

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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

September 24, 2013

The Honorable Beth Carrigg
Clerk of Court, Lexington County
205 E Main St Ste 146
Lexington SC 29072-3557

REMITTITUR

Re: Kevin J. Mercer v. The State
Lower Court Case No. 2009-CP-32-05465
Appellate Case No. 2011-196608

Dear Clerk of Court:

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

Very truly yours,

Daniel E. Shearouse
DS

CLERK

cc:

Emily C. Paavola, Esquire

Alphonso Simon, Jr., Esquire

Robert Michael Dudek, Esquire

Donald J. Zelenka, Esquire

Melody Jane Brown, Esquire

The Supreme Court of South Carolina

Kevin Mercer, Petitioner/Respondent,

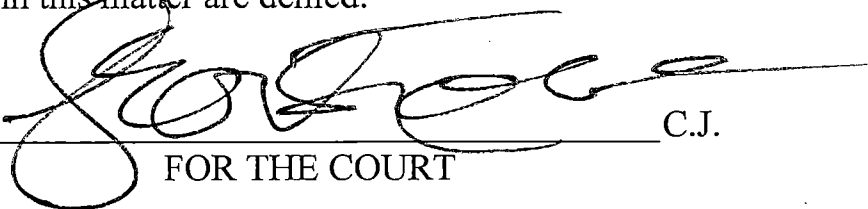
v.

State of South Carolina, Respondent/Petitioner.

Appellate Case No. 2011-196608

ORDER

The petitions for writ of certiorari in this matter are denied.


C.J.
FOR THE COURT

Columbia, South Carolina

September 6, 2013

cc:

Emily C. Paavola

Alphonso Simon, Jr.

Robert Michael Dudek

Alan McCrory Wilson

John W. McIntosh

Donald J. Zelenka

Melody Jane Brown

RECEIVED

DEC 1 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 09-CP-32-5465

KEVIN MERCER, #6021 *Petitioner/Respondent,*

v.

STATE OF SOUTH CAROLINA, ... *Respondent/Petitioner.*

PETITION FOR WRIT OF CERTIORARI

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
P.O. Box 11311
Columbia, SC 29211

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
I. Introduction	2
II. The PCR court held trial counsel were ineffective for failing to investigate and present an <i>Atkins</i> claim at trial	3
III. The PCR court refused to reach the merits of petitioner’s underlying mental retardation claim	5
ARGUMENT	6
I. The PCR court erred in finding petitioner’s <i>Atkins</i> claim procedurally barred from review in post-conviction	6
A. There is no legal basis to support the PCR court’s conclusion	6
B. The PCR court’s proposed procedure would be a waste of judicial time and resources, and it would impose an unfair burden on petitioner	9
CONCLUSION	11

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Atkins v. Virginia</i> , 536 U.S. 306 (2002)	1, 3, 9, 11
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	3, 7

STATE CASES

<i>Council v. State</i> , 380 S.C. 159, 670 S.E.2d 356 (2009)	7
<i>Cummings v. State</i> , 274 S.C. 26, 260 S.E.2d 187 (1979)	5, 6, 7
<i>Drayton v. Evatt</i> , 312 S.C. 4, 430 S.E.2d 517 (1993)	5, 6, 7
<i>Ezell v. State</i> , 345 S.C. 312, 548 S.E. 2d 852 (2001)	8
<i>Franklin v. Maynard</i> , 356 S.C. 276, 588 S.E.2d 604 (2003)	3, 5, 7, 10, 11
<i>Hyman v. State</i> , 278 S.C. 501, 299 S.E.2d 330 (1983)	5, 6, 7
<i>Patrick v. State</i> , 349 S.C. 203, 562 S.E.2d 609 (2002)	9
<i>Simpkins v. State</i> , 303 S.C. 364, 401 S.E.2d 142 (1991)	9
<i>Southerland v. State</i> , 337 S.C. 610, 524 S.E.2d 833 (1999)	8, 9
<i>State v. Mercer</i> , 381 S.C. 149, 672 S.E. 2d 556 (2009)	2, 3
<i>State v. Stokes</i> , 381 S.C. 390, 673 S.E.2d 434 (2009)	9
<i>Wilson v. State</i> , 348 S.C. 215, 559 S.E.2d 581 (2002)	9

MISCELLANEOUS

Rule 71.1 (e), SCRCF	7

QUESTION PRESENTED

Whether the PCR Court erred in finding petitioner's claim under *Atkins v. Virginia*, 536 U.S. 306 (2002), procedurally barred from review in post-conviction where: (a) the PCR Court found trial counsel were ineffective for failing to investigate and present an *Atkins* claim at trial; and, (b) petitioner presented uncontested evidence at the PCR hearing establishing, by a preponderance of the evidence, that he meets South Carolina's three-pronged test for mental retardation.

STATEMENT OF THE CASE

I. INTRODUCTION.

Petitioner, Kevin Mercer, was charged with murder, armed robbery, and possession of a firearm in the commission of a violent crime for a carjacking resulting in the 2002 shooting death of Tracy Davis in Lexington County, South Carolina. *State v. Mercer*, 381 S.C. 149, 672 S.E.2d 556 (2009). Petitioner and his co-defendant, Marcus Thompson, were pulled over by police shortly after the shooting occurred. Petitioner was driving the victim's vehicle – a white Lincoln Navigator – and Thompson was in the front passenger's seat. *Id.* at 154, 672 S.E.2d at 558. After confirming that the Navigator belonged to the murder victim, police took petitioner and Thompson into custody. *Id.* Inside the Navigator, police recovered a .357 caliber handgun that was later determined to be the murder weapon. *Id.* At the time of his arrest, Thompson was in possession of a plastic bag containing fourteen .357 bullets, which fell out of his pants leg as he exited the victim's vehicle.¹ *Id.*

The state proceeded to trial against petitioner and noticed its intent to seek the death penalty. Cameron Littlejohn and Lisa McPherson originally served as petitioner's counsel, but Ms. McPherson was later replaced by Lisa Armstrong (formerly Kimbrough) on January 13, 2006. App. p.3736, ll.13-14. Petitioner's trial began approximately three months later on April 10, 2006. App. p.25. Trial counsel pursued a third-party guilt defense, arguing that Thompson was the shooter. *Mercer*, 381 S.C. at 155, 672 S.E.2d at 559. During the penalty phase, trial counsel presented expert testimony that petitioner suffers from post-traumatic stress disorder

¹ In 2003, Thompson pled guilty to lesser charges and was released on bond. Thompson did not testify at petitioner's 2006 capital trial. Following the trial, Thompson was sentenced to twenty-eight years in prison.

(“PTSD”), although the defense experts testified that petitioner’s PTSD “had nothing to do” with the crime. App. p.2304, ll.7013; p.2305, ll.22-23; p.2307, ll.1-8; p.2343, ll.7-20; p.2345, l.17 – p.2346, l.8. The jury convicted petitioner and sentenced him to death.

This Court affirmed petitioner’s convictions and death sentence on direct review. *Mercer*, 381 S.C. 149, 672 S.E.2d 556 (2009). On December 4, 2009, petitioner’s appellate counsel filed an initial Application for Post-Conviction Relief on his behalf. App. pp.3207-3212. The Honorable James R. Barber, III, (hereafter, “the PCR court”) appointed undersigned counsel on December 9, 2009. App. p.4254. Petitioner subsequently amended his PCR application to include claims that: (a) he is mentally retarded according to South Carolina’s definition for mental retardation, and, accordingly, his death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution, App. p.3256 (citing *Atkins v. Virginia*, 536 U.S. 306 (2002), and *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003)); and, (b) his trial counsel were ineffective in failing to investigate and present an *Atkins* claim at trial. App. pp.3254-3255 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

II. THE PCR COURT HELD TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT AN *ATKINS* CLAIM AT TRIAL.

The PCR court heard live testimony on January 31, February 1, and March 18, 2011. App. p.4254. The court also accepted the sworn deposition of Ms. Armstrong and several sworn affidavits and exhibits. App. p.4271; pp.3279-3868; pp.3870-4102. Regarding trial counsel’s performance, both Armstrong and Littlejohn admitted that: (a) they failed to investigate the issue of petitioner’s mental retardation; (b) they had no strategic reason for this failure; and, (c) as a result, their performance was deficient. App. pp.4273-4274. Regarding the merits of his *Atkins* claim, petitioner offered testimony from Dr. Brad Fisher, an expert in mental retardation,

as well as petitioner's mother, father, ex-wife, high school football coach, two special education teachers, and a cousin/former employer. App. pp.3314-3528; 3870-3875. Petitioner also entered a copy of his special education records, which trial counsel admitted that they failed to obtain, and a lengthy written report prepared by Dr. Fisher detailing the evidence available to trial counsel that would have supported a claim of mental retardation at trial. App. pp.3889-4062; pp.4067-4102. Respondent offered no evidence to challenge petitioner's proof that he is mentally retarded.

After reviewing all of the relevant materials, including post-hearing briefs from both parties regarding petitioner's *Atkins* claim, the PCR court issued an order finding that "trial counsel were ineffective in failing to investigate and raise the issue of [petitioner's] mental retardation at trial." App. p.4271. Specifically, the PCR court found that both trial attorneys "candidly admitted" their deficient performance, and that, "[e]ven if trial counsel had not admitted their performance was deficient, it is also apparent from their actions before trial." App. pp.4273-4274. The PCR court discussed the evidence that should have led trial counsel to investigate petitioner's mental retardation, reviewed well-settled law from the United States Supreme Court and this Court recognizing trial counsel's duty to conduct an adequate investigation into a capital defendant's life and background, and concluded:

[t]his Court finds that trial counsel's failure to investigate and present evidence of [petitioner's] mental retardation was not reasonable; it flew in the face of prevailing professional norms and blatantly ignored evidence of low intellectual functioning and adaptive functioning deficits that clearly indicated a need for additional investigation.

App. p.4279.

The PCR Court further found that petitioner was prejudiced by trial counsel's deficient performance. *Id.* The court observed that South Carolina's definition of mental retardation

consists of three prongs: (1) subaverage intellectual functioning; (2) deficits in adaptive behavior; and, (3) manifestation of these attributes before age eighteen. App. p.4326 (citing *Franklin*, 356 S.C. 276, 588 S.E.2d 604 (2003)). The PCR court then conducted a detailed review of petitioner's unchallenged evidence regarding each of the three prongs and found that petitioner "presented substantial evidence that he has mental retardation" and therefore suffered prejudice as a result of his counsel's failure to raise an *Atkins* claim at trial. App. pp.4279-4292. The court noted:

[i]t is difficult to conceive of any failure more prejudicial than trial counsel's failure to discover and present evidence that their client may be categorically exempt from the death penalty.

App. p.4292.

III. THE PCR COURT REFUSED TO REACH THE MERITS OF PETITIONER'S UNDERLYING MENTAL RETARDATION CLAIM.

Despite finding that trial counsel were constitutionally ineffective for failing to investigate and raise petitioner's mental retardation at trial, the PCR court nonetheless determined that petitioner was procedurally barred from raising an *Atkins* claim in post-conviction because the claim "could have been raised at trial." App. p.4325. The court noted that the remedy of post-conviction relief is not a substitute for trial or direct review, and cited three decisions from this Court holding that issues that could have been raised at trial or on direct appeal cannot be asserted in post-conviction absent a claim of ineffective assistance of counsel. *Id.* (citing *Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993); *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983); *Cummings v. State*, 274 S.C. 26, 260 S.E.2d 187 (1979)). The PCR court concluded that "[petitioner] had an opportunity to raise this claim at trial. Since this issue could have been raised at trial, it is procedurally barred from review in post-conviction relief. As a result, this claim for relief is dismissed." App. p.4326.

The PCR court vacated petitioner's death sentence on the ground that his trial counsel were ineffective and issued an order remanding the case to the Lexington County Court of General Sessions for a new sentencing trial. App. pp.4271-4272; p.4294. Moreover, the court ordered that prior to the new sentencing trial, petitioner is entitled to a pre-trial hearing on his *Atkins* claim at which the trial judge will determine whether or not petitioner is mentally retarded by a preponderance of the evidence. App. p.4294.

ARGUMENT

I. THE PCR COURT ERRED IN FINDING PETITIONER'S *ATKINS* CLAIM PROCEDURALLY BARRED FROM REVIEW IN POST-CONVICTION.

A. THERE IS NO LEGAL BASIS TO SUPPORT THE PCR COURT'S CONCLUSION.

The PCR court erred in finding petitioner's *Atkins* claim procedurally defaulted for post-conviction review where petitioner also alleged and proved that his trial counsel were ineffective in failing to raise this claim at trial. Relying on three opinions from this Court, the PCR court concluded that "[t]he South Carolina Supreme Court has consistently and repeatedly held that issues that either were or could have been raised at trial and on direct appeal may not be raised in PCR." App. p.4325 (citing *Drayton*, 312 S.C. at 8-9, 430 S.E.2d at 520; *Hyman*, 278 S.C. at 502, 288 S.E.2d at 331; *Cummings*, 274 S.C. at 28; 260 S.E.2d at 188). But, of course, petitioner was unable to raise an *Atkins* claim at trial because trial counsel unreasonably failed to investigate and present evidence of his mental retardation, in violation of petitioner's rights under the Sixth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution.

Moreover, none of the cases cited by the PCR court supports a finding of procedural default here. In all three cases, the PCR applicant attempted to raise one or more free-standing claims of trial error *apart from an allegation of ineffective assistance of trial counsel*. And, in all

of these cases, this Court held that a post-conviction court may not address the underlying substance of such a claim apart from a finding that trial counsel was ineffective for failing to raise it. *Drayton*, 312 S.C. at 9, 430 S.E.2d at 520 (“Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel”); *Hyman*, 278 S.C. at 502, 299 S.E.2d at 331 (same); *Cummings*, 274 S.C. at 28, 260 S.E.2d at 188 (same).

Here, petitioner alleged, and proved, that his trial counsel were ineffective for failing to investigate and present an *Atkins* claim at trial. App. pp.4271-4295. To establish a claim of ineffective assistance, a post-conviction applicant must demonstrate that: (1) trial counsel’s performance was deficient; and, (2) applicant suffered prejudice as a result. *Council v. State*, 380 S.C. 159, 169, 670 S.E.2d 356, 361 (2009); *see also*, *Strickland v. Washington*, 466 U.S. 668 (1984). A PCR applicant bears the burden of proof and must establish each element of his claim by a preponderance of the evidence. Rule 71.1 (e), SCRCP; *see also*, *Franklin v. Maynard*, 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003) (“As with other PCR claims, the applicant must show that he or she is mentally retarded by a preponderance of the evidence”). Petitioner’s trial counsel admitted deficient performance. App. p.4273. Thus, in order to prove prejudice, petitioner was obligated to show that he meets South Carolina’s three-pronged test for mental retardation. Petitioner did exactly that, and the PCR court carefully evaluated and discussed petitioner’s evidence of mental retardation in its order granting relief. App. pp.4279-4295. There is no legal reason that the PCR court should not take its analysis one step further and reach the underlying merits of petitioner’s *Atkins* claim by determining whether petitioner has established, by a preponderance of the evidence, that he is, in fact, mentally retarded.

Such a procedure would be entirely consistent with the outcome this Court has reached in substantially analogous situations. For example, in *Ezell v. State*, 345 S.C. 312, 548 S.E.2d 852 (2001), this Court granted a petition for writ of certiorari to determine, *inter alia*, “[w]hat is the appropriate remedy for ineffective assistance of appellate counsel?” *Id.* at 313, 548 S.E.2d at 852. Ezell was tried and convicted on drug charges, and his convictions and sentence were affirmed on direct appeal. The case involved a recorded undercover drug transaction. The entire tape of the transaction was admitted into evidence and played for the jury at trial over defense counsel’s objection. On appeal, Ezell argued that the trial judge erred in admitting the tape because it contained hearsay testimony and therefore denied Ezell his right to confrontation. The Court of Appeals found that Ezell failed to provide a sufficient record for review since the audio tape was not included in the Record on Appeal. *Id.* at 314, 548 S.E.2d at 853.

In post-conviction, the PCR court found that appellate counsel was ineffective for not including the tape in the Record on Appeal and concluded that Ezell was entitled to file a new direct appeal addressing this issue. *Id.* This Court reversed, holding that the appropriate remedy was not to grant Ezell a new direct appeal. Instead, the Court analyzed the merits of the underlying claim, determined that the substantive claim was meritorious, and granted Ezell a new trial. *Id.* at 315-16, 548 S.E.2d at 853-54.

The *Ezell* court relied on *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999), a capital case in which the Court previously held:

A defendant is constitutionally entitled to the effective assistance of appellate counsel. . . . First, the burden of proof is on petitioner to show that counsel’s performance was deficient as measured by the standard of reasonableness under prevailing professional norms. Second, the petitioner must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.

Southerland, 337 S.C. at 615-616, 524 S.E.2d at 836. Thus, in *Southerland*, after determining that appellate counsel was ineffective, this Court likewise looked at the underlying merits of the substantive claim to determine whether or not it merited a new trial. Neither *Southerland* nor *Ezell* were required to re-litigate the merits of their substantive claims in a new direct appeal. *See also, Patrick v. State*, 349 S.C. 203, 209-210, 562 S.E.2d 609, 612 (2002) (holding that appellate counsel was ineffective in failing to raise or brief the issue of prosecutorial retaliation and then addressing the merits of the underlying retaliation claim and, finding the underlying claim meritorious, reversing petitioner's convictions); *Simpkins v. State*, 303 S.C. 364, 368, 401 S.E.2d 142, 143-144 (1991) (addressing the underlying merits of petitioner's hearsay argument where appellate counsel was ineffective in failing to raise the claim on appeal), overruled on other grounds by *State v. Stokes*, 381 S.C. 390, 673 S.E.2d 434 (2009); *accord Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582-583 (2002) ("A defendant has the procedural right to one fair bite at the apple. . . . [This] policy would be frustrated if the one year statute of limitations for PCR claims applied where the applicant was denied his direct appeal due to ineffective assistance of counsel, and then was denied his right to a PCR application because of the one year statute of limitations.").

By the same reasoning, petitioner should not be required to re-litigate the merits of his *Atkins* claim in a subsequent proceeding. The PCR court has already heard all of the evidence needed to make a determination on the merits of this claim, and it should have done so.

B. THE PCR COURT'S PROPOSED PROCEDURE WOULD BE A WASTE OF JUDICIAL TIME AND RESOURCES, AND IT WOULD IMPOSE AN UNFAIR BURDEN ON PETITIONER.

In 2002, the United States Supreme Court ruled that the Eighth Amendment to the United States Constitution prohibits the execution of persons with mental retardation. *Atkins*, 536 U.S.

at 321. In *Franklin*, 356 S.C. 276, 588 S.E.2d 604 (2003), this Court delineated certain procedures for determining whether capital litigants are mentally retarded and thus, ineligible for capital punishment. When the issue of a capital defendant's mental retardation is raised pre-trial, the trial judge must hold a pre-trial hearing at which the defendant "shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence." *Franklin*, 356 S.C. at 279, 588 S.E.2d at 606. With respect to *Atkins* claims raised in post-conviction, this Court held:

A death row inmate who claims he is mentally retarded and, as a result, not subject to the death penalty, may institute post-conviction relief (PCR) proceedings because his sentence is in violation of the Constitution and exceeds the maximum authorized by law. See S.C. Code Ann. §§ 17-17-20(a) and -160 (2003). As with other PCR claims, the applicant must show that he or she is mentally retarded by a preponderance of the evidence. If mental retardation is proven, the PCR court will vacate the death sentence and impose a life sentence.

Id. at 280, 588 S.E.2d at 606 (internal citations omitted).

Here, petitioner was forced to litigate his *Atkins* claim in post-conviction because his trial counsel unreasonably failed to raise it pre-trial, and petitioner properly complied with this Court's directives for raising and proving such a claim in post-conviction. Accordingly, the PCR court should have vacated petitioner's death sentence and imposed a life sentence. Instead, the PCR court ordered that petitioner must *first* comply with the procedural requirements for litigating an *Atkins* claim in post-conviction *and then further* meet the procedural hurdles for litigating his claim pre-trial before he can ultimately be determined categorically exempt from the death penalty. This proposed two-step process is a waste of judicial time and resources. A capital defendant raising an *Atkins* claim pre-trial carries a burden to prove his mental retardation before a circuit court judge by the same evidentiary standard that a PCR applicant likewise bears

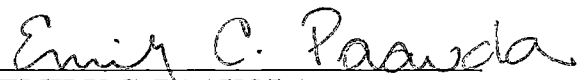
before a circuit court judge. *Franklin*, 356 S.C. at 280, 588 S.E.2d at 606. There is no rational justification for the PCR court's determination that a PCR applicant is essentially required to carry this burden *twice* before relief can be granted.

Furthermore, such a procedure imposes an unfair burden on petitioner simply because he had the misfortune of having ineffective trial counsel in the first place. As such, the PCR court's order violates petitioner's rights under the Due Process and the Equal Protection Clauses of the Fourteenth Amendment because it arbitrarily imposes a heavier evidentiary burden on petitioner because his trial counsel failed to competently represent him at trial, whereas mentally retarded capital defendants with effective trial counsel need only prove their mental retardation a single time.

CONCLUSION

The PCR court correctly held that petitioner's trial counsel were ineffective for failing to investigate and present an *Atkins* claim at trial. But the PCR court did not go far enough. At the PCR hearing, petitioner satisfied his burden of establishing that he meets all three prongs of South Carolina's test for mental retardation. Thus, petitioner proved by a preponderance of the evidence that he is exempt from the death penalty under *Atkins v. Virginia*, 436 U.S. 306 (2002). There is no legal support for the PCR court's conclusion that petitioner's *Atkins* claim is procedurally defaulted in these circumstances. This Court should grant *certiorari*, allow full briefing on this issue and, ultimately, enter an order vacating petitioner's death sentence and imposing a life sentence. Alternatively, this Court should remand this case to the PCR judge for a decision on the merits of petitioner's *Atkins* claim.

Respectfully submitted,


EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
P.O. Box 11311
Columbia, SC 29211
(803) 764-1044

ATTORNEY FOR PETITIONER

December 1, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No.09-CP-32-5465

KEVIN MERCER. *Petitioner,*

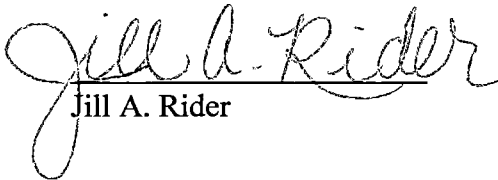
v.

STATE OF SOUTH CAROLINA *Respondent.*

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner's Petition for Writ of Certiorari was served today by first class United States mail, postage prepaid, this 1st day of December, 2011, and Petitioner's Appendix was served via hand-delivery by the South Carolina Office of Appellate Defense on November 29, 2011, upon the following:

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


Jill A. Rider

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
James L. Barber, III, Circuit Court Judge

KEVIN MERCER,

PETITIONER-RESPONDENT,

V.

STATE OF SOUTH CAROLINA

RESPONDENT-PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
(803) 734-6305

ATTORNEYS FOR RESPONDENT-PETITIONER

RECEIVED

MAR 22 2012

S.C. SUPREME COURT

TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
PETITIONER-RESPONDENT’S QUESTION PRESENTED	3
RESPONDENT-PETITIONER’S RESTATEMENT OF QUESTION PRESENTED	4
STATEMENT OF THE CASE.....	5
ARGUMENT	11
CONCLUSION.....	16

PETITIONER-RESPONDENT'S QUESTION PRESENTED

Whether the PCR Court erred in finding petitioner's claim under Atkins v. Virginia, 536 U.S. 306 (2002), procedurally barred from review in post-conviction where: (a) the PCR Court found trial counsel were ineffective for failing to investigate and present an Atkins claim at trial: and (b) petitioner presented uncontested evidence at the PCR hearing establishing, by a preponderance of the evidence, that he meets South Carolina's three-pronged test for mental retardation.

RESPONDENT-PETITIONER'S RESTATEMENT OF QUESTION PRESENTED

Whether the PCR Court erred in finding petitioner's freestanding Eighth Amendment claim was procedurally barred from review in his post-conviction relief action when (a) petitioner was tried after the United States Supreme Court decision in Atkins v. Virginia, 536 U.S. 306 (2002) and this Court's decision in Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003); and (b) the PCR Court did not make a legal determination that petitioner suffers from mental retardation?

STATEMENT OF THE CASE

During the February 2003 term of the Lexington County Court of General Sessions, the Lexington County Grand Jury indicted Petitioner-Respondent, Kevin Mercer, for murder, armed robbery, possession of a firearm while in the commission of a violent crime, and criminal conspiracy (2003-GS-32-409). (App. 2876-83). The state gave notice of intent to seek the death penalty, and served notice of evidence in aggravation.

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

Jury selection took place from April 10 through April 13, 2006. Trial began before Judge Few and a jury on April 17, 2006, and on April 19, 2006, Mercer's jury convicted him of all charges. (App. 1806-07).

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

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

The following mitigating factors were submitted to the jury:

- (1) The murder was committed while the Defendant was under the influence of mental or emotional disturbance.

(2) The capacity of the Defendant to appreciate the criminality of his conduct was substantially impaired.

(3) The age or mentality of the Defendant at the time of the crime.

On April 22, 2006, Mercer's jury found the aggravating factor and recommended a sentence of death. (App. 2554-57). Judge Few then sentenced Mercer to death for murder, thirty (30) years for armed robbery consecutive to the sentence Mercer was serving for ABIK, and five (5) years consecutive for possession of a weapon. (App. 2557-58).

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

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

informed resolution of the new trial motion given the after-discovered evidence of Thompson's confession.

- (2) The court erred by excluding the expert opinion of neurologist Dr. John Steedman that appellant suffered from a specific brain abnormality since Dr. Steedman's opinion that the abnormality might affect appellant's behavior was very probative of his penalty phase mitigation, and the court erred by excluding this evidence under Rule 403, SCRE.
- (3) The court erred by excluding the expert testimony of Dr. John Steedman that disorders such as post-traumatic stress disorder and brain impairments can cause poor judgment, paranoia, and other negative consequences. Dr. Steedman was qualified by his experience as a neurologist to give this opinion, he was board certified in psychiatry, and the state's objection that this was psychiatric testimony went to the weight and not the admissibility of the expert's opinion.
- (4) Juror Kyzer was a Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985) qualified juror. The court committed reversible error by excusing this qualified juror for cause.
- (5) The court erred by refusing to grant appellant a new trial based on after-discovered evidence where co-defendant Marcus Thompson's cellmate, Kevin Fuller, testified that Thompson bragged to him that he was the one who killed the decedent, and bragged that appellant received the death penalty for his crime. Fuller's testimony probably would have changed the result of the trial. This is especially true in regard to the penalty phase since appellant only had to convince one juror not to vote for the death penalty to change the result of the penalty phase.
- (6) The court erred by excluding the testimony of David Farrell that co-defendant Thompson was charged as only an accessory after the fact and that he was released on bond since this evidence was relevant to appellant's defense that the state failed to investigate Thompson and fully ignored his role in the crime. Further, the court erroneously excluded this evidence as inadmissible evidence of third-party guilt.

(App. 2947-3005). The State, through Senior Assistant Attorney General S. Creighton Waters, Esquire, filed its Final Brief of Respondent on June 24, 2008. (App. 3006-87). Mercer, through Mr. Dudek and Ms. Kimbrough, filed his Final Reply Brief of Appellant on June 26, 2008. (3088-96).

Oral argument in the case was held before the state supreme court on October 7, 2008. The South Carolina Supreme Court issued an opinion affirming the convictions and death sentence on January 12, 2009. State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009). Counsel for Mercer filed a Petition for Rehearing on January 27, 2009. (App. 3118-21). The petition for rehearing was denied by the South Carolina Supreme Court on February 19, 2009. (App. 3122-23). The Remittitur was also issued on February 19, 2009.

On March 18, 2009, the South Carolina Supreme Court granted a stay of execution so that Mercer could pursue certiorari review before the United States Supreme Court. Mercer, through Mr. Dudek, filed a Petition for Writ of Certiorari with the United State Supreme Court dated May 20, 2009. (App. 3124-77). The State, through Assistant Attorney General Waters, filed its Brief in Opposition to the Petition for Writ of Certiorari on June 10, 2009. (App. 3178-3205). The United States Supreme Court denied the petition for writ of certiorari by order dated October 5, 2009. (App. 3206).

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

Esquire, Assistant Appellate Defender with the Commission on Indigent Defense, Division of Appellate Defense. At the hearing, the State was represented by Senior Assistant Attorney General S. Creighton Waters and Assistant Attorney General Alphonso Simon, Jr. Mercer, through Mr. Dudek, filed his initial Application for Post-Conviction Relief on December 4, 2009. (App. 3207-3212). By Order of this Court filed December 9, 2009, Emily C. Paavola, Esquire, and Jason Paul Peavy, Esquire, were appointed as counsel for Mercer.

Mercer, through Ms. Paavola and Mr. Peavy, filed his first Amended Application for Post-Conviction Relief on February 3, 2010. (App. 3213-16). The State filed its Return on March 17, 2010. (App. 3217-47). Mercer subsequently filed his second Amended Application for Post-Conviction Relief on December 17, 2010. (App. 3248-52). On January 14, 2011, Mercer filed his third Amended Application for Post-Conviction Relief. (App. 3253-58). As part of Mercer's third Amended Application, he asserted

9(b): Applicant was denied the right to effective assistance of counsel - guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, § 3 and 14 of the South Carolina constitution - during the sentencing phase of his capital trial when trial counsel committed the acts or omissions . . .

(3) Counsel failed to uncover and present all available evidence of Applicant's mental retardation and/or low intellectual functioning and deficits in adaptive behavior prior to the age of eighteen. Counsel failed to provide the Department of Disabilities and Special Needs with all available social history records which would have assisted in an accurate determination of Applicant's intellectual functioning. Counsel failed to thoroughly investigate and present all available evidence of Applicant's neurological damage. Counsel failed to prepare its sentencing-phase lay witnesses to ask the jury for mercy.

. . .

9 & 10(f): Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that he is mentally retarded. Because Applicant has significantly sub-average intellectual functioning, existing concurrently with deficits in adaptive functioning, both which began before he was eighteen years old, he is ineligible for capital punishment. Atkins v. Virginia, 536 U.S. 306 (2002); Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003).

The PCR Court granted relief upon the claim raised in Ground 9(b)(3), finding trial counsel were deficient in not investigating and presenting evidence of a mental retardation claim on Mercer's behalf. (App. 4271-92). The PCR Court also denied relief on Mercer's claim in Ground 9(f). In doing so, the PCR Court found that Mercer could have raised the freestanding Eighth Amendment claim at trial. (App. 4326). Since it could have been raised at trial and in Mercer's direct appeal, it was not a properly presented claim in PCR. (App. 4325-26).

ARGUMENT

The PCR Court correctly denied relief upon Mercer's freestanding Eighth Amendment claim because it was not a proper claim for review in post-conviction relief.

In Franklin v. Mayard, 356 S.C. 276, 588 S.E.2d 604 (2003), this Court addressed how the issue of mental retardation should be handled at the trial level after the United States Supreme Court's decision in Atkins.

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

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

Franklin, 356 S.C. at 279, 588 S.E.2d at 605 (footnotes omitted); see State v. Laney, 367 S.C. 639, 627 S.E.2d 726 (2006).

The procedures outlined by this Court show that an Eighth Amendment claim asserting that a death sentence would constitute cruel and unusual punishment because the defendant has mental retardation can only be properly raised before the trial court in post-Franklin trials. Mercer had the opportunity to raise this challenge at trial. Based upon counsel's investigation at the time of trial – including reliance upon mental health

experts – they chose not to raise such a challenge. (See R. 2537-40, 1213-16). Since this Eighth Amendment claim was a matter that could have been raised at trial, but was not done so by Applicant’s trial counsel, Applicant is not entitled to relief upon his freestanding claim regarding mental retardation. Simmons v. State, 264 S.C. 417, 422-23, 215 S.E.2d 883, 885-86 (1975)(issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (same); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); S.C. Code Ann. § 17-27-20(b) (“This remedy[PCR] is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.”).

There is no legal authority supporting Mercer’s position on this issue. Mercer cannot point to any case where post-conviction relief was granted on a freestanding claim that could have been raised at an applicant’s trial because no such case exists. Instead, Mercer relies upon this Court’s determination that a defendant can be granted a new trial if he is successful on an ineffective assistance of appellate counsel claim in Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001). Ezell does not support Mercer’s proposition; Ezell does quite the opposite. The issue before this Court in Ezell was what was the appropriate relief in an **ineffective assistance of appellate counsel** claim. Neither the PCR Court nor this Court found the applicant in Ezell was entitled to relief upon the underlying freestanding claim. As with most cases of ineffective assistance of counsel, this Court in Ezell had to assess the merits of the underlying substantive claim in determining whether appellate counsel was ineffective. The fact that an underlying

substantive claim has to be reviewed in assessing whether counsel is deficient and/or whether an applicant is prejudiced does not equate to a ruling on an ineffective assistance of counsel claim into a merits finding on a freestanding claim.

Mercer's contention that he had to show the PCR Court that he was mentally retarded to obtain relief on the ineffective assistance of counsel claim is simply not true. As with all claims of ineffective assistance of counsel, the applicant has to show deficient performance by counsel, and there is a reasonable probability that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984); Simpson v. Moore, 367 S.C. 587, 595-96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Strickland, supra. In order to prove "prejudice" in regard to sentencing phase error, an applicant must show "there is a reasonable probability that, absent [counsel's] errors, the sentence - 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." Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998).

The PCR Court's finding of ineffective assistance of counsel in this case disproves Mercer's point. Here, the PCR Court did not find that Mercer was mentally retarded. Instead, the PCR Court found there "a reasonable probability of a different outcome had trial counsel properly investigated and presented a mental retardation claim." (App. 4294-95). Altogether, Mercer's contention "that a PCR applicant is essentially required to carry this burden [of establishing mental retardation] twice before relief can be granted," represents a complete misunderstanding of the post-conviction

relief process. An applicant who is tried after Atkins and Franklin is not required to establish they suffer from mental retardation in PCR to obtain PCR relief. To the contrary, Respondent submits an applicant's burden in establishing ineffective assistance of counsel based on a failure to *investigate* and *present* evidence of mental retardation is less than that of *establishing* one is mentally retarded. That is because evidence that would support a finding of mental retardation serves dual purposes in a capital trial; it can lead to the application of a bar to a death sentence as required under Atkins, or it can serve as mitigation evidence in sentencing when mental retardation is not found by a preponderance of the evidence. Under Mercer's theory, if he does not prove mental retardation, he is not entitled to relief even though there was evidence of low intellectual functioning that could have been used in mitigation.

Finally, Mercer's contention that Franklin supports his position is without merit. In Franklin, the South Carolina Supreme Court held that an inmate sentenced to death **prior to the Atkins opinion** could file an application for post-conviction relief to address freestanding claims of mental retardation. It is axiomatic that a defendant who was convicted and sentenced to death before the decisions in Atkins and Franklin, would be able to seek review of an Eighth Amendment claim based upon the defendant's mental retardation would be able to seek relief in PCR. Prior to Atkins and Franklin, the issue would not have been available to be raised at trial for those individuals. The same is not true for individuals, like Mercer, who could have raised the Eighth Amendment issue at trial. As was properly found in this case by the PCR Court, such a freestanding claim for post-Atkins defendants is not available in post-conviction relief. If Mercer's position were accepted, it would open the floodgates to having all freestanding claims that could

have been raised at trial and in a direct appeal litigated in PCR. This is clearly inconsistent with the language of the PCR statute. S.C. Code Ann. § 17-27-20(b).

CONCLUSION

For the foregoing reasons, Respondent-Petitioner respectfully requests this Court deny Mercer's petition for writ of certiorari and affirm the PCR Court's denial of relief upon the freestanding Eighth Amendment claim in the application for post-conviction relief.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

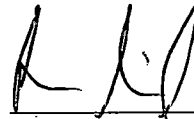
DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

By:



Alphonso Simon Jr.
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

March 16, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
Court of Common Pleas
Honorable James R. Barber, III, Circuit Court Judge

Case No. 2009-CP-32-5465

KEVIN MERCER,

Petitioner-Respondent,

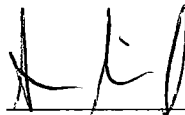
v.

STATE OF SOUTH CAROLINA,

Respondent-Petitioner.

PROOF OF SERVICE

The undersigned hereby certifies that on the 16th day of March, 2012, two copies of the Respondent-Petitioner's Return to Petition for Writ of Certiorari was served on counsel for the Petitioner-Respondent, Emily C. Paavola, Esq., Death Penalty Resource & Defense Center, 900 Elmwood Avenue, Ste. #101, Columbia, South Carolina 29201.



ALPHONSO SIMON, JR.

March 16, 2012.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No.09-CP-32-5465

KEVIN MERCER. *Petitioner/Respondent,*

v.

STATE OF SOUTH CAROLINA *Respondent/Petitioner.*

PETITIONER/RESPONDENT'S REPLY BRIEF

Petitioner-respondent, Kevin J. Mercer, alleged in post-conviction that: (1) the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina constitution bar his death sentence because he is mentally retarded, *see Atkins v. Virginia*, 536 U.S. 304 (2002) (hereafter, “the *Atkins* claim”); and, (2) his trial counsel was ineffective for failing to discover and present evidence of his mental retardation (hereafter, “the IAC claim”). The PCR court granted relief on the IAC claim, App. pp.4271-4295, but did not reach the merits of the *Atkins* claim because it erroneously believed that it was powerless to do so. App. pp.4325-4326.

In its Return, respondent-petitioner (hereafter, “respondent”) makes a number of arguments but largely ignores what actually happened in this case. First, respondent claims that trial counsel

RECEIVED
MAR 28 2012

investigated the issue of Mercer's mental retardation and "chose not to raise such a challenge."

Return at pp.11-12. This assertion is clearly false. In the PCR hearing, both trial attorneys testified that:

- (1) trial counsel failed to obtain Mercer's special education records from the Philadelphia school system where he was in special education for over eleven years, App. p.3668, ll.16-20; App. p.3754, ll.12-24;
- (2) trial counsel failed to hire an expert in mental retardation, App. p.3669, ll.12-23; App. p.3770, ll.9-11;
- (3) trial counsel never raised the issue of Mercer's mental retardation at trial, App. p.3692, ll.3-6;
- (4) trial counsel had no strategic reason for these failures; App. p.3691, ll.13-22; and,
- (5) if trial counsel had known that Mercer suffers from mental retardation, they would have provided that information to their experts and raised an *Atkins* claim. App. p.3669, ll.7-10; App. p.3691, ll.13-22.

The PCR court correctly found that trial counsel "candidly admitted" their deficient performance, and that, "[e]ven if trial counsel had not admitted their performance was deficient, it is also apparent from their actions before trial." App. pp.4273-4274. Respondent continues to rely on a series of opinions from this Court holding that "issues that could have been raised at trial or in direct appeal cannot be asserted in a PCR application *absent a claim of ineffective assistance of counsel*," Return at p.12 (emphasis added), while apparently ignoring the plain facts of this case, which are that Mercer *did* make a claim of ineffective assistance of counsel and the PCR court correctly found that his *Atkins* claim was not raised at trial due to trial counsel's constitutionally deficient performance.

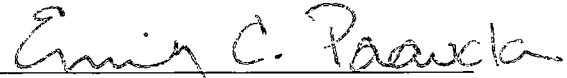
As to the issue of prejudice, Mercer offered uncontroverted evidence in PCR demonstrating that he meets South Carolina's definition of mental retardation. Mercer presented testimony from Dr. Brad Fisher, an expert in mental retardation who testified that Mercer is mentally retarded, as well as supporting evidence from Mercer's mother, father, ex-wife, high school football coach, two special education teachers, his cousin/former employer, and his social history records. App. pp.3314-3528; 3870-3875; 3889-4062; 4047-4102. Despite invitations from the PCR court to do so, respondent did not produce an expert on mental retardation or offer any other evidence to contradict Mercer's claim of mental retardation.¹ Thus, there can be no dispute that Mercer established his mental retardation by a preponderance of the evidence offered in post-conviction. But the PCR court never reached the merits of the *Atkins* claim because of its mistaken belief that it lacked the authority to make that determination. App p.4326 (finding that the *Atkins* claim is "procedurally barred from review in post-conviction relief."). The PCR court erred in finding the *Atkins* claim procedurally defaulted where Mercer also alleged and proved that his trial counsel's ineffective assistance prevented him from previously raising the claim. This Court should vacate Mercer's death sentence and impose a life sentence.

CONCLUSION

For all of the reasons above, as well as the reasons discussed in Mercer's Petition For Writ of Certiorari, this Court should grant *certiorari*, and allow full briefing on this issue.

¹ Prior to the PCR hearing, respondent notified post-conviction counsel of its intent to call an expert witness to testify about the mental retardation issue. Post-conviction counsel requested that respondent produce a *curriculum vitae* and/or make its expert available for a pre-hearing interview. Respondent failed to produce a CV or to make its expert available and later withdrew its request to call an expert on this issue.

Respectfully submitted,

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

EMILY C. PAAVOLA

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

ATTORNEY FOR PETITIONER

March 21, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No.09-CP-32-5465

KEVIN MERCER. *Petitioner/Respondent,*

v.

STATE OF SOUTH CAROLINA *Respondent/Petitioner.*

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner/Respondent's Reply Brief was served today by first class United States mail, postage prepaid, this 21st day of March, 2012, upon the following:

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


Jill A. Rider

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

JAN 10 2012

Appeal from Lexington County

S.C. SUPREME COURT

James L. Barber, III, Circuit Court Judge

KEVIN MERCER,

PETITIONER-RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT-PETITIONER.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
(803) 734-6305

ATTORNEYS FOR RESPONDENT-PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS	2
QUESTION PRESENTED.....	3
STATEMENT OF THE CASE	4
ARGUMENT	12

QUESTION PRESENTED

Whether the PCR Court erred in granting relief upon Mercer's claim of ineffective assistance of counsel in failing to investigate and present evidence of mental retardation when the defense team engaged in a substantive investigation into Mercer's low intellectual functioning, and where the PCR Court's finding of prejudice is not supported by the record?

STATEMENT OF THE CASE

During the February 2003 term of the Lexington County Court of General Sessions, the Lexington County Grand Jury indicted Petitioner-Respondent, Kevin Mercer, for murder, armed robbery, possession of a firearm while in the commission of a violent crime, and criminal conspiracy (2003-GS-32-409). (App. 2876-83). The state gave notice of intent to seek the death penalty, and served notice of evidence in aggravation.

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

Jury selection took place from April 10 through April 13, 2006. Trial began before Judge Few and a jury on April 17, 2006, and on April 19, 2006, Mercer's jury convicted him of all charges. (App. 1806-07).

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

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

The following mitigating factors were submitted to the jury:

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

(3) The age or mentality of the Defendant at the time of the crime.

On April 22, 2006, Mercer's jury found the aggravating factor and recommended a sentence of death. (App. 2554-57). Judge Few then sentenced Mercer to death for murder, thirty (30) years for armed robbery consecutive to the sentence Mercer was serving for ABIK, and five (5) years consecutive for possession of a weapon. (App. 2557-58).

A timely Notice of Appeal was filed and served with the South Carolina Supreme Court on April 24, 2006. On appeal, Mercer was represented by Robert M. Dudek, Esquire, Deputy Chief Attorney for Capital Appeals with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, and Melissa Jane Reed Kimbrough, Esquire. By Order of the South Carolina Supreme Court filed July 10, 2006, Mercer's case was remanded back to the Honorable John C. Few, Circuit Court Judge, to hear Mercer's motion for a new trial based on after discovered evidence. (See generally App. 2884-2909, 2922-23). In an Order filed September 26, 2006, Judge Few denied the Motion for a New Trial Based on After-Discovered Evidence. (App. 2910-21). A timely Notice of Appeal was filed on Mercer's behalf on October 4, 2006. On June 26, 2008, Dudek and Kimbrough filed with the state supreme court the Final Brief of Appellant, in which they asserted the following issues on behalf of Mercer:

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

- (2) The court erred by excluding the expert opinion of neurologist Dr. John Steedman that appellant suffered from a specific brain abnormality since Dr. Steedman's opinion that the abnormality might affect appellant's behavior was very probative of his penalty phase mitigation, and the court erred by excluding this evidence under Rule 403, SCRE.
- (3) The court erred by excluding the expert testimony of Dr. John Steedman that disorders such as post-traumatic stress disorder and brain impairments can cause poor judgment, paranoia, and other negative consequences. Dr. Steedman was qualified by his experience as a neurologist to give this opinion, he was board certified in psychiatry, and the state's objection that this was psychiatric testimony went to the weight and not the admissibility of the expert's opinion.
- (4) Juror Kyzer was a Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985) qualified juror. The court committed reversible error by excusing this qualified juror for cause.
- (5) The court erred by refusing to grant appellant a new trial based on after-discovered evidence where co-defendant Marcus Thompson's cellmate, Kevin Fuller, testified that Thompson bragged to him that he was the one who killed the decedent, and bragged that appellant received the death penalty for his crime. Fuller's testimony probably would have changed the result of the trial. This is especially true in regard to the penalty phase since appellant only had to convince one juror not to vote for the death penalty to change the result of the penalty phase.
- (6) The court erred by excluding the testimony of David Farrell that co-defendant Thompson was charged as only an accessory after the fact and that he was released on bond since this evidence was relevant to appellant's defense that the state failed to investigate Thompson and fully ignored his role in the crime. Further, the court erroneously excluded this evidence as inadmissible evidence of third-party guilt.

(App. 2947-3005). The State, through Senior Assistant Attorney General S. Creighton Waters, Esquire, filed its Final Brief of Respondent on June 24, 2008. (App. 3006-87). Mercer, through Mr. Dudek and Ms. Kimbrough, filed his Final Reply Brief of Appellant on June 26, 2008. (3088-96).

Oral argument in the case was held before the state supreme court on October 7, 2008. The South Carolina Supreme Court issued an opinion affirming the convictions and death sentence on January 12, 2009. State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009). Counsel for Mercer filed a Petition for Rehearing on January 27, 2009. (App. 3118-21). The petition for rehearing was denied by the South Carolina Supreme Court on February 19, 2009. (App. 3122-23). The Remittitur was also issued on February 19, 2009.

On March 18, 2009, the South Carolina Supreme Court granted a stay of execution so that Mercer could pursue certiorari review before the United States Supreme Court. Mercer, through Mr. Dudek, filed a Petition for Writ of Certiorari with the United State Supreme Court dated May 20, 2009. (App. 3124-77). The State, through Assistant Attorney General Waters, filed its Brief in Opposition to the Petition for Writ of Certiorari on June 10, 2009. (App. 3178-3205). The United States Supreme Court denied the petition for writ of certiorari by order dated October 5, 2009. (App. 3206).

