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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Common Pleas

CAPITAL PCR ACTION

APPEAL FROM SPARTANBURG COUNTY
Honorable Paul M. Burch, Circuit Court Judge

MARION ALEXANDER LINDSEY..... PETITIONER

v.

STATE OF SOUTH CAROLINA. ..... RESPONDENT.

Appellate Case No. 2019-001271

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PETITIONER'S QUESTIONS PRESENTED

1.

Whether the PCR court, in flagrant disregard of this Court's remand Order and Petitioner Lindsey's rights under the Fifth and Fourteenth Amendments to the United States Constitution and under state law, erred in twice adopting the Attorney General's proposed orders of dismissal under circumstances that show the PCR court failed to consider Lindsey's grounds for PCR and did even not read the proposed order before signing it?

2.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to conduct an adequate mitigation investigation and failing to prepare and present an adequate mitigation case at trial especially where counsel did not hire a social work expert who could testify regarding petitioner's miserable upbringing, where counsel hired an inexperienced forensic psychiatrist on month before trial, and then failed to prepare her to testify to petitioner's considerable prejudice?

3.

Whether trial Counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a prison adaptability expert who would have rebutted the state's aggravation and future dangerousness evidence against petitioner by testifying petitioner did not pose an unreasonable risk of harm to prison staff, other inmates, or the community?

RESPONDENT'S RESTATEMENT OF QUESTIONS PRESENTED

1.

Whether Judge Burch was correct that this Court's order of remand did not prohibit him from receiving proposed orders from the parties, or from using the language of a proposed order when he carefully reviews and adopts the language as his own in the exercise of his independent judicial judgment.

2.

Whether the record supports that Lindsey failed to carry his burden of showing either deficient performance or prejudice in counsel's mitigation investigation and presentation of evidence when Lindsey failed to show any missed line of mitigation, and the items of evidence he suggested counsel missed would not significantly alter the mitigation case presented at trial.

3.

Whether the record supports that Lindsey failed to carry his burden of showing either deficient performance or prejudice in counsel's failing to retain and present a prison adaptability expert when evidence supports that counsel made a reasonable strategic decision, and Lindsey failed to present evidence that would show its omission would produce a reasonable probability of a different result.

STATEMENT OF THE CASE

This appeal is from Lindsey's capital post-conviction relief action. The following is an overview of the procedural history:

A Spartanburg County grand jury indicted Lindsey in October 2002 for the murder of Ruby "Nell" Lindsey on September 18, 2002. (App. p. 3945). On October 10, 2002, the State served its notice of intent to seek the death penalty. Spartanburg County Public Defender Michael Bartosh, along with Doug Brennan and Karen Quimby (Hatcher), represented Lindsey. This Court assigned the Honorable John C. Few to preside.

The case was called to trial on May 17, 2004, and, on May 21, 2004, the jury convicted as charged. (App. pp. 1718-1719). On May 22, 2004 the penalty phase began. On May 24, 2004, the jury returned, finding the statutory aggravating circumstance of "great risk of death to more than one person," and recommended a sentence of death. (App. pp. 2169 – 71; p. 2177). Judge Few imposed the death sentence, as required by the jury's determination. (App. pp. 2173-2174; 2178).

This Court affirmed after direct appeal review in *State v. Lindsey*, 372 S.C. 185, 188, 642 S.E.2d 557, 558 (2007). The Supreme Court of the United States denied certiorari on October 1, 2007. *Lindsey v. South Carolina*, 552 U.S. 917 (2007).

On August 14, 2007, Lindsey filed his PCR action. (App. pp. 2192-2198). This Court appointed the Honorable Paul M. Burch to hear the matter and vested him with exclusive jurisdiction. Judge Burch appointed Spartanburg attorneys Richard W. Vieth, and David M. Collins, Jr., to represent Lindsey in the collateral action. PCR counsel amended the application on August 6, 2009. (App. pp. 2210-2216). An evidentiary hearing was held July 19-21, 2010. (See App. p. 2285). The Court received testimony from Douglas Brannon, Dr. Tora Brawley,

Vincent Bell, Lenora Topp, Rod Tullis, James Aiken, Karen Hatcher, Bill Burton, Mrs. Burton, Virginia Lindsey, Bessie Smith, Steve Pilgrim, Tim Sims, Jan Vogelsang, and Dr. Margaret Melikian. Former lead counsel, Mr. Bartosh, had died before the hearing was held.

At the conclusion of the hearing, Judge Burch allowed counsel to obtain a transcript of the PCR hearing before submitting post-trial briefing. (See App. pp. 2933-34). Counsel filed Lindsey's post-hearing brief on October 26, 2010. (App. 3284-3344). The State submitted its post-hearing brief on April 1, 2011. (App. pp. 3345-3534).

On May 2, 2011, Judge Burch called for a proposed order from the State. (Supp. App. p. 1). On May 12, 2011, after inquiry by PCR counsel, and prior to the submission from the State, Judge Burch, who mistakenly thought he had a proposed order from Lindsey's PCR counsel, then called for a proposed order from Lindsey. (Supp. App. p. 2). The State submitted a proposed order on June 2, 2011. (Supp. App. p. 6). Lindsey submitted his proposed order on July 29, 2011. (See Supp. App. 2 and pp. 8-69). Judge Burch issued an Order of Dismissal on August 10, 2011, filed August 12, 2011. (App. pp. 3536 – 3727). Counsel for Lindsey filed a motion to alter or amend pursuant to Rule 59(e), SCRCP, on September 19, 2011. (App. pp. 3728-37). The State made a response in opposition to the motion on November 18, 2011. (App. pp. 3738-50). Judge Burch denied Lindsey's motion by order dated December 21, 2011, and filed December 22, 2011. (App. p. 3751). Lindsey appealed the denial for relief.

While the petition was pending, and before a decision on the petition issues, this Court vacated the 2011 Order of Dismissal due to "the Court's concern with the frequency and severity of the drafting errors ... and this Court's admonishments to PCR judges" in prior precedent concerning PCR orders. (II Supp. App. p. 1). Specifically, the Court remanded "for the issuance of an amended order that complies with *Pruitt* [*v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992)],

Hall [*v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004)], and S.C. Code Ann. § 17-27-80 (2003), to include specific findings of fact and conclusions of law on each issue presented, based on accurate references to the record and the applicable law." (II Supp. App. p. 1).

While the matter was pending before Judge Burch, Judge Burch requested materials from the parties to review. On January 23, 2015, the judge's clerk, with notice to all counsel, requested a copy of Lindsey's proposed order, which Respondent provided. (II Supp. App. pp. 30-31 and p. 60). The next month, on February 26, 2015, Judge Burch requested copies of both of the previously submitted proposed orders in Microsoft Word. (II Supp. App. p. 9 and 17; see also p. 31). Lindsey objected to the Judge receiving materials from the parties, (II Supp. App. p. 20), and, on February 26, 2015, petitioned this Court for extraordinary relief to remove Judge Burch. (II Supp. App. pp. 7-26). The State made its return on March 2, 2015, (II Supp. App. pp. 27-83), and Lindsey replied on March 3, 2015, (II Supp. App. pp. 84-88). This Court denied the petition on April 9, 2015. (II Supp. App. p. 89).

On September 28, 2015, Judge Burch issued an Amended Order Denying Post-Conviction Relief that the Clerk of Court subsequently filed on October 2, 2015. (II Supp. App. pp. 97-283). Lindsey again sought relief from the order, both in this Court and by post-trial motion in the circuit court.

Lindsey filed a "renewed" petition for extraordinary relief from this Court on February 26, 2016.[1] (II Supp. App. pp. 284-315). The State made a return to the renewed petition for extraordinary relief on March 7, 2016. (II Supp. App. pp. 369-382). On March 25, 2016, this Court denied the petition. (II Supp. App. p. 386).

[1] By letter dated February 17, 2016, the State served Lindsey's counsel with the Order after confirming that Lindsey's counsel had no record of receiving the Amended Order mailed by the Spartanburg County Clerk of Court on October 2, 2015. (See II Supp. App. pp. 93-96).

On February 29, 2016, while the "renewed" petition was pending, Lindsey filed in the circuit court a motion for stay of proceedings, and for new evidentiary hearing before a different PCR judge, or in the alterative, a Rule 59(e) motion to alter or amend the amended order. (II Supp. App. pp. 317-367). On September 22, 2016, Judge Burch held a hearing on pending post-trial motion in the circuit court. (II Supp. App. p. 389). Judge Burch denied the motion for his recusal. (II Supp. App. pp. 406-408). As to the remainder of the motion, Lindsey submitted a post-hearing supplemental memorandum on October 21, 2016. (II Supp. App. pp. 431-440). The State submitted its memorandum on November 10, 2016. (II Supp. App. pp. 442-488). Judge Burch held a second hearing on the motion on February 20, 2019. (II Supp. App. p. 493). On March 26, 2019, the State filed a response in supplement to its prior 2016 memorandum. (II Supp. App. pp. 511-563). By written Order dated July 8, 2019, filed July 10, 2019, Judge Burch again denied the motion to recuse, and also denied the remainder of the motion. (II Supp. App. pp. 607-647).

Lindsey now seeks review of the amended order and the denial of relief. He filed his petition for writ of certiorari in this Court on January 17, 2020. This return to the petition follows.

STATEMENT OF FACTS

In affirming the conviction and sentence, this Court initially, and succinctly, summarized Lindsey's crime: "[Lindsey] killed his estranged wife, Ruby Nell Lindsey (Victim), on September 18, 2002, in the parking lot of the Inman City Police Department." *Lindsey*, 372 S.C. at 188, 642 S.E.2d at 558. The Court then set out the general context facts as follows:

> Celeste Nesbitt, a close friend of Victim, was the State's witness-in-chief. On the day of the murder, Celeste gave Victim a ride home from work at about 8:00 p.m. In the car were Celeste's two young daughters, four-year-old Keysha and ten-year-old Kiera, who were in the back seat with Victim—Keysha in a car seat

behind the front passenger seat, Kiera in the middle, and Victim behind the driver's seat. Celeste was driving and Celeste's mother was in the front passenger seat. The car was a Mercury sedan with dark tinted rear windows.

Victim was separated from appellant at the time and was staying with her mother. As they neared Victim's mother's house, they saw appellant in his girlfriend's car. Celeste pulled into the yard and turned the car around so appellant was facing them in a head-on direction. Celeste rolled down her window and greeted him. Appellant asked her if she had seen Victim. Because Celeste knew appellant had threatened to kill Victim, she lied and answered that she had not seen her in three days.

Celeste's youngest daughter, Keysha, leaned forward in her car seat and greeted appellant. Appellant then asked who else was in the back seat. Celeste told him Kiera, her older daughter, was lying on the back seat asleep. Because the windows were tinted, appellant asked Celeste to roll down the window so he could see. Celeste answered that the window was broken. When appellant said he would get out to look, Celeste sped off.

Celeste drove to the police department without stopping while Victim dialed 911. When they arrived, Celeste jumped out of the car and urged Victim to get out. Victim was still in the back seat when appellant pulled into the parking lot and ran toward the back of Celeste's car. Celeste saw him pull out a gun and shoot into the car through the rear windshield. She dove for cover as she heard additional shots.

