

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

October 24, 2014

The Honorable M. Hope Blackley
Clerk of Court, Spartanburg County
PO Box 3483
Spartanburg SC 29304-3483

REMITTITUR

Re: Richard Bernard Moore v. State
Lower Court Case No. 2004-CP-42-02715
Appellate Case No. 2011-198472

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,

CLERK

cc:

Robert Michael Dudek, Esquire

W. Edgar Salter, III, Esquire

J. Anthony Mabry, Esquire

Susan Barber Hackett, Esquire

Donald J. Zelenka, Esquire

The Supreme Court of South Carolina

Richard Bernard Moore, Petitioner,

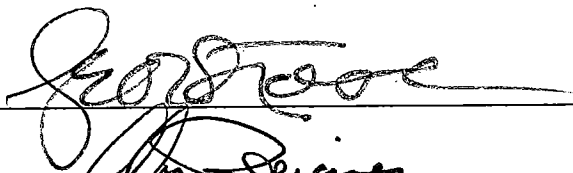
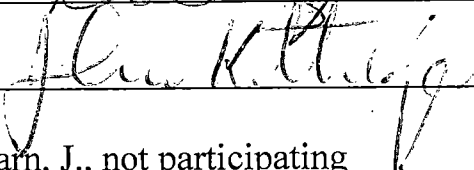
v.

State of South Carolina, Respondent.

Appellate Case No. 2011-198472

ORDER

The Petition for Rehearing filed in the above entitled matter is denied.

	C.J.
	J.
	J.
	J.
Hearn, J., not participating	

Columbia, South Carolina

October 24, 2014

cc:

Robert Michael Dudek, Esquire

W. Edgar Salter, III, Esquire

J. Anthony Mabry, Esquire

Susan Barber Hackett, Esquire

Donald J. Zelenka, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

RECEIVED

SEP 26 2014

S.C. Supreme Court

RICHARD BERNARD MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, petitioner respectfully moves this Court for an order (1) vacating the denial of the petition for writ of certiorari, entered September 11, 2014, (2) granting rehearing, and, (3) granting the petition for writ of certiorari. Petitioner brings this Court's attention to the fact that trial counsel was ineffective, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, by failing to adequately prepare and rebut evidence that Petitioner shot the decedent with premeditation while the decedent was behind the store counter. How the decedent came to be shot was critical to the extent of Petitioner's culpability.

In addition, petitioner seeks rehearing because this Court may have overlooked the fact that trial counsel was ineffective for failure to call James Aiken to testify that petitioner could adapt to prison, and would be a "low risk" of being any danger "to staff, inmates, or the general public."

App. 2971. Petitioner further seeks rehearing because trial counsel's decision not to investigate Petitioner's family history in Michigan, where he was born and raised, was not reasonable. The Michigan witnesses that testified during the PCR hearing would have conveyed to the jury that Petitioner was a good person, and not an aggressive person by nature, and asked for mercy. This evidence was important for the life and death decision the jury had to make particularly since the trial facts that follow make this a most troublesome death penalty case.

Two scenarios of what occurred

Everyone knew the third shift clerk at Nikki's convenience store, James Mahoney, carried a gun in his waistband behind his back. That gun was a .44 Magnum. Keith Fowler, whose wife owned the store, testified in addition to Mahoney's .44 Magnum bulldog revolver, there were a .45 and a .32 caliber Magnum kept under the counter. App. 1347, l. 23 – 1348, l. 20.

Petitioner testified at the PCR hearing that he knew Mahoney from patronizing the store. He was sure Mahoney recognized him on the night of the incident. Petitioner also knew there was a security camera that monitored what occurred in the convenience store. App. 2266, l. 24 – 2267, l. 5.

Defense counsel Michael Morin testified at the PCR hearing that petitioner had consistently told him he went into the store to purchase beer and cigarettes and that he put them on the counter. The photographs of the store and the diagram of the store are before this Court to review. Morin recalled that Petitioner did not have quite enough money -- just some small change short to buy the beer and cigarettes. He asked the clerk to "let him slide because he was in there all the time. Then the clerk made some offensive remarks to [petitioner] and told him he'd have to leave or what have you. Mr. Moore didn't want to. That the clerk pulled out a gun and Mr. Moore immediately tried to

disarm him for his own safety. Then after he got that gun away from the, him, the clerk pulled out a second gun and shot him and he [Petitioner] returned fire.” App. 2511, ll. 11-25.

Petitioner, at the PCR hearing, described what happened largely the same way as Morin. He asked Mahoney to allow him to take some small change out of the little container on the counter since he had put his change there in the past to help others similarly situated. Petitioner remembered he was eleven or twelve cents short, but Mahoney told him he could not take change out of the container to have enough to purchase his beer and cigarettes. He reminded Mahoney that he had contributed to the small change cup in the past. Mahoney was not a big man. Petitioner really did not think he was intimidated by Mahoney, even though he knew that Mahoney always kept a pistol in his waistband behind his back. App. 2267, l. 10 – 2268, l. 20.

Mahoney told Petitioner to get his “black ass out of my store.” App. 2268, ll. 3-9. When Mahoney told him to get “my black ass out of the store, that’s when I, I must have said something like I’m not going nowhere.” He may have cursed back at Mahoney. Mahoney reached under the counter and came back up with “a pistol in his hand.” “I automatically responded and, and I wouldn’t allow him to point the pistol at me. So, I reached for it. We struggled over that particular pistol, and it fired, it went off, and it jammed, and that’s how I was able to get it from his hands.” App. 2268, l. 3 – 2274, l. 13.

Mahoney then reached behind his back, pulled out the .44 Magnum and shot petitioner with it. Petitioner recalled he was able to fire three or four shots at Mahoney and Mahoney fell to the floor. Petitioner denied that he pointed the gun at Terry Hadden, who was playing the video poker machine. Petitioner admitted he grabbed the bag of money and left. App. 2268, l. 3 – 2274, l. 13.

Hadden's trial testimony

Defense counsel Morin repeatedly acknowledged during the PCR hearing that discrediting Hadden's trial version of what occurred was critical. App. 2384, ll. 12-23; 2398, l. 13 – 2399, l. 23; 2400, l. 4 – 2401, l. 15; 2549, l. 16 – 2550, l. 13.

At trial, Hadden described petitioner as “a big guy.” Petitioner walked into the store at about three o'clock that morning. Hadden was playing the video poker machine and he claimed he heard Mahoney say: “What the hell do you think you are doing?” Hadden said he turned around and he saw petitioner had Mahoney by both of his hands. Hadden claimed that petitioner got a weapon away from Mahoney and told him not to move. Hadden claimed petitioner shot at him so he fell to the floor and played dead. App. 1204, l. 12 – 1209, l. 17.

Hadden agreed that everyone could see that Mahoney carried a gun in his back waistband. App. 1212, ll. 7-13. Defense counsel Morin's cross-examination of Hadden consisted of less than ten pages of transcript. Hadden's only concession to defense counsel was his acknowledgement that nowhere in his statement to the police did he tell them that petitioner had held Mahoney's hands down. App. 2224, ll. 8-10. However, Hadden insisted that he told the police at some point. App. 1227, ll. 12-19.

Lesser-included offense and self-defense

Morin further testified he tried to present evidence to obtain a voluntary manslaughter instruction “[w]ithout him [Petitioner] testifying, the best we could try to do is a get a [voluntary] manslaughter.” App. 2494, l. 12 – 2495, l. 3. Morin said he discussed voluntary manslaughter and self-defense with petitioner. App. 2495, ll. 1-5.

Morin told the PCR judge that petitioner refused to plead guilty in return for a life sentence. Morin agreed repeatedly that Petitioner was consistent in what he said occurred in the store that

morning. Morin claimed petitioner was not interested in testifying, which Morin agreed would have helped him get jury instructions on self-defense and voluntary manslaughter. App. 2515, l. 9 – 2517, l. 5; App. 2532, ll. 7-21.

Morin testified that the state did not really have a clear theory of what occurred in the store that morning, but they put it to the jury that petitioner went into the store with the intention of robbing it. Morin said on cross-examination: “[I]t didn’t really [matter] how many shots were going off because he’s contended he is defending himself, and, and I think, in any argument, the fact that you’ve got a gun, a .45 pointed in your face or chest, that right there causes a defensive reaction. Whether it’s to run or fall down or take the gun. And then when you get shot, you return fire. That’s not unreasonable I didn’t think, and I was concerned about the bullets and, and the other things that had to do with where Mr. Mahoney was so that we could develop that, that, that defensive struggle between two armed, one man armed twice, one [Petitioner] not armed, now they’re both armed, now they’re both shot. That’s the - - that right there is where we were trying to go with it, and how many times the .45 got shot, once the gun’s pointed at you, you, you kind of - - he’s kind of reacting.” App. 2549, l. 16 – 2550, l. 8.

Morin talked with two retained experts only one time each. Strangely, as the PCR judge acknowledged in the order of dismissal, “*Mr. Morin did not tell his experts what Moore said had occurred.*” App. 2898. (emphasis added). “Mr. Morin met with both his pathologist and his crime scene expert, at the same time, to discuss their findings.” App. 2898. (emphasis added).

As will be argued infra, this is certainly unusual since surely Morin in his practice now as a solicitor, has the police brief the pathologist with their version of what law enforcement thought occurred. Morin only spoke to Dr. McMahon, forensic pathologist and potential witness, “only one

time.” Morin did not talk to the State’s crime scene investigator, Paul Dorman, at all before trial. App. 2371, l. 15 – 2372, l. 2.

The unfortunate part of this case was, as Investigator Dorman said during the trial, the video in Nikki’s was not working. “The video. The whole system was turned off. It wasn’t working at all . . . it was inoperable.” App. 1331, l. 15 – 1333, l. 23. Dorman testified at trial: “I don’t remember a tape being in the machine.” App. 1333, ll. 22-23.

The bag containing the items petitioner was going to purchase, the beer and cigarettes, became a critical piece of evidence. Dorman testified on cross-examination by Morin:

Q. This is a photograph of the bag, is that right?

A. Yes, sir, it is.

Q. And the bullet was fired from what side of the counter based on this bag?

A. **Looking at the bag, it was fired from the outside in.** I believe that’s - -

Q. Well, this bag is on what part of this counter?

A. There is the counter.

App. 1327, ll. 4-11. (emphasis added).

This ineffective cross left the jury with impression that petitioner’s gun may have fired the shot from outside the counter into the counter area. When properly questioned at PCR, Dorman made it clear that the bullet that *went through the bag* containing the two beer cans **came from behind the counter**. (i.e. *it was fired by Mahoney*). App. 2206, l. 24 – 2208, l. 6.

Although the bag was a critical piece of evidence, all Morin could say at PCR was: “I don’t remember this bag.” App. 2356, l. 10- 2357, l. 12. Dorman testified unequivocally at the PCR

hearing that the bullet that went through the bag “came from the server side toward the customer side” and that the exit hole “would be on the customer side.” App. 2207, l. 11 – 2208, l. 6.

From his single conversation with Dr. Carol McMahon and crime scene reconstructionist Donald Girndt, Morin recalled they both believed petitioner fired shots from behind the counter and Morin admitted he did not consult with any other potential experts. He admitted he did not attempt to relay to them what Petitioner said actually occurred. App. 2358, l. 8 – 2363, l. 2. Morin reasoned: “I mean obviously Mr. Moore had told me consistently what his part, version was and that was fine. But I needed to be able to have somebody telling me what their professional opinion was so that, when I got to the point where I was gonna (sic) be faced with cross-examining them, I would have some education as to what that evidence may reflect.” App. 2361, l. 25 – 2362, l. 6. Morin admitted he thought there were “holes in this [the state’s] story.” App. 2362, l. 18 – 2363, l. 10.

However, in addition to not telling his retained experts what Petitioner consistently said happened, Morin acknowledged he did not attempt to engage a crime scene reconstruction expert or crime scene expert to testify following the negative opinions of McMahon and Girndt. App. 2363, ll. 8-10.

When Morin was asked to admit that it would have been helpful to have a crime scene reconstruction expert testify and corroborate available helpful evidence which came out at PCR, that “the .45 was fired as it was shooting out toward the customer side,” Morin answered: “Without any more thoughts than what you’ve gave (sic) me, I don’t know that it would have.” App. 2373, ll. 7-16.

One bullet wound, or two

At the PCR hearing, Dr. Sandra Conradi testified that “the cause of death is a single gunshot wound to the chest with perforation of the heart . . . which means bleeding into the sac around the heart causing the heart to become unable to beat.” App. 2326, ll. 16-20. Dr. Conradi acknowledged on cross-examination that it was “a close range wound” but that the decedent was only shot one time and “he could’ve been conscious for seconds to a minute or two . . .” App. 2331, l. 10 – 2389, l. 20.

Dr. Conradi had trained Dr. John David Wren who was the state’s pathologist at trial. Dr. Wren testified during the trial the decedent was shot “21 and a half inches from the top of his head . . . and then he had another gunshot wound in his lower right arm.” Dr. Wren stated the second wound could have been a re-entry wound, but he said the wound, while not a contact wound, the gunshot was only “12 to 15 inches away.” App. 1492, l. 15 – 1502, l. 9.

Dr. Wren, in contrast to Dr. Conradi, testified “this person probably lived six to ten, maybe fifteen minutes. He could have live fifteen minutes, but I would say less than ten minutes.” App. 1502, ll. 10-12. Dr. Wren opined: “This person bled to death.” App. 1502, ll. 4-12.

Order of dismissal

In the order of dismissal the PCR court wrote: “Mr. Morin reviewed the physical evidence with both his crime scene expert and his investigator. Counsel’s investigation and the information that the state provided to him through discovery revealed that Moore did not have a handgun on him when he entered Nikki’s and that both the murder weapon (a .45 caliber handgun) and a .44 caliber revolver, originated with the victim. There were a number of shots fired at the store and a number of shell casings. He had his experts to assist him in reviewing the physical evidence and determining what the physical evidence indicated as to the relative positions of Moore and Jamie

Mahoney and what had occurred. Also, Mr. Morin reviewed the physical evidence with his crime scene expert, Donald Girndt, and he provided Girndt with crime scene photographs. Mr. Morin met with his pathologist and his crime scene expert, at the same time, to discuss their findings.” App. 2897 – 2898.

The PCR court wrote of its belief that Moore was shot by the clerk in self-defense and it found some significance in the fact petitioner was “just a few short blocks to Spartanburg Regional Hospital and receiving treatment for his serious gunshot wound, Moore [instead] drove approximately six miles in the opposite direction. Moore did not drive to the hospital or even his own home, but directly to George Gibson’s house.” App. 2900.

The court wrote that Dr. McMahon’s testimony would have been harmful to petitioner and the court found that counsel was not ineffective for failing to retain and call Dr. Conradi because “counsel is not required to search for another expert who will testify favorably. Counsel is not required to ‘expert shop.’” App. 2901 – 2902. The Court’s dismissive comment about “expert shopping” is inaccurate. See Rompilla v. Beard, 545 U.S. 374 (2005)(counsel retained pitiful “expert” on gun markings to exclude defendant as shooter whom solicitor destroyed in closing argument -- three qualified experts testified at PCR and defendant granted new trial for IAC). Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007).

As seen, Dr. Conradi testified that the decedent was only shot once, and that he died within seconds or minutes. His pain did not linger. The court stated that Conradi’s testimony would have hurt Petitioner because she also opined that the decedent was shot at close range. App. 2904.

The order stated that Paul Dorman, the state’s crime-scene technician, “was not the state’s expert at trial” even though he was a state’s witness. The PCR court rejected petitioner’s contention that defense counsel was ineffective for failing to cross-examine Dorman to reveal, as came out at

the PCR hearing, that the victim shot at petitioner first with the .45 caliber revolver. App. 2197, l. 11 – 2208, l. 6. Interestingly, the judge wrote that the PCR testimony of Dorman, a life-long law enforcement officer, was not credible. App. 2906.

The court wrote that petitioner did not prove prejudice even if this useful testimony had been admitted because several factors could have contributed or caused the shell casings to end up behind the counter. The Court found it was impossible to tell how the shell casings ended up behind the counter, and the court wrote that found petitioner's version of the shooting implausible. The court also stated there was overwhelming evidence of "Moore's guilt of these crimes." App. 2907.

Discussion

As seen, Morin did not even tell Dr. McMahon and Donald Girndt petitioner's "consistent," - - Morin's words - - version of what occurred in Nikki's store that morning to his retained experts. The videotape at the store was not working, which left the jury to speculate about what had occurred. Petitioner, who Morin agreed was consistent in his version, turned down an offer to plead guilty.

Petitioner testified during the PCR hearing that defense counsel made it very clear that if he testified at his trial that his prior record would come before the jury. Petitioner also said defense counsel did not explain or emphasize to him that his testimony might be necessary for the judge to charge the jury on self-defense and voluntary manslaughter. App. 2280, l. 1 – 2281, l. 24. Morin conversely maintained that petitioner "had no interest" in testifying.

While Morin thought there were "holes" in the state's version of what occurred, he did not even bother to tell his retained experts what petitioner said had occurred at the store that morning. At PCR, Dorman clearly stated that the shot *through the bag* with the beer cans petitioner was going to purchase came from *behind* the counter towards petitioner. This was critical evidence, yet the

jury was left with the impression at trial that the shot came from the “outside in,” meaning, in a normal sense of the words, that the shots came *from the customer side of the store toward the counter* and the decedent.

Further, the PCR court’s finding that Dr. Conradi’s testimony would have been damaging to petitioner in its totality is simply incorrect. Dr. Conradi’s testimony that the clerk was shot at close range one time was consistent with petitioner’s testimony that he frantically reacted to the decedent pulling a gun on him, cursing, and telling him to get out of the store. Dr. Conradi’s testimony that the decedent was only shot one time and died quickly far outweighed any downside it had. It contradicted Dr. Wren’s testimony that decedent was shot twice – a very critical distinction that would create reasonable doubt of the state’s version.

This is a highly unusual death penalty case since self-defense and voluntary manslaughter, given Morin’s PCR testimony about what petitioner consistently told him prior to trial, would have been verdict options had petitioner testified. The worst case scenario was that Petitioner intended for this to be a larceny or common-law robbery since he did not have a firearm with him.

If the jury found Petitioner intended to steal money but was not armed it could have reasonably found that the murder was not the natural or probable consequence of the larceny. It could have further concluded that the state had failed to prove beyond a reasonable doubt that the homicide was the natural or probable consequence of a plan to steal money from the store, and Petitioner would have been entitled to an acquittal on the murder charge. Cf. State v. Peterson, 287 S.C. 244, 246-247, 335 S.E.2d 800, 801 (1985).

It is highly implausible that Petitioner anticipated that the decedent would point a firearm at him and that petitioner would successfully disarm the decedent and exchange gunfire with him. It

was therefore critical at both the guilt phase and penalty phase that the Dorman and Conradi PCR testimony was given to the jury.

