g., Sears v. Upton*, 561 U.S. 945 (2010); *Porter v. McCollum*, 558 U.S. 30 (2009).

The failure of PCR judges to make specific findings of fact in capital cases is all too common. This is similar to a current petition, *Hamm v. Alabama*, 15-8753. It was a relevant factor in *Brumfield v. Cain*, 13-1433 (2015). Indeed, as in many states, South Carolina specifically mandates PCR judges make specific findings. Without determining whether Williams had FAS or how bad his cognitive deficits were due to FAS, the PCR judge's findings are "insufficient for appellate review." *Simmons v. South Carolina*, 788 S.E.2d 220 (SC 2016); *McCray v. South Carolina*, 408 S.E.2d 241, 241 (SC 1991).¹²

In *Sears v. Upton*, this Court reiterated that *Strickland* requires probing and fact-specific analysis in post-conviction cases. *Sears* revolved around prejudice, but this Court made clear a probing analysis of the amount and type of mitigation was also a necessary part of the analysis. Specifically, it disagreed with the dissent, that the trial judge simply discounted the evidence as

¹² See also, *Pigg v. Arkansas*, 486 S.W.3d 751 (2016); *Adams v. Missouri*, 483 S.W.3d 480 (COA Div. 4, 2016); *Pennsylvania v. Montalvo*, 114 A.3d 401 (2015); *Palmer v. North Dakota*, 816 N.W.2d 807 (ND 2012); *Felix v. Mississippi*, 73 So.3d 1194 (Miss. COA 2011); *Alaska v. Zeciri*, 43 P.3d 169 (Alaska COA 2002).

unpersuasive, noting the lower court could have easily stated so in the record. *Sears* at 954, Footnote 12. Relying on *Wiggins* the Court noted a deficient mitigation investigation should, at the very least, call into question the reasonableness of the trial counsels' mitigation theory. *Sears*, 953; Cf. *Wiggins v. Smith*, 539 U.S. 510, 522.

The PCR order never disputed or acknowledged the fact that Petitioner has FAS. The order also clearly ignores the undisputed PCR testimony that the Petitioner could not conform his actions to the law. App. 3859-3891. It also fails to acknowledge the fact that the prosecutor used the fact that not only did the trial experts disagree, but they testified Williams could conform his conduct to the requirements of the law. The order also failed to address the Gudjohnson test that rated Williams as highly suggestible, which could have explained the damaging evidence of Dr. Crawford, who the South Carolina Supreme Court described as the state's primary witness. *Williams* at 64. Williams is susceptible to making inappropriate admissions that make his conduct appear in the worst light. The order also ignores the testimony that Petitioner had the mental capacity of a nine year old child. All of these matters made Williams case very similar to *Atkins v. Virginia*, 536 U.S. 304 (2002).

The PCR order also fails to acknowledge or address Attorney Mauldin's testimony that if he would have suspected FAS he would have hired a neurologist and told him to do whatever testing needed to be done to determine whether it existed. App. 3367-3368. The PCR order also fails to

address the fact that the trial team's neurologist was hired on the eve of trial, not given an adequate history, not only about Williams' mother drinking during pregnancy but also Dr. Evan's testing, and if he had seen this evidence, he would have advised the team to investigate FAS. (App. p. 4851) The PCR judge also failed to acknowledge the ABA Guidelines for Death Penalty defense or any standard of care.

The PCR judge also failed to address the significant disabilities FAS causes, and instead believed that the scientific community was just beginning to understand the role FAS plays in human behavior and criminal activity. Appendix A, page 37. As evidenced by the massive amount of literature entered into evidence encompassing over 500 pages, this is simply not true. The damaging effects of FAS have been known for decades. The ABA Guidelines specifically mention FAS in two different places. App. pp. 4340, 4390. The PCR judge also seemed to be concerned that this condition was inevitable or possibly that he believed it was still not common knowledge that drinking during pregnancy was harmful, because there were still pregnant women drinking despite the literature. App. pp. 4005-6. These beliefs make it clear the PCR judge failed to give appropriate consideration to this condition, but more importantly, his beliefs, without specific findings of fact, call into question why he ruled the way he did.

The PCR judge did note in a footnote, that each expert acknowledged that the state of the art for FASD forensic assessment was "hit or miss" prior

to 2007. App. p. 4203. While the experts testified this was a slide on a power point presentation they gave at a FAS conference in 2009, they all testified there were qualified experts making this diagnosis and testifying in 2005. App. pp. 3570-1, 3723-4, 3727, 3805-3816. In fact, Dr. Novick-Brown was available to testify in 2004. App. p. 3808.¹³ Furthermore, the diagnostic criteria for FAS have been widely accepted since the 1970s, the standard four criteria were codified by the Institute of Medicine in 1996, and evidence of FAS has long been recognized as mitigating in capital cases. *See, e.g., Wiggins and Rompilla*. There are undoubtedly still many individuals in many fields claiming to be experts that might give an improper diagnosis, but that does not mean one can ignore the fact that there were qualified experts available to give an appropriate opinion in 2005.

More importantly, the PCR judge's notation about the experts' testimony is the only mention in his entire order about their testimony, the medical evidence, the implications of FAS, the trial attorneys' candid admissions that they absolutely failed to consider FAS, or whether Williams even suffers from FAS. Such a complete failure to make adequate findings of facts makes it clear the PCR judge could not and did not appropriately evaluate Petitioner's condition and how powerful that evidence could have

¹³ All of the experts essentially agreed that the point of the slide and their presentation was that it was important to put together a multi-disciplinary approach as the diagnostic criteria suggested. Dr. Adler testified teams were often put together more like pick-up basketball and when they created their ensemble, they created a more protocolized approach. App. 3723-4.

been to the jury. It is clear from the record that Petitioner's undisputed evidence of FAS is compelling and powerful mitigation which should have been presented to the jury.

The PCR judge relied on decisions in other states for the proposition that the trial attorneys were not deficient. Review of these cases finds them easily distinguished from this case, and some of them are not relevant at all. Furthermore, this highlights the failure of the PCR judge to make his own specific findings of fact.¹⁴

¹⁴ *Johnson v. Missouri*, 333 S.W.3d 459 (Mo. 2011)(Trial experts testified defendant met conditions of FAS and went into detail of where he fell on the spectrum and how his behavior was characteristic of the syndrome. The trial attorneys clearly made a decision to focus on mental retardation in that case but did investigate and present evidence of FAS as well.) Similarly in *Burgess v. Alabama*, 962 So.2d 272 (Ala Crim App 2005), PCR counsel did not call trial attorneys and there was no evidence that they failed to investigate FAS. Furthermore, the jury voted 8 to 4 for Life and PCR experts did not find Burgess had a serious mental disease or defect. *In re Andrews*, 52 P.3d 656 (Cal. 2002)(There was one brief reference that defendant "might" have suffered from FAS, but the majority of the opinion is based on fact that trial attorneys gave strategic reasons for conducting the trial in the way they did); *Ohio v. Murphy*, 747 N.E.2d 765, 797 (2001) (PCR counsel did not show trial counsel failed to investigate FAS); *New Jersey v. Cooper*, 979 A.2d 792 (N.J. Super. Ct. App. Div. 2009)(New Jersey had abolished the death penalty by the time this case was reconsidered; furthermore, trial counsel had presented evidence, and the jury had found, that the mother's prenatal ingestion of alcohol had damaged the defendant physically and developmentally)

II. THE PCR JUDGE FAILED TO MAKE SPECIFIC AND PROBING FINDINGS OF FACT IN WEIGHING PREJUDICE AS DICTATED IN *SEARS V. UPTON*, AND IN THE ALTERNATIVE, THIS CASE SHOULD BE REMANDED FOR FURTHER FINDINGS OF FACT.

Even if this Court fails to rule that PCR courts must make probing and fact-specific findings in the first prong of *Strickland*, this case should be remanded for failing to appropriately weigh the evidence. It is undisputed that Petitioner suffers from organic brain damage resulting in cognitive deficits that cause him to function on the same level as someone with mental retardation. To establish prejudice, a PCR applicant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Porter*, 130 S.Ct. at 453 (quoting *Strickland*, 466 U.S. at 694). The test is not whether a capital defendant would have received a life sentence absent trial counsel’s deficient performance. As this Court recently reiterated in *Porter*:

[w]e do not require a defendant to show ‘that counsel’s deficient conduct more likely than not altered the outcome’ of his penalty proceeding, but rather that he establish ‘a probability sufficient to undermine confidence in [that] outcome.

130 S.Ct. at 455-56 (quoting *Strickland*, 466 U.S. at 693-94). The question is whether “the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury’s appraisal of [a defendant’s] culpability.” *Rompilla*, 545 U.S. at 393. Prejudice is established if “there is a reasonable probability

that at least one juror would have struck a different balance.” *Wiggins*, 539 U.S. at 537.

This history of FASD and its effects on Petitioner’s life would have made a powerful mitigation story – far different from two experts that could not agree on a diagnosis. It would have directly challenged the prosecutor’s argument that Petitioner could control his actions. The mitigation evidence established in PCR would have undermined the State’s case in aggravation and offered a far more sympathetic explanation for Petitioner’s actions. Altogether, this case in mitigation could have convinced at least one juror that death was not an appropriate sentence. *See Wiggins*, 539 U.S. at 536. However, the PCR judge failed to conduct a reweighing of prejudice as required. Instead, he relied on *Jones v. South Carolina*, 504 S.E.2d 822 (1998) for the proposition that this was merely a fancier mitigation case.

This Court has consistently found trial counsel ineffective for failing to investigate and present similar evidence. For example, in *Wiggins*, the Supreme Court held that defense counsel’s performance was unreasonable where, much like here, trial counsel failed to offer expert testimony on the significance of Wiggins’ likely FASD and instead relied on evidence of Wiggins’ mental illness even though trial counsel knew that “[Wiggin’s] mother was a chronic alcoholic”. *Wiggins*, 539 U.S. at 524–25. Similarly, in *Rompilla v. Beard*, this Court found that counsel’s assistance was ineffective when counsel failed to present evidence that the defendant suffered from organic brain

damage as a result of fetal alcohol exposure, because it was an impairment that by definition existed since childhood and thus likely impaired the defendant's ability to appreciate the criminality of his conduct at the time of the offense. 545 U.S. 374, 392–393 (2005); *see also, Porter*, 130 S.Ct. at 451 (holding trial counsel was ineffective for failing to present evidence of brain damage that could manifest in impulsive behavior); *Sears*, 130 S.Ct. at 3262 (holding trial counsel was ineffective for failing to present evidence that the defendant had “problems with planning, sequencing and impulse control”).¹⁵

Perhaps the most compelling part of this evidence is the expert's analysis that Williams is emotionally on the level of a nine year old. The massive amounts of research combined with both the trial and PCR neurological testing make it clear that Williams was clearly impaired on the days and weeks leading up to the murder. While it is true the Petitioner has an average IQ, the experts were clear that his cognitive deficits, just like those of the mentally retarded, made it impossible for him to use this IQ appropriately. They were also clear, that just because an individual is good at spelling or standardized testing, it has no bearing on how he can conform his actions in real world situations. Just as the United States Supreme Court noted in *Hall v. Florida*, ___ U.S. ___, 134 S.Ct. 1986 (May 27, 2014): “IQ test

¹⁵ Several lower courts have also found FAS to be powerful mitigation in similar circumstances. *Hurst v. State*, 18 So. 3d 975, 1010–1011 (Fla. 2009); *In re Brett*, 16 P.3d 601, 604–607 (Wash. 2001); *see also, Bond v. Beard*, 539 F.3d 256, 283 and 288 (3rd Cir. 2008); *Silva v. Woodford*, 279 F.3d 825, 847 n.17 (9th Cir. 2002).

scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks.’ DSM–5, at 37.” And, “It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment. See DSM–5, at 37 (‘[A] person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person’s actual functioning is comparable to that of individuals with a lower IQ score’). *Id.*

Petitioner’s cognitive deficits are exactly the same evidence that protects the mentally retarded from execution:

[B]y definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others’ reactions. Their deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability.

Hall v. Florida, quoting *Atkins v. Virginia*, 536 U.S. 304 (2002).