Officer Godfrey was in the police department parking lot when the dispatcher informed him there was a "rolling domestic," meaning a domestic dispute involving a vehicle. He saw the two cars pull into the parking lot, and saw appellant jump out and fire two rounds into Celeste's car. Officer Godfrey took cover and saw two more flashes from a gun. Appellant came around the front of the car and pointed his gun at Officer Godfrey who then fired four rounds at appellant. Appellant was wounded and fell to the ground.

Victim died at the scene. Four bullets from appellant's gun were recovered: three from Victim's head and one from the trunk of Celeste's car.[1] The bullet recovered from the trunk had traveled through the back seat of the car into the trunk. The car had two bullet holes in the rear driver's side window and two in the rear windshield.

> [FN 1 Five shell casings were found but the fifth bullet was not recovered. A paramedic testified for the defense that when he arrived on the scene to transport appellant to the hospital, appellant said he had shot himself in the head.]

> Other evidence indicated that during their marriage, appellant struck Victim several times in front of witnesses. In December 2001, he beat her in a restaurant parking lot and left the scene before the responding officer could arrest him. On September 17, 2002, the night before the murder, appellant was arrested on a warrant for criminal domestic violence arising from this incident. He was released on a $1,000 bond; one of the conditions of bond was that he have no contact with Victim.

372 S.C. at 188–89, 642 S.E.2d at 558–59.

STANDARD OF REVIEW

This Court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). However, this Court "review[s] questions of law de novo, with no deference to trial courts." *Id.*, at 180-181, 819 S.E.2d at 839.

ARGUMENT

I.

> Judge Burch was correct that this Court's order of remand did not prohibit him from receiving proposed orders from the parties, or from using the language of a proposed order when he carefully reviews and adopts the language as his own in the exercise of his independent judicial judgment.

Introduction to Argument:

This issue has returned to the Court once again. In his first petition to this Court, Lindsey argued that adoption of the State's proposed order "violates the express commands of this Court," citing *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004), and also the Sixth, Eighth, and Fourteenth Amendments. (2012 Petition, pp. 105-107).[2] He cited to various spelling and grammatical errors within the 192 page order as evidence that Judge Burch abdicated his judicial duty. (See 2012 Petition, pp. 106-107). As noted above, this Court vacated

[2] These filings are a part of this Court's records. See Appellate Case No. 2012-206087.

the Order of Dismissal, noting the "frequency and severity of the drafting errors" in the Order, and remanded for compliance with the Court's prior directives that PCR orders contain adequate findings of facts and conclusions of law with accurate references to the record. (Supp. App. II p. 1). After lengthy review, and two hearings on Lindsey's post-trial motion, Judge Burch, again disagreed with Lindsey's position on the merits and to his objections to the judge receiving proposed orders. (Supp. App. II pp. 97-283 and pp. 607-646).

Lindsey – not attacking the substance of the amended order to make his point – asserts there has been a "flagrant disregard of this Court's remand Order," and, that the amended order process has offended due process and state law. (Petition, p. 3). He argues, essentially, that this Court prohibited Judge Burch from adopting a proposed order offered by the State, and that certain drafting errors[3] show that Judge Burch must not have fairly considered the case. (See Petition, pp. 16-21). He is mistaken on both counts. But more troubling is this – not one argument on the factual or legal basis for the ruling is *ever* asserted. None. Lindsey has neither claimed nor shown any unfairness in the presentation of evidence at the post-conviction relief hearing. Lindsey has neither claimed nor shown he was prevented from expressing his views on the weight to be afforded the evidence. Lindsey has neither claimed nor shown that there are any factual errors or lack of record support for any finding. Lindsey has neither claimed nor shown *any* substantive support for his assertion that a new post-conviction relief hearing is warranted. Lindsey has failed to afford any credit to Judge Burch's own statements that the order is his; that he personally reviewed every portion of the order; and, that he even took specific steps to assure

[3] In making his case for multiple errors, Lindsey counts as errors unmatched brackets, spaces in the sentence structure, and failure to italicize case references. (See Petition, p.16 and 20). Respondent does not consider all the "errors" Lindsey lists to be actual "errors" in any meaningful sense, much less factual error based on the record, or legal error based on precedent. (For example, punctuation error, challenging the phrase "he was running drugs," and noting an "unnecessary space," see Petition, pp. 20-21).

any reader that it is his order issued after his independent review and decision. To be sure, there were typographical and/or drafting errors in the first Order (192 pages), and some are in the Amended Order (187 pages); but, the question here is not whether relief is due based on unmatched brackets, an additional space in the text, or the lack of subject-verb agreement. Rather, the question is whether Judge Burch adhered to his sworn duty as a member of the judiciary in denying relief for the reasons expressed in the Amended Order. Any fair reading of the record shows Judge Burch did adhere to that duty.

Relevant facts:

These points from the proceedings prior to the first order are relevant:

- Lindsey's PCR counsel did not indicate they were rushed to the hearing, or at the hearing; there was no request by PCR counsel for additional time;
- Lindsey's PCR counsel provided a written "road map" for the trial judge prior to the evidentiary hearing, outlining Lindsey's position, (App. pp. 2267-2284 and 2294);
- Both parties submitted post-hearing briefs, Lindsey on October 26, 2010, (App. pp. 3284-3344), the State on April 1, 2011, (App. pp. 3345-3534);
- Both parties were given notice of the PCR court's decision to request a proposed order from the State by letter dated May 2, 2011, (Supp. App. p. 1);
- Lindsey did not object to providing proposed orders; rather, Lindsey submitted his own proposed order for consideration on July 29, 2011, (Supp. pp. 8-69);
- The Order of Dismissal was filed on August 12, 2011, (App. pp. 3536-3727);
- Lindsey filed a Rule 59 motion on September 19, 2011, but did not object to adoption of language from the proposed order, (See App. pp. 3728-3736).

In short, PCR counsel did not challenge the process of submitting proposed orders – he participated in the process. PCR counsel even reported his participation when advising this Court of the status of the PCR case. (Supp. p. 4). Further, PCR counsel did not object or

otherwise challenge the PCR court's order as lacking factual support in the record, or any glaring factual or legal error. Lindsey raised the challenge to adoption of the proposed order for the first time in the PCR appeal, resting his argument on theory and simple uncorrected drafting errors.

These points from the remand proceedings are relevant:

- The PCR court requested copies of both of the prior proposed orders, and received both proposed orders by late February 2015, (See II Supp. App. pp. 30-33 and pp. 60-65);
- The Amended Order was not signed until September 2015, (II Supp. p. 283);
- The PCR court held hearings when Lindsey challenged the process and the court's impartiality, (See II Supp. App. pp. 389 and 493);
- The PCR court explained the detailed process of review, (See Supp. App. pp. 406-408 and 501-502);
- The PCR court explained that it was the PCR court's findings in both the first Order and in the Amended Order along with the court's conclusions of law, (Supp. App. pp. 406-408) (acknowledging failed to correct some errors in the first order, but stating "***the base order was exactly as I, as I saw the case*** that was presented to me" (emphasis added));
- The PCR court denied Lindsey's recusal motion finding no factual or legal basis warranting recusal, (II Supp. App. p. 408 and 610).

Discussion:

Lindsey argues that Due Process requires impartiality, and Judge Burch evidenced a lack of impartiality by adoption of the State's proposed order. (Petition, pp. 13-14). In support of his argument, he asserts that this Court prohibited the proposed order process, but Judge Burch used that process anyway. (Petition, pp. 15-16). While the record supports that Judge Burch used a proposed order process, the record does not support error in that process. This Court did not prohibit the proposed order process, and the record shows open, fair and balanced proceedings on remand.

When Lindsey asserted in remand proceedings that this Court prohibited the acceptance of a proposed order, (II Supp. App. p. 395-396), Judge Burch responded, firmly, that he did not read the remand order to have that prohibition, (II Supp. App. p. 400; see also p. 501 and pp. 608-617).[4] Judge Burch is correct. A plain reading of this Court's remand order simply does not support Lindsey's conclusion. There is no direction to write a new order from scratch; there is no prohibition on acceptance of proposed orders. (II Supp. App. p. 1). Additionally, neither of the two cases cited in the Order, *Pruitt v. State* and *Hall v. Catoe*, (Supp. App. II p. 1), stand for that proposition.

In *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992), this Court did not ban proposed orders. To the contrary, the Court set out the preferred process: "Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it." *Id.*, at 256, 423 S.E.2d at 128.[5] The emphasis was on the parties working to insure that the substance of the proposed order presented adequately reflect the statutorily required findings of facts and conclusions of law on each issue presented in the post-conviction relief action. *Id.* (citing S.C. Code § 17-27-80 (1991) and Rule 52(a), SCRCP). *Pruitt* was not a capital case. However, a challenge to the adoption of a proposed order in a capital case was presented in *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). Again, this Court did not prevent the practice of submitting a proposed order:

> Although we ***strongly encourage*** PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all

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[4] Judge Burch stated: "I vehemently disagree with Appellate Defense in making that statement. No where have I read that." (II Supp. App. p. 400, lines 6-8).

[5] Rather than showing any signs of retreat, this Court has repeatedly directed the parties follow the process. *See, e.g., Reese v. State*, 425 S.C. 108, 820 S.E.2d 376 (2018).

> other cases, ***it is common practice*** for judges to ask a party to draft a proposed order for the sake of efficiency.

360 S.C. at 365, 601 S.E.2d at 341 (emphasis added).

Not only did this Court not ban the proposed ordered process, it did not even find the *Hall* order resulting from the process to be deficient. Rather, the Court ultimately concluded the process produced an acceptable order finding "the evidence sufficiently indicates the PCR judge spent an adequate amount of time reviewing the order before adopting it." *Id.*

Consequently, Petitioner can show no violation of the remand order, and no violation of either *Pruitt* or *Hall*. More recent than either *Pruitt* or *Hall*, though, is the discussion of proposed orders in *Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589–90 (2019). In *Fishburne*, even while acknowledging once again that the practice of calling for proposed orders from litigants remains routine, this Court instructed that particular care must be taken in the process:

> The preparation and finalization of a PCR order is often a collaborative effort. We recognize the prevailing party often prepares a proposed order for the PCR court. *See Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) ("[I]t is common practice for judges to ask a party to draft a proposed order for the sake of efficiency."). When counsel for either side prepares the proposed order, the order must include findings of fact and conclusions of law as to all issues raised by an applicant. A copy of the proposed order should be transmitted to opposing counsel. Opposing counsel should promptly review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order. Because the PCR judge will ultimately be signing the order, the PCR judge must carefully review the proposed order to ensure it includes appropriate findings of fact and conclusions of law as to all issues raised. Once a proposed order is finalized, signed by the PCR judge, filed, and served upon the parties, the parties should thoroughly review the final order to make sure all issues raised were adequately addressed as required by section 17-27-80 and Rule 52(a); if they were not, a timely Rule 59(e) motion should be filed, requesting the PCR court to address the appropriate issues.