Defense counsel was ineffective in cross-examining state's witness Paul Dorman during the trial to elicit testimony that gunshot *did go through petitioner's bag from behind the counter*. Defense Counsel Morin did not even bother to interview Dorman prior to the trial even though his forensic testimony was very important.

The PCR court's refusal to call Dorman anything other than a neutral witness was, respectfully, as unusual as law enforcement not giving the pathologist their version of how a shooting occurred. Defense counsel was deficient for failing to provide his retained experts with petitioner's version of what had occurred, and for failing to find available expert testimony of Dr. Conradi, or somebody similar to her, and for not cross-examining Dorman with the evidence that the hole in the bag was from a shot fired by the decedent. See Strickland v. Washington, 466 U.S. 668 (1984). Counsel's performance fell below an objectionable standard of reasonableness. See Franklin v. Catoe, 346 S.C. 563, 570-571, 552 S.E.2d 718, 722 (2001).

Morin's failure to interview Dorman, and his inept cross-examination of him constituted deficient performance. It was completely unreasonable under prevailing professional norms and therefore constituted deficient performance under the Sixth Amendment. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Dorman's PCR testimony was critical guilt phase evidence, and strong evidence in mitigation at the penalty stage. Evidence that petitioner was being shot at, and shot at first, would have entitled him, at a minimum, to a voluntary manslaughter instruction. Even if not manslaughter, the testimony was strong evidence of the statutory mitigating circumstance that the "defendant was provoked by the victim into committing the murder." See S.C. Code §16-3-20

(C)(b)(8). Morin's decision not to interview Dorman prior to trial and not to tell his experts petitioner's consistent version of how the shooting came about was objectively unreasonable. It was not a reasonable strategic decision. See Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008).

Defense counsel's failure to interview Dorman so that he could effectively cross-examine him was unreasonable since defense counsel could easily have interviewed Dorman and discovered there was available evidence corroborating petitioner's testimony, a game changer in this case demonstrating a reasonable probability the outcome would have been different. See Cobbs v. State, 305 S.C. 209, 408 S.E.2d 223 (1991).

Further, the judge's conclusion that the PCR testimony of Dorman, a life-long law enforcement officer, was not credible applies the wrong standard of credibility, and is legal error. App. 2906. See State v. Jenkins, 848 N.W.2d 786, 797 (Wis.2014)(holding that "[i]n assessing the prejudice caused by defense trial counsel's performance, i.e., the effect of the defense trial counsel's deficient performance, **a circuit court may not substitute its judgment for that of the jury in assessing which testimony would be more or less credible**")(emphasis in original); Commonwealth v. Johnson, 966 A.2d 523, 541 (Pa. 2009)(recognizing "that assessing credibility for purposes of Strickland prejudice *is not necessarily the same thing as assessing credibility at a trial*," finding no case from the United States Supreme Court setting "forth a standard for credibility determinations in the Strickland prejudice context" and explaining that "credibility assessments in the Strickland context are not absolutes, *but must be made with an eye to the governing standard of a 'reasonable probability' that the outcome of the trial would have been different*"). (emphasis added). The judge, in his order of dismissal, simply adopted the state's version of what occurred in the store that day in finding Dorman's testimony on this subject not credible. Witnesses are presumed to tell the truth, and there was nothing in this record from which the PCR judge could

have legitimately found Dorman's PCR testimony on this seemingly dispositive matter not credible.

See State v. George, 113 S.C. 154, 102 S.E. 284-285 (1920).

Defense counsel's deficient performance was prejudicial to petitioner because the state was able to argue that petitioner entered the store with the intent to rob it – though it was undisputed he was not armed with a gun -- and shot a helpless clerk in cold blood. This is a much different version of events than what Morin admitted petitioner had consistently told him: Everyone knew that the decedent was always armed, Petitioner knew there was a video camera in the store, and Petitioner only returned fire in self-defense after the decedent pointed a gun at him and ordered him out of the store because he did not have enough money to purchase beer and cigarettes. Petitioner's consistent statement about what occurred should have been presented to the retained experts, and Dr. Conradi or another similarly situated expert should have been retained, and Dorman would have stated at trial that the shot came from behind the counsel had defense counsel's cross-examination not been so deficient.

In the final analysis, the jury never learned of readily available evidence that a gun was fired toward Petitioner from behind the counter, and the bullet went through the grocery bag towards Petitioner. The evidence of Investigator Dorman and Dr. Conradi were critical at both the guilt stage (self-defense or voluntary manslaughter), and the penalty phase trial (Petitioner's culpability and the suffering of the decedent), and rehearing is absolutely justified.

PRISON ADAPTABILITY EVIDENCE

Sentencing Proceeding

The prosecution presented evidence of Petitioner's prior convictions through multiple witnesses, including the victims of prior crimes and court officials. Petitioner's trial counsel did nothing to counter the prosecution's case that Petitioner posed a future danger. Trial counsel

presented only two witnesses, Petitioner's girlfriend, Lynda Byrd, and his stepson, James Byrd, during the penalty phase of the trial. Neither witness presented by trial counsel countered the prosecution's evidence of future dangerousness.

The prosecution called Jacqueline Walker, an employee of the Wayne County Clerk of Court in Detroit, Michigan, to testify. App. 1648, ll. 3-19. Through Walker, the prosecution entered certified copies of Petitioner's criminal record from Wayne County. App. 1649, l. 12 – 1650, l. 7. The record revealed Petitioner had been convicted for unlawful possession of a weapon in 1985. App. 1650, ll. 8-11.

Next, the prosecution called Bill Nixon, the Chief Deputy Clerk for the County of Macomb in Michigan, to testify. Nixon testified that the records indicated Petitioner was charged with breaking and entering a building with intent and was convicted on May 15, 1987. App. 1653, ll. 20-24. The record included an additional form in which Petitioner was asked to explain in his own words what happened. Petitioner's statement was "Pushed open front door of Broadway Market. Entered store and removed two handguns and \$10 in quarters. When officers arrived - - but I ran away." App. 1654, ll. 4-10. On cross-examination, Nixon clarified that Petitioner had been charged with breaking and entering, but had pled guilty to attempt to break and enter, a lesser-included offense. App. 1654, l. 22 – 1655, l. 2.

David Saad, a parole and probation officer from the Michigan Department of Corrections, testified on behalf of the prosecution. App. 1655, l. 24 – App. 1656, l. 1. Saad prepared a presentence investigation report prior to Petitioner being sentenced for attempted breaking and entering. App. 1656, ll. 5-8. Saad testified that as part of his investigation for the report, he asked Petitioner what happened. Saad recalled Petitioner explained he broke into a building that he selected at random and stole two handguns and a roll of quarters. Later, Petitioner turned

himself into the police. When Saad questioned Petitioner about the cause of his behavior, Petitioner stated he was addicted to cocaine, both in the rock and powder form. App. 1657, ll. 6-24.

Next, the prosecution called Michelle Crowder to testify. She testified that in 1991, she was in a Sub Station restaurant with her fiancé. Petitioner walked in and stood in line behind her. Petitioner then grabbed her purse. When Crowder turned around, Petitioner punched her in the left side of her neck. Crowder fell to the ground as a result of the punch, landing on her purse. Crowder testified Petitioner then kicked her. Crowder's fiancé tackled Petitioner, but Petitioner beat him up, sending him to the hospital. Petitioner then left the restaurant. App. 1659, l. 4 – 1660, l. 7.

Valerie Wisniewski testified that she worked at Rack Room Shoes on September 13, 1991 in Spartanburg. Around closing time, Petitioner entered the store, jumped over the door where she was located, pushed her against a counter and ordered her to give him the money in the register. App. 1663, ll. 12-23. While she was screaming, the assistant manager, David Kivet, opened the register and gave Petitioner the funds. App. 1664, ll. 18. Petitioner then left the store. App. 1664, ll. 12-16.

Gail Moffitt, an employee of the Spartanburg County Clerk of Court, testified on behalf of the prosecution. App. 1665, ll. 23-25. Through Moffitt, the prosecution painstakingly detailed Petitioner's criminal record. She testified that in August 23, 1994, Petitioner was convicted of common law robbery, which was the incident involving Rack Room Shoes and Wisniewski. App. 1667, ll. 3-17. According to Moffitt, Petitioner was convicted of driving under suspension, second offense and driving under suspension, third offense on September 15, 1993. App. 1667, l. 18 – 1668, l. 2; App. 1668, ll. 14-21. He was also convicted of habitual

traffic offender on two occasions. App. 1668, ll. 3-10; App. 1668, l. 22 – 1669, l. 6. Petitioner had a second driving under suspension, third offense on July 13, 1995, and driving under suspension, fifth offense and sixth offense on January 18, 1996. App. 1669, l. 7 – 1670, l. 11. On August 7, 1997, Petitioner was convicted of assault and battery of a high and aggravated nature. App. 1670, ll. 12-24.

During the prosecutor's closing argument, he referred to Petitioner as a "career criminal." App. 1722, l. 3. The prosecutor also attacked Petitioner's request for mercy. After noting that mercy may exist in the form of probation or relatively small prison sentences, the prosecutor detailed Petitioner's criminal record and opined that the time for mercy "ha[d] come and gone." App. 1723, l. 14 – 1724, l. 7. According to the prosecutor, Petitioner "had chance after chance after chance" and "had ample opportunity." As such, the prosecutor argued, Petitioner had hurt too many people too bad[ly] for too long for mercy in this case. App. 1724, ll. 15-22. He further argued Petitioner had engaged in "a steady, continuous, gradual pattern of escalating violence" and "sixteen years of escalating violent acts." App. 1724, ll. 2-3; App. 1724, ll. 20-21. The prosecutor asked the jury to give Petitioner "what he ha[d] earned for [fifteen] years. ... Fifteen years of victimizing people; [fifteen] years of disregarding other people's well-being." App. 1725, ll. 3-7. He concluded his argument by asking the jury "to sentence him to what he has earned for a lifetime of violent crimes. Death." App. 1725, ll. 22-24.

Adaptability Evidence Presented at PCR hearing

Petitioner called James Aiken to testify during his PCR hearing. Aiken was the president of a jail and prison consulting firm dealing with all aspects of criminal justice as it pertains to confinement facilities and systems. App. 2098, ll. 8-12. Aiken was a graduate of Benedict College and held a master's degree in criminal justice from the University of South Carolina.

App. 2098, ll. 16-19. Aiken worked for the South Carolina Department of Corrections beginning in 1971. He worked in sixteen prisons within the state system. App. 2098, l. 24 – 2099, l. 14. Thereafter, he worked for the Indiana Department of Corrections and the United States Virgin Islands corrections system. App. 2099, ll. 15-18. Subsequently, he began his consulting firm. App. 2099, ll. 18-21.

Without objection, Aiken testified as an expert in the field of classifications of inmates and the security of staff and inmates within those institutions and classifications. App. 2107, ll. 16-23. Aiken reviewed the classification and history of Petitioner. App. 2108, l. 25 – 2109, l. 8. Aiken determined Petitioner could be “adequately managed while in confinement status and that the South Carolina Department of Corrections can adequately manage him.” App. 2112, ll. 16-20.

Aiken testified that he was prepared for Petitioner’s trial, but was not called to testify as a witness. App. 2097, l. 24 – 2098, l. 3. Aiken would have testified the same in 2001 as he did during the post-conviction relief hearing. App. 2113, ll. 1-4.

On cross-examination, Aiken admitted Petitioner had received several disciplinary write-ups while on death row, including a verbal altercation with staff concerning opening a window and attempting to possess a cell phone. App. 2117, ll. 5-20; App. 2118, ll. 11-18. Additionally, Aiken testified Petitioner received disciplinary write-ups while incarcerated in Spartanburg County, including refusing a direct order from an officer, abuse of telephone privileges, and arguing with a correctional officer. App. 2119, l. 25 – 2121, l. 23.

Aiken also reviewed Petitioner’s criminal record. Aiken disagreed that Petitioner’s record showed a history of escalating violence. App. 2122, l. 20 – 2123, l. 7. Aiken opined Petitioner’s actions did not reflect that he was a predator and unable to adapt to prison. App.

2124, ll. 8-13. According to Aiken, Petitioner did not “come anywhere near the level of predator inmate population and the intensive type of management that’s required for that type of population.” App. 2127, ll. 12-15. Aiken further concluded that the prison system could adequately manage Petitioner for the remainder of his life. App. 2126, ll. 4-5.

Trial counsel, Michael Morin, testified that that he could not think of a reason not to call an adaptability expert to testify even if doing so would have allowed the prosecutor to introduce evidence of Petitioner’s infractions within the county detention center.¹ App. 2497, ll. 13-23. Morin recognized the state would argue that based upon the infractions, Petitioner refused to follow the rules, and as a result, the attorney would have to “weigh that back and forth.” App. 2499, ll. 9-18.

Keith Kelly, who also served as trial counsel, consulted with Aiken prior to Petitioner’s trial. His recollection was that Aiken would have testified that the Department of Corrections could house Petitioner and keep the population safe. “In other words, he’s never gonna get out and we can control him.” App. 2649, ll. 13-25. Additionally, Aiken would have testified that Petitioner was “not a monster” and was “not uncontrollable.” App. 2650, l. 1.

Kelly testified that he decided not to call Aiken to testify because the prosecution had a witness from Michigan to testify concerning Petitioner’s lengthy record in Michigan. Kelly believed the state would have used the witness to rebut Aiken’s testimony. App. 2650, ll. 5-18. Kelly testified that he wanted to keep out evidence relating to Petitioner’s discipline while

¹ As will be discussed in greater detail *infra*, the prosecution can introduce evidence of an individual’s conduct in the county detention center without waiting for the defense to open the door.

incarcerated and such evidence would have been admitted had Aiken testified. App. 2650, l. 23 – 2651, l. 14.

On cross-examination, Kelly admitted that the potential state's witness from Michigan was not an expert; rather, the witness was a records custodian. App. 2686, l. 23 – 2687, l. 2. Kelly maintained that based on Petitioner's previous incarceration and "whatever disciplinarys may have been documented as a result," he decided not to call Aiken. App. 2687, l. 24 – 2688, l. 4.

Order of Dismissal

Concerning Petitioner's claim that trial counsel provided ineffective assistance by failing to present evidence of his adaptability to prison through the retained expert, the PCR court found "counsel made a reasonable strategic decision not to present Aiken's testimony." The PCR court further found no prejudice resulted from counsel's decision.

The court's order summarized Aiken's testimony, including that Petitioner "would be of low risk of presenting a future danger in the prison system" and that Petitioner could "be controlled in a prison environment for the remainder of his life without causing an undue risk of harm to staff, inmates, or the general public." App. 2971. The court found Aiken was present at the trial and prepared to testify favorably on Petitioner's behalf. App. 2972. Additionally, the court found that the prosecution was prepared to introduce the testimony of a records custodian from Michigan concerning Petitioner's misconduct while incarcerated there. Kelly, who could not recall the nature of those records, decided not to call Aiken in fear of the state calling the witness from Michigan. App. 2972.

The PCR court concluded trial counsel's decision not to call Aiken was reasonable because the presentation of Aiken's testimony would have resulted in the prosecution being

allowed to present damaging testimony in reply. The court found “Respondent significantly impeached [Aiken’s] opinion of [Petitioner]’s adaptability with a contrary history of disciplinary infractions that [Petitioner] has committed while incarcerated.” App. 2974. The PCR court was particularly concerned about Petitioner’s possession of a cell phone and cell phone charger while on death row, which was considered a major infraction by the institution. App. 2974. The PCR court characterized Aiken as “dismissive of all the disciplinary infractions that Respondent elicited” as he testified that these infractions would not alter his opinion of Petitioner’s ability to adapt to life in prison. App. 2974. The PCR court admitted that Respondent did not impeach Aiken with an offense listed on the mitigation investigator’s report that Petitioner allegedly absconded from parole in Michigan; however, the PCR considered this in its analysis.² App. 2975.

As a result, the PCR court concluded that the numerous disciplinary infractions that Petitioner committed in South Carolina prior to trial would have minimized the effectiveness of Aiken’s testimony. The court held “[t]his is particularly true if there [were] further evidence of misconduct that [Petitioner] committed in the Michigan incarcerations, as there appears to be.” App. 2975 (emphasis added). Thus, the court found “Aiken’s expert testimony would have been of slight value, at best, *and that it would have permitted the introduction of evidence that would be damaging to the defense’s case in mitigation.*” App. 2975. (emphasis added).

² The only evidence before the PCR court of Petitioner’s alleged absconding was the mitigation investigator’s report.

Discussion

In order to obtain relief based upon a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and such deficiency prejudiced petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984).

An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Id. at 688. An attorney's performance is measured against prevailing professional norms. Id. at 688. The United States Supreme Court explained the ABA Guidelines provide evidence of the well-defined and prevailing professional norms. "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 prosecutor.'" Wiggins v. Smith, 539 U.S. 510, 524 (2003)(citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C)(1989)). The 1989 Guidelines also provide that trial counsel should consider presenting evidence of the client's rehabilitative potential and expert testimony concerning such. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6(B)(6) & (8)(1989).

The purpose of the sentencing phase of a capital trial is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the defendant. Woodson v. North Carolina, 428 U.S. 280 (1976); State v. Stewart, 283 S.C. 104, 107, 320 S.E.2d 447, 450 (1984); State v. Owens, 346 S.C. 637, 665, 552 S.E.2d 745, 760 (2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Haselden, 353 S.C. 190, 199, 577 S.E.2d 445, 450 (2003). The United States Supreme Court held that a penalty phase jury may consider any aspect of a defendant's character or record and any circumstances of the offense

that the defendant proffers as a basis for a sentence less than death as a mitigating factor. Lockett v Ohio, 438 U.S. 586, 604 (1978); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982).

In Skipper v. South Carolina, 476 U.S. 1, 4 (1986), the United States Supreme Court held that evidence of good behavior of a previously-incarcerated defendant is relevant evidence in mitigation of punishment. Skipper sought to introduce the testimony of two jailers and a regular visitor to the jail, who would have testified that Skipper adjusted well to life in jail. Id. at 2. This testimony would have allowed the jury to draw favorable inferences concerning Skipper's character and his probable future conduct if sentenced to life imprisonment. Id. at 4. The Court held there was no question that such inferences were mitigating because they may serve as a basis for a sentence less than death. Id. "The exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." Id. at 8.