Considering the fact that the PCR judge failed to acknowledge the vast amount of evidence regarding the severe circumstances of FAS, combined with the unexplained finding that the trial attorneys made a strategic decision not to present FAS to the jury, it is impossible that the PCR judge adequately weighed this evidence. Furthermore, as countless courts have held, organic brain damage is powerful evidence before a jury, and the lack of this evidence establishes a probability sufficient to undermine confidence in the outcome. This is especially true considering, there was only one

aggravator, the jury was initially divided 8 - 4, and there were extended deliberations. *South Carolina v. Williams*, 690 S.E.2d 62 (SC 2010).

CONCLUSION

For the reasons stated, Petitioner asks this Court grant the writ of certiorari.

Respectfully submitted,

September 9, 2016



Derek J. Enderlin
Ross and Enderlin, PA
330 East Coffee Street
Greenville, SC 29601
864-647-7205
derek@rossenderlin.com
Attorney for Petitioner

APPENDIX A

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Charles Christopher Williams,

Petitioner,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

C.A. No. 2010-CP-23-9792

ORDER OF DISMISSAL

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS
2013 JUL 24 P 4:11

Before the Court is Petitioner's Application for Post-Conviction Relief. Petitioner was convicted of murder, kidnapping, and possession of a weapon during the commission of a violent crime, and was sentenced to death. On November 17, 2010, the South Carolina Supreme Court granted a stay of execution and assigned jurisdiction over the matter to this Court. Having carefully considered the evidence and testimony presented, the record before the Court, and the erudite arguments and briefs of counsel, and for the reasons set forth below, this Court denies the Petitioner's request for relief and dismisses this application with prejudice.

FACTS

This matter arises from the murder of Maranda Williams ("Victim") by Charles Christopher Williams ("Petitioner"). On the morning of September 3, 2003, the Petitioner, armed with a shotgun, entered the Bi-Lo grocery store where his former girlfriend, the Victim, was working. Petitioner accosted the Victim and forced her into an office in the bakery/deli area. The Victim called 911 from her cell phone. During the ninety-minute phone call, hostage negotiators tried to convince Petitioner to release the Victim. When the Victim attempted to

[Handwritten signature]

escape, Petitioner chased, shot, and killed her. Hearing the shots, law enforcement entered the store and apprehended Petitioner. Shortly after his arrest, Petitioner gave a statement in which he confessed to the crimes for which he was later charged.

PROCEDURAL HISTORY

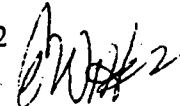
The Petitioner was indicted on March 23, 2004, for murder, possession of a weapon during the commission of a violent crime, and kidnapping. A jury trial was held before the Honorable J.C. "Buddy" Nicholson beginning on February 7, 2005. Thirteenth Judicial Circuit Solicitor Robert Ariail and Deputy Solicitor Betty Strom prosecuted the case for the State. The Petitioner was represented by Attorneys John Mauldin and William Nettles of the South Carolina Bar and Attorneys Mark MacDougall and Colleen Coyle of the Washington D.C. law firm Akin Gump Strauss Hauer & Feld. On February 15, 2005, the jury found the Petitioner guilty of murder, kidnapping, and possession of a firearm during a violent crime.

The penalty phase of the trial began on February 17, 2005. The jury was charged to consider the existence of one aggravating factor: "Murder was committed while in the commission of kidnapping." Record on Appeal ("ROA") at 2399. The jury was also charged to consider two statutory mitigating circumstances:

1. Murder was committed while the defendant was under the influence of mental or emotional disturbance.
2. The age or mentality of the defendant at the time of the crime.

ROA at 2403. The jury was also charged to consider five non-statutory mitigating circumstances:

1. Any testimony regarding the defendant's mental illness is treatable with medication.
2. Any testimony regarding the defendant's adaptability to prison.
3. Any testimony regarding the defendant's future violence in prison.

2 

4. Any testimony the defendant is loved and supported by his sister, Maureen, and her family that have and will continue to encourage, sustain, and assist him in the future.
5. Any other testimony or any other reason or reasons which the jury may consider.

ROA at 2404-05.

On February 19, 2005, the jury returned a verdict finding the existence of the statutory aggravating circumstance "murder was committed while in the commission of kidnapping."

ROA at 2417. The jury recommended a sentence of death. Judge Nicholson then sentenced the Petitioner to death.

The Petitioner filed an appeal and was represented by Attorney Robert M. Dudek of the South Carolina Office of Indigent Defense. The South Carolina Supreme Court affirmed the convictions and sentence on February 8, 2010. *See State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010) (petition for rehearing denied, Mar. 25, 2010). On October 4, 2010, the United States Supreme Court denied the Petitioner's request for a writ of certiorari. *Williams v. South Carolina*, 131 S.Ct. 230 (2010). On November 17, 2010, the South Carolina Supreme Court granted the Petitioner's request for a stay of execution so that he could pursue state post-conviction relief.

Petitioner filed his Application for Post-Conviction Relief on November 30, 2010, arguing that both trial counsel and appellate counsel were ineffective. On September 30, 2011, the Petitioner filed his First Addendum to Application for Post-Conviction Relief. On November 20, 2012, the Petitioner filed his Second Addendum to Application for Post-Conviction Relief. The State filed a Return to Application for Post-Conviction Relief on January 13, 2011, and a Return to Amended Application for Post-Conviction Relief on November 20, 2011. A hearing was held before this Court from January 28, to January 31, 2013, at the Greenville County Courthouse. The Petitioner was present at the hearing and was represented by Attorneys Derek

J. Enderlin and Richard W. Vieth. Attorney Donald Zalenka of the South Carolina Office of the Attorney General represented the Respondent, State of South Carolina.

The following testified at the PCR hearing: Petitioner's trial counsel and defense team members, Attorney John Mauldin, Attorney Bill Nettles, and Jan Vogelsang; Petitioner's appellate counsel, Attorney Robert Dudek; Petitioner's mother, Daisy Huckaby, and father, Dwight Williams; Petitioner's experts, Dr. Paul D. Connor, Dr. Richard S. Adler, and Dr. Natalie Novick Brown. The Court had before it the record on appeal from the guilt and penalty phases of Petitioner's trial ("ROA"), the Greenville County Clerk of Court records, the PCR application and addenda, the State's return, the parties' briefs, and the parties' exhibits.

STANDARD OF REVIEW – INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *Vasquez v. State*, 388 S.C. 447, 456, 698 S.E.2d 561, 565 (2010). In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief by a preponderance of the evidence. *Council v. State*, 380 S.C. 159, 169, 670 S.E.2d 356, 361 (2008); *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). In order to prevail on a claim for ineffective assistance of counsel, a PCR applicant must satisfy a two prong test. The applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland, supra*; *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). The PCR applicant

must satisfy both the deficiency prong and the prejudice prong of this test. *Franklin v. Catoe*, 346 S.C. 563, 570-71, 552 S.E.2d 718, 722-23 (2001).

"Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690; *Morris v. State*, 371 S.C. 278, 639 S.E.2d 53 (2006); *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). "The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application." *Von Dohlen v. State*, 360 S.C. 598, 603, 602 S.E.2d 738, 741 (2004). "[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Watson v. State*, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006). . . . Counsel's strategy will be reviewed under 'an objective standard of reasonableness.' *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)." *Brown v. State*, 375 S.C. 464, 481, 652 S.E.2d 765, 774 (Ct. App. 2007).

Furthermore, a defendant is constitutionally entitled to effective assistance of appellate counsel. *Southerland v. State*, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999); *Evitts v. Lucey*, 469 U.S. 387 (1985) (to be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair). Effective assistance of appellate counsel does not require the presentation of all issues on appeal that may have merit; appellate counsel is presumed to have decided which issues were most likely to afford relief on appeal. *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Lawrence v. Branker*, 517 F.3d 700, 709 (4th Cir. 2008); *Thrift v. State*, 302 S.C. 535, 397 S.E.2d 523 (1990) (appellate counsel must provide effective assistance but need not raise every nonfrivolous issue presented by the record). "For judges to second-guess reasonable professional judgments and

impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citations omitted).

The standard established by *Strickland* is that the defendant must establish by a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Smith v. State*, 309 S.C. 413, 424 S.E.2d 480, 481 (1992); *Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (noting "defendant who contends appellate counsel rendered ineffective assistance, e.g., by failing to argue issue, must show that failure to raise issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have reversed").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner raised fifteen issues in his Application for Post-Conviction Relief and subsequent Addenda. This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented by counsel at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Dr. Crawford's Testimony

In Petitioner's first three grounds for relief, he alleges that trial counsel failed to properly respond to testimony offered during the penalty phase of the trial by State's witness, Dr. Pamela Crawford. Petitioner alleges that trial counsel was ineffective (1) for waiving various objections

to the confession given by the Petitioner to Dr. Pamela Crawford, (2) for waiving the objection to Dr. Crawford being allowed to testify before the jury, and (3) for failing to effectively move for a mistrial based on Dr. Crawford's cumulative testimony.

Dr. Crawford was employed as a forensic psychiatrist with the South Carolina Department of Health and as a consultant for the South Carolina Law Enforcement Division. ROA at 2150-51. Soon after the Petitioner was taken into custody, Dr. Crawford interviewed the Petitioner at the Solicitor's request to help assess the case. ROA at 2153. During the penalty phase of the trial, the Solicitor called Dr. Crawford as a lay fact witness. Defense counsel moved to suppress Dr. Crawford's testimony and Petitioner's confession to her, made numerous objections during her testimony, requested curative instructions, and moved for a mistrial. ROA at 2694-2756, 2103-09, 2153-69, 2861-63. The trial court instructed the Solicitor to treat Dr. Crawford "as if she was an investigating officer that took a confession" and to limit questioning of the witness to those permitted by Rule 701, SCRE. ROA at 2165.

Petitioner has failed to demonstrate that trial counsel was ineffective in handling Dr. Crawford's testimony. At his PCR hearing, Petitioner did not provide further evidence to support the allegations in his PCR application related to Dr. Crawford's testimony. To the contrary, at the PCR hearing, Attorney Nettles stated "we tried everything we could to keep [Dr. Crawford's testimony] out[, b]ut given the fact that it came in, I felt the best we could do is utilize [it]." PCR Transcript of Record at 123. The trial transcript supports Attorney Nettles' assertion. Trial counsel made pre-trial motions to exclude Dr. Crawford's testimony; trial counsel strenuously objected numerous times¹ during Dr. Crawford's testimony; trial counsel requested curative

¹ Mr. Nettles objected to Dr. Crawford's testimony, emphatically stating "[m]y legal objection is that this testimony has been ruled on repeatedly," and noted people "mocked John Mauldin for how many times he stands up and gets this clear." ROA at 2152-53. Mr. Mauldin later affirmed this, stating "we done everything . . . pretrial motions, hearings, I been reserving it until I'm blue in the face." ROA at 2163.

7  7

instructions and drafted a charge that the judge read to the jury; trial counsel moved for a mistrial; and, during a post-verdict motions hearing, trial counsel moved for a new sentence, based on the previous objections to Dr. Crawford's testimony.² ROA at 2150-87. Petitioner has not met his burden of showing that trial counsel's performance fell below an objective standard of reasonableness.

Furthermore, even if trial counsel's handling of Dr. Crawford's testimony was in some way defective, Petitioner has not shown prejudice. The admissibility of Dr. Crawford's testimony was one of Petitioner's key arguments on appeal. The Supreme Court addressed the merits of that argument and found no error:

We find that there was nothing improper about the solicitor's examination of Dr. Crawford as a lay witness. Furthermore, to the extent there was any confusion among the jurors regarding Dr. Crawford's role as a lay witness, such confusion was effectively cured by the trial court's instruction to the jury. ... There is no indication in the record that the jury's responsibility for determining Appellant's fate was diminished in any way by the solicitor's questioning of Dr. Crawford. Even if Dr. Crawford's testimony was improper, any prejudice was cured by the jury instruction.

State v. Williams, 386 S.C. 503, 516, 690 S.E.2d 62, 69 (2010). Accordingly, Petitioner has failed to show either deficient performance or prejudice regarding his claims for ineffective assistance of counsel related to Dr. Crawford's testimony.