427 S.C. at 516, 832 S.E.2d at 589–90.

Simply, the process of submitting proposed orders is built into our rules, (see Rule 5(b)(3), SCRCP), and custom, *Hall*, 360 S.C. at 365, 601 S.E.2d at 341. Further, a long line of

precedent, state and federal, allows the acceptance of proposed order language where the court independently reviews and adopts the language as its own. *See, e.g., Jefferson v. Upton*, 560 U.S. 284, 293-94 (2010) (acknowledging prior holdings that "verbatim adoption of findings of fact prepared by prevailing parties" should be treated as findings of the court though recognizing it had "also criticized that practice.") (citing *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985))[6]; *State v. Holmes*, 832 S.E.2d 777, 781 (Ga. 2019) ("It is well established that a trial court may request and then adopt a proposed order from one party. Doing so does not itself demonstrate an absence of cautious discretion.") (internal citations omitted); *McGahee v. State*, 885 So.2d 191, 229–30 (Ala.Crim.App.2003) ("even when a trial court adopts verbatim a party's proposed order, the findings of fact and conclusions of law are those of the trial court and they may be reversed only if they are clearly erroneous.").[7] The process this Court has directed be followed contains specific safeguards and cautions to insure that the process is one where care is taken in review, both by the parties and the judge, and both before and after the order is entered.

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[6] Though the Supreme Court in *Anderson* noted the criticism, the Court ultimately resolved "that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Anderson*, 470 U.S. at 572.

[7] Other cases similarly allow adoption of such language. *See, e.g., United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 656 (1964) (in reviewing order from district court adoption of entirety of proposed order, "Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence."); *Tennille v. W. Union Co*., 785 F.3d 422, 440 (10th Cir. 2015) ("the fact that the district court adopted the order drafted by the parties, alone, does not establish that the district court failed to exercise its judgment independently"); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1215 (3d Cir. 1993) ("While we cannot dispute that a district court's verbatim adoption of many of a party's proposed findings does not always represent a desirable practice, we are satisfied that the district court's findings here satisfy Rule 52(a) and should be upheld unless they are not supported by the evidence in the record."); *Patton v. State,*784 So. 2d 380, 388 (Fla. 2000) (rejecting challenge to verbatim adoption noting,"[t]he court chose to adopt the State's arguments as an accurate and well-documented reflection of the facts and law pertaining to the issues.").

With the Court having just recently spoken on the safeguards to ensure fairness in the procedure, it is unnecessary to scrap the precedent in favor of less structure – essentially placing all requesting of additional findings or reconsideration in the Rule 59 stage (a later submission with the same presentation). At bottom, a litigant will always be allowed to ask for certain findings of facts and urge certain conclusions of law. In fact, the capital post-conviction relief statute allows for the presentation of post-trial briefing, which is, necessarily, presented in a litigant's preferred phrasing:

> Within thirty days from the receipt of the transcript, or if the judge requests post trial briefs, within thirty days from the receipt of the post trial briefs, the hearing judge in writing shall make specific findings of fact and state expressly the judge's conclusions of law relating to each issue. ….

S.C. Code Ann. § 17-27-160 (D).

Whether taken from a document titled "post-trial brief" or a document submitted as a proposed order, if the PCR judge, after careful consideration, adopts the language offered, that language becomes the Court's order. *Anderson*, 470 U.S. at 572. A judge is free to accept or reject a proposed phrasing, finding, or conclusion, as that judge deems appropriate. What is critical is whether the judge considered the submission(s) in light of the evidence and law; gave his own, independent consideration to those submissions; and, made the proposed language his own. *See Hallford v. State*, 629 So. 2d 6, 8 (Ala. Crim. App. 1992) (where trial judge included sentence that "adoption of this order is based on the Court's own evaluation of the evidence and law in the case," the reviewing court found "We do not have a situation here where the trial court merely adopted verbatim the proposed order of the State. It is clear from the trial court's order denying the petition that the trial court independently evaluated each allegation and denied the petition."). *Accord Hall v. Catoe*, 360 S.C. at 341, 601 S.E.2d at 365 (noting the PCR judge "told

the parties that he would 'carefully review the proposed order and insure that the facts and conclusions of law are as I find them to be."). The record supports that is the case here.

The PCR judge in this case, much like the PCR judge in *Hall*, told the parties that he had reviewed the order to make sure the facts and conclusions were as he determined them to be. Also like *Hall*, there is specific evidence of an adequate time spent in review before adopting the order. At the status conference on the pending post-trial motion, Judge Burch placed on the record descriptions of the time spent in review:

> … I remember spending many hours with Mr. Sam Thomas, who was my law clerk at that time, going back and doing that last order. So I certainly disagree with the contention of the Defense that we just simply copied something here.
>
> That was not the case. …

(II Supp. App. p. 497, lines 10-15). Further, at the prior hearing on the motion, Judge Burch outlined his review process, and underscored that he placed markers within the final order to assure any reader that he reviewed and accepted the order language unless specifically modified. (II Supp. App. p. 407, line 12 – p. 408, line 3). In fact, PCR appellate counsel seemed to abandon an absence-of-review based argument during the remand proceedings. PCR appellate counsel asserted that they were not alleging Judge Burch failed to read the proposed order; but that the amended order "does not comply with the Supreme Court's remand order," which, in counsel's opinion, required the PCR court to draft a whole new order. (II Supp. App. p. 406, lines 1-11). In response, Judge Burch acknowledged, on the record, that he read *both* of the proposed orders, albeit perhaps "too hastily" to make proof-reading corrections in the first order; however, he asserted clearly, "the base order was exactly as I, as I saw the case that was presented to me." (II Supp. App. p. 407, lines 4-11). He continued to describe the additional steps of review and

cautioned that even if some mistakes were still in the lengthy order, it was not a failure to correct because he didn't read, consider, and adopt the findings and conclusions reflected:

> … on this remand, y'all would never imagine the number of hours that Sam Thomas and I spent going through ***all these documents***. And even after we loaded the final proposed order, and after all my changes and adjustments, after we loaded that, I even instructed Sam to not make some corrections on purpose to prove to everyone that could possibly be concerned on this case that I was involved in redrafting that order and there were many changes made.
>
> As I said, I purposefully asked him to leave some errors in there so I could initial them to prove that point, and I even took the extra step to call the Clerk of the Supreme Court to let them know over there that I had purposefully done that to prove what I'm just stating.
>
> So I wanted to put that on the record because ***I didn't want anybody to say well, Judge Burch didn't even correct this last order***. That was purposefully done. If anybody questions that later on, we're clear on the record now.

(II Supp. App. p. 407, line 12– p. 408, line 3) (emphasis added). Yet, here we are. There is again an argument that spelling and grammar errors left in the order are evidence of judicial obliviousness.

Lindsey's argument that drafting "errors" remain thus the judge blindly signed the proposed order shows he has failed to see the forest for the trees. The great weight of the evidence is that Judge Burch heard from each side; considered arguments from each side; considered language from each side; and heard no objection to the process from PCR counsel – either at the time of the process, or in the Rule 59 motion. [8] On remand, Lindsey did object to

[8] Both parties were noticed of the request for materials on remand. On January 23, 2015, the PCR judge's clerk, with notice to all counsel, requested a copy of Lindsey's proposed order, which Respondent provided. (II Supp. App. pp. 30-31 and p. 60). Both PCR counsel and PCR appellate counsel were noticed of the request, and that counsel for Respondent had provided a copy. (II Supp. App. pp. 30-31 and p. 60). Neither objected to the submission of Lindsey's proposed order. (See II Supp. App. pp. 30-31; see also p. 77). In fact, it was not until the next month, on February 26, 2015, when Judge Burch requested copies of both of the previously submitted proposed orders in Microsoft Word, (see II Supp. App. p. 9 and 17; see also p. 31),

the proposed order process, but he could not change the fact that the open process was a part of the record, or erase the proposed findings and conclusion the judge had already considered. Never was there a suggestion of factual inaccuracy or lack of record support.

Lindsey has shown no factual support for his claim that the procedure used in this case violated this Court's order and/or his right to due process. Lindsey's persistence in relying on drafting errors elevates editing and writing style to equal position with fair judicial review. That cannot be correct. The record here shows the process this Court has recently underscored as proper and correct in *Fishburne* was faithfully followed. Further, Lindsey has also failed to show legal support for his assertions decrying the proposed order process. The best rebuttal to Lindsey's argument may be found in review of cases where there was truly evidence a judge failed to review and adopt the findings offered through a proposed order.

For instance, in *Ex parte Ingram*, 51 So.3d 1119 (Ala. 2010), the Supreme Court of Alabama reviewed an order that reflected the signing judge did not exercise sufficient independent review. There was a glaring factual error that the judge could not have failed to recognize had an independent review been conducted – the order referenced that the judge reviewing the conviction was also the trial judge but he was not:

> The obvious problem with the emphasized portions of the above-quoted passages from the June 8 order is that Judge Fielding, not Judge Hollingsworth, presided over Ingram's capital-murder trial. Although minor factual errors understandably find their way into orders drafted by trial courts in handling busy dockets, an error as to whether the judge in fact sat as the trial judge in a capital-murder trial and is basing his decision on personal observations and personal knowledge acquired by doing so is the most material and obvious of errors.

Ex parte Ingram, 51 So. 3d at 1123. Further still, the judge actually attempted to rescind the erroneous order and recuse himself; however, that later order was found deficient for lack of

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that Lindsey objected to the Judge receiving materials from the parties, (II Supp. App. p. 20). (II Supp. App. pp. 7-26).

jurisdiction as Ingram's post-hearing motion was not timely. 51 So. 3d at 1121. The Alabama Supreme Court concluded: "In this unusual case, however, we cannot conclude that the above-stated 'general rule' is applicable. That is, despite the fact that the trial judge signed the June 8 order, we cannot conclude that the findings and conclusions in that order are in fact those of the court itself." *Id.*, at 1123. This case shares no similar facts. Lindsey has offered none in support of his argument. The record supports Judge Burch was engaged and decided the matter on the substance of the presentation and arguments.

Turning to the Alabama Court again, another example of exception to its general rule is in *Ex parte Scott*, 262 So. 3d 1266 (Ala. 2011). The state supreme court found error when a trial court *summarily dismissed* an action and adopted an adversarial pleading, an answer to the complaint, as its order, rather than adoption of a proposed order. *Id.*, at 1274. Again, this case shares no such facts. The matter was not summarily dismissed and the judge did not adopt an adversarial answer to a complaint without addressing the evidence offered in collateral proceedings. Rather, Judge Burch adopted a proposed order after careful and independent review of the proposed language in light of the evidence offered during the PCR hearing.

In similar fashion to the *Scott* case, the collateral court in a Pennsylvania capital case, while summarily dismissing an action, crafted "a three-page opinion restating the procedural history of the case and" simply incorporated a brief by the district attorney. The Supreme Court of Pennsylvania determined it would not "condone the wholesale adoption … of an advocate's brief," especially where there were claims of prosecutorial misconduct asserted. *Com. v. Williams*, 732 A.2d 1167, 1176 (Pa. 1999). The court, nonetheless, reviewed the issues on appeal. *Id.* Again, these facts are distinguishable. Lindsey's action was not summarily dismissed; Lindsey participated in the proposed order process, receiving notice of the request and receipt of

the State's submission, and offering his own proposed order; Judge Burch did not incorporate the initial return in the action, but considered the evidence presented at the PCR hearing; and, Lindsey was able to test Judge Burch's review and confirm his independent judicial determination to accept the proposed order.