As explained by the Skipper Court, "[c]onsideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing." Id. Thus, evidence that a defendant would pose a danger in the future may be treated as an aggravating factor in capital sentencing proceedings. Jurek v. Texas, 428 U.S. 262, 275-276 (1976); Barefoot v. Estelle, 463 U.S. 880 (1983). "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Jurek, 428 U.S. at 271. In Nance v. Ozmint, 367 S.C. 547, 556, 626 S.E.2d 878, 882-883 (2006), this Court noted that one of the many failings of trial counsel was his failure to present "adaptability evidence at the sentencing hearing." During the PCR proceedings, Nance presented considerable adaptability evidence, including his selection as the Manning Correctional Institution's Inmate of the Year, his nomination for the Department of

Corrections' Inmate of the Year, his singing in the prison choir, his participation in other Christian activities, and a jail administrator's description of him as a "model inmate." Id. at 556-557, 626 S.E.2d at 883.³

The trial judge may allow the introduction of additional evidence of aggravation to aid the jury in determining whether to recommend a death sentence. State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442, (2003). In fact, this Court has held that the prosecution may introduce testimony that a defendant has attempted a similar crime to that for which the defendant is on trial during the penalty phase because the evidence is relevant to the defendant's individual characteristics and predisposition to commit similar crimes. State v. Green, 301 S.C. 347, 358, 392 S.E.2d 157, 162-163 (1990). Evidence of a defendant's violent behavior in prison is relevant to future dangerousness, an issue properly before the sentencing jury. State v. Shafer, 352 S.C. 191, 198-199, 573 S.E.2d 796, 799-800 (2002).

As explained by this Court, "it is well-settled evidence of the defendant's behavior in prison is admissible in capital sentencing because it bears upon his character." State v. Hughes, 336 S.C. 585, 591-592, 521 S.E.2d 500, 503-504 (1999)(holding evidence that defendant killed a sleeping cellmate by stabbing him with a shank was admissible as evidence of the defendant's character and future dangerousness). There is a tension between evidence regarding the defendant's adaptability to prison life, which is admissible, and evidence regarding prison life in general, which is not admissible. State v. Burkhardt, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007); State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005). However, when the prison conditions are narrowly tailored to demonstrate the defendant's personal behavior in those

³ The Third Circuit Court of Appeals found trial counsel rendered ineffective assistance by failing to present, among other things, evidence of the defendant's adaptability to prison. Blystone v. Horn, 664 F.3d 397, 427 (3d Cir. 2011).

conditions, then the evidence is admissible. Id. Although the issue was not preserved for appeal, in State v. Whipple, 324 S.C. 43, 52, 476 S.E.2d, 683, 688-689 (1996), this Court held the introduction of Whipple's disciplinary record by the prosecution was not in error as the records were relevant to a matter properly before the jury – Whipple's adaptability. As explained in State v. Tucker, 324 S.C. 155, 173-174, 478 S.E.2d 260, 270 (1996), a defendant's future dangerousness and his adaptability to prison life are legitimate interests in the penalty phase of a capital case.

Relying upon Burkhart, this Court later held the prosecution's introduction during its case-in-chief of a video recording of a capital defendant refusing an order of prison guards and the guards using pepper spray to force his compliance was "probative on the issue of the defendant's adaptability to prison life, which is a legitimate concern in the sentencing phase of a capital case." State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010). This Court held "[t]he video recording presented the jury with competent evidence to showcase Torres' character and an actual routine prison situation." Id. Although the prosecution had introduced evidence of Torres' prior convictions and his inability to abide by conditions of parole, this Court held the video was still admissible as it "was unique in its application to a specific parameter held by this Court to not be arbitrary in the sentencing phase of a capital murder trial." Id. at 625-626; 703 S.E.2d at 230.

Without question evidence of a defendant's future adaptability to prison life is admissible during the penalty phase as it is evidence of a mitigating circumstance. Exclusion of such testimony is reversible error. State v. Matthews, 291 S.C. 339, 348-349, 353 S.E.2d 444, 449-450 (1986); State v. Patterson, 290 S.C. 523, 530-531, 351 S.E.2d 853, 857 (1986); State v. Riddle, 291 S.C. 232, 235-236, 353 S.E.2d 138, 140-141 (1987), overruled on other grounds by

State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). The District Court for the Western District of Texas granted habeas relief to a death-sentenced inmate based, in part, upon trial counsel's failure to present testimony from an expert that the probability of the defendant being a danger in the future was "very low" and failure to utilize records from a state rehabilitation center to demonstrate the defendant's good behavior and attempts to rehabilitate while in custody. Martinez-Macias v. Collins, 810 F.Supp. 782, 819-821 (W.D. Tex. 1991), affirmed by Martinez-Macias v. Collins, 979 F.2d 1067 (5th Cir. 1992).

If trial counsel articulates a valid reason for employing certain strategy, then the conduct is not ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). In Stokes, this Court determined trial counsel employed a valid strategy in not calling witnesses that he believed lacked credibility. Id. On the other hand, this Court found counsel deficient in Gilchrist v. State, 350 S.C. 221, 228 n.2, 565 S.E.2d 281, 285 n.2 (2002) for failing to object to the state's vouching for the credibility of a witness where counsel stated he decided not to object based upon a strategy, but never articulated that strategy. In Sanchez v. State, 351 S.C. 270, 276, 569 S.E.2d 363, 366 (2002), this Court determined trial counsel's reason for not objecting to an officer's hearsay testimony of the alleged assault on a child victim, which was that the testimony would help show the allegations were vague, was unreasonable because the hearsay corroborated the victim's testimony.

In Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993), this Court held trial counsel's decision not to present evidence of Drayton's ability to adapt to prison was not ineffective assistance of counsel. Trial counsel testified during post-conviction proceedings that he decided not to present adaptability evidence because the evidence included unfavorable psychiatric evaluations, poor disciplinary reports, and some accounts of misconduct while incarcerated. Id.

at 10, 430 S.E.2d at 521. This Court noted that Drayton's past actions in juvenile detention and when incarcerated as an adult reflected "a mixed picture of his ability to function in a prison setting." As such "[a]n attempt to develop favorable evidence of future adaptability would have opened the door for the prosecution to reveal Drayton's earlier misconduct in prison." Id. at 11, 430 S.E.2d at 521.

Petitioner's trial counsel testified that he did not present testimony of Aiken because to do so would have opened the door for the prosecution to present evidence of Petitioner's prior discipline record in Michigan. The PCR court determined trial counsel employed sound strategic reasoning, and thus, trial counsel rendered effective assistance. However, the basic premise is flawed. As explained supra, evidence of Petitioner's conduct while in prison was admissible by the prosecution without waiting for Petitioner to open the door to such testimony. This Court and the United States Supreme Court have held that a defendant's conduct while in prison is relevant to the defendant's character, adaptability to prison, and future dangerousness, all of which are proper considerations of a penalty phase jury. Thus, trial counsel's decision not to call Aiken based upon a fear of opening the door to presentation of harmful evidence by the prosecution was unfounded. The PCR court's determination that trial counsel employed sound strategy is legal error.

Although Drayton, supra, appears to support the PCR court's order that trial counsel made a valid strategic decision concerning the admission of adaptability evidence, the case law is clear – the prosecution was not required to wait for Petitioner to present evidence of his ability to adapt. Petitioner's prison record was relevant to his character, his future dangerousness, and his ability to adapt to life in prison; therefore, nothing prevented the prosecution from presenting this

evidence during its case-in-chief. Unlike the Drayton evidence, Aiken's testimony was very favorable to Petitioner, not interlarded with damaging evidence as that in Drayton.

In addition, concluding that the evidence of Petitioner's conduct while incarcerated in Michigan was harmful is entirely speculative. Neither the trial record nor the PCR record contained evidence of what was contained within Petitioner's prison records in Michigan. Even the PCR court order admitted that its decision was based upon speculation when the court noted that there "appear[ed]" to be evidence of misconduct by Petitioner while in Michigan, but could point to no evidence of such as Respondent failed to produce any of the records or attempt to impeach Aiken with the records. In any event, the State had *already* presented evidence on this issue from Michigan witnesses in its case-in-chief, including his probation agent.

Prejudice

"When a defendant challenges a death sentence, prejudice is established when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998)(quoting Strickland, 466 U.S. at 695 (1984)). As this Court noted "the evaluation of the consequences of an error in the sentencing phase of a capital case [is] more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all." State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000).

Prejudice is apparent in this case in light of the minimal case presented by trial counsel during the penalty phase and the weak case for death offered by the prosecution. The only evidence presented during the penalty phase by Petitioner was from his wife and stepson who testified that Petitioner continued to be a good parent while in prison and asked for mercy. The

prosecutor's case in aggravation concerned the circumstances of the crime at issue and Petitioner's prior criminal record. Although the victim's family suffered a tremendous loss and Petitioner's argument in no way seeks to minimize the loss suffered by the family, the circumstances of the crime were not of the brutal or torturous nature as is typical of most death penalty cases. The evidence adduced during the guilt phase and penalty phase was undisputed that Petitioner did not enter the convenience store with a murder weapon and Petitioner was shot by a bullet fired by the victim. Although Petitioner had a lengthy criminal record, the majority of his convictions were for traffic offenses. The prosecution used Petitioner's criminal record to demonize him and argue he had "earned" death.

Evidence of an undisputed and respected expert in the field of classifications of inmates and the security of staff and inmates within those institutions and classifications was "not self-serving evidence a jury would naturally tend to discount." See Skipper, 476 U.S. at 8. Due to the damaging character evidence presented by the state, Petitioner's character could not have been further damaged by the presentation of adaptability evidence or evidence of misconduct while in prison in Michigan, if such evidence existed. See Council, 380 S.C. at 175, 670 S.E.2d at 364. Like the attorneys in Council, "[t]rial counsel essentially would have had 'nothing' to lose' and 'everything to gain' by presenting this evidence." Id. at 176, 670 S.E.2d at 364-365. Due to trial counsel's deficient performance, the jury never heard the impartial testimony of Aiken that in his expert opinion, Petitioner would adapt well to life in prison and the Department of Corrections was equipped to maintain custody and control over Petitioner. Had the jury learned of Petitioner's high likelihood of adaptability and low risk of future dangerousness from an expert and placed this evidence on the mitigating side of the scale, there is a reasonable

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

Failure to Investigate and Present Evidence in Mitigation

Trial counsel presented only two witnesses during the penalty phase of the trial: Petitioner's girlfriend, Lynda Byrd, and Petitioner's "stepson," James Byrd. Trial counsel called no other members of Petitioner's family to testify and presented no evidence of Petitioner's life history. Rather, the focus of the mitigation case appeared to be Petitioner's ability to be a "father" while in prison.

Mitigation Evidence Presented at PCR hearing

During PCR proceedings, Petitioner presented deposition testimony from Dorothy Hooper, Cecil J. Hooper, Harold Harrington, Arma Hadley, James A. Moore, and Maurice Moore. Pete Skidmore testified concerning his role as fact investigator, and Dr. Sandra Conradi testified regarding the meaning of the forensic evidence which as discussed above showed the decedent was actually shot only once.

Petitioner's aunt, Dorothy Hooper, who has been a lifelong resident of Michigan, became aware of Petitioner being charged with murder in 2006, five years prior to her deposition testimony. App. 1802, ll. 13-20; App. 1803, ll. 16-21; App. 1808, ll. 7-9. No lawyers or investigators ever spoke to her prior to the PCR investigation. App. 1803, ll. 22-24; App. 1807, l. 17 – 1808, l. 1; App. 1813, ll. 4-8. Dorothy would have spoken to investigators and would have testified at Petitioner's trial. App. 1803, l. 25 – 1804, l. 6. At the time of Petitioner's trial, Petitioner's mother was deceased, and no member of the defense team, or Petitioner's father or other family members asked Dorothy to testify. App. 1808, ll. 11-21; App. 1813, ll. 21-22.

Dorothy explained Petitioner was at her home on a weekly basis, including overnight visits, when he was a child. App. 1804, ll. 9-12; App. 1804, l. 21 – 1805, l. 11. She described Petitioner as a “good person” who never gave her any trouble. App. 1804, l. 9-14; App. 1805, ll. 12-19. According to Dorothy, Petitioner was respectful and did not act aggressively or violently. App. 1805, ll. 22-24. Had Dorothy addressed the jurors in Petitioner’s capital trial, she would have asked them to spare his life and for mercy. App. 1805, l. 25 – 1806, l. 6. Dorothy candidly admitted she was not aware of Petitioner’s prior interactions with law enforcement; however, knowing of Petitioner’s legal troubles would not have affected her willingness to testify on his behalf. App. 1809, l. 21 – 1811, l. 23; App. 1813, ll. 9-15.

Cecil J. Hooper, Dorothy’s husband, had known Petitioner all of Petitioner’s life. App. 1819, l. 22 - 1820, l. 15. Cecil learned Petitioner had been charged with murder from Dorothy. App. 1820, l. 16-20. He was never contacted by anyone on Petitioner’s behalf prior to the PCR investigation. App. 1820, l. 21 – 1821, l. 2; App. 1822, ll. 7-18. Had Cecil been contacted, he would have been willing to be interviewed and testify on Richard’s behalf. App. 1821, ll. 3-9. Cecil would have told the jury that based upon his regular interactions with Petitioner, he considered Petitioner “a nice kid growing up,” who was respectful to adults, and had no behavior problems. App. 1821, ll. 10-21. Cecil would have asked the jury for mercy. App. 1821, l. 25 – 1822, l. 1. Like Dorothy, Cecil admitted he was not aware of Petitioner’s prior criminal record, but he would have testified on Petitioner’s behalf even knowing about Petitioner’s troubles with the law. App. 1822, l. 19 – 1824, l. 11; App. 1825, l. 24 – 1826, l. 1.

Harold Harrington, Petitioner’s uncle and a lifelong resident of Michigan, became aware of Petitioner’s murder charges shortly after Petitioner’s mother’s death. App. 1832, ll. 5-6; App. 1832, ll. 16-20; App. 1833, ll. 2-7. During Petitioner’s teenage years and into his twenties,

Harold saw him several times a week. App. 1835, ll. 2-11. Harold never observed Petitioner acting out aggressively. App. 1836, ll. 15-18.

Harold was never contacted by anyone on Petitioner's behalf prior to the PCR investigation. App. 1833, ll. 8-12. Had he been contacted, he would have testified that Petitioner was a good person and would have asked the jury to be lenient and not recommend the death penalty. App. 1834, ll. 6-13. Harold was not aware of Petitioner's criminal record, but that would not have changed Harold's willingness to testify on Petitioner's behalf. App. 1835, l. 12 – 22; App. 1836 l. 25 – 1837, l. 2; App. 1837, ll. 12-18; App. 1838, ll. 5-15; App. 1838, l. 21 – 1839, l. 5.

Arma Hadley, Petitioner's maternal aunt, was one of nine children. All lived in the same area in Michigan. App. 1845, l. 25 – 1846, l. 3; App. 1850, l. 20 – 1851, l. 2. Her family was very close with Petitioner's father's family. App. 1851, ll. 7-17. Arma was never contacted by anyone regarding Petitioner until the PCR investigation. App. 1846, ll. 12-21; App. 1859, ll. 11-21. Arma would have been willing to speak to investigators and testify on Petitioner's behalf. App. 1846, l. 22 – 1847, l. 5.

Arma recalled Petitioner as a sweet and friendly person. App. 1847, ll. 21-25. Petitioner was respectful to her, worked hard, and played on the basketball team in high school. App. 1848, ll. 4-8. Petitioner was not a discipline problem and did not act aggressively. App. 1848, ll. 14-20. She admitted that after Petitioner graduated from high school and moved away, she did not see him as often. App. 1855, ll. 8-22.

Furthermore, Arma would have told the jury that Petitioner was a calm person, who did not show signs of aggression. App. 1848, l. 22 – 1849, l. 9. She would have asked the jury to spare his life. App. 1849, ll. 16-23. Arma was aware of Petitioner having trouble with the law

on one occasion. App. 1851, ll. 21-23. She was not aware of any other arrests or convictions. App. 1852, l. 22 – 1855, l. 5; App. 1855, l. 25 – 1856, l. 12. Arma did not learn of Petitioner's murder conviction and death sentence until several years after the fact. App. 1856, ll. 18-25.

James Moore is Petitioner's younger brother. App. 1866, ll. 6-18. James did not learn of Petitioner being charged with murder until after Petitioner was convicted. App. 1867, l. 23 – 1868, l. 2. No one ever contacted James about Petitioner. App. 1869, ll. 2-9; App. 1880, ll. 17-23; App. 1881, l. 20 – 1882, l. 11; App. 1886, ll. 8-10. James would have been willing to speak to Petitioner's defense team and would have testified on Petitioner's behalf. App. 1869, ll. 10-17. Had James testified, he would have informed the jury that Petitioner was nice, was a good man, and loved by many. App. 1869, ll. 22 – 24; App. 1870, ll. 1-3. James recalled Petitioner played sports and was popular in school. App. 1869, l. 4 – 1871, l. 2. He would have asked the jury to have mercy on Petitioner. App. 1869, ll. 24-25.

On cross-examination, James admitted he was not aware of Petitioner's prior arrests in the late 1980s and early 1990s.⁴ App. 1876, ll. 21-24; App. 1877, ll. 8-11; App. 1877, ll. 15-18; App. 1878, ll. 1-7; App. 1878, l. 21 – 1879, l. 6.

Maurice Moore, Petitioner's older brother, became aware of Petitioner being charged with murder within a few months of the incident. App. 1897, ll. 11-16; App. 1897, ll. 20-25; App. 1905, ll. 4-8. No lawyers or investigators attempted to speak with him prior to Petitioner's trial. App. 1898, ll. 1-8. However, Maurice recalled receiving a phone call from a woman he believed to be Petitioner's lawyer, who informed Maurice of Petitioner's legal troubles. App.

⁴ James also admitted he had been convicted of drug law violations in 1994 and 2000. App. 1884 lines 3-11; App. 1884, ll. 20-24. As a result of the 2000 conviction, James would have been in prison at the time of Petitioner's 2001 trial. App. 1885, ll. 19-24.

1898, ll. 12-22; App. 1899, ll. 8-11. The woman explained she would call back, but she never did. App. 1899, ll. 10-13.

Maurice would have testified during Petitioner's trial had he been asked. App. 1900, ll. 10-14. He would have told the jury that his brother was a loving, caring person who loved sports and worked hard. App. 1900, l. 20; App. 1901, ll. 15-18. Petitioner was a good brother, a good husband, and Maurice loved him. App. 1901, ll. 21-24; App. 1903, ll. 8-12. He would have asked the jury to have mercy for Petitioner. App. 1902, ll. 1-3; App. 1903, ll. 9-10.

On cross-examination, Maurice admitted he was upset with Petitioner and did not want to talk to him soon after the incident. App. 1910, l. 1-4. However, Maurice denied ever telling Petitioner's lawyers or mitigation investigator that he was upset with Petitioner. App. 1910, ll. 5-8. Maurice was aware of some of Petitioner's past troubles with law enforcement, but was unaware of others. App. 1913, ll. 10-12; App. 1913, ll. 21-23; App. 1914, ll. 9-20; App. 1915, ll. 5-9; App. 1915, ll. 21-24. Maurice admitted he had a criminal history. App. 1918, ll. 2-7.

Pete Skidmore, a private investigator, testified that the defense team retained him to investigate facts relating to the guilt-phase of the case. App. 2046, ll. 5-6; App. 2046, ll. 12-20; App. 2047, ll. 17-25. According to Skidmore, he did not deviate from his role as fact investigator except that he was asked to locate some individuals and he provided the information to the mitigation investigator. App. 2048, ll. 1-5.