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

Esquire, Assistant Appellate Defender with the Commission on Indigent Defense, Division of Appellate Defense. At the hearing, the State was represented by Senior Assistant Attorney General S. Creighton Waters and Assistant Attorney General Alphonso Simon, Jr. Mercer, through Mr. Dudek, filed his initial Application for Post-Conviction Relief on December 4, 2009. (App. 3207-3212). By Order of this Court filed December 9, 2009, Emily C. Paavola, Esquire, and Jason Paul Peavy, Esquire, were appointed as counsel for Mercer.

Mercer, through Ms. Paavola and Mr. Peavy, filed his first Amended Application for Post-Conviction Relief on February 3, 2010. (App. 3213-16). The State filed its Return on March 17, 2010. (App. 3217-47). Mercer subsequently filed his second Amended Application for Post-Conviction Relief on December 17, 2010. (App. 3248-52). On January 14, 2011, Mercer filed his third Amended Application for Post-Conviction Relief. (App. 3253-58). In the third Amended Application, Mercer raised the following issues for review:

9(a): Applicant was denied the right to effective assistance of counsel - guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, § 3 and 14 of the South Carolina constitution - during the guilt-or-innocence phase of his capital trial when trial counsel committed the acts or omissions . . .

(1) Counsel failed to impeach the State's witness, Terry Brown, with evidence of personal bias and animosity against Applicant due to a physical altercation that Brown and Applicant had been involved in prior to Brown's offer to testify on behalf of the State. (Trial Tr. 1542-1 555).

(2) Counsel failed to move pre-trial for gunshot residue testing to be conducted on the gloves found in possession of Applicant's co-defendant, Marcus Thompson.

(3) Counsel failed to secure the assistance and testimony of an expert in eyewitness identification.

9(b): Applicant was denied the right to effective assistance of counsel - guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, § 3 and 14 of the South Carolina constitution - during the sentencing phase of his capital trial when trial counsel committed the acts or omissions . . .

(1) Counsel failed to present available evidence that more than one perpetrator was present at the scene of the crime when the shooting occurred.

(2) Counsel failed to object to the State's improper cross examination of Dr. Steedman (See Tennard v. Dretke, 124 S.Ct. 2562, 2572-73 (2004); see also, Skipper v. South Carolina, 106 S.Ct. 1669, 1673 (1986)) and improper statements in closing argument. (See Tennard, 124 S.Ct. 2562, 2572-73 (2004); see also, State v. Davis, 112 S.E.2d 633, 635 (1961)).

(3) Counsel failed to uncover and present all available evidence of Applicant's mental retardation and/or low intellectual functioning and deficits in adaptive behavior prior to the age of eighteen. Counsel failed to provide the Department of Disabilities and Special Needs with all available social history records which would have assisted in an accurate determination of Applicant's intellectual functioning. Counsel failed to thoroughly investigate and present all available evidence of Applicant's neurological damage. Counsel failed to prepare its sentencing-phase lay witnesses to ask the jury for mercy.

(4) Counsel failed to object to extensive victim impact testimony regarding the effect of the victim's death on the United States Army generally and on various members of the U.S. Army in particular. (Tr. 2078-83, 2101). This testimony was outside the scope of proper victim impact evidence, and counsel's failure to lodge an appropriate objection was unreasonable and prejudicial. Counsel further failed to object to inflammatory and prejudicial evidence concerning the victim's funeral, including the introduction of a video set to music that was shown at the victim's memorial and testimony concerning an army "roll call" that took place during the victim's funeral. (Tr. pp. 2116-29, 2118-19, 2393). This evidence was calculated to inflame the passions and prejudice of the jury and counsel's failure to object was unreasonable and prejudicial. Finally, counsel failed to object when the trial judge cried in front of the jury during the funeral video. Counsel's failure to object was unreasonable and prejudicial. Sapp v. South Carolina, 2006-CP-08- 2204, 44-47 (S.C. Court of Common Pleas) (citing Van Dohlen v. State, 360 S.C. 598, 612 (2004)).

(5) Counsel failed to ask their expert witnesses to prepare reports even though counsel was aware that the State would impeach the credibility of their expert witnesses without such reports.

(6) Counsel failed to prepare their sentencing-phase expert witnesses to explain how their opinions had any bearing on the jury's decision. Instead, counsel's experts consistently told the jury that their opinions had nothing to do with the crime.

(7) Counsel unreasonably waived the trial judge's proposed charge that the jury could not consider prior bad acts when determining whether or not the State had proven an aggravating factor and whether or not the State had proven that Applicant was the shooter. State v. Stewart, 283 S.C. 104, 320 S.E.2d 447 (1984).

9(c) & 10(c): Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the State's inflammatory and prejudicial presentation of victim impact evidence - which included a video set to music that was shown at the victim's memorial and testimony concerning an army "roll call" that took place during the victim's funeral (Tr. pp. 21 16-29, 21 18-19, 2393) - and by the fact that the trial judge cried in front of the jury during this presentation.

9 & 10(d): Applicant's conviction and sentence were obtained in violation of the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution when the State suppressed evidence that was both exculpatory and material to Applicant's guilt or punishment prior to the hearing on Applicant's motion for new trial. See Brady v. Maryland, 373 U.S. 83, 87 (1963). Moreover, Applicant's motion for new trial was denied based on the State's presentation of false, misleading or inaccurate evidence. See Napue v. Illinois, 360 U.S. 264 (1959); Brady v. Maryland, 373 U.S. 83 (1963); Darden v. Wainwright, 477 U.S. 168 (1986).

9 & 10(e): Applicant was denied the right to effective assistance of appellate counsel - guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, § 3 and 14 of the South Carolina constitution - during the appellate proceedings when appellate counsel failed to raise on appeal the trial court's error in qualifying jurors Deborah Lucas and Phillip Lofollette and in disqualifying juror Michael Sponhour. Appellate counsel's performance was both unreasonable and prejudicial as outlined below. See Strickland v. Washington, 466 U.S. 668 (1984).

9 & 10(f): Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that he is mentally retarded. Because Applicant has significantly sub-average intellectual functioning, existing concurrently with deficits in adaptive functioning, both which began before he was eighteen years old, he is ineligible for capital

punishment. Atkins v. Virginia, 536 U.S. 306 (2002); Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003).

The State filed its Return to the third Amended Application on January 31, 2011. (App. 3259-3308). An evidentiary hearing was held on January 31-February 1, 2011 and on March 18, 2011. (App. 3309-3701). Pursuant to the PCR Court's request, the parties provided the court with post-hearing briefing regarding the handling of the mental retardation related issues. (App. 4208-4248). After an in-chambers discussion regarding the issues regarding ineffective assistance of counsel relating to evidence of mental retardation and the freestanding mental retardation claim, the PCR Court instructed the parties to jointly provide a proposed order denying relief upon all claims except for the ineffective assistance of counsel for failing to investigate and present evidence of mental retardation claim. After further discussion with the parties in chambers regarding the language on the issues regarding ineffective assistance of counsel regarding evidence of mental retardation and the freestanding mental retardation issue, the PCR Court signed a submitted proposed order. (See App. 4249-4327). Both the State and Mercer filed Motions to Alter or Amend the Judgment. (App. 4328-4342). The PCR Court denied both motions without argument. (App. 4352).

ARGUMENT

This Court will not affirm a ruling that is "controlled by an error of law" or lacks factual support in the record. Brown v. State, 383 S.C. 506, 514-515, 680 S.E.2d 909, 914 (2009).

To establish that counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error(s), there is a reasonable probability that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984); Simpson v. Moore, 367 S.C. 587, 595-96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Id.

In order to prove deficient performance, the applicant must "show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. '" Harrington v. Richter, __ U.S. __, 131 S.Ct. 770, 787 (2011), quoting Strickland, 466 U.S. at 687. "The standard for judging counsel's representation is a most deferential one." Id. at 788. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Butler v. State, 286 S.C. 441, 445, 334 S.E.2d 813, 815 (1985), quoting Strickland, [466 U.S. at 690]. "An attorney is not required to anticipate potential changes in the law, which are not in existence at the time of the conviction." Patterson v. State, 359 S.C. 115, 118, 597 S.E.2d 150, 151 (2004).

In order to prove "prejudice" in regard to sentencing phase error, an applicant must show "there is a reasonable probability that, absent [counsel's] errors, the sentence - 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." Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998). Further, prejudice is evaluated by consideration of the trial evidence of mitigation, along with the PCR evidence, compared to the aggravating circumstance evidence. Wong v. Belmontes, __ U.S. __, 130 S.Ct 383 (2009). "The likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 131 S.Ct at 792, citing Strickland, 466 U.S. at 693.

"[W]hile in some instances 'even an isolated error' can support an ineffective assistance claim if it is 'sufficiently egregious and prejudicial,' Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct 2639, 91 L.Ed.2d 397 (1986), it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." Harrington v. Richter, 131 S.Ct. at 791.

The PCR Court erred in finding trial counsel was ineffective in failing to investigate and raise the issue of Mercer's mental retardation at trial.

The PCR Court found that counsel was ineffective in failing to investigate and present evidence of Mercer's low intellectual functioning. This general finding is not supported by the record. Contrary to the PCR Court's findings, there was not sufficient evidence presented at the PCR hearing that Mercer's trial counsel were deficient in their investigation and presentation of evidence that would support a finding of low intellectual functioning.

At the evidentiary hearing, Dr. Donna Schwartz-Watts testified that she asked the defense team to have neuropsychological testing done on Mercer because there as a possible issue with his intellectual functioning. (App. 3628). Schwartz-Watts noted that Mercer's mother and family had provided her with a history that gave reason to believe he may have some intellectual deficits. (App. 3628). Schwartz-Watts further testified that she would have recommended Dr. Tora Brawley conduct the testing. (App. 3629). Schwartz-Watts testified that it was her understanding that Brawley stopped testing "because Mr. Mercer was not giving a good effort at that time." (App. 3629, ll 16-17). During the pretrial investigation, the defense team found no indication that Applicant was mentally retarded. (App. 2278-79, see App. 3845).

Mr. Littlejohn testified that the defense team was looking into matters regarding Mercers' intellectual functioning through Dr. Schwartz-Watts and Dr. Brawley. (App. 3685-86). He noted that if they had received a diagnosis relating to mental retardation, they would have presented it at trial. (App. 3686). In her deposition, Ms. Armstrong testified they did not obtain special education records from the Philadelphia school system. (App. 3754, 3772). Armstrong also noted that the defense team did not provide the Social Security records to the Department of Disabilities and Special Needs because they likely had not received them when Mercer was evaluated. (App. 3772-75). However, Armstrong also indicated that their mitigation specialist did attempt to obtain some records and information from Philadelphia related to Mercer's intellectual functioning. Specifically, she identified correspondence indicating the mitigation specialist attempted to track down the Institute for Learning, which had given Mercer one IQ test; and information relating to a search for Sol Barenbaum, the psychologist who

evaluated Mercer for his disability determination. (App. 3841-42). Further, Armstrong confirmed the defense team attempted to have neuropsychological testing done on Mercer, but he would not cooperate. (Ap. 3832-33). Altogether, the testimony in the PCR proceeding clearly indicated that counsel did investigate into Mercer's intellectual functioning. In fact, Schwartz-Watts' testimony indicated the primary reason further information for trial was not developed from the neuropsychological testing was because Mercer failed to cooperate. In light of these facts, the PCR Court's findings that counsel was deficient even without consideration of the special education records from Philadelphia is not supported by the overall record.

The PCR Court erred in finding Mercer was prejudiced by the investigation and presentation of evidence of low intellectual functioning during the sentencing phase of his trial.

The PCR Court's findings that Mercer was prejudiced by counsel's investigation and presentation of evidence regarding his low intellectual functioning was error for two reasons. First, the PCR Court's Order shows that the Court failed to consider the evidence of low intellectual functioning presented by the defense in assessing whether the result at trial would have been different but for counsel's actions. At trial, the defense presented evidence of Mercer's low intellectual functioning. The defense began with psychiatrist Dr. Donna Schwartz-Watts. She testified Mercer changed schools a lot, had terrible grades, a diagnosed learning disability, and a low IQ with poor verbal skills. (App. 2269-71). Mercer had a diagnosis of oppositional defiant disorder as a child, meaning he had problems with authority, and also had mixed developmental delay disorder. (App. 2272-74). Mercer did say he witnessed as a child his father assault his mother, and violence in the area he grew up. (App. 2275-77). Schwartz-Watts testified

she ordered neuropsychological testing on Mercer given his drug history and involvement in a car wreck, but could not complete the testing as Mercer's effort was too variable. (App. 2278-79). His mother used Dexatrim in the first two months of her pregnancy. (App. 2281-82). His mother would come home and find marks on Mercer's arms and was concerned he was being abused by his father, and Mercer had told another psychologist that he had been sexually abused. (App. 2281-82). Schwartz-Watts indicated one Mercer's sister hit him hard with a frying pan. (App. 2283). Mercer's mother really helped him with school and he was able to graduate 180th of a class of 181 despite his learning disability, but his lack of success there meant school was not a safe haven from chaos at home. (App. 2283-85). There is a family history of depression, anxiety, and substance abuse. (App. 2285-86). Mercer had diagnoses of PTSD, substance abuse, a reading disorder, and a personality disorder with antisocial traits. (App. 2288-91, 2310). All of these things contributed to Mercer's "horrible judgment." (App. 2291-92).

Dr. Marti Loring, a clinical social worker who was qualified as an expert on PTSD, trauma, and abuse; testified Mercer's father would drink, come home, and beat Mercer's mother, during which Mercer would try to protect her. (App. 2316, 2326). Mercer got severe beatings that were longer than his other brother, because for a time his father thought Mercer was someone else's biological son. (App. 2326-29). Mercer's mother would beat him as well. (App. 2327-29). Part of his childhood was spent in squalid conditions in a Philadelphia home with holes, pigeons, and cats. (App. 2329). Mercer has difficulty concentrating and had trouble in school despite his efforts, given his reading disability. (App. 2330-31, 2336). He was raped when he was young by an uncle.

(App. 2336). He had an imaginary friend named Pyro. (App. 2337). His antisocial traits were in large measure learned from the difficult environment in which he was raised. (App. 2341-42).

Neurologist Dr. John Steedman found that Mercer had a reflex disparity when tapping his biceps and triceps that indicated some sort of interruption in the pathways of the brain. (App. 2391-93). Steedman noted that his IQ testing, while not qualifying as mentally retarded, was in the range of a learning disorder. (App. 2393-95). Mercer received supplemental security income at a young age due to this disability. (App. 2394-95). His drug use would affect his judgment and lower his functioning. (App. 2396). Mercer had a disability in terms of his functioning, as well as anxiety disorders and PTSD. (App. 2420-21). There was a cumulative effect on Mercer of the brain dysfunction, PTSD, and substance abuse. (App. 2421).

Retired high school coach Charles Mancuso coached Mercer in football during high school. He stated Mercer was easily influenced by peers, and they had to keep things simple since he was in special needs classes. However, Mercer was a hard worker and “outstanding student.” (App. 2436-39).

Mercer’s younger sister stated that her brother was always there for her, that her father had anger problems, and that the family moved south to escape bad conditions. (App. 2443-46). Mercer’s other sister testified Mercer was picked on by other kids, the family moved because of the bad environment, there was violence between her parents, and Mercer “caught” more from his parents than the others. (App. 2446-50). Mercer’s wife stated he was “the best male role model [she] had ever met in [her] life,” and was

her protector and friend. After displaying some family photographs, she noted that Mercer began to “shut down” after his grandmother died in 2001. (App. 2450-55).

Diane Mercer testified, contending that the family had a difficult home life with her husband’s anger and abuse, on top of bad schools and a poor environment. She stated he had problems as an infant and she had taken diet pills during her pregnancy because she did not know she was expecting. She described the effects of Mercer’s learning disability, and his difficulties in school, with his peers, and in trying to find employment. She also displayed some family photos, and described Mercer’s love for his family. (App. 2455-74). Finally, Mercer’s father testified, admitting he was responsible for anger and violence in the home, but stating that was how he grew up and he did not know any better. (App. 2474-81).

In light of all of this testimony and evidence that was presented at trial, Respondent submits the additional testimony provided at the PCR evidentiary hearing would not have led to a different result in Mercer’s sentence in light of the testimony that was presented at trial, especially in light of the PCR Court’s determination that the special education records from Philadelphia were not necessary for its determination of finding prejudice.

Second, the PCR Court’s finding that the evidence presented at the evidentiary hearing constituted evidence of mental retardation is not supported by the record. While South Carolina statutes do not specifically define the requirements for a diagnosis of mental retardation, DDSN has issued a policy containing such requirements.

[T]he requirements for a diagnosis of mental retardation under the DDSN Policy include:

1. Significantly sub-average intellectual functioning; an IQ of approximately 70 or below on an individually administered intelligence test;

2. Concurrent deficits in present overall adaptive functioning (i.e. the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) with deficits in at least two of the following adaptive skills areas: communication, self care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work leisure, health, and safety[;]

3. The onset of mental retardation is before age 18 years.

Pruitt v. S.C. Dep't of Health and Human Serv., 2008 WL 2828634, at *10 (S.C.Admin.Law.Judge.Div. June 20, 2008). The PCR Court's Order makes detailed reference to Dr. Fisher's opinion in finding counsel was deficient in investigation and or presentation of evidence supportive of an adjudication of mental retardation. However, Dr. Fisher relied on post-trial testing as a baseline for intelligence and as a reference to discount IQ test scores that far exceeded the 70 level. Mercer refused to participate in pre-trial testing. Counsel could not be ineffective for failing to discover evidence not available to them at the time of trial, particularly where their own client withheld cooperation. Strickland v. Washington, 466 U.S 668, 691 ("[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."); Hicks v. Collins, 384 F.3d 204, 217-218 (6th Cir. 2004)(counsel was not ineffective regarding investigation where client uncooperative).

Dr. Fisher testified that he did not rely upon Mercer's first IQ score because the test given was a Stanford-Binet LM Form. Fisher testified that the test was not relied upon in making diagnoses in mental retardation because it was developed to determine the intellectual functioning of gifted children, and not meant for use in determining mental retardation. (App. 3429-30). Fisher's assessment of the Stanford-Binet Form L-

M is inconsistent with other psychologists' and courts' assessment of the use of the test. See generally, Branch v. State, 882 So. 2d 36, 51 (Miss. 2004) (psychologist utilized test to make argument defendant suffered from mental retardation); Bone v. Polk, 1:04CV1074, 2010 WL 2733333 (M.D.N.C. July 9, 2010)(reflecting petitioner's failure of several subtests of Stanford-Binet Form L-M was part of state court's basis for finding Petitioner was not eligible for death penalty as result of mental retardation); Stacey G. by William & Jane G. v. Pasadena Indep. Sch. Dist., 547 F. Supp. 61, 65 (S.D. Tex. 1982)(court utilized results from test in determining disability).

The PCR Court's finding discounts Mercer's 1993 IQ score of 88. (App. 4281-82). The Order acknowledges that Fisher attempted to discredit the score by subtracting ten points from it based upon his assertion that there would be an artificial ten point inflation between the last WISC-R and the WAIS-R test. (App. 4282-83). The Order also acknowledges Fisher attempted to discredit the score by re-administering the verbal IQ subtests. (App. 4283). However, the Order does not reflect that Fisher's subtraction of ten points was inconsistent with the guidelines of the APA, which indicate it is not accepted practice for someone to subtract points from an IQ test administered by someone else. Implicit in the Order is this Court's recognition of the APA guidelines in this regard. The PCR Court rejected Fisher's testimony regarding the application of the Flynn Effect. Respondent further submits Fisher's subtraction of ten points from the WAIS-R score was inappropriate by Fisher's own testimony. Fisher indicated the ten point differential was found when the WISC-R and WAIS-R were given within a one-year period. (App. 3517). Here, there was an almost two-year gap between Mercer's final WISC-R testing and his WAIS-R testing. Also, while Fisher claimed his retesting

(which was more than seventeen years after the original IQ test) produced lower scores on the verbal IQ subtests, he neither presented the scores from those subtests nor the change that would have resulted in Mercer's overall verbal IQ score and full scale IQ score. (App. 3475-76).

Fisher's finding that Mercer had significant subaverage intellectual functioning also failed to discount other factors that would have contributed to Mercer's IQ scores. For example, Fisher's testimony indicated he did not assess whether: 1) Mercer's home environment would have affected his performance on the IQ tests; 2) Mercer's learning disabilities would have contributed to lower scores; and 3) Mercer's post-traumatic stress disorder would have contributed to lower IQ scores. (App. 3471-77). Also, the PCR Court's erred in finding that the operational IQ score for mental retardation was 75 based upon the standard error of measurement without applying the same standard error of measurement to Mercer's IQ scores. (See App. 3463).

Third, Fisher's findings regarding adaptive functioning were based, in part, upon the inconsistent testimony of family members who had a clear bias in favor of providing Fisher with information that would assist him in reaching a conclusion favorable to Mercer. Fisher acknowledged that his findings were only as good as the accuracy of the information he received. Some of his findings were contradicted by the testimony at the evidentiary hearing. He acknowledged as much during his testimony.

Finally, Fisher's findings are undermined by his assessment that mental retardation can be assessed differently solely because of the application of Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002). (App. 3478). For these reasons, the State submits the PCR Court erred in granting post-conviction relief to Mercer.

CONCLUSION

For the foregoing reasons, Respondent-Petitioner respectfully requests this Court grant this petition for writ of certiorari and reverse the PCR Court's grant of post-conviction relief. Respondent-Petitioner further requests any other relief this Court deems appropriate.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

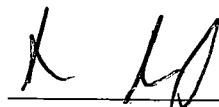
DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

By:



Alphonso Simon Jr.
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

January 3, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
Court of Common Pleas
Honorable James R. Barber, III, Circuit Court Judge

Case No. 2009-CP-32-5465

KEVIN MERCER,

Petitioner-Respondent,

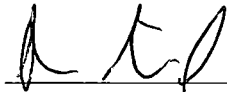
v.

STATE OF SOUTH CAROLINA,

Respondent-Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of January, 2012, two copies of the Respondent-Petitioner's Petition for Writ of Certiorari was served on counsel for the Petitioner, Emily Paavola, Esq., Death Penalty Resource & Defense Center, P.O. Box 11311, Columbia, SC 29211.



ALPHONSO SIMON, JR.

January 3, 2012.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 09-CP-32-5465

RECEIVED

APR 13 2012

S.C. Supreme Court

KEVIN MERCER, #6021 *Petitioner/Respondent,*

v.

STATE OF SOUTH CAROLINA, ... *Respondent/Petitioner.*

**RETURN TO RESPONDENT/PETITIONER'S
PETITION FOR WRIT OF CERTIORARI**

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
P.O. Box 11311
Columbia, SC 29211

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
RESPONDENT/PETITIONER’S QUESTION PRESENTED	1
RESTATEMENT OF THE QUESTION PRESENTED	1
ADDITIONAL SUSTAINING GROUNDS	1
STATEMENT OF THE CASE	3
I. Trial Proceedings	3
A. The Parties’ Competing Theories of the Case	3
B. Victim Impact Evidence	6
C. Motion for New Trial	12
III. Appellate and Post-Conviction Proceedings	16
REASONS WHY RESPONDENT’S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED	16
I. The PCR Court Correctly Held that Mercer’s Trial Counsel was Ineffective for Failing to Investigate and Present an <i>Atkins</i> Claim at Trial	16
II. The PCR Court’s Order Granting Mercer a New Sentencing Trial Should be Sustained on Additional Grounds	20
A. Evidence to Support the Defense Theory That Thompson was the Shooter	21
i. Ineffective Assistance of Counsel for Failure to Call an Expert in Eyewitness Identification	21
ii. Ineffective Assistance of Counsel for Failing to Present Available Evidence of More Than one Perpetrator	26
iii. Timothy Johnston’s Perjured Testimony	29

B.	Improper Victim Impact Evidence	30
i.	Relevant Legal Principles	30
ii.	The State’s Victim Impact Evidence was Improper	32
iii.	Trial Counsel’s Performance was Deficient and Prejudicial	38
CONCLUSION		41

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Atkins v. Virginia</i> , 536 U.S. 304, 321 (2002)	19
<i>Eddings v. Oklahoma</i> , 455 U.S. 104, 112 (1982)	29, 30,31, 37
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	31, 37
<i>Johnson v. Mississippi</i> , 486 U.S. 578, 590 (1988)	30
<i>Kelly v. California</i> , 129 S.Ct. 564, 566 (2008) (Mem.)	36
<i>Lockett v. Ohio</i> , 438 U.S. 586, 604 (1978)	30
<i>Mills v. Maryland</i> , 48 U.S. 367 (1988)	31
<i>Payne v. Tennessee</i> , 501 U.S. 808 (1991)	30
<i>Porter v. McCollum</i> , 130 S.Ct. 447, 454-455 (2009)	30, 41
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005)	40, 41
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	16, 25, 28, 38, 38, 40, 41
<i>United States v. Fields</i> , 516 F.3d 923, 947-948 (10 th Cir. 2008)	31
<i>United States v. Wade</i> , 388 U.S. 218, 228 (1967)	24
<i>Watkins v. Sowders</i> , 449 U.S. 341, 352 (1981)	24
<i>Williams v. Taylor</i> , 529 U.S. 362, 396 (2000)	40
<i>Wiggins</i> , 539 U.S. at 536	41
<i>Woodson v. North Carolina</i> , 428 U.S. 280, 304 (1976)	29

STATE CASES

<i>Ard v. Catoe</i> , 372 S.C. 318, 642 S.E.2d 590 (2007)	25

<i>Council v. State</i> , 380 S.C. 159, 169, 670 S.E.2d 356, 361 (2009)	16, 40
<i>Franklin v. Maynard</i> , 356 S.C. 276, 588 S.E.2d 604, 606 (2003)	19
<i>Hall v. Catoe</i> , 360 S.C. 353, 362, 601 S.E.2d 335, 340 (2005)	32, 36
<i>Johnson v. Catoe</i> , 345 S.C. 389, 548 S.E.2d 587 (2001)	15
<i>People v. Bryant</i> , 907 N.E. 2d 862, 874 (Ill. App. 2009)	28
<i>People v. Kindle</i> , 2002 WL 1554118 (Cal. App. Ct. 2002)	26
<i>Rosemond v. Catoe</i> , 383 S.C. 320, 330, 680 S.E. 2d 5, 10 (2009)	31
<i>Sapp v. The State of South Carolina</i> , 2006-CP-08-2204	33, 37, 38
<i>State v. Bernard</i> , 608 So.2d 966, 972 (1992)	32
<i>State v. Gaskins</i> , 284 S.C. 105, 326 S.E.2d 132 (1985)	32
<i>State v. Hughey</i> , 339 S.C. 439, 457, 529 S.E.2d 721, 730 (2000)	31
<i>State v. Mercer</i> , 381 S.C. 149, 672 S.E.2d 556 (2009)	16
<i>State v. Peterson</i> , 287 S.C. 244, 248, 335 S.E.2d 800, 802 (1985)	28
<i>State v. Prince</i> , 316 S.C. 57, 447 S.E.2d 177 (1993)	15
<i>State v. Southerland</i> , 316 S.C. 377, 447 S.E.2d 862 (1994)	32
<i>State v. Spann</i> , 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999)	15
<i>State v. Torrence</i> , 305 S.C. 45, 406 S.E.2d 315 (1991)	28
<i>State v. Whaley</i> , 305 S.C. 138, 142, 406 S.E.2d 369, 371 (1991)	25
<i>State v. Williams</i> , 550 A.2d 1172, 1202 (N.J. 1988)	32
<i>Vasquez v. State</i> , 388 S.C. 447, 456, 698 S.E.2d, 561. 565 (2010)	17
<i>Von Dohlen v. State</i> , 360 S.C. 598, 612, 602 S.E.2d 738, 745 (2004)	31, 33

MISCELLANEOUS

A. Daniel Yarmey & Megan J. Yarmey, <i>Eyewitness Recall and Duration Estimates in Field Settings</i> , 27 J. Applied Social Psychol. 330 (1997)	23
Adalberto Aguirre, Jr., et al., <i>Sentencing Outcomes, Race and Victim Impact Evidence in California, A Pre and Post-Payne Comparison</i> , 11 The Just. Prof'l 297, 300-304 (1999)	36
Elizabeth F. Loftus, <i>EYEWITNESS TESTIMONY</i> at 31-32 (Harvard University Press)(1979)21, 24	
Malcolm D. MacLeod, Jason N. Frowley, and John W. Shepherd, <i>Whole Body of Information: Its Relevance to Eyewitnesses</i> , in <i>ADULT EYEWITNESS TESTIMONY</i> 126 (1994)	23
S.C. Code Ann. §16-3-20(C)(b)(4) (1976)	28
S.C. Code Ann. §16-3-25 (C)(1) (2003)	31, 33
S.C. Code Ann. §16-9-10	30
S.C. Const. Art. I, §24(C)(2)	35

RESPONDENT-PETITIONER'S QUESTION PRESENTED

Whether the PCR Court erred in granting relief upon Mercer's claim of ineffective assistance of counsel in failing to investigate and present evidence of mental retardation when the defense team engaged in a substantive investigation into Mercer's low intellectual functioning, and where the PCR Court's finding of prejudice is not supported by the record?

RESTATEMENT OF THE QUESTION PRESENTED

Whether, given this Court's "any evidence" standard of review, the PCR court erred in granting relief on Mercer's claim that trial counsel was ineffective for failing to investigate and present evidence of mental retardation where: (a) trial counsel "candidly admitted" that they made no effort to investigate the possibility of mental retardation, App. p.4273; and, (b) Mercer's evidence of prejudice was uncontested and the PCR court found that "[i]t is difficult to conceive of any failure more prejudicial than trial counsel's failure to discover and present evidence that their client may be categorically exempt from the death penalty." App. p.4292.

ADDITIONAL SUSTAINING GROUNDS

The PCR Court's order granting Mercer a new sentencing trial should be sustained on the following additional grounds:

I.

Mercer's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the South Carolina Constitution, were violated when: (a) trial counsel failed to call an expert in eyewitness identification; (b) trial counsel failed to present available evidence that a second perpetrator was present at the scene of the crime when the shooting occurred; and, (c) the State's witness, Timothy Johnston, perjured himself at a hearing on Mercer's motion for a new trial by falsely testifying that petitioner's co-

defendant, Marcus Thompson, had never confessed to shooting the victim when, in fact, Thompson had stated that he was the shooter.

II.

Mercer's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the South Carolina Constitution, were violated by the State's extensive presentation of victim impact evidence – which included: (a) testimony regarding the effect of the victim's death on the United States Army generally; (b) a memorial video set to music; and, (c) an army "roll call" that took place during the victim's funeral. Moreover, Mercer's rights were violated when the trial judge cried in front of the jury during this presentation and, further, by trial counsel's failure to object to any of these events.

STATEMENT OF THE CASE

I. TRIAL PROCEEDINGS.

A. THE PARTIES' COMPETING THEORIES OF THE CASE.

Kevin Mercer was charged with murder, armed robbery, and possession of a firearm in the commission of a violent crime in connection with the May 16, 2002 shooting death of Tracy Davis outside the Raintree Apartment Complex in Lexington County, South Carolina. Within twenty minutes after the shooting, Mercer and another man – Marcus Thompson – were stopped by police on interstate twenty and arrested. App. p.1455 – 1457. At the time of their arrest, Mercer was driving the victim's white, 1998 Lincoln Navigator and Thompson was sitting in the front passenger's seat. App. p.1458. Police recovered the murder weapon – a .357 caliber handgun – under the driver's seat inside the vehicle. App. p.1466-1467. At the time of his arrest, Thompson was in possession of a plastic bag containing fourteen .357 caliber bullets and two pairs of black, knit gloves. App. p.1465, l.3 – p.1466, l.5; App. p.1725, ll.1-25; App. p.1727, ll.13-22. Mercer's car was later recovered at the Economy Inn, not far from the Raintree Apartments. App. p.1682, l.18 – p.1683, l.10.

Mercer was represented at trial by Mr. Cameron Littlejohn and Ms. Melissa Kimbrough. Solicitors Donald Meyers and Samuel Hubbard represented the State. Throughout the trial, the State attempted to show that Mercer acted as the shooter. This theory largely hinged on testimony from Clifton Magwood, the victim's roommate. Magwood testified that he and Davis attended a softball game on the night of the shooting. App. p.1396, ll.5-9. After the game, Davis planned to make a trip to the store while Magwood returned home. App. p.1396, ll.10-16. Around 11:00 p.m., Magwood was lying in bed watching the movie "Full Metal Jacket," when

he heard a commotion outside. App. p.1402, ll.2-14. Magwood thought he heard Davis's voice say "All right. I'll give it to you," so he briefly peered out of the blinds from his upstairs bedroom window. App. p.1402, ll.15-18. He testified that it looked like Davis was being held up at gunpoint next to his white, Lincoln Navigator. App. p.1402, ll.19-20. Magwood was "very excited, adrenaline flowing, [and] very emotional." App. p.1404, ll.16-17. He went to get the cordless telephone and a handgun from Davis's bedroom and dialed 911. App. p.1402, l.22 – p.1403, l.5. As he was running down the stairs, Magwood heard a gunshot and then went outside to find Davis lying on the ground, shot once behind the ear. App. p.1403, ll.6-19.

Magwood never saw the perpetrator's face and "didn't have a clear vision of the person who was robbing [Davis]." App. p.1407, l.24 – p.1408, l.3. Moreover, Magwood did not see the shooting occur. App. p.1428, ll.17-19. He explained that he looked out of the window and down into the dimly-lit parking lot for only "a few seconds," App. p.1425, ll.7-9, where he saw a black male, "heavy set, anywhere from 5'11" to 6 feet tall" wearing dark pants and a dark top. App. p.1407, ll.5-6. The assailant was walking Davis to the back of the Navigator and the driver's side door was open. App. p.1421, ll.18-20. By the time Magwood reached the front door of his apartment, the Navigator was already leaving the parking area. App. p.1403, ll.6-19. He did not see the perpetrator again.

Mercer and Thompson are both black males of approximately the same height.¹ At the time of their arrest, Mercer was wearing denim shorts and a denim top; App. p.1486, l.21 – p.1487, l.1. Thompson was wearing a black tee-shirt and dark blue cotton pants. App. p.1487, ll.13-20. The primary physical distinction between the two is size of frame, as Mercer's build is

¹ Mercer's driver's license indicated that he is 5 feet, 10 inches tall, App. p.1460, l.19. Thompson was reportedly 5 feet, 8 inches tall. App. p.1757, l.14.

larger than Thompson's. During closing arguments, the State argued that Magwood's description conclusively pointed to Mercer. *See, e.g.*, App. p.1754, l.11 (arguing that Magwood "nailed it"); App. p.1760, ll.15-17 (arguing that it is clear Mercer shot the victim because of Magwood's description); App. p.1761, ll.4-5 (arguing "[Mercer] is the man Clifton Magwood saw; this large man."). The State also claimed that Magwood's description was particularly reliable because "[h]is senses were heightened. He looked out that window and fear locked that picture in his head." App. p.1754, ll.12-13. Magwood's observations, the State argued, were "forever sealed and seared into [his] memory. He will never forget what happened." App. p.1753, ll.20-22; *see also*, App. p.1656, ll.16-24 ("He has an image in his head, not a photograph, not a story given to him by a cop or someone else. The image is forever there. His senses were heightened. . . . It's forever in his mind.").

The defense countered by arguing that Thompson – not Mercer – was the shooter. In her opening statements, Lisa Kimbrough told the jury: "[s]uffice it to say, Marcus Thompson was in the Navigator and he's not here today, and we believe that Marcus Thompson, in fact, was the shooter. That's our theory. It's pretty simple." App. p.1360, ll.22-25. But the defense offered no evidence to support this theory. Thus, the jury had no information from which it could determine that Thompson fired the fatal shot. In the penalty phase, trial counsel presented expert testimony that Mercer suffers from post-traumatic stress disorder and possible brain damage, but the experts consistently testified that these factors had "nothing to do" with the events of the crime. App. p.2304, ll.7-13; p.2305, ll.22-23; p.2307, ll.1-8; p.2343, ll.7-20; p.2345, l.17 – p.2346, l.8. Trial counsel did not allege or offer any expert or lay opinion evidence that Mercer is a person with mental retardation.

B. VICTIM IMPACT EVIDENCE.

In support of its case for death, the State offered extensive victim impact evidence. The victim, Tracy Davis, was an active member of the United States Army and worked as a recruitment trainer at Fort Jackson. First, the State called Sergeant Robert Ames, a member of the Army for nearly twenty years. App. p.2190, ll.7-25. Ames testified that he met Davis in 1991, when they were stationed together at Fort Benning, Georgia. App. p.2191, ll.7-8. Davis became close with his Ames's family. Ames described an incident when Ames's younger son hit his older son above the eye with the claw of a hammer, and "without fail, [Davis] just scooped my son up and we ran out of the house and we went right to – right to the emergency room. And we sat there and he got sewn up, and it was just a small injury." App. p.2193, ll.19-22. Ames explained that his children always remembered this incident and then described how he had to tell his children about Davis's death and their reaction to that news. App. p.2193, l.23 – p.2194, l.4. Ames testified about a variety of charitable and religious activities that he and Davis participated in through their membership in the Masonic Order. App. p.2194, l.9 – p.2073, l.19. Ames attended a memorial service for Davis at Fort Jackson and served as a pallbearer at his funeral service in Miami, Florida. App. p.2197, ll.10-16.

Next, Command Sergeant Major Martin Wells, dressed in his Army uniform, App. p.2207, ll.2-7, testified that there is only one enlisted rank in the Army higher than his own, and only one person holds that rank, "[s]o for all intents and purposes, Command Sergeant Major is generally regarded as the highest enlisted rank in the Army." App. p.2077, ll.3-7. Wells testified that he knew Davis for approximately 10 months while they worked at Fort Jackson starting in

the summer of 2000. App. p.2077, ll.14-18. The solicitor asked Wells to “tell the jury . . . what kind of soldier was Tracy Davis?” App. p.2201, ll.1-2. Wells responded,

[w]e have a creed that all noncommissioned officers live by, and it’s quite detailed and quite lengthy. But if someone were to ask me to choose one person who personified the ideals captured in that creed, it would be Sergeant Davis. His leadership qualities, his character, were without a doubt worthy of emulation by anybody in his charge, by his peers, even those superior in rank. He taught me a lot, and I was his supervisor. . . . If I retired today and looked back on the 23 years that I served and were to think of maybe two or three people that I will never forget because of the way that they touched and affected my life and my family’s, he would definitely be within that few people, few number of people without a doubt.

App. p.2201, ll.3-17. Wells gave detailed descriptions of approximately twenty-eight (28) medals, ribbons, badges and awards that Davis had earned during his service in the Army and introduced photographic evidence of each award. App. p.2079, l.4 – p.2207, l.11.

Wells then told the jury that Davis called him “out of the blue” on the night of his death, just hours before the shooting occurred, to say that he was going to be promoted and relocated to Miami where he could be close to his daughter, and “that he wanted [Wells] to know that he had recently accepted Jesus Christ as his Lord and Savior.” App. p.2207, l.18 – p.2208, l.8. Wells also testified that Davis once gave him a large print with a picture of “a heavenly place setting with two hands signifying the hand of the Lord and a place setting that goes on just seemingly without end.” App. p.2208, ll.23-25. Wells described Davis as “on the fast track,” which he explained was “an unofficial term for someone who is progressing through the ranks at more than an average rate.” App. p.2209, ll.20-25. Wells claimed that at the time of the trial, if Davis had lived, he would undoubtedly have achieved the same rank as Wells. App. p.2210, ll.1-5. Finally, Wells testified that he participated in the memorial service for Davis at Fort Jackson

where Davis was posthumously promoted to Master Sergeant and given a merit award. App. p.2087, l.6 – p.2212, l.23. Wells showed the jury Davis’s certificate of promotion and read its inscription:

All true leaders are remembered by name.
Master Sergeant Tracy L. Davis will never be forgotten.
May 2002.

App. p.2212, ll.4-8. Wells concluded by testifying that “Sergeant Davis was someone who just exuded selfless service. He always thought of others before he thought of himself. . . . He was a very good mentor to soldiers in his charge.” App. p.2213, l.9 – p.2214, l.4. Davis was given a lot of responsibility in the Army “because of his leadership and management skills . . . [and] his proven performance.” App. p.2214, ll.4-7.

Third, the State recalled Davis’s roommate, Clifton Magwood, who worked with Davis in the Army recruitment training division. Magwood testified that being “an instructor at the recruiting and retention school is one of the elite positions in recruiting.” App. p.2216, ll.16-17. He described the lengthy process that he and Davis went through before they were selected to be part of a group of only eight people from a nationwide search. App. p.2216, l.18 – p.2095, l.9. Magwood and Davis were active with the Masons and in other community events. Magwood listed several causes that Davis advocated, including cancer awareness, research for women’s breast cancer, muscular dystrophy and the Special Olympics. App. p.2220, ll.15-23. Magwood testified that Davis was

the type of person that you wanted to embody his leadership style, his traits. He personified what it is to be a leader in the United States Army. Everything he did was strictly by the books: ethical, moral, legal. He was upright. Everything he did was the way it was supposed to be done, and he would take nothing short.

App. p.2221, ll.12-17. After Davis's death, Magwood and another member of the Army established a youth center in Davis's honor "because of his work in the community with the young groups, churches, civic organizations, mentoring young men and women to be positive in the community." App. p.2221, l.18 – p.2222, l.2. For Davis's memorial service at Fort Jackson, Magwood helped put together a video with pictures and music for people to take with them as "a tribute in his honor, sort of like a living memorial." App. p.2224, ll.2-10. Fort Jackson wanted to do that for Davis "because of the impact that he left." App. p.2224, ll.11-13. Magwood explained,

[L]osing a soldier like that, I mean – any life lost is a tragedy, but to lose a soldier that impacted the community as well as Fort Jackson and so many other soldiers from all over the continent who had been in recruiting was a big loss.

App. p.2224, ll.13-17.

Fourth, David O'Garro testified that he was a First Sergeant in the United States Army who had also worked with Davis as a recruitment trainer. O'Garro described how Davis helped his first group of students achieve 100% of their goals, which had never happened before, by spending extra time with students after class. App. p.2228, l.7 – p.2229, l.21. Davis and another Army friend, Eric Williams, started a youth mentoring program together for troubled teens who were at risk of dropping out of school. O'Garro described a coffee mug that Davis had about the youth program. It had a picture of the Bible on it and slogans that said "For the Souls of the People" and "I am reaching new heights." App. p.2330, l.5 – p.2331, l.11; App. p.2232, ll.6-15. Davis and his friends had plans to expand the youth program by opening several centers and starting summer camps and retreats. App. p.2331, l.15 – p.2232, l.5. O'Garro testified that they were trying to get young people "spiritually back into the Word, into the Bible, and trying to

curb their behavior.” App. p.2232, ll.21-23. After Davis was murdered, Williams, O’Garro and Magwood decided to name the youth center in Davis’s honor. App. p.2233, ll.7-18. They obtained a building to house the youth center, which needed new paint. Williams approached O’Garro and Magwood and said, “[t]he Lord told me that, hey, only you two can do this and no one else can.” App. p.2233, ll.19-23. So, Magwood and O’Garro painted the outside of the building and put up a sign in honor of Davis. App. p.2233, l.23 – p.2234, l.2. They held a ribbon cutting ceremony for the center and invited Davis’s ex-wife and daughter to attend.

O’Garro testified that the Army renamed an award in Davis’s honor after his death. They also renamed the whole wing where Davis was stationed at Fort Jackson after him and put a plaque with his picture and biography on it in every classroom. App. p.2239, ll.4-15. O’Garro explained that he and Davis were friends with another Army instructor, Reverend Ogden, who was also a minister. O’Garro stated that Reverend Ogden was a eulogizing speaker at Davis’s memorial service. O’Garro also testified that the Reverend told him “[e]verywhere I preach, you know, I’ll be preaching and I look up and I like, you know, look in the back and Tracy [will] be sitting there.” App. p.2240, ll.19-25. O’Garro responded, “[r]eally?,” and the Reverend said, “[y]eah, you know.” So, O’Garro concluded that “Tracy would follow him pretty much everywhere he preached.” App. p.2241, ll.1-2. O’Garro helped create Davis’s funeral video. He testified that he chose the song “Hero” for part of the presentation because that was what Davis was to him. App. p.2239, l.16 – p.2240, l.10. O’Garro described an Army roll call that took place during the memorial service for Davis. He stated that the roll call is done by “any squad or platoon that loses a member, in honor of that member or to show that that member is no longer with that group.” App. p.2241, ll.22-24. O’Garro explained that their division chief called the names of everyone in the group, and each person responded “here.” Davis’s name was the last to

be called. The division chief called Davis's name three times with no answer, and then his name was stricken from the rolls. App. p.2241, l.24 – p.2242, l.10. The State introduced a copy of the memorial service program and then played the funeral video on an enlarged screen before the jury. App. p.2240, ll.6-13; p.2242, ll.11-22. This presentation was so emotionally charged that the trial judge cried while viewing the video. App. p.3323, l.20 – p.3324, l.14; App. p.3388, ll.16-25; App. p.3767, ll.2-5; App. p.3783, l.21 – p.3784, l.4.

Finally, Davis's daughter and mother gave brief accounts of how his death had impacted them and their family. App. p.2244 – 2254. Defense counsel did not object to any of the State's victim impact evidence. In his closing argument, Solicitor Myers stressed Davis's role as a member of the United States Army and repeatedly referred to Davis as "the soldier," a "brave soldier," a "fine soldier," and "Master Sergeant Davis." App. p.2494, ll.23-25; p.2495, l.6; p.2509, ll.10-11; p.2513, l.24; p.2515, ll.24-25; p.2516, l.7. Myers highlighted Wells' testimony, stating:

Tracy Davis was on a fast track. What a man. Do you remember the Command Sergeant Major in his uniform the other day explaining the ribbons? There's one fellow, noncommissioned officer in the United States Army, that's higher than he is, and that's the Head Sergeant of the Army. One fellow higher than Mr. Wells. He said, 'If Tracy Davis were alive today, he'd have my rank, just like me and none higher.' Youth Centers. Helping People. Running for breast cancer, leukemia, all those things. [Mercer] doesn't care. It doesn't make any difference to Mercer. Makes no difference to him.

App. p.2510, ll.12-22. Myers also emphasized Sergeant O'Garro's testimony and concluded by using the Army roll call from Davis's memorial service as an analogy for the jury's role in the case:

O'Garro talked about all the things that Tracy had done and everybody he touched. And then right here they had a roll call.