Mitigation Evidence

Petitioner alleges that trial counsel failed to present available mitigation evidence regarding Petitioner's extremely troubled childhood. Petitioner has failed to support these

² The Supreme Court analyzed trial counsel's performance, to determine whether the matter was properly preserved for appeal, and noted: "Appellant objected to Dr. Crawford's testimony before it was given and renewed this objection both during and after her testimony. Appellant moved for mistrial on these grounds, and the judge denied the motion. Appellant then sought to introduce a curative instruction, which the trial judge accepted." *Williams*, 386 S.C. at 516, FN 8, 690 S.E.2d at 68, FN 8.

allegations with any evidence. Furthermore, a review of the record shows that, contrary to Petitioner's allegations, trial counsel presented an array of mitigation evidence at Petitioner's trial.

For example, Attorney Nettles developed mitigation testimony regarding Petitioner's troubled childhood in his cross-examination of Dr. Crawford, who testified that Petitioner had difficulty with his parent's divorce, feeling like he was an "evil child" after the divorce; that his mother's multiple failed marriages had a negative impact on him; that his mother was an alcoholic for 30 years and was intoxicated for much of his childhood; that he had difficulty in school; that he had ADD, but was never medicated for it; among other difficulties. ROA at 2173-86. Dwight Williams, Petitioner's father, testified about the impact of the divorce on Petitioner, the violence and disturbances within the home, Daisy's drinking problem, and his own (Dwight's) mental health issues. ROA at 2208-17. Ann Wilson, a teacher at Taylors Elementary School, testified that Petitioner was very weak academically and that he was referred to special education classes, but his mother had negative attitudes towards helping him. ROA at 2220-2232. Rebecca Owens, who worked with Petitioner's mother, testified that Daisy drank heavily and had a volatile relationship with Petitioner. ROA at 2234-40. Additionally, trial counsel called numerous other experts and family members, who provided strong mitigation evidence: Professor Margorie Hammock, a clinical social worker, who testified as an expert in sociology; James Tollison, a retired Mauldin police officer who testified concerning domestic violence calls involving Petitioner's mother; Dr. Eric Elbogen, an assistant professor in clinical forensic psychology who testified as an expert in the field of violence risk assessment; James Aiken, a former warden in the South Carolina correctional system, who testified as an expert regarding Petitioner's prison adaptability; Dr. Seymour Halleck, a forensic psychiatrist, who testified

9  9

extensively about his findings regarding Petitioner's troubled childhood; and Maureen Bangcuyo, the Petitioner's sister, who gave a first-hand account about Petitioner's troubled childhood. ROA at 2241-2351.

Notably absent from Petitioner's list of mitigation witnesses was Petitioner's mother, Daisy Huckaby. At the PCR hearing, Attorney Nettles testified that the reason for not calling Daisy Huckaby to testify was trial counsel's "concerns about her willingness to tell the truth." PCR Transcript at 130. Trial counsel concluded that "as a matter of strategy, based upon those concerns . . . we felt the best thing to do is not call her." *Id.* Here, trial counsel articulated a valid strategic reason for not calling Petitioner's mother. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992); *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). Furthermore, any information that Daisy Huckaby could have offered regarding mitigation had already been elicited through the testimony of other witnesses, including Petitioner's father and sister.

Finally, trial counsel hired Jan Vogelsang, a well-respected clinical social worker, to work as the defense team's mitigation expert. Ms. Vogelsang testified at the PCR hearing regarding the thoroughness of her investigation and the collection of mitigation evidence. PCR Transcript of Record at 12-84. Further, Attorney Mauldin testified that he had full confidence in Ms. Vogelsang's expertise, noting "[s]he's an extraordinary investigator." PCR Transcript of Record at 153.

Accordingly, Petitioner has not shown that trial counsel was ineffective in failing to present mitigation evidence of Petitioner's troubled childhood. Inasmuch as this claim for relief also relates to mitigation testimony regarding Fetal Alcohol Syndrome, that issue will be discussed in detail below.

Jury Disclosure of Vote Division

Petitioner alleges that trial counsel was ineffective for failing to move for a mistrial and request a life sentence on the ground that the trial judge introduced an arbitrary factor when he distinguished between a judge inquiring into a jury's division and a jury's reporting its division on its own. During deliberations in the penalty phase of Petitioner's trial, the jury sent a note to the judge explaining that it was divided nine to three in favor of death. ROA at 2410. Trial counsel moved for a mistrial and asked that the judge impose a life sentence on the grounds that the jury had revealed its split.³ The judge explained that the jury revealed the split on its own and that the court did not ask for it; the judge further noted the jury requested "instruction about what procedure to follow in resolve." ROA at 2411. The judge denied the motion for a mistrial and instead concluded the proper "procedure is to give an *Allen* charge and let them continue deliberation." ROA at 2411. Trial counsel then objected to the *Allen* charge. ROA at 2416.

Petitioner contends that trial counsel made the wrong argument and should have argued that the trial judge's distinction injected arbitrariness into the jury deliberations. This assertion is without merit. During Petitioner's direct appeal, the South Carolina Supreme Court reviewed the *Allen* charge issue and concluded that "the trial judge's issuance of an *Allen* charge was not improper" and held that "the trial judge committed no error in not declaring a mistrial and giving an *Allen* charge after the jury revealed it was divided nine to three in favor of death." *Williams*, 386 S.C. at 510, 690 S.E.2d at 65. Additionally, the Supreme Court reviewed the applicable case law and confirmed that the judge's distinction was *not* improper:

Initially, we agree with Appellant that it is improper for a trial judge to inquire into the numerical division of a jury. [Citations omitted.] However, these decisions are inapplicable in the instant case because the jury here voluntarily

³ Counselor Mauldin explained: "We believe the disclosure . . . does now require that this court end deliberations and impose a life without parole sentence. We believe that the law requires that." ROA at 2411.

disclosed its numerical division and requested further instructions on how to proceed. The judge then promptly informed the attorneys of the jurors' numerical division and indicated that he could give an Allen charge. Unlike other cases, the trial judge did not inquire about the specifics of the jury's impasse. Therefore, we hold the trial judge committed no error.

Williams, 386 S.C. at 510, 690 S.E.2d at 65. Furthermore, the Supreme Court conducted a proportionality review and concluded that "the death sentence was not the result of passion, prejudice, or *any other arbitrary factor*." *Id.* (emphasis added). Accordingly, the Petitioner's contention that the judge introduced an arbitrary factor is without merit. Petitioner has failed to show either deficient performance or prejudice by trial or appellate counsel.

Admissibility of Petitioner's Journal

Petitioner alleges that trial counsel was ineffective in failing to argue that certain portions of Petitioner's journal should have been excluded under Rule 403, SCRE. Petitioner has failed to support this allegation with any evidence. Furthermore, a review of the record shows that trial counsel moved to suppress the journal, which the trial judge denied. ROA at 6. Additionally, during the course of the trial, trial counsel used the journal in Petitioner's defense. ROA at 1878-88. Importantly, defense expert Dr. Robert Richards relied, in part, on the journal in making his diagnosis that Petitioner had bipolar disorder, a diagnosis Petitioner used in his mitigation argument. ROA at 1971-77. Accordingly, Petitioner has not shown that counsel was ineffective.

Death Penalty Not Appropriate/ Arbitrary Manner

Petitioner alleges trial counsel and appellate counsel failed to argue that the death penalty was not appropriate and that the death penalty was used in an arbitrary manner. Petitioner asserts that South Carolina's death penalty statute is unconstitutional under *Furman v. Georgia*,

408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976). Specifically, Petitioner argues that the death penalty statute does not narrow the circumstances for which a person can be subject to the death penalty for murder. Petitioner contends that in South Carolina, "virtually every murder case can qualify for the death penalty," due to South Carolina's broad statutory definitions of kidnapping and physical torture. Petitioner's Post-Trial Brief at 25-27. Petitioner asserts that "it is almost impossible to commit murder without committing the offense of kidnapping under these definitions," violating the principle that the death penalty should only be available in limited circumstances. *Id.* at 27 (citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008)).

Contrary to Petitioner's argument, trial counsel and appellate counsel were not ineffective for failing to argue that South Carolina's death penalty statute is unconstitutional. The Eighth Amendment to the United States Constitution requires capital punishment to be limited to "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)); U.S. Const. Amend. VIII; S.C. Const. Art. I, § 15. The South Carolina Supreme Court has ruled that our State's current death penalty sentencing scheme is constitutional pursuant to the limitations mandated by *Furman* and *Gregg*. See *State v. Shaw*, 273 S.C. 194, 211, 255 S.E.2d 799, 807 (1979). Our Supreme Court has consistently upheld the death penalty statute as constitutional. See, e.g., *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981); *State v. Goolsby*, 275 S.C. 110, 268 S.E.2d 31 (1980), cert. denied, 449 U.S. 1037 (1981); *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982).

In South Carolina, a murder is death-eligible if it occurs during the commission of a kidnapping. S.C. Code Ann. § 16-3-20(C)(a)(1)(b). South Carolina's kidnapping statute provides that "[w]hoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry

away any other person by any means whatsoever without authority of law" is guilty of kidnapping. S.C. Code Ann. § 16-3-910. The South Carolina Supreme Court has consistently held the kidnapping statute is constitutional, and not overbroad or ambiguous. *See, e.g., State v. Smith*, 275 S.C. 164, 166, 268 S.E.2d 276, 277 (1980) (holding the statute's terms were not unconstitutionally vague and defendant's conduct fell squarely within the language of the statute); *State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981); *State v. Copeland*, 278 S.C. 572, 577, 300 S.E.2d 63, 66 (1982). In *State v. Tucker*, our Supreme Court affirmed the statutory definition of kidnapping when used as an aggravating circumstance of murder. *State v. Tucker*, 334 S.C. 1, 8, 13, 512 S.E.2d 99, 102, 105 (1999) (citing *State v. Hall*, 280 S.C. 74, 310 S.E.2d 429 (1983)). The Supreme Court has repeatedly upheld cases where kidnapping was used as an aggravating circumstance for a death-eligible murder. *See, e.g., State v. Vasquez*, 364 S.C. 293, 613 S.E.2d 359 (2005); *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001), *reversed on other grounds by Kelly v. South Carolina*, 534 U.S. 246 (2002); *State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001). Likewise, the Supreme Court has consistently upheld kidnapping as an aggravating circumstance in capital cases against constitutional challenges. *See, e.g., State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981), *overruled on other grounds by State v. Short*, 333 S.C. 473, 511 S.E.2d 358 (1999), (kidnapping statute in death penalty case was not unconstitutionally vague or overbroad); *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982) (death sentence for murder in the commission of a kidnapping does not violate the Eighth Amendment; the statutory definition of kidnapping is not overbroad or ambiguous); *State v. Koon*, 278 S.C. 528, 537, 298 S.E.2d 769, 774 (1982) (kidnapping statute, as used in defining statutory aggravating circumstance, is not so overly broad that it virtually encompasses all cases of murder); *State v. Davis*, 309 S.C. 326, 348, 422 S.E.2d 133, 147 (1992); *State v. Ray*, 310 S.C.

431, 437, 427 S.E.2d 171, 174 (1993). Based on all the foregoing, Petitioner's argument that South Carolina's death penalty statute is unconstitutional is without merit.

Additionally, the facts of this case clearly support the jury's finding of the aggravating circumstance of kidnapping. The State provided overwhelming evidence that Petitioner kidnapped his Victim. *See, e.g.*, ROA at 1565, 1579-81, 1597-1602, 1669, 1748-49, 1914-20. Petitioner held Victim at gunpoint against her will for over ninety minutes. Petitioner confined the Victim primarily to the bakery/deli office area of the Bi-Lo store, although they did at certain times move to other parts of the store. The Victim, as well as hostage negotiators, pleaded with Petitioner to let her go. When the Victim attempted to escape, Petitioner chased her and shot her in the back.

Furthermore, the record shows that trial counsel objected to the judge's kidnapping charge and requested additional instruction. During the guilt phase of trial, the trial judge instructed the jury with the standard jury charge on the law of kidnapping. *See* ROA at 2056. Petitioner's trial counsel requested an additional charge relating to kidnapping and requested a question regarding the kidnapping, which the judge denied. ROA at 2067. During the penalty phase, while the trial judge did not redefine kidnapping, he instructed the jury that an aggravating circumstance, kidnapping, must be found. ROA at 2399-2400. Accordingly, Petitioner has not shown that trial counsel's performance was deficient.