When asked if he were involved in the penalty phase investigation, Skidmore responded: "I may [have] been asked to try to find some witnesses. But the - - from my [per]spective, there wasn't much investigation going on in that area that I was aware of." App. 2048, ll. 19-24. On cross-examination by the state, Skidmore agreed that he had no role in developing the mitigation case other than trying to help locate some witnesses. App. 2057, ll. 15-20. During re-direct

examination, Skidmore testified that he did not travel to Michigan to interview available witnesses. App. 2059, l. 19 – 2060, l. 2.

Petitioner's father, five brothers, two sisters, multiple aunts, uncles, cousins, nieces and nephews lived in Michigan. App. 2257, ll. 2-7. He graduated high school in Michigan. App. 2257, ll. 8-11. His trial attorneys asked about his family in Michigan, and Petitioner provided names, addresses, and phone numbers. App. 2259, ll. 20-24; App. 2261, ll. 14-19; App. 2278, l. 24 – 2278, l. 1. Petitioner recalled his attorneys tried to call a few of the numbers he provided, but went no further in the investigation. App. 2261, ll. 20-24. Petitioner's trial attorneys failed to call any of his family members from Michigan to testify during the penalty phase of his trial. App. 2282, ll. 23-25.

On cross-examination, Petitioner denied that his family in Michigan wanted nothing to do with him when he was arrested. App. 2286, ll. 8-11. Petitioner admitted writing a letter to his trial attorney dated April 20, 2001 concerning his case. App. 2288, ll. 1-10; App. 2805. In the letter, Petitioner explained he was unable to supply all of the information requested; however, he explained that trial counsel could get the required information by calling his sister, Vanessa Moore. Petitioner provided his sister's address and telephone number. App. 2805. The letter explained that Petitioner had not informed his family of the prosecution's intention to seek the death penalty. According to the letter, Petitioner asked for his family's help when he was first arrested and was told no help would be coming. However, the letter encouraged trial counsel to contact his sister to obtain information concerning his family. App. 2805.

Petitioner was not aware of what role Drucy Glass, the mitigation investigator, played in his case. App. 2289, ll. 10-11; App. 2289, ll. 16-22. He did recall his trial attorneys retaining

someone to track down people to testify on his behalf. App. 2290, ll. 3-6. Neither Ms. Glass nor his trial attorneys indicated his family would not cooperate. App. 2290, ll. 13-21.

Trial counsel, Michael Morin, testified during the PCR hearing.⁵ The defense retained Drucy Glass as a mitigation investigator. App. 2524, ll. 18-20. Morin said his relationship with Petitioner deteriorated over the course of the representation. App. 2524, l. 24 – 2526, l. 25. Morin sent a letter to the fact investigator, Pete Skidmore, in August of 2001 providing a list of names and numbers of people who may have been helpful to Petitioner during the penalty phase. App. 2535, ll. 6-15. Concerning Petitioner's family background or family history, Morin expressed the importance of Petitioner cooperating with the defense team, but he did not attempt to elicit any specific information. App. 2551, ll. 6-24.

Petitioner completed the social history packet provided by Morin. App. 2551, l. 25 – 2552, l. 12. Morin claimed that the defense team was unable to secure the cooperation of Petitioner's family in Michigan. App. 2552, ll. 12-19. Morin further maintained that Petitioner sent a letter in April of 2001 indicating he was not interested in getting the assistance of his family in Michigan. App. 2553, ll. 11-21. As explained above, in contravention of Morin's representations about the letter during PCR proceedings, the letter did not indicate Petitioner's lack of cooperation. In fact, the letter supplied trial counsel with the name, address, and phone number of Petitioner's sister, who would be able to supply trial counsel with additional information concerning the family. App. 2805.

On May 8, 2001, Morin met with Petitioner and received additional names and contact information for family members. App. 2736, l. 7 – 2737, l. 20. Morin's notes from this meeting

⁵ At the time of his PCR testimony, Morin was an Assistant Solicitor in Spartanburg County after he transferred "back here" from the Cherokee County Solicitor's office. App. 2343, ll. 2-6.

indicated Morin and Petitioner spoke about Petitioner's family. Specifically, Petitioner explained to Morin that his four brothers, two sisters, and father were in Michigan and one family member was in Alabama. App. 2797-2799. Petitioner provided his father's address and phone number. App. 2798. Morin's notes indicated that he attempted to call Petitioner's father and sister, but was unsuccessful. App. 2554, ll. 14-25; App. 2798-2799.

When asked if Morin had an obligation "to at least go to [Petitioner]'s hometown and talk to his family," Morin's response reflected an improperly narrow view of admissible mitigation evidence: Morin "may have felt that way if [he] thought that or had any evidence that [Petitioner] had some sort of mental defect." App. 2576, l. 18 – 2577, l. 10. Morin posited that "a functioning defendant" should have a say in what the defense team does or does not do. App. 2577, ll. 10-12. Morin admitted "some things" are required in capital cases, "[b]ut in this particular instance, with [Petitioner], he felt like [Petitioner] could make the call about his family." App. 2577, ll. 16-18. Petitioner in fact wrote Morin suggesting he get in touch with his sister in Michigan, and that Morin could find out whatever information he needed by calling or writing. See App. 2805.

Keith Kelly was called as a witness by the state. He was responsible for the penalty phase of the trial. App. 2629, ll. 22-23. The mitigation investigator prepared a report, and Kelly prepared a history of Petitioner's prior criminal record. App. 2637, ll. 8-16; App. 2848 – App. 2868.

Although the report listed the names of some family members, the report “[was] really essentially a chronology of his [Petitioner’s] criminal offenses.” App. 2664, ll. 12-14.⁶ According to Kelly’s testimony and the report, attempts to contact Petitioner’s father were by phone and letter. App. 2638, ll. 15-20. Two relatives were listed, but never contacted. App. 2639, ll. 13-16. One relative allegedly told Petitioner’s wife that Petitioner “[was] dead to [them].” App. 2639, ll. 17-20. Three other relatives were in prison. App. 2639, ll. 21-24.

When questioned regarding why the mitigation investigation revealed nothing in terms of Petitioner’s social history, Kelly maintained the mitigation investigator could not get in touch with anyone in Michigan. App. 2664, l. 15 – 2665, l. 11. According to Kelly, if Petitioner had given him names of family members, he would have gone to Michigan to investigate. App. 2665, ll. 21-25. Kelly claimed there was no way to reach individuals for whom the defense team had names because Petitioner did not know how to contact them. App. 2666, ll. 4-13. Although the team discussed traveling to Michigan, the decision was made not to go because there was not “much to go on.” App. 2669, l. 21 – App. 2670, l. 5. Kelly testified that the mitigation investigation tried to reach some members of the family by phone and certified mail and he did not “know what else she may [have] done.” App. 2670, ll. 13-15.

The defense’s presentation during the penalty phase consisted of Linda Byrd, Petitioner’s wife, and Petitioner’s stepson, James. App. 2645, ll. 5-6. According to Kelly, the defense was

⁶ The social history prepared by the mitigation investigator and introduced as Respondent’s Exhibit #25 illustrated that an investigation into Petitioner’s family and social history was incomplete. App. 2848-2860. Throughout the document, the investigator indicated a need for additional documentation to have a clear understanding of the very limited information already gathered. For example, the report indicated a need for arrest records, court records, and jail records for many charges listed. App. 2856; App. 2857 – 2858; App. 2859.

“begging for mercy” and wanted to show Petitioner was “life eligible because he ha[d] a family.” App. 2645, ll. 13.

Regarding Petitioner’s letter to Morin explaining that his family told him to get himself out of the mess, the actual contents of the letter provided the defense team with Petitioner’s sister’s name, address, and telephone number. The letter expressed Petitioner’s desire not to contact his sister himself, but informed the defense team that if the information concerning his family was needed, then his sister would provide it. He further explained that he was “not trying to be uncooperative.” App. 2668, l. 12 – 2669, l. 8; App. 2805.

Kelly admitted that if the mitigation investigation uncovered anyone who had anything positive to say, he would have had the person testify. App. 2671, l. 7 – 2672, l. 1; App. 2672, ll. 11-12; App. 2700, ll. 5-9.

Order of Dismissal

The PCR judge determined there was no merit to Petitioner’s claim that trial counsel rendered ineffective assistance in failing to investigate, develop, and present mitigation evidence from family members of Petitioner. App. 2962. Having reviewed the video-taped depositions of Petitioner’s family from Michigan, the PCR judge found “their testimony on the issue of their willingness to come to trial and testify to be not credible given this entire record.” App. 2963. The court found the record showed trial counsel’s investigation for and presentation of mitigating evidence was objectively reasonable under prevailing professional norms where “trial counsel investigated and attempted to locate mitigation witnesses ... from his family in Michigan.” App. 2963. The court emphasized that Petitioner was largely uncooperative in trial counsel’s endeavor and initially did not want the family to assist. App. 2963.

The judge stated that trial counsel attempted to develop mitigation witnesses in South Carolina through the fact investigator, Pete Skidmore. Without any support in the record, the judge concluded “[t]hese results were apparently unsuccessful.” App. 2964.

The judge noted the mitigation investigator’s report indicated her attempts to contact Petitioner’s father by phone and certified letter and Petitioner’s indication to her that he had been cut off by his family. App. 2964. The judge posited, without evidence in the record, that Petitioner’s family cut him off due to his “life of crime.” App. 2965-2966. The judge further found trial counsel’s testimony credible and found Petitioner’s family members did not want to assist in the case and avoided all efforts to gain their assistance. App. 2967. Finally, the PCR court found trial counsel’s decision not to seek out Petitioner’s brothers who were incarcerated for drugs was an objectively reasonable trial strategy. App. 2969.

Turning to the prejudice prong, the PCR court relied upon its credibility determinations concerning the witnesses presented by Petitioner. App. 2967. The judge based this finding upon testimony of James Moore, which the judge concluded “typifie[d] the credibility of [Petitioner]’s family members on this issue.” App. 2967.⁷ Initially, James testified he was living at home with

⁷ The PCR court used its credibility determination regarding James against all of Petitioner’s witnesses, but the record did not support doing so. This was error. See State v. Jenkins, 848 N.W.2d 786, 797 (Wis.2014)(holding that “[i]n assessing *the prejudice caused by defense trial counsel’s performance*, i.e., the effect of the defense trial counsel’s deficient performance, a circuit court may not substitute its judgment for that of the jury in assessing which testimony would be more or less credible”)(emphasis in original); Commonwealth v. Johnson, 966 A.2d 523, 541 (Pa. 2009)(recognizing “that assessing credibility for purposes of Strickland prejudice is not necessarily the same thing as assessing credibility at a trial,” finding no case from the United States Supreme Court setting “forth a standard for credibility determinations in the Strickland prejudice context” and explaining that “credibility assessments in the Strickland context are not absolutes, but must be made with an eye to the governing standard of a ‘reasonable probability’ that the outcome of the trial would have been different”). Predicating a mass finding on credibility of all family members based on other witnesses was wrong. In South Carolina, corruption of blood is constitutionally prohibited. See S.C. Constitution. Art I, §4.

his father and he would have testified had he been notified of the trial. However, on cross-examination, James admitted he was incarcerated during the trial. App. 2968. According to the court, “James also admitted that he was kept in the dark by [Petitioner]’s Michigan family regarding the fact that [Petitioner] had been charged with murder and was facing the death penalty.” App. 2968. The judge surmised this corroborated the fact that Petitioner’s family in Michigan was embarrassed and angered by Petitioner’s crime and “had washed their hands of him.” App. 2968.

The PCR judge next pointed to Maurice Moore’s testimony that he was angry with Petitioner after his arrest. The judge asserted that Maurice “admitted that [Petitioner]’s father basically disowned him after he was charged with murder and armed robbery in South Carolina.” App. 2968. The judge found Maurice’s testimony not credible because of his conflicting testimony about his discussions with Petitioner regarding Maurice testifying at his capital trial. App. 2968-2969. In addition, the judge held Maurice’s testimony that he was not contacted by anyone on Petitioner’s behalf was contradicted by the mitigation investigation report indicating she sent a certified letter to him. App. 2969.

In addition, the PCR judge held Petitioner was not prejudiced by trial counsel’s failure to call any of the witnesses presented during the PCR proceedings to testify during his capital trial because (1) trial counsel presented two witnesses during the trial, who made a plea for Petitioner’s life; (2) the witnesses who testified during the PCR proceedings had little contact with Petitioner after he reached the age of eighteen and were unaware of Petitioner’s legal troubles; and (3) the witnesses, while saying good things about Moore, offered no evidence Petitioner suffered from any mental illness, mental retardation, personality disorder, physical or sexual abuse or deprivation or poverty. The judge determined the witnesses’ claims that they

were unaware of Petitioner's criminal record was not credible and even if credible, the witnesses would have been thoroughly impeached at trial. Thus, the court concluded, Petitioner suffered no prejudice by trial counsel's failure to call these witnesses during the penalty phase of his trial. App. 2969-2970.

Discussion

In order to obtain relief based upon a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and such deficiency prejudiced petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984).

Deficient Performance

An attorney whose representation falls below an objective standard of reasonableness provides deficient performance. Id. at 688. An attorney's performance is measured against prevailing professional norms. Id. at 688. Attorneys are not required "to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." Wiggins v. Smith, 539 U.S. 510, 533 (2003). Nevertheless, courts must determine whether a decision not to investigate is reasonable in all circumstances. Id.

The United States Supreme Court explained the ABA Guidelines provide evidence of the well-defined and prevailing professional norms. "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 prosecutor.'" Id. at 524 (citing ABA Guidelines for the Appointment and

Performance of Counsel in Death Penalty Cases 11.4.1(C)(1989)).⁸ (emphasis added). The Guidelines direct counsel to “[c]ollect information relevant to the sentencing phase of trial including ... family and social history.” Id. at 11.4.1(D)(2)(C). In addition, the Guidelines directed counsel to interview “witnesses familiar with aspects of the client’s life history that might affect the ... possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death.” Id. at 11.4.1(D)(3)(B). As expressed in the commentary and relevant to this case, “[c]ounsel’s duty to investigate is not negated by the expressed desires of a client.” Id. at 11.4.1 cmt. 4.

For purposes of deciding which witnesses and evidence to prepare for presentation during the penalty phase, the Guidelines instruct counsel to consider “[w]itnesses familiar with and evidence relating to the client’s life and development, from birth to the time of sentencing, who would be favorable to the client.” Id. at 11.8.3(F)(1). “Counsel should present to the sentencing entity ... all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence.” Id. at 11.8.6(A). Additionally, counsel should consider presenting evidence of a capital defendant’s family and social history. Id. at 11.8.6(B)(5).

⁸ The 1989 ABA Guidelines are relevant for Petitioner’s case as well. The 1989 ABA Guidelines provided the investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1 (C)(1989)(emphasis added).

For the reasons explained below, based on the evidence above, counsel was wholly deficient in failing to investigate Petitioner's background in Michigan. The fact that counsel did not bother to travel to Michigan in this capital case to investigate is stunning in and of itself.

As explained by the Court, the Guidelines provided that counsel should consider presenting evidence of a defendant's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. Id.

Just a few short months ago, this Court granted sentencing relief to a death-sentenced inmate based upon "the complete lack of social history mitigation evidence in the sentencing phase." Weik v. State, ___ S.C. ___, 761 S.E.2d 757, 758 (2014). During Weik's trial, the defense presented three mental health experts to testify about Weik's mental illness – paranoid schizophrenia. Id. However, the defense "failed to present readily available evidence concerning Weik's chaotic upbringing and dysfunctional family." Id. Although the defense had uncovered a "wealth of social mitigating information," only one witness, Weik's sister, was presented during the penalty phase to address Weik's background. Id. The sister's testimony was very limited and general. Id. In fact, this Court surmised that the sister's testimony "revealed virtually nothing about Weik's abusive upbringing." Id. at 761. As explained by this Court, "[t]hough counsel introduced *psychological* testimony regarding [Weik]'s mental illness, counsel failed to present even a skeletal version of [Weik]'s *social history* even though there was abundant social history evidence available to them." Id. at 768 (emphasis in original).

In Wiggins, 539 U.S. at 523, trial counsel's mitigation investigation into Wiggins' life history consisted of two parts: (1) a written pre-sentence investigation, which included a one-page account of Wiggins' personal history, and (2) the state's social services records

documenting Wiggins' various placements in the state's foster care system. Counsel thereafter abandoned their investigation of Wiggins' background. Id. at 524. The Court held counsel's decision not to extend their investigation fell short of prevailing professional norms in light of their failure to retain a forensic social worker to prepare a social history report, which was standard practice in the state at the time, and their failure to investigate all reasonably available mitigating evidence, as mandated by the ABA Guidelines. Id.

In addition, the Wiggins Court held that counsel's investigation was unreasonable due to the evidence counsel actually uncovered in the social services records, which indicated Wiggins' mother was an alcoholic and Wiggins displayed emotional difficulties in foster homes and had frequent, lengthy absences from school. Id. at 525. The Court concluded "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." Id. The Court explained that "[i]n assessing the reasonableness of an attorney's investigation ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 527.

The United States Supreme Court again confronted the issue of trial counsel's duties to investigate mitigation in a capital case where counsel conducted a minimal investigation with an apparently uninterested client. Rompilla v. Beard, 545 U.S. 374 (2005). In general, Rompilla's contribution was minimal as he was not interested in helping his attorneys develop a mitigation case. He told trial counsel his childhood was normal. At times, he actively obstructed counsel by sending them off on false leads. Id. at 381. Trial counsel interviewed five family members, who indicated they did not know Rompilla well because he spent many of his adult years and some of his childhood years in custody. Id. at 381-382. The three mental health witnesses who

examined Rompilla offered nothing useful either. Trial counsel made no further efforts to investigate a mitigation case. Id. at 382. However, post-conviction counsel for Rompilla uncovered multiple sources of mitigation evidence, including school records, incarceration records, and a history of alcohol dependence. Id. The Court concluded trial counsel's failure to even examine Rompilla's prior conviction file fell below the level of reasonable performance. Id. at 383. The file concerned Rompilla's prior conviction for rape and assault, which trial counsel knew would be used by the prosecution. Id.

The Court held trial counsel had a duty to make all reasonable efforts to learn what they could about the prior offense, and that reasonable efforts included obtaining the readily available file to learn what the prosecution knew, to discover any mitigating evidence, and to anticipate the details of the aggravating evidence. Id. at 385.