Commander Sergeant Major Wells? Here. Magwood? Here. Sergeant O'Garro? Here. Sergeant Davis. No answer. Sergeant Davis. No answer. Master Sergeant Tracy L. Davis. He can't answer. Kevin Mercer has made sure of that. Stricken from the rolls.

You're going to have a roll call in a little while this afternoon, and it's going to be on this form. There's going to be 12 lines. A roll call for you. Will you speak up where Tracy Davis can't? If you don't, it will be a blight on this fine soldier's memory.

App. p.2515, l.21 – p.2516, l.7. The jury deliberated approximately two hours before sentencing Mercer to death on April 22, 2006.

C. MOTION FOR NEW TRIAL.

Eleven days after Mercer was sentenced to death, Kevin Fuller, a cellmate of Marcus Thompson's, wrote a letter to Solicitor Myers stating that Thompson was bragging that he had shot Tracy Davis but Mercer was getting the blame for it. App. p.2898. Six days later, on May 9, 2006, Fuller gave a written statement to the Lexington County Sheriff's Department in which he stated that Thompson told him Mercer was going to die for what Thompson did. App. p.2899. Thompson said that he and Mercer followed a guy into the Raintree Apartment complex. *Id.* At that time, Thompson put on his gloves inside out because he wanted to prevent powder marks on his hands. *Id.* After the guy parked, Mercer pulled open the door to the truck. Thompson stated that the guy was on the phone and he started to get out to defend himself, so that's when Thompson shot him behind the ear.² *Id.* Thompson said that Mercer jumped in the guy's 1998 Expedition or Escalade truck while Thompson jumped in Mercer's car. *Id.* They left and went back to the place where Mercer was staying and then Thompson jumped in the truck

² Davis's cell phone was recovered at the scene. App. p.3716 (Investigative Report stating that "[w]hen the roommate got to the parking lot he observed a Wal Mart bag and the victim's cell phone lieing [sic] in the parking lot next to where the victim's vehicle had been parked.").

with Mercer and they went out on the highway. *Id.* After they went “not too far down the road” they got pulled over. *Id.* The cop asked the driver, Mercer, to get out of the car. Thompson said it took the cop ten to twenty minutes before he finally told Thompson to get out of the car as well. *Id.* Before he got out of the truck, Thompson put the gun under Mercer’s seat. *Id.* After Mercer was sentenced to death, Thompson bragged about how the Lexington County Sheriff’s officers were “stupid” and they “didn’t put two-and-two together because [Thompson] had the bullets on him that went to the gun.” *Id.*

The solicitor disclosed Fuller’s statements to the defense on May 23, 2006. App. p.2985. Defense counsel promptly moved this Court to remand the case for a hearing on their motion for a new trial based on after-discovered evidence. App. pp.2844 – 2894. This Court granted the motion, and the trial court held a hearing on August 9, 2006. App. p.2734. At the hearing, Thompson testified that he was originally charged with murder and armed robbery, among other things, in connection with the murder of Tracy Davis. App. p.2750, ll.5-8. After Mercer’s trial concluded, the State dismissed the murder indictment against Thompson and allowed him to plead guilty to accessory before the fact of armed robbery and accessory after the fact of murder and armed robbery. Thompson pled guilty to those charges on June 20, 2006. App. pp. 2911-2912. Thompson testified that he did not shoot Tracy Davis and denied participating in any of the events that led to Davis’s death at the Raintree Apartments. App. p.2752, ll.9-24. Thompson admitted that he had previously given conflicting statements on this topic. App. p.2751, l.20 – p.2752, l.8. Moreover, Thompson denied ever telling Kevin Fuller anything about Davis’s murder. App. p.2753, l.23 – p.2754, l.24. On cross-examination by Solicitor Myers, Thompson stated that he actually talked with his other cellmate, Timothy (“Rocky”) Johnston, much more

frequently than Fuller. Thompson claimed that Johnston could verify his story. App. p.2767, ll.6-17.

Next, Kevin Fuller testified to essentially the same facts that he recounted in his May 9th written statement to police. Fuller said that Thompson told him he and Mercer were looking for a ride so that they could go to Atlanta for a party and they had been out all day shooting some kind of gun. App. p.2776, ll.18-21. They found a guy with “some kind of Escalade or Navigator” and they pulled in behind him in Mercer’s car. App. p.2776, ll.21-23. Mercer jumped out and opened the door. Thompson said that “they thought [the guy] had a gun on him, but he had a cell phone in his hand and Marcus Thompson shot the guy behind his ear.” App. p.2776, l.24 – p.2777, l.1. They went and parked Mercer’s car at a hotel somewhere and then Mercer was driving the truck when they got pulled over. App. p.2777, ll.10-14. Thompson said that “the officer told Kevin Mercer to step out of the vehicle, and as Kevin Mercer stepped out of the vehicle, Marcus Thompson took the gun and placed it over on Kevin Mercer’s side.” App. p.2777, ll.15-18.

To rebut Fuller’s testimony, the State called Timothy Johnston who testified that Thompson never admitted to shooting Davis. Johnston reported that Thompson had always stated that Mercer shot Davis while Thompson waited at a hotel in Mercer’s car. App. p.2839, ll.8-16; App. p.2840, ll.6-21. On cross-examination, Johnston testified that he was currently serving time for probation violation. App. p.2849, ll.10-11. He was also facing pending burglary charges and three counts of criminal domestic violence for which he could receive up to a life sentence. App. p.2848, l.17 – p.2489, l.9. Johnston claimed that all of his charges had previously been dismissed, but they were still showing as pending due to a clerical error. App. p. 2849, l.21 – p.2850, l.25. The Lexington County solicitor’s office was saying that the charges

were still pending, but Johnston hoped that they would correct the error “just as soon as they find the paperwork on them.” *Id.*

On September 25, 2006, the trial court issued an order denying Mercer’s motion for either a new trial or a new sentencing proceeding. App. pp.2910 – 2921. In order to obtain a new trial based on after-discovered evidence, Mercer was required to show that the evidence:

- (1) is such that it would probably change the result if a new trial were granted;
- (2) has been discovered since the trial;
- (3) could not in the exercise of due diligence have been discovered prior to the trial;
- (4) is material; and,
- (5) is not merely cumulative or impeaching.

State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999) (citing *State v. Prince*, 316 S.C. 57, 447 S.E.2d 177 (1993)); *see also*, *Johnson v. Catoe*, 345 S.C. 389, 548 S.E.2d 587 (2001).

The trial court found that the only disputed element was whether the after-discovered evidence “would probably change the result if a new trial were granted,” since “[t]he other four elements are clearly met.” App. p.2913. The trial court held that Fuller’s statements would not likely change the outcome of a new sentencing proceeding because Fuller was not believable. The court found that “neither Fuller nor Thompson has any real credibility about them,” App. p.2195, but determined that Johnston “is the one witness in this whole analysis of jailhouse confessions who does not have anything to gain from his testimony.” App. p.2198. The court “observed him to be straightforward” and found his testimony “believable.” *Id.* Based on this analysis, the trial court concluded that “there is essentially no chance the jury would believe Fuller’s testimony that Thompson confessed to shooting Sergeant Davis.” *Id.*

II. APPELLATE AND POST-CONVICTION PROCEEDINGS.

This Court affirmed Mercer's convictions and death sentence on direct appeal and held that the trial court did not abuse its discretion in denying the motion for a new trial. *State v. Mercer*, 381 S.C. 149, 672 S.E.2d 556 (2009). Mercer sought post-conviction relief and raised claims that: (a) he is ineligible for a death sentence because he is mentally retarded; (b) his trial counsel were ineffective for failing to investigate and present a mental retardation claim at trial; (c) trial counsel were ineffective for failing to offer available evidence to support their theory that Marcus Thompson was the shooter; (d) Mercer's constitutional rights were violated by Timothy Johnston's perjured testimony during the hearing on his motion for a new trial; and, (e) Mercer's rights were violated by the state's inflammatory and prejudicial presentation of victim impact evidence, the trial judge's response to that evidence, and trial counsel's failure to object to any of these events. Following an evidentiary hearing on January 31, February 1, and March 18, 2011, the PCR court issued an order granting Mercer a new sentencing proceeding on the ground that his trial counsel were ineffective for failing to investigate and present his mental retardation at trial and denying relief on all other grounds. App. pp.4249-4327.

REASONS WHY RESPONDENT'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I. THE PCR COURT CORRECTLY HELD THAT MERCER'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT AN *ATKINS* CLAIM AT TRIAL.

In order to establish a claim of ineffective assistance, a PCR applicant must show that: (1) counsel's performance was deficient; and, (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Council v. State*, 380 S.C. 159, 169, 670 S.E.2d 356, 361 (2009); *see also, Strickland v. Washington*, 466 U.S. 668, (1984). A PCR court's decision granting post-conviction relief must be upheld on appeal if there is any

probative evidence supporting the Court's findings of fact and conclusions of law. *Vasquez v. State*, 388 S.C. 447, 456, 698 S.E.2d 561, 565 (2010). Given the relevant standard of review, the weight of the evidence supporting Mercer's claim and respondent's failure to present even a shred of evidence that Mercer is not a person with mental retardation, the PCR Court's judgment that trial counsel was constitutionally ineffective must be sustained.

The PCR court's conclusions in this case are amply supported by the record. In the PCR hearing, both trial attorneys admitted that they failed to investigate and present the issue of Mercer's mental retardation. Specifically, trial counsel testified that:

- (1) they failed to obtain Mercer's special education records from the Philadelphia school system where he was in special education for over eleven years, App. p.3668, ll.16-20; App. p.3754, ll.12-24;
- (2) they failed to hire an expert in mental retardation, App. p.3669, ll.12-23; App. p.3770, ll.9-11;
- (3) they never raised the issue of Mercer's mental retardation at trial, App. p.3692, ll.3-6;
- (4) they had no strategic reason for these failures; App. p.3691, ll.13-22; and,
- (5) if they had known that Mercer suffers from mental retardation, they would have provided that information to their experts and raised an *Atkins* claim. App. p.3669, ll.7-10; App. p.3691, ll.13-22.

The PCR court correctly found that trial counsel "candidly admitted" their deficient performance, and that, "[e]ven if trial counsel had not admitted their performance was deficient, it is also apparent from their actions before trial." App. pp.4273-4274. Respondent-Petitioner [hereafter, "Respondent"] argues that Mercer refused to cooperate in a mental retardation investigation. Respondent's Petition for Writ of Certiorari at p. 15. This is incorrect. Trial

counsel testified that they were investigating the possibility that Mercer suffered from brain damage. App. p.3690, 1.19 – p.3692, 1.6. Dr. Schwartz-Watts requested that Dr. Tora Brawley complete some neuropsychological testing for that purpose. Dr. Watts later explained that this testing was not completed because Dr. Brawley felt that Mercer's efforts were "too variable" to produce valid results. Neither Dr. Schwartz-Watts nor Dr. Brawley are experts in mental retardation, nor were they asked to investigate Mercer's mental retardation. *See Applicant's PCR Exhibit 12, Affidavit of Dr. Donna Schwartz-Watts at ¶ 5* ("I am not an expert in mental retardation. I was not asked to evaluate Kevin Mercer to determine if he has mental retardation"). Mercer did not refuse to participate in an investigation of his mental retardation, nor could he have, since his trial counsel candidly admitted that they did not hire an expert in mental retardation nor did they make any other effort to investigate or pursue an *Atkins* claim.

As to the issue of prejudice, Mercer's evidence was uncontested. Mercer presented testimony from Dr. Brad Fisher, an expert in mental retardation who testified that Mercer is mentally retarded, as well as supporting evidence from Mercer's mother, father, ex-wife, high school football coach, two special education teachers, his cousin/former employer, and his social history records. App. pp.3314-3528; 3870-3875; 3889-4062; 4047-4102. Despite invitations from the PCR court to do so, Respondent offered no evidence to challenge Mercer's proof that he is mentally retarded.³ Thus, there can be no dispute that Mercer proved his mental retardation

³ Prior to the PCR hearing, Respondent notified post-conviction counsel of its intent to call an expert witness to testify about the mental retardation issue. Post-conviction counsel requested that Respondent produce a *curriculum vitae* and/or make its expert available for a pre-hearing interview. Respondent failed to produce a CV or to make its expert available and later withdrew its request to call an expert on this issue.

by a preponderance of the evidence offered in post-conviction and therefore established prejudice.

Respondent argues that the issue of Mercer's mental retardation was generally presented at trial, although it was not officially given the label of "mental retardation." Respondent's Petition for Writ of Certiorari at p.15. Even if this were true, Respondent's argument is legally irrelevant because, had trial counsel properly raised the issue of Mercer's mental retardation pre-trial, a sentencing proceeding would likely not have occurred at all. *Franklin v. Maynard*, 356 S.C. 276, 279, 588 S.E.2d 604, 606 (2003) ("If the judge finds the defendant to be mentally retarded by a preponderance of the evidence in the pre-trial hearing, the defendant will not be eligible for the death penalty."). Moreover, there is a fundamental difference between presenting a jury with information that a capital defendant had some difficulties in school and presenting a jury with information that that defendant is categorically excluded from a sentence of death. *Atkins v. Virginia*, 536 U.S. 304, 321 (holding that the Eighth Amendment to the United States Constitution prohibits the execution of persons with mental retardation); *see also, id.* at 318 ("by definition, [mentally retarded persons] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."). Trial counsel failed to investigate and assert an *Atkins* claim and failed to call an expert to explain what mental retardation is and how Mercer meets that definition. Finally, even a cursory review of the record demonstrates that trial counsel did not present available evidence of Mercer's mental retardation.⁴ In sum, the record below conclusively supports the PCR court's conclusion that

⁴ For example, trial counsel did not present any evidence of the following facts:

trial counsel was ineffective, and there is no reason that this Court should grant Respondent's petition for a *writ of certiorari* on this issue.

II. THE PCR COURT'S ORDER GRANTING MERCER A NEW SENTENCING TRIAL SHOULD BE SUSTAINED ON ADDITIONAL GROUNDS.

In addition to the ground on which the PCR court granted relief, there are several other reasons that Mercer is entitled to a new sentencing proceeding. These additional grounds fall into two basic categories: (1) evidence that would have supported the defense theory that Marcus Thompson was the shooter; and, (2) the State's use of improper victim impact evidence and trial counsel's failure to object to that evidence.

-
- Mercer failed kindergarten, second grade and ninth grade.
 - He was placed in special education in the second grade, where he remained for the rest of his schooling.
 - Mercer's teachers and school evaluators noted that he functioned "well within retarded expectation."
 - Mercer's school exams had to be administered to him orally because of his reading difficulties.
 - The Department of Disabilities and Special Needs found that Mercer could not tell time on an analog watch or perform basic money calculations.
 - The Department of Mental Health found that Mercer could not read the words "criminal" and "responsibility."
 - Mercer's mother had to repeat simple instructions to him, such as steps for making up a bed, while holding his head to face hers to make sure he heard.
 - As a child, Mercer had difficulty learning the alphabet and took several years to learn basic color differentiation. He was much slower than other children in learning to walk.
 - Mercer's football coach had to physically put his hands on Mercer's shoulders and move him to the spot on the field where he was supposed to stand as a defensive blocker and then point out the direction where the opposition would be coming.
 - The other players on the football team called Mercer "brain lock."
 - Mercer has never lived independently for any significant period of time. His mother and his wife managed his finances, filled out job applications for him, and took care of the cooking, laundry and shopping. His wife once sent him to the store with instructions to buy baby formula, and he not only failed to find the right formula, he also got lost on his way home.
 - As a child and young teen, Mercer's mother would send his brother along with him on errands to prevent him from getting lost.

A. EVIDENCE TO SUPPORT THE DEFENSE THEORY THAT THOMPSON WAS THE SHOOTER.

Trial counsel's theory of the case was that Marcus Thompson acted as the shooter. The problem with this theory was that Clifton Magwood described seeing only a single perpetrator whom he described as having a large build, like Mercer. But there was additional evidence that trial counsel could have offered to address this problem and support their theory of the case.

i. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO CALL AN EXPERT IN EYEWITNESS IDENTIFICATION.

Trial counsel should have called an expert in eyewitness identification to challenge the reliability of Magwood's testimony. At the PCR hearing, Dr. Lori Van Wallendael, an expert in memory, cognition and eye witness reliability, explained that there are a number of variables that relate to the reliability of what a witness claims to recall, including things such as stress, distance, angle of view, exposure time, lighting conditions, and weapon focus. App. p.3582, 1.24 – p.3583, 1.4. These factors affect whether or not a witness is able to "get a good view of a person" and whether that witness is also able to reliably "put[] that view into memory." App. p.3583, 11.4-7.

Dr. Van Wallendael testified that "most lay persons have the idea that emotion or stress somehow enhances memory." App. p.3583, 11.23-24. But, in fact, "the research tends to suggest exactly the opposite, that severe stress impairs memory and that it impairs it quite severely."⁵ App. p.3584, 11.6-8. Dr. Van Wallendael described a field study in which only 32 or 33 percent

⁵ A witness's ability to accurately recall information decreases significantly when an event is violent or emotionally charged. ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY at 31-32 (Harvard University Press) (1979). "[T]he practical significance is clear: testimony about an emotionally loaded incident should be treated with greater caution than testimony about a less emotional incident." *Id.*

of participants could remember the faces of interrogators who questioned them during a forty-minute, high-stress interrogation. App. p.3584, l.15 – p.3585, l.23. “So basically, far less than half the time they could remember someone who was literally in their face for 40 minutes.” App. p.3585, ll.23-25. The stress factor is particularly relevant to Mercer’s case because of the related misconception that people with military training are better able to recall information in stressful situations than others. Dr. Van Wallendael explained that even researchers in her field originally thought that “people who were trained to deal with stress ought to be better eye witnesses than the rest of us.” App. p.3586, ll.7-13. After this hypothesis was tested, however, it was proven to be false. People such as military officers are no better than the average person at committing visual information to memory.⁶ “We’re dealing with the basic nature of the human body and the basic nature of the human brain that you really can’t change with training or experience very much.” App. p.3586, ll.18-20.

Next, Dr. Van Wallendael explained that when a witness believes that a gun is present at the scene, the witness tends to focus their attention on the weapon and away from other factors. This is called “weapon focus.” App. p.3588, l.15 – p.3589, l.1. Weapon focus impairs a witness’s memory in a variety of ways. It affects the witness’s “hearing, their ability to talk about what was said, their ability to recognize voices, all of that becomes impaired when you’re focused on a gun and wondering what’s that gun going to be used for next.” App. p.3589, ll.9-12.

⁶ Similarly, Dr. Van Wallendael testified that “witness confidence” bears no relation to the reliability of what a witness purports to recall. In other words, “confidence and accuracy are not really very strongly related.” App. p.3595, ll.7-8. “[T]here are often people who are relatively uncertain who turn out to be very correct and there are people who say they are a hundred percent sure who . . . turn out to be completely incorrect.” App. p.3595, ll.15-19.

Brief exposure time is another important factor because a person can only process “a handful of details” in the amount of time it takes to look out the window and see what the witness interprets to be a crime in progress. App. p.3592, l.20 – p.3593, l.19. After that, the witness goes into “action mode.” App. p.3592, l.22. Dr. Van Wallendael explained:

Your nervous system is right into that fight or flight mode and you want to do something and you want a phone but the phone is in another room, you run to the other room, you get on the phone, you run down the stairs. During the time that you glanced out the window, you know, you’re probably talking about maybe a second or less and in that amount of time, there’s a very limited amount that you can really take in.

App. p.3592, l.24 – p.3593, l.6. Further, Dr. Van Wallendael testified that there is a correlation between exposure time and “size estimation,” which “has to do with our ability to take in information about a person’s height and weight.” App. p.3593, ll.24-25. Research shows that, in general, “our abilities to estimate size are not especially good.”⁷ App. p.3594, ll.3-4. But, when a witness has only a short time to view a subject, size estimation is even less reliable. App. p.3594, ll.20-24. Finally, Dr. Van Wallendael explained that viewing conditions, such as seeing something from a strange angle or from a distance and in poor lighting conditions, are also reliability factors. She testified that “jurors tend to not know how to deal with this kind of information [in] terms of just the magnitude of an effect that it can have.” App. p.3597, ll.23-25. “[I]t [does] not just slightly impair your memory to be seeing something in dark conditions or

⁷ Height and weight estimates are the primary sources of error when eyewitnesses describe bodily features. See Malcolm D. MacLeod, Jason N. Frowley, and John W. Shepherd, *Whole Body Information: Its Relevance to Eyewitnesses*, in ADULT EYEWITNESS TESTIMONY 126 (1994). “Height, weight, and age estimations produced in traditional police interviews, for example, have been found to be highly error prone.” A. Daniel Yarmey & Meagan J. Yarmey, *Eyewitness Recall and Duration Estimates in Field Settings*, 27 J. Applied Social Psychol. 330, 331 (1997). Male witnesses in particular are more likely to inaccurately estimate height and weight. See *id.* at 331.

seeing something from above that's happening below." App. p.3598, ll.1-4. "[I]t can, in fact, have a pretty dramatic effect on what you can recall." *Id.*

Here, Magwood observed the events of the crime for only a few seconds when he peered through the blinds of his second story bedroom window and looked down into the dimly lit parking lot. He then went into "action mode" running from his bedroom to Davis's bedroom, locating a telephone and a handgun, and then running down the stairs. It is clear from the 911 tape that Magwood was under a lot of stress at the time of the call. By his own testimony, he was "very excited, adrenaline flowing, [and] very emotional." App. p.1404, ll.16-17. Although Magwood's written statement to police made no mention of seeing a handgun, App. pp.4103-4104, he later "added" this element during his testimony at trial.⁸ App. p. 1409, ll.15-17.

Courts have long recognized that "the vagaries of eyewitness identification are well known." *United States v. Wade*, 388 U.S. 218, 228 (1967). And yet, "despite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries." *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J. and Marshall, J., dissenting); *see also*, LOFTUS, *supra*, at 9 (surveying statistical and psychological evidence in support of her

⁸ Dr. Van Wallendael testified that this was a good example of the reconstructive nature of memory:

If you think about his initial statement, he talks about just seeing something going on outside the truck, hearing voices. There seemed to be an element of threat, but he doesn't mention the gun. But you hear the rest of his story and he calls 911, he hears a gunshot, he runs downstairs, he sees the victim of a gunshot wound on the ground. So in his mind, what's probably happening each time he talks about the event, each time he answers questions about it, or even just reviews it in his own head, he's filling in those missing pieces.

App. p.3591, ll.6-18.

conclusion that eyewitness identification evidence is “overwhelmingly influential.”). Without the assistance of an expert such as Dr. Van Wallendael, the jury very likely operated under the false assumption that Magwood’s description of the perpetrator was exceptionally reliable. The solicitor capitalized on this misconception by arguing that the jurors should consider Magwood’s description like a “picture” that “fear locked into his head,” and repeatedly claiming that Magwood’s “senses were heightened,” and that his observations were “forever sealed and seared into [his] memory.” App. p.1754, ll.12-13; App. p.1753, ll.20022; App. p.1565, ll.6-24.

Trial counsel’s strategy was simple – present a defense that Mercer was not the shooter. In order to accomplish that task, they needed to show that Magwood’s description was unreliable. And yet, trial counsel failed to present the expert testimony necessary to challenge the reliability of Magwood’s testimony. Trial counsel never even considered consulting with an expert in eyewitness identification. App. p.3683, ll.8-10; App. p.3758, l.12 – p.3759, l.15. The PCR court denied relief on this ground on the basis that the case did not involve a traditional line-up or a cross-racial identification. App. p4265. But, obviously, all of the factors that Dr. Van Wallendael described at the PCR hearing would have been relevant to the jury’s analysis of Magwood’s testimony even though he never personally identified Mercer. An expert in eyewitness identification could have educated the jury by “explain[ing] how certain aspects of every day experience shown by the record can affect human perception and memory, and through them, the accuracy of eyewitness identification.” *State v. Whaley*, 305 S.C. 138, 142, 406 S.E.2d 369, 371 (1991). Instead, trial counsel failed to challenge the State’s evidence and failed to support their own theory of the case. Counsel’s performance was deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007) (trial counsel’s failure to challenge the State’s evidence with expert testimony

was deficient and prejudicial); *see also*, *People v. Kindle*, 2002 WL 1554118 (Cal. App. Ct. 2002) (finding trial counsel ineffective for failing to call an expert in eyewitness identification).

ii. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PRESENT AVAILABLE EVIDENCE OF MORE THAN ONE PERPETRATOR.

The State's presentation of the case left the jury with the impression that only one perpetrator was present at the scene of the crime.⁹ Once the jury found Mercer guilty of murder in the first phase of the trial, the only way for defense counsel to argue, in the penalty phase, that Thompson acted as the shooter would be to show that Thompson was also present at the scene.¹⁰ And, in fact, there was extensive and reliable evidence that two black males were reported to be

⁹ Magwood testified that he saw only a single perpetrator at the scene of the crime. App. p.1409, ll.18-20. The only evidence to contradict this testimony was a statement from Terry Brown, who testified that Mercer confessed to Brown that he and Thompson participated together in the crime. App. p.1642, ll.14-23. But, there were several reasons for the jury to question Brown's credibility. First, he was a jailhouse snitch with prior convictions for burglary, possession of cocaine, failure to stop for a blue light, possession of crack, aggravated assault and robbery. App. p.1640, l.19 – p.1641, l.4. Second, Brown claimed that Mercer told him about the crime in December of 2003, but Brown did not tell anyone about it until more than two years later. App. p.1649, ll.6-25. Third, he did not take notes or have any written proof to support his claims. *Id.* And fourth, Brown had personal animosity against Mercer stemming from a physical altercation that occurred between them in the Lexington County Detention Center on January 14, 2004. App. p.2147, ll.22-25.

¹⁰ At the close of the guilt-or-innocence phase of the trial, the jurors were given a "hand of one, hand of all" instruction. App. p.1794, ll.3-12. In other words, they were told that Mercer could be found guilty of murder simply by being present and participating in the carjacking, even if he did not shoot Davis. *Id.* In the penalty phase, however, this principle did not apply. Prior to the start of the penalty phase, the trial judge indicated that he would instruct the jury that they could not sentence Mercer to death unless they first determined that he acted as the shooter. App. p.1817, l.5 – p.1818, l.17. The judge felt it was important for the parties to know this in advance because it might make a difference "in terms of how you all present evidence." App. p.1817, ll.13-14. And, indeed, the trial judge later charged the jurors "before you may consider imposing the death penalty, you must first find that the State has proven beyond a reasonable doubt that the defendant, Kevin J. Mercer, fired the shot that killed the victim." App. p.2538, ll.16-20.

at the scene. First, the victim's girlfriend, Neysa Williams, gave a written statement to police in which she stated that she was on the telephone with Davis when he arrived in the parking lot at the Raintree Apartments around 11:00 p.m. on the night of the crime. App. p.3710. Williams stated, "I could hear him getting out at his apartment. I then hear[d] someone approach him. I thought that I was hearing two different people talking to Tracy because I thought maybe it was his roommate and his next door neighbor." *Id.* After some conversation, Williams heard Davis say "Whatever man!" *Id.* Then, she "heard a loud noise and then the phone dropped."¹¹ *Id.*

Moreover, the 911 operator's report indicated that Magwood's call came in at 11:33 p.m. App. p.3708. Officers were dispatched to the scene one minute later. *Id.* At 11:46 p.m., the 911 operator reported that the suspects were two black males. *Id.* Mercer and Thompson were stopped on I-20 at 11:58 p.m. App. p.3709. This is consistent with several other police reports and witness statements. The coroner reported that the "[v]ictim pulled up into the parking lot and was held up in a carjacking by two suspects per victim's roommate." App. p.3707. "The two suspects fled the scene in victim's Lincoln Navigator." *Id.* Tracie Ondera, one of Davis's neighbors, recalled that he had just gone upstairs to bed at around 11:10 p.m. He "heard a gunshot and then heard two car doors shut." App. p.3711. Ondera "jumped up and looked out the window [and] saw a white Lincoln Navigator leaving the parking lot with its lights off." *Id.* Dennis Stazer, the officer who arrested Mercer and Thompson, issued a formal report in which he stated that he took up position on I-20 after "dispatch advised that a white in color Lincoln

¹¹ Williams' statement is consistent with Kevin Fuller's testimony that Marcus Thompson said "they thought the guy had a gun on him, but he had a cell phone in his hand and Marcus Thompson shot the guy behind his ear." App. p.2776, l.24 – p.2777, l.1. Davis's cell phone was recovered in the parking lot on the ground near where the Navigator had been parked. App. p.3716.

Navigator was taken by two black males.” App. p.3712. After Mercer and Thompson were arrested, the Lexington County Sheriff’s Department issued a press release stating that two minutes after the shooting, “dispatchers radioed a description of the stolen Lincoln Navigator . . . and advised that two men were riding in the vehicle.” App. p.3715; *see also*, App. p.3716 and p.3719.

It has long been accepted that, in terms of culpability and appropriate punishment, there is an important distinction between a triggerman and a non-triggerman. *See* S.C. Code Ann. § 16-3-20(C)(b)(4) (1976); *State v. Peterson*, 287 S.C. 244, 248, 335 S.E.2d 800, 802 (1985), overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Thus, trial counsel’s plan to show that Mercer was not the shooter was a sound trial strategy. But without any evidence to show that someone other than Mercer was present at the scene of the crime, the defense theory that Thompson acted as the triggerman was dead on arrival in the penalty phase. The jury had already determined that Mercer was present at the scene of the crime – if he was not present, then he could not be guilty of murder. Thus, the only way to show that Thompson could have acted as the shooter was to demonstrate that witnesses saw and heard a *second* perpetrator. There was substantial evidence that trial counsel could have used to make such a showing. Their failure to do so was deficient and prejudicial, since it undermined the entire defense theory of the case. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Baines*, 927 N.E.2d 158, 170 (Ill. App. 2010) (“it defies reason to believe that defense counsel would intentionally fail to bring out the very essence of the defense theory in the clearest possible manner.”); *People v. Bryant*, 907 N.E.2d 862, 874 (Ill. App. 2009) (“We cannot conclude that counsel’s failure to call any witnesses in support of the defense that he had both promised and adhered to throughout the defendant’s trial was a reasonable strategic decision.”).

iii. TIMOTHY JOHNSTON'S PERJURED TESTIMONY.

At the August 2006 hearing on Mercer's motion for a new trial, Timothy Johnston testified for the State that he had never heard Thompson admit to shooting Davis, and instead claimed that Thompson always said that Mercer was the shooter. The State offered Johnston's testimony to rebut Kevin Fuller's account that Thompson was boasting about how he was the one who shot Davis but Mercer was going to die for it instead. App. p.2898. The trial court credited Johnston's testimony over Fuller's and denied the motion for a new trial. Johnston's testimony was false. At the PCR hearing, Johnston admitted that he lied when he testified that Thompson never admitted to shooting Davis. App. p.3567, ll.2-25. Johnston explained that Thompson told several different versions of the events of the crime. In one of those accounts, Thompson said that Mercer dropped him off at an apartment complex where Thompson planned to steal a truck. App. p.3566, ll.22-25. Thompson said that he shot the victim of the robbery after they got into an altercation. App. p.3566, l.25 – p.3567, l.1. Johnston testified that he “failed to bring up” this version of the events when he spoke to the State because Thompson had threatened him and he was afraid. App. p.3567, ll.14 – p.3568, l.1.

The United States Supreme Court has long held that “the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). Thus, the Court has “insist[ed] that capital punishment be imposed fairly, and with reasonable consistency, or not at all.” *Id.* Among other things, this mandate prohibits imposition

of a death sentence on the basis of information that is “materially inaccurate.” *Johnson v. Mississippi*, 486 U.S. 576, 590 (1988).

Here, Mercer’s motion for a new trial was denied based upon false testimony in violation of the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution. Johnston’s testimony at the hearing on the motion for new trial constituted perjury. *See, e.g.*, S.C. Code Ann. § 16-9-10 (“It is unlawful for a person to willfully give false, misleading, or incomplete testimony under oath in any court of record, judicial, administrative, or regulatory proceeding in this State.”). If the jury had been told that Thompson was bragging about his role as the triggerman, there is a reasonable probability that at least one juror would have viewed Mercer’s role in the crime – or even the ambiguity over what that role was – as “a basis for a sentence less than death.” *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see also*, *Porter v. McCollum*, 130 S.Ct. 447, 454-455 (2009) (“the Constitution requires that ‘the sentencer in capital cases must be permitted to consider any relevant mitigating factor.’”) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)).

B. IMPROPER VICTIM IMPACT EVIDENCE.

i. RELEVANT LEGAL PRINCIPLES.

In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Supreme Court held that the Eighth Amendment did not erect a bar to the admission of victim impact evidence. Specifically, the Court stated that the jury may be presented with evidence “of the specific harm caused by the defendant” and evidence “about the victim and about the impact of the murder on the victim’s family.” *Id.* at 808; *see also*, *id.* at 840 (O’Connor, J., concurring) (“[a] State may decide . . . that the jury should see ‘a *quick glimpse* of the life petitioner chose to extinguish.’”) (emphasis

added) (quoting *Mills v. Maryland*, 48 U.S. 367 (1988)).¹² This Court has determined that victim impact evidence is generally admissible to demonstrate the “uniqueness” of the victim and the “specific harm caused by the defendant.” *State v. Hughey*, 339 S.C. 439, 457, 529 S.E.2d 721, 730 (2000), overruled on other grounds by *Rosemond v. Catoe*, 383 S.C. 320, 330, 680 S.E.2d 5, 10 (2009). The admission of such evidence, however, is not allowed if it is “so unduly prejudicial that it renders the trial fundamentally unfair and violates due process under the Fourteenth Amendment.” *Von Dohlen v. State*, 360 S.C. 598, 612, 602 S.E.2d 738, 745 (2004).

A capital defendant is entitled to an objective, individualized sentencing decision free from “the influence of passion, prejudice, or any other arbitrary factor.” S.C. Code Ann. § 16-3-25 (C)(1) (2003); *see also*, *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Gregg v. Georgia*, 428 U.S. 153 (1976). To ensure these protections, many courts have held that the scope of victim impact evidence must be carefully and narrowly tailored. For example, in *United States v. Fields*, 516 F.3d 923, 947-948 (10th Cir. 2008), the Tenth Circuit cautioned that “[i]ncluding the community in the victim-impact inquiry is fraught with complication. It would involve not just the incremental extension from family to friends (and even co-workers), but a radical change in perspective: replacing a close-in focus on persons closely or immediately connected to the victim with a wide view encompassing generalized notions of social value and loss.” *Id.* at 947.

Similarly, the Louisiana Supreme Court has concluded:

[i]ntroduction of detailed descriptions of the good qualities of the victim or particularized narrations of the emotional, psychological and economic sufferings of the victim’s survivors, which go beyond the purpose of showing the victim’s individual identity and verifying the existence of survivors reasonably expected to grieve

¹² *See also*, *id.* at 839 (Souter, J., concurring) (stating victim impact statements should be limited to the consequences of the defendant’s acts that were “obviously foreseeable”).

and suffer because of the murder, treads dangerously on the possibility of reversal because of the influence of arbitrary factors on the jury's sentencing decision.

State v. Bernard, 608 So.2d 966, 972 (1992); *see also*, *State v. Williams*, 550 A.2d 1172, 1202 (N.J. 1988) (“our law does not regard a crime committed against a particularly virtuous person as more heinous than the one committed against a victim whose moral qualities are perhaps less noteworthy or apparent. The law exists to protect all persons equally.”).¹³

ii. THE STATE’S VICTIM IMPACT EVIDENCE WAS IMPROPER.

Here, the State offered extensive and detailed evidence that improperly exceeded the scope of permissible victim impact evidence. Six victim impact witnesses testified at the penalty phase of Mercer’s trial. Two of these witnesses were Davis’s mother and his daughter. The remaining four were members of the U.S. Army who spoke at great length about Davis’s successful career in the armed forces and his involvement in religious and community activities. Command Sergeant Major Wells testified extensively about the various medals and honors Davis received throughout his military career. Following this testimony, visual evidence of each of these medals and awards was entered into evidence. Sergeant David O’Garro testified about the Army roll call that was performed at Davis’s memorial service at Fort Jackson. In total, the

¹³ In *Williams*, the New Jersey Supreme Court also noted that “[d]efendants may not assert as a defense that the victim was such a worthless human being that the latter’s murder was acceptable or at least no loss to the world.” *Id.* This Court has likewise held that “a criminal defendant’s reprehensibility was not mitigated by the fact that the victim was a murderer himself.” *Hall v. Catoe*, 360 S.C. 353, 362, 601 S.E.2d 335, 340 (2005) (explaining the holding in *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985); *see also*, *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994) (holding that the defendant was not permitted to introduce evidence of the victim’s bad character). Similarly, this Court has held that victim impact evidence may not be used to make arguments that “encourage the jury to compare the worth of a defendant’s life with that of his victims.” *Hall*, 360 S.C. at 362, 601 S.E.2d at 340.

victim impact testimony occupies sixty-six pages of the trial transcript. In addition to this substantial testimony, the State showed the jury a video containing pictures and graphics set to music that was prepared for Davis's funeral. By all accounts, the video was emotionally moving and several people in the courtroom, including the trial judge himself, were brought to tears.

This evidence was unduly prejudicial, exceeded the scope of permissible victim impact evidence, and violated Mercer's rights under the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution. It also injected an arbitrary factor and created the risk of influencing the jury's sentencing decision with unfair passion and prejudice in violation of South Carolina law. S.C. Code Ann. § 16-3-25 (C)(1) (2003); *see also, Sapp v. The State of South Carolina*, 2006-CP-08-2204, attached as Exhibit A, at 45 (citing *Von Dohlen v. State*, 360 S.C. 598, 612(2004)). Judge James Williams's recent decision granting post-conviction relief in *Sapp*, a case involving similar victim impact testimony, is instructive on this issue.¹⁴ In *Sapp*, the PCR court found that introduction of an essay regarding the victim's death went beyond the scope of *Payne* because it impermissibly demonstrated the loss suffered by the community in general. *Id.* at 46-47. The essay centered on the victim's role as a police officer and the loss suffered by his colleagues and society because of his death. *Id.* at 46. The essay was written by one of the victim's co-workers and opened by telling the reader that the day the victim died, "we *all* lost a friend." *Id.* The PCR court held that this evidence was inadmissible under *Payne*. *Id.* at 46-47.

The victim impact evidence offered against Mercer had a similar impermissible focus. The overwhelming majority of the State's victim impact evidence was given by uniformed members of the United States Army and focused on Davis's career as a soldier. Both Wells and

¹⁴ This Court denied the State's petition for a *writ of certiorari* in the *Sapp* case.

Magwood testified that Davis “personified the ideals” of the military, App. p.2201, ll.3017, and “personified what it was to be a leader in the United States Army.” App. p.2221, ll.12-17.

Magwood further elaborated on the Army’s loss in general, saying:

[l]osing a soldier like that, I mean – any life lost is a tragedy, but to lose a soldier that impacted the community as well as Fort Jackson and so many other soldiers from all over the continent who had been in recruiting was a big loss.

App. p.2224, ll.13-17. Ames, Wells, Magwood and O’Garro all testified in detail about the posthumous awards, promotions, memorials and honors the Army awarded to Davis. App. p.2197, ll.10-16; App. p.2087, l.6 – p.2212, l.23; App. p.2212, ll.4-8; App. p.2224, ll.1-13; App. p.2239, ll.4-15. The State showed the jury Davis’s posthumous certificate of promotion and his Army memorial program. App. p.2212, ll.4-8; App. p.2240, ll.6-13. Finally, in his closing argument the solicitor highlighted the magnitude of the Army’s loss, repeatedly referring to Davis in military terms and presenting the jury with the scene of the crime as played out between Mercer and “a brave soldier.” *See, e.g.*, App. p.2494, l.22 – p.2495, l.1 (“I’m sure you never would have thought in your wildest dreams that a man would make a soldier get down on his knees¹⁵ after the soldier had said, ‘all right. I’ll give it to you. Take it;’ After the soldier had said, ‘here’s the keys.’”); App. p.2495, ll.4-6 (“And I bet you never thought that a man would stand back at least two feet away and pump a round into the brain of this soldier.”); App. p.2509, ll.8-13 (arguing that Terry Brown asked Mercer “After you had done all of this, after you put that soldier on the ground, after the soldier gave you the keys to his Navigator, after you shot him in the back of the head and the cop stopped you 17 minutes later, why didn’t you shoot the cop?”);

¹⁵ According to the State’s own expert witness, there was no evidence that Davis was shot while on his knees. App. p.1678, l.25 – p.1679, l.13.

App. p.2513, l.21 – p.2514, l.1 (showing a photo of Davis alive alongside a photo of Davis after his death and stating that Davis’s daughter was “[a] young girl with already nearly 30 college credits. [Davis] won’t be there for graduation. Won’t be there for college, marriage, kids, because this brave soldier – [the Army] named a building after him at Fort Jackson with his name in all the rooms. Awards. Kevin Mercer turns this into this.”). All of this evidence impermissibly focused on the general loss suffered by the United States Army and the entire community in general. Indeed, Magwood testified that Davis’s death was “a big loss” felt by “soldiers from all over the continent.” App. p.2224, ll.13-17.

Moreover, this evidence was improper because it was offered as if the Army itself was a victim of the crime. An entity such as the Army, however, does not qualify as a victim under South Carolina law. The South Carolina Constitution defines a victim “a person who suffers direct or threatened physical, psychological, or financial harm as the result of the commission or attempted commission of a crime against him.” S.C. CONST. ART. I, § 24(C)(2). It also considers as victims, “the person's spouse, parent, child, or [the] lawful representative of a crime victim who is deceased, who is a minor or who is incompetent or who was a homicide victim or who is physically or psychologically incapacitated.” *Id.* Under this definition, the Army is not a constitutionally recognized crime victim. The State’s victim impact evidence was improper because it emphasized the loss suffered by the Army in the same manner – and, in fact, more acutely – than the loss suffered by Davis’s family.¹⁶

¹⁶ Strict adherence to the definition of victim found in the South Carolina Constitution is necessary to prevent victim impact evidence from otherwise impairing the capital sentencing process. For example, if the State may present the Army as a victim because it has lost the service of a soldier, then the defense will be invited to rebut the value of the victim as a member of the armed forces. This would necessarily result in extensive discovery requests for the victim’s military records, his reviews by superiors, and other documents, culminating in an

After a lengthy and detailed presentation from members of the Army, the State then introduced Davis's funeral video and testimony about the Army roll call performed at Davis's memorial service at Fort Jackson. The video and roll call testimony were excessive, inflammatory and unduly prejudicial, particularly when viewed in light of the substantial victim impact evidence that had already been offered.¹⁷ These elements served primarily to appeal to

argument about the victim's worth as a soldier during the penalty phase of the trial. Additionally, allowing organizations such as the Army to play the role of a crime victim increases the risk that a defendant's constitutional rights will be violated. It creates a heightened risk that the jury will engage in an impermissible weighing of the worth of the life of the victim versus the worth of the life of the defendant or the worth of the entire armed forces. *See Hall v. Catoe*, 360 S.C. 353 (2005). It also invites the jury to impermissibly focus on tenuous and speculative far-reaching impacts of the victim's death, for example national security. Finally, inviting the jury to consider extraneous and impermissible evidence creates an opportunity for racial bias to come into play. Empirical studies show that when the defendant is a member of a disfavored minority, the likelihood of a death sentence increases when victim impact evidence is offered at sentencing. *See, e.g.,* Adalberto Aguirre, Jr., et al., *Sentencing Outcomes, Race and Victim Impact Evidence in California, A Pre and Post-Payne Comparison*, 11 *The Just. Prof'l* 297, 300-304 (1999). Studies also demonstrate that the presentation of victim impact evidence increases the likelihood of a death sentence when the victim and the defendant are members of the same race, as they were in Mercer's case. *Id.* The risk of racial discrimination was especially great in Mercer's case where he, an African American defendant, was sentenced by an all white jury.

¹⁷ Three United States Supreme Court Justices have expressed their desire to grant *certiorari* in a case addressing victim impact evidence similar to this case. In a statement in the denial of a petition for writ of *certiorari*, Justice Stevens stressed the need "to define or otherwise constrain the category of admissible victim impact evidence." *Kelly v. California*, 129 S.Ct. 564, 566 (2008) (Mem.) (Stevens, J., issuing statement respecting the denial of petitions for writs of *certiorari*). Justice Stevens stated that because the introduction of victim impact evidence "puts a heavy thumb on the prosecutor's side of the scale in death cases, the Court has a duty to consider what reasonable limits should be placed on its use." *Id.* at 567. Also, Justices Breyer and Souter dissented from the denial of *certiorari* in *Kelly*. *Id.* at 564, 568 (Breyer, J., dissenting from denial of petitions for writs of *certiorari*). Justice Breyer agreed with Justice Stevens' statement and similarly stressed the need to "draw[] a line between what is, and is not, constitutionally admissible in this area." *Id.* at 568. Justices Stevens and Breyer clearly indicated, at the very least, that the use of videos and picture montages of the victim, which were admitted by the lower court, should not be admissible as victim impact evidence. *See id.* at 567 ("[W]hen victim

the jurors' emotions and "played more towards sympathy than showing the true man." *Sapp*, at 46. Clearly, the video served that purpose as even the trial judge cried during its presentation. App. p.3323, l.20 – p.3324, l.14; App. p.3388, ll.16-25; App. p.3767, ll.2-5; App. p.3783, l.21 – p.3784, l.4. This evidence impermissibly detracted from the individualized sentencing to which Mercer was entitled. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Gregg v. Georgia*, 428 U.S. 153 (1976). Furthermore, any probative value of this evidence was substantially outweighed by the prejudice that surely flowed from its admission. How could jurors be expected to make a fair and impartial sentencing determination after watching *the trial judge* weep in the courtroom over the victim's death?

In addition to the inadmissible victim impact evidence, the State's presentation contained irrelevant information and extensive hearsay. For example, Command Sergeant Major Wells' testimony about his own rank and success in the Army was irrelevant to the jury's sentencing decision. The solicitor emphasized Wells' testimony before the jury, saying "Do you remember the Command Sergeant Major in his uniform the other day explaining the ribbons? There's one fellow, noncommissioned officer in the United States Army that's higher than he is, and that's the Head Sergeant of the Army. One fellow higher than Mr. Wells." App. p.2510, ll.12-17. Wells' personal military success did not relate to Mercer's characteristics, the nature of the crime, or Davis. It served only to suggest to the jury that Davis's life was of particular value because high-ranking military officials were there to speak for him.