Similarly, Petitioner's argument that the Supreme Court's proportionality review was inadequate is without merit. South Carolina's death penalty statute mandates that the South Carolina Supreme Court review all death sentences to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." S.C. Code Ann. § 16-3-25(C)(3). This review is intended to serve as

"[a]n additional check against the random imposition of the death penalty." *State v. Shaw*, 273 S.C. 194, 211, 255 S.E.2d 799, 807 (1979); *State v. Copeland*, 278 S.C. 572, 591, 300 S.E.2d 63, 75 (1982). The Supreme Court conducted a proportionality review in Petitioner's case:

Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate. *See, e.g., State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996).

State v. Williams, 386 S.C. 503, 517, 690 S.E.2d 62, 69 (2010). This review was consistent with the Supreme Court's mandates regarding its death sentence proportionality reviews. *See State v. Harrison*, 402 S.C. 288, 741 S.E.2d 727 (2013); *State v. Passaro*, 350 S.C. 499, 567 S.E.2d 862 (2002). Accordingly, Petitioner has not shown that trial counsel or appellate counsel were ineffective.

Solicitor's Improper Argument

Petitioner alleges that trial counsel was ineffective in failing to object to various comments made by the Solicitor during the opening and closing statements of the penalty phase of his trial. Petitioner contends that the Solicitor strayed from the record and failed to limit his arguments to the circumstances of the crime and character of the defendant, thereby lessening the jury's responsibility and injecting arbitrary factors into the jury's deliberation process. Specifically, Petitioner alleges that the Solicitor improperly referred to his personal decision to seek the death penalty, told the jury that the legislature had limited the times when the State could seek the death penalty, and commented on prison conditions.

Law

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices." *State v. Cooper*, 334 S.C. 540, 514

S.E.2d 584 (1999). The State's closing arguments must be confined to the evidence in the record and the reasonable inferences that may be drawn from the evidence. *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996); *State v. Woomer*, 277 S.C. 170, 284 S.E.2d 357 (1981). "[The] evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime. . . . The jury's sole function is to make a sentencing determination based on these factors." *State v. Burkhardt*, 371 S.C. 482, 487-88, 640 S.E.2d 450, 453 (2007). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). However, a solicitor is bound to rules of fairness; a closing argument must therefore be "carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice." *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010).

This Court must "view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). The relevant question is whether, in light of the context of the entire record, the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Smith v. State*, 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007); *State v. Hornsby*, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice."). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

The Petitioner has the burden of proving he did not receive a fair trial because of the alleged inappropriate comments. *Simmons*, 331 S.C. at 338, 503 S.E.2d at 166. "To establish prejudice, Petitioner must show a reasonable probability the result of the proceeding would have been different but for trial counsel's deficiency. *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). Therefore, to demonstrate prejudice . . . Petitioner must prove a reasonable probability exists that a jury would not have sentenced him to death if trial counsel had objected to the solicitor's comments." *Vasquez*, 388 S.C. at 466-67, 698 S.E.2d at 571.

Solicitor's Personal Opinion and Legislative Determinations/Limitations

Petitioner contends that trial counsel failed to object when the Solicitor improperly injected his personal opinion and his decision to seek the death penalty into the jury deliberations. He argues that the Solicitor repeatedly told the jury that the legislature had limited the cases where the solicitor could seek the death penalty and that he also had made the difficult decision to seek the death penalty. *See* Petitioner's Post-Trial Brief at 3. He further alleges that the Solicitor improperly invoked Dr. Crawford's opinion in arguing for the death penalty.

The Solicitor made the following statements in his closing argument during the penalty phase of Petitioner's trial:

They have said earlier the solicitor is not satisfied with a life sentence. And I agree, I am not. They told you he's going to want the death penalty, and I do. Why is the death penalty the appropriate sentence in this case? And that is a fair question for you to ask, ask of us, the State of South Carolina. And I submit to you that this is the reason, is that there are mean and evil people who live in this world who do not deserve to continue to live with the rest of us regardless of how confined they may be.

The law limits the State's right to seek the death penalty to a very few murders. We seek the death penalty in only a few cases. But the circumstances where it's available are for mean and evil people. The worst of the worst. Christopher Williams and this murder are one of those cases. The worst of the worst.

ROA at 2370. Petitioner argues that the Solicitor's comments are similar to those made in *State v. Woomer*, 277 S.C. 170, 284 S.E.2d 357 (1981). However, this Court finds that the Solicitor's comments are distinguishable from those made in *Woomer*. Instead, the Solicitor's comments in the instant case are nearly identical to the comments made by Solicitor Ariail in a different trial that the Supreme Court recently reviewed and upheld in *Sigmon v. State*:

Now, when we asked for the death penalty, it's a fair and appropriate question for you to say back to me, *Solicitor Ariail*, *why do you think that the death penalty is an appropriate punishment in this case?* And I can best summarize it by a response that I got from a juror in another case on voir dire, and that juror said, as to her response in her argument for the death penalty, that they're [sic] are mean and evil people who live in this world, who do not deserve to continue to live with the rest of us, regardless of how confined they are. And that's what the basis of our request for the death penalty is. There are certain mean and evil people that live in this world that do not deserve to continue to live with us.

....

And there are people, there are people who will argue that the death penalty is not a deterrent. But *my response as the solicitor of this circuit is, it is a deterrent to this individual and that is what we are asking, is to deter Brad Sigmon and send the message that this type of conduct will not be tolerated in Greenville County, or anywhere in this State.* And let that decision that you reach ring like a bell from this courthouse, that people will understand that we will not accept brutal behavior such as this. Thank you.

Sigmon v. State, 403 S.C. 120, 128-29, 742 S.E.2d 394, 399 (2013) (emphasis by the Supreme Court). In *Sigmon*, the Court concluded that the solicitor's comments were distinguishable from those in *Woomer*⁴ because the comments did not diminish the role of the jury in sentencing Sigmon to death. See *Sigmon*, 403 S.C. at 130, 742 S.E.2d at 399 ("Although the solicitor mentioned his own considerations, he did not go so far as to compare his undertaking in

⁴ In *Woomer*, the Court concluded the solicitor's statements were improper because he repeatedly stated that he himself had undertaken the same difficult process of deciding to impose the death penalty: "[T]he initial burden in this case was not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried for his life or not. . . . I had to make this same decision, so I have had to go through the same identical thing that you all do. It is not easy." *Woomer*, 277 S.C. at 175, 284 S.E.2d at 359.

requesting the death penalty to the jury's decision to ultimately impose a death sentence.").

Similarly, in the instant case, the Solicitor's comments did not diminish the role of the jury in determining the appropriate sentence, even though the Solicitor referenced his role in choosing to request the death penalty.

Furthermore, throughout his closing argument, the Solicitor emphasized the important role the jury played in determining the appropriate sentence:

So, this is a legal process, a legal penalty enacted by our legislators; and it is a function of government *carried out by you*, the citizens. . . . *This is a function of you as citizens* carrying out part of our government process. *You are shaping a* lawful punishment to an unlawful act. So, *the responsibility is given to you* to decide what the appropriate punishment is.

...

[Y]ou are the judge. The judge does not sentence, *you sentence.* And that's what this process is about. And it is a process which *we have entrusted to you* as our citizens to carry it out fairly

...

The process makes you responsible for this difficult decision; but we can't run and hide from our responsibilities. The law places it on our shoulders, the law *entrusted it to you* and it means we'll do it, just like any other tough decision that we make; that is, you will apply common sense, you will consider the facts and you will consider the alternative solution, just like you do when you make your decisions on your jobs, with your family, otherwise. If you imagine yourself making a tough decision and handling it in the same way you would handle it with your job or with your family, we trust you would make the right decision.

ROA at 2366-68 (emphasis added). Similarly, the trial judge carefully instructed the jury regarding its role in determining the appropriate sentence. ROA at 2397-2405.

The Solicitor did not inject his own personal opinion concerning the death penalty into the proceedings, and he did not diminish the role of the jury in determining the appropriate sentence. Instead, the Solicitor merely explained his involvement in the State's decision to seek the death penalty and explained that the State does not choose to pursue the death penalty for every murder charge. The Solicitor's comments, without more, were not improper. *See State v.*

Bell, 302 S.C. 18, 34, 393 S.E.2d 364, 373 (1990); *Sigmon*, 403 S.C. at 130, 742 S.E.2d at 400 ("[T]he solicitor has some leeway in referencing the State's decision to request death, provided he does not go so far as to equate his initial determination with the jury's ultimate task of sentencing the defendant. Although the solicitor here articulated why he chose to request the death penalty, he did not equate his role with that of the jury."); *Williams v. Ozmint*, 380 S.C. 473, 479, 671 S.E.2d 600, 602 (2008) (a solicitor's comments are not improper where he states that he is asking for the death penalty or even expecting the death penalty, as long as he does not attempt to minimize the jurors' own sense of responsibility). Accordingly, Petitioner has not shown deficient performance.

Conditions of Prison

Petitioner also alleges trial counsel was ineffective for failing to object to the Solicitor's improper statements about prison conditions, which allowed the jury to return a death sentence based on arbitrary factors. See Petitioner's Post-Trial Brief at 6. In particular, Petitioner claims the following statements by the Solicitor were improper:

So, what is the appropriate sentence to fit this crime and hold him responsible? Life in prison is not appropriate. You can't put him in prison for life and expect him to suffer. You can't do it. Because he is not going to think about it every day, because there's not going to be anybody there to remind him of the damage that's done to Mandy's family or to his family. No one is going to do that. Nobody is going to constantly remind him. So, he's not going to think about it.

Sure you and I may think going to prison for life is a serious sentence, but what about Chris Williams? Being in prison is like a small city, allow all things of life. Places, restaurant, places to exercise, recreation when he wants. Doctors, hospital take care of him, clothing provided, TV. Contact with family and loved ones. He'll have freedom of movement, a social structure. He'll play cards and games. Go to work if he wants, go to school if he wants. Watch ball games on TV.

Sure, he doesn't have a car and his travel is limited, but it's not really much more than a serious change of address. He will have his family to visit him but Mandy's family won't, and her daughter won't.

ROA at 2377-78.

It is well-settled that "evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime," and that "[t]he jury's sole function is to make a sentencing determination based on these factors and not to legislate a plan of punishment." *State v. Burkhart*, 371 S.C. 482, 487-88, 640 S.E.2d 450, 453 (2007); *see also State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982); *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987). Furthermore, "[s]uch determinations as the time, place, manner, and conditions of execution or incarceration ... are reserved ... to agencies other than the jury." *State v. Plath*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984). In *State v. Bowman*, our Supreme Court cautioned that evidence regarding general prison conditions is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment. *State v. Bowman*, 366 S.C. 485, 498-99, 623 S.E.2d 378, 387 (2005).⁵

However, our Supreme Court has recognized a "tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life *in general*." *State v. Burkhart*, 371 S.C. 482, 488-89, 640 S.E.2d 450, 453 (2007). The Supreme Court has emphasized that "evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions." *Id.* When considering whether a solicitor's arguments were improper, a reviewing court must examine the comments in light of the entire record, including the overwhelming evidence of the defendant's guilt. *Vasquez v. State*, 388 S.C.

⁵ "[T]he evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant." *State v. Bowman*, 366 S.C. 485, 498-99, 623 S.E.2d 378, 385 (2005) *abrogated by State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006).

447, 698 S.E.2d 561 (2010); *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

A solicitor's comments are grounds for reversal only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

Here, given the context of the entire closing argument, even if the Solicitor's statements were improper, the improper statements do not warrant reversal. While the Solicitor did briefly address prison conditions, he did so in the context of whether a prison sentence would be appropriate for the Petitioner under the facts of this particular case. The Solicitor noted

It's not really much more than a serious change of address. [Chris Williams] will have his family to visit him. But Mandy's family won't, and her daughter won't. The death penalty is the appropriate punishment.

ROA at 2378. The Solicitor went on to contrast the grievous nature and "extent of *this crime* and the culpability of *this defendant*" with a life versus a death sentence. ROA at 2378 (emphasis added).