Lindsey, though, relies on *Jefferson v. Upton*, 560 U.S. 284 (2010), (see Petition, p. 4 and pp. 17-18), a capital habeas action arising from the denial of relief in the Eleventh Circuit Court of Appeals.[9] His reliance is misplaced. In *Jefferson*, after a concern whether the acceptance of the proposed order in the circumstance of the case was a sound judicial acceptance, the Supreme Court remanded for further findings on whether the order should be given deference. On appeal from remand proceedings, the Eleventh Circuit summarized:

> In laying out its concerns, the Supreme Court noted that, while the verbatim adoption by a court of findings of fact prepared by a prevailing party is often permissible, the use of such a practice might be procedurally problematic "where (1) a judge solicits the proposed findings ex parte, (2) does not provide the opposing party an opportunity to criticize the findings or to submit his own, or (3) adopts findings that contain internal evidence suggesting that the judge may not have read them." Id. at 294, 130 S.Ct. 2217.

Jefferson v. GDCP Warden, 941 F.3d 452, 462 (11th Cir. 2019) (emphasis in original).

After a hearing to gather the facts on the process actually used by the state court, the district court found that each side had submitted post-hearing briefs; however, the process lost its balance after those submissions: 1) the judge's clerk *ex parte* reached out to the State to request

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[9] On remand, Lindsey also relied upon a potential review of the practice in *Hamm v. Allen*, (See II Supp. App. p. 394); however, the Supreme Court the United States denied certiorari on October 3, 2016. 137 S.C. 39 (2016). The Eleventh Circuit had acknowledged that the order was adopted without modification, but noted "this procedural shortcut has no bearing on our disposition of Hamm's federal habeas appeal, *see Jones v. GDCP Warden*, 753 F.3d 1171, 1182–83 (11th Cir.2014)…" 620 Fed.Appx. 752 756 n.3 (11th Cir. 2015). It did, however, "strongly criticize the practice of trial courts' ***uncritical*** wholesale adoption of the proposed orders or opinions submitted by a prevailing party." *Id.* (emphasis added). The Eleventh Circuit explained that the judge in that case failed to even strike the word "proposed" from the caption. *Id.*

a proposed order; 2) no evidence supported any direction on the substance of the order; 3) while the law clerk reviewed the transcript and other documents, he did not recall review of either post-hearing brief, nor communications with the judge concerning the matter; 4) the clerk did not recall seeing the proposed order, or participating in review of such order; 5) having received notice of the *ex parte* request for an order, Jefferson's counsel moved to recuse the judge and asserted he would have requested to send his own proposed order, but considered it to be "an exercise in futility," believing the judge had already decided the result; 6) the judge denied the recusal motion and did not request a "competing proposed order," 7) 21 grammar and spelling errors remained in the order; and, 8) the order referenced an affidavit from an attorney never present or mentioned in the case. 941 F.3d at 463-465. The district court reasoned, based on these facts, under the relevant federal law governing habeas reviews, that the state order "invited the reasonable inferences that Judge Newton failed to review the proposed order submitted" by the state, "before executing the final order and failed to review the relevant evidence." *Id.*, at 474. Finding "no clear error in the district court's fact finding," the Eleventh Circuit resolved the state order would not be afforded "a presumption of corrections." *Id.*

To underscore, the federal court did not vacate the order, but found that the statutory deference was not available.[10] Critically, there was no evidence of careful consideration by the

[10] Even here, Lindsey did not suggest such a grave consequence – only that the federal court may not afford heightened or any deference to its review of federal issues from state convictions on federal habeas review. (See II Supp. App. p. 394, lines 18-23). Even that view is not dominate. *See Green v. Thaler*, 699 F.3d 404, 416 (5th Cir. 2012), *as revised* (Oct. 31, 2012) (recognizing the Court had "criticizing the practice" of verbatim adoption, but finding "the Court has never found it to violate due process or to entitle a state court's decision to less deference under AEDPA.") (citing *Brownlee v. Haley*, 306 F.3d 1043, 1067 n. 19 (11th Cir. 2002)(with notation "agreeing with the district court that, although verbatim adoptions by state court of State-submitted proposed orders has been criticized, the practice has been consistently upheld where adequate evidentiary proceedings were held and the court's order was fully supported by the evidence")); *Young v. Catoe*, 205 F.3d 750, 755 n. 2 (4th Cir. 2000) ("It is true that, with

judge. The federal court, without key testimony from the judge (as he had passed away), simply looked at what was left – the law clerk did not read or research the proposed order; the proposed order was requested *ex parte*; there was no opportunity to provide opposing views; the same drafting errors remained; and, the order included reference to evidence that was not presented or otherwise part of the case. That is far closer to *Ex parte Ingram* than the facts of the instant case as shown in this record. Moreover, the applicability of *Jefferson* is limited not only to its facts, it is also limited to federal habeas review *under the prior statute*, as the Eleventh Circuit was careful to note:

> Taking all of this together, we agree with the district court that the factual record compels the conclusion that Jefferson did not receive a full and fair hearing in his state court habeas proceeding. We, therefore, hold that the state court's factual findings were not entitled to a presumption of correctness under pre-AEDPA law.
>
> We neither hold nor imply that if this were a post-AEDPA case the state court's adoption of the order in these same circumstances would affect the presumption of correctness afforded by 28 U.S.C. § 2254(e)(1) (1996) or the deference provided factual determinations by § 2254(d)(2) (1996). See Jones v. GDCP Warden, 753 F.3d 1171, 1183 (11th Cir. 2014) (explaining that the Supreme Court's decision in Jefferson "never could have held, nor did it presume to hold, that this kind of adopted order is not entitled to AEDPA deference"); see also Rhode v. Hall, 582 F.3d 1273, 1281–82 (11th Cir. 2009) (Where both sides had opportunity to present the state habeas court with their version of the facts, the court's verbatim adoption of the State's proposed order, which petitioner contended selectively used and mischaracterized evidence, did not deprive the findings of AEDPA deference.).

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regard to opinions and orders rendered by the district courts within this circuit, "[t]he adoption of one party's proposed findings and conclusions is a practice with which we have expressed disapproval on a number of occasions." *Shaw v. Martin*, 733 F.2d 304, 309 n. 7 (4th Cir.1984) (citing examples). Nonetheless, the disposition of a petitioner's constitutional claims in such a manner is unquestionably an "adjudication" by the state court."). Moreover, federal courts have also rejected the consideration of an independent due process claim when reviewing state convictions in habeas actions. *See Trevino v. Johnson*, 168 F.3d 173, 180 (5th Cir. 1999) (finding alleged error on adoption of state's proposed findings not cognizable in federal habeas for failure to raise a constitutional error that could undermine the inmate's legal detention); *see also Jolly v. Gammon*, 28 F.3d 51, 54 (8th Cir. 1994) ("the court's disapproval of this practice cannot convert Jolly's challenge to a proceeding collateral to his detention into a constitutional challenge of the detention itself.").

941 F.3d at 476–77.

Even so, the point is that – unlike *Jefferson* – the record here soundly supports that Judge Burch carefully reviewed the proposed order and adopted the language and substance of the order as his own. The Amended Order became Judge Burch's Order upon adoption of the language proposed. *Jefferson* teaches that significant errors may reasonably raise a concern with the process as used in a particular case, but it is not dispositive of judicial error. Lindsey has been afforded ample opportunity to confirm that the amended order is, in fact, Judge Burch's order, and his challenges have resulted in creating firm record support that Judge Burch did not abandon his judicial duty. Lindsey's argument does not stand up in light of the remand and additional evidence before the Court.

In sum, Lindsey fails to show any error much less bias or impropriety by Judge Burch. Certiorari review is not warranted.

II.

> The record supports that Lindsey failed to carry his burden of showing either deficient performance or prejudice in counsel's mitigation investigation and presentation of evidence when Lindsey failed to show any missed line of mitigation, and the items of evidence he suggested counsel missed would not significantly alter the mitigation case presented at trial

Introduction to Argument:

Lindsey complains counsel did not present available mitigation evidence; failed to employ and present a social worker; and did not properly prepare the expert presented. The record shows factual and legal support for the denial of relief upon a reasonable and correct application of the *Strickland* test. Lindsey neither showed that counsel was deficient nor a reasonably probability of a different result existed.

Relevant Law:

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). To show the required prejudice, a death-sentenced petitioner must show "there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

"A 'reasonable probability' is less than a preponderance of the evidence but still 'a probability sufficient to undermine confidence in the outcome.' " *Weik v. State*, 409 S.C. 214, 233–34, 761 S.E.2d 757, 767 (2014) (quoting *Strickland*, 466 U.S at 693-94). "Prejudice is established where "there is a reasonable probability that at least one juror would have struck a different balance." *Id.* (quoting *Wiggins*, 539 U.S. at 537).

The Supreme Court has recognized that "counsel have an 'obligation to conduct a thorough investigation of the defendant's background," *Williams v. Taylor*, 529 U.S. 362, 396 (2000).[11] However, *Strickland* deficient performance is not shown merely by producing additional mitigation evidence in collateral proceedings. *See Bobby v. Van Hook*, 558 U.S. 4, 11

[11] Before addressing the substance of the allegations, Lindsey argues Judge Burch "erred in refusing to use the ABA Guidelines as tools to determine the prevailing professional norms." (Petition, p. 32). Lindsey characterizes Judge Burch's treatment as conveying "dismissiveness." (Petition, p. 32). The record shows Lindsey is incorrect. Judge Burch acknowledged that the guidelines were not dispositive to constitutionally deficient performance, but repeatedly considered the guidelines as part of the arguments for deficient performance. (See II Supp. App. pp. 112, 131, 152, 183, 196). This is correct. "*Strickland* itself rejected the notion that the same investigation will be required in every case." *Cullen v. Pinholster*, 563 U.S. 170, 195–96 (2011) (citing *Strickland*, at 691). Respondent submits Lindsey's argument is premised on incorrect reading of the Order. To the extent Lindsey seeks to elevate the utility of the guidelines over and above what the Supreme Court precedent allows, his argument lacks support.

(2009) ("there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative"); *see also Wong v. Belmontes,* 558 U.S. 15, 28 (2009) (rejecting notion of a different result "if only Schick had put on more than the nine witnesses he did"). It does not turn, even, on "whether counsel should have presented a mitigation case." *Wiggins*, 539 U.S. at 523. Rather, the critical consideration is whether counsel conducted a ***reasonably thorough*** investigation.[12] *See Wiggins*, 539 U.S. at 533 ("*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence…."). If not, the next question is whether – when all the evidence is considered at the whole – mitigation and aggravation, omitted and admitted at trial – the petitioner has shown a reasonable probability of a different result. *Belmontes*, 558 U.S. at 26 (prejudice analysis requires consideration of all evidence, including additional evidence in aggravation that may be introduced) (citing *Strickland*, 466 U. S. at 695-96). If the omitted evidence "would barely have altered the sentencing profile presented to the sentencing judge," the applicant has not shown sufficient evidence of prejudice. *Strickland*, 466 U.S. at 700.