Furthermore, the State offered a variety of religiously themed testimony. Wells testified

impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming."); *id.* at 568 ("[M]inimal probity coupled with the video's *purely emotional* impact . . . may call due process protections into play.").

that Davis called him on the night of the crime and said “that he wanted [Wells] to know that he had recently accepted Jesus Christ as his Lord and Savior.” App. p.2207, ll.18 – p.2208, ll.8. Wells told the jury that Davis once gave him a picture of “a heavenly place setting with two hands signifying the hand of the Lord.” App. p.2208, ll.23-25. O’Garro described a coffee mug that Davis had with a picture of the Bible on it and a slogan saying, “For the Souls of the People.” App. p.2231, ll.5-7; App. p.2232, ll.6-15. O’Garro stated that Davis was working with youth and “trying to get them spiritually back into the Word, into the Bible.” App. p.2232, ll.21-23. O’Garro also claimed that another Army friend told him that “the Lord” commanded him that only O’Garro and Magwood could paint a youth center building in Davis’s honor. App. p.2233, ll.19-23. He also testified that another Army instructor, Reverend Ogden, told him that, after Davis’s death, Ogden would look up and see Davis sitting in the back of the room everywhere he preached. App. p.2240, ll.19-15. Much of this testimony was hearsay. Moreover, it suggested that jurors should be influenced by a “higher power” and that Davis’s life was more valuable than others because of his personal religious beliefs.

iii. TRIAL COUNSEL’S PERFORMANCE WAS DEFICIENT AND PREJUDICIAL.

Trial counsel’s failure to object to any of this evidence was unreasonable and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1994); *Sapp*, at 47. Cameron Littlejohn testified that Lisa Kimbrough was generally responsible for the penalty phase of the case and any objections were her primary responsibility. App. p.3674, ll.11-17. He further testified that he did not review the funeral video before it was shown to the jury, but after seeing the video, he did believe that they should have raised an objection. App. p.3675, ll.3-4. Once the video started, however, Littlejohn stated that he “felt it was too late” to object. App. p.3675, ll.18-19. Littlejohn described the funeral video as “a tearjerker” and stated that the trial judge was

obviously “visibly taken” and “you could tell he had, he got emotional about it.” App. p.3767, ll.2-5. Littlejohn was afraid to object at that point and he simply hoped the jurors did not see the judge’s reaction. App. p.3676, ll.7-13. Kimbrough testified that she did not object to any of the victim impact evidence because she believed that, legally, the State could offer whatever it wanted in terms of victim impact evidence. App. p.3782, ll.2-11. She stated that if she had known that any of the evidence was legally improper, she would have objected to it. *Id.* She further testified that she felt she made a mistake by not objecting to the funeral video and the army roll call testimony. App. p.3782, ll.12-25. Kimbrough had no strategic reason for failing to object. *Id.* After the funeral video was played, Kimbrough was told by observers in the courtroom that the trial judge had cried on the bench while the jury was present.¹⁸ App. p.3783,

¹⁸ Diane Mercer and Naomi Stackhouse also testified to this fact. Diane Mercer stated:

Q: Do you recall seeing a video that was played for the jury from the victim’s funeral?

A: Yes.

Q: Were you able to view the trial judge when the video was played?

A: Yes.

Q: And what was his reaction?

A: He was crying.

...

Q: How did you know he was crying?

A: His eyes was red and they surely wasn’t red when we started out, but, you know, you could see the emotions. I mean, he looked down like this and you could -- you know, you knew he was crying. It wasn’t – you knew he was crying. It was just obvious.

App. p.3323, l.20 – p.3324, l.14. Naomi Stackhouse similarly testified:

Q: Were you present during the trial when the video from the victim’s funeral was played for the jury?

1.21 – p.3784, 1.4.

Trial counsel has an obligation to determine what evidence the State intends to offer in aggravation and formulate an appropriate response. *See Rompilla v. Beard*, 545 U.S. 374 (2005). The American Bar Association recommends that counsel “should ascertain what, if any, victim-impact evidence the prosecution intends to introduce at the penalty phase, and evaluate all available strategies for contesting the admissibility of such evidence and minimizing its effect on the sentencer.” ABA Guidelines for the Appointment and Performance of Defense Council in Death Penalty Cases 113-114 (2003). Although the ABA guidelines do not necessarily define objective standards of reasonableness under *Strickland*, many courts including this Court and the United States Supreme Court have referenced them as relevant guidelines. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 396 (2000) (citing the ABA guidelines in holding that counsel’s performance fell below Strickland’s standard of reasonableness); *Council v. State*, 380 S.C. 159, 173, 670 S.E.2d 356, 363 (2008) (same). Trial counsel’s failure to thoroughly review the State’s proposed victim impact evidence and to formulate an appropriate legal strategy to attack that

A: Yes, I was.

Q: Were you able to see the judge at this time?

A: Yes, I was.

Q: What was his reaction during the video?

A: The judge was like this (indicating) and his head was down like this (indicating) and he was crying.

Q: Did you observe any of the jurors at that time?

A: There were two jurors who were crying.

App. p.3388, ll.16-25.

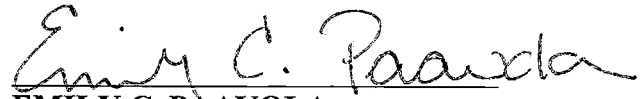
evidence was unreasonable. *Strickland*, 466 U.S. at 687; *Sapp*, at 47.

Prejudice is established when “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Porter*, 130 S.Ct. at 452 (citing *Strickland*, 466 U.S. at 694). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The test is not whether a defendant would have received a life sentence absent counsel’s deficient performance. *Porter*, 130 S.Ct. at 455-456; *see also, id.* at 451 (holding the state court conducted the wrong prejudice analysis by concluding “that even considering [trial counsel’s error], the ‘trial judge and jury still would have imposed death.’”). Rather, the question is whether trial counsel’s error “might well have influenced the jury’s appraisal of [petitioner’s] culpability.” *Rompilla*, 545 U.S. at 393. Here, trial counsel’s failure to consider any legal challenges to the State’s victim impact presentation resulted in the admission of irrelevant, inflammatory, excessive and unduly prejudicial information that unfairly played to the jury’s emotions and tipped the balance in favor of death. Had trial counsel properly challenged the admission of this evidence, “there is a reasonable probability that at least one juror would have struck a different balance.” *Wiggins*, 539 U.S. at 536.

CONCLUSION

For all of the reasons stated above, this Court should deny Respondent’s Petition for Writ of Certiorari.

Respectfully submitted,

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

EMILY C. PAAVOLA

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

ATTORNEY FOR PETITIONER

April 9, 2012

Exhibit A

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

Case No. 2006-CP-08-2204

COUNTY OF BERKELEY)

Jesse Waylon Sapp,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER

2009 AUG 17 PM 1:45
CLERK OF COURT
BERKELEY COUNTY, SC

PROCEDURAL HISTORY

In the early morning hours of July 7, 2002, applicant was arrested and charged with the murder of South Carolina Trooper Jeff Johnson. The state contended that applicant shot Trooper Johnson to avoid arrest after being stopped at a license check point. While running away, applicant was shot several times and arrested a short distance from the truck in which he had been a passenger. Tr. 1203. In addition to eyewitness testimony, ballistics testing proved that the bullet which killed Trooper Johnson was fired from applicant's gun. Tr. 1426-28. Upon searching applicant's truck, SLED agents found Xanax, ecstasy, cocaine and other prescription drugs. Tr. 1289-92.

Applicant was indicted for murder as well as several drug offenses. Initially, applicant was provided two court-appointed lawyers, Glenn Churchill and Peter Beck; however, in December 2002, attorneys Paul Archer and Robert Johnston, both retained by applicant's family, entered their appearance as counsel for applicant. Jury selection began on May 9, 2003, and the jury found applicant guilty of murder and the drug offenses. The sentencing phase began on

CERTIFIED TRUE COPIES OF RECORD
IN THIS COUNTY

Mary P. Brown
DATE 8/17/09
CLERK OF COURT C.P. & G.S.
BERKELEY COUNTY SC

1 [Signature]

applicant's prior criminal history, primarily relating to drug and weapons offenses. The prosecution also presented four victim impact witnesses. For its part, the defense presented the testimony of a family physician, several family members and friends of applicant who generally described applicant as a nice person who had lived a tough life, including witnessing the death of his best friend. On May 19, 2003, the jury returned a unanimous sentence of death.

Applicant filed a timely appeal and the South Carolina Supreme Court affirmed his convictions and sentence on October 24, 2005. *State v. Sapp*, 366 S.C. 283, 621 S.E.2d 883 (2005). Thereafter, applicant filed a timely application for post-conviction relief. On April 21-23, 2008, this Court presided over the post-conviction relief evidentiary hearing. The applicant was present at the hearing, represented by court-appointed counsel Robert Lominack and Daniel Prenner. The state was represented by Assistant Deputy Attorney General Donald Zelenka and Assistant Attorney General Melody Brown. Following the hearing, the Court and the parties received copies of the transcript of the proceedings and the parties each filed memoranda setting forth their factual and legal arguments. Having now carefully considered the entire record, the testimony and exhibits introduced at the evidentiary hearing, and the filings and arguments of the parties, the Court makes the following findings.

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

I. Involvement of Paul Archer and Robert Johnston

On September 12, 2002, two months after applicant was arrested, attorneys Paul Archer and Robert Johnston met with applicant at the Charleston County Detention Center. Petitioner's

¹ The Court finds it necessary to summarize the facts concerning the manner in which applicant's trial counsel became involved in the case as well as the trial and post-conviction proceedings before addressing the legal claims at issue.

Exhibit 20; PCR Tr. 550.² At this point, Judge Dennis had already appointed attorneys Glenn Churchill and Peter Beck to represent applicant. The meeting on September 12, 2002, took place without the knowledge or consent of Churchill or Beck. PCR Tr. 550. Some time before or after this meeting, Johnston drafted a "Criminal Fee Agreement" which outlined an agreement between applicant's grandmother and Archer and Johnston for legal representation. Petitioner's Exhibit 21. In this document Johnston indicated that he and Archer had already spent a "substantial amount of time" on applicant's case. Petitioner's Exhibit 21. Pursuant to the agreement applicant's family would pay a non-refundable sum of \$10,000 after which Archer and Johnston would file a motion to be substituted as counsel for applicant. Petitioner's Exhibit 21. Indeed, Johnston was unable to dispute that it is possible, consistent with a representation made by applicant's grandmother in a taped phone call to applicant while at the Charleston County Detention Center, that he and Archer were paid the \$10,000 on September 12, 2002, the same day that they met with applicant at the jail. PCR Tr. 556.

In late September, Johnston and Archer filed a motion to be appointed as counsel for applicant. A hearing on that motion was held on October 18, 2002. Johnston and Archer did not reveal their substantial contact with applicant nor the fact that they had entered into a fee agreement and had been paid.³ Ultimately, they withdrew the motion when Judge Dennis expressed a reluctance to compensate them for time traveling from their out-of-circuit office to Charleston. Tr. 19. Subsequently, on November 19, 2002, Archer was paid \$20,000 by applicant's family. PCR Tr. 604. Thereafter, Johnston and Archer entered their appearance on

² The Court will refer to the applicant's exhibits at the PCR hearing as "Petitioner's Exhibits" in keeping with the court reporter's reference. I reference the trial transcript and the PCR hearing transcript as "Tr." and "PCR Tr.," respectively.

³ They did not inform Judge Dennis that they had entered into a private agreement with applicant's family nor that they had accepted money from the family despite a direct question in

behalf of applicant.

Archer and Johnston had approximately five months to prepare for applicant's capital trial. Petitioner's Exhibit 14, ¶ 1 (indicating that as of December 12, 2002, Archer and the Johnston were "handling all of [applicant's] representation."). Archer was responsible for the guilt-or-innocence phase preparation and Johnston was responsible for the sentencing phase preparation. Petitioner's Exhibit 14, ¶ 2-3. The December 12, 2002, letter explaining this division of labor is consistent with Archer's testimony at the PCR hearing. PCR Tr. 590, 607 ("[I]n the sentencing phase there is a lot of paperwork, and I just don't do that."); 591 ("Yeah, I can try the penalty part in two seconds. Somebody who have [sic] to do the leg work for me . . ."); 609 ("Q: You did not help investigate in preparation for the sentencing phase? A: Correct.").

Despite having only a few months to prepare for a capital trial, Archer and Johnston did not hire a single expert or investigator to assist with the sentencing phase. There were two reasons for this failure. First, Archer and the Johnston mistakenly believed that since they were retained by applicant's family, they were not entitled to state funding for experts even though applicant was indigent and had previously been appointed counsel. PCR Tr. 452, 494. In fact, Johnston had never before utilized the services of an expert in a criminal case. PCR Tr. 452. Had either attorney contacted the South Carolina Office of Indigent Defense (now the South Carolina Commission on Indigent Defense), he would have learned that applicant was eligible to receive funds for investigative and expert assistance owing to his indigency and regardless of his family's ability to partially pay for legal representation. Petitioner's Exhibit 24 (Affidavit of Lisa Graves of SCCID).

this regard from Judge Dennis. Tr. 16-17.

4 

The second reason appears to be based on financial considerations. Archer and Johnston recognized that they needed experts. Indeed, Archer utilized the free services of a live-in girlfriend to assist in the interpretation of the autopsy report and some childhood psychiatric records. PCR Tr. 588, 594, 604-605. Archer's girlfriend was a family physician with no training or experience in forensic psychiatry. PCR Tr. 588, 606. Furthermore, Johnston recognized from reviewing applicant's school records that "something happened" around the sixth grade and that developing an understanding of what was going on in applicant's life during that time would have been useful. PCR Tr. 462, 496-497. However, given their misunderstanding about the availability of state funds for experts, Archer and Johnston could only hire experts by using the funds paid to them by applicant's family. In fact, Johnston told the family that he would "work with" them on his fees in light of expenses for experts. Petitioner's Exhibit 14, ¶ 6. In other words, it is apparent that the amount of money that Johnston would ultimately receive was dependent on whether he used any funds for experts or investigators. Archer and Johnston chose to forgo hiring any experts leaving Johnston to conduct the entire sentencing phase preparation himself. As a result, substantial information and documentation was never obtained, including *inter alia*, records and information surrounding applicant's pre-trial diagnosis of post-traumatic stress disorder, PCR Tr. 581; records documenting a family history of medical and mental illnesses, PCR Tr. 581, and; criminal records regarding applicant's mother and stepfather. PCR Tr. 581.

As of March 2003, Archer and Johnston were still preparing for the guilt-or-innocence phase of the trial. At a pre-trial hearing in March, Archer stated, "Well, first of all, I would like to say that we got involved in this a couple of months ago. We've had four months to prepare for a death penalty case. There was a comment in chambers that it is probably going to be 90

percent penalty and 10 percent guilt [sic]. The problem is, the more discovery that we receive, because we are still working on the guilt part . . ."). Tr. 1927; *see also* Respondent's Exhibit 4 (March 11, 2003 letter from Johnston to Archer listing tasks to be done in preparation for trial. Almost every task relates only to the guilt-or-innocence phase of the trial.). To be sure, Johnston testified that he began work on sentencing phase preparation at his first meeting with applicant by requesting that applicant write his "life story." PCR Tr. 448-449. It is unclear whether this occurred at the September meeting at which time Johnston was not applicant's attorney or after Johnston had entered his appearance in December 2002. Also, in mid-February 2003, three months before trial, Johnston mailed form letters to a variety of potential witnesses and family members. The letters requested that the recipients contact Johnston. Respondent's Exhibit 5. It is apparent from the letters that Johnston had not spoken to any of these people, including applicant's biological father.⁴ Respondent's Exhibit 5. In April, less than one month before trial, Johnston sent applicant a letter complaining that applicant had not yet compiled the witnesses to be called at trial. Johnston had formulated his own list. Respondent's Exhibit 6. For the most part this list of witnesses was the same group to whom Johnston mailed the form letters in February.⁵ PCR Tr. 483. Johnston was never able to locate a single document memorializing a conversation with any potential witness. Furthermore, Johnston could not say whether he and Archer had met with applicant more than two times.⁶ PCR Tr. 441. Johnston did elaborate that

⁴ The body of each letter, including the letter to applicant's father, began with the following: "I am one of the attorneys representing Jessie [sic] Sapp. Your name was provided to me by Mr. Sapp and his mother, Cathy Catchings."

⁵ It appears from this letter that Johnston did not realize that "Robert Sapp" and "Robert Sapp, Jr." were the same person, applicant's biological father. He placed Robert Sapp in the first list and then placed Robert Sapp, Jr. in the second list with a notation that he did not have his address. However, he did have the address and had previously mailed a form letter to applicant's father.

⁶ This is consistent with Johnston's pre-trial representation that he had met with applicant a

he and Archer had met with applicant "[a]s many times as we needed to. You know, there is a point in the representation when you don't need to meet with your client, it's kind of like a bell curve. You start out needing to meet with your client frequent [sic] at the beginning of the case to gather information and to formulate a direction for the case." PCR Tr. 441-442.

Johnston waited until April 16, 2003, a month before trial, to write an introductory letter to Dr. David Baggett, M.D., a family physician who had seen applicant as a patient. Petitioner's Exhibit 18. Eventually, the defense called Dr. Baggett as a witness in the sentencing phase of the trial. Johnston never discussed with Dr. Baggett the substance of his anticipated testimony. PCR Tr. 12. Dr. Gordon Kimbrell, a Charter Psychiatric Hospital psychologist who administered testing to applicant as a 14-year-old inpatient, recalled a similar experience. Dr. Kimbrell was subpoenaed as a witness for applicant and appeared in the courtroom in Berkeley County only to learn that he was not going to be called. Dr. Kimbrell did not recall having a single substantive conversation with Johnston or Archer about his potential testimony. Petitioner's Exhibit 25, ¶ 2-4. Dr. Kimbrell's recollection puts into context Johnston's testimony during the PCR hearing on this topic. At first Johnston thought that he had spoken with Dr. Kimbrell though he was not certain. PCR Tr. 526-527. He further believed that Dr. Kimbrell was not "receptive to cooperating whatsoever." PCR Tr. 530. Johnston could not recall precisely why he thought this but believed that Dr. Kimbrell had indicated that he did not even know what the trial was about. PCR Tr. 531-532. Johnston was unable to recall having a substantive conversation with Dr. Kimbrell but assumed he had "substantial contact" with him because he had written Dr. Kimbrell's home telephone number on a potential witness list. PCR Tr. 531-532. Johnston finally admitted that it was possible that he never had a substantive conversation with him about

"couple of times." Tr. 29.



his evaluation of applicant. PCR Tr. 534.

Likewise, Johnston waited until May 13, 2003, the week of trial, to subpoena Dr. Patrick McArthur, one of the evaluating psychiatrists at Charter Psychiatric Hospital. Petitioner's Exhibit 17; *see also* Petitioner's Exhibit 16. Dr. McArthur refused to comply with the subpoena because he had not been provided with a medical release of information and because he was given only 2-3 days' notice. Johnston initially testified at the PCR hearing that he was "95 percent sure" he spoke to Dr. McArthur. PCR Tr. 456. Later, on cross-examination, he could not recall if he spoke to Dr. McArthur. PCR Tr. 523, 525-526. There was also no documentation of any contact between Johnston and Dr. McArthur. PCR Tr. 536. Dr. McArthur's response to Johnston's subpoena indicate that they had never spoken about applicant since Dr. McArthur, even after being subpoenaed, had never been provided with a signed release of information form.

Sometime on or after May 7, 2003, Johnston faxed to applicant's mother a printout of a website regarding Axis IV psychosocial and environmental stressors.⁷ PCR Tr. 543-544; Petitioner's Exhibit 19. Johnston had placed x's next to a number of stressors he believed may have been present in applicant's life. PCR Tr. 544. Apparently, Johnston wanted applicant's mother to explain the stressors in applicant's life. PCR Tr. 543-544.

Despite the lack of investigation, Archer and Johnston were on notice of a significant amount of information. At Johnston's request, applicant provided a detailed, written "life story." PCR Tr. 545. The information provided to Johnston included, *inter alia*, the following:

- Applicant's mother suffered from mental illness. PCR Tr. 545.

⁷ This document was downloaded from the website http://ivy_league0.tripod.com/rhyme_of_the_ancient_wanderer. This website, still online today with the identical page printed out by Johnston, is administered by a 29-year-old satellite communications technician. *See* http://ivy_league0.tripod.com/rhyme_of_the_ancient_wanderer/id1.html.

- Applicant's mother abused drugs. PCR Tr. 545.
- Applicant's mother had been to jail. PCR Tr. 546.
- Applicant's stepfather abused drugs. PCR Tr. 546.
- Applicant's mother and grandmother attended drug and alcohol treatment at Fenwick Hall in Charleston, SC. PCR Tr. 547.
- Applicant's stepfather had been in jail. PCR Tr. 547.
- Applicant began to get sick because of fear for the safety of his mother and himself. PCR Tr. 547-548.
- Applicant suffered from depression when he was 12 or 13 years old. PCR Tr. 548.
- Applicant suffered from symptoms of anxiety and was home-bound. PCR Tr. 548.
- After applicant's friend killed himself, applicant drank every day and night until he passed out. PCR Tr. 548.

Nevertheless, counsel still did not think to hire any experts or to request a continuance to further develop these facts. Indeed, at a March 2003 pretrial motions hearing, Judge Dennis, having received a letter from applicant expressing concerns that Archer and Johnston were not going to be ready for trial, specifically invited defense counsel to move for a continuance and indicated that such a motion would be entertained. Tr. 1924, 1942. Archer refused to request a continuance and asked the court to disregard applicant's letter. Tr. 1958-1959.

II . Trial Proceedings

At trial, Archer and Johnson relied on the theory that the victim was shot by another state trooper and that several state troopers destroyed evidence and committed perjury to conceal this fact. Archer and Johnston continued to pursue this theory even in the sentencing phase of the trial. Indeed, Archer specifically tried to characterize the state troopers negatively in the hope that a juror already inclined to dislike law enforcement would sentence applicant to life. "So I



know for a fact that there are some people that basically don't like police officers, you know they get a speeding ticket and they don't like it and they just feel that, so." PCR Tr. 593. Archer's reliance on residual doubt in the sentencing phase did not get very far. The prosecution objected to Archer's opening statement when it became clear that he was arguing residual doubt. Tr. 1864. It is unclear whether Archer was aware that the South Carolina Supreme Court had ruled that residual doubt is not an appropriate consideration in the sentencing phase of a capital case. PCR Tr. 616.

Specifically, at trial Archer theorized that another trooper shot the victim while they were trying to shoot applicant as he was running away. Because the shooting occurred at a license checkpoint, there were numerous witnesses who indicated that applicant had shot in the direction of the victim. Furthermore, the ballistics testing clearly established that the bullet fired from applicant's gun killed the victim. Tr. 1430, 1433-1434. Indeed, as early as February 2003 Archer recognized that this ballistics evidence completely undermined the working defense theory that this shooting was the result of friendly fire. Petitioner's Exhibit 13 (February 6, 2003 letter from Archer in which he stated, "Tracing [applicant's] gun to the bullet, and the fact that the bullet entered the office [sic] at a 45 degree angle, just about shoots down any theory of another police officer shooting Johnson."). Johnston conceded that if the state's expert was to be believed, then the ballistics evidence did in fact remove any possibility that this was a friendly fire incident. PCR Tr. 512-513. Archer and Johnston did not hire an expert to refute this evidence. PCR Tr. 514. Ultimately, Johnston conceded that their defense could have alienated the jury. PCR Tr. 562.

As for the sentencing phase, Johnston candidly admitted that they did not have a theory. PCR Tr. 487. Indeed, in Johnston's opinion attorneys do not utilize a theory in the sentencing

phase of a capital case. Rather, he put up "adorable" and crying witnesses in the hope that they would "appeal" to one juror. PCR Tr. 487. When asked what he wanted the jury to understand about applicant, Johnston could not recall "anything specific." PCR Tr. 488. He did recall that applicant "started off as a normal kid" and he wanted to "paint that picture." PCR Tr. 488. Ultimately, however, it was Archer who conducted all the direct and cross-examinations as well as the closing argument in the sentencing phase. At the last minute Archer had to present the sentencing phase evidence because Johnston did not feel well. PCR Tr. 590. "[T]hey were really not my witnesses. [Johnston] didn't feel well and I said, just give me the file. And I just took over." PCR Tr. 590. Archer was not aware of the anticipated testimony of the sentencing phase witnesses. PCR Tr. 590-591. Further elaborating on this point Archer testified that "I didn't interview any of [the penalty phase witnesses]. I mean a file was shoved in front of me and I got up and I started to ask questions." PCR Tr. 597. Specifically, he explained that he had never spoken to Susan Lantz, applicant's aunt, or James Catchings, applicant's brother before they testified. PCR Tr. 599.

In the end, the sentencing phase presentation, occupying only 50 pages of the transcript, consisted primarily of several family members recounting portions of applicant's life. The mitigation case relied primarily on applicant's aunt, Susan Lantz, his seriously mentally ill mother, Cathy Catchings, and his younger brother, James to describe generally applicant's childhood and his family life.

III . Post-Conviction Relief Proceedings

The evidence case presented to this Court after an appropriate investigation revealed substantial mitigation the jury never heard. This evidence provided a complete social history documenting a childhood filled with abuse, mental health problems, and a chaotic and constantly



changing home environment. The witnesses were also able to explain the effect of applicant's genetics and his childhood on him and his actions leading up to and on July 7, 2002. The following represents a summary of the mitigation case presented at applicant's post-conviction hearing.

A. Applicant's Background

Applicant was born to a drug addicted mother named Cathy Catchings whose own history included reform school, foster care, custody of the Department of Social Services, juvenile detention and significant mental illness. PCR Tr. 54. By the time applicant's mother was 11 years old, she had already been diagnosed with depression. PCR Tr. 54. Around this age she also began to use alcohol and drugs and seemed "completely out of control." PCR Tr. 54. Applicant's mother also suffered from long-term symptoms of anxiety. Other members of applicant's maternal side of the family had substantial patterns of mental, emotional and behavioral impairments as well as pervasive substance abuse problems. PCR Tr. 37. Applicant's mother married his father when she was 18 years old. At this point, she was taking Prozac for depression. PCR Tr. 57. She soon became pregnant with applicant who was born in 1979. PCR Tr. 58. Cathy's erratic behavior worsened and she would leave for weeks at a time. PCR Tr. 59. Family members became concerned about her inability to nurture and care for applicant and began to take him for extended periods of time.

When applicant was two years old, his mother moved in with another man, Robert Catchings, who would later become applicant's stepfather. Robert Catchings physically abused applicant's mother. Cathy's unpredictable behavior continued and she would forget to pick up applicant from daycare. PCR Tr. 67. Applicant began demonstrating symptoms of stress including throwing up and not sleeping. PCR Tr. 68-69. When applicant was a toddler, Cathy

and Robert Catchings began to steal lawn mowers at night. Applicant was in the car with them during these crimes. PCR Tr. 69. Cathy and Robert were using drugs and Cathy was periodically in legal trouble. PCR Tr. 69. At this point Cathy and Robert began to teach applicant that the police were bad and that "they will come take your mother away." PCR Tr. 69.

The chaos of applicant's home life continued when he started school. When applicant began the first grade, his mother was in jail. They corresponded by mail and had an ongoing game of tic tac toe. PCR Tr. 72. When applicant began second grade, his mother and grandmother were admitted to Fenwick Hall in Charleston for drug and alcohol treatment. PCR Tr. 73. During this time applicant's stepfather, Robert Catchings, was serving 18 months in a Florida prison for burglary. PCR Tr. 73. Applicant was living with his father in Florida. After his mother left Fenwick Hall, she took applicant from Florida back to Charleston. PCR Tr. 73. Once Robert Catchings was released from prison he came to live with applicant and his mother and he began stealing again. Robert and applicant's mother continued to reinforce the idea that any knock at the door could be the police coming to take them away.⁸ PCR Tr. 74. Robert continued to physically abuse Cathy and applicant would frequently try to intervene. PCR Tr. 75. Applicant continued to become sick and throw up during this time. PCR Tr. 80. Applicant's father and stepmother noticed that whenever applicant returned to live with them, he was shaky, sweaty and would become withdrawn in the presence of a large number of people. PCR Tr. 80. However, after about a month applicant would generally return to normal and was a respectful and easy-to-manage child. PCR Tr. 82-83.

In the fourth-grade applicant was doing very well in school both academically and

⁸ In fact, this mis-socialization of applicant regarding law enforcement manifested itself in significant symptoms of anxiety when police officers came to applicant's school to visit the students. PCR Tr. 77-78.

socially. PCR Tr. 84; Petitioner's Exhibit 5. A teacher noted that applicant was a "super worker," a "very pleasant boy," and she was "looking for great things from [him] in the years to come!" PCR Tr. 85; Petitioner's Exhibit 5. The following school year saw a dramatic change in applicant's school progress. Applicant still maintained above average grades, but they had dropped from the previous year. The marks for social development, work habits, and effort, however, were significantly lower than the previous year. PCR Tr. 86; Petitioner's Exhibit 6. Indeed, applicant did not receive one satisfactory score in either social development or work habits.⁹ PCR Tr. 87.

During this time applicant was becoming increasingly worried about his mother's safety. There were substantial periods of time during which applicant could not locate her. PCR Tr. 88. Applicant also learned that his mother had married Robert Catchings. PCR Tr. 89. Applicant began to get in trouble at school and at home and was sent to live with his mother again. PCR Tr. 92. He started using alcohol around this time. PCR Tr. 92-93. Applicant also began to feel hopeless, so much so that his mother believed he needed professional help. PCR Tr. 96. At the age of 14 applicant was admitted to Charter Psychiatric Hospital. PCR Tr. 97. He was diagnosed with depression and prescribed Prozac. PCR Tr. 99. The psychiatrists also noted his anxiety symptoms, and his school records reflect that applicant had panic attacks. PCR Tr. 102. Back at home applicant engaged in "anticipatory behavior" which included playacting in front of a mirror in the morning in an attempt to anticipate the day's events. This behavior is consistent with the behavior of children living in unpredictable environments. PCR Tr. 136.

When applicant was 17 years old, he witnessed the suicide of his best friend. Applicant and several friends were at applicant's trailer drinking and smoking marijuana. PCR Tr. 103. At

⁹ It is this drastic change in school performance that Johnston noticed.

some point the others left leaving applicant and his best friend, Virgil. Applicant saw Virgil put a gun in his mouth and assumed he was joking. Applicant heard a "pop" and it took a few moments before he realized what had happened. PCR Tr. 211. When he recognized that blood was coming from his friend's mouth, he called 9-1-1. While he was on the phone with the 9-1-1 operator, he thought Virgil was trying to speak but he was unable to make out the words. PCR Tr. 212. Applicant could smell the blood and gunpowder while he was sitting with his friend and holding his head. PCR Tr. 212. Applicant still recalls the song which was playing while he was waiting for the ambulance to arrive. PCR Tr. 212. He was distraught after this episode and was subsequently diagnosed with post-traumatic stress disorder (PTSD). PCR Tr. 104. Consistent with people suffering from PTSD, applicant avoided the vicinity of the trailer where this happened and also suffered intrusive thoughts of the episode. PCR Tr. 227. He began to drink more heavily at this point. PCR Tr. 218.

Shortly after this event, Robert Catchings was sentenced to eight years in prison for drug trafficking. PCR Tr. 104. Applicant was now responsible for supporting his mother and little brother. Applicant accomplished this by selling drugs as his stepfather had taught him. PCR Tr. 105. For the first time, applicant began to garner the respect of his mother and stepfather. At one point, applicant came home and tossed a bag of money on the bed. His mother was on the phone with his stepfather who was still in prison. His mother looked at applicant and the money and said to his stepfather, "I feel like I'm looking at you." PCR Tr. 109. Applicant imagined that this feeling of recognition was similar to what high school students must feel at graduation. PCR Tr. 108. Despite engaging in this criminal conduct, applicant tried to be a father figure for his little brother, James. He taught him how to ride a bike and would use humor to help his brother deal with the stresses of their life. PCR Tr. 107. For example James was afraid to learn how to



ride his bicycle because they lived near a busy street. Applicant, therefore, brought James and the bicycle into their apartment which contained almost no furniture. Applicant rode the bike inside the house to help teach James and purposely crashed into the wall to make James laugh. PCR Tr. 106-107.

By this time applicant was using drugs and drinking heavily, and he was arrested for a variety of primarily drug-related offenses. PCR Tr. 111. In May of 2001, applicant was sentenced to jail but was allowed to leave during the day as part of a work release program. PCR Tr. 153. While in jail he learned that his girlfriend, Krista Lewandowski, had become pregnant but that the child would probably not survive long after birth due to medical complications. PCR Tr. 112. In July 2001, around the time that applicant learned of his girlfriend's medical issues, he left for work and did not return to jail. Several months later applicant went to the hospital to be with his girlfriend during the delivery. He was able to hold his daughter before she died several hours after birth. PCR Tr. 112.

B. Effects of Applicant's Background

Jan Vogelsang, the social worker who conducted the social history investigation as well as a biopsychosocial assessment of applicant concluded that there was an accumulation of factors in applicant's life that placed him at "a high risk to end up someday in very serious trouble." PCR Tr. 114. These factors included having a mother who was severely mentally ill, abused drugs, and failed to provide adult supervision and support when applicant was a young child; witnessing serious physical violence against his mother at the hands of his stepfather, Robert Catchings; and being taught to fear the police at an early age. PCR Tr. 115-116. Moreover, Ms. Vogelsang found that there was insufficient compensation in applicant's life to undo the negative consequences of growing up in the unstable, unsafe and always changing environment that was

his childhood. PCR Tr. 118.

1. Anxiety and Post-Traumatic Stress Disorder

The instability of his environment, the violence he witnessed, and his genetic predisposition resulted in applicant suffering from anxiety at an early age and increased the likelihood that he would later suffer from post-traumatic stress disorder. Dr. Rebekah Bradley, an Emory University professor who treats war veterans suffering from PTSD and conducts research in the area of PTSD and childhood abuse testified about the relationship of applicant's childhood to his anxiety and PTSD diagnosis. She noted that the history of psychiatric disorders, specifically anxiety disorders, found in applicant's family as well as the violence witnessed and suffered by applicant increased his likelihood of developing post-traumatic stress disorder. PCR Tr. 183. 185-186. Specifically, Dr. Bradley identified three types of childhood experiences that placed him at high-risk for developing PTSD: he was the victim of physical abuse; he witnessed the physical abuse of his mother, and; he witnessed the suicide of his best friend. PCR Tr. 188.

While there were numerous occasions during which applicant witnessed or was the victim of physical abuse, there was one particular instance of abuse that Dr. Bradley found especially significant. Applicant was nine or ten years old and living with his stepfather. PCR Tr. 189. He and a friend were pretending to draw a Playboy Magazine when applicant's stepfather arrived home. The stepfather was clearly angry and sent applicant's friend home; applicant became nauseous and sweaty. PCR Tr. 190. Applicant's stepfather yelled at applicant calling him "fucking ignorant" and then pushed him hard against a wall. He then dragged applicant to the bathroom and forced him to actually eat a bar of soap. PCR Tr. 190. During this time applicant was crying and felt ashamed and embarrassed. After eating the bar of soap, applicant was beaten with a cord. PCR Tr. 191.

1- JLB

Applicant also witnessed the frequent abuse of his mother. Dr. Bradley noted one particular example. Applicant was eight or nine years old. PCR Tr. 196. One evening he walked into the bathroom and saw his stepfather injecting his leg with something which applicant understood to be drugs. PCR Tr. 195. Soon thereafter he heard his stepfather and mother fighting. He became anxious, nauseous and distressed. His mother grabbed him and his half brother who was living with them at the time and took them to the car. At this point applicant's heart was racing and he was sweaty. PCR Tr. 195. After having some trouble getting the car started, applicant's mother began to drive down the driveway when the car stalled. At this point applicant felt "frozen." PCR Tr. 196.¹⁰ When he looked through the back windshield, he saw his stepfather coming towards them. Due to the dust and the red light from the brakes, this image reminded him of the devil. Applicant's stepfather got to the car and assaulted his mother. PCR Tr. 196.

According to Dr. Bradley prior to turning twelve, applicant was an anxious child who worried constantly and felt nauseous frequently. PCR Tr. 198. Applicant was also sad for long periods of time at this age. PCR Tr. 199. Dr. Bradley's observations were consistent with the psychiatric report from Charter Psychiatric Hospital when applicant was 14. At that time, his mother indicated that he had been depressed for 18 months beginning when applicant was 12 years old.¹¹ Petitioner's Exhibit 15 (report of psychiatric evaluation). Prior to his admission at Charter, applicant was experiencing what Dr. Bradley called common anxiety symptoms including decreased appetite, social withdrawal and feelings of hopelessness. PCR Tr. 200. He also experienced suicidal ideations and a "sadness within his heart." Petitioner's Exhibit 15.

¹⁰ Dr. Bradley testified that this "frozen" feeling described by applicant is called "dissociation" and is a common report from people, especially children, who are terrified. PCR Tr. 197.

Ultimately, applicant was diagnosed with panic disorder and depressive disorder. PCR Tr. 201. Dr. Bradley concluded that applicant's childhood left him anxious and distressed generally, and he was more likely to suffer from PTSD and other associated problems such as substance abuse. PCR Tr. 208.

Even before applicant witnessed the suicide of his friend, Dr. Bradley observed symptoms of post-traumatic stress disorder; however, she was not able to definitively conclude that applicant met the diagnosis for PTSD at this point in his life. After Applicant witnessed the suicide, however, Dr. Bradley found that he clearly was suffering from PTSD. PCR Tr. 214. Consistent with research and her clinical work, applicant's substance abuse increased significantly after the death of his friend. PCR Tr. 218. Indeed, self-medication frequently coexists with PTSD. While such self medication may mask some of the symptoms of PTSD, it generally does not "cure" the person and sometimes worsens the symptoms. PCR Tr. 219.¹² In fact, applicant's substance abuse of drugs leading up to and on July 6 and 7, 2002, prevented Dr. Bradley from being able to diagnose applicant with PTSD during a specific time frame. PCR Tr. 220. However, Dr. Bradley was able to determine that applicant was suffering from symptoms of PTSD on July 7, 2002. She further concluded that applicant was "under the influence of emotional or mental disturbance" when he shot Trooper Johnson and that his mood and anxiety symptoms combined with his substance abuse and traumatic experiences "clearly impacted his decision-making capacities" on the evening of the shooting. PCR Tr. 221. Finally, Dr. Bradley

¹¹ This is the same time period during which applicant's school performance deteriorated.

¹² Dr. Schwartz-Watts, a forensic psychiatrist who evaluated applicant and whose testimony is discussed in detail *infra*, also noted the episode during which applicant witnessed his best friend shoot himself. She indicated that the short-term treatment he received after his diagnosis of PTSD, while sufficient as "crisis intervention," did not provide the type of long-term treatment which was necessary, especially in light of his prior admission to Charter Psychiatric Hospital. PCR Tr. 281-282.

19 JCWJ

concluded that applicant was mentally ill when he shot Trooper Johnson. PCR Tr. 221.

Dr. Donna Schwartz-Watts, a forensic psychiatrist, also evaluated applicant. As with Ms. Vogelsang and Dr. Bradley, Dr. Schwartz-Watts noted the pervasiveness of mental health illness and substance abuse in applicant's maternal side of the family. PCR Tr. 249-250. Dr. Schwartz-Watts indicated that because of Cathy's criminal arrests and convictions, she was separated from applicant on three occasions before he was eight years old. PCR Tr. 252. During these periods, applicant was moved to different caretakers and changed schools and residences in a sudden, unplanned manner which was disruptive to his childhood development. PCR Tr. 253.

Dr. Schwartz-Watts found one particular childhood incident remarkable. When applicant was three or four years old, he witnessed his stepfather punch his hand through a window. Applicant vividly recalled blood dripping in the bathtub. PCR Tr. 254. Dr. Schwartz-Watts indicated that this incident, while not involving violence directed at applicant, was nevertheless terrifying to him as a child. PCR Tr. 255. Indeed, the fact that applicant reported this incident at all was significant to Dr. Schwartz-Watts, because he, like many child victims, under reported the violence he witnessed as a child. PCR Tr. 255-257.

Dr. Schwartz-Watts found it significant that at the age of 14 applicant was diagnosed with depression and panic disorder, both Axis I mental illnesses. PCR Tr. 263. Psychological testing administered at the time also indicated depression. PCR Tr. 270. Even having worked at the Department of Juvenile Justice for fifteen years, she stated that such a diagnosis at that age was uncommon and cause for concern. PCR Tr. 263. She also noted that the onset of the depression, dating back to when applicant was twelve years old, was noteworthy because it was consistent with the onset of depression in other members of his family, particularly his mother who was diagnosed with depression at the age of eleven. PCR Tr. 264.

As did Dr. Bradley, Dr. Schwartz-Watts noted that applicant was suffering from suicidal ideation, depressed mood, behavioral difficulties, and feelings of hopelessness. PCR Tr. 264. Additionally, applicant showed symptoms of anxiety: stomach problems, nervousness, shakiness, increased sweating, and an increased heart rate.¹³ PCR Tr. 265. Additionally, Dr. Schwartz-Watts noted applicant's global assessment of functioning score of 40 when he was at Charter Psychiatric Hospital. According to Dr. Schwartz-Watts such a low score is an indication of severe mental illness and would qualify someone for disability. PCR Tr. 276. Moreover, this score suggested a major impairment in several areas of functioning such as work, school, family relations, judgment, thinking or mood. PCR Tr. 278.

According to Dr. Schwartz-Watts, the constellation of applicant's mental illnesses are consistent with clinical practice and research. "[P]ost-traumatic stress disorder is associated with increased rates of . . . major depressive disorder, substance-related disorder, panic disorder, agoraphobia, obsessive-compulsive disorder, generalized anxiety disorder, social phobia, specific phobia and bipolar disorder." PCR Tr. 285; DMS-IV-TR.¹⁴ In other words, the types of illnesses from which applicant suffered as a child and young adult were related.

Dr. Schwartz-Watts concluded that applicant was demonstrating symptoms of his mental illness the day and night of the crime. He was extremely anxious during this time, was using a number of substances, and was not sleeping. PCR Tr. 295. On the night of the incident, he first went to his ex-girlfriend's house. There were other people at the house which made him

¹³ These anxiety symptoms were a constant feature of applicant's childhood and remained with him as he grew older. Indeed, in October 2000 Dr. Schwartz-Watts noted that applicant suffered an anxiety attack after being pulled over by police. He had to be taken by ambulance to the emergency room and was found to be tachycardic with an irregular EKG. PCR Tr. 288-290.

¹⁴ The Diagnostic and Statistical Manual of Mental Disorders is used by all psychiatrists when diagnosing a patient. PCR Tr. 272-273. This Court granted applicant's motion to consider the DSM-IV a "learned treatise." PCR Tr. 273.

uncomfortable, a symptom of PTSD according to Dr. Schwartz-Watts. PCR Tr. 296. Later, when applicant approached the license check point, he could not think clearly and was unable to understand what his ex-girlfriend was saying to him. PCR Tr. 297. He began to feel as if he were under water and overheated, common symptoms of anxiety. PCR Tr. 298.

Dr. Schwartz-Watts found that applicant's history and mental illness influenced his actions on the night he shot Trooper Johnson. Further, she testified that applicant's anxiety and substance abuse substantially impaired his ability to conform his conduct and that he was under the influence of an emotional or mental disturbance at the time of the crime. PCR Tr. 305. She also concluded that applicant was suffering from symptoms of PTSD. PCR Tr. 306-308.

2. Substance Abuse

Dr. Alex Morton, a psychopharmacologist and professor of pharmacy practice and psychiatry at the Medical University of South Carolina evaluated applicant and his history of substance abuse. Generally, Dr. Morton found a number of factors which contributed to applicant's substance abuse, including a genetic predisposition, environmental factors, psychiatric disorders, and trauma. PCR Tr. 356-360.

Dr. Morton noted that applicant's use of alcohol began early, around eleven years old. PCR Tr. 356. In addition to alcohol, applicant, at the suggestion of his stepfather, began to use marijuana when he was 12 or 13 years old. PCR Tr. 100. His stepfather recommended marijuana to relieve a headache. Applicant would later go on to use other drugs including cocaine, methamphetamine, hallucinogenic drugs, morphine, Percocet, Valium, and Xanax. PCR Tr. 368-369.

Dr. Morton concluded that applicant was primarily using drugs and alcohol to mitigate the symptoms of his anxiety disorder and his depression. PCR Tr. 349-350. Dr. Morton found



that applicant carefully chose drugs that had some effect on his psychiatric symptoms, mainly his anxiety symptoms. For example, applicant rarely used marijuana, because it would cause or exacerbate his panic attacks. PCR T. 374. Similarly, applicant rarely used cocaine alone because it increased his anxiety symptoms even while relieving depressive symptoms. PCR Tr. 352, 360. This self-medication, while temporarily alleviating the symptoms of his psychiatric disorders, worsened their progression, intensity and frequency over time. PCR Tr. 347.

Ultimately, applicant's long-term and consistent use of drugs to self-medicate his anxiety and depressive symptoms resulted in severe addiction. PCR Tr. 346. While the short-term effects of his substance abuse may have been positive in terms of mitigating the symptoms of his mental illnesses, this abuse produced very negative long-term effects. In addition to worsening his psychiatric symptoms, applicant's substance abuse resulted in a high level of impulsivity, irritability, and inability to think clearly. PCR Tr. 375.

Specifically, on July 6, 2001, applicant used morphine, Percocet tablets, cocaine, and alcohol. PCR Tr. 372. In addition to the negative effects of these drugs discussed *supra* Dr. Morton noted that applicant was also suffering withdrawal from some of the drugs by the time he was stopped at the license check point. PCR Tr. 375. For example, Dr. Morton concluded that applicant was suffering from withdrawal from morphine which he had not consumed for several hours before the shooting. PCR Tr. 375. Dr. Morton testified that withdrawal symptoms generally produce erratic and unpredictable behavior. PCR Tr. 376. Dr. Morton concluded that applicant's underlying psychiatric issues and his substance abuse, in addition to generally producing unpredictable behavior, made it difficult for him to think logically as he approached the license check point and throughout the traffic stop. PCR Tr. 396.



INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Most, though not all, of applicant's claims are based on the failure of trial counsel to fulfill their constitutional obligation to provide effective assistance of counsel. Because of the prevalence of this claim throughout applicant's post-conviction relief application, I will provide a general overview of the law in this area.