Maybe one shot, maybe one shot we could say he deserved life; but not three, not three shots to her back as she was running away. Maybe one, but three? The extent of the culpability after she had begged for her life, "Please, please, please don't kill me."

ROA at 2378-79. The Solicitor also highlighted the following facts as demonstrated by the evidence at trial: Petitioner stole a work schedule and meticulously planned the killing; he drew a diagram of the scene and planned what clothes he would wear; he kidnapped and emotionally and mentally tortured the Victim for nearly two hours; he ordered her to call her mother to tell her she was going to die; he made the Victim choose how she was going to die; he carried out the crime in a public supermarket where he endangered the safety of others; the hostage negotiator begged for the Victim's life; after firing the first non-fatal shot that paralyzed the Victim,

Petitioner walked up to her and shot her two more times in the back at point blank range. ROA at 2372-80.

Furthermore, based on a reading of the trial transcript and in considering trial counsel's testimony at the PCR hearing, this Court finds that trial counsel's failure to object to the Solicitor's improper comments was a valid strategic decision. At the PCR hearing, Attorney Nettles stated that he objected to everything in the Solicitor's statements that he thought was objectionable. PCR Transcript of Record at 117. He stated that at the time of the trial, he felt the Solicitor's statements were improper, irresponsible, and prejudicial to his client. *Id.* at 112-13, 128. However, he explained that he believed the Solicitor's comments were "so improper and so irresponsible that by mocking him" he could "begin to undermine [the Solicitor's] credibility." *Id.* at 125. Attorney Nettles further explained that the jury responded to the Solicitor's improper comments by snickering because it was so irresponsible and ridiculous. *Id.* at 109. Ultimately, Attorney Nettles believed that while the Solicitor's comments were improper, it would be "more powerful" to mock the Solicitor, erode his credibility, and explain away his comments. *Id.* at 110. Thus, Attorney Nettles began his closing statement with the following rebuttal:

Did he say restaurants? Did he say Chris Williams is going to a place in prison with restaurants there? Because I didn't hear anything about restaurants. What I heard about where Chris Williams is going at the end of this trial is a place where it's men and he's in a cell by himself. What I heard Jim Aiken talk about was a place where if you don't do what they tell you to do, they'll kill you.

He said restaurants. Restaurants in prison? Do any of you all really believe your tax dollars are paying for restaurants in prison? They're not. Prison is a very serious place. And what you are being asked is to decide between whether Chris Williams dies on God's time or your time.

What you're being asked to decide is whether Chris Williams spends the rest of his life until he's dead in prison or whether that, however they want to word it to try to make it seem okay, whether the government either electrocutes him or straps him to a gurney and kills him. That's where we are. Let's make no doubt about that. Let's not try to do anything to make that seem less severe. That's what we're talking about.

ROA at 2380-81. Failing to make an objection does not render trial counsel ineffective where counsel articulates a valid trial strategy. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (counsel's conduct not ineffective where counsel articulates a valid reason for employing certain strategy); *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). Here, trial counsel articulated a legitimate trial strategy—rather than objecting to the Solicitor's improper statements, he responded by emphasizing to the jury the absurdity and ridiculousness of those statements. Accordingly, trial counsel was not deficient.

Finally, even if trial counsel's performance was deficient, Petitioner has not proven prejudice. The allegedly improper statements were only a small part of the Solicitor's closing argument. See *State v. Tucker*, 324 S.C. 155, 169, 478 S.E.2d 260, 268 (1996) (noting solicitor's improper comment "was one isolated event in the entire argument"). Also, the trial judge gave clear instructions to the jury that they were to decide what verdict to return and that they were not required to return a death sentence. See ROA at 2397-2405. Therefore, considering the closing statement in its entirety within the context of the full record and the careful instructions by the trial judge, and given the overwhelming evidence of guilt and the egregious circumstances of the crime, Petitioner has failed to prove that there is a reasonable probability that the jury would have returned a different verdict had the Solicitor not made these comments.

Furthermore, the South Carolina Supreme Court conducted a review of the trial record pursuant to S.C. Code Ann. § 16-3-25 and concluded that "the death sentence was not the result of passion, prejudice, or any other arbitrary factor." See *State v. Williams*, 386 S.C. 503, 517, 690 S.E.2d 62, 69 (2010). Accordingly, Petitioner's argument that he was prejudiced by counsel's failure to object to the solicitor's improper statements and injection of arbitrary factors into the jury's deliberation is without merit.

Recommendation Instruction

Petitioner alleges that trial and appellate counsel were ineffective in failing to object to or argue that the trial judge erred in his instructions to the jury that their decision concerning the sentence was a recommendation. At a pretrial motions hearing on January 13, 2005, trial counsel raised the issue of the judge using the term "recommendation" in his jury charge, after which the following exchange took place:

The Court: Well, in my charge, I say it is a recommendation. It says it in the statute; however, it is mandatory on the court. And I tell them that in my charge.

Mr. Mauldin: All right, sir. So you say the word, but you tell them that you're going to do what they say?

The Court: Right. It doesn't mean what it says. It means that I am obligated to follow what the jury does, okay, and I do that in my charge.

ROA at 2607-08. Again, at the beginning of the sentencing phase of Petitioner's trial, Attorney Mauldin objected to the use of the term "recommendation." ROA at 2085. Judge Nicholson overruled the objection, explaining:

It's the state law. The form was provided by the state law. I got to go into it and I will explain it to the jury. I will explain to the jury it is not a recommendation, the court is obligated to follow – the statute needs to be amended, the word recommendation needs to be taken out.

ROA at 2085. Judge Nicholson gave the following charge to the jury:

Mr. Foreman, members of the Jury, it now becomes your duty to decide what sentence you recommend this Court impose upon the Defendant. . . . Please understand your sentence recommendation will be followed by this Court. . . . And even though the form says "recommendation," I charge you that the Court is obligated to follow that recommendation.

ROA at 2397-99. *See also* ROA at 26-27.

At the PCR hearing, appellate counsel, Robert Dudek, testified that based on his understanding of the law and his prior experience with the issue, "as long as the jury was made

known that their sentence would be binding, that that solved any problem." PCR Transcript of Record at 223. He further testified that he did not believe he could prevail on this issue because the trial judge clearly instructed the jury "that this is not a recommendation. Whatever verdict you come back with, death or life, that's going to be the verdict and that's going to be the sentence that I'm going to impose." *Id.* at 222. Citing Justice Toal's book, Mr. Dudek also stated that standard appellate practice is to raise only those issues most likely to succeed, not every possible issue. *Id.* at 221-22. Petitioner has not shown that trial or appellate counsel were deficient.

Further, Petitioner has not shown prejudice. Notwithstanding the imprecise use of the word "recommendation" in the statute, the case law in this state is well-settled that there is no error where a judge uses the word "recommendation" in his jury charge, if he also explains the binding nature of the jury's decision. "The idea should be conveyed to the jury that its sentencing recommendation will be followed. *See State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981)." *State v. Bellamy*, 293 S.C. 103, 107, 359 S.E.2d 63, 65 (1987) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *see also State v. Smith*, 286 S.C. 406, 409, 334 S.E.2d 277, 279 (1985) (approving "the judge's sentencing phase charge concerning the jury's responsibility to recommend a sentence and the finality of their recommendation"). Here, the trial judge properly instructed the jury that its sentencing recommendation would be followed. Accordingly, Petitioner's allegations are without merit.

Adequacy of Voir Dire/ Exclusion of Jurors/ Venue Preservation

Petitioner alleges that trial counsel was ineffective for failing to conduct an adequate jury voir dire, exclude certain jurors, and request a change of venue. At a pretrial motions hearing on

January 13, 2005, trial counsel made a motion for ten additional peremptory challenges, which the trial judge denied. ROA at 2564-66. Similarly, at the same hearing, trial counsel moved for a change of venue, stating that the "case is a highly publicized, very well-known case." ROA at 2570, 18-20. The trial judge took this matter under advisement stating that they could revisit the issue, if necessary, during the jury voir dire process. Trial counsel made numerous other motions related to jury selection, some of which the trial judge granted and others he denied. ROA at 28-39, 2570-2606.

"[T]he process of jury selection inherently falls within the expertise and experience of trial counsel. *Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). . . . [J]ury selection is within the ambit of trial strategy. . . . '[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury.' *Id.* at 516, 511 S.E.2d at 68." *Magazine v. State*, 361 S.C. 610, 617, 606 S.E.2d 761, 764-65 (2004). "A motion to change venue is addressed to the sound discretion of the trial judge . . . *Sheppard v. State*, 357 S.C. 646, 654, 594 S.E.2d 462, 467 (2004). . . . A denial of a change of venue is not error if the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial. *State v. Tucker*, 334 S.C. 1, 14, 512 S.E.2d 99, 106 (1999)." *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013).

Petitioner has not provided any explanation or put forward any evidence to support his bald assertions regarding ineffective assistance on the issues of jury selection and change of venue. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *Morris v. State*, 371 S.C. 278, 639 S.E.2d 53 (2006); *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the applicant bears

the burden of establishing that he is entitled to relief. *Edwards v. State*, 372 S.C. 493, 494, 642 S.E.2d 738, 739 (2007); *Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000). In light of the foregoing, Petitioner has not met his burden of showing ineffective assistance of counsel.

Guilty Plea and Jury Sentencing

Petitioner alleges that trial counsel and appellate counsel were ineffective for failing to argue that Petitioner should have the right to plead guilty and still receive a jury trial for sentencing. Petitioner contends that he desired to plead guilty to the murder charge in order to show acceptance of responsibility, and that he wanted to be sentenced by a jury.

The law in this state is well-settled regarding the right to a jury sentencing after a guilty plea in a death penalty case. State statute mandates that in all capital cases in which the defendant pleads guilty, "the sentencing proceeding must be conducted before the judge." S.C. Code Ann. § 16-3-20(B). Our Supreme Court has repeatedly upheld this statute, finding that a defendant does not have a constitutional right to plead guilty and receive a sentencing hearing by a jury. See *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004); *State v. Crisp*, 362 S.C. 412, 608 S.E. 2d 429 (2005); *State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009); *State v. Inman*, 359 S.C. 539, 720 S.E.2d 31 (2011). Petitioner concedes that his position—that he should have the right to plead guilty and still receive a jury sentencing—is contrary to the overwhelming case law in South Carolina. See Petitioner's Post-Trial Brief at 76-77.

Furthermore, at a pre-trial motions hearing, trial counsel moved to quash the death penalty, arguing that if Petitioner pled guilty to murder, he would be deprived of a jury sentencing and the ability of using his guilty plea as evidence of remorse. ROA at 2432. Trial counsel renewed this motion at the beginning of Petitioner's trial and again subsequent to the verdict and sentence.

ROA at 7-9, 2085, 2844-45. The trial judge appropriately denied these motions. At the PCR hearing, appellate counsel, Robert Dudek, testified that he did not raise this issue on appeal because the South Carolina Supreme Court has not shown "any interest" in the issue, and because he did not believe it would be a "winning" issue based on the applicable case law and his past experiences with this issue. PCR Transcript of Record at 212-14, 225-28; *see Lawrence v. Branker*, 517 F.3d 700, 713 (4th Cir. 2008) (noting appellate counsel has wide discretion in deciding which issues are most likely to afford relief on appeal and cannot be ineffective for failing to assign error to an issue that is without merit). Accordingly, Petitioner has not shown that trial counsel or appellate counsel were ineffective on this issue.

Aggravators in the Indictment

Petitioner argues that trial counsel or appellate counsel failed to argue that the circumstances of aggravation should have been included in the indictment. The law in this state is well-settled regarding the inclusion of circumstances of aggravation in an indictment. Our Supreme Court has repeatedly affirmed that the State is not constitutionally required to allege aggravating circumstances in the indictment for capital murder cases. *See State v. Laney*, 367 S.C. 639, 649-650, 627 S.E.2d 726, 732 (2006); *State v. Crisp*, 362 S.C. 412, 419-20, 608 S.E.2d 429, 433-34 (2005); *State v. Downs*, 361 S.C. 141, 147-48, 604 S.E.2d 377, 380-81 (2004) ("aggravating circumstances need not be alleged in an indictment for murder"). Petitioner concedes that his position—that circumstances of aggravation should be included in the indictment—is contrary to the overwhelming case law in South Carolina. *See* Petitioner's Post-Trial Brief at 77-78.