Recently, the United States Supreme Court examined the failings of trial counsel in a capital case involving trial counsel's failure to secure an expert witness. Hinton v. Alabama, 134 S.Ct. 1081 (2014). In early 1985, two restaurant managers were killed during similar robberies. In mid-1985, a third restaurant manager was robbed and shot, but survived. Two .38 caliber bullets were recovered from each scene. The third restaurant manager identified Hinton as the shooter after viewing a photographic line-up. Id. at 1083. When the police arrested Hinton, they recovered a .38 caliber revolver belonging to his mother, who shared the house with him. Id. The state's expert analyzed the six bullets and opined that all had been fired by the gun found in Hinton's home. Id. The state charged Hinton with capital murder for the first two killings and tried to link Hinton to those killings through the use of the forensic evidence and the third restaurant manager's eyewitness testimony. Id. There was no other evidence connecting Hinton to the crimes. Hinton maintained his innocence of all three crimes. Id. at 1084. As stated by the

Supreme Court, “[t]he state’s case turned on whether its expert witnesses could convince the jury that the six recovered bullets had indeed been fired from the Hinton revolver.” Id.

Hinton’s trial counsel filed a motion for funding to hire an expert witness. The judge granted \$1000 to hire an expert. In the funding order, the judge indicated he believed he was limited to \$1000 by statute, but told trial counsel to seek additional funding if necessary. Id. Unfortunately, trial counsel did not seek additional funding and the statute did not limit the funding as the judge believed. Id. Although trial counsel did not believe him qualified, he hired the only person willing to take the case for the paltry sum – Andrew Payne. Id. at 1085.

At trial, Payne testified that the toolmarks in the barrel of the Hinton revolver had been corroded away such that it was impossible to say with certainty whether a particular bullet had been fired from that gun. Payne also testified that the bullets from the three crime scenes did not match each other. On cross-examination, the prosecutor “badly discredited” Payne by forcing him to admit he had testified as an expert on firearms and toolmark identifications only twice in the preceding eight years and that one of the two cases involved a shotgun, not a handgun, by forcing him to admit he had difficulty operating the microscope at the state forensic laboratory, and finally by forcing him to admit he had only one eye. Id. at 1085-1086. As expected, in his closing argument, the prosecutor seized on Payne’s lack of qualifications. Id. at 1086.

During state post-conviction relief proceedings, Hinton presented three new experts on toolmark evidence. One of the three had worked on toolmark identification at the FBI in a senior position; the other two had worked for many years for the Dallas County Crime Laboratory and had testified as experts in several hundred cases. Id. All three examined the evidence and testified “they could not conclude that any of the six bullets had been fired from the Hinton revolver.” One of Hinton’s experts testified that he had asked the state’s expert to show him how

he determined the recovered bullets had been fired from the Hinton revolver, and the state's expert refused to do so. Id.

The Supreme Court explained the case “call[ed] for a straightforward application of our ineffective-assistance-of-counsel precedents.” Id. at 1087. After recognizing that Hinton's case required consultation with experts and the introduction of expert evidence, the Court noted that trial counsel had recognized the need for an expert as well, but counsel hired an unqualified expert based upon his mistaken belief that the statute limited his funding. Further, the Court noted that trial counsel failed to request additional funding despite the court's express invitation to do so. Id. at 1088. The Court held this was deficient performance. Id. The Court explained that trial counsel “failed to make even the cursory investigation of the state statute providing for defense funding for indigent defendants.” Id. at 1089.⁹

In Cauthern v. Colson, 736 F.3d 465, 483-487 (6th Cir. 2013), the Sixth Circuit Court of Appeals recently granted relief to Cauthern, who had been sentenced to death, where trial counsel failed to present testimony at the sentencing hearing from the individual's step-siblings concerning Cauthern's abusive childhood. Explaining that the “fail[ure] to investigate a defendant's nearest relatives at all is deficient performance, regardless of what the end result might have been,” the Sixth Circuit found trial counsel rendered deficient performance by failing to interview and present testimony from the defendant's step-siblings regarding the abuse they suffered at the hands of their grandmother. Id. at 484-485. The court was not persuaded by trial counsel's testimony that Cauthern “did not bring anything to his attention that would have caused him to suspect that [Cauthern]'s home life might be of value to the defense” or that trial

⁹ The Supreme Court remanded the case for a determination of whether Hinton suffered prejudice because no court had yet evaluated the prejudice question. Hinton, 134 S.Ct. at 1090.

counsel “wasn’t too successful” when he sought family background information from Cauthern’s adoptive parents. Id. at 485.¹⁰

The Fifth Circuit Court of Appeals recently granted a certificate of appealability to a death-sentenced inmate on his claim that trial counsel’s failure to present the true nature of his disadvantaged upbringing amounted to ineffective assistance. Escamilla v. Stephens, 749 F.3d 380 (5th Cir. 2014). During the sentencing proceeding, the defense presented to testimony of Escamilla’s father, sister, two former neighbors, and an old friend. Id. at 383-384. The defense presentation had portrayed Escamilla’s childhood as loving and affectionate. Further, the defense emphasized the difficulty Escamilla had in dealing with the death of his mother a few years before trial. Escamilla coped with his loss by drinking alcohol. Id. In state post-conviction relief proceedings, Escamilla presented evidence of his violent and abusive upbringing and untreated substance abuse problems. Id. at 385. The post-conviction relief evidence showed Escamilla’s father was physically abusive to his children and their mother, that Escamilla and his siblings were involved with a gang from an early age, and that Escamilla had abused alcohol since age nine and had used drugs as a child. Id. The Fifth Circuit granted a certificate of appealability because reasonable jurists could debate that the state post-conviction court unreasonably applied Strickland, *supra*, when it determined Escamilla’s trial counsel was not deficient “despite the available, unpursued ‘red flags’” regarding his troubled childhood. Id. at 392.¹¹

¹⁰ See also Mason v. Mitchell, 543 F.3d 766 (6th Cir. 2008)(finding trial counsel ineffective in failing to investigate and present social history evidence during the sentencing proceeding).

¹¹ Likewise, the Fifth Circuit granted the certificate of appealability to consider the prejudice prong. Escamilla v. Stephens, 749 F.3d 380, 392-394 (5th Cir. 2014).

In Council v. State, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008), this Court held trial counsel's decision not to further investigate Council's background and present even the minimal mitigating evidence obtained was unreasonable. According to this Court, counsel was deficient in failing to begin his investigation into Council's background as soon as the prosecution served its notice of intent to seek the death penalty. Id. Despite the strong case of guilt against Council, the trial attorney obtained only his juvenile justice records and state hospital records before trial. Trial counsel did not request certain background records until the day of jury selection and did not set up a meeting with the defense's retained mental health expert, who had received only limited records, until a month before trial. Id. This Court held counsel's conduct fell below the standards set by the ABA. Id. at 172-173, 670 S.E.2d at 363 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 11.4.1(2)(C)(1989)).

Additionally, this Court held the limited information obtained by trial counsel should have put him on notice that Council's background could potentially provide powerful mitigating evidence. Id. at 173, 670 S.E. 2d at 363. Not only did trial counsel unreasonably delay in investigating Council's background, trial counsel failed to conduct an adequate investigation. Id. The retained mental health expert evaluated Council for competency and criminal responsibility only, had inadequate records, and met with Council only once, shortly before trial. Id. Trial counsel did not utilize the services of a social history investigator, despite available funding. Id. Finally, this Court concluded "it was unreasonable for trial counsel not to obtain [Council's] family records." Id. at 174, 670 S.E.2d at 363. The limited records obtained by trial counsel "should have alerted him to the fact that the family was dysfunctional." Id. at 174, 670 S.E.2d at 364.

This Court went on to hold “[e]ven if trial counsel’s investigation could be deemed sufficient or adequate, we believe trial counsel also failed to present any significant mitigating evidence [where the] mitigation presentation consisted solely of [Council’s] mother’s extremely limited testimony.” Id. at 174-175, 670 S.E.2d at 364.

This Court rejected the state’s argument that trial counsel made a reasonable strategic decision not to present additional evidence where the investigation was inadequate and incomplete, trial counsel was aware the jury had rejected the defense theory that Council was merely present, and it would not have been inconsistent for trial counsel to have pursued the merely present theory along with the evidence in mitigation. Id. at 175, 670 S.E.2d at 364. This Court also noted that in light of the state presenting damaging character evidence, Council’s character could not have been further damaged by the presentation of additional mitigation evidence. Id.

In Von Dohlen v. State, 360 S.C. 598, 608, 602 S.E.2d 738, 743 (2004), this Court held trial counsel’s investigation concerning Von Dohlen’s mental state was not reasonable despite the fact that counsel made “some effort.” The mitigation case presented during the trial was that Von Dohlen was a good husband, had been married for seventeen years, was a good father to his four children, and was a dependable employee. At trial, witnesses testified he grew up in a very poor family and had been physically abused and emotionally neglected as a child. Von Dohlen’s personality dramatically changed when his brother was murdered just two weeks before the murder involving Von Dohlen. He began abusing alcohol and Valium. A psychiatrist, Dr. Michael Lampkin, testified on behalf of Von Dohlen indicating he suffered from an adjustment reaction, which was easily treated, short-term, and not a chronic mental illness. Id. at 604, 602 S.E.2d at 741.

However, the same psychiatrist testified during post-conviction proceedings that had he been provided with the additional medical and psychiatric records that post-conviction counsel uncovered, he would have testified Von Dohlen suffered from “major depressive episodes with severe symptoms of anxiety and possible prepsychotic features.” Id. at 605, 602 S.E.2d at 741. Another psychiatrist, Dr. John DeWitt, testified at the post-conviction relief hearing that Von Dohlen suffered from a major mental illness at the time of the murder and was predisposed to such based upon his family history of mental illness and alcohol or drug abuse. Id. at 606, 602 S.E.2d at 742. This Court held that although trial counsel “exerted some effort,” their failure “to adequately investigate and prepare expert testimony about Von Dohlen’s condition as it existed at the time of the murder” was deficient performance. Id.

The question presented in the instant case is whether trial counsel’s decision not to investigate Petitioner’s family history in Michigan was reasonable. Trial counsel’s stated reasons for not investigating were (1) that their limited phone calls and letters to several family members in Michigan had been unsuccessful in securing the family’s cooperation; and (2) that counsel was not certain of the addresses of family members. In Petitioner’s case, counsel failed to conduct any investigation relating to Petitioner’s family and social history in Michigan, where he was born and raised. The record indicates that the mitigation investigator made several phone calls and wrote letters; however, this level of investigation is constitutionally deficient. Neither attorney nor the mitigation investigator even bothered to go to Michigan where Petitioner had been raised. The witnesses were not impossible to locate. PCR counsel did so easily enough. The decision not to investigate further was unreasonable as it was based upon what trial counsel considered a lack of good leads.

The evidence presented during the post-conviction relief proceeding indicated Petitioner had an expansive family all residing in the same small town in Michigan. In addition, trial counsel knew the locations of at least two of Petitioner's brothers because they were in prison. Petitioner's counsel put forth much less effort than even Von Dohlen's trial counsel who had interviewed multiple family members and investigated and presented evidence of Von Dohlen's social history to the jury. Petitioner's case is similar to Council's in that Petitioner's trial attorneys called only two witnesses to beg for mercy, just as Council's trial attorneys called one witness to beg for mercy. Petitioner's trial counsel's decision not to investigate further was unreasonable in light of their limited and inadequate investigation. Wiggins, *supra*.

Prejudice

The Wiggins Court explained that to show prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 539 U.S. at 534 (quoting Strickland, 466 U.S. at 694). To assess prejudice, the Court reweighed the evidence in aggravation against the totality of available mitigation evidence. Id. The mitigation evidence showed Wiggins experienced "severe privation and abuse in the first six years of his life," "suffered physical torment, sexual molestation and repeated rape during his subsequent years in foster care," was homeless for a period of time, and had diminished mental capacities. Id. at 535. The Court concluded that had the jury been informed of the additional mitigating evidence that a reasonable investigation would have uncovered, there was a reasonable probability that the jury would have returned a different sentence. Id. at 536.

The Rompilla Court held trial counsel's failure to examine the file on his prior conviction was prejudicial. Rompilla, 545 U.S. at 390. The file contained "a range of mitigation leads that no other source had opened up." Id. Evidence in the file indicated Rompilla grew up in a "slum environment," his criminal activity was accompanied by alcohol abuse, mental health testing indicated possible schizophrenia, and cognitive testing placed him at a third grade level. Id. at 391. The undiscovered evidence, which the file would have prompted reasonably competent counsel to investigate, showed Rompilla's parents were extreme alcoholics who fought violently; Rompilla was physically abused by his father, Rompilla and his siblings lived in terror; Rompilla and his brother had been locked in a small wire mesh dog pen containing excrement; Rompilla had been isolated as a child; the family had no indoor plumbing; Rompilla slept in the attic with no heat; and the children were not given clothes. Id. at 391-392.

Armed with the appropriate social history, the post-conviction mental health experts found Rompilla suffered from organic brain damage, an extreme mental disturbance significantly impairing his cognitive functions. His problems were likely the result of fetal alcohol syndrome and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the offense. Id. at 392. The Court held the mitigation case taken as a whole may have influenced the jury's appraisal of Rompilla's culpability and the likelihood of a different result if the evidence had been presented was sufficient to under confidence in the result at sentencing. Id. at 394.

In Cauthern, the Sixth Circuit relied upon the Supreme Court's explanation that trial counsel's effort to present some mitigation evidence never forecloses an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. Cauthern, 736 F.3d at 486 (citing Sears v. Upton, 130 S.Ct. 3259, 3266 (2010)). As an initial matter, the court

recognized that in death penalty cases, a defendant has wide latitude in the introduction of mitigation evidence and that evidence of abuse is significant to a jury's determination of moral culpability. Id. The Sixth Circuit rejected the state court's speculation that a jury may reject or be insulted by the suggestion that a defendant's criminal actions were attributable to a disadvantaged background because such speculation was inapposite to federal law. Id. at 487. There remained "the possibility that there was a reasonable probability that the jury would have found that it did mitigate his culpability." Id. The only evidence before the jury of the abuse Cauthern suffered was his own testimony, "which is on its face less compelling than the testimony of a less interested party." Id. Thus, the Sixth Circuit concluded Cauthern was entitled to habeas relief on this ground of effective assistance of trial counsel. Id.

The Supreme Court confronted a state court's failure to apply the proper prejudice inquiry in Sears v. Upton, 130 S.Ct. 3259 (2010). After finding trial counsel performed deficiently in his mitigation investigation, the state post-conviction court found no prejudice because trial counsel "did present some mitigation evidence" making it impossible to compare the case with those where little or no mitigation evidence was presented. Id. at 3264. The state court concluded that because trial counsel put forth a reasonable theory with support evidence, Sears had failed to meet his burden of proving there was a reasonable likelihood that the outcome of the trial would have been different if a different mitigation theory had been advanced. Id. at 3264-3265. The Supreme Court held this analysis was error for two reasons. The first was the state court "curtailed a more probing prejudice inquiry because it placed undue reliance on the assumed reasonableness of counsel's mitigation theory." Id. at 3265. Trial counsel's constitutionally deficient mitigation investigation called into question the reasonableness of the theory employed at trial. Id. Second, the state court limited the prejudice inquiry to cases where

little or no mitigation evidence was presented, which the Supreme Court had never done. Id. at 3265-3266. Rather, the prejudice inquiry requires a probing and fact-specific analysis no matter the quality or quantity of evidence presented by trial counsel. Id. at 3266.¹²

In Council, this Court held Petitioner was prejudiced despite the prosecution's production of overwhelming evidence of guilt and the jury finding six aggravating factors in light of the very strong mitigating evidence that was adduced at PCR. Council, at 176, 670 S.E.2d at 365. The mitigating evidence which trial counsel failed to uncover and present included medical evidence concerning Council's and family members' mental health issues, Council's extremely violent alcoholic father, Council growing up in poverty, Council's significant drop in IQ and learning disabilities, Council's use of drugs and alcohol at a very young age, and Council's frontal lobe brain dysfunction and diagnosis of schizophrenia. Id. at 177, 670 S.E.2d at 365.

In Von Dohlen, 360 S.C. at 608, 602 S.E.2d at 743, this Court held Von Dohlen had shown prejudice based upon trial counsel's insufficient investigation concerning his mental health because "[t]here [was] a reasonable probability the outcome of the trial might have been different had the jury heard the available information about [Von Dohlen]'s mental condition as it existed at the time of the murder."

Concerning prejudice, this Court held the presentation at Weik's PCR hearing "revealed graphic and detailed accounts of [Weik]'s abusive and dysfunctional childhood, saturated with violence and military fantasies, which was not apparent from the scant testimony presented at trial." Weik, 761 S.E.2d at 769. This testimony "would have demonstrated [Weik]'s genetic predisposition to schizophrenia and helped explain his auditory and visual hallucinations at the

¹² The Court remanded the case for further proceedings consistent with its opinion. Sears v. Upton, 130 S.Ct. 3259, 3267 (2010).

time of the shooting.” Id. After reviewing the evidence presented by both sides during the sentencing phase and the evidence presented during the PCR hearing, this Court concluded there was “a reasonable probability that the missing details regarding the degree of physical and emotional abuse [Weik] suffered and the full extent of [his father]’s mental illness and its impact on the Weik household might well have influenced the jury’s determination.” Id. at 770. Thus, Weik was prejudiced by counsel’s deficient performance. Id.

Similarly, Petitioner suffered prejudice as a result of trial counsel’s failure to adequately investigate his family history and uncover witnesses who would have testified as to Petitioner’s positive character as a youth and to the love his family felt for him. As demonstrated during the post-conviction relief proceeding, these additional family members would have asked the jury to spare Petitioner’s life.

The judge’s use of his credibility determinations as the basis for his prejudice analysis as to these witnesses was erroneous. The PCR judge provided no reason for his credibility determination and the record discloses none. “[W]itnesses are presumed to tell the truth.” State v. George, 113 S.C. 154, 102 S.E. 284 (1920). In fact, when judges instruct juries concerning determinations of credibility of witnesses, the traditional charge has explained that the jurors may “reject any part of the testimony if they found good reason for so doing.” State v. Steadman, 257 S.C. 528, 186 S.E.2d 712 (1972). While Jones had been in prison and Maurice had an unspecified “criminal record,” nothing in the record supports an adverse credibility determination as to four family witnesses: Dorothy, her husband Cecil, Uncle Harold, Aunt Arma. This mass adverse credibility determination is inexplicable and unwarranted.

The family witnesses, among other things, would have asked the jury for mercy for your Petitioner. A jury may recommend a life sentence as an act of mercy and it is proper to so instruct the jury. Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5, 10 (2009).

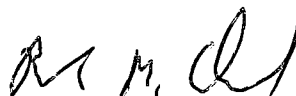
Only one juror is needed to prevent a death penalty sentence. This Court explained why it is difficult to find harmless error from a penalty stage error on direct appeal in State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000). “A capital jury can recommend a life sentence for any reason or no reason at all.” State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000). Petitioner has shown prejudice since Petitioner’s family members from Michigan asking the jury for mercy, and informing the jury of Petitioner’s good traits, and that they still cared for Petitioner despite his recent troubles with the law would have had an effect on the jury.