"An ineffective assistance claim has two components: A[n applicant] 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, 687 (1984)). "To establish deficient performance, a[n applicant] must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 687). Under this standard, a reviewing court must "conduct an objective review of [counsel's] performance, measured for 'reasonableness under prevailing professional norms,' . . . which includes a context dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time[.]'" *Wiggins*, 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 688). And when counsel's challenged conduct is purportedly attributable to "tactical judgment," that judgment and the "investigations supporting" it must themselves be objectively reasonable. *Wiggins*, 539 U.S. 521.¹⁵

An applicant establishes prejudice by demonstrating a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 695. This standard requires a showing by less than a preponderance, and

¹⁵ As for applicant's claims that trial counsel failed to investigate, develop and present available mitigating evidence, Respondent has conceded that applicant's trial counsel performed deficiently. "Respondents [sic] acknowledge that the focus on these alleged deficiencies must be upon whether Sapp has proven the second prong under *Strickland*." Respondent's Post-Hearing Memorandum (hereinafter "RPHM") at 107.

is satisfied where "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. "[T]he question is whether '[counsel's deficient performance] could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (quoting *Kyles*, 514 U.S. at 435).

I. Applicant was denied his right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina Law by trial counsel's failure to investigate, develop or present mitigating evidence.

A. Introduction

Trial counsel's performance in this case fell below the minimum standard of professionally reasonable representation. One of applicant's attorneys had a policy of not conducting the "leg work" of a capital case thus leaving all of the investigation for the sentencing phase of the trial to his co-counsel who had never tried a capital case and had never used an expert of any type in a criminal case. To make matters worse, based on a blatant misunderstanding of applicant's right to funds for expert and investigative services and a general lack of knowledge of the role of experts in capital cases, counsel did not hire a single investigator or expert to assist with the sentencing phase which began about five months after the attorneys became involved in the case. The performance of counsel at trial was no better. The attorney who had no role in preparing for the sentencing phase was actually the attorney who conducted every direct and cross-examination during this phase. Indeed, he candidly admitted having never seen a file on some of the witnesses he questioned and not knowing who some of them were, including applicant's aunt and brother. Based on the lackluster pre-trial investigation trial counsel were unable to protect their client, object appropriately, or present evidence in mitigation. The result was not surprising - the jury was provided a one-sided, at times

inaccurate, portrayal of applicant and did not hear substantial information that put into context his actions on July 7, 2002, and more generally would have provided support for a life sentence.

As discussed *supra*, to prevail on an ineffective assistance of counsel claim, applicant must demonstrate that trial counsel's deficient performance prejudiced him. It is unnecessary to repeat here the facts of Archer and Johnston's involvement in this case and the lack of pretrial investigation and preparation generally. However, there are several aspects of trial counsel's representation that are remarkable. First, trial counsel had under five months to prepare for a death penalty trial and despite this tight timeframe, they did not begin working on the sentencing phase in any real way until approximately two months before trial. Even experienced capital defense attorneys assisted by a team of mental health experts and investigators would find it difficult to prepare in such a short amount of time. Second, trial counsel were made aware of a significant amount of information about applicant's background that required further investigation and development. Not only did the necessary investigation not occur but trial counsel explicitly refused to request a continuance despite an invitation for such a motion from the trial court.

Because of trial counsel's failure to conduct an adequate investigation, they were unable to: make informed judgments about which witnesses to call at trial, rebut inaccurate characterizations of applicant, and provide the jury with information which was relevant to his actions on July 7, 2002. The jury was left to put together on its own bits and pieces of information about applicant which were unexplained and often only mentioned in passing by witnesses who had not been prepared to testify.

A comparison of trial counsel's performance in applicant's case with the performance of trial counsel deemed deficient in *Council v. State*, 670 S.E.2d 356 (2008) is instructive. In both



cases the mitigation investigation was begun late and was incomplete. At trial in both cases the jury was provided with only a cursory outline of the defendant's life history. In both cases, post-conviction investigation revealed that the defendants were mentally ill. Moreover, the social histories of both Council and applicant were remarkable for the prevalence of mental illness and criminal activity of immediate family members and a dysfunctional home life that included violence and constant moving. *See Council* at *3. Nevertheless, at both Council's and applicant's trials the jury heard only family members' general testimony which failed to provide medical evidence or describe the mental health issues. Moreover, the limited testimony at these trials omitted significant and mitigating information about the childhood and family history of Council and applicant. *Council* at *10. As in this case, defense counsel in *Council* ultimately chose to present an already rejected guilt-or-innocence phase defense theory that the defendant was not guilty of murder.

The state supreme court concluded that the representation in *Council* was constitutionally inadequate; I believe that the facts of this case call for the same result. If anything, the case for relief here is even stronger than in *Council*, since the gruesome facts of Council's crime - a ghastly torture-rape-murder of a 72-year-old victim of a residential burglary - were far more egregious than those involved here, and applicant's burden of showing prejudice from his lawyers' sentencing-phase errors is comparatively less.

B. Deficient Performance

Trial counsel failed to conduct a meaningful investigation into applicant's background which ultimately led to their inability to rebut aggravating evidence and offer powerful mitigation that a reasonable investigation would have uncovered. The duty of defense counsel to conduct a thorough mitigation investigation into the background of a capital client is well-

established. *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000). Such investigation is required not only to develop mitigating evidence, but also to test the prosecution's case for the death penalty. "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecution.'" *Wiggins*, 539 U.S. at 524 (internal citation omitted) (emphasis in original); *see also Rompilla v. Beard*, 545 U.S. 374 (2005) (failure to review court file containing evidence relating to prior convictions was unreasonable when defense knew that prosecution intended to rely on it); *Council v. State*, 670 S.E.2d 356 (2008) (failure to conduct a meaningful investigation despite evidence suggesting its necessity was unreasonable). Moreover, the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (hereinafter ABA Guidelines) provide specific guidance concerning trial counsel's duties in a capital case.¹⁶ "[C]ounsel . . . have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation." ABA Guidelines 10.11.A (2003).

Decisions made to curtail a mitigation investigation are not entitled to deference if they were made on the basis of an incomplete investigation. In other words, a cursory investigation cannot justify a tactical decision regarding sentencing strategy. *Wiggins*, 539 U.S. at 527. While it is true that trial counsel need not undertake an investigation he reasonably believes, based on other information, will be fruitless, counsel cannot arbitrarily neglect to conduct an investigation - especially when, as in this case, the need for such an investigation is affirmatively shown by

¹⁶ The ABA Guidelines have been cited with approval by numerous federal and state courts, including the South Carolina Supreme Court. *See e.g., Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Council v. State*, 670 S.E.2d 356 (2008).



other information. Therefore, a court tasked with assessing the reasonableness of an investigation must consider whether the evidence known to the trial attorneys would lead a reasonable attorney to investigate further. "Even the limited information obtained should have put counsel on notice that [the defendant's] background, with additional investigation, could potentially yield powerful mitigating evidence." *Council* at *8. See also *Wiggins* 539 U.S. at 527; *Council v. State*, 670 S.E.2d 356 (2008) (strategic choices made by counsel after an incomplete investigation are reasonable "only to the extent that reasonable professional judgment supports the limitations on the investigation.") (quoting *McKnight v. State*, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008)) (quoting in turn *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)).

Trial counsel's failure to conduct a thorough mitigation investigation could not have been, and in this case was not, based on a legitimate tactical decision to forego such an investigation. Here applicant's counsel had sufficient, indeed significant, information about applicant that further investigation by a trained expert was necessary. What information Johnston did know about applicant's background was primarily gleaned from a 16-page single spaced "life history" written by applicant at Johnston's request. PCR Tr. 545. This document detailed substantial information about applicant's psychiatric problems and substance abuse as well as his family's psychiatric and criminal histories. Moreover, the Axis IV stressors printout from the internet described *supra*, establishes that Johnston believed that the following psychosocial and environment stressors, *inter alia*, applied to applicant: housing problems, death of a family member, physical or mental illness of a family member, disruption of family by separation, divorce, or estrangement, sexual or physical abuse, neglect of child, personal physical illness, death of a friend. PCR Petitioner's Exhibit 19.

In addition, based on his review of applicant's school records, Johnston recognized that "something happened" around the sixth grade. PCR Tr. 462, 496. Johnston candidly admitted that based on the drastic change in school performance, he needed experts and investigators to assist in determining the cause of this change. PCR Tr. 496.¹⁷ Similarly, Johnston obtained applicant's Charter Psychiatric Records from his inpatient treatment at the age of 14. However, Johnston and Archer, without any assistance from a psychiatrist or other mental health expert, were unable to evaluate the records and understand their importance. PCR Tr. 520-521.¹⁸ These records indicated that when applicant was 14 years old he had been diagnosed with major depressive disorder, panic disorder, and that his global assessment of functioning was so low as to qualify someone for disability. Such important historical records would put any reasonable attorney on notice of the need for further investigation and expert assistance.

The overarching reason for trial counsel's failure was the erroneous belief that they were not entitled to funding.¹⁹ Therefore, trial counsel did not hire a single expert or investigator to assist with the sentencing phase investigation. Specifically, the failure to utilize the services of a qualified expert to compile a social history of applicant was simply unreasonable. *Wiggins*, 539

¹⁷ Ultimately, having no investigator or experts, Johnston decided that bringing the school records into evidence was "more trouble than it was worth." PCR Tr. 462.

¹⁸ Despite lacking an understanding of these medical records Johnston decided not to utilize them in any fashion because of some statements made by applicant which were "stuff we didn't want in court." PCR Tr. 460. However, Archer and Johnston had made sure that the state obtained their client's psychiatric records by having applicant sign a release of this information to the solicitor's office. Indeed, it was the prosecution who received these records first and provided them to the defense. Therefore, had the prosecution wanted to use the information in these records in its case-in-chief, it could have. In other words, Johnston's uninformed desire that he did not want this "stuff" in court had no bearing on whether the prosecution could present this evidence.

¹⁹ As discussed *supra* at 4, Archer and Johnston wrongly believed that since they had been retained by applicant's family, applicant was not entitled to state funding for experts and investigators despite his indigent status. Johnston conceded that had he simply contacted the South Carolina Commission on Indigent Defense, this misunderstanding would have been

U.S. at 524 (counsel's decision not to commission a forensic social worker to put together a social history was unreasonable); *Council v. State*, 670 S.E.2d 356(2008) (despite the availability of funds, counsel did not hire a social history investigator but instead relied upon his law partner and an investigator neither of whom were trained to evaluate the information for its use at trial).

Without assistance from qualified investigators, trial counsel, like the defense attorneys in *Council*, were responsible for conducting the social history investigation. However, as the testimony at the PCR hearing made clear, only Johnston had any role in developing mitigation. PCR Tr. 589-590. As in *Council* Johnston had no training or experience in preparing a social history. Indeed, applicant's capital trial was Johnston's first. PCR Tr. 493. Johnston's lack of experience and training led to a number of serious errors resulting in his inability to gather information and properly evaluate what little information he did manage to obtain.

From the outset Johnston was operating with such a short amount of time that even an experienced capital defense attorney would have had difficulty being ready for trial. Johnston's sentencing phase preparation began less than three months before trial. *See Council v. State*, 670 S.E.2d 356 (2008) (duty to investigate begins at the outset of a capital case). In February 2003, he sent out form letters to applicant's family, including his biological father, and friends. These form letters failed to generate substantial information. Moreover, Johnston first made contact with applicant's treating family physician less than one month before trial and even then only by way of a letter of introduction indicating that Johnston planned to contact the doctor "in the near future." PCR Tr. 528-529; Petitioner's Exhibit 18. Similarly, Johnston first attempted to contact a treating psychiatrist, Dr. Patrick McArthur, from Charter Psychiatric Hospital after applicant's trial had already begun. Dr. McArthur received a subpoena from Johnston on May 13, 2003. He

resolved and experts and investigators would have been retained.



had not previously spoken to Johnston, or anyone else representing applicant, and did not have a signed release of information from applicant; therefore, he refused to comply with the subpoena. Petitioner's Exhibit 17.

Without expert assistance, Johnston made a limited but failed effort to gather social history information. For example, just a week before trial Johnston, in an attempt to gather basic social history information, sent to applicant's mother a list of various Axis IV stressors. Johnston obtained this list from a website. *See supra*. Based on the information he had obtained up to that point, he had put "x's" next to various stressors and asked applicant's mother to "answer" them. PCR Tr. 543-544; Petitioner's Exhibit 19. Severely diminishing any chance of constructing a reliable social history, Johnston also failed to obtain, or even seek, numerous records pertaining to applicant's psychiatric and medical history as well as records regarding his family. *See supra* at 5 for partial list of documents; *see also Von Dohlen v. State*, 360 S.C. 598, 606, 602 S.E.2d 738, 742 (2004) (court found trial counsel ineffective for failing to provide expert with records that were available prior to trial and which would have allowed the expert to correctly diagnose the defendant).

C. Prejudice

As previously discussed, to establish a violation of applicant's Sixth Amendment right to the effective assistance of counsel, applicant must establish that counsels' errors, individually and cumulatively, affected the outcome of the sentencing proceeding such that absent these errors there is a reasonable probability that the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). This review is not a mathematical equation and must take into account the unfettered discretion of the jury to sentence a capital defendant to life. *See State v. McClure*, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000) (in reversing sentence the court



recognizes that "the evaluation of the consequences of an error in the sentencing phase of a capital case are more difficult because of the discretion that is given to the sentencing jury").

The requirement that applicant demonstrate prejudice does not mean that he must show that the jury heard no mitigating evidence. Indeed, in *Council* the jury heard from the defendant's mother who told the jury that her son had received mental health treatment as a young child, that he had been teased as a child and had suffered a severe burn in a cooking accident. *Council* at *2. Similarly, at applicant's trial the jury was informed in a general way about some of his childhood, including that he suffered from mild depression, that his mother abused alcohol, and he had emotional problems. Tr. 1820-1831. However, as in *Council*, this information, especially the information about applicant's psychiatric history and diagnosis at the time of the crime, went unexplained. In fact, Archer in his sentencing phase closing argument told the jury that applicant was not mentally ill, an assertion not based on evidence and, as it turns out, inaccurate. In the end, without an expert, and unbiased, explanation of the causes of applicant's mental illnesses and their impact on his actions on July 7, 2001, the jury was simply left to speculate.

When examining the facts of the crime to determine whether the mitigating information not presented at trial could have resulted in a different outcome, it is useful to review the underlying facts of *Council*, a case which was substantially more aggravated than the facts of applicant's trial. Council was convicted of an horrendous rape and murder of an elderly woman, the facts of which were summarized by the state supreme court:

On the evening of October 9, 1992, police discovered the body of seventy-two-year-old Elizabeth Gatti underneath a bedspread in her basement. She had been hogtied with a white cord and layers of duct tape were wrapped around her entire head. Her clothes had been ripped, and the crotch of her underwear had been cut out. Surrounding her body were various bottles of cleaning fluids which

she had been forced to ingest. Mrs. Gatti had been sexually assaulted. . .

Council at *1. On these facts Council was found guilty of six aggravating factors: criminal sexual conduct, kidnapping, burglary, larceny with the use of a deadly weapon, killing by poison, and physical torture. *Council* at *2. The facts of applicant's case, while certainly tragic, were not this aggravated and at trial the state relied upon only two statutory aggravating circumstances: knowingly created risk of death of more than one person and the murder of a state law enforcement officer. Tr. 1974.

In terms of prejudice review from the perspective of the effect of trial counsel's failures on the presentation of evidence, applicant's case falls squarely in line with cases in which courts have found prejudice. *See Rompilla*, 545 U.S. at 390-393 (defendant was prejudiced by trial counsel's failure to review prior conviction file which revealed information concerning defendant's mental health issues, troubled upbringing, and substance abuse); *Williams v. Taylor*, 529 U.S. 362, 397-398 (2000) (defendant was prejudiced by trial counsel's failure to investigate and present substantial mitigating information about his childhood and his borderline mental retardation); *Von Dohlen*, 360 S.C. at 608, 602 S.2d at 743 (defendant was prejudiced by trial counsel's failure to investigate and prepare adequately expert testimony concerning the defendant's mental health). Trial counsel's failures and the effects on applicant's case are not at all similar to the facts of cases in which the state supreme court has found no prejudice. *See Simpson v. Moore*, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006) (no prejudice found for trial counsel's failure to offer sufficient social history information in a case where trial counsel had conducted numerous social history interviews, used an investigator to gather background information on the defendant, called three experts to testify about the defendant's troubled childhood, his low I.Q., substance abuse and mental illnesses including schizophrenia,



depression and PTSD); *Jones*, 332 S.C. at 336-39, 504 S.E.2d at 826-27 (no prejudice found where trial counsel presented six social history witnesses and a psychologist who testified that defendant was mentally retarded, had brain damage and acted impulsively).

D. Conclusion

Having found that trial counsel performed deficiently and having found that trial counsel's errors prejudiced applicant during the sentencing phase of his trial, I find that applicant's constitutional right to the effective assistance of counsel was violated and that his death sentence must be vacated.

II. Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated by trial counsel's failure to develop and present evidence regarding applicant's adaptability to prison.

A. Relevant Facts

At trial, the prosecution presented evidence that applicant had escaped from the Charleston County Detention Center when he shot Trooper Johnson. Tr. 1638-1639. The escape stemmed from applicant's failure to return to the jail from work release in July 2001. Tr. 1638-1639. He remained on escape status for a year.

For his part, Johnston who was in charge of preparing for the sentencing phase, PCR Tr. 590, did not present any evidence, lay or expert, regarding applicant's likely adaptability to prison. Indeed, counsel did not even consult with a prison adaptability expert to determine whether such testimony may have proven useful. As discussed in detail *supra*, counsel's failure to hire an expert stemmed from his erroneous belief that funding was not available. PCR Tr. 460. Moreover, Johnston had never used an expert in a criminal case and was generally unaware of the importance of experts in a capital trial. PCR Tr. 452, 493. Neither Johnston nor Archer

articulated a strategic reason for failing to introduce testimony that applicant would not pose a safety risk if sentenced to life in prison. However, Johnston did testify that they did not have a sentencing phase theory. PCR Tr. 487 ("I don't know that we had a theory [in the sentencing phase].").

As part of the post-conviction investigation, applicant retained James Aiken to conduct an assessment of his adaptability to prison. Mr. Aiken is a nationally recognized expert in inmate classification who began his career in South Carolina in 1971. PCR Tr. 408. He was the warden of the South Carolina women's correctional institution as well as the now defunct Central Correctional Institution. PCR Tr. 411. Mr. Aiken was then promoted to deputy regional administrator and subsequently moved to Indiana where he became the commissioner for the state's corrections department. PCR Tr. 412. The Department of Justice has frequently used Mr. Aiken as a consultant to train the wardens of federal correctional institutions, and he currently serves on a congressional commission which was established to address the problem of prison rape. PCR Tr. 413-414. Mr. Aiken estimated that he had classified thousands of inmates during his career and implemented classification systems in numerous institutions. PCR Tr. 416.

Mr. Aiken reviewed applicant's criminal history, materials regarding the shooting of Trooper Johnson as well as institutional records from the Charleston and Berkeley County jails at which applicant was detained for the year prior to his trial. PCR Tr. 420-421. He concluded that applicant could be managed by the South Carolina Department of Corrections without undue risk to staff, inmates or the general public.²⁰ PCR Tr. 423. Indeed, Mr. Aiken's only concern was that applicant would be harmed by other inmates or himself. PCR Tr. 423.

²⁰ Mr. Aiken noted that an inmate sentenced to life imprisonment is housed in the most secure institution and would never have an opportunity to leave the prison grounds for work release. PCR Tr. 418-419.

B. Legal Analysis and Conclusion

Trial counsel's failure to develop and present evidence regarding applicant's adaptability to prison represented deficient performance. A defendant's adaptability to prison, and the likelihood that he will not pose an undue risk of future violence in prison, is a category of mitigation that has been specifically recognized as constitutionally relevant by the United States Supreme Court. *Skipper v. South Carolina*, 476 U.S. 1 (1986). Moreover, the South Carolina Supreme Court found counsel ineffective based on their failure to develop and present such evidence. *Nance v. Ozmint*, 367 S.C. 547, 557, n.8, 626 S.E.2d 878, 883, n.8 (2006), *cert. denied*, 127 S.Ct. 131 (2006); *see also Williams v. Taylor*, 529 U.S. 362, 396 (2000) (granting habeas relief based in part on defense counsel's failure to present testimony concerning defendant's past and likely future good adjustment to prison).

Trial counsel's failure to present any evidence concerning applicant's prison adaptability was not based on a strategic reason nor supported by a reasonable investigation and, therefore, is not entitled to deference. Here, trial counsel's failure to present this evidence was not informed by strategy or investigation. Rather, they simply did not have funding for an expert, and generally did not recognize the importance of experts. Nevertheless, counsel had available to them applicant's pre-trial incarceration records from the Charleston and Berkeley County jails which established his good behavior for almost a year prior to trial. Applicant's lengthy pretrial detention during which he adjusted to incarceration would have provided a substantial basis for the jury to believe that applicant would not pose a risk if sentenced to life in prison. As Mr. Aiken put it, "institutional behavior is a better predictor [than community behavior] of future institutional behavior." PCR Tr. 421.

In addition, counsel knew, of course, that the prosecution would introduce evidence establishing that applicant had escaped from the jail while serving another sentence. While this "escape" was the result of applicant's failure to return from work release, it surely put the issue of applicant's future dangerousness in the jurors' minds. Mr. Aiken's expert opinion about applicant's likely prison adaptability as well as his specific testimony indicating that applicant would not be eligible for work release while serving a sentence of life imprisonment would have put to rest any concerns about his future dangerousness. In short, Mr. Aiken's testimony, or similar testimony from an expert or lay witnesses, would have provided a reason for the jury to sentence applicant to life. There is a reasonable probability that the failure of applicant's trial counsel to provide the jury with this crucial information affected the outcome of the sentencing phase. *See Strickland v. Washington*, 466 U.S. 668 (1984).

III . Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by trial counsel's reliance on an unsupported theory at the guilt-or-innocence and sentencing phases of the trial.

A. Relevant Facts

At trial the prosecution case established the following: In the early morning hours of July 7, 2002, applicant and former girlfriend Kathryn Boles approached a license check point. Tr. 1080. Kathryn Boles was the driver. Tr. 1080. Ms. Boles pulled the car over as instructed. Tr. 1082. A trooper approached the passenger side of the car and saw a bottle of beer on the floorboard. Tr. 1083. The trooper requested applicant's driver's license and proceeded to the rear of the truck to speak with Ms. Boles. Tr. 1085. The trooper gave applicant's license to Trooper Johnson who walked to the passenger side to look for more open containers. Tr. 1087. While the precise sequence of events was somewhat unclear based on the witnesses who were at the scene, it is clear that applicant shot Trooper Johnson once he arrived at the passenger side

door. Vello Paavel, a firearm and tool mark examiner with the State Law Enforcement Division, testified that the bullet which killed Trooper Johnson was fired by applicant's gun. Tr. 1430, 1433-1434. Mr. Paavel's testimony was not contradicted by any evidence and was supported by eyewitness accounts.

Prior to trial, applicant's attorneys pursued a theory that Trooper Johnson was shot accidentally by one of the other troopers who was trying to shoot applicant as he was fleeing. The ballistics testing and the trajectory of Trooper Johnson's wound did not support this theory. Indeed, in February 2003 Archer and Johnston recognized that the results of the SLED ballistics testing "[shot] down" their theory that Trooper Johnson was killed by another trooper. PCR Tr. 512; PCR Petitioner's Exhibit 13. Nevertheless, the defense at trial consisted of this very theory. Furthermore, Archer suggested that a videotape recorded the shooting but had been erased to conceal the fact that Trooper Johnson was shot by another trooper.²¹ Tr. 1060. The defense did not present expert testimony to refute the opinion of Vello Paavel. Moreover, the defense did not offer any evidence to rebut the eyewitness accounts of that night.

B. Legal Analysis and Conclusion

Trial counsel's reliance on an unsupported theory destroyed their credibility in the eyes of the jury. "A cardinal tenet of successful advocacy is that the advocate be unquestionably credible. If the fact finder loses confidence in the credibility of the advocate, it loses confidence in the credibility of the advocate's cause." *State v. Moorman*, 358 S.E.2d 502, 510 (N.C. 1987); *see also State v. (Jeffrey) Jones*, 343 S.C. 562, 578, 541 S.E.2d 813 (2001) (court's decision to

²¹ There was a dashboard video camera that recorded Trooper Johnson approaching applicant who was sitting in the passenger side of the car. The video recording stopped moments before Trooper Johnson was shot. It turned out that a video camera in one of the trooper's cars had been turned on unintentionally. Tr. 1174. When the trooper got in his car and noticed that the camera was on, he turned it off. Tr. 1174.

excise "hesitate to act" phrase from reasonable doubt instruction diminished the defense attorney's credibility in the eyes of the jury since the defense attorney had relied on court's previous ruling that it would give such an instruction and had repeated this phrase throughout its closing argument); *State v. Pace*, 316 S.C. 71, 74, 447 S.E.2d 186 (1994) (impugning remarks by judge about defense counsel undermined counsel's effectiveness and prejudice is apparent because "[appellant's] attorney's credibility was crucial to his defense. . ."); *State v. Simmons*, 267 S.C. 479, 229 S.E.2d 597 (1976) (counsel's ability to provide effective representation was impaired by court's comments which diminished trial counsel in the eyes of the jury); *People v. Trait*, 572 N.Y.S.2d 920 (N.Y. 1988) (counsel who engage in excessive and purposeless cross-examination alienated the jury to such an extent that reversal was required). In fact, numerous courts have found it appropriate for attorneys to concede facts or forego arguing an unsubstantiated theory to avoid losing credibility. *See i.e., Wilson v. Butler*, 813 F.2d 664 (1987) (court found that it was reasonable for trial counsel to avoid arguing client's innocence because to do so in the face of overwhelming evidence would have alienated the jury); *Simms v. Cain*, Slip Copy 2008 WL 624073, *23 (E.D. La. 2008) (trial counsel not ineffective for failing to challenge the fact that defendant was the driver of the car in question. Due to the overwhelming evidence establishing this point, to do otherwise would have risked alienating the jury).

Here, applicant's trial counsel pursued a theory – that Trooper Johnson was shot by another trooper - which was objectively unreasonable and lacked a scintilla of evidence. Indeed, Archer and Johnston did not even have confidence in this theory. Apparently, this theory was borne from Archer's overall strategy that he would tap into the anti-law enforcement prejudices of some jurors. "So I know for a fact that there are some people that basically don't like police

officers. you know they get a speeding ticket and they don't like it and they just feel that, so." PCR Tr. 593 (testimony of Archer). It was professionally unreasonable for trial counsel to pursue an inflammatory theory at the guilt-or-innocence phase of the trial, especially given their own doubt in the theory and in light of the overwhelming evidence supporting applicant's guilt. "Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies." ABA Guidelines, 10.10.1.A.

The theory of the defense was simply incredible – to the prosecution, to the defense lawyers, and most importantly, to the jury. But Archer did not stop at simply relying on a baseless theory. He went on to suggest a concerted effort to cover up the truth on the part of the trooper and SLED investigators. He accused them of perjury and the destruction of evidence. Of course, the prosecution took advantage of this insulting and unfounded theory arguing in closing, "And for them, Mr. Archer, to accuse those men of destroying evidence is amazing. You saw them testify. You judge their credibility. . . . And to assail those men's credibility who serve every day of their lives protecting the citizens of Berkeley County is ridiculous." Tr. 1517.²² In his guilt-or-innocence phase closing argument Johnston belatedly expressed a concern that he may lose his credibility with the jury by suggesting that applicant shot his gun but did not hit Trooper Johnson. Tr. 1534 ("Now, again, I don't want to lose my credibility with you. I'm not saying – I'm not telling you that that's what happened."). Later, after the jury had convicted applicant Johnston asks the jury not to hold it against the defense that their theory was rejected. Tr. 1610. For his part Archer seemed to have forgotten what his theory was at the first

²² This Court had the opportunity to observe the demeanor of Archer and the manner in which he continues to accuse law enforcement of engaging in a cover up. His confidence in this theory is remarkable given its lack of evidentiary support. Indeed, during the PCR hearing, law enforcement personnel in the audience left the courtroom in the middle of Archer's testimony, obviously in disgust. The jury at applicant's trial surely had the same reaction.

phase of the trial. In his sentencing phase closing argument, he argued that some currently undiscovered science would demonstrate that applicant did not shoot Trooper Johnson. Tr. 1863. But then he contradictorily stated that "I'm not by any means saying that Jesse Sapp is innocent." Tr. 1863. He goes on to state that applicant "used [his] gun to kill Officer Johnson." Tr. 1865. Previously, in his sentencing phase opening statement, Archer attempted to argue residual doubt.

From the moment trial counsel put forth their defense theory, they began to lose credibility with the jury. This continued into the sentencing phase where Archer relied on a variety of inconsistent theories one of which was the guilt-or-innocence phase theory which had already been rejected by the jury. See ABA Guidelines 10.10.1.A ("Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies."). It was professionally unreasonable to rely on this highly inflammatory and groundless theory. Its use at the guilt-or-innocence phase and its continued use at the sentencing phase of applicant's trial so damaged the credibility of the defense that applicant was prejudiced.

IV . Applicant was denied the right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by trial counsel's failure to object to the admission of prosecution exhibit 108.

At trial the prosecution introduced an entire issue of South Carolina Trooper Magazine. Defense counsel did not object to its admission. Applicant alleges two grounds for the exclusion of the magazine. First, according to applicant, portions of the magazine contained victim impact evidence which went beyond the boundaries set out by the Supreme Court for this type of evidence. Second, applicant contends that the contents of the magazine contained irrelevant and prejudicial information.

A. Relevant Facts

During the sentencing phase of the trial the prosecution admitted without objection an issue of the South Carolina Trooper Magazine as State's Exhibit 108. Tr. 1686. This exhibit was admitted through James Woods, a victim impact witness. The magazine contained two categories of information at issue here. First, it contained a photograph and writings about the victim in this case. Specifically, the cover of the magazine contained a photograph of Trooper Johnson as well as another trooper killed in an unrelated incident. Inside the magazine there were tributes to both of these officers. The "Tribute to Corporal Kenneth J. Johnson" is, as its title suggests, a tribute to and biography of the victim in the form of a two page essay written by another trooper. This article is accompanied by a poem entitled "Nicholas' Dad" which focuses on Trooper Johnson's young son's loss of a father.

Second, the magazine contains substantial information unrelated to applicant's case. In summary, the exhibit contained the following:

- ☐ The first non-advertisement page contains a letter from the widow of a state trooper who was killed in 1969. The letter begins, "In the early morning hours of January 29, 2002, and under the supervision of Cpl. Tom Velky, we left the Patrol office in Beaufort. Our destination was the Probation [sic], Pardon, and Parole Board in Columbia . . . Our mission was to oppose the parole of Forest Wade Phillips, who murdered Cpl. R. V. Woods in 1969 in Beaufort." After summarizing this man's criminal history the widow continued, "In 1985, he was retruned [sic] to our state and, after serving 8 yrs. 8 mos., became eligible for his first parole hearing. To date, he has come before the board six times asking for his freedom. . . . When I work to keep this man in prison, not only am I doing it for my family and myself, but for each one of you who risks your life every day." Petitioner's Exhibit 26, p. 5.
- ☐ A reference to the 9-11 attacks in New York and Washington, DC, along with the request that everyone "continue to support this state and country in our efforts to preserve our freedom and way of life." Petitioner's Exhibit 26, p. 8.
- ☐ "In Memoriam: IN memory OF state troopers who gave their lives in the line of duty," compiled a list of all the troopers who have died in the line of duty since 1932. Petitioner's Exhibit 26, p. 11.

- A tribute in memory of Trooper Michael Rao who was killed in an incident unrelated to applicant's case. Petitioner's Exhibit 26, pp. 15-16.
- An article on officer survival training which includes photographs of target practice, various weapons, and a description of the stereotypical "convicted cop killer[]." Petitioner's Exhibit 26, p. 26.
- An article describing the "peer support" which was provided by South Carolina troopers to the New York Police Department in the wake of the 9-11 terrorist attack. Petitioner's Exhibit 26, pp. 36-37.
- An article which describes, *inter alia*, high speed chases, a suspect shooting, and other dramatic arrests. This article also raises the specter of parole. ("[H]e is currently serving a lengthy jail sentence with no parole anywhere in his near future." "[T]he girlfriend was wanted for parole violations."). Petitioner's Exhibit 26, p. 40.
- An article, "Twice the Pain," details families of law enforcement officers who have lost two family members. In one of the scenarios presented in this article the killer of a state trooper received 8-12 years imprisonment. Moreover, a family member of this victim stated, "My father's murder seems to have had a great deal more impact on my family's life than it has had on [the defendant's]." Petitioner's Exhibit 26, pp. 60-61.

Attorney Johnston testified at the post-conviction hearing that he vaguely recalled being shown the magazine by either Mr. Hoisington or Mr. Jennings. PCR Tr. 558-559. However, Johnston and Archer were "preoccupied" with other issues. PCR Tr. 559. Johnston could not recall a strategic reason for failing to object to the introduction of the magazine. PCR Tr. 559. In retrospect Johnston felt that counsel should have asked that only the cover of the magazine be admitted into evidence. PCR Tr. 559. Archer testified that he had never seen the magazine. PCR Tr. 609. Similarly, he could not recall any strategic reason for failing to object to the admission of the magazine and believed he would have objected to its admission had he seen the magazine. PCR Tr. 610.

B. Victim impact evidence

Prosecution Exhibit 108 contained substantial information that exceeded the permissible scope of victim impact evidence. In *Payne v. Tennessee*, 501 U.S. 808 (1991) the Supreme

Court held that the Eighth Amendment did not erect a bar to the admission of victim impact evidence. Specifically, “[a] State may decide . . . that the jury should see ‘a *quick glimpse* of the life petitioner chose to extinguish.’” *Id.* at 830 (O’Connor, J., concurring) (emphasis added) (quoting *Mills v. Maryland*, 48 U.S. 367 (1988)). The South Carolina Supreme Court has determined that victim impact evidence is generally admissible to demonstrate the “uniqueness” of the victim and the “specific harm caused by the defendant.” *State v. Hughey*, 339 S.C. 439, 457, 529 S.E.2d 721, 730 (2000). The admission of such evidence, however, is not allowed if it is “so unduly prejudicial that it renders the trial fundamentally unfair and violates due process under the Fourteenth Amendment.” *Von Dohlen v. State*, 360 S.C. 598, 612, 602 S.E.2d 738, 745 (2004).

When viewed in the context of the substantial victim impact testimony which had already been admitted through two motorists assisted by Trooper Johnson, Tr. 1616-1625; a coworker, Tr. 1679-1686, and; two family members, Tr. 1766-1782, the detailed essay and poem in memory of the victim went beyond the “brief glimpse” which the Supreme Court has found permissible. Located on the last page of the essay was a poem written by the same author. In heart wrenching fashion this poem described the process of informing the victim’s son that his father had been killed. The poem went on to describe the son’s great love for his father and then alluded to what was probably a scene from the funeral: “We all stood in formation in front of Nicolas. He looked as tears streamed down his face.” When viewed in the context of the evidence which was presented by family members and coworkers, this essay and poem was excessive. Indeed, if the trial court had been made aware of the contents of this exhibit, it likely would have precluded its admission. Previously, when the state indicated its intention to introduce a videotape of the victim’s funeral, including Taps, the trial court excluded this

evidence even though trial counsel did not object. "I believe Taps at this point would be playing more towards sympathy than showing the true man." Tr. 1774. Likewise, the poem which defense counsel had never reviewed prior to its admission was "playing more towards sympathy."

Moreover, this essay and poem went beyond the permissible scope of victim impact because it was focused not on the impact on the victim's family but rather the impact on the community as a whole. See *United States v. Fields*, 516 F.3d 923, 947-8 (10th Cir. 2008). "Including the community in the victim-impact inquiry is fraught with complication. It would involve not just the incremental extension from family to friends (and even to co-workers), but a radical change in perspective: replacing a close-in focus on persons closely or immediately connected to the victim with a wide view encompassing generalized notions of social value and loss." *Id.* at 947. Noting that the Supreme Court had not broadened the scope of *Payne* to include co-workers and the community, the Tenth Circuit Court of Appeals found such evidence to be outside the scope of admissible victim impact testimony. *Id.*

The "Tribute to Corporal Kenneth J. Johnson" focused on the loss to his coworkers and the community as a whole, the precise focus which the Tenth Circuit Court of Appeals found inappropriate. The essay is written from the perspective of a coworker and the majority of the essay comments on the victim as a coworker and the loss that will be felt by his colleagues. The most problematic portions of the essay, however, are those which discuss the loss to the community. For example, the essay begins, "On Sunday, July 7, 2002, South Carolina lost a state trooper; however, we *all* lost a friend." (emphasis in original). It goes on to describe the people lining the streets the day of his funeral as well as a sign held under an overpass which read, "Johnson, thank you for protecting us while you were here." The essay concludes by

reminding the reader that Trooper Johnson was the “44th SC State Trooper killed in the line of duty.” The invocation of the community’s loss was impermissible. And in this case the reminder of the deaths of 43 other state troopers took the focus away from the individual victim in this case and placed the burden of all South Carolina trooper deaths on applicant. Trial counsel did not review this exhibit prior to its admission and, therefore, were unable to articulate an appropriate objection. Counsels’ actions in this regard were unreasonable and not based on a strategic or tactical decision. *See Rompilla v. Beard*, 545 U.S. 374 (2005) (counsel has a duty to review prosecution evidence used in aggravation so that he may formulate a response). Indeed, given counsel’s ignorance of this exhibit’s substance, their failure to object was not a decision at all, and but for the introduction of this information there is a reasonable probability that the outcome of applicant’s sentencing trial would have been different.

C. Irrelevant and Prejudicial Information

In addition to the inadmissible victim impact evidence, state’s Exhibit 108 contained irrelevant and highly inflammatory information summarized *supra*. To begin, there were at least three references to parole in the magazine. First, there was the letter to the editor written by a widow of a slain state trooper who described having to attend six parole hearings to keep her husband’s killer behind bars. Another article called “Twice the Pain” indicated that a defendant received 8-12 years imprisonment for killing an officer. Finally, in an article detailing dramatic arrests, the author indicates that a defendant was serving a lengthy sentence with “no parole . . . in his future.” The inflammatory nature of these references is self-evident – it put into focus in the most dramatic way the fear among jurors that if they do not sentence the defendant to death, they risk that person being paroled and killing again. *See State v. Young*, 319 S.C. 33, 38-9, 459 S.E.2d 84, 87 (1995) (Court reiterated that parole eligibility is not a proper consideration and that

information about parole could push a jury into voting for death). But the letter from the widow also did more than merely mention parole in a way that put it in the minds of the jurors. Written from the perspective of a still-grieving widow who had endured six parole hearings, it portrayed the widow as a victim of the parole process. So, in addition to instilling fear that applicant would some day be released, the letter portrayed the process of parole, even if not granted, as additional victimization of the murder victim's family. It is difficult to imagine a more prejudicial piece of evidence.

In a similar instance in which the parole eligibility of a capital defendant was accidentally included on an exhibit, the PCR judge found that "[i]t is an affront to common sense to argue that a jury's decision on the death penalty would not be affected by misinformation that a murderer could be back on the streets within a few years." *Patterson v. State*, 98-CP-32-0097 at p. 5. Judge Keesley found this to be an "obvious conclusion without knowing what actually was said in the jury's deliberations." *Id.*

Other portions of the magazine contain irrelevant and prejudicial information. Some portions tended to garner sympathy generally for state troopers. Petitioner's Exhibit 26, p. 8 (reference to 9/11 attacks and request to support troopers' efforts to preserve freedom). Some portions placed before the jury the deaths of other state troopers. Petitioner's Exhibit 26, p. 11 (list of all state trooper killed in light of duty since 1932); Petitioner's Exhibit 26, pp. 15-16 (tribute to a trooper who was killed in an unrelated accident). Lastly, one portion of the magazine described the stereotypical "convicted cop killer[]." All of this information detracted from the individualized sentencing to which applicant was entitled. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Gregg v. Georgia*, 428 U.S. 153 (1976). Furthermore, and more simply, the probative value of this evidence was substantially outweighed by the prejudice that surely

flowed from its admission.

The information detailed above was irrelevant to any aspect of the sentencing phase of applicant's trial and for that reason alone it should not have been admitted. Moreover, the information generally created a sense of the need to protect all law enforcement personnel, injected inflammatory information suggesting the possibility of parole, and implied that sentencing applicant to death would in some way be justice for all the terrible wrongs detailed in the article. Trial counsel's failure to review, and object to the admission of, this piece of evidence was unreasonable and but for its admission there is a reasonable likelihood that the outcome of applicant's sentencing proceeding would have been different.

V . Prosecution attempt to demonstrate the "relative freedom of life in prison."

At trial the prosecution admitted evidence that applicant was looking forward to prison because life in prison was no different than life outside of prison. Despite the fact that such evidence was inadmissible, defense counsel failed to lodge an objection. Exacerbating this error, trial counsel also failed to review and utilize evidence which would have directly rebutted this inaccurate portrayal of applicant's beliefs about incarceration. Trial counsel's failures form the basis of two related but separate legal claims: trial counsel was ineffective for failing to object to inadmissible evidence and trial counsel was ineffective for failing to rebut the prosecution's case.

A. Relevant Facts

Prior to applicant's trial the prosecution made a decision to establish that life in prison was "easy" and to demonstrate its "relative freedom." PCR Tr. 653-654. To this end, the state contacted Jimmy Sligh, the same South Carolina Department of Corrections employee at issue in *State v. Burkhardt*, *see infra*. In the end, however, the prosecution decided not to call Mr. Sligh as a witness due to a belief that the admission of his testimony might be error. PCR Tr. 653-654.

Instead, the prosecution admitted a portion of a recording of applicant speaking to a friend from jail. Applicant was held at the Charleston County Detention Center for most of his year-long pre-trial detention. Over 700 of his phone calls from the Charleston jail were recorded. PCR Tr. 469. The prosecution entered into evidence without objection the recording of one call from applicant to a friend, Charles Pascien. Tr. 1759. During a portion of the call applicant can be heard claiming, based on information from other inmates, that a prisoner could purchase a whole array of items including soft drinks, a cooler, ice, a jump rope, scissors, popcorn, and pizza. PCR Tr. 422.

Defense counsel, in an attempt to establish that applicant was joking when he made these statements, called Charles Pascien to the stand. Pascien testified that he believed applicant was nervous and scared when he spoke to him. Tr. 1807. He did not believe that applicant was bragging about going to prison. Tr. 1807. The prosecution countered with the following cross examination:

Q. Prison doesn't sound like a very bad place, does it?

A. Well, everybody knows prison isn't a good place.

Q. But a place where you can go and order a pizza?

A. Right.

Q. You have pizza at home?

A. Right, but I seriously doubt you can order pizza at prison.

Q. When you sit at your house and have pizza, will you sometimes have an ice cold Coke with it?

A. Yes, sir.

Q. And you sit down and watch TV maybe?

A. Yes, sir.

Q. So the place Jesse Sapp was describing doesn't sound a whole lot different than you sitting in your living room relaxing?

A. Right.

Tr. 1809. In its closing argument, the prosecution argued that applicant wanted to live in prison and that anything other than the death penalty was not a punishment. "[Applicant] wants you – through his lawyers, he will ask you to give him life in jail. He will tell you that that [sic] terrible punishment – let me tell you something, that's what he wants. Are hot pizzas and cold drinks, TV's and microwaves the punishment he deserves?" Tr. 1862. Defense counsel did not object to this argument.

The prosecution had provided to trial counsel copies of all the jail telephone recordings and Johnston had listened to the specific conversation at issue. PCR Tr. 467. Archer had not listened to these recordings. PCR Tr. 589.

B. Applicant was denied his right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by trial counsel's failure to object to prosecution evidence and argument regarding the conditions of confinement.

Evidence admitted in the sentencing phase of a capital trial must be relevant to the "character of the defendant or the circumstances of the crime." *State v. Burkhart*, 371 S.C. 482, 487, 640 S.E.2d 450, 453 (2007) citing *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982). Specifically, the conditions of confinement are not appropriate considerations in the sentencing phase; therefore, evidence regarding the manner of incarceration should not be admitted. "Such determinations as the time, place, manner, and conditions of execution *or incarceration* . . . are reserved . . . to agencies other than the jury." *Burkhart*, 371 S.C. at 487, 640 S.E.2d at 453 (emphasis included in original), quoting *State v. Plath (Plath II)*, 281 S.C. 1, 15, 313 S.E.2d 619,

627 (1984).

Here, the prosecution, through the admission of the taped phone call of applicant and the cross-examination of defense witness, Charles Pascien, ensured that the jury would consider the conditions of a life sentence.²³ Such evidence was clearly inadmissible and warranted an objection from defense counsel. In *Burkhart*, the state supreme court found that similar evidence injected an arbitrary factor into the jury's decision. See S.C. Code Ann. §16-3-25(C)(1). That is precisely what occurred here, albeit through a different witness. According to Jennings, the phone conversation at issue was relevant to show applicant's "callousness" though he never explained this characterization. PCR Tr. 643. In any event, Jennings candidly admitted that there were other calls which the state could have used to characterize applicant in this manner, other calls which did not raise the issue of the conditions of confinement. PCR Tr. 654. Yet, the state chose to use the one call that injected evidence about the conditions of confinement into the trial. The state's original intent to demonstrate that life in prison is "easy" and to inform the jury of the "relative freedom of life in prison," PCR Tr. 653-654, was more clearly evident in its cross examination of Charles Pascien. Instead of questioning Pascien about applicant, the prosecution chose to focus its inquiry on the substance of the phone call. In other words it chose again to focus the jury's attention on the conditions of confinement in a way that suggested that life in

²³ It is worth noting that the evidence indicating that applicant would be able to possess a long list of items including scissors and a microwave was inaccurate. PCR Tr. 422. Moreover, the state's suggestion that life in prison is no different than life outside of prison is similarly inaccurate. Applicant separately argued that the jury's consideration of this inaccurate evidence violated the Eighth Amendment to the United States Constitution and South Carolina law. *Johnson v. Mississippi*, 486 U.S. 578 (1988). Moreover, applicant contends that this evidence created a materially false impression of the facts in violation of applicant's right to due process of law as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and South Carolina law. *Mooney v. Holohan*, 294 U.S. 103 (1935); *Napue v. Illinois*, 360 U.S. 264 (1959). Having granted relief on the ineffective assistance of counsel claim, I do not address these separate but related issues.

prison was an easy sentence, indeed no different than "sitting in your living room relaxing." Tr. 1809.