Furthermore, at the beginning of Petitioner's trial, trial counsel objected to the fact that the circumstances of aggravation were not included in the indictment. ROA at 9-12. Also, trial counsel made a motion to reconsider this issue subsequent to the verdict and sentence. ROA at 2845-49. The trial judge appropriately denied these motions. ROA at 12, 2849. At the PCR hearing, appellate counsel, Robert Dudek, testified that he did not raise this issue on appeal because he had raised the issue before and lost, and because he did not believe he would prevail on that issue based on the applicable case law and his past experiences with the issue. PCR Transcript of Record at 223-25; *see Lawrence v. Branker*, 517 F.3d 700, 713 (4th Cir. 2008) (noting appellate counsel has wide discretion in deciding which issues are most likely to afford relief on appeal and cannot be ineffective for failing to assign error to an issue that is without merit). Accordingly, Petitioner has not shown that trial counsel or appellate counsel were ineffective on this issue.

Foreign National

Petitioner alleges that his trial counsel was ineffective for failing to recognize that Petitioner was a German citizen and for failing to notify the Petitioner of his rights as a foreign national. The Federal Republic of Germany submitted an *amicus curiae* brief to this Court, making arguments on Petitioner's behalf. Also, representatives from the German Consulate were present throughout Petitioner's PCR hearing held before this Court.

The Petitioner's mother, Daisy Huckaby, is a German citizen; she was born in Germany and immigrated to the United States in 1978 after meeting and marrying the Petitioner's father, Dwight Williams. By virtue of his mother's German citizenship, Petitioner apparently is also a

German citizen.⁶ See Plaintiff's Exhibit 26, Citizenship Certification. Petitioner contends that because of his German citizenship, he was entitled to consultation rights and protections as a foreign national as outlined in Article 36 of the Vienna Convention on Consular Relations.

Contrary to Petitioner's arguments, he is not a "foreign national." Instead, he is a United States citizen and was not entitled to any of the rights of consultation under the Vienna Convention. The Petitioner was born in Greenville, South Carolina, to an American father and is therefore a United States citizen by birth. See United States Const., Amend. XIV ("All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."); 8 U.S.C. § 1401 ("[t]he following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof").

Evidently, Petitioner is a dual citizen of the United States and German. See Plaintiff's Exhibit 26, Citizenship Certification. However, this dual citizenship does not confer upon the Petitioner the status of a "foreign national" for purposes of consular protection in a criminal proceeding in South Carolina. See, e.g., *Commonwealth v. Baumhammers*, 599 Pa. 1, 63-4, 960 A.2d 59, 97-8 (2008) (finding a dual national detained by authorities in his own country and state is not a foreign national and is not entitled to consular protections); *Cauthern v. State*, 145 S.W.3d 571, 628 (Tenn. Crim. App. 2004) (finding a dual national born in the U.S. is not entitled to consular protections under the Vienna Convention and, furthermore, the Vienna Convention does not create a judicially enforceable individual right); *State v. Ahmed*, 103 Ohio St.3d 27 35-6, 813 N.E.2d 637, 651 (2004). The Code of Federal Regulation defines the term "foreign

⁶ At Petitioner's PCR hearing, Gerrit Morking, a representative from the German consulate, posited that a person born to a German citizen is also a German citizen, regardless of place of birth. In fact, Mr. Morking suggested that German citizenship inherited by birth could be passed on from generation to generation such that "if my great, great, great, great grandfather was a German Citizen, I'm still a German Citizen also." See PCR Transcript of Record at 801-02.

national" as "any individual *other than* a U.S. national," 31 C.F.R. § 800.215 (emphasis added); while a "national" means a "citizen of the United States," 22 C.F.R. § 50.1. Similarly, the U.S. Department of State's "Consular Notification and Access" instruction manual—which, incidentally, is cited in Germany's *amicus* brief—defines a foreign national as "any person who is not a U.S. citizen." *See* Consular Notification and Access, U.S. Department of State, at 12.⁷ Additionally, the State Department manual explains that "consular notification is not required if the detainee has U.S. citizenship, regardless of whether he or she has another country's citizenship or nationality as well." *Id.* at 14.

While our courts have recognized the right of foreign nationals to receive consular protection during criminal proceedings in state courts, those cases presume that the person being charged with the crime is a foreign national and not a U.S. citizen. *See, e.g., State v. Banda*, 371 S.C. 245, 639 S.E.2d 36 (2006) (defendant was a citizen of Zimbabwe and was in the U.S. on a basketball scholarship); *State v. Lopez*, 352 S.C. 373, 574 S.E.2d 210 (2002) (defendant was a Mexican national residing legally in the U.S. as a resident alien). Here, Petitioner is a United States citizen, born in South Carolina, and is therefore not a foreign national. Accordingly, Petitioner has failed to show that he was entitled to the consular protections under the Vienna Convention, and has failed to meet his burden of showing that trial counsel was ineffective for failing to enlist the resources of the German consulate.⁸

Even assuming that the Petitioner was entitled to consular advice and that his trial counsel was deficient in failing to notify him of his rights, the Petitioner has not demonstrated that he suffered any prejudice. *State v. Lopez*, 352 S.C. 373, 574 S.E.2d 210 (2002). Petitioner

⁷ The Consular Notification and Access manual is available at http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf.

⁸ Additionally, this Court notes that courts disagree about whether trial counsel's failure to notify a criminal defendant of his rights to consular protection rise to the level of ineffective assistance.

argues that if the German consulate had become involved in the case prior to his trial, the German government would have provided financial and legal assistance and the outcome of the trial would have been different. Specifically, Petitioner asserts that the German consulate would have helped uncover the fetal alcohol syndrome issue and would have objected to the Solicitor's improper statements. However, beyond mere speculation, Petitioner has not shown any evidence that assistance from the German consulate would have changed the outcome of his trial. Trial counsel stated that while defense attorneys in death penalty cases always desire more time to prepare, in this particular case, the attorneys felt they were sufficiently prepared. PCR Transcript of Record at 148-49. Further, there is no evidence that the defense team lacked adequate resources. The defense team was composed of highly-qualified, experienced attorneys, including the Public Defender for the Thirteenth Judicial Circuit, John Mauldin, and attorney Bill Nettles, who now serves as United States Attorney for the District of South Carolina. Attorneys Mark MacDougall and Colleen Coyle of the Washington D.C. law firm Akin Gump Strauss Hauer & Feld also aided in the Petitioner's defense. The defense team relied on the skills and resources of its mitigation investigator, Jan Vogelsang, a well-respected and experienced social case worker who has worked with numerous capital defense teams,⁹ and a team of highly-qualified experts who met with the Petitioner and his defense team on numerous occasions and testified at trial. Using the resources at its disposal, the defense team developed a comprehensive trial strategy, even though the Petitioner was ultimately convicted and sentenced to death.

Petitioner contends that the German consulate could have helped collect information about Daisy's family history, including mental health issues and alcohol consumption. PCR Transcript of Record at 67, 80-81. Jan Vogelsang testified that she felt that she could not

⁹ Jan Vogelsang's expertise gained national attention in 2006 when she was enlisted by the defense team for September 11 conspirator, Zacarias Moussaoui.

provide a complete genogram without the opportunity to travel to Germany. *Id.* at 64-65, 67-68. However, in spite of the defense team's lack of ability to travel to Germany to investigate Daisy's family history, the team did in fact collect information and evidence regarding Daisy's family history, mental health history, and alcohol addiction.

While this Court understands the sentiments of trial counsel that additional time and resources are always desirable in a death penalty case, here, Petitioner has failed to show that he was prejudiced in not having the assistance of the German Consulate at his trial. Accordingly, trial counsel was not ineffective for failing to advise the Petitioner of his rights as a foreign national or failing to enlist the help of the German government in the Petitioner's defense.

Sex Offender Registry

Petitioner alleges that trial counsel was ineffective for failing to ask the judge to make a finding that he did not have to register as a sex offender.¹⁰ In South Carolina, a person guilty of kidnapping is required to register as a sex offender unless the court "makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense." S.C. Code Ann. § 23-3-430(15); *Lozada v. S.C. Law Enforcement Div.*, 395 S.C. 509, 514, 719 S.E.2d 258, 260-61 (2011).

The trial record shows that Judge Nicholson sentenced the Petitioner to death after the jury found the existence of a statutory aggravating factor for murder; however, no sentence was given for the kidnapping conviction, consistent with S.C. Code Ann. § 16-3-910 (mandating

¹⁰ This Court notes that Petitioner was not convicted of any kind of sexual offense. While investigators initially considered whether there was a sexual aspect to the crimes, due in part to the Petitioner's prior relationship with the victim and the fact that the victim's shirt had been torn from her during her struggle to get away from the Petitioner, there was no other evidence suggesting Petitioner had committed any crimes of a sexual nature.

imprisonment for a period not to exceed thirty years for kidnapping, *unless* sentenced for murder as provided in § 16-3-20). *See* ROA at 2420.

At the PCR hearing, attorney John Mauldin testified that he could not recall any discussions about Petitioner being required to register as a sex offender as a result of a kidnapping conviction. PCR Transcript of Record at 176. Notwithstanding trial counsel's concession, Petitioner has failed to show counsel's representation fell below an objective standard of reasonableness. *See Williams v. State*, 378 S.C. 511, 515-16, 662 S.E.2d 615, 617-18 (Ct. App. 2008) (finding defendant's trial counsel was not ineffective for failing to request the trial court to make a determination as to whether the kidnapping was sexual in nature).

Additionally, Petitioner has not shown that he was prejudiced by his trial counsel's failure to ask the judge to make a finding that the defendant did not have to register as a sex offender. Petitioner was convicted of murder and sentenced to death. Petitioner's death sentence essentially voids the practical effect and requirements of the sex offender registry act. Accordingly, the Petitioner has not suffered any prejudice as a result of trial counsel's failure to request a finding that the Petitioner did not have to register as a sex offender.

Fetal Alcohol Syndrome

Petitioner alleges trial counsel was ineffective in failing to adequately investigate Petitioner's prenatal exposure to alcohol and the resulting complications of that exposure, including a diagnosis of Fetal Alcohol Syndrome (FAS) or some other type of Alcohol Related Neurodevelopmental Disorder (ARND). Petitioner contends that evidence of prenatal exposure to alcohol and a diagnosis of FAS or ARND would have been powerful mitigation that a jury could have considered in determining an appropriate sentence. Petitioner also contends that such

evidence may have been used to prove Petitioner, because of mental disease or defect, lacked sufficient capacity to conform his conduct to the requirements of the law.

At the outset, this Court recognizes that we are just beginning to understand the role that Fetal Alcohol Syndrome (FAS) plays in human behavior in general and criminal activity in particular. As Petitioner's PCR counsel astutely noted, "we are just now at the tip of the iceberg of what we know about the brain."¹¹ PCR Transcript of Record at 10. With that understanding, this Court has fully considered the testimony of Petitioner's experts on the issue of FAS, has thoroughly studied the exhibits and information provided to the Court by Petitioner's counsel and experts, and has carefully reviewed the relevant cases involving FAS or comparable organic brain damage.

"Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. *Strickland*, 466 U.S. at 691. Thus, '[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.' *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (citation omitted). In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation 'was

¹¹ It is noteworthy that each member of the FASD Experts team acknowledged that the state of the art for FASD forensic assessment was "hit or miss" and lacked "a protocolized structured assessment process in the forensic context" prior to 2007 when the FASD Experts team began working together, which was nearly two years after the Petitioner's trial in February 2005. See PCR Transcript of Record at 396 (Dr. Connor testifying that the team gave a presentation at a seminar in March 2009, during which they noted that the science of forensic assessment for FASD prior to 2007 was "hit or miss," and that the FASD Experts team developed the current structured, multi-disciplinary team approach in 2007 to better evaluate and assess FASD); 449-50 (Dr. Adler explaining the 2009 "presentation really was the first public scientific, professional presentation about our proposed model for the evaluation," prior to which "there was no . . . protocolized approach"); 636-37, 733-34 (Dr. Brown testifying that during the 1990s and up to 2005, there were people testifying in trials who were not qualified and did not know what they were doing, and thus, the "hit or miss" idea emphasized that "for the forensic context you needed a higher level of protocol and approach that would ensure that . . . the diagnostic criteria, were met and that the individuals working in the context were trained and experienced in the field").

itself reasonable.' *Wiggins v. Smith*, 539 U.S. 510, 522-23, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (emphasis in original) (citation omitted). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. *Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006)." *Taylor v. State*, 2009-123871, 2013 WL 3048636 (S.C. June 19, 2013); see also *Council v. State*, 380 S.C. 159, 171-72, 670 S.E.2d 356, 362-63 (2008) (noting our Supreme Court has adhered to the principles and analysis in *Wiggins* in determining whether counsel was ineffective in failing to thoroughly investigate potential guilt and penalty phase evidence).