One of the guiding principles of death penalty jurisprudence is “death is different.” See Harmelin v. Michigan, 501 U.S. 957 (1991); Turner v. Murray, 476 U.S. 28, 36-37 (1986); Gregg v. Georgia, 428 U.S. 153, 181-188 (1976). The United States Supreme Court “has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.” California v. Ramos, 463 U.S. 992, 998-999 (1983); see also McCleskey v. Kemp, 481 U.S. 279, 335 (1987); Caldwell v. Mississippi, 472 U.S. 320, 329 (1985); Eddings v. Oklahoma, 455 U.S. 104, 117-118 (1982)(O’Connor, J., concurring); Beck v. Alabama, 447 U.S. 625, 637-638 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Gardner v. Florida, 430 U.S. 349, 357-358 (1977); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). “[T]his qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.” Lockett, 438 U.S. at 604. The Court’s denial of certiorari to review the post-conviction relief proceedings below does not consider the qualitative

difference between death and all other penalties and fails to ensure the greater degree of reliability required by the United States Constitution.

For the foregoing reasons, Petitioner respectfully requests this Court rehear this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', is written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

Susan B. Hackett
Appellate Defender

ATTORNEYS FOR PETITIONER

This 26th day of September, 2014.

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

RICHARD BERNARD MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

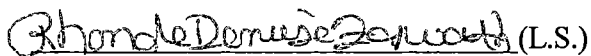
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of September, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 27th day
of September, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 17, 2021.

The Supreme Court of South Carolina

Richard Bernard Moore, Petitioner,

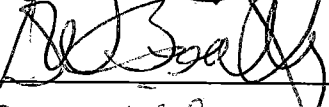
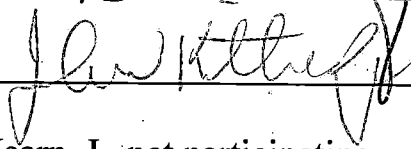
v.

State of South Carolina, Respondent.

Appellate Case No. 2011-198472

ORDER

Petitioner seeks a writ of certiorari to review the denial of his application for post-conviction relief. We deny the petition.

 C.J.
 J.
 J.
 J.
Hearn, J., not participating

Columbia, South Carolina

September 11, 2014

cc:

Robert Michael Dudek, Esquire
W. Edgar Salter, III, Esquire
J. Anthony Mabry, Esquire
Susan Barber Hackett, Esquire
Alan McCrory Wilson, Esquire
John W. McIntosh, Esquire
Donald J. Zelenka, Esquire
M. Hope Blackley

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Roger L. Couch, Circuit Court Judge

RECEIVED

JUL 18 2012

S.C. Supreme Court

RICHARD BERNARD MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2011-198472

PETITION FOR WRIT OF CERTIORARI

SUSAN BARBER HACKETT
Appellate Defender

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR PETITIONER

INDEX

INDEX	1
ISSUES PRESENTED	2
STATEMENT	3
ARGUMENT	
1.	
Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to perform a reasonable investigation concerning Petitioner's background and family life and present evidence of the investigation during the sentencing proceeding	7
2.	
Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to call James Aiken to testify regarding Petitioner's adaptability to life in prison.....	32
3.	
Trial counsel was ineffective, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, by failing to adequately prepare and rebut evidence Petitioner shot the decedent with premeditation while behind the store counter since how the decedent came to be shot was critical to the extent of Petitioner's culpability	47
CONCLUSION	59

ISSUES PRESENTED

1.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to perform a reasonable investigation concerning Petitioner's background and family life and present evidence of the investigation during the sentencing proceeding?

2.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to call James Aiken to testify regarding Petitioner's adaptability to life in prison?

3.

Whether trial counsel was ineffective, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, by failing to adequately prepare and rebut evidence Petitioner shot the decedent with premeditation while behind the store counter since how the decedent came to be shot was critical to the extent of Petitioner's culpability?

STATEMENT OF FACTS

Petitioner grew up in the small town of Mt. Clemens, Michigan surrounded by his family. App. 1802, ll. 17-18; App. 1804, ll. 9-11; App. 1820, ll. 9-15; App. 1821, ll. 11-13; App. 1834, l. 25 – 1835, l. 11; App. 1836, ll. 5-14; App. 1845, l. 21 – 1846, l. 3; App. 1847, ll. 21-25; App. 1848, ll. 9-12; App. 1850, l. 20 – 1851, l. 17; App. 1858, ll. 14-21; App. 1866, ll. 19-24; App. 1873, ll. 1-9; App. 1880, l. 24 – 1881, l. 10; App. 1897, ll. 1-14; App. 1912, ll. 6-12. Petitioner along with his parents and five brothers and two sisters lived next door to Petitioner's maternal grandmother and grandfather. App. 1835, ll. 2-5; App. 1836, ll. 11-12; App. 1858, ll. 14-17; App. 1918, ll. 12-14. Petitioner lived in Michigan until 1991 when he moved to Spartanburg, South Carolina with his girlfriend, Lynda Byrd. App. 1688, l. 15 – 1689, l. 7; App. 2256, ll. 12-17. Lynda had a child from a previous relationship, and she and Petitioner had two children together. App. 1689, l. 19 – 1690, l. 2; App. 1692, l. 23 – 1693, l. 3. Petitioner's entire family remained in Michigan. App. 2256, l. 25 – 2257, l. 7.

On September 16, 1999, Petitioner entered Nikki's, a convenience store in Spartanburg County. App. 1196, l. 25 – 1197, l. 3; App. 1204, l. 15 – 1205, l. 1; App. 2264, ll. 3-23. The third shift clerk was James Mahoney. App. 1196, l. 25 – 1197, l. 18. Petitioner gathered several items for purchase and approached the register. App. 2265, ll. 22-25. Shortly thereafter, Mahoney pulled a gun on Petitioner. App. 2269, ll. 5-12; App. 1347, l. 12 – 1348, l. 20 (testimony of the store owner that he owned two handguns that were kept at the store and Mahoney carried a third gun on his person); App. 1212, ll. 7-12 (testimony of Terry Hadden that Mahoney carried a gun in his waistband). A struggle ensued and Petitioner got the gun from Mahoney. App. 2269, ll. 14-16. However, Mahoney pulled another gun on Petitioner and the two began shooting at each other. App. 1209, ll. 4-5; App. 2270, ll. 16-24. Both Petitioner and Mahoney were shot. App. 1377, ll. 19

– 25; App. 1382, ll. 3-13; App. 2270, ll. 23-24. Mahoney died as a result of the gunshot wound, and Petitioner left the store. App. 2274, ll. 13-15. However, Petitioner was captured by police within hours. App. 1238, l. 2 – 1239, l. 10; App. 1241, ll. 14-17.

In October of 2001, Petitioner was tried before an all white jury. The Honorable Gary E. Clary was the trial judge. Petitioner was represented by Michael Morin, Keith Kelly, and Jennifer Johnson. Trey Gowdy, III., Barry Barnette, and James Willingham, II, prosecuted the case. App. 1. The jury returned its verdict finding Petitioner guilty of the murder of Mahoney. App. 1601, ll. 5-14. After a short sentencing proceeding, the jury sentenced Petitioner to death. App. 1758, ll. 8-21.

Petitioner's conviction and death sentence were affirmed in State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004).

Petitioner's application for post-conviction relief and amended application for post-conviction relief contained numerous grounds for relief. App. 1766-1797. Petitioner was represented on post-conviction relief by Jim Morton and Melissa Armstrong. William Edgar Salter, III., and Anthony Mabry represented the State. The grounds relevant for this petition were raised in the court below as follows:

Trial counsel was ineffective in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and federal laws, South Carolina Constitution and South Carolina state law due to their failure to perform a reasonable investigation into [Petitioner]'s background and family life, resulting in a sentencing proceeding that was fundamentally unfair and assured a death verdict for [Petitioner] would be returned by the jury. Trial counsel failed to conduct any investigation in the state of Michigan, where [Petitioner] was born and raised. Had counsel conducted a reasonable investigation into Applicant's background, they would have learned that [Petitioner] comes from a large family, had numerous relatives who could have testified to his good character and struggle with addiction, and these relatives and/or friends would have been willing to testify on [Petitioner]'s behalf during his sentencing proceeding at trial. Failure to conduct a reasonable investigation into potential avenues of mitigation is conduct failing below what is required of trial counsel in a capital case. Wiggins v. Smith, 539 U.S. 510 (2003); Strickland v. Washington, 466 U.S. 688 (1984) ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular

investigations unnecessary.” Id., 466 U.S. at 691); Eddings v. Oklahoma, 455 U.S. 104 (1982).

App. 1789.

[Petitioner] was denied due process of law and also denied the right to effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, the South Carolina Constitution and South Carolina law because trial counsel failed to present adaptability evidence from James Aiken, a nationally recognized expert in the field of penal institution safety and management. Mr. Aiken was prepared and available to testify on behalf of [Petitioner], but was never called as a witness. Counsel’s unreasonable decision to not call Mr. Aiken opened the door for the state’s damning closing argument that [Petitioner] had shown “escalating violence,” thereby injecting the fear of [Petitioner]’s future dangerousness into the minds of the jurors, who were never told that [Petitioner] would be safely housed for the duration of his life. The prejudice to [Petitioner] stemming from counsel’s inexplicable (and seemingly eleventh hour) decision to discard the only defense expert is manifest. Strickland v. Washington, supra.

App. 1792-1793.

[Petitioner] was denied the right to effective assistance of counsel at both the trial and sentencing phases in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, federal law, South Carolina State Constitution, and South Carolina law in that trial counsel failed to properly and adequately investigate and prepare to confront and rebut the State’s alleged physical evidence, and further trial counsel failed to present its own expert or evidence to rebut or explain such physical evidence and/or object that ballistics and firearms and serology testimony was inadmissible in that it failed to meet the mandates of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and State v. Jones, 273 S.C. 723 (1979). Counsel’s unreasonable omissions denied [Petitioner] an opportunity to show to the jury he acted in self defense or

This incident involved a late night shoot out in a convenience store. Multiple gun shots involving two guns were fired. The defendant was wounded in the arm and chest and the victim was mortally wounded. There is undisputed evidence that the victim owned and/or possessed both guns involved and no evidence [Petitioner] possessed any gun until he wrestled one of the guns from the victim. There was a great deal of evidence and testimony presented by the Solicitor regarding multiple guns, ballistics, shell casings, bullet jackets, bullet fragments, fingerprints, trace evidence, [gunshot] residue, blood, blood spatter, DNA, and pathology. Much of this testimony is subject to attack on the basis of its questionable admissibility. Even if admissible, the evidence was easily contradicted and/or explained in a manner consistent with “circumstances other than the guilt of the accused.” Trial counsel never retained its own expert to assist with the forensic issues involved with the

State's physical evidence. Trial counsel never called as witnesses its own experts for the jury to hear an opposing view and opinion as to the physical evidence. Thus, trial counsel did not adequately investigate or prepare to deny, rebut, or explain the State's physical evidence. Gardner v. Florida, 430 U.S. 122, 50 L.Ed.2d 339, 97 S.Ct. 399 (1976). Had counsel hired appropriate forensic experts, including a forensic pathologist, who could have testified as to the single bullet having killed James Mahoney, rather than two as opined by the state, and a crime scene analyst, who could have provided testimony concerning the likely origin of bullets, bullet fragments, shell casings, and general crime scene analysis, there is a reasonable probability that the guilt and/or penalty phase would have had a different outcome. Strickland v. Washington, *supra*.

App. 1789-1790.

Six depositions were taken in Mt. Clemens, Michigan prior to the evidentiary hearing. App. 1798-1923. An evidentiary hearing was convened on January 31, 2011 before the Honorable Roger L. Couch. App. 1962.

An order of dismissal was filed on August 1, 2011. App. 2879-2979. This petition for a writ of certiorari follows.

ARGUMENT

1.

Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to perform a reasonable investigation concerning Petitioner's background and family life and present evidence of the investigation during the sentencing proceeding.

Relevant Facts

Mitigation Evidence Presented at Trial

Trial counsel presented only two witnesses during the penalty phase of the trial: Petitioner's girlfriend, Lynda Byrd, and Petitioner's "stepson," James Byrd. Trial counsel called no other members of Petitioner's family to testify and presented no evidence of Petitioner's life history. Rather the focus of the mitigation case appeared to be Petitioner's ability to be a "father" while in prison.

Lynda Byrd

Lynda Byrd testified that she had known Petitioner since 1989 and the two were "a couple." App. 1688, ll. 13-17; App. 1689, ll. 2-4. Lynda had a child named James whose father was someone other than Petitioner. App. 1689, l. 19 – 1690, l. 4. However, James considered Petitioner to be his father. App. 1690, l. 5-6. In addition, Lynda and Petitioner had two children together. App. 1692, ll. 23-25. Lynda recalled that Petitioner had coached one of James' basketball teams. App. 1691, ll. 4-6. She testified Petitioner and James enjoyed fishing and watching sports together. App. 1691, ll. 11-20.

Lynda testified that since Petitioner's pretrial detention, she visited him in the detention center once or twice a week. App. 1692, ll. 4-12. She also testified that she provided some

money for Petitioner to allow him to call home and buy necessities. App. 1692, ll. 13-19. Petitioner called home to speak to his children every day. App. 1692, ll. 20-22. She described the children as running to the phone whenever it rang, hoping it was Petitioner on the other end. App. 1698, ll. 22-24.

Petitioner also received copies of the children's report cards. App. 1693, ll. 10-14. Petitioner was very supportive of the children's progress in school and other achievements. App. 1694, ll. 2-21. The children and Petitioner also stayed in touch through written correspondence and photographs sent through the mail. App. 1697, ll. 15-23. Lynda noted that Petitioner and one of their children were teaching each other Spanish through the mail. App. 1698, ll. 1-2. Lynda explained the children looked forward to talking to Petitioner and he was a positive influence over them, even while incarcerated. App. 1697, ll. 4-14.

Lynda explained that Petitioner "was always working" and had contributed financially to the family. App. 1694, l. 22 – 1695, l. 7. She was aware that Petitioner had a drug problem at one time, but she was adamant that he did not expose the children to drugs and he continued to contribute to the family. App. 1696, ll. 4-22.

Ultimately, Lynda asked the jury to spare Petitioner's life because his three children needed him and adored him. She emphasized that despite his incarceration he provided a strong support base for the family and guided them. App. 1698, ll. 15-18.

James Byrd

James was sixteen-years old at the time of Petitioner's trial. App. 1699, l. 25 – 1700, l. 1. He testified that he had no relationship with his biological father and considered Petitioner to be his father. App. 1700, ll. 5-9. James recalled Petitioner coaching one of his sports teams. App. 1700, ll. 19-23. In addition, Petitioner attended James' practices and games whenever possible.

App. 1701, ll. 2-8. During Petitioner's pretrial detention, Petitioner wrote letters to James encouraging him with his academics and athletics. App. 1701, ll. 12-16. James and Petitioner spoke on the phone every day during this time as well. App. 1701, ll. 19-20. James testified Petitioner encouraged the younger children to do well in school also. App. 1703, ll. 2-4. The family visited Petitioner every week. App. 1703, ll. 8-16.

James asked the jury to spare Petitioner's life because he was the only Dad James ever had and he and his siblings needed Petitioner.

Mitigation Evidence Presented at PCR hearing

During PCR proceedings, Petitioner presented deposition testimony from Dorothy Hooper, Cecil J. Hooper, Harold Harrington, Arma Hadley, James A. Moore, and Maurice Moore. Petitioner and trial counsel testified during the PCR proceedings. In addition, James Aiken testified about Petitioner's adaptability to prison. Pete Skidmore testified concerning his role as fact investigator, and Dr. Sandra Conradi testified regarding the meaning of the forensic evidence which showed the decedent was actually shot only once. Paul Dorman unequivocally testified at the PCR hearing that the bullet hole in Petitioner's bag containing his beer and cigarettes indicated the shot came from behind the counter where the clerk was towards the counter where Petitioner was located.

Dorothy Hooper

Dorothy Hooper, a lifelong resident of Michigan, testified that she is Petitioner's aunt. App. 1802, ll. 13-20; App. 1808, ll. 7-9. She became aware of Petitioner being charged with murder five years prior to her deposition testimony on January 20, 2011. App. 1803, ll. 16-21. She never spoke to any lawyers or investigators on Petitioner's behalf prior to the PCR investigation. App. 1803, ll. 22-24; App. 1807, l. 17 – 1808, l. 1; App. 1813, ll. 4-8. Dorothy

indicated she would have spoken to investigators and would have testified at Petitioner's trial. App. 1803, l. 25 – 1804, l. 6. At the time of Petitioner's trial, Petitioner's mother was deceased, and no member of the defense team, or Petitioner's father or other family members asked Dorothy to testify. App. 1808, ll. 11-21; App. 1813, ll. 21-22.

Dorothy explained Petitioner was at her home on a weekly basis, including overnight visits, when he was a child. App. 1804, ll. 9-12; App. 1804, l. 21 – 1805, l. 11. She described Petitioner as a "good person" who never gave her any trouble. App. 1804, l. 9-14; App. 1805, ll. 12-19. According to Dorothy, Petitioner was respectful and did not act aggressively or violently. App. 1805, ll. 22-24.

Had Dorothy addressed the jurors in Petitioner's capital trial, she would have asked them to spare his life and for mercy. App. 1805, l. 25 – 1806, l. 6. Dorothy candidly admitted she was not aware of Petitioner's prior interactions with law enforcement. App. 1809, l. 21 – 1811, l. 23. However, knowing of Petitioner's legal troubles would not have affected her willingness to testify on his behalf. App. 1813, ll. 9-15.

Cecil J. Hooper

Cecil J. Hooper, Dorothy's husband, had known Petitioner all of Petitioner's life. App. 1819, l. 22 - 1820, l. 15. Cecil learned Petitioner had been charged with murder from Dorothy. App. 1820, l. 16-20.

He was never contacted by anyone on Richard's behalf prior to the PCR investigation. App. 1820, l. 21 – 1821, l. 2; App. 1822, ll. 7-18. Had Cecil been contacted, he would have been willing to speak to the person and testify on Richard's behalf. App. 1821, ll. 3-9. Cecil would have told the jury that based upon his regular interactions with Petitioner, he considered Petitioner "a nice kid growing up," who was respectful to adults, and had no behavior problems.

App. 1821, ll. 10-21. Cecil would have asked the jury for mercy. App. 1821, l. 25 – 1822, l. 1. Like Dorothy, Cecil admitted he was not aware of Petitioner's prior criminal record. App. 1822, l. 19 – 1824, l. 11. Cecil explained that he would have testified on Petitioner's behalf even knowing about Petitioner's troubles with the law. App. 1825, l. 24 – 1826, l. 1.

Harold Harrington

Harold, Petitioner's uncle and a lifelong resident of Michigan, testified that he became aware of Petitioner's murder charges shortly after Petitioner's mother's death. App. 1832, ll. 5-6; App. 1832, ll. 16-20; App. 1833, ll. 2-7. During Petitioner's teenage years and into his twenties, Harold saw him several times a week. App. 1835, ll. 2-11. Harold never observed Petitioner acting out aggressively. App. 1836, ll. 15-18.