Discussion:

Lindsey makes three arguments. First, he argues counsel failed to spend sufficient time in preparation; second, he argues counsel omitted critical mitigation; and, third, he argues counsel failed to properly prepare his expert, Dr. Melikian.[13] (See Petition, pp. 37-38, 45, and 47). The record supports that there was an adequate and revealing investigation, reliance on

[12] As a practical, and logical, matter, it is an unattainable standard to require counsel to find *all* potential mitigation lest counsel be held constitutionally deficient in performance. That universe of facts can neither be fully defined nor accurately identified. Thus, it is the ***reasonable*** attempt to find mitigation that must be considered for a *Strickland* claim.

[13] Lindsey complains the PCR court misconstrued his argument below as "counsel failed to spend enough time investigating and preparing a mitigation case." (Petition, p. 31; see also Petition, p. 36 and II Supp. App. p. 409, lines 4-12). The PCR court simply answered the question Lindsey posed. (See II Supp. App. pp. 267-272).

experts, and that there was a fulsome defense presentation in sentencing; but, critically, the record supports the PCR court's finding that Lindsey failed to show the proffered testimony not presented at trial undermined confidence in the verdict. The PCR court also correctly recognized that some of the additional pieces of evidence fall into the "double-edged sword" category that could well have added to the evidence in aggravation. (II Supp. App. pp. 161, 185 and 191).[14] *See Truesdale v. Moore*, 142 F.3d 749, 755 (4th Cir. 1998) (counsel's strategy reasonable in omission of evidence that "might as easily have condemned Truesdale to death as excused his actions."). The record supports the judge's determination that Lindsey was not entitled to relief.

To show error, Lindsey argues the PCR court erred in its prejudice analysis by resolving some evidence was discovered and presented, (Petition, p. 39); and, also argues, that the PCR court "ignored the evidence and witnesses that trial counsel should have presented to the jury at sentencing." (Petition, p. 39). Factually, his position is unsustainable. The PCR judge set out in detail the evidence presented at the sentencing phase. (See II Supp. App. pp. 112-130). The PCR judge compared what was received at trial and what was presented in PCR. (See II Supp. App. pp. 195-259). The PCR judge then concluded:

> This Court finds that the investigation concerning the social history of the family was constitutionally adequate. In addition … the 2004 defense team was aware that there had been mental health concerns for Bessie Smith who had tried to commit suicide, and Steve Pilgrim who at least had nerve and anxiety problems.
> …
> [Lindsey] has failed to show what material counsel was unaware of that was critical to the defense, just that in depth evidence was not presented. However, he has failed to show that counsel's investigation of the family background was unreasonable.

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[14] South Carolina is not a "weighing" state. Any evidence presented may be considered as aggravating and need not go to support a specific statutory aggravating factor. *See State v. Bellamy*, 359 S.E.2d 63, 65 (S.C. 1987), *overruled on other grounds by State v. Torrence*, 406 S.E.2d 315 (S.C. 1991) ("A jury should not be instructed to 'weigh' the aggravating circumstances against the mitigating circumstances") (citing *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984)).

(II Supp. App. pp. 259-260).

Lindsey cannot show any conclusion that remotely resembles the PCR court denied relief because "some" evidence was developed and presented at trial. Nor can he show error in the fact-finding.

As to relevant factual findings, the findings are spread throughout the order as Lindsey's present issue is a blending of several claims, (II Supp. App. pp. 105-107, claims 2, 3, 4, 5, 7 and 8; see also II Supp. p. 195); however, the following resolutions by the PCR court are relevant:

- As to Lindsey Issue 2, failing to challenge evidence of malingering, and failure to call Dr. Brawley: Lindsey's malingering as reported by State evaluators was addressed by Dr. Melikian; and results by Dr. Brawley were presented through Dr. Melikian, (II Supp. App. p. 155);

- As to Lindsey Issue 3, failing to adequately present evidence of mercy: Four witnesses made requests for mercy; and, under *State v. Sapp*, 366 S.C. 283, 294, 621 S.E.2d 883, 888 (S.C. 2005), the cumulative evidence presented at PCR does not support counsel error and prejudice, (II Supp. App. p. 160);

- As to Lindsey Issue 4, failure to adequately present Dr. Melikian: Lindsey showed that Dr. Melikian reviewed more information for the PCR hearing, than for trial; however, she was not able to state with any clarity what particular information she lacked in 2004 that was critical to a revised assessment; she, in fact, testified "that her 2010 diagnosis of mental illness under Axis I, II, III, IV would be the same as her earlier conclusion, only that the degree of the severity of the depression was greater than she earlier thought," (II Supp. App. pp. 178-179);

- As to Lindsey Issue 5, failing to present family history of mental illness: "there was some evidence presented of some family members' mental health problems involving whether aunt Bessie Smith had attempted suicide … and that Steve Pilgrim suffered from illnesses of panic attack and anxiety attack and that his daughter was being treated for an illness described as panic attach," (II Supp. App. pp. 182-183);

- As to Lindsey Issue 7, failure to retain a social history/social worker: The PCR court considered this claim to present a combination of Issues 5 (family mental history), 7 (social worker), and 9 (time spent in investigation), in considering Issue VII, (II Supp. App. p. 195); the Court resolved: Lindsey "failed to prove either deficient performance or prejudice … counsel retained a mitigation investigator Lenora Topp who acquired background data concerning the defendant, acquired an understanding of the family from

Marion Lindsey and his mother and provided her summaries to the defense team for their use in deciding what information to present" and Lindsey "failed to show how this evidence from the social worker – or its absence – undermined the confidence in the verdict under the standards of *Strickland*," (II Supp. App. pp. 196-197);

- As to Lindsey Issue 8, failure to present evidence from EMS worker Vincent Bell: at trial, "the defense was able to present testimony [from EMS worker Joseph Stewart] that Lindsey told him that he shot himself in the head. ROA 1674" and Dr. Melikian referenced same in her testimony; the comment attributed to Bell that Lindsey said to let him die is consistent with that testimony; "the new evidence does not differ in subject matter much less 'in a substantial way' from the evidence already presented at sentencing" and Lindsey "fails to explain how such evidence, had it been presented would have done anything to change the jury's perception of Lindsey's moral culpability or mental state for such a brutal and horrific crime." (II Supp. App. pp. 266-267).

These individual findings and conclusions are sound. Lindsey did not show any new category of evidence or new medical diagnosis different that presented at trial; rather, his PCR case rested on a great deal of cumulative or evidence of limited impact. Given that the record supports the PCR judge's factual findings and those findings support Lindsey failed to carry his *Strickland* burden of proof, Lindsey has not shown that certiorari review is warranted.

Adequacy of the Investigation

Lindsey argues counsel was deficient because they failed to spend enough time in investigation. (Petition, p. 36). Taking his own assertions as true, counsel had over a month to investigate[15] and had the assistance of experts, specifically, a mitigation investigator, a psychologist and a psychiatrist. (See Petition, p. 36).[16] These facts are certainly far from cases

[15] But see App. pp. 2939-2940, Time Sheet for defense counsel Brannon, showing first meeting with client on March 12, 2004, and research beginning on March 15, 2004, before jury selection on May 17, 2004. The Order appointing counsel was signed March 5, 2004, (App. pp. 2941-42; see also App. p. 2297, defense counsel Brannon confirming accuracy of time records).

[16] See also App. p. 2937, Defense Voucher submitted by Public Defender Bartosh reflecting consultation and expenses for Drs. Brawley and Melikian, and also consultation with Dr. Absher, along with significant travel expenses for mitigation investigation Topp in the amount of

where counsel failed to investigate, *see Williams*, 529 U.S. at 395, or limited investigation to only two, narrow sources, *Wiggins*, 539 U.S. at 524-35. *See Porter v. McCollum*, 558 U.S. 30, 40 (2009) (counsel "failed to uncover and present any evidence of [the defendant's] mental health or impairment, his family background, or his military service"). That type of blatant insufficient investigation will not meet counsel's responsibility to investigate as the Supreme Court has recently reaffirmed. *Andrus v. Texas*, ___ U.S. ___, 140 S.Ct. 1875, 1877 (2020) (counsel deficient when counsel "failed to even look for" evidence of a "grim" life history).

The time spent in preparation may lend context to the failings. *See Williams*, 529 U.S. at 395 (counsel waited "until a week before the trial" to begin to prepare for penalty phase). However, far more important is the actual results of the investigation. *See Wiggins*, 539 U.S. at 534 ("Counsel's pursuit of bifurcation until the eve of sentencing and their partial presentation of a mitigation case suggest that their incomplete investigation was the result of inattention, not reasoned strategic judgment."). For instance, in *Bobby v. Van Hook*, the Supreme Court found no issue with the investigation when counsel "looked into enlisting a mitigation specialist when the trial was still five weeks away," and began working with an expert witness "more than a month before trial." 558 U.S. at 9-10. *See also Owens v. Stirling*, ___ F.3d ___, No. 18-8, 2020 WL 4197742, at *12 (4th Cir. July 22, 2020) (rejecting complaint that "lawyers waited too long to begin investigating" where record shows counsel had "nearly two months" for investigation which "far exceeded the one week at issue in *Williams* … and roughly equaled the amount of time in *Bobby*"). Again, the emphasis is on the investigation itself. Here, the PCR court correctly found much of the PCR evidence was based on the investigation trial counsel had conducted. (II

$593.05; and App. pp. 2938, Defense Voucher for defense counsel Brannon showing 107 hours for out of court services and 62.5 hours in court services.

Supp. App. p. 261). Being in the same vein of mitigation presented, the omitted details would not have significantly altered the case, and Lindsey failed to show prejudice. (II Supp. App. p. 263).

Lindsey's offered points of error in the PCR court's reasoning fall into six general areas which are addressed separately below. None show factual or legal error by the PCR judge in resolving Lindsey's *Strickland* claims.

(1) *Rod Tullis Testimony*

Lindsey claims counsel failed to preserve and present testimony from Lindsey's former counsel, Rod Tullis. He claims that "Tullis could have testified regarding the despondent and suicidal message petitioner left on his answering machine in the hours immediately before the incident." (Petition, p. 37). Tullis testified at the PCR hearing that he had a working relationship with Lindsey and his wife though his legal representation of Lindsey; about suicide notes he had received; and, about a message he had received on his answering machine around the time of the incident.[17] However, the PCR court did not initially make specific findings concerning the potential testimony of Tullis or the tape. The testimony is referenced in the investigation allegation, but there is no finding in the Order. (See II Supp. App. pp. 236-241 and 253-263). In the Rule 59 motion from the Amended Order, Lindsey raised the issue; and Judge Burch in denying the motion found that there was similar evidence admitted and prejudice was not shown. (II Supp. App. p. 622).[18] The record supports his conclusion. Evidence concerning Lindsey's suicidal ideation was presented. As Judge Burch pointed out, Dr. Melikian and others gave such evidence. (II Supp. App. p. 622). Dr. Melikian testified Lindsey had suicidal intent at the time

[17] Defense counsel Hatcher had a note that reflected Tullis was a possible witness to Lindsey's mental state, showing, in lead counsel Bartosh's handwriting, "Rod Tullis - mental state," (App.p. 2522 3044), and a witness subpoena list with his name, (App. p. 3074). Defense counsel Brannon confirmed Tullis was on the list but not called. (App. p. 2308).