Trial counsel's failure to conduct a reasonable investigation into mitigating circumstances constitutes ineffective assistance. *Simpson v. Moore*, 367 S.C. 587, 605-06, 627 S.E.2d 701, 710-11 (2006) citing *Wiggins v. Smith*, 539 U.S. 510, 511 (2003) (finding counsel's review of a pre-sentence investigation report and DSS records did not constitute a reasonable investigation into defendant's background, and a more in-depth investigation would have revealed the defendant's "abuse in the first six years of his life while in the custody of his alcoholic, absentee mother" and his diminished mental capacity). Similarly, our Supreme Court has found counsel ineffective for failing to adequately investigate and prepare expert testimony about a defendant's mental condition. *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004) (holding the absence of crucial medical records and related information which existed at the time of trial prevented experts from conveying an accurate diagnosis and explanation of defendant's mental condition); see also, *Ard v. Catoe*, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007); *Nance v. Ozmint*, 367 S.C. 547, 557, 626 S.E.2d 878, 883 (2006) (concluding defense counsel in capital murder case should have investigated and presented mitigating social history evidence outlining defendant's troubled childhood and mental illness).

"When determining if want of mitigation evidence resulted in prejudice, we must determine whether the 'mitigating evidence, taken as a whole, "might well have influenced the jury's appraisal" of [the defendant's] culpability.' *Wiggins v. Smith*, 539 U.S. 510, 538 (2003). . . '[T]he likelihood of a different result if the [mitigation] evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing.' *Rompilla*, 545 U.S. at 393 (quoting *Strickland*, 466 U.S. at 694). Accordingly, if trial counsel's complete failure to present mitigation evidence undermines confidence in the outcome, then [Petitioner] suffered prejudice." *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009) (citations omitted).

The South Carolina Supreme Court has found prejudice where "there was very strong mitigating evidence to be weighed against the . . . aggravating circumstances presented by the State[, and such] . . . evidence may well have influenced the jury's assessment of [a defendant's] culpability." *Council v. State*, 380 S.C. 159, 176, 670 S.E.2d 356, 365 (2008) (granting new sentencing trial where only very limited mitigation testimony was presented and no medical evidence was presented); *see also*, *Gray v. Branker*, 529 F.3d 220, 238 (4th Cir.2008) (concluding if a jury had been able to "place [mental disturbance] on the mitigating side of the scale," but was deprived of such evidence, "there is a reasonable probability that at least one juror would have struck a different balance" (quoting *Wiggins*, 539 U.S. at 537)).

In *Jones v. State*, our Supreme Court addressed a claim for ineffective assistance of counsel very similar to the one at issue here. *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998). While the defendant in that case was not diagnosed with FASD, he did claim that trial counsel was ineffective in failing to present mitigating evidence that he had organic brain damage. The Court found that additional evidence about the defendant's mental impairment would not have revealed anything significantly different than what had been presented to the

jury. *Id.*, 332 S.C. at 339, 504 S.E.2d at 826. The Court noted that the jury had been presented with several mitigating factors regarding the mental condition of the defendant, but that they were also presented with overwhelming evidence of the defendant's guilt along with aggravating factors surrounding the murder. *Id.* The Court explained that the defendant was not entitled to retool his mitigation argument into a "fancier" package:

At the sentencing hearing, the mentality of Jones was the focus of his mitigation case. His counsel's strategy was not to portray Jones as being under active mental and emotional disturbance, but rather to emphasize his mental retardation, as evidenced by his upbringing. This strategy obviously did not succeed. Just because it was unsuccessful does not mean that Jones can now recharacterize the evidence and claim that counsel did not adequately present mitigation evidence. The "new" evidence is the same as the "old" evidence. At best, it is a fancier mitigation case. If the evidence was not persuasive in the first case, the defendant does not get a second chance. Otherwise, there would never be an end to litigation.

Jones v. State, 332 S.C. 329, 339, 504 S.E.2d 822, 826-27 (1998). Accordingly, the Court held that trial counsel was not ineffective.

Our Supreme Court also considered issues similar to those in the instant case¹² in *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006). In *Moore*, defense counsel called several witnesses, including three experts, to offer mitigating evidence in the sentencing phase of a capital murder trial. The Supreme Court summarized the mitigation testimony from the trial as follows:

Witnesses testified that Simpson's mother used heroin while pregnant with him, Simpson grew up in a drug environment, he had trouble in school, and he experienced several personal tragedies. One expert, a clinical social worker, testified that Simpson's mother abused drugs while pregnant with Simpson and after, Simpson was often abandoned as a child, he suffered chronic headaches,

¹² The Court notes that whether the defendant suffered organic brain damage was not discussed in *Simpson*. Nevertheless, the issues are analogous to the instant case: mother abused drugs while pregnant; defendant had traumatic childhood; PCR counsel claimed trial counsel failed to investigate and present evidence of these issues sufficiently; PCR counsel offered evidence and experts offered opinions regarding the defendant's mental condition, which the defendant claims could have changed the jury's sentencing decision.

and had been exposed to traumatic life events. A second expert, a clinical psychologist, testified that Simpson's IQ was at the lower end of the normal range, and that Simpson tested "highly abnormal" on the scales of paranoia, schizophrenia, and mania. Finally, a forensic psychiatrist, Dr. Dupree, testified that Simpson suffered from a mental illness known as dysthymic disorder, which is basically chronic depression that lasts over a period of more than two years. Dr. Dupree also testified that Simpson experienced symptoms associated with attention deficit disorder and post-traumatic stress disorder, but he could not be diagnosed as having these disorders. She also noted his history of drug and alcohol abuse.

Simpson v. Moore, 367 S.C. 587, 606-07, 627 S.E.2d 701, 711-12 (2006). At the PCR hearing, defendant's counsel presented testimony of two experts, who explained the relationship between Simpson's traumatic childhood and the likelihood that he would murder someone. *Id.* Also, Dr. Dupree submitted an affidavit stating her prior opinion was not reliable because she did not know that Simpson's mother had used drugs during her pregnancy with Simpson, among a variety of other facts, and that based on this new information, she was prepared to offer a different opinion. *Id.*

The Court held¹³ that defense counsel was not deficient because counsel interviewed a number of witnesses about the defendant's childhood and life; counsel hired a private investigator to gather background information on the defendant; and counsel called several witnesses to offer mitigating evidence, including three experts who were provided the information gathered about the defendant's background. *Simpson v. Moore*, 367 S.C. 587, 606-07, 627 S.E.2d 701, 711-12 (2006). The Court also held that the defendant failed to show that he was prejudiced during the mitigation case because "the jury was aware of the defendant's troubled childhood, traumatic life experiences, and mental condition." Citing *Jones v. State*, the Court concluded that any "additional investigation would have merely resulted in a 'fancier'

¹³ The Court reversed the PCR court, which had found that counsel failed to fully investigate the defendant's medical, mental, social, and familial history, and because of this, the jury did not have the opportunity to consider mitigating factors warranting a life sentence as opposed to the death penalty. See *Moore*, 367 S.C. at 607, 627 S.E.2d at 712.

mitigation case, having no effect on the outcome of the trial." *Simpson v. Moore*, 367 S.C. 587, 606-07, 627 S.E.2d 701, 711-12 (2006), quoting *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998).

This Court finds the instant case analogous to *Jones v. State* and *Simpson v. Moore*. The record shows that trial counsel did not present evidence to the jury that Petitioner suffered from Fetal Alcohol Syndrome or that he had organic brain damage. At Petitioner's PCR hearing, Petitioner's trial counsel and defense mitigation investigator testified that they had evidence that Petitioner's mother, Daisy, drank alcohol during pregnancy and that they were aware of Fetal Alcohol Syndrome and the effects of prenatal exposure to alcohol. However, both Attorney Mauldin and Attorney Nettles stated that they could not identify a reason why they did not develop a mitigation strategy based on Fetal Alcohol Syndrome. PCR Transcript of Record at 93-97, 119, 186-88. Nevertheless, this Court finds that Petitioner has not shown trial counsel was ineffective.

Trial counsel's investigation, preparation, and presentation of defense evidence and mitigation at Petitioner's trial were not deficient. Trial counsel put together a highly qualified defense team, which included experienced capital defense attorneys, mitigation investigators, social workers, and mental health experts. Trial counsel carefully investigated the social, educational, familial, and mental health background of the Petitioner. Trial counsel developed a cogent mitigation defense, offered an array of compelling evidence, and presented the poignant testimony of a number of lay and expert witnesses.

Trial counsel retained Jan Vogelsang as a mitigation expert. Ms. Vogelsang is a highly-regarded clinical social worker with substantial experience in capital litigation, although this was her first trial working as a mitigation investigator. See PCR Transcript of Record at 15-19. Ms.

Vogelsang testified that she was familiar with Fetal Alcohol Syndrome, including its symptoms and causes, given her prior experience with working with people affected by FAS. *Id.* at 53-55. During the course of her investigation, Vogelsang investigated and collected information regarding the mother's drinking habits. *Id.* at 50-51. For example, she interviewed family members, including Petitioner's father, Dwight Williams, and Petitioner's sister, Maureen Williams. *Id.* at 55-60. In her testimony at the PCR hearing, Ms. Vogelsang noted that neither Dwight nor Maureen could identify the precise amount of alcohol consumed by the mother. *Id.* at 55-60. Vogelsang also interviewed the mother, Daisy Huckaby, who denied drinking while pregnant. *Id.* at 58. Vogelsang presented the information she collected about the mother's drinking to trial counsel as well as to the defense team's experts. *Id.* at 59-60.

Trial counsel retained Dr. James Evans, a neuropsychologist, who completed a battery of neuropsychological testing that revealed the Petitioner suffered from neuropsychological brain damage affecting the frontal lobes. This information was presented to trial counsel and the other members of the defense team, including Jan Vogelsang, as well as to the defense experts. Also, trial counsel retained Dr. Griesemer who conducted an MRI of the Petitioner's brain and concluded the MRI Report showed a normal brain. This Report was available prior to the start of trial.

Trial counsel retained Dr. Robert Richards who testified during the guilt phase of the trial and diagnosed the Petitioner with bipolar disorder. ROA at 1961. Similarly, trial counsel retained Dr. Seymour Halleck, who testified as a forensic psychiatrist in the penalty phase of the trial. ROA at 2303. At trial, Dr. Halleck testified that Petitioner had a major depressive episode and an obsessive compulsive disorder. ROA at 2309. Dr. Halleck based his diagnosis on an extensive review of Petitioner's background and family history, including defense team's

mitigation notes, school records, police records, incident reports, medical records, as well as a four hour interview with Petitioner. ROA at 2306. Having reviewed all of this information, however, Dr. Halleck concluded that Petitioner knew right from wrong and was able, though with difficulty, to conform his behavior to the requirements of the law. ROA at 2318.

Additionally, trial counsel brought in experienced litigation attorneys from the well-regarded Washington D.C. law firm, Akin Gump, to help prepare Petitioner's defense. In particular, these attorneys helped investigate and prepare mitigation experts, including Dr. Seymour Halleck. PCR Transcript of Record at 135-36. Attorney Nettles testified that he was satisfied with the work of these attorneys and that their presentation of the mitigation experts was consistent with the defense's theory of the case. PCR Transcript of Record at 136.