He was never contacted by anyone on Petitioner's behalf prior to the PCR investigation. App. 1833, ll. 8-12. Had he been contacted, he would have testified that Petitioner was a good person and would have asked the jury to be lenient and not recommend the death penalty. App. 1834, ll. 6-13. Harold was not aware of Petitioner's criminal record. App. 1835, l. 12 – 22; App. 1836 l. 25 – 1837, l. 2; App. 1837, ll. 12-18; App. 1838, l. 21 – 1839, l. 5. However, Petitioner's criminal record would not have changed Harold's willingness to testify on Petitioner's behalf. App. 1838, ll. 5-15.

Arma Hadley

Arma Hadley, Petitioner's aunt, testified that she was one of nine children and all lived in the same area in Michigan. App. 1845, l. 25 – 1846, l. 3; App. 1850, l. 20 – 1851, l. 2. She indicated that her family was very close with Petitioner's father's family. App. 1851, ll. 7-17. Arma was never contacted by anyone regarding Petitioner until the PCR investigation. App.

1846, ll. 12-21; App. 1859, ll. 11-21. Arma would have been willing to speak to investigators and testify on Petitioner's behalf. App. 1846, l. 22 – 1847, l. 5.

Arma recalled Petitioner as a sweet and friendly person. App. 1847, ll. 21-25. Petitioner was respectful to her, worked hard, and played on the basketball team in high school. App. 1848, ll. 4-8. Petitioner was not a discipline problem and did not act aggressively. App. 1848, ll. 14-20. She admitted that after Petitioner graduated from high school and moved away, she did not see him as often. App. 1855, ll. 8-22.

Furthermore, Arma would have told the jury that Petitioner was a calm person, who did not show signs of aggression. App. 1848, l. 22 – 1849, l. 9. She would have asked the jury to spare his life. App. 1849, ll. 16-23. Arma was aware of Petitioner having trouble with the law on one occasion. App. 1851, ll. 21-23. She was not aware of any other arrests or convictions. App. 1852, l. 22 – 1855, l. 5; App. 1855, l. 25 – 1856, l. 12. Arma did not learn of Petitioner's murder conviction and death sentence until several years after the fact. App. 1856, ll. 18-25.

James A. Moore

James Moore is Petitioner's younger brother. App. 1866, ll. 6-18. James did not learn of Petitioner being charged with murder until after Petitioner was convicted. App. 1867, l. 23 – 1868, l. 2. No one ever contacted James about Petitioner. App. 1869, ll. 2-9; App. 1880, ll. 17-23; App. 1881, l. 20 – 1882, l. 11; App. 1886, ll. 8-10. James would have been willing to speak to Petitioner's defense team and would have testified on Petitioner's behalf. App. 1869, ll. 10-17. Had James testified, he would have informed the jury that Petitioner was nice, was a good man, and loved by many. App. 1869, ll. 22 – 24; App. 1870, ll. 1-3. James recalled Petitioner played sports and was popular in school. App. 1869, l. 4 – 1871, l. 2. He would have asked the jury to have mercy on Petitioner. App. 1869, ll. 24-25.

On cross-examination, James admitted he was not aware of Petitioner's prior arrests in the late 1980s and early 1990s.¹ App. 1876, ll. 21-24; App. 1877, ll. 8-11; App. 1877, ll. 15-18; App. 1878, ll. 1-7; App. 1878, l. 21 – 1879, l. 6.

Maurice Moore

Maurice Moore, Petitioner's older brother, became aware of Petitioner being charged with murder within a few months of the incident. App. 1897, ll. 11-16; App. 1897, ll. 20-25; App. 1905, ll. 4-8. No lawyers or investigators attempted to speak with him prior to Petitioner's trial. App. 1898, ll. 1-8. However, Maurice recalled receiving a phone call from a woman he believed to be Petitioner's lawyer, who informed Maurice of Petitioner's legal troubles. App. 1898, ll. 12-22; App. 1899, ll. 8-11. The woman explained she would call back, but she never did. App. 1899, ll. 10-13.

Maurice would have testified during Petitioner's trial had he been asked. App. 1900, ll. 10-14. He would have told the jury that his brother was a loving, caring person who loved sports and worked hard. App. 1900, l. 20; App. 1901, ll. 15-18. Petitioner was a good brother, a good husband, and Maurice loved him. App. 1901, ll. 21-24; App. 1903, ll. 8-12. He would have asked the jury to have mercy for Petitioner. App. 1902, ll. 1-3; App. 1903, ll. 9-10.

On cross-examination, Maurice admitted he was upset with Petitioner and did not want to talk to him soon after the incident. App. 1910, l. 1-4. However, Maurice denied ever telling Petitioner's lawyers or mitigation investigator that he was upset with Petitioner. App. 1910, ll. 5-8. Maurice testified he was aware of some of Petitioner's past troubles with law enforcement, but was unaware of others. App. 1913, ll. 10-12; App. 1913, ll. 21-23; App. 1914, ll. 9-20; App.

¹ James also admitted he had been convicted of drug law violations in 1994 and 2000. App. 1884 lines 3-11; App. 1884, ll. 20-24. As a result of the 2000 conviction, James would have been in prison at the time of Petitioner's 2001 trial. App. 1885, ll. 19-24.

1915, ll. 5-9; App. 1915, ll. 21-24. Maurice admitted he had a criminal history. App. 1918, ll. 2-7.

Pete Skidmore

Pete Skidmore, a private investigator, testified that the defense team retained him to investigate facts relating to the guilt-phase of the case. App. 2046, ll. 5-6; App. 2046, ll. 12-20; App. 2047, ll. 17-25. According to Skidmore, he did not deviate from his role as fact investigator except that he was asked to locate some individuals and he provided the information to the mitigation investigator. App. 2048, ll. 1-5.

When asked if he were involved in the penalty phase investigation, Skidmore responded: “I may [have] been asked to try to find some witnesses. But the - - from my [per]spective, there wasn’t much investigation going on in that area that I was aware of.” App. 2048, ll. 19-24. On cross-examination by the state, Skidmore agreed that he had no role in developing the mitigation case other than trying to help locate some witnesses. App. 2057, ll. 15-20. During re-direct examination, Skidmore testified that he did not travel to Michigan to interview available witnesses. App. 2059, l. 19 – 2060, l. 2.

Petitioner

Petitioner testified that his father, five brothers, two sisters, multiple aunts, uncles, cousins, nieces and nephews lived in Michigan. App. 2257, ll. 2-7. He graduated high school in Michigan. App. 2257, ll. 8-11. His trial attorneys asked about his family in Michigan, and Petitioner provided names, addresses, and phone numbers. App. 2259, ll. 20-24; App. 2261, ll. 14-19; App. 2278, l. 24 – 2278, l. 1. Petitioner recalled his attorneys tried to call a few of the numbers he provided, but went no further in the investigation. App. 2261, ll. 20-24. Petitioner’s

trial attorneys failed to call any of his family members from Michigan to testify during the penalty phase of his trial. App. 2282, ll. 23-25.

On cross-examination, Petitioner denied that his family in Michigan wanted nothing to do with him when he was arrested. App. 2286, ll. 8-11. Petitioner admitted writing a letter to his trial attorney dated April 20, 2001 concerning his case. App. 2288, ll. 1-10. The letter was later introduced as Respondent's 19. App. 2805. In the letter, Petitioner explained he was unable to supply all of the information requested; however, he explained that trial counsel could get the required information by calling his sister, Vanessa Moore. Petitioner provided his sister's address and telephone number. App. 2805. The letter explained that Petitioner had not informed his family of the prosecution's intention to seek the death penalty. According to the letter, Petitioner asked for his family's help when he was first arrested and was told no help would be coming. However, the letter encouraged trial counsel to contact his sister to obtain information concerning his family. App. 2805.

Petitioner was not aware of what role Drucy Glass, the mitigation investigator, played in his case. App. 2289, ll. 10-11; App. 2289, ll. 16-22. He did recall his trial attorneys retaining someone to track down people to testify on his behalf. App. 2290, ll. 3-6. Neither Ms. Glass nor his trial attorneys indicated his family would not cooperate. App. 2290, ll. 13-21.

Defense counsel Michael Morin

Trial counsel, Michael Morin, testified during the PCR hearing.² Morin testified the defense retained Drucy Glass as a mitigation investigator. App. 2524, ll. 18-20. Morin said his relationship with Petitioner deteriorated over the course of the representation. App. 2524, l. 24 –

² At the time of his PCR testimony, Morin was an Assistant Solicitor in Spartanburg County after he transferred “back here” from the Cherokee County Solicitor's office. App. 2343, ll. 2-6.

2526, l. 25. Morin stated that he sent a letter to the fact investigator, Pete Skidmore, in August of 2001 providing a list of names and numbers of people who may have been helpful to Petitioner during the penalty phase. App. 2535, ll. 6-15. Concerning Petitioner's family background or family history, Morin expressed the importance of Petitioner cooperating with the defense team, but he did not attempt to elicit any specific information. App. 2551, ll. 6-24.

Petitioner completed the social history packet provided by Morin. App. 2551, l. 25 – 2552, l. 12. Morin claimed that the defense team was unable to secure the cooperation of Petitioner's family in Michigan. App. 2552, ll. 12-19. Morin further maintained that Petitioner sent a letter in April of 2001 indicating he was not interested in getting the assistance of his family in Michigan. App. 2553, ll. 11-21. This letter was introduced as Respondent's 19. As explained above, in contravention of Morin's representations about the letter during PCR proceedings, the letter did not indicate Petitioner's lack of cooperation. In fact, the letter supplied trial counsel with the name, address, and phone number of Petitioner's sister, who would be able to supply trial counsel with additional information concerning the family. App. 2805.

However, on May 8, 2001, Morin met with Petitioner and received additional names and contact information for family members. App. 2736, l. 7 – 2737, l. 20. Morin's notes from this meeting were entered into evidence as Applicant's 31. App. 2797-2799. The notes indicated Morin and Petitioner spoke about Petitioner's family. Specifically, Petitioner explained his four brothers, two sisters, and father were in Michigan and one family member was in Alabama. App. 2797. Petitioner provided his father's address and phone number. App. 2798. Morin's notes indicated that he attempted to call Petitioner's father and sister, but was unsuccessful. App. 2554, ll. 14-25; App. 2798-2799.

When asked if Morin had an obligation “to at least go to [Petitioner]’s hometown and talk to his family,” Morin response reflected an improperly narrow view of admissible mitigation evidence: he “may have felt that way if [he] thought that or had any evidence that [Petitioner] had some sort of mental defect.” App. 2576, l. 18 – 2577, l. 10. Morin posited that “a functioning defendant” should have a say in what the defense team does or does not do. App. 2577, ll. 10-12. Morin admitted “some things” are required in capital cases, “[b]ut in this particular instance, with [Petitioner], he felt like [Petitioner] could make the call about his family.” App. 2577, ll. 16-18. Petitioner in fact wrote Morin suggesting he get in touch with his sister in Michigan, and that Morin could find out whatever information he needed by calling or writing. See Respondent’s exhibit 19; App. 2805.

Defense counsel Keith Kelly

Keith Kelly was called as a witness by the state. He was responsible for the penalty phase of the trial. App. 2629, ll. 22-23. The mitigation investigator prepared a report, and Kelly prepared a history of Petitioner’s prior criminal record. App. 2637, ll. 8-16. The state moved the report into evidence at PCR. App. 2848 – App. 2868.

Although the report listed the names of some family members, the report “[was] really essentially a chronology of his criminal offenses.” App. 2664, ll. 12-14.³ According to Kelly’s testimony and the report, attempts to contact Petitioner’s father were by phone and letter. App. 2638, ll. 15-20. Two relatives were listed, but never contacted. App. 2639, ll. 13-16. One

³ The social history prepared by the mitigation investigator and introduced as Respondent’s 25 illustrated that an investigation into Petitioner’s family and social history was incomplete. App. 2848-2860. Throughout the document, the investigator indicated a need for additional documentation to have a clear understanding of the very limited information already gathered. For example, the report indicated a need for arrest records, court records, and jail records for many charges listed. App. 2856; App. 2857 – 2858; App. 2859.

relative allegedly told Petitioner's wife that Petitioner "[was] dead to [them]." App. 2639, ll. 17-20. Three other relatives were in prison. App. 2639, ll. 21-24.

When questioned regarding why the mitigation investigation revealed nothing in terms of Petitioner's social history, Kelly maintained the mitigation investigator could not get in touch with anyone in Michigan. App. 2664, l. 15 – 2665, l. 11. According to Kelly, if Petitioner had given him names of family members, he would have gone to Michigan to investigate. App. 2665, ll. 21-25. Kelly claimed there was no way to reach individuals for whom the defense team had names because Petitioner did not know how to contact them. App. 2666, ll. 4-13. Although the team discussed traveling to Michigan, the decision was made not to go because there was not "much to go on." App. 2669, l. 21 – App. 2670, l. 5. Kelly testified that the mitigation investigation tried to reach some members of the family by phone and certified mail and he did not "know what else she may of done." App. 2670, ll. 13-15.

Kelly testified that the defense's presentation during the penalty phase consisted of Linda Byrd, Petitioner's wife, and Petitioner's stepson, James. App. 2645, ll. 5-6. According to Kelly, the defense was "begging for mercy" and wanted to show Petitioner was "life eligible because he ha[d] a family." App. 2645, ll. 13.

Regarding Petitioner's letter to Morin explaining that his family told him to get himself out of the mess, the actual contents of the letter provided the defense team with Petitioner's sister's name, address, and telephone number. The letter expressed Petitioner's desire not to contact his sister himself, but informed the defense team that if the information concerning his family was needed, then his sister would provide it. He further explained that he was "not trying to be uncooperative." App. 2668, l. 12 – 2669, l. 8; App. 2805.

Kelly admitted that if the mitigation investigation uncovered anyone who had anything positive to say, he would have had the person testify. App. 2671, l. 7 – 2672, l. 1; App. 2672, ll. 11-12; App. 2700, ll. 5-9.

Order of Dismissal

The PCR judge determined there was no merit to Petitioner’s claim that trial counsel rendered ineffective assistance in failing to investigate, develop, and present mitigation evidence from family members of Petitioner. App. 2962. Having reviewed the video-taped depositions of Petitioner’s family from Michigan, the PCR judge found “their testimony on the issue of their willingness to come to trial and testify to be not credible given this entire record.” App. 2963. The court found the record showed trial counsel’s investigation for and presentation of mitigating evidence was objectively reasonable under prevailing professional norms where “trial counsel investigated and attempted to locate mitigation witnesses ... from his family in Michigan.” App. 2963. The court emphasized that Petitioner was largely uncooperative in trial counsel’s endeavor and initially did not want the family to assist. App. 2963.

The judge stated that trial counsel attempted to develop mitigation witnesses in *South Carolina* through the fact investigator, Pete Skidmore. Without support in the record, the judge concluded “[t]hese results were apparently unsuccessful.” App. 2964.

The judge noted the mitigation investigator’s report indicated her attempts to contact Petitioner’s father by phone and certified letter and Petitioner’s indication to her that he had been cut off by his family. App. 2964. The judge posited, without evidence in the record, that Petitioner’s family cut him off due to his “life of crime.” App. 2965-2966.

In fact, as seen above, the deposition testimony presented by Petitioner indicated that most of his family was unaware of his troubles with the law. However, the family members

testified knowledge of Petitioner's prior criminal record did not diminish their love for Petitioner, affect their willingness to testify, and to ask for mercy. The judge further found trial counsel's testimony credible and found Petitioner's family members did not want to assist in the case and avoided all efforts to gain their assistance. App. 2967.

Turning to the prejudice prong, the PCR court relied upon its credibility determinations concerning the witnesses presented by Petitioner. App. 2967. The judge based this finding upon testimony of James Moore, which the judge concluded "typifie[d] the credibility of [Petitioner]'s family members on this issue." App. 2967. Initially, James testified he was living at home with his father and he would have testified had he been notified of the trial. However, on cross-examination, James admitted he was incarcerated during the trial. App. 2968. According to the court, "James also admitted that he was kept in the dark by [Petitioner]'s Michigan family regarding the fact that [Petitioner] had been charged with murder and was facing the death penalty." App. 2968. The judge surmised this corroborated the fact that Petitioner's family in Michigan was embarrassed and angered by Petitioner's crime and "had washed their hands of him." App. 2968.

The PCR judge pointed to Maurice Moore's testimony that he was angry with Petitioner after his arrest and did not want to talk to Moore initially. The judge asserted that Maurice "admitted that [Petitioner]'s father basically disowned him after he was charged with murder and armed robbery in South Carolina." App. 2968. The judge found Maurice's testimony not credible because of his conflicting testimony about his discussions with Petitioner regarding Maurice testifying at his capital trial. App. 2968-2969. In addition, the judge held Maurice's testimony that he was not contacted by anyone on Petitioner's behalf was contradicted by the mitigation investigation report indicating she sent a certified letter to him. App. 2969.

The PCR court found trial counsel's decision not to seek out Petitioner's brothers who were incarcerated for drugs was an objectively reasonable trial strategy. App. 2969.

In addition, the PCR judge held Petitioner was not prejudiced by trial counsel's failure to call any of the witnesses presented during the PCR proceedings to testify during his capital trial because (1) trial counsel presented two witnesses during the trial, who made a plea for Petitioner's life; (2) the witnesses who testified during the PCR proceedings had little contact with Petitioner after he reached the age of eighteen and were unaware of Petitioner's legal troubles; and (3) the witnesses, while saying good things about Moore, offered no evidence Petitioner suffered from any mental illness, mental retardation, personality disorder, physical or sexual abuse or deprivation or poverty. The judge determined the witnesses' claims that they were unaware of Petitioner's criminal record was not credible and even if credible, the witnesses would have been thoroughly impeached at trial. Thus, the court concluded, Petitioner suffered no prejudice by trial counsel's failure to call these witnesses during the penalty phase of his trial. App. 2969-2970.

Discussion

In order to obtain relief based upon a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and such deficiency prejudiced petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984).

Deficient Performance

An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Id. at 688. An attorney's performance is measured against prevailing professional norms. Id. at 688. Attorneys are not required "to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the

defendant at sentencing.” Wiggins v. Smith, 539 U.S. 510, 533 (2003). Nevertheless, courts must determine whether a decision not to investigate is reasonable in all circumstances. Id.

The United States Supreme Court explained the ABA Guidelines provide evidence of the well-defined and prevailing professional norms. “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 prosecutor.’” Id. at 524 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C)(1989)).⁴ (emphasis added). The Guidelines direct counsel to “[c]ollect information relevant to the sentencing phase of trial including ... family and social history.” Id. at 11.4.1(D)(2)(C). In addition, the Guidelines directed counsel to interview “witnesses familiar with aspects of the client’s life history that might affect the ... possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death.” Id. at 11.4.1(D)(3)(B). As expressed in the commentary and relevant to this case, “[c]ounsel’s duty to investigate is not negated by the expressed desires of a client.” Id. at 11.4.1 cmt. 4.