[18] There was a factual issue over the receipt of the physical cassette tape of the message that, Judge Burch reasoned, need not be resolved. (II Supp. App. p. 622).

of the crime and that he had a reported a history of suicide attempts. (App.pp. 2013-2014). Further, Ann Howard, a mental health professional, described Lindsey as suicidal and suffering from depression, (App. pp. 1984-1992); Lindsey's mother, Virginia Lindsey, described Lindsey as depressed, (App.p. 2059); and, of course, there was evidence that he shot himself in the head, (see App. p. 1674 and 2014). In light of the other evidence presented, the absence of this testimony does not undermine confidence in the verdict.

(2) *Vincent Bell – EMS paramedic – Testimony*

Lindsey argues Bell "would have testified about [Lindsey's] self-inflicted head wound and the fact that [Lindsey] told him to 'Let me die.'" (Petition p. 37). However, EMS worker Joseph Stewart testified that Lindsey told him that he shot himself in the head, (App. pp. 1168-1674); and Dr. Melikian testified that Lindsey advised her that "he had asked EMS, the paramedics who came to the scene to let him die," and that he had a wound from having "put the gun to [his] head [and] shot himself in the head." (App. p. 2014). At its core, the statement reflecting he wished to die is simply more evidence of the attempt to kill himself. The PCR judge's ruling is correct: "the new evidence does not differ in subject matter much less 'in a substantial way' from the evidence already presented at sentencing" and Lindsey "fails to explain how such evidence, had it been presented would have done anything to change the jury's perception of Lindsey's moral culpability or mental state for such a brutal and horrific crime." (II Supp. App. pp. 266-267).

(3) *Witnesses and Mercy Request Testimony*

Lindsey argues that counsel failed to call brother, Timothy Sims, and "failed to have the lay witnesses ask for mercy," or adequately ask for mercy, particularly Bill Burton, Steven Pilgrim, and Bessie Smith. (Petition, pp. 37-38). A critical finding bars a conclusion of

Strickland prejudice – the fact that a number of witnesses made requests for mercy during the sentencing phase. Those witnesses included his mother Virginia Lindsey, (App. p. 2060, "Marion is my son. I love him very much. I ask for mercy for my son not be sentenced to death."),[19] his father, Leon McDowell, (App. p. 2072, to the jury "[i]f they can see fit not to execute Marion maybe he can benefit his kids somehow."); and his cousin Chris Wilkins, (App. p. 2076, "Please have mercy on him."), while Bill Burton spoke of his long friendship with Lindsey and Lindsey's disadvantaged upbringing, (App. pp. 2061- 2067). Lindsey's uncle, Steve Pilgrim, testified to Lindsey's auto accident as a child and that Pilgrim stayed with him, (App. p. 2079), and Lindsey's aunt, Bessie Smith, testified how Lindsey's uncles brutally killed Lindsey's cat and how hurt he was, and how that affected him as a child. (App. p. 2081).

Where pleas for mercy would be cumulative, this Court has found no prejudice and has not reversed. *See State v. Sapp*, 366 S.C. 283, 294, 621 S.E.2d 883, 888 (2005). Further, this Court has found that a request for mercy need not be express or in any particular wording. In *Sapp*, this Court found the defendant's girlfriend could have answered a question posed as to "whether she would like to see him put to death," but she had, at any rate, expressed her love for him in other testimony. 366 S.C. at 293–94, 621 S.E.2d at 888; *see also State v. Johnson*, 338 S.C. 114, 126–27, 525 S.E.2d 519, 525 (2000) ("despite the trial court's ruling which limited her testimony, Johnson's sister was able to make a general plea for mercy on her brother's behalf. In addition to her testimony concerning their abusive family life, she clearly expressed her love and affection for Johnson at trial. Therefore, we conclude Johnson has failed to demonstrate that he

[19] Judge Burch noted that "contrary to the assertion in the post-hearing memorandum of Petitioner, p. 25, Virginia Lindsey testified that she did talk to the defense team and 'they did' prepare her to request the jury to have mercy on her son. PCR 368, l. 14-18." (II Supp. App. p. 213). The referenced page from the PCR transcript may be found at PCR Appendix p. 2652.

was prejudiced by the trial court's ruling."). Further still, in *Sapp*, this Court noted that Sapp's mother and small nephew had asked for mercy; thus, a ***third plea*** would be cumulative and did not support reversible prejudice. *Id.* at 294, 621 S.E.2d at 888 (emphasis added). The case law supports the PCR judge's decision that Lindsey failed to show prejudice.[20]

(4) *Dr. Tora Brawley Testimony*

Lindsey also contends counsel erred in failing to call the retained psychologist, Dr. Tora Brawley, to explain her opinion on Lindsey's "cognitive deficits." (Petition, p. 38). The PCR judge found, "although Dr. Brawley did not testify, her findings and conclusions on the issue of malingering were presented through Dr. Melikian." (II Supp. App. p. 155). The record shows defense counsel Bartosh made a decision after reviewing the information and testing results with Dr. Brawley that he would have the information presented as part of Dr. Melikian's testimony. (App. p. 2365, p. 2375, pp. 2885-2886, and pp. 2958-60). The record further shows that Dr. Melikian presented the test results within her testimony after consulting with Dr. Brawley. (App. pp. 2004-2006, pp. 2009- 2012, and pp. 2885-86). Lindsey failed to show either deficient performance or prejudice regarding Dr. Brawley's opinion.

(5) *Testimony of a Social Worker*

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[20] Respondent further notes some of the PCR testimony in reference to mercy tends to show testimony that would not be admissible. (See II Supp. App. p. 213, mother testified she "would have asked for mercy on her son because she had lost a son and "would ask for mercy that he not get the death penalty." She stated that he had to be punished, but not the death penalty because it hurts to lose someone. She said she not only lost a son, but that she lost a daughter, a son, and two grandsons."). (See also App. pp. 2652-2653). Testimony showing impact to an individual for reasons other than the close connection to Lindsay would not be admissible. *See State v. Dickerson*, 395 S.C. 101, 123, 716 S.E.2d 895, 907 (2011) (affirming the judge's ruling barring the evidence offered that "execution would … exacerbate the suffering her family has already endured. This evidence no longer concerns Dickerson's character but rather borders on an opinion that Dickerson should not be executed in order to spare her family the suffering.").

Social workers are often a source of preparation in capital trials. There is no requirement that a social worker testify at trial in order to present evidence of background. Such personal and relevant family history, or even underprivileged background, however, are not matters that are difficult to understand or complex such that an expert was required. Even so, much of what Lindsey complains should be heard through social worker testimony, but was not developed in investigation, was developed and actually presented at trial. The defense retained a mitigation investigator, Lenora Topp, who conducted detailed investigation and shared her findings with counsel. (See App. pp. 2405-2439). As the PCR court reasonably and logically found, (II Supp. App. pp. 260-261), comparison between her investigation and the information presented through Vogelsang at the PCR hearing shows no deficiency in counsel's investigation.

In PCR, Lindsey presented clinical social worker Jan Vogelsang to show a different mitigation investigation. Vogelsang testified that she conducted a bio-psychological assessment of Lindsey. In doing so, she interviewed Lindsey, family members, friends, former attorney, Tullis, and Drs. Melikian and Brawley; and reviewed records not just concerning Lindsay, but also his family. (II Supp. App. p. 241; see also App. pp. 2779-2781). She additionally read the trial testimony of family members, Mr. Burton, and Dr. Melikian. (App. p. 2781). Vogelsang referenced the community, family and development risks. (App. pp. 2781-2782). She described a suicide attempt, testifying Lindsey took 50-60 over-the-counter pills (Tylenol, Nuprin), after fighting with Fred over competing for their mother's attention. (App. pp. 2811-2812). She described the "red flag" that suicide gestures of a child and the need for treatment, (App. p. 2813), and also reviewed the history of suicide "attempts" of Bessie, Robin, and Virginia (and declared that the mental health center was not aware of their history when they saw Lindsey).

(App. pp. 2814-2815).[21] She testified that a note in Steven Pilgrim's medical records indicated that on July 15, 2002, Steven, who was taking Xanax, said he was anxious. He feared his wife was "putting a root" on him and that she was putting something in his drink or food. (App. p. 2817). She stated Lindsey was confused by the practice of roots.[22] She also opined that the use of "magical solutions" in a confusing and chaotic family environment only further confuses things. (App. p. 2818).

Vogelsang summarized Dr. James Garbarino's theory on psychological battering of children and asserted she would have used his model had she testified in 2004. (App. p. 2819). She testified the factors that would have been addressed included:

- Abandonment: noting his father's abandonment; his mother's alleged lack of involvement; and that he carried into adulthood a fear of rejection and over-reactivity to rejection. (App. pp. 2819-20)

- Isolation: "not exposed regularly to activities outside the immediate environment; noting evidence of minimal exposure to church and scouts; and he quit his attempt to play football when no one came to his games (App. p. 2820)

- Exposure to negative behaviors in the home: negative home environment, "no exposure to positive relationships outside the home and community with the exception of … Mr. Burton, his mother and his uncle Steve (App.p. 2820)

- Terrorism: "witnessing a threat of harm constantly within the home" noting Lindsey "witnessed his uncles fighting and beating girlfriends and wives; "witnessed his

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[21] Histories and stories of others may be useful to detecting possible family patterns for the social worker to detect, but offer very little in deciding a defendant's "moral culpability" if not shown that the defendant knew or was exposed to the event. *See Humphrey v. Morrow*, 717 S.E.2d 168, 176 (Ga. 2011) (habeas court received evidence suggesting one of Morrow's mother's later boyfriends might have sexually abused Morrow's sister. However, our review of the record does not reveal that Morrow was ever aware of this alleged abuse; therefore, it would not have affected the jury's assessment of his moral culpability in the murders if it had been presented at trial.").

[22] On cross-examination, Vogelsang admitted she had no reference to discussing "roots" with Lindsey in her interview notes from November 2009. (App. p. 2859-2860). Many of her hearsay assertions or assumptions were critically challenged in cross-examination and some are recounted below.

mother shoot at her boyfriend"; and saw his uncles throw his favorite pet into the fire" all of which "would create a threat of harm for a child" (App. pp. 2820-2821)

- Ignoring: "parents or adults failed to notice the child's needs" and failing to intervene, help, protect or provide for App.p. 2821; PCR Tr. 537.

- Corruption: noting his uncles' violence, his mother shooting at her boyfriends tires and boyfriend, and his uncle's profit from drugs. App.p. 2821; PCR Tr. 537.

She suggested that these factors showed the child had been mis-socialized. (App.p. 2822). Vogelsang opined that Lindsey's experiences in development affected his judgment, impulsivity, insight, "and placed him at a higher risk to end up committing a serious act." (App. p. 2831).