In fact, the evidence presented at applicant's trial was more prejudicial than the erroneously admitted evidence in *Burkhart*. There, an employee of the South Carolina Department of Corrections, Jimmy Sligh, testified about the privileges an inmate would have but also acknowledged that prison was "not a country club." *Burkhart*, 371 S.C. at 487, 640 S.E.2d at 354. Moreover, the defense presented evidence which established prison as a "harsh environment with violent predators." *Id.* At applicant's trial, however, sitting in prison was characterized as just like sitting in one's living room. The prosecution also provided the jury with a list, albeit an inaccurate one, of items to which it suggested prisoners had access. Unlike in *Burkhart*, however, there was no rebuttal to this portrayal. Simply put, the jury was left to believe that prison was not different from the outside world, a place where inmates can freely order pizza and drink a Coke while watching a movie. This unchallenged characterization provided by a defense witness answering carefully crafted leading questions led directly to the prosecution's inflammatory rhetorical question posed to the jury in closing - did the jury believe that sitting around and watching movies while drinking a soda was the punishment that applicant deserved. Tr. 1862. This argument is precisely the reason that the state supreme court found evidence about the conditions of confinement to be inadmissible - the prosecution at applicant's trial asked the jury to disregard life in prison based on prison operations over which the jury had no control.

While this testimony only occupies a small portion of the trial transcript, its inflammatory nature cannot be over stated. The idea that prison is a country club provided the jury with no choice but to sentence applicant to death. This jury had already convicted applicant of the

murder of a state trooper and no doubt believed that he should be punished for this crime. The options as presented by the prosecution left the jury no choice. It could either sentence the applicant to death or send him to a place that, according to the state, was no different than being at home.

Trial counsel's failure to object to this inappropriate line of inquiry was unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Based on a long line of cases delineating the appropriate contours of sentencing phase evidence, this evidence was clearly inadmissible. Moreover, even had this evidence been relevant, it was substantially more prejudicial than probative and should have been excluded based on this rule of evidence. As it turns out, however, it is not surprising that trial counsel did not object to its admission. Archer, who actually handled the witnesses at the sentencing phase, had not listened to the audio tape prior to its introduction at trial, because it was not relevant to the guilt-or-innocence phase. PCR Tr. 589. Archer also did not have a strategic reason for failing to object to the cross-examination of Charles Pascien which focused on the conditions of confinement.²⁴ PCR Tr. 616-617. Archer had a duty to review this prosecution evidence before its admission so that he could be prepared to lodge appropriate objections and respond to the evidence. *Rompilla v. Beard*, 545 U.S. 374 (2005) (trial counsel who failed to review prosecution evidence in aggravation were ineffective because they were unable to respond or rebut this evidence).

C. Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law when trial counsel failed to rebut prosecution evidence.

1. Additional Relevant Facts

²⁴ For his part, Johnston also could not recall a strategic reason for their failure to object to the audio tape of the phone call. PCR Tr. 497-498. Nor could he recall a strategic reason for not objecting to the cross-examination of Charles Pascien. PCR Tr. 499-500; 564.

As described *supra*, counsel had been provided, and was aware of, the audio tape of applicant's telephone calls from the Charleston jail. Further, Johnston had listened to the particular call at issue here. Assistant Solicitor Jennings had also received a number of letters written by applicant to a former girlfriend, Krista Lewandowski. The prosecution informed defense counsel of the existence of these letters and made them available for inspection prior to trial. PCR Tr. 624. In fact, Assistant Solicitor Jennings specifically recalled a meeting with defense counsel at which he informed Archer and Johnston that the state had the letters but did not intend to use them at trial. He offered an opportunity for defense counsel to "take a look at them" in case they wanted to "use them for anything." PCR Tr. 628, 648. Johnston testified that he had never been shown the letters. PCR Tr. 564. Johnston's recollection, however, is inconsistent with Jennings' specific memory to the contrary. Furthermore, notations by defense counsel on a state's preliminary witness list indicate that trial counsel were aware of the letters. PCR Tr. 565; PCR Petitioner's Exhibit 10.²⁵

The letters written by applicant provided insight into his thoughts of incarceration. Below are relevant portions of the letters.

It is harder than I thought in here. I try to make jokes and kidd [sic] about how it's like a camp – high school kind of place. Truth is, it's not and I'm finding less and less to laugh at in here. It's like they designed this place to slowly detach people from the real world or something.

Petitioner's Exhibit 27 (emphasis in original).

[My] attorneys I have would have me to believe I'll never get to hug or hold anyone ever again. That sounds like tourcher [sic] though doesn't? [sic] Who on this earth could live like that?" "I wish I had some funny stuff to talk about. I wish I could rewind

²⁵ This Court agrees with applicant that the testimony at the PCR hearing clearly established that these letters were provided to the defense. Mr. Jennings' testimony was credible and supported by other evidence while Johnston's testimony generally was evasive and vague.

this life about 3 yrs. back and do it over.” “God I wish [sic] could have just slowed down for one second to see my choices were in front of me all the time. I try not to think about what I could or could not have done. But it’s so hard in here to keep your mind off that.

Petitioner’s Exhibit 28 (emphasis in original).

I wish you could come by for real though. The visits are good but the distance and seperation [sic] in that glass still hurts. I always say I [sic] alright but I’m not. Everyday I go threw [sic] the same situation – it never changes. It’s like ‘Ground Hog’s Day.’” “What does it really matter if your [sic] not depressed anymore but your [sic] still in jail?” “I keep wanting to just detach myself from everyone and everything. It is so hard to see people and talk on the phone and all when your [sic] in here. Because everyone is trying to tell me about life that is going on and I can’t try to live out there along with you all when I [sic] not there – I’m here. When you say this happened or you saw that or what ever, it hurts me cause I don’t live in the same environment or world as the rest of you do.

Petitioner’s Exhibit 29.

2. Legal Analysis and Conclusion

Trial counsel failed to accomplish one of a defense lawyer’s primary obligations - review all discovery and be prepared to respond to the state’s case. “[A capital defendant’s] lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.” *Rompilla v. Beard*, 545 U.S. 374, 377 (2005). In *Rompilla* trial counsel failed to review the file of a prior crime compromising their ability to anticipate the state’s case in aggravation and making it impossible to rebut any inaccuracy in the portrayal of the prior crime. *Id.* at 385-386. “The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense.” *Id.* at 387. The American Bar Association’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, upon which the Supreme Court relied in *Rompilla*, emphasizes that “[c]ounsel at

all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible.”

10.7 Investigation, Commentary: Counsel should secure information in the possession of the prosecution. 10.11.I.

In applicant's case the failure on the part of defense counsel was even more egregious than in *Rompilla*. All defense counsel had to do was take the prosecution up on its offer and review the letters written by their client to a former girlfriend. Clearly, the sentiments expressed in the letters directly contradict the portrayal offered by the prosecution. Applicant paints a picture of despair over the thought of spending his life in prison. Moreover, in one letter he indicates that he tried to make light of his situation even though he felt increasingly despondent. Petitioner's Exhibit 27. This particular letter would have gone a long way to putting into context the phone call with Charles Pascien. Cumulatively, excerpts from these three letters would have rebutted the state's evidence, based on one portion of a phone call to a friend, that applicant was looking forward to incarceration. *See State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007) (error for court to preclude defense from introducing portion of letter written by defendant which would have contradicted evidence that defendant was not remorseful). Such rebuttal would have headed off the state's argument in its closing that life in prison was not an option because that was exactly what applicant was looking forward to.

VI . Purported statement by applicant that he intended to shoot a police officer to escape apprehension.

As described *infra*, the prosecution admitted testimony that tended to establish that prior to his arrest applicant made statements suggesting an intent to shoot a police officer to escape

apprehension. Two separate but factually related claims arise out of the admission of this evidence. First, applicant contends that in violation of due process, the prosecution did not provide the defense with information which would have rebutted the prosecution portrayal. Second, applicant has alleged that defense counsel was ineffective for failing to impeach one of the witnesses who testified about this statement. After detailing the facts relevant to these two claims, counsel will discuss each separately.

A. Relevant Facts

At trial the prosecution portrayed the shooting of Trooper Johnson as the result of substantial planning. In support of this theory, the state introduced testimony that applicant had made statements implying that he would kill a police officer rather than risk going back to jail. The prosecution began to lay the groundwork for this evidence through the testimony of Officer Greg Friday of the City of Savannah Police Department. Tr. 1627. Corporal Friday arrested applicant in Savannah, Georgia in 1998. Ultimately, applicant was charged with reckless conduct, carrying a concealed weapon, and obstruction by fleeing. Tr. 1634. Officer Friday testified at applicant's trial that after he was arrested, applicant said, "you got me this time, but I won't go back again." Tr. 1634. The prosecution then called Mark Boles as a witness.²⁶ Mr. Boles testified that on several occasions after applicant failed to return to the jail from work release applicant stated that "he wasn't going back" to jail. Tr. 1756. Boles elaborated that he "took it to mean that [applicant] would kill whoever [sic] tried to take him back to jail." Tr. 1756.

In its closing argument the prosecution used this testimony to argue that applicant had planned to kill a police officer. "[Applicant] told [Officer Friday], well, you got me this time,

²⁶ Mr. Boles was the father of Kathryn Boles, the woman who was driving the car the night

but I'm not going to be taken again. And that's a theme that's in his head and in his heart and caused him to take the actions that he took on July 7th of 2002." Tr. 1854. The solicitor continued to argue that applicant:

told Mark Boles . . . on three separate occasions that even though he was an escapee, even though he had walked away from the work release camp that he wasn't going to go back and he would kill anybody that tried to take him. How often, ladies and gentlemen, can you imagine a person telling others that they're going to do exactly the horrible crime that they did?

Tr. 1855.

Prior to the trial Mr. Jennings had provided to trial counsel an incident report authored by Officer Friday. In this report, written shortly after his arrest of applicant, Officer Friday did not mention the alleged statement made by applicant. Johnston testified that he was aware of Officer Friday and recalled being provided with his incident report. PCR Tr. 502-504, 569-570. Neither Johnston nor Archer made an attempt to contact Officer Friday prior to trial. PCR Tr. 502-504. Ultimately, it was Archer who cross-examined Officer Friday. Tr. 1634. For his part, Archer did not review the incident report prior to trial and had no recollection of ever seeing it. PCR Tr. 609. During cross-examination Archer did not question Officer Friday about the omission of applicant's statement in his description of his arrest. Tr. 1634-1635. Therefore, the jury was never informed that shortly after the arrest Officer Friday failed to note the statement about which he testified over five years later.

During the post-conviction hearing Assistant Solicitor Jennings testified that he had spoken to potential witnesses Kathryn Boles and Krista Lewandowski prior to trial. PCR Tr. 625, 655-658. He took notes during these interviews. Both of these potential witnesses discussed with Mr. Jennings statements made by applicant regarding his desire not to return to

of the incident. He also helped applicant sell drugs. Tr. 1746, 1752-1753.

59 

jail. Kathryn Boles described a conversation with applicant during which he said that if stopped by the police, he planned to shoot up in the air in an effort to incite the police to kill him. PCR Tr. 657; Petitioner's Exhibit 23, p. 5. Mr. Jennings conceded that if she had stated in any way that applicant had previously indicated an intention to kill a law enforcement officer, he would have written that down. PCR Tr. 658. Similarly, Krista Lewandowski told Mr. Jennings of a conversation with applicant during which he said he would commit suicide before going back to jail. PCR Tr. 656; Petitioner's Exhibit 22, p.3. Again, Mr. Jennings admitted that had Ms. Lewandowski told him that applicant had indicated a previous intent to shoot an officer to avoid arrest, he would have written that down. PCR Tr. 657.

B. The prosecution's failure to provide material information which was favorable to applicant was a violation of due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law.

The prosecution failed to reveal favorable information which was material to applicant's sentencing. Suppression of evidence which is favorable to a defendant is a violation due process. *Brady v. Maryland*, 373 U.S. 83 (1963). Whether the prosecution withheld the evidence in good faith or bad faith is irrelevant. *Id.* at 87. In order to establish a *Brady* violation applicant must prove that the state withheld evidence which was material to the sentencing proceeding. Information is material if there is a reasonable probability of a different result due to the disclosure. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

Clearly, in this case the state's presentation of two witnesses who claimed that applicant made a not-so-veiled threat of doing harm to a police officer in the future was crucial. The state

used this evidence to show that applicant had intended to kill Trooper Johnson as soon as he was pulled over. The prosecutor referenced this plan twice in his closing argument. And the statements, had they really been made by applicant, would have proved substantial premeditation and as such would have served as a powerful aggravating circumstance.

However, it is clear now that the portrayal offered by the state was inaccurate. But, since the state failed to provide the defense with the evidence which would have undermined its presentation, the defense was unable to establish this inaccuracy. Indeed, the state believed that at least Kathryn Boles' version of applicant's statement was unhelpful to its case, because unlike Officer Friday and Mark Boles the prosecution did not ask her to relate to the jury her conversations with applicant about his intentions if he was stopped by police.

The clarity of Kathryn Boles' and Krista Lewandowski's statements to Mr. Jennings is striking, especially in contrast to the ambiguous interpretations of Officer Friday and Mark Boles.²⁷ The defense, had it been provided with this information, would have been able to put into context the testimony of both Officer Friday and Mark Boles in a way that would have neutralized the insinuation offered by the prosecution. The failure of the prosecution, even if unintentional, to provide this information to the defense violated applicant's due process rights and warrants relief from this Court.²⁸

²⁷ Parenthetically, it is worth noting here that the interpretation of applicant's statement by Mark Boles was entirely speculative and as such was substantially more prejudicial than probative. The "translation" of applicant's statement by Mark Boles was not admissible and defense counsel should have objected. The failure to appropriately object to this testimony represented ineffective assistance of counsel.

²⁸ Applicant alleged in his Second Amended Application for Post-Conviction Relief and continues to maintain that the jury's consideration of this inaccurate evidence violated the Eighth Amendment to the United States Constitution and South Carolina law. *Johnson v. Mississippi*, 486 U.S. 578 (1988). Moreover, this evidence created a materially false impression of the facts in violation of applicant's right to due process of law as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and South Carolina law. *Mooney*

C. Trial counsel was ineffective for failing to impeach Officer Friday.

Defense counsel's duty to protect his client and rebut the state's case is the foundation of effective representation. To this end counsel have a duty to obtain and review discovery and to undertake an independent investigation to ensure that the portrayal offered by the prosecution is accurate. *See* ABA Guidelines 10.7 Investigation, Commentary: *Inter alia*, counsel should secure information in the possession of the prosecution; ABA Guidelines 10.11.I, "Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible." Here, Archer who actually cross-examined Officer Friday had never reviewed or even seen the incident report of the arrest about which the officer testified. App. 609 ("I didn't see [Officer Friday's incident report] at any time. I have never seen it."). Moreover, neither Johnston nor Archer made an attempt to contact Officer Friday to discuss his recollection of this arrest even though they knew that the prosecution intended to call him as a witness. App. 502-504.

Applicant's case is sufficiently similar to *Rompilla v. Beard*, 545 U.S. 374 that an in-depth review of *Rompilla* is in order. In *Rompilla* the defense was put on notice that the government intended to introduce information about a prior crime through which the prosecution intended to prove the defendant's violent character. *Id.* at 383. The file of the prosecution was a public record to which defense counsel had access. Defense counsel never reviewed the entire file. *Id.* at 385. The Supreme Court held that defense counsel at the very least had an obligation to obtain and review the state's file on the prior conviction so that it could anticipate the state's evidence in aggravation and prepare a rebuttal if necessary. *Id.* "Without making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the

v. Holohan, 294 U.S. 103 (1935); *Napue v. Illinois*, 360 U.S. 264 (1959). Because I have

prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim.” *Id.* at 386. The Court went on to observe that “the notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense.” *Id.* at 387. The American Bar Association guidelines, according to the Court, also made clear defense counsel’s obligation to obtain information in the possession of the prosecution including police reports. *Id.* at 387, n. 7.

Here, the trial attorney who conducted the cross-examination of Officer Friday had never reviewed the discovery provided by the prosecution. In other words, there is no real difference between the failure of trial counsel in *Rompilla* and that of trial counsel in this case. In both instances the attorneys responsible for lodging objections and questioning witnesses were unable to protect their client because they had not reviewed evidence in the possession of the prosecution and about which they were aware. In applicant’s trial, Archer’s failure to review Officer Friday’s incident report meant that he could not impeach Friday for his failure to include a single mention of the purported threatening statement made by applicant during his arrest. This statement featured prominently in the prosecution argument and likely in the minds of the jurors as well. Trial counsel’s failure to challenge the accuracy of the state’s case on this point must have seemed like a tacit admission that the state’s characterization was correct. Trial counsel was ineffective for failing to simply review and use at trial discovery which was provided by the prosecution. Further, had the jury known that this officer never documented this seemingly important fact after applicant’s arrest some five years before this crime, there is a reasonable likelihood that it would not have sentenced applicant to death.

VII . Applicant’s right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South

granted relief on the *Brady* claim, it is not necessary to address these related issues.

Carolina law was violated by trial counsel's failure to object to improper comments made by the prosecution in opening statements.

A. Relevant Facts

During the opening statement of the sentencing phase of applicant's trial, the prosecutor made the following arguments:

- ☐ "We put the jurors on the stand and we question them under oath and we lock them up in a motel. But there's a point to that and that is to make sure that anybody charged with this type of offense, anybody facing this type of punishment gets as fair a trial as our country can give them." Tr. 1604-1605.
- ☐ "You may have noticed that when Mr. Sapp was convicted, he cried. Ladies and gentlemen, there are all types of tears in the world. Tears of compassion, there are tears of sorrow and there are tears of self-pity. I submit to you the ones you saw were self-pity . . . No sorrow, that's what that was." Tr. 1606-07.
- ☐ "[T]he person you see in court is not the person that was there that night. That is never the case. Courtrooms subdue people. Courtrooms make [defendants] meek." Tr. 1607.
- ☐ "We've got four types of poisonous snakes in South Carolina. The meekest, the coral snake, is actually the most poisonous, hides under rocks and only comes out at night." Tr. 1607.

Johnston gave the defense opening statement and, therefore, was responsible for lodging appropriate objections to the prosecution opening statement. He did not object to any of the statements detailed above. PCR Tr. 501-502. Furthermore, testifying at the PCR hearing he could not recall a strategic reason for his failure to object. PCR Tr. 501-502.

B. Legal Analysis and Conclusion

Trial counsel's failure to object to the prosecution statements detailed above represents another example of counsel's failure to protect his client. The comments were inappropriate and prejudicial. Courts have made clear that prosecutors are "ministers of justice and not merely advocates." *State v. (Jeffrey) Jones*, 343 S.C. 562, 578 541 S.E.2d 813, 822 (2001), quoting *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000). For this reason, the job of the

prosecutor is not to “win” a conviction; rather, the prosecutor’s job is to see that justice is done. *See State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989); *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981). Prosecutors must refrain from engaging in “improper methods calculated to produce a wrongful conviction.” *Dawkins*, 297 S.C. at 388, 377 S.E.2d at 299. As a corollary to this principle, it is well-established that the state’s arguments should not appeal to the jurors’ passions or prejudices nor should the argument be misleading. *State v. Copeland*, 321 S.C. 318, 468 S.E.2d 620 (1996). *See also State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (“The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.”) (quoting *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)).

Each of these statements above was objectionable and will be addressed individually. The statement regarding sequestration improperly faulted applicant for this rather substantial inconvenience. First, the solicitor reminded the jurors of the negative aspects of jury service in a capital case: being put on the witness stand, being placed under oath, and being *locked* in a hotel room. Then the solicitor explained to the jury that all this trouble was to ensure that the *defendant* got a fair trial. Blaming sequestration on applicant was both inaccurate and improper. The rationale behind sequestration is not solely to provide the defendant with a fair trial. Indeed, many defendants have objected to sequestration on the grounds that the jury will do exactly what the solicitor did here – blame the defendant for the inconvenience. *See State v. Allen*, 373 A.2d 377, 381 (N.J. 1977) (“[M]any defendants are wary of jury sequestration for the reason that the jurors will resent it and hold a defendant responsible for the sequestration order and the resultant inconvenience and hardship to them.”); *see also* IJA Report, Vol. 18, No. 1 (Fall 1985) (“sequestered jurors . . . may develop a high level of friction, frustration, anger and aggression

and direct such impulses toward the defendant"). Second, even if the solicitor's statement was accurate, it was not a proper argument because it was not relevant to the "character of the defendant or the circumstances of the crime." *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982). This line of argument was improper and trial counsel should have objected.

The second line of argument represented an improper comment on the applicant's failure to demonstrate remorse. The South Carolina Supreme Court has previously found similar arguments to be improper. "Comments by the prosecution upon an accused's failure to express remorse invite the jury to draw an adverse inference merely because the defendant did not appear penitent." *State v. Johnson*, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987); *see also State v. McClure*, 342 S.C. 403, 537 S.E.2d 273 (2000) (solicitor improperly focused attention on whether the defendant had shown remorse); *State v. Hawkins*, 292 S.C. 418, 357 S.E.2d 10, 13 (1987) (solicitor argued, "I ask you to consider all of the evidence. You have seen no remorse." The Court found error); *State v. Cockerham*, 294 S.C. 380, 365 S.E.2d 22, 23 (1988) (The state argued, "[D]oes he look sorry to you? . . . Have you seen any remorse?" The Court found error).

Here, the prosecution's comments were even more prejudicial. Not only did the prosecutor argue that applicant lacked remorse but he also argued that applicant's crying was really an indication of self-pity. In this way, the prosecutor turned applicant's appearance into a double aggravator: the only emotion applicant displayed was sadness for his own situation rather than remorse for his actions and their effects on the victim and his family. The remarks asking the jurors to speculate about applicant's remorse were improper and objectionable.

The third comment, suggesting that applicant was a different person in the courtroom than on the night of the incident was improper because it turned his mere presence in the courtroom into an aggravator and it constituted an inappropriate comment on the defendant's

non-testimonial demeanor. See *United States v. Mendoza*, 522 F.3d 482 (5th Cir. 2008) (“[C]ourtroom demeanor of a non-testifying criminal defendant is an improper subject for comment by a prosecuting attorney.”); *State v. John B.*, 925 A.2d 1235; 1243 (Conn. App. Ct. 2007) (same). The implication was that the applicant was trying to fool the jury or, at the very least, that the jury had to assume that the person before them was behaving appropriately only because he was in a courtroom. In short, such a statement punishes a defendant for demanding a trial and for acting appropriately during the trial. This comment violated applicant’s right to trial and as such was objectionable.

The fourth comment, and perhaps the most egregious, provided a detailed comparison of applicant to a coral snake. Arguments like this are inappropriate because their only purpose is to appeal to emotion, passion, or prejudice. In *State v. Hawkins*, 292 S.C. 418, 357 S.E.2d 10 (1980), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), the Court found error in the repeated reference to the defendant as “Mad Dog.” In that case the defendant’s nickname was “Mad Dog” and so the Court recognized that it was permissible for the solicitor to use the name to clarify the defendant’s identity. *Hawkins*, 292 S.C. at 421, 357 S.E.2d at 12. However, the Court held that the repeated use of this nickname “denied the right to a fair trial and infected the sentencing proceedings with an arbitrary factor.” *Id.* Similarly, other jurisdictions have found derogatory comparisons of a defendant to an animal improper. See *Rosser v. Commonwealth of Virginia*, 482 S.E.2d 83, 87 (1997) (Error found when prosecutor argued that “I don’t think I’m overstating this when I say [the defendant] is an animal.”); *State v. Roache*, 595 S.E.2d 381, 416 (N.C. 2004) (court found improper prosecution comparison of defendant to wild dogs, “high on the taste of blood and power over their victims” because such statements led “the jury to base its decision not on the evidence relating to the issue submitted.

but on misleading characterizations, crafted by counsel, that are intended to undermine reason in favor of visceral appeal.”); (quotations and citation omitted)); *State v. Barajas*, 177 P.3d 106, 114 (Wash. Ct. App. 2007) (court found comparison of defendant to “mongrel mutt” improper).

Like the comparisons to animals cited above, the prosecutor’s argument here was improper because its only purpose was to appeal to the jurors’ emotions. While the argument was concise, it was extremely powerful. The prosecutor described the snake as “meek” just as he had previously described applicant’s courtroom demeanor, a not-so-veiled suggestion that applicant, even as he sat in the courtroom, was not human. The prosecutor went on to metaphorically argue that applicant, just like the coral snake, only appeared at night and hid under rocks. This dehumanizing argument, in addition to playing on common fears of snakes in general, took the jurors’ attention away from the proper focus of a capital sentencing. Trial counsel should have objected to these improper comments and but for their failure to object, there is a reasonable likelihood that the outcome of the sentencing proceeding would have been different.

VIII. Applicant was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by trial counsel's failure to object to the admission of improper victim impact testimony.

A. Relevant Facts

During the sentencing phase of applicant’s trial, the prosecution presented the victim impact testimony of Tim Johnson, the brother of Trooper Johnson. During his testimony Mr. Johnson addressed applicant personally and commented on applicant’s character. “And having to stand in that operating room with my beloved sister-in-law and say good-bye because someone like you killed him.” Tr. 1769. Later in his testimony, Mr. Johnson stated:

And Mr. Sapp, you said in your closing arguments to the jury that

you're not a monster. Well, let me tell you why that is not true. . . . So, Mr. Sapp, as you sit over there saying you're not a monster, all I will say to you is that my brother's children see you as a monster. Every night they go to bed crying and holding pictures of them and their dad together with tears running down their cheeks because you are the monster that shattered their lives into tiny pieces like broken glass.

Tr. 1770-1771. Trial counsel did not object to this testimony.

At the PCR hearing Johnston could not recall why he did not object to this testimony. PCR Tr. 490. However, Johnston did describe his general fear that lodging an objection to victim impact testimony could alienate jurors. PCR Tr. 490-491. Johnston had never considered requesting permission to approach the bench so that he could articulate an objection outside the presence of the jury. PCR Tr. 541-542. He added that this was the only opportunity that the victim's family had to "confront[] the person who has been convicted of killing a loved one," and he thought the jury would *sua sponte* filter out any prejudicial information. PCR Tr. 539. Johnston was unable to recall being involved in a case which included victim impact testimony. PCR Tr. 537. Johnston also could not recall whether he had ever read any United States Supreme Court case concerning victim impact evidence including *Payne v. Tennessee*. PCR Tr. 538, 542. Specifically, when asked why he did not object to Mr. Johnson's reference to applicant as a monster, Johnston stated that in addition to his general policy of not objecting to victim impact testimony, "that was his moment in court, let the jury listen to him." PCR Tr. 541.

B. Legal Analysis and Conclusion

In this case, trial counsel did not object to the admission of victim impact evidence that went beyond the scope of such evidence as set out by the United States Supreme Court. Victim impact evidence is generally admissible to demonstrate the "uniqueness" of the victim and the "specific harm caused by the defendant." *State v. Hughey*, 339 S.C. 439, 457, 529 S.E.2d 721.

730 (2000); *see also Payne v. Tennessee*, 501 U.S. 808 (1991) (Eighth Amendment did not erect a bar to the admission of victim impact evidence and a state may allow the jury to see “a *quick glimpse* of the life” of the victim.” *Id.* at 830 (O’Connor, J., concurring (emphasis added)(quoting *Mills v. Maryland*, 486 U.S. 367 (1988)). However, in *Payne*, the Supreme Court did not alter its prior holding that “victim’s family members’ characterizations and opinions about the crime, the defendant, and the appropriate sentence, violates the Eighth Amendment.” *Payne*, 501 U.S. at 830, n. 2; *see also Booth v. Maryland*, 482 U.S. 496, 508-509 (1987).

The testimony of Mr. Johnson went beyond simply describing the “uniqueness” of Trooper Johnson or the effect of his death on his family. Personally addressing applicant and referring to him as a monster overstepped the boundaries set out by *Payne* and *Booth* and “so infected the trial with unfairness as to make the resulting [sentence] a denial of due process.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Clearly, this testimony was objectionable. Indeed, Johnston’s reasons for not objecting had nothing to do with the substance of this testimony; rather, his failure was based on a general policy of allowing family members of victims to “confront” the defendant and have their “moment in court.” Of course, this policy is at odds with Supreme Court jurisprudence which has never approved victim impact testimony as an opportunity for a witness to “confront” a defendant. Indeed, the Supreme Court specifically prohibited victim impact witnesses from characterizing (i.e. confronting) a defendant. By his own account Johnston lacked an understanding of the confines of victim impact testimony. Indeed, he could not recall having reviewed a single case on this topic, and his general policy of not objecting suggested that he, in fact, was unaware of the legal bases for potential objections. Second, *assuming arguendo*, that Johnston was aware of the possible objections to this testimony

but did not raise them out of a concern that it would alienate the jury,²⁹ such a concern does not explain his failure to at least approach the bench so that he could protect his client without having to argue in the presence of the jury.³⁰ According to Johnston, this thought had never occurred to him. PCR Tr. 541. Johnston's willingness to sit by while a witness personally castigated his client in front of the jury was professionally unreasonable and prejudicial to applicant.

IX . Applicant was denied the effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by appellate counsel's failure to appeal the disqualification of Juror Massey.

A. Relevant Facts

During jury selection, the trial court disqualified Juror Massey based on its concerns that the juror had prejudged applicant's guilt. Tr. 669-670. This juror testified during *voir dire* that he was impartial and would need to hear the evidence before deciding between life imprisonment and the death penalty. Tr. 654-655. The juror did indicate that normally when he reads about an arrest in the newspaper, he assumes that the defendant is guilty. Tr. 658. However, the juror elaborated that he could be fair in applicant's case. Tr. 659-660, 662-663. Juror Massey also indicated a concern about being away from his business and home for ten days but also "[didn't] think anyone would want to be away from home for 10 days." Tr. 665. The prosecution objected to this juror's qualification on the basis that his concerns about being away from his

²⁹ Given trial counsels' decision to pursue a theory at trial that was not supported by evidence and destroyed the defense's credibility, his excuse for not objecting to this testimony - a fear of alienating the jury - is more convenient than it is convincing.

³⁰ Mr. Johnson, rather than testify in question/answer form, simply read from a letter which he, or someone, had previously written. While this form of victim impact testimony has been allowed, *see State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000), to the extent that it made it more difficult for trial counsel to object appropriately without alienating the jury, an objection should have been made by trial counsel.

work and home might "impact his ability to serve." Tr. 668. The trial court expressed concern about the juror's frustration at being away from work and home as well as his statements indicating an assumption that arrestees are guilty of the crime for which they were arrested. The court acknowledged that Juror Massey had testified that he could be fair and set aside any preconceptions, but, nevertheless, worried that the juror's frustration of being sequestered may cause him to revert back to this biased opinion. Tr. 669-670.

At the PCR hearing Mr. Savitz testified that he did not raise on direct appeal the issue of Juror Massey's disqualification. Specifically, Mr. Savitz testified that he did not believe the issue was "meritorious." PCR Tr. 401. Mr. Savitz did recall that the juror had indicated that he could be fair to the defendant but believed that the juror may have still been concerned about his business. PCR Tr. 401-402.

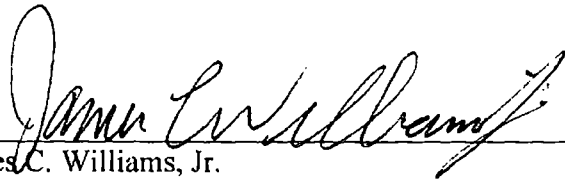
B. Legal Analysis and Conclusion

A juror must be impartial and must be able to set aside any previously formed opinion. It is not enough for a juror to simply have formed an opinion about a defendant's guilt. "The venireperson must not only have a formed opinion of the defendant's guilt, but also be unable to set that opinion aside to view the evidence with impartiality." *State v. Avery*, 374 S.C. 524, 533, 649 S.E.2d 102, 106 (Ct. App. 2007). Applying this standard, Juror Massey was a qualified juror. While at one time he implied that he may have prejudged applicant's case because of his general assumption that when defendants are arrested they are most probably guilty, he unequivocally and consistently indicated that he would be able to decide the case based on the evidence and would not assume applicant's guilt. As for his concern about work and family, Juror Massey even acknowledged that the inconvenience to him was probably felt by the other jurors as well. Tr. 665.

While certainly appellate counsel can prioritize issues and raise only those that he or she believes has merit, here counsel only raised four issues, one of which was obviously defaulted and could not be decided on direct appeal. So, any suggestion that Savitz "winnowed" down the issues in this case is belied by the facts. PCR Tr. 402. The trial court improperly disqualified Juror Massey, trial counsel appropriately objected, and appellate counsel's failure to raise this issue on direct appeal was professionally unreasonable. Had the issue been raised there is a reasonable likelihood that relief would have been granted.

CONCLUSION

For the foregoing reasons this Court vacates applicant's sentence and remands the case to the Berkeley County Court of General Sessions for a new sentencing trial.


James C. Williams, Jr.
Circuit Court Judge

Dated: Aug 11, 2009
Orangeburg, South Carolina



State of South Carolina
The Circuit Court of the First Judicial Circuit

James C. Williams, Jr.
Judge

Post Office Box 1949
190 Gibson Street, Suite 207
Orangeburg, SC 29116-1949
Phone: (803) 535-2187
Fax: (803) 535-2188
jwilliamsj@sccourts.org

August 12, 2009

Berkeley Clerk of Court
P. O. Box 219
300 B. California Avenue
Moncks Corner, S. C. 29461

Re: Jesse Waylon Sapp v. State of South Carolina
2006-CP-08-2204

Dear Ms. Brown:

Please file the enclosed ORDER and send copies to Assistant Attorney General Don Zelenka and Attorney Robert Lominack, the attorneys of record in this case.

Thank you for your assistance in this matter.

Sincerely,

James C. Williams, Jr.
James C. Williams, Jr.

JCWjr:pts

Enclosure

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

CA No.09-CP-32-5465

RECEIVED

APR 13 2012

S.C. Supreme Court

KEVIN MERCER. *Petitioner/Respondent,*

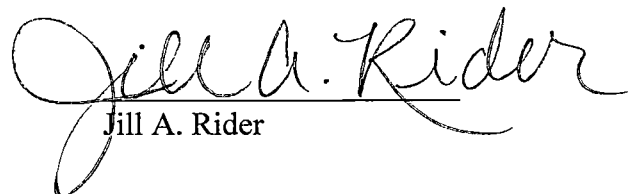
v.

STATE OF SOUTH CAROLINA *Respondent/Petitioner.*

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner/Respondent's Return to
Respondent/Petitioner's Petition for Writ of Certiorari was served today by first class United
States mail, postage prepaid, this 9th day of April, 2012, upon the following:

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


Jill A. Rider

RECEIVED

MAY 24 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. SUPREME COURT

Appeal from Lexington County

James L. Barber, III, Circuit Court Judge

KEVIN MERCER

PETITIONER-RESPONDENT,

V.

STATE OF SOUTH CAROLINA

RESPONDENT-PETITIONER.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
(803) 734-6305

ATTORNEYS FOR RESPONDENT-PETITIONER

The Petitioner-Respondent (hereinafter "Respondent") hereby replies to the Return to the Petition for Writ of Certiorari.

A. Mercer's assertion that there are additional sustaining grounds is not supported by the record; the alleged additional sustaining grounds are all claims upon which the PCR Court denied relief and cannot serve as additional sustaining grounds as a result.

Mercer has asserted four additional sustaining grounds in support of denying the State's Petition for Writ of Certiorari. First, he contends trial counsel was ineffective for not calling an expert in eyewitness identification. Second, he asserts trial counsel was ineffective in not presenting evidence there was more than one perpetrator. Third, he argues that Timothy Johnston gave perjured testimony. Fourth, he asserts trial counsel was ineffective in not objecting to some of the victim impact testimony presented at trial.

1. Mercer's claims that these can serve as additional sustaining grounds is not supported by the law.

All four alleged additional sustaining grounds offered by Mercer were claims upon which the PCR Court denied relief. As such, these claims cannot serve as additional sustaining grounds.

"The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR.

The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case. It is within the appellate court's discretion whether to address any additional sustaining grounds.

On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

Respondent submits that none of the claims now raised as additional sustaining grounds

can serve as such. As with the claim upon which Mercer has sought writ of certiorari, all four alleged additional sustaining grounds were all separate claims upon which the PCR Court denied relief. As such, Mercer cannot utilize these claims as potential additional sustaining grounds because he was not the prevailing party upon those claims. See generally I'On, 338 S.C. at 419, 526 S.E.2d at 723 (noting prevailing party is the winner upon claims in lower court). Since Mercer did not appeal the denial of relief upon these claims as he did with the freestanding claim he does raise in his cross-appeal, he abandoned those claims and the denial of relief by the PCR Court upon these claims has become law of this case.¹ See generally McCray v. State, 317 S.C. 557, 559, 455 S.E.2d 686, 687 (1995) (issue must be raised in petition for writ of certiorari to be preserved for review); ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (unappealed ruling becomes law of the case and should not be reconsidered on appeal).

2. The PCR Court properly found trial counsel was not ineffective in not utilizing an eyewitness identification expert.

The PCR Court's denial of relief upon this claim is supported by the record. The PCR Court noted that Mr. Littlejohn indicated that he did not believe this case was a good one for an eyewitness identification expert because there was no facial identification. (App. 4264). Further, the PCR Court also noted that Ms. Armstrong did not recall discussing whether such an expert should be hired. (App. 4264). She further noted that she may have thought at the time that Mercer's case was not a case in which

¹ To the extent this Court disagrees, Respondent would further assert that even if these claims could be considered as additional sustaining grounds, it would be unwise to do so in light of the fact the PCR Court's denial of relief upon those claims was clearly supported by the record.

one should be used, but she did not recall any specific conversations regarding using an eyewitness identification expert. Id. The PCR Court's factual findings in regards to the attorneys' testimony were supported by the record. (App. 3673-74, 3758-59, 3816).

Mercer also presented the testimony of Dr. Van Wallendael, a psychologist who focuses on memory and eyewitness identification. The PCR Court stated,

Van Wallendael testified there were a number of variables that should be used in assisting in the evaluation of an eyewitness identification. Those included how long the witness had to view, the lighting, the stress level of the witness, whether the witness was focused on a weapon, and whether there were other distractions present. She noted that stress was a very important variable. She also testified there is a misperception that police officers and members of the military are better at making eyewitness identifications because of their training. Van Wallendael testified there were several factors at play in the "identification" made by the victim's roommate in Applicant's case. First, she maintained the description could have been more accurate if Magwood was under less stress. She noted there was no mention of seeing a gun in Magwood's statement, but the presence of a weapon was implied. Van Wallendael also noted that a sense of heightened awareness does not necessarily translate into more accurate identification. Van Wallendael also indicated that the lighting conditions can influence one's visual perceptions. She remarked that the lighting conditions probably played a role in the accuracy of Magwood's "identification" in this case.

(App. 4264-65). The PCR Court's recitation of the testimony of Van Wallendael's testimony is also supported by the record. (App. 3579-83, 3586-96, 3602-10).

As noted by the PCR Court, this was not a case in which an eyewitness identification was made. Magwood did not identify Mercer in any lineup. Nor did Magwood testify that he saw any shots fired that night. He merely described the individual he saw at the victim's vehicle shortly before the shooting. Van Wallendael acknowledged that the description of the perpetrator given by Magwood was consistent with the photograph taken of Mercer on the night of the murder. (App. 3603-06). She also noted that the initial description given by an eyewitness is the purest reflection of

what the witness actually saw. (App. 3602-03). The description Magwood gave at trial was consistent with the clothing Mercer was wearing when he was arrested shortly after the shooting. It was further consistent with the description he gave law enforcement in his initial statement to police. (App. 4103-04). In all, the PCR Court's finding that trial counsel was not deficient in not presenting the testimony of an eyewitness identification expert was supported by the record. Further, the PCR Court's finding that Mercer was not prejudiced by counsel not presenting an eyewitness identification expert was similarly supported by the record. Mercer presents no argument as to how Van Wallendael's testimony would have supported the defense theory that Mercer's co-defendant was either present at the scene or that the co-defendant was the one who shot the victim, especially in light of the stark contrast between what Mercer's general size and clothing as compared to his co-defendant's size and clothing on the evening of the shooting. Since this testimony would not have undermined the description provided by Magwood, it would not have led to a different result at trial. Thus, this argument is insufficient to serve as an additional sustaining ground in this case.

3. The PCR Court properly found trial counsel was not ineffective in not presenting additional evidence of more than one perpetrator at the scene of the murder.

Mercer's contention that trial counsel should have presented additional evidence that more than one perpetrator was at the scene of the murder is without merit. As properly noted by the PCR Court, Mercer failed to establish how any of the alleged additional evidence could have been presented at trial. Much of the alleged evidence was inadmissible hearsay. Mercer has not presented how the evidence could be presented at trial, and it is not apparent from the record that the alleged additional evidence of two

perpetrators could have been presented. Thus, the PCR Court's finding that Mercer failed to show that counsel was deficient was reasonable. See generally Hoots v. Allsbrook, 785 F.2d 1214, 1222-23 (4th Cir. 1986)(finding no ineffective assistance of counsel in failure to present inadmissible evidence). Furthermore, Mercer was not prejudiced by the fact counsel did not present this alleged evidence. As noted by the PCR Court, the additional evidence was cumulative to testimony presented at trial through Deputy Stazer and Terry Brown, both of whom indicated Mercer was not the sole perpetrator. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625-26 (1989)(finding counsel not ineffective for not presenting cumulative testimony that would not have proven a defense). Altogether, the PCR Court's findings were supported by the record, and Mercer's contention that this claim is an additional sustaining ground is without merit.

4. The allegation that Timothy Johnston provided perjurious testimony was properly denied

Mercer's reliance upon the allegation that Timothy Johnston testified falsely at the motion for new trial hearing does not constitute an additional sustaining ground. The PCR Court properly denied relief upon this claim, and the PCR Court's denial of relief is supported by the record.

At the motion for new trial hearing, Timothy Johnston testified he was one of Marcus Thompson's cell mates in May 2006. (App. 2688-89). He recalled Thompson talking about his charges. (App. 2689). Johnston testified that Thompson told him what had happened, and Thompson was asking his cellmates what he thought they [the State] would do to him. (App. 2689-90). Thompson's focus was on his murder charge. (App.

2690). Johnston testified that both he and their third cellmate, Kevin Fuller, both had been to prison before. (App. 2690). Thompson had not. (App. 2690).

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

Johnston also testified about a second time Thompson told him about the crime. During this second conversation, Kevin Fuller was asleep. Thompson told Johnston the same story. However, this time, Thompson told him he was in the stolen truck when they were stopped. (App. 2693-94). Johnston further testified that Thompson never said anything about pulling the trigger. (App. 2698-99). Johnston did ask Thompson about the gloves found on Thompson when he was arrested. Thompson informed Johnston that the gloves were from his job. (App. 2699-700). Thompson never told Johnston about the pistol or target practice. (App. 2700).

Johnston acknowledged on cross-examination that he had prior convictions for criminal domestic violence, shoplifting, failure to stop, and a couple of driving under suspensions. He also noted that he had pending charges for first degree burglary and second degree burglary. However, he was not seeking assistance with the first-degree burglary charge because it was already set to be dismissed. He testified that the complaining witness had already informed law enforcement that he had permission to

enter the residence, and he was in a dispute with the solicitor's office as to whether the charges were still pending. (App. 2702-04). He also testified he was pleading guilty to the second-degree burglary. (App. 2709).

At the evidentiary hearing, Johnston testified that Thompson had told him a third version of the events on the night of the shooting. (App. 3566). In the third version, which Johnston asserted he did not share with the solicitor's office, Johnston alleged that Thompson was the one who shot Sgt. Davis. Id. Johnston testified that he had never told anyone else that Thompson had told him he was the shooter. (App. 3567). Johnston also testified that he lied at the motion for new trial hearing because Thompson grew up in the same area as Johnston and his family. Id. Johnston claimed that Thompson threatened to "reach out and touch" Johnston's family. Id. Johnston also testified that he did not know which of the three versions of the story were true. (App. 3569).

Deputy Solicitor Samuel R. Hubbard testified that when the Solicitor's Office met with Johnston, he started by indicating they would not like what he had to say about Kevin Fuller. Johnston had indicated that Fuller was lying in an attempt to receive assistance with his charges. Hubbard testified that Johnston never said that Thompson indicated he was the shooter. To the contrary, Johnston's impression of Thompson was that he was afraid of prison, and he was seeking advice from his two cell mates who had more experience with the system. Further, Johnston indicated that Fuller would say anything. (App. 3638-44). Assistant Solicitor Shawn Graham also indicated that Johnston told them that Fuller would say anything. Graham's testimony indicates that Johnston's testimony at the motion for new trial hearing was consistent with what he told them prior to the hearing. (App. 3648-52).

“Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial.” State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977)(quoting State v. Mayfield, 235 S.C. 11, 34–35, 109 S.E.2d 716, 729 (1959)); State v. Harris, 391 S.C. 539, 544, 706 S.E.2d 526, 529 (Ct.App.2011). “The credibility of newly-discovered evidence is for the trial court to determine. Only the trial court and not the appellate court has the power to weigh the evidence; the trial court's judgment will not be disturbed except for error of law or abuse of discretion.” Harris, 391 S.C. at 545, 706 S.E.2d at 529. Here, the PCR Court determined that Johnston’s testimony was not credible. The PCR Court’s findings are supported by the record. Thus, Mercer cannot show that this claim could be an additional sustaining ground for the PCR Court’s grant of post-conviction relief.

5. Victim impact evidence claim

Mercer’s assertion that trial counsel was ineffective for not objecting to victim impact testimony at trial was properly denied by the PCR Court for lack of merit. The PCR Court’s findings are supported by the record. In her deposition, Ms. Armstrong testified that she believed the testimony of the four soldiers regarding the victim’s loss on themselves and the Army generally was properly admissible victim impact testimony. (App. 3781). She felt the State had some latitude under which it could present the testimony of people who knew the victim and his qualities. (App. 3782). Mr. Littlejohn also testified that he did not believe that Judge Few would have excluded any of the testimony had an objection been made. (App. 3675).

The PCR Court properly found the testimony contained on R. pp. 2078-83 was properly admitted at trial. This was the testimony of Command Sergeant Major Martin

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

As noted by the PCR Court, there was nothing particularly heartwrenching about this testimony; it was pretty much what someone would expect and delivered in a

professional and matter-of-fact manner. Thus, given the limited nature of the testimony during the course of a large proceeding and the lack of any undue prejudice, it cannot be said it rendered Mercer's trial fundamentally unfair or its absence alone would create a reasonable probability of a different result given the extremely egregious nature of this crime as well as Mercer's other violent run-ins throughout his life. See, e.g. Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (improper argument not reversible where it was but 10 lines in transcript).