Based on all the foregoing, this Court finds that trial counsel had evidence that Petitioner's mother drank during pregnancy, and that trial counsel was aware of the resulting complications, including brain damage. Trial counsel also had evidence that Petitioner possibly suffered brain damage, based on Dr. Evans' reports. Trial counsel presented this information, along with other mitigation evidence, to the defense experts. Considering all of the information it had available and in consultation with its experts, trial counsel developed a cogent strategy to present mitigation evidence—including evidence of the mother's alcohol addiction—but also made a strategic decision to not present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (though trial counsel was unable to articulate the reasons for that strategic decision). Instead, trial counsel's strategy was to present mitigation evidence regarding Petitioner's troubled childhood and his mental illness, as diagnosed by defense experts.

Trial counsel carefully developed its mitigation evidence. As explained above, trial counsel attempted to fully develop mitigation evidence of Petitioner's troubled childhood. As

part of that strategy, trial counsel presented evidence of mother's alcohol addiction and her consumption of alcohol during pregnancy. Trial counsel attempted—albeit unsuccessfully—to use that evidence, along with other facts in evidence, to persuade the jury to consider the lesser sentence of life. Similarly, as explained above, trial counsel presented evidence of Petitioner's mental illness, again pleading with the jury for a sentence other than death. While it is easy in retrospective to criticize an unsuccessful trial strategy, Petitioner has not shown that trial counsel's investigation and presentation of mitigation evidence fell below the standard required in a PCR action.

Accordingly, counsel's performance was not deficient. *See Johnson v. State*, 333 S.W.3d 459, 466 (Mo. 2011) (failure to present expert testimony specifically related to fetal alcohol syndrome was not ineffective assistance); *Sells v. Thaler*, CIV. SA-08-CA-465-OG, 2012 WL 2562666 (W.D. Tex. June 28, 2012) (concluding no reasonable probability that, but for the failure of petitioner's trial counsel to present evidence of fetal alcohol syndrome, the outcome of the punishment phase of petitioner's capital murder trial would have been any different); *Garza v. Thaler*, 909 F. Supp. 2d 578 (W.D. Tex. 2012) (petitioner's complaints about his trial counsel's failure to investigate whether petitioner suffers from FAS and to present evidence establishing such a diagnosis did not cause the performance of trial counsel to fall below an objective level of reasonableness); *Burgess v. State*, 962 So. 2d 272 (Ala. Crim. App. 2005) (denying defendant's claims of ineffective assistance of counsel that his trial counsel should have called an expert witness on FAS and should have obtained a neuropsychological assessment to investigate possible organic brain impairment, where defendant's counsel conducted a diligent investigation and introduced evidence in support of mitigation); *In re Andrews*, 28 Cal. 4th 1234, 1259, 52 P.3d 656 (Cal. 2002) (concluding counsel's strategic decision to limit the scope of their

[Handwritten signature]

investigation of mitigating background evidence and to not present evidence at the penalty phase that included FAS and organic brain damage came within "the wide range of reasonable professional assistance"); *State v. Sullivan*, 1995 WL 465172 (Del. Super. June 29, 1995) *aff'd*, 676 A.2d 908 (Del. 1996) (finding trial counsel's failure to investigate FAS not ineffective where trial counsel was provided conflicting evidence regarding mother's drinking habits during pregnancy); *State v. Murphy*, 91 Ohio St. 3d 516, 542, 747 N.E.2d 765, 797 (2001) (finding trial counsel's failure to present evidence of organic brain damage was not ineffective where record showed that counsel presented mitigating factors, including defendant's neglected childhood in an alcoholic home; and noting trial counsel "need not pursue every conceivable avenue"); *Foell v. Mathes*, 310 F. Supp. 2d 1020, 1049 (N.D. Iowa 2004) (concluding trial counsel was not ineffective for failing to present evidence of FAS where attorney conducted a satisfactory and reasonable investigation into defendant's mental state, but rejecting the viability of using FAS as a defense).

Furthermore, Petitioner has not shown prejudice. Petitioner argues that had trial counsel presented evidence of Petitioner's organic brain damage, resulting from his FAS, it is reasonable that at least one juror would have been persuaded to give a life sentence rather than the death penalty. This Court disagrees. As discussed above, trial counsel presented a well-reasoned mitigation defense, which included compelling evidence of the Petitioner's troubled childhood and evidence of the Petitioner's mental illness based on multiple expert opinions. Petitioner's fetal alcohol argument would have "merely resulted in a 'fancier' mitigation case, having no effect on the outcome of the trial." *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998) (trial counsel not ineffective for failing to thoroughly investigate and present mitigating evidence regarding defendant's mental impairments, including organic brain damage, where trial counsel

focused its mitigation on the mental conditions of the defendant); *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

This Court also notes that a survey of jury verdicts in sister jurisdictions shows that defendants are often sentenced to death in spite of evidence offered in mitigation that the defendant had fetal alcohol syndrome or organic brain damage. *See, e.g., Zack v. State*, 753 So. 2d 9 (Fla. 2000) (affirming death sentence where jury weighed aggravating circumstances against mitigating circumstances, including evidence and diagnosis of FAS) *aff'd Zack v. State*, 911 So. 2d 1190 (Fla. 2005); *State v. Locklear*, 349 N.C. 118, 134, 505 S.E.2d 277, 286 (1998) (affirming sentence of death in capital case where defendant's evidence during the sentencing phase included evidence that defendant suffered from Fetal Alcohol Syndrome); *State v. Timmendequas*, 168 N.J. 20, 33, 773 A.2d 18, 25 (2001) (affirming death sentence where jury found aggravating circumstances outweighed mitigating circumstances, including jury's finding that defendant was born to a mother who was emotionally unfit and unable to meet his physical and emotional needs and caused him to suffer from fetal alcohol effect due to her drinking throughout her pregnancy); *People v. Roybal*, 19 Cal. 4th 481, 522, 966 P.2d 521 (1998) (jury instructed to consider fetal alcohol syndrome as a mitigating factor after expert testimony that defendant had organic brain damage as a result of the FAS; defendant sentenced to death); *Brown v. State*, 659 N.E.2d 671, 675 (Ind. Ct. App. 1995) (affirming trial court sentence in murder case where the court concluded that the aggravating circumstances outweighed the mitigating circumstances, which included evidence of fetal alcohol syndrome); *Davies v. State*, 758 N.E.2d 981, 988 (Ind. Ct. App. 2001) (affirming sentence where the trial court weighed aggravating and mitigating circumstances, including fetal alcohol syndrome); *State v. Sullivan*, 1995 WL 465172 (Del. Super. June 29, 1995) *aff'd*, 676 A.2d 908 (Del. 1996) (concluding that a

diagnosis of FAS would not have affected the outcome of the sentencing phase because the sentencing court relied on mitigation evidence that defendant had limited intelligence and reasoning powers); *State v. Cooper*, 410 N.J. Super. 43, 979 A.2d 792 (N.J. Super. Ct. App. Div. 2009) (alleged deficiency in failing to present mitigation evidence that defendant had brain damage from fetal alcohol syndrome or fetal alcohol spectrum disorder was not prejudicial and thus did not constitute ineffective assistance). Accordingly, Petitioner has not met his burden.

All Other Allegations

As to any and all other allegations that were raised in Petitioner's application or at the hearing in this matter, and have not been specifically addressed in this Order, this Court finds the Petitioner failed to present any evidence regarding such allegations. Accordingly, this Court finds the Petitioner waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

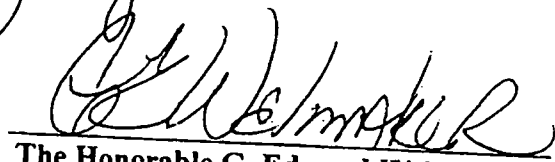
Based on all of the foregoing, this Court finds that the Petitioner has not met his burden. Counsel was not deficient in any manner. Further, the Petitioner was not prejudiced by counsel's representation. Accordingly, this Court finds the allegations raised in this Application for Post-Conviction Relief are without merit and dismisses this Application with prejudice.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. That the Petitioner is remanded to the custody of the South Carolina Department of Corrections for the purpose of carrying out his sentence.

IT IS SO ORDERED this 24 day of July, 2013.



The Honorable G. Edward Welmaker
Circuit Court Judge
Thirteenth Judicial Circuit

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Charles Christopher Williams,

Petitioner,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

C.A. No. 2010-CP-23-9792

ORDER

ENTERED COMPUTER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKERSHED

2013 AUG -9 PM 2:24

JS

Before the Court is Petitioner Charles Christopher Williams' Motion to Alter Judgment pursuant to Rule 59, SCRCP. By Order of Dismissal dated July 24, 2013, the Court denied the Petitioner's Application for Post-Conviction Relief. Having had the opportunity to carefully review the Order of Dismissal, the extensive record before the Court, and each and every factor in the Petitioner's Motion to Alter Judgment, this Court finds that its Order of Dismissal adequately addresses each issue raised by the Petitioner, even though many of the Court's findings and conclusions are adverse to Mr. Williams.

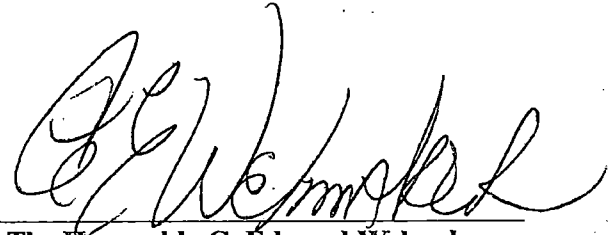
This Court has again reviewed the evidence presented in light of the applicable cases, both from federal courts and from South Carolina courts. This Court has exhaustively studied the Fetal Alcohol Syndrome literature presented by the Petitioner. Having carefully considered the credentials, demeanor, and credibility of each witness, this Court has thoroughly evaluated the substance of each witness's testimony. This case, as with others of its nature, presents difficult legal issues, with which all in the legal profession and judiciary must grapple. This Court has digested, studied, and agonized about the issues presented by Mr. Williams, and firmly believes that the law has been properly applied to the evidence in this case. Fortunately, our

1 *[Signature]*

judicial system provides appellate courts, which are waiting to review this decision and will have the opportunity, with a deeper insight from an impassive record of trial, to provide wise analysis for this case.

Accordingly, the Petitioner's Motion is respectfully DENIED.

Aug 9, 2013



The Honorable G. Edward Welmaker
Circuit Court Judge
Thirteenth Judicial Circuit

APPENDIX B

The Supreme Court of South Carolina

Charles Christopher Williams, Petitioner,

v.

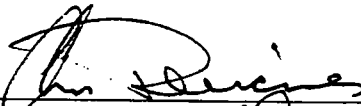
State of South Carolina, Respondent.

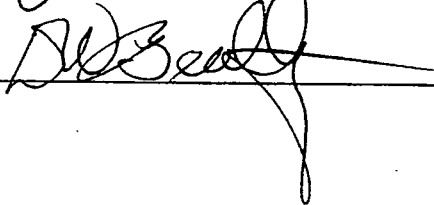
Appellate Case No. 2013-001945

Lower Court Case No. 2010-CP-23-09792

ORDER

This matter is before the Court on a petition for a writ of certiorari. The petition is granted as to Petitioner's Question I, and denied as to petitioner's remaining questions. The parties shall proceed to serve and file the appendix and briefs regarding Question I as provided by Rule 243(j), SCACR.



J.


J.

Columbia, South Carolina

August 20, 2015

cc:

Derek Joseph Enderlin, Esquire

Robert Michael Dudek, Esquire

Alan McCrory Wilson, Esquire

Donald J. Zelenka, Esquire

Louis O'Neill, Esquire

John S. Nichols, Esquire

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Charles Christopher Williams, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2013-001945

ON WRIT OF CERTIORARI

Appeal from Greenville County
G. Edward Welmaker, Post-Conviction Relief Judge

Memorandum Opinion No. 2016-MO-012
Heard March 22, 2016 – Filed April 13, 2016

DISMISSED AS IMPROVIDENTLY GRANTED

Derek Joseph Enderlin, of Ross & Enderlin, PA, of
Greenville, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, all of
Columbia, and William W. Wilkins, III, of Greenville,
for Respondent.

Louis O'Neill, of White & Case, LLP, of New York, New York and John S. Nichols, of Bluestein Nichols Thompson & Delgado, LLC, of Columbia, for Amicus Curiae, The Federal Republic of Germany.

PER CURIAM: We granted a writ of certiorari to review the decision of the post-conviction relief judge. We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

PLEICONES, C.J., BEATTY, KITTREDGE, HEARN and FEW, JJ., concur.