Vogelsang also described Lindsey' romantic relations as "erratic and chaotic." (App. p. 2824). She described the shooting of Stafford Wilkins over Lindsey's former girlfriend, Stephanie, that resulted in Lindsey being sent to jail. (App.p. 2824). She described the marriage between Lindsey and Nell as fraught with violence. (See App. pp. 2825-2827). She opined that Lindsey lacked an understanding of fidelity and being committed in a relationship. (App. p. 2829). Vogelsang opined, concerning the final breakup, that Lindsey "became extremely depressed over the loss of his boys" and Nell. (App. p. 2829). Vogelsang pointed out that when he threatened to take his life, no one took him anywhere to receive treatment or help. (App. p. 2829).

However, Vogelsang's testimony, though detailed, showed little more than the information previously uncovered in the trial investigation. Topp made detailed summaries of her interviews with Lindsey and Virginia Lindsey and these written interviews reveals virtually identical data to a significant portion of Social Worker Jan Vogelsang's PCR testimony. (App. pp. 3056-3067). Lindsey failed to show new and critical information that was not discovered. For instance a review of the data received from Lindsey's mother in 2004 reflected: (1) mother's background, involvement in raising children, her absence from the home, Lindsey's lack of an

active father; and Lindsey's opinion that the family was poor: (2) Lindsey's suicide attempt by swallowing pills; (3) violence in the family and Lindsey's injuries sustained while growing up, *i.e.*, being run over by a car at 19 months old, and his falling and hitting his head frequently; (4) Lindsey's relationships with Stephanie Petty and Nell; and (5) that Lindsey sold drugs sometimes to support his family. (Ap. pp. 3067-3069).

In Lindsey's interviews with Topp on April 16 and 25, 2004, he reported similar details about the family background and his own history such as: (1) his father was not around him, and that his brothers would go on activities with their fathers and he was left out; (2) his mother struggled while he was growing up, and his family was desperately poor; (3) that his brother Fred, who he had been closed to, died in a canoeing accident; (4) Lindsey practically raised his brother Tim Sims; (5) Lindsey did not know his sister Vanessa who was killed in a car accident; (6) Lindsey's basic educational history through 10th grade when he quit school to work and help his mother and his disciplinary actions including facts and suspension; (7) that he had played football in junior high, but quit when no one would come to watch; (8) that Lindsey had two traumatic times in his life, pointing out the incident when his cat was thrown into the heater alive and when he tried to commit suicide when he was 12 years old; and he also described running away from home when he was seven because his mother would not let him go somewhere, but returned home when he got hungry; (9) that Lindsey quit school, and began working; also went over his work history; (10) Lindsey described having a bad car accident when the tire blew and the car flipped and he was out of work for a year due to injuries. He claimed that he lost his memory, broke his hip and gad facial surgery; (11) Lindsey described his relationship with Stephanie Petty; (12) Lindsey described working with his brother Fred in West Virginia and returning home; (13) Lindsey claimed that he partied, drank beer but never did drugs; he was a

drug courier at times; (14) concerning Bill Burton, Lindsey said he was his mentor while growing up and Burton got him a job at his plant, and that in his youth he would go fishing with Bill and met his mother; and, (15) Lindsey described shooting Stafford Wilkins in 1994. (App. pp. 3056-3066). During the interview on April 16, 2004, Lindsey also went into detail about his relationship with Nell Lindsey. Within that part of the interview he described breaking up with Stephanie after Nell became pregnant, he stated that he would also take care of the children. He described the relationship leading to the shooting, and told Topp that he had written suicide notes after Nell had moved back with her mother and told him that he could not see his children after a domestic violence order. He claimed to have lost weight from 225 to 160 in four weeks and was depressed all the time. He described his version of the day of the shooting including going to his brother hoping he would stop him, seeing Nell's cousin's car seeing Nell and then chasing them, not recalling the shooting but recalling putting his gun to his temple and hearing a voice tell him to put the gun down, then being shot. (App. pp. 3062-3066).

The defense team was not unarmed going into the mitigation phase. Moreover, Vogelsang's testimony suffered with potential admissibility issues. For instance, she opined that had she been a witness in 2004, she would have testified whether Bessie Smith had attempted suicide or suffered mental illness based upon her knowledge of its foundation, although Respondent objected to it under hearsay. (App. pp. 2833-2835). The cross-examination, also showed the dangers inherent in presenting social history testimony. [23]

[23] Statements repeated from others may be related again to counsel without concern for the rules of evidence; however, how much of the hearsay is admissible is always in question. Rule 602, SCRE demands that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." By reference, the rule leaves room for the applicability of Rule 703, SCRE. In further explanation of allowable expert testimony, Rule 705, SCRE expressly provides that an opinion may be given "without first testifying to the underlying facts or data, unless the court requires otherwise."

For example, Vogelsang admitted that she misstated on direct that Uncle Willie has killed someone, when in fact it was only an assault. (App. pp. 2840-2841). Further, she admitted that Lindsey was not identified in the pill incident as attempting suicide by the hospital, but only that it was a gesture. (App. pp. 2841-2842). Vogelsang was inconsistent on which family members involved with drugs that Lindsey helped. (App. p. 2862). Also, the competency and/or strength of her investigation and conclusions were weakened by the fact that she either avoided or could not obtain cooperation to interview a series of individuals who had long relationships with Lindsey, including the mother of his other child. (See App. pp. 2851-2853).

Additionally, significantly negative factors were presented in the testimony. In the questioning concerning her expertise in child custody matters, Vogelsang admitted that a person with Lindsey's character should not have been allowed to have visitation without court supervision, if at all, even though she had to be reminded that there was evidence that Lindsey gave beer to his baby son in a baby bottle. (App. pp. 2846-2849; see also App. p. 1820). Vogelsang also reiterated Lindsey had a record of violence, not only toward Nell, but toward other females. (App. p. 2873). In suggesting a reason for the crime, she confirmed that he had declared to the EMS that he had shot her because she had a boyfriend - not because she would not let him see his children. (App. p. 2870; see also App. p. 3055). But again, the issue is investigation. Lindsey does not point to any particular piece of evidence that he claims was critically omitted from the prior investigation, or trial presentation, but merely suggests that it

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However, an expert may be compelled to disclose the basis on cross-examination. *Id.* Even so, there is no provision that works to convert hearsay into non-hearsay based upon an expert's participation in the trial. "A trial court must insure that an expert witness is truly testifying as an expert and not merely serving as a conduit through which hearsay is brought before the jury." *Ramirez v. State*, 96 S.W.3d 386, 397 (Tex. App. 2002). If allowed, the hearsay nature of the testimony renders it of little value. *See Humphrey v. Morrow*, 717 S.E.2d 168, 176 (Ga. 2011) (finding information divulged through expert's hearsay "would not have been given great weight by the jury").

was not done in the depth that he thinks counsel should have done. That is not sufficient to carry his burden.

Presenting the same evidence in greater detail is still presentation of cumulative evidence which will not fairly support *Strickland* prejudice. *See Owens v. Stirling*, 2020 WL 4197742, at *14 ("The Supreme Court has likewise rejected the notion that counsel must tell a defendant's life history with elaborative detail, reasoning that where (as here) counsel put forth "substantial mitigation evidence," any cumulative evidence about the same circumstances heard by the jury offers 'an insignificant benefit, if any at all.' ") (quoting *Wong v. Belmontes*, 558 U.S. at 23). Petitioner failed to show what material counsel was unaware of that was critical to the defense. Though he presented additional detail within a laborious PCR presentation, he failed to show that counsel's investigation was unreasonable. Even with the further information about the family background, the psychiatric diagnosis is similar,[24] and, the information provided by the social expert is similar to the Topp information. The record shows that in light of the trial testimony of Lindsey's mother, Virginia Lindsey, his father, Leon McDowell, his cousin , Chris Wilkens, his friend Bill Burton, his uncle, Steve Pilgrim, and his aunt, Bessie Smith, (see App. pp. 2044-2082), the jury heard the essential personal and family background. Simply put, defense counsel Bartosh through his investigation had an understanding of the potential evidence he could have

[24] This case is decidedly different than the facts in *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004), where this Court held counsel's investigation was unreasonable. In *Von Dohlen*, the defense psychiatrist at trial opined that the defendant suffered from adjustment reaction disorder. However, upon learning additional records existed, and after having reviewed the additional record in the subsequent PCR action, the psychiatrist testified that his diagnosis would have been "major depressive episodes with severe symptoms of anxiety and possible prepsychotic features." *Von Dohlen*, 360 S.C. at 605, 602 S.E.2d at 741. Von Dohlen contended counsel "fail[ed] to adequately prepare and present evidence in the penalty phase of the trial that he suffered from severe, chronic depression, a major mental illness, at the time of the murder." 360 S.C. at 606, 602 S.E.2d at 742. This Court agreed finding that the medical records that affected the defense expert's opinion were available at the time of trial but not provided to him.

presented in greater depth. The investigation concerning the social history of the family was constitutionally adequate.

Further, because the information is virtually the same, Lindsey failed to show that further investigation of the family history undermines confidence in the outcome of the case and creates a reasonable probability that the result of the proceeding would be a life sentence. *Strickland, supra.*

(6) *Dr. Melikian Testimony*

Lindsey next argues he showed counsel was ineffective in investigation and preparation based on the "ineffective way the witness" Dr. Melikian testified at trial. (Petition, p. 31). Lindsey's major block to showing *Strickland* prejudice is that his expert did not change her diagnosis. While more time and additional information may have made Dr. Melikian ***more comfortable*** with her assessment about Lindsey's mental health, ***it would not have changed her resulting opinion***. Lindsay failed to show *Strickland* prejudice. He failed to show a reasonable probability that the result of the proceeding would have been different.

The Court found that Dr. Melikian's 2010 PCR diagnosis of Lindsey's mental illness under Axis I, II, III, IV would be the same as her earlier conclusions, with only that the degree of the severity of the depression was greater than she earlier thought. (II Supp. App. pp. 178-179). The PCR court correctly concluded that Dr. Melikian reviewed more materials for her PCR testimony, than for her sentencing testimony: She stated that there was a difference between what she received in 2004 and the material she received in preparation for the PCR hearing which was 6 or 7 times as much. (App. p. 2887). However, that does meet the critical showing of prejudice. Assuming deficient performance in providing information to her, Lindsey failed a different mental health diagnosis to show to the jury. Dr. Melikian stated the additional material she reviewed would have changed her diagnosis because she did not understand the <u>level</u> of

depression he was showing at the time of the evaluation and that way she looked at his cognition in his low testing results. (App. p. 2888). However, it did not change her diagnosis concerning depression. She admitted her conclusions of mental illness under Axi I, II, III, and IV would be the same. (App. p. 2905).

As to malingering, Dr. Melikian stated she would challenge the Hall Report conclusion that Lindsey was malingering, but that is consistent with her sentencing phase testimony. (App. pp. 2005-2008). Further, in addition to Dr. Brawley's report, Dr. Melikian confirmed that her conversation with Dr. Brawley included actual results of the other testing she did, that Lindsey had problems with attention and concentration. (App. pp. 2910-11).[25] She stated that Lindsey had been tested for malingering on the SIRS tests and the Test of Malingered Memory (TOMM). (App. p. 2911).