To the extent Mercer alleges that the testimony of Robert Ames, Clifton Magwood, David O'Garro, and Martin Wells was improper victim impact testimony, the PCR Court finds this claim is without merit. It was established by their testimony that Robert Ames, Clifton Magwood, and David O'Garro were all close friends of the victim, Sergeant Davis. Martin Wells indicated that he was Davis' immediate superior officer at Fort Jackson. The admission of fellow workers statements have been deemed admissible as proper victim impact evidence under Payne v. Tennessee as showing the uniqueness of the individual. See, U.S. v. Barnard, 299 F.3d 467 (5th Cir 2002); Franklin v. State, 965 So. 2d 79 (Fla. 2007) ("designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death"); Wesley v. State, 112 Nev. 503, 520, 916 P.2d 793, 804 (Nev.1996) (victim impact evidence from neighbors and co-worker appropriate under Payne where each witness's testimony was relevant to the impact of Wesley's actions); U.S. v. Wilson, 493 F. Supp. 2d 364 (E.D.N.Y.2006) (victim impact testimony admissible from colleagues and co-workers in police department, where the testimony of NYPD coworkers will be presented to demonstrate "the chilling effect" these murders had specifically on undercover

detectives within the NYPD and the fact that as a result of these murders, undercover detectives were “refusing to go out on the street, do these operations because of the danger, how some even retired from undercover work, said I’ll be a police officer but I will not do undercover work anymore.”); U.S. v. Battle, 173 F.3d 1343 (11th Cir. 1999) (prison officials testifying about the impact the prison murder had upon the prison guards admissible impact evidence). “Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant” People v. Valencia, 43 Cal.4th 268, 300, 74 Cal.Rptr.3d 605, 639 (Cal.,2008). But see U.S. v. Fields, 516 F.3d 923 (10th Cir. 2007).

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

The video played at the funeral expressed no outrage, contained no clarion call for vengeance, but may have implied sadness. See, People v. Kelly, 68 Cal.Rptr 3d 531 (2008), cert. denied 129 S.Ct. 564 (2008) (particular video montage admissible under Payne); cf. State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010), cert. denied (Apr. 25,

2011)(finding no error in admission of video of funeral slain law enforcement officer). Here, the video supplemented but did not duplicate any of the witnesses' testimony. While Mercer may suggest that revealing emotional effect demands exclusion of the evidence, that is not the test where Payne allows the admission of the impact of the victim's death upon the survivors. Altogether, the PCR Court properly found the testimony regarding the roll call and the funeral video were admissible as victim impact evidence at Mercer's trial. Thus, counsel was not deficient in not objecting to either the roll call testimony or the funeral video as improper victim impact evidence.² See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial); Anderson v. Goeke, 44 F.3d 675, 680 (8th Cir. 1995) ("[T]he 'performance of an attorney is not deficient for failure to object to admissible evidence.'")(quoting Russell v. Jones, 886 F.2d 149, 152 (8th Cir.1989)). As a result, this claim for relief is denied.

Furthermore, the PCR Court properly found that Mercer was not prejudiced by counsel not objecting to the roll call testimony or the funeral video. Since the evidence was admissible victim impact evidence, an objection based upon those grounds would have been denied. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying

² Respondent would note that Mercer has relied upon Sapp v. South Carolina, 2006-CP-08-2204 in support of his allegations in this claim. This is not binding precedent on this Court.

evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition for Writ of Certiorari, Respondent-Petitioner respectfully requests this Court grant this petition for writ of certiorari and reverse the PCR Court's grant of post-conviction relief. Respondent-Petitioner further requests any other relief this Court deems appropriate.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

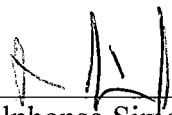
DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

By:



Alphonso Simon Jr.
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

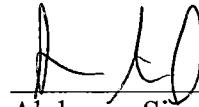
May 21, 2012

CERTIFICATE OF SERVICE

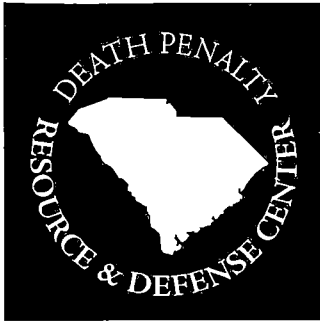
I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the ***Reply to Return to Petition for Writ of Certiorari***, by depositing one (1) copy of same in the United States mail, postage prepaid, addressed to:

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

This, the 21st day of May, 2012



Alphonso Simon Jr.
Assistant Attorney General



RECEIVED

MAY 31 2012

S.C. SUPREME COURT

May 29, 2012

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

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

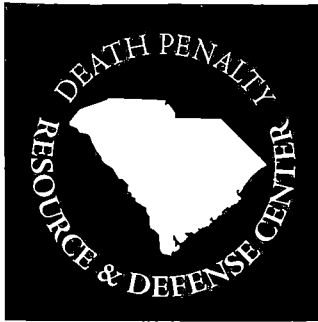
Dear Mr. Shearouse:

I have recently received Respondent-Petitioner's Reply to Return to Petition for Writ of Certiorari in the above captioned case. Respondent takes the position that the additional sustaining grounds raised in Mercer's Return have been "abandoned" because they were not raised in Mercer's own Petition for Writ of Certiorari. I am writing to note that Mercer has not abandoned these claims. The PCR court granted Mercer a new sentencing trial on the ground that his trial counsel was ineffective for failing to investigate and present an *Atkins* claim at trial. Mercer's Petition for Writ of Certiorari did not challenge that relief. Rather, Mercer argued that the PCR court should have gone even further and decided his freestanding *Atkins* claim on the merits. Respondent's petition, on the other hand, *does* challenge the PCR court's decision to grant a new sentencing trial. In his Return to that pleading, Mercer raised several additional grounds on which the PCR court should also have granted a new sentencing trial. It is my understanding that these are properly raised "additional sustaining grounds." These claims could not have been raised in Mercer's own Petition for Writ of Certiorari. Moreover, this understanding was confirmed in a telephone conversation that I had with Mr. Shearouse prior to filing Mercer's Petition for Writ of Certiorari. I would like to ensure that the record is clear on this point.

Sincerely yours,


Emily C. Paavola

cc: Alphonso Simon, Esq.



2011-196608

RECEIVED

JUL 18 2013

S.C. SUPREME COURT

July 16, 2013

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

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

Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. The lower court entered an order granting Post-Conviction Relief. Both parties have filed notices of appeal. Cross petitions for a writ of *certiorari* have been filed and briefing has been completed.

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

Sincerely yours,

Emily C. Paavola

The Supreme Court of South Carolina

Kevin J. Mercer, Petitioner/Respondent,

v.

State of South Carolina, Respondent/Petitioner.

Appellate Case No. 2011-196608

ORDER

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

FOR THE COURT

By Brenda I. Shealy
Chief Deputy Clerk

Columbia, South Carolina

May 11, 2012

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



ALAN WILSON
ATTORNEY GENERAL

May 9, 2012

RECEIVED

MAY - 9 2012

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

S.C. Supreme Court

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

Dear Mr. Shearouse:

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

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

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

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

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAY - 9 2012

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

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General

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

BY: 

ALPHONSO SIMON, JR.
Assistant Attorney General


DONALD J. ZELENKA,
Assistant Deputy Attorney General

I support the finding of good cause.

ATTORNEYS FOR RESPONDENT/PETITIONER

May 9, 2012.

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

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

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

CERTIFICATE OF SERVICE

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

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



ALPHONSO SIMON, JR.
Assistant Attorney General

The Supreme Court of South Carolina

Kevin J. Mercer, Petitioner/Respondent,

v.

State of South Carolina, Respondent/Petitioner.

Appellate Case No. 2011-196608

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

ORDER

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

FOR THE COURT

BY



CLERK

Columbia, South Carolina

May 7, 2012

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



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

APR 30 2012

April 30, 2012

S.C. Supreme Court

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

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

Dear Mr. Shearouse:

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

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

Sincerely,


Alphonso Simon, Jr.
Assistant Attorney General

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

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

KEVIN J. MERCER,

RECEIVED

APR 30 2012

Petitioner/Respondent,

S.C. Supreme Court

vs.

STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

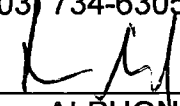
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General

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

BY: 

ALPHONSO SIMON, JR.
Assistant Attorney General

April 30, 2012.

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

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

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

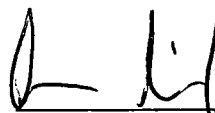
STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

CERTIFICATE OF SERVICE

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

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



ALPHONSO SIMON, JR.
Assistant Attorney General

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

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

ORDER

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

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Shanda L. Shealy*
Chief Deputy CLERK

Columbia, South Carolina

April 20, 2012

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



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

APR 19 2012

April 19, 2012

S.C. Supreme Court

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

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

Dear Mr. Shearouse:

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

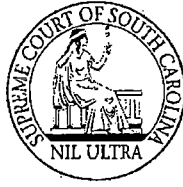
Therefore, I respectfully request this extension within which to serve and file the Reply to Return to Petition for Writ of Certiorari. I am informing opposing counsel of my request by copy of this letter.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS/dmd

cc: Emily Paavola, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE: (803) 734-1080

FAX: (803) 734-1499

www.sccourts.org

April 16, 2012

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

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

Dear Counsel:

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

"Granted.

s/ Costa M. Pleicones J.
For the Court

April 16, 2012."

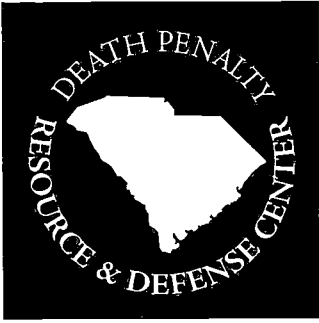
By copy of this letter we are advising opposing counsel of the action of the Court in this matter.

Very truly yours,

Daniel D. Shearouse
DS

CLERK

cc: Alphonso Simon, Jr.



April 9, 2012

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

RECEIVED

APR 13 2012

S.C. Supreme Court

Re: Kevin Mercer v. State of South Carolina

Dear Mr. Shearouse:

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

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

Sincerely,

Jill A. Rider
Paralegal

cc: Alphonso Simon, Jr., Esq

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

CA No.09-CP-32-5465

RECEIVED

APR 13 2012

S.C. Supreme Court

KEVIN MERCER. *Petitioner/Respondent,*

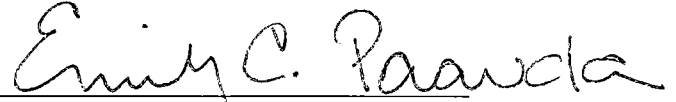
v.

STATE OF SOUTH CAROLINA *Respondent/Petitioner.*

PETITIONER/RESPONDENT'S MOTION TO EXCEED PAGE LIMITS

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

Respectfully submitted,



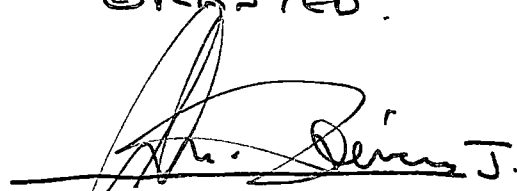
EMILY C. PAAVOLA

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

ATTORNEY FOR PETITIONER

April 9, 2012

GRANTED.



For the Court

April 16, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

CA No.09-CP-32-5465

RECEIVED

APR 13 2012

S.C. Supreme Court

KEVIN MERCER. *Petitioner/Respondent,*

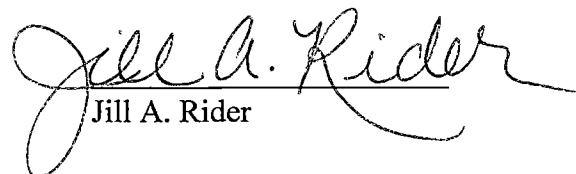
v.

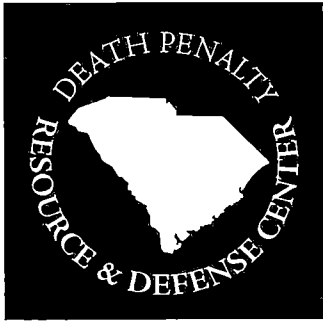
STATE OF SOUTH CAROLINA *Respondent/Petitioner.*

CERTIFICATE OF SERVICE

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

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


Jill A. Rider



March 21, 2012

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

Re: Kevin Mercer v. State of South Carolina

Dear Mr. Shearouse:

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

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

Sincerely,

Jill A. Rider

Paralegal

RECEIVED
MAR 23 2012
S.C. SUPREME COURT

cc: Alphonso Simon, Jr., Esq



ALAN WILSON
ATTORNEY GENERAL

March 16, 2012

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

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

Dear Mr. Shearouse:

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

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

Thank you for your assistance in this matter.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

RECEIVED
MAR 22 2012
S.C. SUPREME COURT

AS/dmd
Enclosures

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

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

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

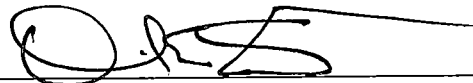
ORDER

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

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

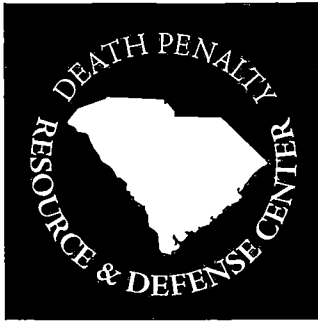


CLERK

Columbia, South Carolina

March 9, 2012

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



March 8, 2012

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

Re: Kevin Mercer v. State of South Carolina

Dear Mr. Shearouse:

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

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

Sincerely,

Jill A. Rider
Paralegal

cc: Alphonso Simon, Jr., Esq

RECEIVED

MAR 09 2012

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No.09-CP-32-5465

RECEIVED

S.C. SUPREME COURT

KEVIN MERCER. *Petitioner,*

v.

STATE OF SOUTH CAROLINA *Respondent.*

SECOND MOTION FOR EXTENSION OF TIME TO FILE RETURN

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

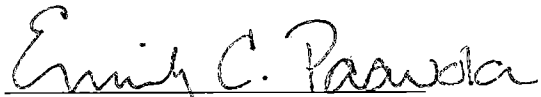
This request is based on counsel's heavy caseload and the complexity of the issues involved. Over the past thirty days, undersigned counsel has spent a substantial amount of time conducting mitigation investigation and making preparations for the capital post-conviction relief hearing in Bobby Wayne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

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

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

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

Respectfully submitted,



EMILY C. PAAVOLA

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

March 8, 2012.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No.09-CP-32-5465

KEVIN MERCER. *Petitioner,*

v.

STATE OF SOUTH CAROLINA *Respondent.*

CERTIFICATE OF SERVICE

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

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


Jill A. Rider

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

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

ORDER

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

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

March 9, 2012

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

ALAN WILSON
ATTORNEY GENERAL



March 5, 2012

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

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

Dear Mr. Shearouse:

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

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

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

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

RECEIVED
MAR 07 2012
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

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

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

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

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

RECEIVED

MAR 07 2012

S:O: SUPREME COURT

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

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

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

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

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

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

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

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

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

Respectfully submitted,

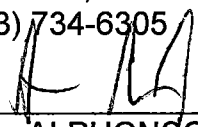
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

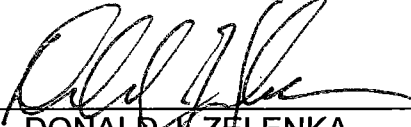
DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General

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

BY: 

ALPHONSO SIMON, JR.
Assistant Attorney General

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

March 5, 2012.

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

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

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

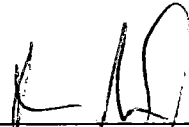
STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

CERTIFICATE OF SERVICE

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

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



ALPHONSO SIMON, JR.
Assistant Attorney General

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

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

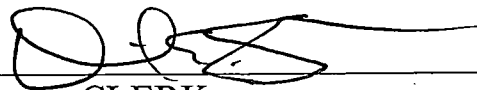
ORDER

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

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY


CLERK

Columbia, South Carolina

February 7, 2012

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



ALAN WILSON
ATTORNEY GENERAL

February 2, 2012

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

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

Dear Mr. Shearouse:

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

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

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

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

RECEIVED

FEB 06 2012

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

RECEIVED

FEB 06 2012

S.C. SUPREME COURT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General

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

BY: 
ALPHONSO SIMON, JR.
Assistant Attorney General

February 2, 2012.

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

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

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

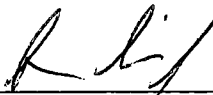
STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

CERTIFICATE OF SERVICE

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

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



ALPHONSO SIMON, JR.
Assistant Attorney General

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

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

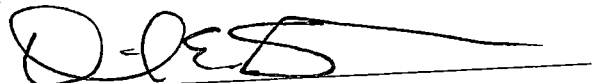
ORDER

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

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

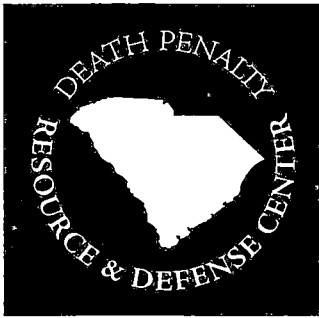


CLERK

Columbia, South Carolina

February 3, 2012

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



February 1, 2012

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

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

Dear Mr. Shearouse:

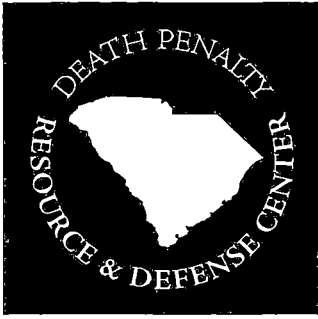
I am writing to request an extension of thirty (30) days in which to file the Return to Petition for Writ of Certiorari on behalf of Petitioner/Respondent in the above referenced case. This request for a continuance is based on counsel's heavy caseload and the complexity of the issues involved. Although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

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

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

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

RECEIVED
FEB 03 2012
S.C. SUPREME COURT

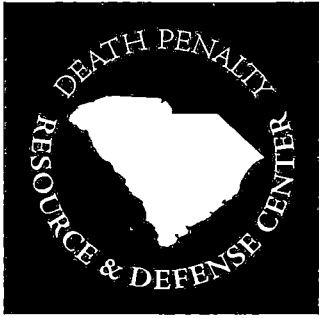


Sincerely yours,

Emily C. Paavola

Emily C. Paavola

cc: Alphonso Simon, Esq.



January 23, 2012

RECEIVED
JAN 24 2012
S.C. SUPREME COURT

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

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

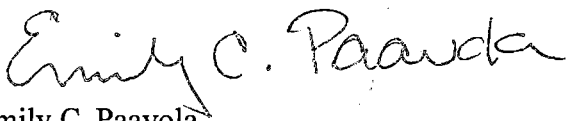
Dear Mr. Shearouse:

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

900 Elmwood Avenue
Suite 101
Columbia, SC 29201

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

Very truly yours,


Emily C. Paavola

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

ALAN WILSON
ATTORNEY GENERAL



RECEIVED
JAN 10 2012
S.C. SUPREME COURT

January 3, 2012

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

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

Dear Mr. Shearouse:

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

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

Thank you for your assistance in this matter.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

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

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

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

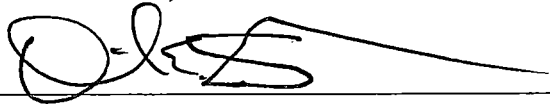
ORDER

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

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

January 4, 2012

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



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

JAN - 3 2012

January 3, 2012

S.C. Supreme Court

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

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

Dear Mr. Shearouse:

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

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

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS/dmd
cc: Emily Paavola, Esquire

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

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

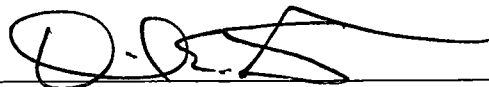
ORDER

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

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

December 5, 2011

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



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

December 2, 2011

DEC - 2 2011

S.C. Supreme Court

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

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

Dear Mr. Shearouse:

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

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd

Enclosures

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

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

DEC - 2 2011

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

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

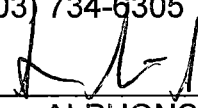
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

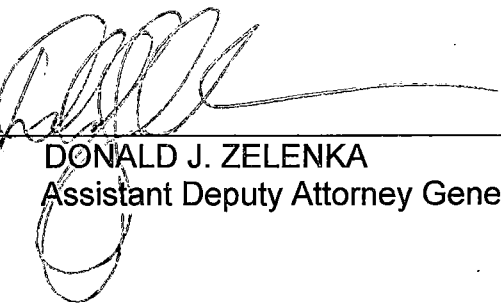
ALPHONSO SIMON, JR.
Assistant Attorney General

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

BY: 

ALPHONSO SIMON, JR.
Assistant Attorney General

December 2, 2011.

BY: 

DONALD J. ZELENKA
Assistant Deputy Attorney General

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

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

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

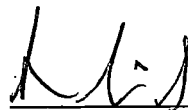
STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

CERTIFICATE OF SERVICE

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

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



ALPHONSO SIMON, JR.
Assistant Attorney General

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

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

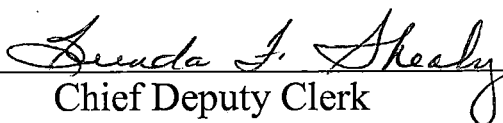
ORDER

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

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY


Chief Deputy Clerk

Columbia, South Carolina

November 4, 2011

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No.09-CP-32-5465

RECEIVED

NOV 3 2011

S.C. SUPREME COURT

KEVIN MERCER. *Petitioner,*

v.

STATE OF SOUTH CAROLINA *Respondent.*

SECOND MOTION FOR EXTENSION OF TIME

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

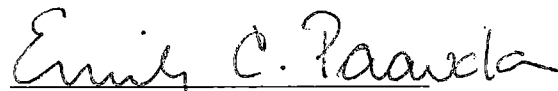
1. In accordance with this Court's instructions by letter dated August 26, 2011, undersigned counsel and counsel for respondent have jointly agreed on the items to be included in the single Appendix for this consolidated appeal. Undersigned counsel has delivered those items to the Division of Appellate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

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

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

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

Respectfully submitted,

A handwritten signature in black ink, reading "Emily C. Paavola". The signature is fluid and cursive, with the first name "Emily" and last name "Paavola" clearly legible.

EMILY C. PAAVOLA

Death Penalty Resource & Defense Center

P.O. Box 11311

Columbia, SC 29211

(803) 765-1044

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No.09-CP-32-5465

KEVIN MERCER. *Petitioner,*

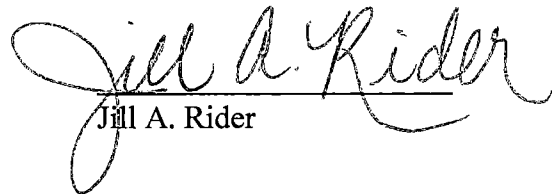
v.

STATE OF SOUTH CAROLINA *Respondent.*

CERTIFICATE OF SERVICE

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

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


Jill A. Rider

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

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

ORDER

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

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY


Chief Deputy Clerk

Columbia, South Carolina

November 4, 2011

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

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

NOV 2 2011

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

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

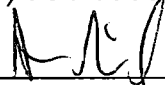
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General

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

BY: 

ALPHONSO SIMON, JR.
Assistant Attorney General

November 2, 2011.

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

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

KEVIN J. MERCER,

Petitioner/Respondent,

vs.

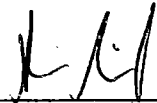
STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

CERTIFICATE OF SERVICE

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

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



ALPHONSO SIMON, JR.
Assistant Attorney General



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

NOV 2 2011

November 2, 2011

S.C. Supreme Court

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

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

Dear Mr. Shearouse:

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

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd

Enclosures

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

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

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

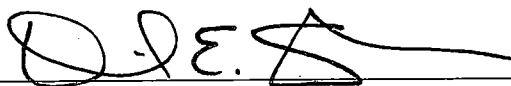
ORDER

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

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

October 4, 2011

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



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

OCT - 3 2011

October 3, 2011

S.C. Supreme Court

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

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

Dear Mr. Shearouse:

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

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

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS/

cc: Emily Paavola, Esquire

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

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

ORDER

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

IT IS SO ORDERED.

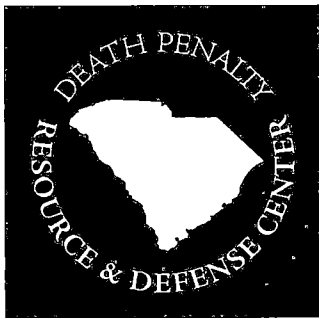
JEAN H. TOAL, CHIEF JUSTICE

BY Shirley J. Shealy
Chief Deputy CLERK

Columbia, South Carolina

September 29, 2011

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



September 28, 2011

RECEIVED

SEP 28 2011

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

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

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

Dear Mr. Shearouse:

Dear Mr. Shearouse:

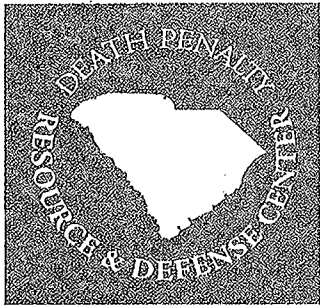
I am writing to request an extension of thirty (30) days in which to file Petitioner's Writ of Certiorari and Appendix in the above referenced case. The Petition and Appendix are currently due to be filed, October 3, 2011. This request for a continuance is based on counsel's heavy caseload and the complexity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

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

Sincerely yours,

Emily C. Paavola
Emily C. Paavola

cc: Alphonso Simon, Esq.



September 2, 2011

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

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

Dear Mr. Shearouse:

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

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

Sincerely yours,

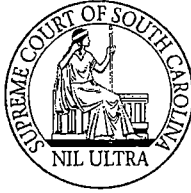
Emily C. Paavola

RECEIVED

SEP 02 2011

cc: Alphonso Simon, Esq.

S.C. SUPREME COURT



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 1, 2011

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

Re: Mercer, Kevin v. The State

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

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

Very truly yours,



CLERK

DES/dmh

Enclosure

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

The Supreme Court of South Carolina

Kevin J. Mercer,

Petitioner/Respondent,

v.

State of South Carolina,

Respondent/Petitioner.

ORDER

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

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

IT IS SO ORDERED.


FOR THE COURT C.J.

Columbia, South Carolina

September 1, 2011



ALAN WILSON
ATTORNEY GENERAL

August 29, 2011

RECEIVED

AUG 31 2011

S.C. SUPREME COURT

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

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

Dear Mr. Dudek:

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

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

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd

cc: The Honorable Daniel E. Shearouse



ALAN WILSON
ATTORNEY GENERAL

August 29, 2011

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

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

Dear Mr. Shearouse:

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

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

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd

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

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Honorable James R. Barber, III, Circuit Court Judge

ORIGINAL

RECEIVED

AUG 16 2011

S.C. Supreme Court

KEVIN MERCER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

MOTION FOR APPOINTMENT
OF OUTSIDE COUNSEL

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

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

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

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

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

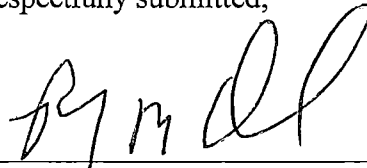
(4) Petitioner was granted a stay of execution by this Court to pursue a writ of certiorari from the United States Supreme Court. The petition for writ of certiorari was denied on October 5, 2009. See Kevin Mercer v. South Carolina, 130 S.Ct. 104 (2009).

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

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

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

Respectfully submitted,

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

Robert M. Dudek
Chief Appellate Defender

Attorney for Petitioner

This 16th day of August, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Honorable James R. Barber, III, Circuit Court Judge

KEVIN MERCER,

PETITIONER,

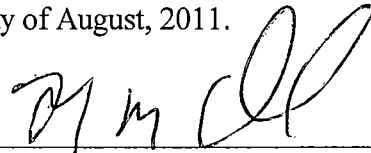
V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

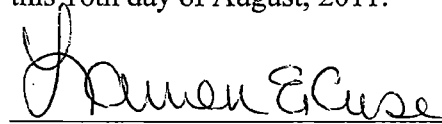
The undersigned attorney hereby certifies that a true copy of the Motion for Appointment of Outside Counsel in the above referenced case has been served upon opposing counsel, Donald J. Zelenka, Esquire and Kevin Mercer, this 16th day of August, 2011.



Robert M. Dudek
Chief Appellate Defender

Attorney for Petitioner

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

 (L.S.)

Notary Public for South Carolina

My Commission Expires: August 23, 2014

EXHIBIT

“A”

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

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

Ground E: Ineffective assistance of appellate counsel

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(R. 616).

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

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

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

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

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

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

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



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

AUG 29 2011

S.C. Supreme Court

August 29, 2011

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

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

Dear Mr. Shearouse:

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

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

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd

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



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

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

August 16, 2011

RECEIVED
AUG 16 2011
S.C. Supreme Court

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

Re: Kevin Mercer v. State of South Carolina

Dear Mr. Shearouse:

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

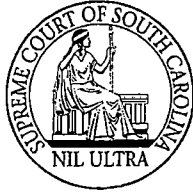
Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/lec

Enclosure

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



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

August 26, 2011

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

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

Re: Mercer, Kevin v. The State

Dear Counsel:

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

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

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

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

Very truly yours,



CLERK

DES/dmh

cc: Division of Appellate Defense

STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

KEVIN MERCER #6021,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner

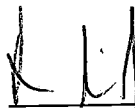
RECEIVED

AUG 26 2011

S.C. SUPREME COURT

NOTICE OF APPEAL

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



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

August 23, 2011.

OTHER COUNSEL OF RECORD:

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

STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

KEVIN MERCER #6021,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

PROOF OF SERVICE

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

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

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

This 23rd day of August, 2011.



ALPHONSO SIMON JR.
Assistant Attorney General

STATE OF SOUTH CAROLINA
 COUNTY OF RICHLAND
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2009CP3205465

Kevin Mercer

vs.

State of South Carolina

Plaintiff

Defendant

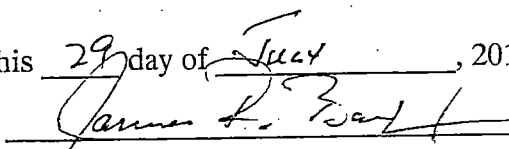
CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
 NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

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

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

Dated at Columbia, South Carolina, this 29 day of July, 2011.

 PRESIDING JUDGE

This judgment was entered on the 11th day of July, 2011, and a copy mailed first class this 21st day of July, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Emily Paavola
 Jason Peavy

ATTORNEY(S) FOR THE PLAINTIFF(S)

Alphonso Simon

ATTORNEY(S) FOR THE DEFENDANT(S)

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2009CP3205465

Kevin Mercer #6021 vs. State Of South Carolina

CHECK ONE:

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

IT IS ORDERED AND ADJUDGED:

☒ See attached order;

☐ Statement of Judgment by the Court:

PRESIDING JUDGE -

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

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

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/wh

SCRPC APP-24/FORM 4

Beth A. Carrigg - Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Kevin Mercer, #6021,

Applicant,

v.

The State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

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

ORDER GRANTING POST
CONVICTION RELIEF

(Capital Case)

FILED
2011 JUL 29 AM 10:54
CLERK OF COURT
LEXINGTON

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

Procedural History

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

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

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

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

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

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

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

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

(R. 2416-17).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Grounds for Relief

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

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

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

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

Ground A: Ineffective Assistance of Counsel During the Guilt Phase

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Allegation #3

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

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

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

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

I. LEGAL FRAMEWORK.

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

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

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

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

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

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

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A. APPLICANT'S TRIAL COUNSEL PROVIDED DEFICIENT PERFORMANCE.

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

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

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

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

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

FILED
2011 JUN 29 AM 11:04
CLERK OF COURT
LEXINGTON

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

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

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

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

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

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

A: No, I did not.

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

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

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

A: Yes.

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

A: Nope, they are not.

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

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

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

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

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

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

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

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

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

1. SIGNIFICANT SUBAVERAGE INTELLECTUAL FUNCTIONING.

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

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

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

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

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

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

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

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

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

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

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

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

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

2. DEFICITS IN ADAPTIVE BEHAVIOR.

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

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

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

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

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

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

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

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

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

	money calculations. He believed that there are eight dimes in a dollar. • According to a report from a pre-trial evaluation by the Department of Mental Health, Applicant could not read (much less understand) "criminal" and "responsibility." • Applicant's technical school experience included temporary class attendance for trucking and electrical work. His wife had to help him with all of his homework, but he often grew frustrated and was not able to complete the work. • Applicant's mother had to repeat things to him, often holding his head to face hers to make sure he heard. This was even for simple instructions that the other children had understood easily (e.g., making up a bed). • As a child, Applicant had difficulty learning the alphabet and took several years to learn basic color differentiation. His mother tried "hooked on phonics" to address his deficits but this didn't work either.

SOCIAL	• School records document that at age 8, "Kevin is starting to perceive that he is experiencing difficulty with his academic work," and that "as a result, he is starting to develop some feelings of inadequacy and question his capabilities at times. This is primarily due to the comparisons he makes between himself and the other members of the class." • Social Security Records report that Applicant's mother stated: "When I tell him about the things I want him to do or give him instructions, I have to look at him directly and tell him what I want as well as get him to repeat the instructions I have given him before I am sure he understands. If I were to tell him these same things in a casual manner without forcing he many times won't understand me. If I am relating basic instructions like clean the kitchen, I have to break each individual task involved". • School records and social security records indicate that Applicant was shy and subject to a lot of teasing as a child by his peers. • Special education records indicate that Applicant had very limited self control. • In seventh grade, Applicant's teacher observed that his attention span was extremely short. • Applicant's teachers and family members consistently reported that he tried hard to appear normal and was teased by others because he was slow. He never stood up for himself. He had a generally poor sense of self-direction. He pretended to know things so that other would not know that he had difficulty understanding. • Applicant's wife, mother and football coach all described him as very gullible. He never had the judgment to know that people were taking advantage of him. He was a complete follower, and thought everyone was his friend. • Applicant's father and football coach explained that he was unable to understand the complexities of most sports, which led to his assignment as waterboy (basketball) and defensive blocker (football). • On the football team, Applicant was placed as a defensive blocker, whose only assignment was to block a space and keep anyone from coming through, because he could not understand other positions. Applicant's football coach he had to physically put his hands on Applicant's shoulders and move him to the spot and point in the direction of where the opposition would be coming.

	• The other players on Applicant's football team called him "brain lock."

PRACTICAL	• Applicant has never lived independently for any significant period of time. • In 11th grade, Applicant's adapted goals on his IEP included acquiring basic life skills such as math for daily living and using public transportation. • While he did obtain a driver's license, Applicant did so only after taking the oral exam and it appears that he ultimately lost it through suspensions and revocations on at least four occasions. • Applicant was only ever able to obtain non-skilled labor employment. Even then, he had difficulty maintaining jobs and was frequently fired or quit out of frustration when he could not perform simple tasks. • Applicant had his then girlfriend (future wife), Naomi, added to a bank account his mother set up for him. After that, Naomi managed his finances. • Applicant's wife filled out written job applications for him, which he always brought home. • Applicant had great difficulty in counting money, to the point where he would just hand the money over and have the receiver (or his wife) do the counting. • Applicant could not cook, do laundry, or do any of the shopping when he was married. Once he tried to get baby formula when his wife was sick, and not only failed in finding the right formula, he also got lost on his way home. • As a child and young teen, Applicant's mother would send his brother with him on errands to prevent him from getting lost.

3. ONSET OF DEVELOPMENTAL DEFICITS BEFORE AGE EIGHTEEN.

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

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

C. RESPONDENT'S ARGUMENTS ARE NOT PERSUASIVE.

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

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

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

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

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

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

III. CONCLUSION.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Allegation #4: Victim impact evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

witnesses' testimony would have been different had counsel prepared them in the way that Applicant asserts should have been done in this ground. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (state's failure to object to hearsay testimony as to what another witness's testimony might have been does not relieve applicant of burden of producing admissible testimony in accordance with the rules of evidence); Cf. generally Beaver v. Thompson, 93 F.3d 1186, 1995 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present mitigation evidence, where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony). "[A] a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069. Since Applicant cannot show that he was prejudiced by any alleged deficiency of counsel in this regard as to these witnesses, this claim for relief as it relates to the testimony of those experts is denied.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ground E: Ineffective assistance of appellate counsel

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(R. 616).

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

AND IT IS SO ORDERED.



Honorable James R. Barber, III
Circuit Court Judge
Presiding by Appointment of the Supreme Court

June 21, 2011

FILED
JUN 29 AM 10:55
CLERK OF COURT
LEXINGTON



ALAN WILSON
ATTORNEY GENERAL

August 23, 2011

RECEIVED

AUG 26 2011

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

S.C. SUPREME COURT

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

Dear Mr. Shearouse:

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

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

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

Sincerely,

Alphonso Simon Jr.
Assistant Attorney General

AS/dd

Enclosures

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



\$02.280

08/23/2011

Mailed From 29201
US POSTAGE

COLUMBIA SC 292

WED 24 AUG 2011 PM

Office of the Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211-1549



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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 2009-CP-32-5465

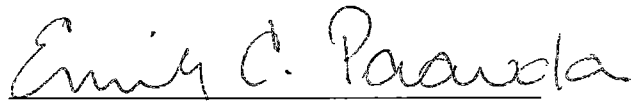
Kevin J. Mercer, #6021,

v.

State of South Carolina.

NOTICE OF APPEAL

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



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

August 8, 2011

RECEIVED

AUG - 8 2011

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 09-CP-32-5465

Kevin J. Mercer, SK6021

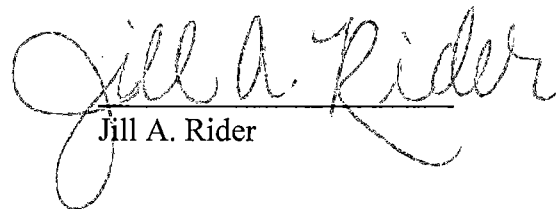
v.

State of South Carolina

CERTIFICATE OF SERVICE

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

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


Jill A. Rider

RECEIVED

AUG - 8 2011

S.C. Supreme Court

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2009CP3205465

Kevin Mercer

vs.

State of South Carolina

Plaintiff

Defendant

CHECK ONE:

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

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

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

IT IS ORDERED AND ADJUDGED:

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

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

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

Alphonso Simon

ATTORNEY(S) FOR THE DEFENDANT(S)

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

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

Procedural History

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

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

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

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

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

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

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

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

(R. 2416-17).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Grounds for Relief

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

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

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

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

Ground A: Ineffective Assistance of Counsel During the Guilt Phase

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Allegation #3

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

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

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

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

I. LEGAL FRAMEWORK.

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

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

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

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

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

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

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A. APPLICANT'S TRIAL COUNSEL PROVIDED DEFICIENT PERFORMANCE.

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

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

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

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

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

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

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

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

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

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

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

A: No, I did not.

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

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

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

A: Yes.

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

A: Nope, they are not.

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

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

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

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

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

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

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

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

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

1. SIGNIFICANT SUBAVERAGE INTELLECTUAL FUNCTIONING.

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

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

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

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

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

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

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

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

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

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

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

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

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

2. DEFICITS IN ADAPTIVE BEHAVIOR.

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

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

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

AAMR Manual (10th ed.) at 22. The American Psychiatric Association's phrasing of the adaptive functioning requirement, also quoted by the United States Supreme Court, is virtually identical. See DSM-IV-TR at 41. More recently, the AAMR has updated both the name of their organization and their definition of adaptive functioning. The current definition contains three general categories of adaptive functioning – conceptual, social, and practical skills – into which the prior ten (10) fall, and requires significant limitations

in one of these three areas. INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS, 5 (AAIDD, 11th ed. 2010). All three definitions, the AAMR, the DSM-IV and the AAIDD, are designed to measure how an individual with significantly subaverage intelligence functions and can be used interchangeably to determine whether the individual in question suffers from deficits in adaptive behavior.

~~To determine whether~~ Applicant suffers from deficits in adaptive behavior Dr. Fisher reviewed Applicant's social history records, including school records, medical records, social security records, and special education records. Dr. Fisher also interviewed Applicant's mother and father, his former wife, a middle school teacher, his high school football coach, and Applicant himself. Dr. Fisher also consulted with colleagues, reviewed literature in his field, and reviewed relevant affidavits entered as Applicant's PCR Exhibit Number 12.⁶ Dr. Fisher testified extensively about Applicant's adaptive behavior and his deficits in many areas, including functional academics, home-living, self direction, and work. Ultimately, Dr. Fisher concluded that Applicant has significant limitations in all three areas of adaptive functioning identified in the AAIDD definition of mental retardation, and also meets prong two under either the AAMR or the DSM-IV criteria as well as South Carolina's statutory definition. Dr. Fisher's testimony regarding adaptive behavior was corroborated by testimony from Applicant's mother, his father, his ex-wife, his high school football coach, and affidavits from his former

⁶ This includes the Affidavit of Ms. Kathryn Cook (one of Applicant's special education teachers); the Affidavit of Ms. Linda McCombs (another special education teacher); and Dr. Albert Humphrey (a medical doctor and distant relative of Applicant's who hired him to do odd jobs).

teachers and one employer. The following chart summarizes some of the most significant evidence offered at the PCR hearing regarding Applicant's deficits in each of these areas.

Skill Area	Summary of Deficit
CONCEPTUAL	• Applicant failed Kindergarten. • Applicant failed the second grade. • After Applicant repeated second grade, he was placed in special education. He remained in special education for the rest of his schooling. • During his first year in special education, Applicant took the 1988 Tests of Essential Learning Skills: He scored a 22.0% in reading. The national average was 77.3%. He scored a 29.2% in math. The national average was 79.5%. • In seventh grade, Applicant functioned at the second grade level, and had been tested as much as 9 years below his grade level on other tests. • In eighth grade, Applicant was administered a citywide achievement test. He tested at a fourth grade level for reading and a third grade level for math. • Applicant failed ninth grade. • During his second attempt at ninth grade, Applicant failed three out of his seven classes. • In ninth grade an evaluator noted that Applicant performed "well within retarded expectation." • When Applicant enrolled in tenth grade at Columbia High School, his reading skills and written expression were described as far below his grade level. • In eleventh grade, Applicant's IEP included testing modifications which allowed for him to have his exams administered orally due to his reading difficulties. • Applicant's grades were very poor throughout his entire school history. • In 1996, Applicant received a special education certificate from Columbia High School. He was ranked 180 in a class of 181 students, and his GPA was a .956. • During a DDSN Mental Status Exam, conducted after his arrest, Applicant was asked questions to test his Orientation to Date. He did not know what month it was. • During a DDSN Mental Status Exam, Applicant could not tell the evaluator what time it was on an analog watch. • DDSN evaluated Applicant through an oral examination because of his limitations in reading and writing. • According to the DDSN report, Applicant could not remember anything after ten minutes. He could not perform some basic

	money calculations. He believed that there are eight dimes in a dollar. • According to a report from a pre-trial evaluation by the Department of Mental Health, Applicant could not read (much less understand) "criminal" and "responsibility." • Applicant's technical school experience included temporary class attendance for trucking and electrical work. His wife had to help him with all of his homework, but he often grew frustrated and was not able to complete the work. • Applicant's mother had to repeat things to him, often holding his head to face hers to make sure he heard. This was even for simple instructions that the other children had understood easily (e.g., making up a bed). • As a child, Applicant had difficulty learning the alphabet and took several years to learn basic color differentiation. His mother tried "hooked on phonics" to address his deficits but this didn't work either.

SOCIAL	• School records document that at age 8, "Kevin is starting to perceive that he is experiencing difficulty with his academic work," and that "as a result, he is starting to develop some feelings of inadequacy and question his capabilities at times. This is primarily due to the comparisons he makes between himself and the other members of the class." • Social Security Records report that Applicant's mother stated: "When I tell him about the things I want him to do or give him instructions, I have to look at him directly and tell him what I want as well as ~~get him to repeat~~ the instructions I have given him before I am sure he understands. If I were to tell him these same things in a casual manner without forcing he many times won't understand me. If I am relating basic instructions like clean the kitchen, I have to break each individual task involved". • School records and social security records indicate that Applicant was shy and subject to a lot of teasing as a child by his peers. • Special education records indicate that Applicant had very limited self control. • In seventh grade, Applicant's teacher observed that his attention span was extremely short. • Applicant's teachers and family members consistently reported that he tried hard to appear normal and was teased by others because he was slow. He never stood up for himself. He had a generally poor sense of self-direction. He pretended to know things so that other would not know that he had difficulty understanding. • Applicant's wife, mother and football coach all described him as very gullible. He never had the judgment to know that people were taking advantage of him. He was a complete follower, and thought everyone was his friend. • Applicant's father and football coach explained that he was unable to understand the complexities of most sports, which led to his assignment as waterboy (basketball) and defensive blocker (football). • On the football team, Applicant was placed as a defensive blocker, whose only assignment was to block a space and keep anyone from coming through, because he could not understand other positions. Applicant's football coach he had to physically put his hands on Applicant's shoulders and move him to the spot and point in the direction of where the opposition would be coming.

	• The other players on Applicant's football team called him "brain lock."

PRACTICAL	• Applicant has never lived independently for any significant period of time. • In 11th grade, Applicant's adapted goals on his IEP included acquiring basic life skills such as math for daily living and using public transportation. • While he did obtain a driver's license, Applicant did so only after taking the oral exam and it appears that he ultimately lost it through suspensions and revocations on at least four occasions. • Applicant was only ever able to obtain non-skilled labor employment. Even then, he had difficulty maintaining jobs and was frequently fired or quit out of frustration when he could not perform simple tasks. • Applicant had his then girlfriend (future wife), Naomi, added to a bank account his mother set up for him. After that, Naomi managed his finances. • Applicant's wife filled out written job applications for him, which he always brought home. • Applicant had great difficulty in counting money, to the point where he would just hand the money over and have the receiver (or his wife) do the counting. • Applicant could not cook, do laundry, or do any of the shopping when he was married. Once he tried to get baby formula when his wife was sick, and not only failed in finding the right formula, he also got lost on his way home. • As a child and young teen, Applicant's mother would send his brother with him on errands to prevent him from getting lost.

3. ONSET OF DEVELOPMENTAL DEFICITS BEFORE AGE EIGHTEEN.

Much of the information Applicant offered at the PCR hearing relates to his intellectual and adaptive functioning before age eighteen. Applicant's IQ was measured on several occasions before his eighteenth birthday. Beginning at age eight, his IQ scores have demonstrated significantly subaverage intellectual functioning. Additionally, all of the information contained in Applicant's school records and the overwhelming majority of the information from Applicant's family members and football coach relates to his functioning before the age of eighteen.

Dr. Fisher's evaluation of Applicant focused on the pre-eighteen period and revealed that Applicant consistently struggled in school, in sports and in social situations throughout his life. Applicant's school and social security records contain many examples of his difficulties with functional academics prior to the age of eighteen. They also confirm that Applicant was severely deficient in many social and practical skills during that time. Applicant's mother testified that even as a toddler he was much slower to obtain milestones such as walking and reciting his ABC's. As a child, Applicant's father found it difficult to give him chores or even play with him because of his difficulties with understanding directions. Applicant's high school football coach testified about his struggles during his teen years, when he was unable to understand the plays his other teammates had learned, resulting in the nickname "Brain Lock." Finally, Applicant's ex-wife confirmed that his struggles continued into adulthood where she "covered" for him constantly because he had been unable to learn basic living skills during his childhood.

C. RESPONDENT'S ARGUMENTS ARE NOT PERSUASIVE.

After carefully considering the entirety of the evidence as a whole, this Court finds, by a preponderance of the evidence, that Applicant has presented substantial evidence that he has mental retardation and thus, there is a reasonable probability that the outcome of his capital trial would have been different had trial counsel investigated and raised a mental retardation claim. Accordingly, this Court finds that Applicant was prejudiced by his trial counsel's failure to raise the issue of his mental retardation at trial. It is difficult to conceive of any failure more prejudicial than trial counsel's failure to discover and present evidence that their client may be categorically exempt from the death penalty.

Respondent argues that Applicant has not proven deficient performance nor prejudice because, prior to trial, neither DDSN nor any defense expert, including Dr. Donna Schwartz-Watts and Dr. Tora Brawley, found that Applicant was mentally retarded. But, of course, this is precisely the point since Applicant's claim is that his trial counsel failed to collect the necessary social history information, hire an expert in mental retardation, and otherwise pursue a mental retardation claim. Dr. Schwartz-Watts specifically averred in her affidavit that she is not an expert in mental retardation and that she never had access to Applicant's special education records. Respondent called Dr. Schwartz-Watts to testify at the PCR hearing where she reiterated these facts and also explained that any questions about the proper assessment for a mental retardation diagnosis would have to be answered by *someone else* with specific

expertise in that field. Additionally, Dr. Tora Brawley is a neuropsychologist who was asked by the defense team to look for brain damage. She is not an expert in mental retardation and, even if she was, there is no dispute that trial counsel failed to adequately investigate evidence of Applicant's mental retardation and provide that information to any experts that they did have.

Respondent also argues that Applicant's claim basically asserts that trial counsel was ineffective for not obtaining the special education records from the Philadelphia School System. This is incorrect. The special education records were indeed very critical records because they contained several historical IQ scores and other important information relevant to mental retardation. However, this Court finds that, even without the missing special education records, trial counsel knew or should have known about information that should have caused them to investigate further into Applicant's mental retardation. Applicant presented a great deal of evidence at the PCR hearing, apart from the special education records themselves, in support of his mental retardation claim. This evidence was readily available to trial counsel, but they simply failed to investigate and present that information. For example, this Court finds the testimony of Mr. Charles Macaluso, Applicant's former football coach, to be particularly credible. Mr. Macaluso is not related to Applicant, and he has over thirty years of experience as an educator and coach. This Court finds his testimony persuasive on the issues of Applicant's deficits in adaptive functioning. Mr. Macaluso was available to Applicant's trial counsel and actually volunteered to testify at the sentencing phase of the trial. Despite Mr. Macaluso's efforts to help, however, trial counsel failed to question him

about these issues or prepare him to testify to facts relevant to a mental retardation claim.

Finally, Respondent asserts that Dr. Fisher's findings are not credible. This Court disagrees. Dr. Fisher is a clinical psychologist with extensive clinical, teaching and research experience. He has been qualified as an expert in numerous state and federal courts. More importantly, ~~Dr. Fisher's findings~~ were extensively corroborated by testimony from Applicant's mother, father, ex-wife and football coach, and documents from Applicant's school and special education performance and his history with the Social Security Administration.

III. CONCLUSION.

The Court finds, by a preponderance of the evidence, that Applicant has met his burden of proof in demonstrating that his trial attorneys rendered deficient performance by failing to investigate and present the issue of his mental retardation. Further, the Court finds that Applicant was prejudiced by his trial counsel's deficient performance because there exists, at a minimum, a reasonable probability of a different outcome had trial counsel properly investigated and presented a mental retardation claim. Accordingly, the sentence of death is vacated and this matter is remanded to the Court of General Sessions in Lexington County for a new sentencing trial. In accordance with *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), Applicant is entitled to a pre-trial determination by the trial judge concerning whether or not Applicant is mentally retarded by a preponderance of the evidence offered at the pre-trial hearing. If the trial judge finds Applicant is mentally retarded, then Applicant is not eligible for the death

penalty and shall be resentenced. *Id.* at 279, 588 S.E.2d at 606. If, however, the trial judge does not find that Applicant is mentally retarded, Applicant is nonetheless entitled to submit evidence of his mental retardation for the jury's consideration as a mitigating factor. *Id.* If the jury finds that mitigating factor, then a death sentence will not be imposed. *Id.*

Sub-allegation (b): Failed to thoroughly investigate and present all available evidence of Applicant's neurological damage.

Applicant's third claim for relief in Ground 10(b)(3) is denied. In this claim, Applicant asserts that trial counsel should have further investigated and presented more evidence of Applicant's neurological damage at Applicant's trial. Applicant has failed to establish he is entitled to relief upon this claim. First, no testimony or evidence supporting this claim was presented by Applicant. Thus, Applicant has not shown how counsel was deficient in this regard. Further, since there was no evidence of neurological damage presented at the evidentiary hearing, Applicant has failed to show that he was prejudiced by counsel not presenting such evidence. As a result, this claim for relief is denied.

Sub-allegation (c): Failed to prepare sentencing phase lay witnesses to ask for mercy.

Applicant's fourth claim for relief in Ground 10(b)(3) is denied. In this claim, Applicant asserts trial counsel was ineffective in not preparing the sentencing phase lay witnesses to ask the jury for mercy. This Court finds that Applicant has not established by a preponderance of the evidence that counsel was deficient in this regard. Further, Applicant has not shown that he was prejudiced as a result.

During the sentencing phase, the defense presented several lay witnesses on Applicant's behalf. His mother, Diane Mercer, testified about her pregnancy with Applicant, Applicant's upbringing in Philadelphia, and Applicant's problems in school. She further testified about her observations of Applicant's attempts at obtaining gainful employment. Mrs. Mercer also told the jury about how Applicant attempted to protect her from his father, and how Applicant was abused by his father as a child. She also discussed her observations of Applicant's interactions with his children. Mrs. Mercer concluded her testimony by discussing her relationship with Applicant. She noted their relationship was one of the best. She stated he always tried to provide for her, even when he was not making a lot of money. (R. 2332-49). She described Applicant as "a good man and he does love people. He would not hurt you. He just want to smile at you." (R. 2350).

Applicant's father, Leroy Mercer, agreed that Mrs. Mercer's recollection of what occurred in Philadelphia was fairly accurate. He testified that he was more harsh towards Applicant because he was not aware of what he described as Applicant being slow. He also noted that Applicant did attempt to protect his mother on occasion. Mr. Mercer also testified about his observations of Applicant with his wife and children. (R. 2351-58). He described his relationship with Applicant to be "[w]onderful" and "loving." (R. 2358). Mr. Mercer also noted that he loved his daughter-in-law and grandchildren, and that he would do anything for them.

Applicant's wife testified about her relationship with Applicant. She asserted that Applicant was "the best male role model" she ever had, and that they were best friends.

(R. 2328). She noted that Applicant was always there for her and their children, and that their children never went without. She also talked about their children, and how excited they were to see their father. Applicant's wife also discussed her observations of the impact that the death of Applicant's grandmother had on him. (R. 2327-32).

Applicant's youngest sister, Ebony Mercer, testified that Applicant was always there for her and the other members of their family. She described him as a very giving person, and he was the type of person who everyone would like to be around. She also stated that Applicant was her best friend, and he was always around to help her with her problems. She also indicated that the family's life in Philadelphia was rough, and that Applicant took the brunt of their father's abuse. (R. 2320-23).

Applicant's other sister, Iesha Mercer, testified that most of the areas they lived in Philadelphia were bad, and Applicant was picked on when they were at school. She recalled he was in special education classes. She also testified that she and Applicant used to joke a lot. She noted that both were called Smiley because they smiled a lot. Iesha testified that Applicant's parents were always arguing, and Applicant caught the most abuse of the children. She further stated that all in the family loved Applicant dearly, and Applicant had a heart of gold. She concluded by asserting Applicant was a good man and a good father, and that they all loved him. (R. 2323-27).

During closing arguments, the solicitor noted that none of Applicant's family members asked for mercy. (R. 2391). During Applicant's closing arguments, Ms. Armstrong contended that the family's testimony adequately gave the jury a specific basis for giving mercy. (R. 2407). She further argued that the best reasons for giving

mercy were his three children, who were present in the courtroom. (R. 2407). Armstrong noted that while Applicant was flawed as a man, there was never any question that he was a good father. Id. Further, she contended that having him alive would make an impact on those children's lives. Id.

At the evidentiary hearing, Diana Mercer, Leroy Mercer, and Naomi Stackhouse all testified that they would have asked for mercy had they ~~been asked a question~~ regarding mercy. Further, Applicant also presented the affidavits of his two sisters, and both indicated in the affidavit that they would have asked for mercy.

In her deposition, Ms. Armstrong testified she recalled the solicitor's argument that Applicant's family did not ask for mercy. (Depo. 51). She noted that in preparing his family to testify, they talked with them a great deal about their testimony. Depo. 51, 118).

Well, I discussed with them what their role was, which was to, number one, help the jury understand that Kevin was human and that he had these deficits and that he was loved and that you didn't want him to die. But I didn't specifically say – obviously, didn't specifically say ask for mercy.

(Depo. 118). She further conceded that it was apparent from their testimony that the defense never asked the family members to use the specific wording of asking for mercy. (Depo. 51). She noted that she thought they family members were going to ask for mercy. Id. Armstrong also indicated that they were not asked a specific question regarding mercy. (Depo. 51-2).

Mr. Littlejohn testified that he also recalled that none of the family witnesses asked for mercy, and that fact was pointed out by the solicitor. (Tr. 17). Littlejohn noted

that he thought it was tricky of the solicitor to make that point in closing arguments. (Tr. 17). He could not recall specifically if they instructed the family members to ask for mercy, but "it was pretty much implicit in their testimony that the reason they were there was to ask for mercy and to . . . try and persuade the jury not to give Kevin the death penalty." (Tr. 17-18).

After reviewing ~~the testimony~~ and arguments at both trial and the evidentiary hearing, this Court finds that counsel was not deficient in not specifically asking Applicant's family to specifically ask the jury for mercy at trial. This Court believes, as was expressed by trial counsel in their testimony and by counsel's closing argument, that it was implicit in the family's testimony that they wanted the jury to spare Applicant's life. See State v. Johnson, 338 S.C. 114, 126-27, 525 S.E.2d 519, 525 (2000). Furthermore, this Court finds Applicant has not established that he was prejudiced by the fact his family members did not explicitly ask for mercy. As already noted, it was implicit in their testimony that they wanted the jury to spare Applicant's life. In light of the fact that the request was implicit in the testimony, counsel argued for mercy, and Applicant requested mercy in his allocution, this Court finds that Applicant has failed to show that the testimony at trial would have created a reasonable probability of a different result. As a result, this claim for relief is denied.

Allegation #4: Victim impact evidence

Sub-allegation (a): Failed to object to testimony regarding the effect of the victim's death on the United States Army generally and on various members of the U.S. Army in particular.

This Court finds the first allegation in Ground 10(b)(4) is without merit. In this claim, Applicant asserts trial counsel was ineffective in not objecting to the testimony regarding the impact the victim's death had on the U.S. Army and on various members of the U.S. Army. Applicant has not shown that counsel was deficient in this regard. Much of the testimony contested by Applicant consisted of a description of the medals that the victim had earned in his military career, not how his death impacted upon the Army. Further, the testimony that was presented regarding how his death affected the U.S. Army was very limited. Further, Applicant has not established that he was prejudiced. As a result, this claim for relief is denied.

Applicant pointed to two portions of the record in support of this claim. First, he asserts that the testimony contained on R. pp. 2078-2083 was inappropriate. Second, he argues that a statement made on R. p. 2101 was also inappropriate.

In her deposition, Ms. Armstrong testified that she believed the testimony of the four soldiers regarding the victim's loss on themselves and the Army generally was properly admissible victim impact testimony. (Depo. 53). She felt the State had some latitude under which it could present the testimony of people who knew the victim and his qualities. (Depo. 54). Mr. Littlejohn also testified that he did not believe that Judge Few would have excluded any of the testimony had an objection been made. (Tr. 19). The testimony contained on R. pp. 2078-83 was properly admitted at trial. This was the testimony of Command Sergeant Major Martin Wells, U.S. Army. Much of his testimony explained the various medals and ribbons that were earned by the victim prior to his death. This was properly admitted victim impact testimony. See Payne v. Tennessee,

501 U.S. 808, 827, 111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720 (1991) (“A State may legitimately conclude that **evidence about the victim** and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.”). State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) (adopting Payne); ~~see generally State v. Hughey, 339 S.C. 439, 457, 529 S.E.2d 721, 730 (2000)~~ overruled on other grounds by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009) (“Victim impact evidence is admissible in the sentencing phase to demonstrate the ‘uniqueness’ of the victim and the specific harm committed by the defendant.”). The same was also true for Wells’ statement that Sgt. Davis personified the ideals captured in the creed for all non-commissioned officers. Since this testimony focused solely on the character of the victim, it was properly admitted testimony. Similarly, Clifton Magwood’s response to the question regarding the memorial service at Fort Jackson ¹ on R. p. 2101 was also properly admissible. Since this testimony was properly admissible, counsel was not deficient in not objecting to it. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

¹There was only one question and answer regarding why Fort Jackson would have hosted the memorial service. (See R. 2101).

There was nothing particularly heartwrenching about this testimony; it was pretty much what someone would expect and delivered in a professional and matter-of-fact manner. Thus, given the limited nature of the testimony during the course of a large proceeding and the lack of any undue prejudice, it cannot be said it rendered Applicant's trial fundamentally unfair or its absence alone would create a reasonable ~~probability of a different result~~ given the extremely egregious nature of this crime as well as Applicant's other violent run-ins throughout his life. See, e.g. Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (improper argument not reversible where it was but 10 lines in transcript); Ketterman v. South Carolina Farm Bureau Mut. Ins. Co., 302 S.C. 276, 395 S.E.2d 187 (Ct. App.1990) (impermissible argument covering less than a page in the entire transcript was not sufficiently prejudicial for reversal).

To the extent Applicant alleges that the testimony of Robert Ames, Clifton Magwood, David O'Garro, and Martin Wells was improper victim impact testimony, this Court finds this claim is without merit. It was established by their testimony that Robert Ames, Clifton Magwood, and David O'Garro were all close friends of the victim, Sergeant Davis. Martin Wells indicated that he was Davis' immediate superior officer at Fort Jackson. The admission of fellow workers statements have been deemed admissible as proper victim impact evidence under Payne v. Tennessee as showing the uniqueness of the individual. See, U.S. v. Barnard, 299 F.3d 467 (5th Cir 2002); Franklin v. State, 965 So. 2d 79 (Fla. 2007) ("designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death"); Wesley v. State, 112 Nev. 503, 520, 916 P.2d 793, 804 (Nev.1996)

(victim impact evidence from neighbors and co-worker appropriate under Payne where each witness's testimony was relevant to the impact of Wesley's actions); U.S. v. Wilson, 493 F. Supp. 2d 364 (E.D.N.Y.2006) (victim impact testimony admissible from colleagues and co-workers in police department, where the testimony of NYPD coworkers will be presented to demonstrate "the chilling effect" these murders had specifically on undercover detectives within the NYPD ~~and the fact that~~ as a result of these murders, undercover detectives were "refusing to go out on the street, do these operations because of the danger, how some even retired from undercover work, said I'll be a police officer but I will not do undercover work anymore."); U.S. v. Battle, 173 F.3d 1343 (11th Cir. 1999) (prison officials testifying about the impact the prison murder had upon the prison guards admissible impact evidence). "Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant" People v. Valencia, 43 Cal.4th 268, 300, 74 Cal.Rptr.3d 605, 639 (Cal.,2008). But see U.S. v. Fields, 516 F.3d 923 (10th Cir. 2007).

Payne authorizes the admission of evidence under the Eighth Amendment which focuses on demonstrating the loss to the victim's family and *to society* which has resulted from the defendant's homicide. This Court finds that Applicant has not established that the testimony of the victim's friends and superior officer was inappropriate victim impact testimony. As a result, he has not shown that counsel was deficient in not objecting to their testimony. Further, since the testimony was admissible victim impact testimony, Applicant was not prejudiced by counsel not objecting. This claim for relief is thus denied.

Sub-allegation (b): Failed to object to video shown at victim's funeral and testimony concerning an Army "roll call" that took place at the funeral.

Applicant's second claim in Ground 10(b)(4) is denied. In this claim, Applicant asserts trial counsel should have objected to the presentation of the video that was shown at the victim's funeral and to the testimony regarding an Army "roll call" that was presented by the State. ~~This Court~~ finds trial counsel was not deficient in not objecting. This evidence was admissible victim-impact evidence under Payne. Further, Applicant has not established that he was prejudiced by the presentation of the video and the testimony. As a result, this claim for relief should be denied and dismissed.

At trial, David O'Garro testified that at the funeral, a roll call was done.

The roll call is - - any squad or platoon that loses a member, in honor of that member or to show that that member is no longer with that group, we do a roll call, and what happens is our division chief, our leader, you know, he'll call the names of everybody in the group, and the last person's name to be called was - - would be the one that was missing. And so Tracy's name was the last to be called, and it's repeated three times. You know, so they called, you know, me. Sergeant O'Garro. Here. And then Sergeant Magwood. Here. You know, Sergeant Evans. Here. And you go down the line and got to Sergeant Davis and there would be no answer. And Sergeant Davis. Then: Sergeant First Class Tracy L. Davis. There would be no answer. Stricken from the rolls.

(R. 2118-19). Shortly thereafter, the State played a video of photographs set to song.

(R. 2119, see R. 2116-17).

At the evidentiary hearing, Ms. Armstrong testified that she did not consider objecting to the video, but now believes she should have. (Depo. 54). She had watched the video on a laptop, but noted the presentation had a different impact when played on the larger screen in the courtroom with the lights dimmed. (Depo. 54-55).

She indicated that if she had the opportunity to do it again, she would request to see the video as it was intended to be presented to the jury (i.e. in the courtroom). (Depo. 55). She noted that had she viewed the video as it was intended to be presented, she would have likely objected to its presentation. (Depo. 55). Mr. Littlejohn testified that he considered lodging an objection, but did not. (Tr. 19, 30). He indicated that once the video started, it was a little too late to object to it. (Tr. 19, 30). He also noted that he did not believe that Judge Few would have excluded the video. (Tr. 19, 30).

This Court finds that Applicant has not shown that counsel was deficient in not objecting to the testimony regarding the roll call done at the funeral or the funeral video. Payne authorizes the admission of evidence under the Eighth Amendment which focuses on demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." The evidence of the video that Applicant now challenges gave that brief glimpse of Sergeant Davis and his loss and its impact on his community - his family and his friends. In addition, testimony, prior to the admission revealed the community acknowledgment of the deaths - the video only confirmed it and bread more life into those static comments.

The video played at the funeral expressed no outrage, contained no clarion call for vengeance, but may have implied sadness. See, People v. Kelly, 68 Cal.Rptr 3d 531 (2008), cert. denied 129 S.Ct. 564 (2008) (particular video montage admissible under Payne); cf. State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010), cert. denied (Apr. 25, 2011)(finding no error in admission of video of funeral slain law enforcement officer). Here, the video supplemented but did not duplicate any of the witnesses' testimony.

While Applicant may suggest that revealing emotional effect demands exclusion of the evidence, that is not the test where Payne allows the admission of the impact of the victim's death upon the survivors. Altogether, this Court finds the testimony regarding the roll call and the funeral video were admissible as victim impact evidence at Applicant's trial. Thus, counsel was not deficient in not objecting to either the roll call testimony or the funeral video ~~as improper victim impact evidence~~. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial); Anderson v. Goeke, 44 F.3d 675, 680 (8th Cir. 1995) ("[T]he 'performance of an attorney is not deficient for failure to object to admissible evidence.'")(quoting Russell v. Jones, 886 F.2d 149, 152 (8th Cir.1989)). As a result, this claim for relief is denied.

Furthermore, this Court finds that Applicant was not prejudiced by counsel not objecting to the roll call testimony or the funeral video. Since the evidence was admissible victim impact evidence, an objection based upon those grounds would have been denied. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

Sub-allegation (c): Failed to object to trial judge allegedly crying in front of jury.

Applicant's third claim in Ground 10(b)(4) is denied. Trial counsel expressed a valid strategic reason for not raising an objection to address whether the trial court had an emotional response to the presentation of victim impact evidence during the sentencing phase. Further, Applicant cannot show that he was prejudiced by counsel's decision not to object. As a result, this claim for relief is denied.

In this allegation, Applicant asserts the trial judge cried in front of the jury while the funeral video was presented to the jury. This was not reflected in the trial court's record. At her deposition, Ms. Armstrong testified that she was not aware of the trial judge's reaction to the video while it was occurring. (Depo. 55). She indicated that she heard after the fact that he was crying. (Depo. 55-6, 99-100, 133). At the evidentiary hearing, Mr. Littlejohn testified that it appeared that the trial judge had gotten emotional about the funeral video. (Tr. 19-20). He further noted that he considered objecting:

[T]hat was kind of a difficult issue to deal with. I was, I was in hopes that the jury didn't see him; I didn't care if anyone else saw him, but I was in hopes the jury didn't see him. And I was afraid if I objected to it at that point or later, I didn't know whether a curative instruction might be more damaging than if the jury had just seen him get emotional like they did.

(Tr. 20, ll 7-13). Mr. Littlejohn also noted that it appeared that the trial judge's reaction was limited to during the video, and not after. (Tr. 31). Littlejohn also testified that he thought it was more of a risk to discuss a curative instruction because he felt there was a strong possibility the jury did not see any response from the judge, and he did not want to risk bringing such a response to their attention. (Tr. 31-2).

This court finds counsel's decision not to raise an objection to the trial court's response to the funeral video was the result of reasonable trial strategy. Counsel clearly thought it was a risky proposition to ask for a curative instruction regarding the judge's response during the video. Counsel noted that it was unlikely the jurors saw the trial judge's response to the video, and he did not want to bring it to their attention if they had not seen it. In light of those concerns, ~~this court finds the decision~~ was reasonable. Furthermore, this Court finds that Applicant could not establish that he was prejudiced in any way by trial counsel's decision not to object or request a curative instruction regarding the trial judge's reaction to the funeral video. At the beginning of the jury charge in the sentencing phase, the trial court instructed the jury as follows:

Now, as I explained to you earlier in the first phase of the trial, only the jury can make the findings of fact in this case and I am not permitted to indicate to you how I might feel about the facts. So if I have said anything or done anything during the course of this phase of the trial that might lead you to believe that I have an opinion about the facts or about what the sentence should be, then you should disregard that.

(R. 2409-10). Jurors are presumed to follow the law as instructed to them. State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999). Applicant has not presented any basis upon which this Court should find the jury did not follow this instruction. Since the jury would have disregarded any reaction the trial judge may have had during the presentation of the funeral video based upon this instruction, Applicant cannot establish he was prejudiced. As a result, this Court finds this claim is without merit. It is therefore denied and dismissed with prejudice.

Allegation #5: Ineffective assistance of counsel for not asking their expert witnesses to prepare reports.

Applicant's claim for relief in Ground 10(b)(5) is denied. In this Ground, Applicant asserts trial counsel was ineffective in not having their experts prepare reports. This court finds trial counsel's decision to not have their experts prepare reports was the result of reasonable trial strategy. As a result, Applicant cannot establish counsel was ineffective in this regard.

This claim stems primarily from the fact the defense did not have one of their primary testifying experts, Dr. Donna Schwartz-Watts, prepare a report of her findings. Prior to trial, there was a discussion on the record between defense counsel and the solicitors trying the case regarding the defense's experts' opinions. (R. 1175-79). During that conversation, it was noted that Dr. Schwartz-Watts, the forensic psychiatrist retained by the defense, had not drafted a written report. It was also noted that the neurologist had not had an opportunity to draft a report because he was still examining the SPECT scans. (R. 1177-78). During the sentencing phase, Dr. Schwartz-Watts was cross-examined on the fact she did not draft a written report. (R. 2169-73).

In her deposition, Ms. Armstrong testified that at the time of Applicant's trial, it was her practice to generally not request reports from experts in preparation for trial. (Dep. 98). She noted that the defense is not obligated to produce a report, and she did not feel like it was the defense's job to make the State's job any easier. Id.

This court finds trial counsels' decision not to request some of their experts to prepare reports was the result of a reasonable strategic decision. Counsel's testimony indicates they were aware that they would have to turn over any reports drafted to the

State. Counsel believed it was to their strategic advantage for the State to not have a report from Dr. Schwartz-Watts to use in preparation for cross-examination. This belief was reasonable. Thus, this Court finds Applicant is not entitled to relief upon this claim. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision cannot be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Allegation #6: Ineffective assistance of counsel for not preparing their sentencing-phase expert witnesses to explain how their opinions had any bearing on the jury's decision.

Applicant's claim for relief in Ground 10(b)(6) is denied. In this Ground, Applicant asserts trial counsel was ineffective in not preparing the defense experts to testify how their opinions bore on the jury's decision. Applicant has not shown that counsel was deficient in this regard. Further, Applicant has not shown that he was prejudiced as a result of the alleged deficiency of counsel. As a result, this Court finds this claim is without merit.

As a preliminary matter, this Court finds this claim is without merit as to the testimony of Dr. Alexander Morton, Dr. Marti Loring, Dr. John Steedman, and James Aiken. Applicant has not presented any testimony or evidence as to how these four

witnesses' testimony would have been different had counsel prepared them in the way that Applicant asserts should have been done in this ground. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (state's failure to object to hearsay testimony as to what another witness's testimony might have been does not relieve applicant of burden of producing admissible testimony in accordance with the rules of evidence); Cf. generally Beaver v. Thompson, 93 F.3d 1186, 1995 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present mitigation evidence, where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony). "[A] a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069. Since Applicant cannot show that he was prejudiced by any alleged deficiency of counsel in this regard as to these witnesses, this claim for relief as it relates to the testimony of those experts is denied.

To the extent that Applicant asserts trial counsel was ineffective in not having Dr. Schwartz-Watts testify regarding how her findings related to the jury's determination, this Court finds this claim is without merit. At the evidentiary hearing, Dr. Schwartz-Watts testified that the reason she could not relate her findings regarding Applicant's post-traumatic stress disorder and her other diagnoses was because Applicant always maintained he was absolutely innocent of the charges he faced when she met with him.

Applicant has not established that he was prejudiced. As was acknowledged by Schwartz-Watts' testimony, she could not testify regarding her opinion as to how Applicant's mental conditions would have impacted on his involvement in the murder and carjacking because Applicant maintained he was completely innocent in his discussions with Schwartz-Watts. While she may have been able to hypothesize how Applicant's diagnosed conditions would have impacted him if he was present at the scene, Schwartz-Watts could not directly connect those hypotheses with Applicant's actual responses at the scene because in her examination of Applicant, he always maintained he was completely innocent. This Court finds this testimony would have been of very limited benefit to Applicant. This Court further finds that had counsel presented such testimony, it would not have created a reasonable probability of a different result. Thus, this claim for relief is denied.

Allegation #7: Ineffective assistance of counsel for waiving the trial judge's proposed charge that the jury could not consider prior bad acts when determining whether the State had proven an aggravating circumstance, and that the State had proven Applicant was the shooter.

Applicant's claim for relief in Ground 10(b)(7) is denied. In this Ground, Applicant argues trial counsel was ineffective when they chose to waive a proposed jury instruction based upon State v. Stewart, 283 S.C. 104, 320 S.E.2d 447 (1984). This court finds trial counsel's decision to waive the additional jury instruction was the result of a reasonable strategic decision by trial counsel. As a result, Applicant is not entitled to post-conviction relief upon this claim.

In giving the jury charge in the sentencing phase of Applicant's trial, the trial court did not give a Stewart charge. State v. Stewart, 283 S.C. 104, 107-08, 320 S.E.2d 447,

450 (1984). A Stewart charge instructs the jury that prior convictions and evidence of prior bad acts can not be used to establish an aggravating circumstance. Id. at 107-08, 320 S.E.2d at 450. After the jury charge, the solicitor brought the omission to the trial court's attention. (R. 2242). The trial court asked defense counsel if they wanted the jury to receive a Stewart charge. (R. 2423). It allowed defense counsel to consult with Applicant about the matter. (R. 2424) After further discussion, the trial court also indicated it would also charge the jury that it could not consider Applicant's criminal record in deciding whether Applicant was in fact the shooter. (R. 2425).

Defense counsel declined. Mr. Littlejohn specifically noted that the defense did not believe any of Applicant's prior crimes could even bear on whether Applicant was the triggerman. (R. 2426). Both trial counsel indicated to the trial court they thought Applicant would be more prejudiced from giving the charge separately than if the charge was not given. (R. 2428-29). Applicant also informed the trial court that he had discussed the matter with counsel, and he was fine with the decision. (R. 2429).

At the evidentiary hearing, Mr. Littlejohn testified that the defense decided to decline the trial court's offer for a Stewart charge because they "thought that that charge would just bring more attention to all the evidence that had been brought out by the state about all these bad acts that Kevin had previously been involved in." Tr. 33, ll 12-15. In her deposition, Ms. Armstrong also indicated the defense did not want to have Applicant's bad acts specifically brought up again with the Stewart charge.

This court finds that counsels' testimony and the record of the discussion regarding the Stewart charge reflect that defense counsel's waiver of the charge was a

matter of trial strategy. This court finds that strategy was reasonable under the circumstances. Thus, Applicant is not entitled to relief upon this claim. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision cannot be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Ground C: Sixth, Eighth and Fourteenth Amendment violations by the State's presentation of victim impact evidence.

Applicant's claim in Ground 10(c) is denied. In Ground C, Applicant argues that his Sixth, Eighth, and Fourteenth Amendment rights were violated by the State presenting of "victim impact evidence - which included a video set to music that was shown at the victim's memorial and testimony concerning an army 'roll call' that took place during the victim's funeral" and "by the fact that the trial judge cried in front of the jury during this presentation." This court finds this claim is procedurally barred.

S.C. Code Ann. § 17-27-20(b) (1986) specifically provides that the remedy of Post-Conviction Relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The South Carolina Supreme Court has consistently and repeatedly held that issues that either were or could have been raised at trial and on direct appeal may not be raised in

PCR. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979).

This claim could have been presented at trial. Trial counsel chose not to object to the victim impact evidence challenged here. Since this argument could have been raised at trial and on direct appeal, it is not an appropriate claim for post-conviction relief. As a result, this claim for relief is denied.

Ground D: Due process violation in denying motion for new trial because motion was denied based upon false testimony

Applicant's claim in Ground 10(d) is denied. In Ground D, Applicant argues Timothy Johnston perjured himself by testifying that Applicant's co-defendant, Marcus Thompson, had never confessed to shooting the victim when, in fact, Thompson had stated to Timothy Johnston that he (Thompson) was the one who shot and killed the victim.⁷ To the extent this is a claim cognizable for post-conviction relief, this court finds the claim is without merit.⁸ Timothy Johnston's testimony at the evidentiary hearing was

⁷ This claim was initially raised as a Brady/Napue prosecutorial misconduct claim. However, after the evidentiary hearing, Applicant moved to amend the ground to conform with the evidence. In the motion to amend, Applicant conceded that after the testimony at the evidentiary hearing, there was no evidence to support the Brady/Napue claim.

⁸ Applicant has not explained why this claim, one step removed from trial, should be evaluated as a trial issue. Even so, this Court finds this claim is easily addressed on a lack of prejudice.

not credible. Applicant has not shown that Timothy Johnston perjured himself at the motion for new trial hearing. As a result, this claim for relief is denied.

At the motion for new trial hearing, Timothy Johnston testified he was one of Marcus Thompson's cell mates in May 2006. (R. 2688-89). He recalled Thompson talking about his charges. (R. 2689). Johnston testified that Thompson told him what had happened, and Thompson was asking his cellmates what he thought they [the State] would do to him. (R. 2689-90). Thompson's focus was on his murder charge. (R. 2690). Johnston testified that both he and their third cellmate, Kevin Fuller, both had been to prison before. (R. 2690). Thompson had not. (R. 2690).

Johnston testified that Thompson told him that he had dropped Applicant off at an apartment complex. Applicant used a cut to go through and get a truck. Thompson told Johnston that the guy got killed, but the guy's girlfriend was on the telephone and heard everything. Thompson was concerned because she heard two car doors shut, and the police were using that to say Thompson was at the scene when the murder occurred. Thompson maintained he was at the other apartment complex. Thompson also told Johnston that he ended up at a local motel. (R. 2691-93).

Johnston also testified about a second time Thompson told him about the crime. During this second conversation, Kevin Fuller was asleep. Thompson told Johnston the same story. However, this time, Thompson told him he was in the stolen truck when they were stopped. (R. 2693-94). Johnston further testified that Thompson never said anything about pulling the trigger. (R. 2698-99). Johnston did ask Thompson about the gloves found on Thompson when he was arrested. Thompson informed Johnston that

the gloves were from his job. (R. 2699-700). Thompson never told Johnston about the pistol or target practice. (R. 2700).

Johnston acknowledged on cross-examination that he had prior convictions for criminal domestic violence, shoplifting, failure to stop, and a couple of driving under suspensions. He also noted that he had pending charges for first degree burglary and second degree burglary. However, he was not seeking assistance with the first degree burglary charge because it was already set to be dismissed. He testified that the complaining witness had already informed law enforcement that he had permission to enter the residence, and he was in a dispute with the solicitor's office as to whether the charges were still pending. (R. 2702-04). He also testified he was pleading guilty to the second-degree burglary. (R. 2709).

At the evidentiary hearing, Johnston testified that Thompson had told him a third version of the events on the night of the shooting. In the third version, which Johnston asserted he did not share with the solicitor's office, Johnston alleged that Thompson was the one who shot Sgt. Davis. Johnston testified that he had never told anyone else that Thompson had told him he was the shooter. Johnston also testified that he lied at the motion for new trial hearing because Thompson grew up in the same area as Johnston and his family. Johnston claimed that Thompson threatened to "reach out and touch" Johnston's family. Johnston also testified that he did not know which of the three versions of the story were true.

Deputy Solicitor Samuel R. Hubbard testified that when the Solicitor's Office met with Johnston, he started by indicating they would not like what he had to say about

Kevin Fuller. Johnston had indicated that Fuller was lying in an attempt to receive assistance with his charges. Hubbard testified that Johnston never said that Thompson indicated he was the shooter. To the contrary, Johnston's impression of Thompson was that he was afraid of prison, and he was seeking advice from his two cell mates who had more experience with the system. Further, Johnston indicated that Fuller would say anything. Assistant Solicitor ~~Shawn Graham~~ also indicated that Johnston told them that Fuller would say anything. Graham's testimony indicates that Johnston's testimony at the motion for new trial hearing was consistent with what he told them prior to the hearing.

“Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial.” Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977)(quoting State v. Mayfield, 235 S.C. 11, 34–35, 109 S.E.2d 716, 729 (1959)). Applicant, who has the burden of proof, has offered no reliable evidence to show he is entitled to relief upon this claim. The only evidence comes from the ever evolving testimony from Mr. Johnston, and even he acknowledges that he does not know which, if any, of the alleged statements he heard from Thompson are true. This Court finds Applicant has failed to carry his burden of proof in this proceeding. As a result, this claim for relief is denied.

Ground E: Ineffective assistance of appellate counsel

Applicant's claim in Ground E is denied. In Ground E, Applicant asserts appellate counsel was ineffective in three regards. First, Applicant argues appellate counsel should have argued on appeal that juror Deborah Lucas was improperly

qualified. Second, Applicant argues appellate counsel should have argued that juror Phillip Lofollette was also improperly qualified. Third, Applicant argues appellate counsel should have argued that juror Michael Sponhour was improperly disqualified. Applicant has not shown that appellate counsel was deficient in not raising these arguments on appeal. Further, Applicant has not shown that he was prejudiced as a result of counsel not raising these issues on appeal. Thus, this Court finds Applicant has not met his burden in establishing that appellate counsel was ineffective in this regard.

These claims are without merit. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). A PCR applicant has the burden of proving appellate counsel's performance was deficient. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004), as "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." Jones v. Barnes, 463 U.S. 745, 752 (1983). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Id.

To obtain relief a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 615-16, 524 S.E.2d 833, 836 (1999). In other words, the applicant is required to demonstrate "that his counsel was objectively unreasonable in

failing" to identify and argue present significant and obvious issues on appeal, and "a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." Smith v. Robbins, 528 U.S. 259, 285 (2000) (citation omitted). Although recognizing that "[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 528 U.S. at 288. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). See also Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc).

In a capital case, the proper standard in determining the qualification of a prospective juror is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. State v. Green, 301 S.C. 347, 392 S.E.2d 157, cert. denied, 498 U.S. 881, 111 S.Ct. 229, 112 L.Ed.2d 183 (1990) (citing Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 853, 83 L.Ed.2d 841 (1985)); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996), cert. denied 520 U.S. 1123, 117 S.Ct. 1261, 137 L.Ed.2d 340 (1997). The determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and is not reviewable on appeal unless wholly unsupported by the evidence. State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), cert. denied, 508 U.S. 915, 113 S.Ct. 2355, 124 L.Ed.2d 263 (1993). When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire voir dire. State v. Green, supra. The ultimate consideration is that the juror be unbiased, impartial and able to carry out the law as explained to him. Id.

State v. Bennett, 328 S.C. 251, 256-57, 493 S.E.2d 845, 848 (1997).

At the evidentiary hearing, appellate counsel Robert M. Dudek testified that he read the full voir dire. He raised one juror issue in his appellate briefs. He noted that he

would have considered all issues that were preserved for review. However, he did contend that he would not have made a strategic decision not to raise a winning issue. Mr. Dudek testified that the appellate courts give due deference or great deference to the findings of trial courts regarding whether a juror is qualified to serve. The only case in which he could recall that an appellant prevailed on a juror claim was in *State v. Johnny Bennett*. He noted that with the juror who was disqualified, the court did have specific concerns about whether the juror was applying a higher burden of proof beyond the reasonable doubt standard. Mr. Dudek indicated that he was not aware of any juror who served who had previously been challenged for cause during the voir dire process.

Applicant's claims relating to jurors Deborah Lucas and Phillip Lofollette were without merit. "[A]ny claim that a jury was not impartial must focus on the jurors who ultimately sat at trial." *State v. Tucker*, 324 S.C. 155, 162-63, 478 S.E.2d 260, 264 (1996)(citing *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273(1988)); see *State v. Green*, 301 S.C. 347, 353, 392 S.E.2d 157, 160 (1990)(holding Both jurors Lucas and Lofollette were struck by the defense during the jury strike. (R. 1258, 1260). Only one regular juror was seated after the defense exhausted its peremptory strikes: Vicky Mills. (R. 1262). She was not challenged by the defense during either the voir dire process or during the jury strike. (R. 784-801, 1262-63). In light of the fact that none of the jurors who sat on Applicant's jury were objectionable, this Court finds Applicant received a fair trial.⁹ Thus, this claim would have been found to be without merit on appeal. See

⁹ This court also finds that the transcript of the jurors' voir dire support the trial court's findings the jurors were qualified.

Green, supra. As a result, Applicant has failed to meet his burden of showing counsel was ineffective in not challenging the qualifications of Jurors Lucas and Lofollette on appeal. United States v. Wilkes, 20 F.3d 651 (5th Cir.1994)(appellate counsel not deficient for not raising legally meritless claim on appeal); see United States v. Kirsh, 54 F.3d 1062, 1071 (2d Cir. 1995)(noting the failure to make a meritless argument does not rise to the level of ineffective assistance of counsel). _____

This Court also finds the third claim for relief in this ground to be without merit. Appellate counsel was not ineffective in not arguing on appeal that juror Sponhour was improperly disqualified. A review of the transcript of the juror Sponhour's voir dire shows that trial court did not abuse its discretion in dismissing Sponhour. In the early portion of the voir dire, when Sponhour is asked by Judge Few if he could vote to impose the death penalty if he felt it was the appropriate punishment, Sponhour responded "I have trouble giving you a yes or no answer on that. It is a bit unlikely that I would be willing to do that." (R. 598). Sponhour had maintained that he did not think he fit into one of the three categories for jurors. During examination by the solicitor, Sponhour indicated that he would be very troubled about voting for the death penalty because there were too many cases where "it's been shown that people have been sent to death and the facts were later found to liberalize it." (R. 599). He also indicated that he probably could not sign a death verdict. (R. 600). While Sponhour did not have a moral opposition to the concept of the death penalty, he asserted that he was more concerned about the fallibility of death sentences. (R. 601). He noted that those concerns would be at the forefront of his mind. (R. 602). In responding to Mr.

Littlejohn's questions on voir dire, Sponhour indicated that he was not completely opposed to the death penalty, but he was troubled by the "inherent fallibility of human institutions like the judicial system." (R. 605).

After the examination of Sponhour concluded, the trial court indicated it was concerned that Sponhour indicated he would be applying a different burden of proof to the State before he would be willing to consider the death penalty. (R. 606). Specifically, the trial court was concerned that if a guilty verdict was entered by the jury, Sponhour would still question guilt during the sentencing phase. (See R. 607-09).

Sponhour was brought back in for further voir dire. During this questioning, Sponhour testified that he could see himself not considering the death penalty in the sentencing phase because he still had questions about the defendant's guilt. (R. 610-14).

After questioning, the solicitor argued the juror was not qualified to serve. He noted that the juror's answers indicated he would not follow the law in the guilt phase because he was looking for more than beyond reasonable doubt. Further, in the sentencing phase, he would be in direct violation of United States Supreme Court precedent in that he would consider residual doubt. The Solicitor argued:

So I think he's disqualified in the guilt phase because he needs proof beyond all doubt. I think he's certainly disqualified in the penalty phase because that's bleeding over into it, and he's bringing in an arbitrary and a capricious manner into that deliberation. Under *Wainwright versus Witt* I agree, your honor. We think that his views substantially impair – they would prevent him from the performance of his duties in accordance with his instruction and his oath and the law that would be charged to him.

(R. 616).

In response, trial counsel argued that the jury could give life for any reason or no reason at all, and the fact that the juror wants to be clear about his decision making process means that he is just doing his duty. Further, counsel noted that it was clear that Sponhour was not fundamentally opposed to capital punishment. Counsel argued that Sponhour did not say that he would hold the State to a standard where he could not give the death penalty. "He didn't say, well, there's no circumstance under which - - no burden that the state could meet such that I would never give a death sentence." (R. 618).

After hearing arguments, the trial court disqualified Sponhour for service on the jury for two reasons. First, the trial court found Sponhour indicated he would hold the State to a higher burden of proof, which was impermissible. (R. 618). While Sponhour did not state what that burden would be, it was clear that it was higher than beyond a reasonable doubt. The trial court found that would interfere with the juror's ability to follow the court's instructions. Second, the trial court found that Sponhour's views about the fallibility of the justice system and discussion about the number of times that individuals sentenced to death would later be found not guilty would interfere with his ability to follow the court's instructions. Thus, Sponhour was disqualified.

The trial court's findings in disqualifying juror Sponhour were supported by the record. As a result, the disqualification of juror Sponhour would not have been reversed on appeal. Since the disqualification of the juror would not have been reversed, Applicant failed to show that appellate counsel was deficient because this issue was not clearly stronger than the issues raised by appellate counsel on appeal. Further,

Applicant fails to establish he was prejudiced as a result of appellate counsel not raising this issue on appeal because the outcome would on appeal would not have been different had counsel raised this issue. As a result, this claim for post-conviction relief is denied.

Ground F: Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that he is mentally retarded.

Applicant's claim in Ground F is denied because it is not an appropriate claim for post-conviction relief. In Ground F, Applicant raises a freestanding claim that Applicant's death sentence violates the Eighth Amendment prohibition of cruel and unusual punishment based upon the fact Applicant is mentally retarded. S.C. Code Ann. § 17-27-20(b) (1986) specifically provides that the remedy of Post-Conviction Relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The South Carolina Supreme Court has consistently and repeatedly held that issues that either were or could have been raised at trial and on direct appeal may not be raised in PCR. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979).

Applicant's trial occurred after the United States Supreme Court's decision in Atkins v. Virginia, 536 U.S. 306 (2002) and after the South Carolina Supreme Court's decision in Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003). In Franklin, the

South Carolina Supreme Court addressed how the issue of mental retardation should be handled after the United States Supreme Court's decision in Atkins:

Regarding the procedures to be used in making the mental retardation determination in post-Atkins cases, we conclude the trial judge shall make the determination in a pre-trial hearing, if so requested by the defendant or the prosecution, after hearing evidence, including expert testimony, from both the defendant and the State. The defendant shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence. Cf. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998) (defendant bears burden of proving incompetence by preponderance of evidence); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998)4 (same).

If the judge finds the defendant to be mentally retarded by a preponderance of the evidence in the pre-trial hearing, the defendant will not be eligible for the death penalty. If, however, the judge finds the defendant is not mentally retarded and the jury finds the defendant guilty of the capital charge, the defendant may still present mitigating evidence that he or she had mental retardation at the time of the crime. See S.C.Code Ann. § 16-3-20(C)(b)(10) (2003). If the jury finds this mitigating circumstance, then a death sentence will not be imposed.

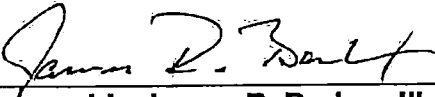
Franklin, 356 S.C. at 279, 588 S.E.2d at 605 (footnotes omitted); see State v. Laney, 367 S.C. 639, 627 S.E.2d 726 (2006). Clearly, the procedures outlined by the South Carolina Supreme Court show that mental retardation as a freestanding claim can only be properly raised before the trial court in post-Franklin trials. Applicant had an opportunity to raise this claim at trial. Since this issue could have been raised at trial, it is procedurally barred from review in post-conviction relief. As a result, this claim for relief is dismissed.

Conclusion

For the reasons stated above, this Court grants post-conviction relief on the ground that Applicant's trial counsel were ineffective in failing to investigate and present

all available evidence of his mental retardation and/or low intellectual functioning and deficits in adaptive behavior prior to the age of eighteen. Accordingly, Applicant's sentence of death is vacated and this matter is remanded to the Court of General Sessions of Lexington County for a new sentencing trial. This Court denies relief on all other grounds alleged in Applicant's PCR Application.

AND IT IS SO ORDERED. _____



Honorable James R. Barber, III
Circuit Court Judge
Presiding by Appointment of the Supreme Court

June 21, 2011