Dr. Melikian acknowledged that in 2004 she sought to address the existence of (imaginary) "Jimmy." However, she did not know until the trial that the day "Jimmy" was reported the day he was served the death notice. As Dr. Melikian stated on cross-examination:

> "One of the reasons that that information would of been so important to me to have is that issue of Jimmy I could have dealt with before trial. As a matter of

[25] Dr. Tora Brawley, a clinical psychologist with a specialty in neuropsychology, testified at the PCR hearing. Dr. Brawley stated she conducted an extended clinical interview and battery of neuropsychological tests. She also consulted with a neurologist, Dr. Abshur, after her testing. She summarized her findings as scattered neurological deficits and a recommendation that they obtain medical and school records and speak with collateral sources to investigate it. (App. p. 2357). In her 2004 written report to Dr. Melikian, she had listed a number of impairments, including severely impaired speed of mental tracking, below average accuracy of mental tracking, severely impaired verbal fluency, severely impaired confrontation at naming (ability to name objects), below average manual dexterity and speed, below average immediate verbal memory, delayed visual memory, severely impaired verbal learning ability, impaired ability to copy and recall a complex figure. (App. pp. 2360-2361; see also App. pp. 2958-2959). She opined that he fell below the average range of scoring. (App. p. 2361). However, she could not give an opinion on what caused the brain dysfunction. She noted there were multiple possibilities from the damage to the brain. (App. p. 2362). She pointed out that she lacked enough information to determine whether it was consistent with where it should be or was due to head injuries. (App. p. 2362).

> fact, the first time I met with Mr. Lindsey in preparation, in preparation for this hearing, one of the first things he did was apologize for Jimmy. **When I look back and, you know, now with hindsight, I can see that Mr. Lindsey started out malingering Jimmy. He was told to do this by some other inmates is the information he's given me since, and he was feigning these symptoms because they told him to act crazy**."

(App. p. 2913, ll. 12-22) (emphasis added). She speculated that if she had spent more time with him in 2004 as opposed to meeting him once, "I probably would have gotten that information before trial and would have been able to give much more effective testimony." (App. p. 2914, ll. 4-7, 12-16).

The evidence produce at the PCR hearing may show a modicum of support for Lindsey's argument that the witness testimony would change; however, he has shown no support of *Strickland* prejudice. Ultimately, the new materials did not change the overall diagnosis. Certiorari review is not warranted.

III.

> The record supports that Lindsey failed to carry his burden of showing either deficient performance or prejudice in counsel's failing to retain and present a prison adaptability expert when evidence supports that counsel made a reasonable strategic decision, and where Lindsey failed to present to evidence that would show its omission would produce a reasonable probability of a different result.

Lindsey asserts the PCR judge erred in finding he made " 'no showing' " at the PCR hearing that he is "adaptable to prison," asserting this "completely disregarded [James] Aiken's testimony. (Petition, p. 64).[26] Further, he argues the PCR court "improperly speculated regarding the existence of a trial strategy regarding prison adaptability." (Petition, p. 64). The PCR court found Lindsey failed to show there was sufficient evidence available touching on

[26] Evidence of a defendant's good behavior in jail or ability to adapt is admissible. In *Skipper v. South Carolina*, 476 U.S. 1 (1986) the United States Supreme Court held that the trial court erred in ***excluding evidence that the defendant was well-behaved in jail*** between the time of his arrest and trial, finding such behavior was probative of his future adaptability in prison: "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself ***an aspect of his character*** that is by its nature relevant to the sentencing determination." *Id.* at 7 (emphasis added).

Lindsay's character of behavior to support a showing of prison adaptability. (II Supp. App. pp. 182-185). Further, the trial judge found – based on existing evidence of notes on prison adaptability and on the presumption that counsel rendered effective assistance – that counsel made a reasonable strategic decision not to pursue and present evidence of adaptability. (II Supp. App. p. 185). Whether counsel was deficient or not (and the evidence support he was not), Lindsey failed to show actual, personal character traits or behaviors to fully support personal adaptability. Thus, he failed to carry his *Strickland* burden of proof.

Both defense counsel Brannon and defense counsel Hatcher testified they were aware of prison adaptability as possible evidence in mitigation, (App. pp. 2335 and 2533); however, the issue was for lead counsel Bartosh (deceased) to decide. Brannon confirmed that –even with the awareness of the admissibility of prison adaptability evidence, and the evidence regarding Lindsey's conduct in jail – Brannon knew what witnesses Bartosh intended to call in the penalty phase, and was aware that there were no jail guards on the witness list. (App. pp. 2336-39). Brannon testified, however, that he did not personally review the records of the 1996 incarceration at SCDC. (App. p. 23339). Brannon's experience with Lindsey at the detention center was very cordial; however, Brannon was aware that Lindsey had been in a fight in the jail and received a disciplinary that resulted in him being locked down at least for the first 3 to 4 weeks Brannon was involved in the case. (App. p. 2336). Brannon stated that they would bring Lindsey into the room for their interview "completely shackled." (App. p. 2336).

Moreover, Hatcher noted the possibility of prison adaptability evidence as mitigation, and that it could be presented through lay and expert witnesses. (App. p. 2533; see also App. p. 3019 and App. p. 3071). Her records also reflected receipt of summaries of the SCDC records and records from the Spartanburg County Detention Facility documenting Lindsey's disciplinary history, and, necessarily, potential witnesses from prison incidents. (App. pp. 2566-2567; see

also App. pp. 3075-3082).

Based on this testimony, the PCR judge found "that the defense team considered the issue." (II Supp. App. p. 190). The evidence supports his conclusion. Moreover, even in the absence of lead counsel's specific testimony, there is the presumption of effectiveness as established in *Strickland*: "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.*, at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). There remains a recognized "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." *Yarborough v. Gentry*, 540 U. S. 1, 8 (2003) (per curiam). Lindsey's claim that the PCR court erred by deciding the issue on "speculation" is factually and legally incorrect. Factually, as noted above, there is evidence that the defense team was aware of both the possibility of prison adaptability evidence and the Lindsey's records. Legally, the burden is on Lindsey to show that counsel was ineffective. "It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of professional assistance.' " *Burt v. Titlow*, 571 U.S. 12, 22-23 (2013) (quoting *Strickland*, 466 U.S. at 689). Further, the PCR judge independently concluded that Lindsey failed to show *Strickland* prejudice based upon the limited impact the Aiken testimony could have had at trial. (II Supp. App. pp. 189-195).

Aiken's testimony was generic. He testified that he had reviewed the correctional files concerning Mr. Lindsey, but had never met Lindsey. (App. p. 2490). He rested on a conclusion that SCDC "can manage this type of offender," and had the necessary staff, equipment and expertise to manage him. (App. p. 2492). He noted that Lindsey did not have relationships with

"security threat groups" or "gangs," (App. p. 2492), and opined Lindsey had not demonstrated a propensity toward random and systematic violence against others while in prison. (App. p. 2492). Aiken acknowledged that the best predictor of future behavior is past behavior; yet, he stated he had no need to speak with Lindsey about his other arrests and crimes of violence he committed, because he was only basing it on adjudications and official records.[27] (App. pp. 2496 and 2499). Aiken also noted Lindsey had been recommended for "anger management" class, (App. pp. 2499-2500), and admitted that this reflected that "the potential for violence is certainly there" and Aiken opined the recommendation was to prepare him for his return to society. (App. p. 2500). Aiken noted fights of record and violent reactions. (App. pp. 2500-2501, March 24, 1996 fight at Dutchman Correctional Institution; and a violent assault in the Spartanburg jail involving an inmate and a detention officer). He noted Lindsey had been "gassed to control his behavior," and acknowledged that the use of gas, though not ordinary, appeared appropriate against Lindsey. (App. pp. 2501 – 2502). Aiken clarified that his opinion was only that Lindsey could be managed not to create an unreasonable risk of harm, not that he was not a risk. (App. p. 2508).

The failure to investigate or retain a prison adaptability expert in this case is supported by reasonable professional judgment. It is easy to recognize the high risk of exceedingly prejudicial information that could be introduced with the generally limited positive information. A decision to not present expert testimony such as that offered in the PCR hearing "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

In particular defense counsel would likely wish to avoid such testimony as: (1) The best predictor of future behavior is past behavior and the prior correctional records of the crime of

[27] Aiken made this comment even though original defense counsel had created a file showing a number of violent incidents involving Lindsey and other individuals. (See App. pp.. 3073- 3082.

assault and battery with intent to kill revealed circumstances where there was an altercation on a highway where shots were fired and the victim was wounded. It was then emphasized - like the present case - that he shot into a vehicle (App. p. 2497); (2) Lindsey had also been arrested for criminal domestic violence; (3) Aiken admitted "the potential for violence is certainly there" and prison records reflected violence with fights and indications he acted violently towards others such as a March 24, 1996 inmate fight at Dutchman Correctional Institution and the Spartanburg Detention Center violent assault in the jail involving both an inmate and a guard, App. pp. 2501-2502); (4) Lindsey received 20 days segregation and Lindsey had to be gassed by officers to control his behavior. (App. p. 2501). The PCR judge reasonably and logically found that the evidence offered in PCR was a classic "double-edged" sword, carrying a high risk of negative impact. (See II Supp. App. p. 191). On the other hand, the offered opinion from Aiken was a generalized conclusion that Lindsey could be managed not to create an ***unreasonable*** risk of harm, not that he would not be harmful to others. (App. p. 2508).

At any rate, there is no reasonable probability that the outcome would have been different had such an expert testified in light of Lindsey's actual past behavior.[28] Lindsey's argument that this was a case with only one aggravating circumstance, and his argument "the only reason this case qualified for capital sentencing is because [Lindsey] shot his wife in a public place, therefore transforming a domestic homicide into a capital crime" is not on firm ground. (Petition, pp. 68-69). This Court previously admonished Lindsey for a similar suggestion on direct appeal. *See State v. Lindsey*, 372 S.C. 185, 195, 642 S.E.2d 557, 562 (2007) ("We find no support for appellant's attempt to reduce this crime to simply 'a domestic dispute.' Appellant's

[28] As to Lindsey's argument that the testimony would serve as "rebuttal," SCDC's ability to control dangerous inmates cannot rebut the evidence of dangerousness and past violence and aggression as presented by Stanford Wilkins (the man he shot) and others recounting violent acts. (See Petition, p. 68).

culpability is not lessened by the fact that the victim was his wife. "). Lastly, Lindsey's argument on "aggravation" is misleading. Only one *statutory* aggravating statute must be proven to consider death, but that does not mean there is not bountiful evidence in aggravation. Consider here that two children were in the car with the victim, Nell. Kiera was cut by the glass and injured physically and psychologically. (See App. pp. 1534-1539; pp. 1755-1756; and pp. 2108-2111). Yes, the record surely supports this is a highly aggravated case. The PCR court reasonably concluded the offered evidence did not undermine confidence in the death sentence verdict. He has failed to show a reasonable probability of a different result had the Aiken testimony been offered. Lindsey has failed to show certiorari review is warranted.

CONCLUSION

Based on the foregoing, the State asks this Court to deny Lindsey's petition.

Respectfully submitted,

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