For purposes of deciding which witnesses and evidence to prepare for presentation during the penalty phase, the Guidelines instruct counsel to consider “[w]itnesses familiar with and

⁴ The 1989 ABA Guidelines are relevant for Petitioner’s case as well. The 1989 ABA Guidelines provided

The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1 (C)(1989).

evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client." Id. at 11.8.3(F)(1). "Counsel should present to the sentencing entity ... all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence." Id. at 11.8.6(A). Additionally, counsel should consider presenting evidence of a capital defendant's family and social history. Id. at 11.8.6(B)(5).

For the reasons explained below, based on the evidence above, counsel was wholly deficient in failing to investigate Petitioner's background in Michigan. The fact counsel did not travel to Michigan in this capital case to investigate should be stunning in and of itself. However, the failure to make even a modicum of phone calls or write letters is telling also.

As explained by the Court, the Guidelines provided that counsel should consider presenting evidence of a defendant's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. Id.

In Wiggins, trial counsel's mitigation investigation into Wiggins' life history consisted of two parts: (1) a written pre-sentence investigation, which included a one-page account of Wiggins' personal history, and (2) the state's social services records documenting Wiggins' various placements in the state's foster care system. Id. at 523. Counsel thereafter abandoned their investigation of Wiggins' background. Id. at 524. The Court held counsel's decision not to extend their investigation fell short of prevailing professional norms in light of their failure to retain a forensic social worker to prepare a social history report, which was standard practice in the state at the time, and their failure to investigate all reasonably available mitigating evidence, as mandated by the ABA Guidelines. Id.

In addition, the Wiggins Court held counsel's investigation was unreasonable due to the evidence counsel actually uncovered in the social services records, which indicated Wiggins' mother was an alcoholic and Wiggins displayed emotional difficulties in foster homes and had frequent, lengthy absences from school. Id. at 525. The Court concluded "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." Id. The Court explained that "[i]n assessing the reasonableness of an attorney's investigation ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 527.

The United States Supreme Court again confronted the issue of trial counsel's duties to investigate mitigation in a capital case where counsel conducted a minimal investigation with an apparently uninterested client. Rompilla v. Beard, 545 U.S. 374 (2005). In general, Rompilla's contribution was minimal as he was not interested in helping his attorneys develop a mitigation case. He told trial counsel his childhood was normal. At times, he actively obstructed counsel by sending them off on false leads. Id. at 381. Trial counsel interviewed five family members, who indicated they did not know Rompilla well because he spent much of his adult years and some of his childhood years in custody. Id. at 381-382. The three mental health witnesses who examined Rompilla offered nothing useful either. Trial counsel made no further efforts to investigate a mitigation case. Id. at 382. However, post-conviction counsel for Rompilla uncovered multiple sources of mitigation evidence, including school records, incarceration records, and a history of alcohol dependence. Id. The Court concluded trial counsel's failure to even examine Rompilla's prior conviction file fell below the level of reasonable performance.

Id. at 383. The file concerned Rompilla's prior conviction for rape and assault, which trial counsel knew would be used by the prosecution. Id.

The Court held trial counsel had a duty to make all reasonable efforts to learn what they could about the prior offense, and that reasonable efforts included obtaining the readily available file to learn what the prosecution knew, to discover any mitigating evidence, and to anticipate the details of the aggravating evidence. Id. at 385.

In Council v. State, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008), this Court held trial counsel's decision not to further investigate Council's background and present even the minimal mitigating evidence obtained was unreasonable. According to this Court, counsel was deficient in failing to begin his investigation into Council's background as soon as the prosecution served its notice of intent to seek the death penalty. Id. Despite the strong case of guilt against Council, the trial attorney obtained only his juvenile justice records and state hospital records before trial. Trial counsel did not request certain background records until the day of jury selection and did not set up a meeting with the defense's retained mental health expert, who had received only limited records, until a month before trial. Id. This Court held counsel's conduct fell below the standards set by the ABA. Id. at 172-173, 670 S.E.2d at 363 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 11.4.1(2)(C)(1989)).

Additionally, this Court held the limited information obtained by trial counsel should have put him on notice that Council's background could potentially provide powerful mitigating evidence. Id. at 173, 670 S.E. 2d at 363. Not only did trial counsel unreasonably delay in investigating Council's background, trial counsel failed to conduct an adequate investigation. Id. The retained mental health expert evaluated Council for competency and criminal responsibility only, had inadequate records, and met with Council only once, shortly before trial. Id. Trial

counsel did not utilize the services of a social history investigator, despite available funding. Id. Finally, this Court concluded “it was unreasonable for trial counsel not to obtain [Council’s] family records.” Id. at 174, 670 S.E.2d at 363. The limited records obtained by trial counsel “should have alerted him to the fact that the family was dysfunctional.” Id. at 174, 670 S.E.2d at 364.

This Court went on to hold “[e]ven if trial counsel’s investigation could be deemed sufficient or adequate, we believe trial counsel also failed to present any significant mitigating evidence [where the] mitigation presentation consisted solely of [Council’s] mother’s extremely limited testimony.” Id. at 174-175, 670 S.E.2d at 364.

This Court rejected the state’s argument that trial counsel made a reasonable strategic decision not to present additional evidence where the investigation was inadequate and incomplete, trial counsel was aware the jury had rejected the defense theory that Council was merely present, and it would not have been inconsistent for trial counsel to have pursued the merely present theory along with the evidence in mitigation. Id. at 175, 670 S.E.2d at 364. This Court also noted that in light of the state presenting damaging character evidence, Council’s character could not have been further damaged by the presentation of additional mitigation evidence. Id.

In Von Dohlen v. State, 360 S.C. 598, 608, 602 S.E.2d 738, 743 (2004), this Court held trial counsel’s investigation concerning Von Dohlen’s mental state was not reasonable despite the fact that counsel made “some effort.” The mitigation case presented during the trial was that Von Dohlen was a good husband, had been married for seventeen years, was a good father to his four children, and was a dependable employee. At trial, witnesses testified he grew up in a very poor family and had been physically abused and emotionally neglected as a child. Von Dohlen’s

personality dramatically changed when his brother was murdered just two weeks before the murder involving Von Dohlen. He began abusing alcohol and Valium. A psychiatrist, Dr. Michael Lampkin, testified on behalf of Von Dohlen indicating he suffered from an adjustment reaction, which was easily treated, short-term, and not a chronic mental illness. Id. at 604, 602 S.E.2d at 741.

However, the same psychiatrist testified during post-conviction proceedings that had he been provided with the additional medical and psychiatric records that post-conviction counsel uncovered, he would have testified Von Dohlen suffered from “major depressive episodes with severe symptoms of anxiety and possible prepsychotic features.” Id. at 605, 602 S.E.2d at 741. Another psychiatrist, Dr. John DeWitt, testified at the post-conviction relief hearing that Von Dohlen suffered from a major mental illness at the time of the murder and was predisposed to such based upon his family history of mental illness and alcohol or drug abuse. Id. at 606, 602 S.E.2d at 742. This Court held that although trial counsel “exerted some effort,” their failure “to adequately investigate and prepare expert testimony about Von Dohlen’s condition as it existed at the time of the murder” was deficient performance. Id.

The question presented in the instant case is whether trial counsel’s decision not to investigate Petitioner’s family history in Michigan was reasonable. Trial counsel’s stated reasons for not investigating were (1) that their limited phone calls and letters to several family members in Michigan had been unsuccessful in securing the family’s cooperation; and (2) that counsel was not certain of the addresses of family members. In Petitioner’s case, counsel failed to conduct any investigation relating to Petitioner’s family and social history in Michigan, where he was born and raised. The record indicates that the mitigation investigator made several phone calls and wrote letters; however, this level of investigation is constitutionally deficient. Neither

attorney or the mitigation specialist even bothered to go to Michigan where Petitioner had been raised. The witnesses were not impossible to locate. PCR counsel did so easily enough. The decision not to investigate further was unreasonable as it was based upon what trial counsel considered a lack of good leads.

The evidence presented during the post-conviction relief proceeding indicated Petitioner had an expansive family all residing in the same small town in Michigan. In addition, trial counsel knew the locations of at least two of Petitioner's brothers because they were in prison. Petitioner's counsel put forth much less effort than even Von Dohlen's trial counsel who had interviewed multiple family members and investigated and presented evidence of Von Dohlen's social history to the jury. Petitioner's case is similar to Council's in that Petitioner's trial attorneys called only two witnesses to beg for mercy, just as Council's trial attorneys called one witness to beg for mercy. Petitioner's trial counsel's decision not to investigate further was unreasonable in light of their limited and inadequate investigation. Wiggins, *supra*.

Prejudice

The Wiggins Court explained that to show prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 539 U.S. at 534 (quoting Strickland, 466 U.S. at 694). To assess prejudice, the Court reweighed the evidence in aggravation against the totality of available mitigation evidence. Id. The mitigation evidence showed Wiggins experienced "severe privation and abuse in the first six years of his life," "suffered physical torment, sexual molestation and repeated rape during his subsequent years in foster care," was homeless for a period of time, and had diminished mental capacities. Id. at 535. The Court concluded that had

the jury been informed of the additional mitigating evidence that a reasonable investigation would have uncovered, there was a reasonable probability that the jury would have returned a different sentence. Id. at 536.

The Rompilla Court held trial counsel's failure to examine the file on his prior conviction was prejudicial. Rompilla, 545 U.S. at 390. The file contained "a range of mitigation leads that no other source had opened up." Id. Evidence in the file indicated Rompilla grew up in a "slum environment," his criminal activity was accompanied by alcohol abuse, mental health testing indicated possible schizophrenia, and cognitive testing placed him at a third grade level. Id. at 391. The undiscovered evidence, which the file would have prompted reasonably competent counsel to investigate, showed Rompilla's parents were extreme alcoholics who fought violently; Rompilla was physically abused by his father, Rompilla and his siblings lived in terror; Rompilla and his brother had been locked in a small wire mesh dog pen containing excrement; Rompilla had been isolated as a child; the family had no indoor plumbing; Rompilla slept in the attic with no heat; and the children were not given clothes. Id. at 391-392.

Armed with the appropriate social history, the post-conviction mental health experts found Rompilla suffered from organic brain damage, an extreme mental disturbance significantly impairing his cognitive functions. His problems were likely the result of fetal alcohol syndrome and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the offense. Id. at 392. The Court held the mitigation case taken as a whole may have influenced the jury's appraisal of Rompilla's culpability and the likelihood of a different result if the evidence had been presented was sufficient to under confidence in the result at sentencing. Id. at 394.

In Council, this Court held Petitioner was prejudiced despite the prosecution's production of overwhelming evidence of guilt and the jury finding six aggravating factors in light of the very strong mitigating evidence. Council, at 176, 670 S.E.2d at 365. The mitigating evidence which trial counsel failed to uncover and present included medical evidence concerning Council's and family members' mental health issues, Council's father's extremely violent alcoholic father, Council growing up in poverty, Council's significant drop in IQ and learning disabilities, Council's use of drugs and alcohol at a very young age, and Council's frontal lobe brain dysfunction and diagnosis of schizophrenia. Id. at 177, 670 S.E.2d at 365.

In Von Dohlen, 360 S.C. at 608, 602 S.E.2d at 743, this Court held Von Dohlen had shown prejudice based upon trial counsel's insufficient investigation concerning his mental health because "[t]here [was] a reasonable probability the outcome of the trial might have been different had the jury heard the available information about [Von Dohlen]'s mental condition as it existed at the time of the murder."

Similarly, Petitioner suffered prejudice as a result of trial counsel's failure to adequately investigate his family history and uncover witnesses who would have testified as to Petitioner's positive character as a youth and to the love his family felt for him. As demonstrated during the post-conviction relief proceeding, these additional family members would have asked the jury to spare Petitioner's life.

Only one juror is needed to prevent a death penalty sentence. This Court artfully explained why it is difficult to find harmless error from a penalty stage error on direct appeal in State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000). "A capital jury can recommend a life sentence for any reason or no reason at all." State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000). Petitioner has shown prejudice since Petitioner's family members from

Michigan asking the jury for mercy, and informing the jury of Petitioner's good traits, and that they still cared for Petitioner despite his recent troubles with the law would have had an effect on the jury.

Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to call James Aiken to testify regarding Petitioner's adaptability to life in prison.

Relevant Facts

Sentencing Proceeding

The prosecution presented evidence of Petitioner's prior convictions through multiple witnesses, including the victims of prior crimes and court officials. Petitioner's trial counsel did nothing to counter the prosecution's case that Petitioner posed a future danger. Trial counsel presented two witnesses, Petitioner's girlfriend, Lynda Byrd, and Petitioner's stepson, James Byrd, during the penalty phase of the trial. Neither witness presented by trial counsel countered the prosecution's evidence of future dangerousness.

Jacqueline Walker

The prosecution called Jacqueline Walker, an employee of the Wayne County Clerk of Court in Detroit, Michigan, to testify. App. 1648, ll. 3-19. Through Walker, the prosecution entered certified copies of Petitioner's criminal record from Wayne County. App. 1649, l. 12 – 1650, l. 7. The record revealed Petitioner had been convicted for unlawful possession of a weapon in 1985. App. 1650, ll. 8-11.

Bill Nixon

Next, the prosecution called Bill Nixon, the Chief Deputy Clerk for the County of Macomb in Michigan, to testify. Nixon testified that the records indicated Petitioner was charged with breaking and entering a building with intent and was convicted on May 15, 1987. App. 1653, ll. 20-24. The record included an additional form in which Petitioner was asked to

explain in his own words what happened. Petitioner's statement was "Pushed open front door of Broadway Market. Entered store and removed two handguns and \$10 in quarters. When officers arrived - - but I ran away." App. 1654, ll. 4-10. On cross-examination, Nixon clarified that Petitioner had been charged with breaking and entering, but had pled guilty to attempt to break and enter, a lesser-included offense. App. 1654, l. 22 – 1655, l. 2.

David Saad

David Saad, a parole and probation officer from the Michigan Department of Corrections, testified on behalf of the prosecution. App. 1655, l. 24 – App. 1656, l. 1. Saad prepared a presentence investigation report prior to Petitioner being sentenced for attempted breaking and entering. App. 1656, ll. 5-8. Saad testified that as part of his investigation for the report, he asked Petitioner what happened. Saad recalled Petitioner explained he broke into a building that he selected at random and stole two handguns and a roll of quarters. Later, Petitioner turned himself into the police. When Saad questioned Petitioner about the cause of his behavior, Petitioner stated he was addicted to cocaine, both in the rock and powder form. App. 1657, ll. 6-24.

Michelle Crowder

Next, the prosecution called Michelle Crowder to testify. She testified that in 1991, she was in a Sub Station restaurant with her fiancé. Petitioner walked in and stood in line behind her. Petitioner then grabbed her purse. When Crowder turned around, Petitioner punched her in the left side of her neck. Crowder fell to the ground as a result of the punch, landing on her purse. Crowder testified Petitioner then kicked her. Crowder's fiancé tackled Petitioner, but Petitioner beat him up, sending him to the hospital. Petitioner then left the restaurant. App. 1659, l. 4 – 1660, l. 7.

Valerie Wisniewski

Valerie Wisniewski testified that she worked at Rack Room Shoes on September 13, 1991 in Spartanburg. Around closing time, Petitioner entered the store, jumped over the door where she was located, pushed her against a counter and ordered her to give him the money in the register. App. 1663, ll. 12-23. While she was screaming, the assistant manager, David Kivet, opened the register and gave Petitioner the funds. App. 1664, ll. 18. Petitioner then left the store. App. 1664, ll. 12-16.

Gail Moffitt

Gail Moffitt, an employee of the Spartanburg County Clerk of Court, testified on behalf of the prosecution. App. 1665, ll. 23-25. Through Moffitt, the prosecution painstakingly detailed Petitioner's criminal record. She testified that in August 23, 1994, Petitioner was convicted of common law robbery, which was the incident involving Rack Room Shoes and Wisniewski. App. 1667, ll. 3-17. According to Moffitt, Petitioner was convicted of driving under suspension, second offense and driving under suspension, third offense on September 15, 1993. App. 1667, l. 18 – 1668, l. 2; App. 1668, ll. 14-21. He was also convicted of habitual traffic offender on two occasions. App. 1668, ll. 3-10; App. 1668, l. 22 – 1669, l. 6. Petitioner had a second driving under suspension, third offense on July 13, 1995, and driving under suspension, fifth offense and sixth offense on January 18, 1996. App. 1669, l. 7 – 1670, l. 11. On August 7, 1997, Petitioner was convicted of assault and battery of a high and aggravated nature. App. 1670, ll. 12-24.

Prosecution's Closing Argument

During the prosecutor's closing argument, he referred to Petitioner as a "career criminal." App. 1722, l. 3. The prosecutor also attacked Petitioner's request for mercy. After noting that

mercy may exist in the form of probation or relatively small prison sentences, the prosecutor detailed Petitioner's criminal record and opined that the time for mercy "ha[d] come and gone." App. 1723, l. 14 – 1724, l. 7. According to the prosecutor, Petitioner "had chance after chance after chance" and "had ample opportunity." As such, the prosecutor argued, Petitioner had hurt too many people too bad for too long for mercy in this case. App. 1724, ll. 15-22. He further argued Petitioner had engaged in "a steady, continuous, gradual pattern of escalating violence" and "sixteen years of escalating violent acts." App. 1724, ll. 2-3; App. 1724, ll. 20-21. The prosecutor asked the jury to give Petitioner "what he ha[d] earned for [fifteen] years. ... Fifteen years of victimizing people; [fifteen] years of disregarding other people's well-being." App. 1725, ll. 3-7. He concluded his argument by asking the jury "to sentence him to what he has earned for a lifetime of violent crimes. Death." App. 1725, ll. 22-24.

Adaptability Evidence Presented at PCR hearing

James Aiken

Petitioner called James Aiken to testify during his PCR hearing. Aiken was the president of a jail and prison consulting firm dealing with all aspects of criminal justice as it pertains to confinement facilities and systems. App. 2098, ll. 8-12. Aiken was a graduate of Benedict College and held a master's degree in criminal justice from the University of South Carolina. App. 2098, ll. 16-19. Aiken worked for the South Carolina Department of Corrections beginning in 1971. He worked in sixteen prisons within the state system. App. 2098, l. 24 – 2099, l. 14. Thereafter, he worked for the Indiana Department of Corrections and the United States Virgin Islands corrections system. App. 2099, ll. 15-18. Subsequently, he began his consulting firm. App. 2099, ll. 18-21.

Without objection, Aiken testified as an expert in the field of classifications of inmates and the security of staff and inmates within those institutions and classifications. App. 2107, ll. 16-23. Aiken reviewed the classification and history of Petitioner. App. 2108, l. 25 – 2109, l. 8. Aiken determined Petitioner could be “adequately managed while in confinement status and that the South Carolina Department of Corrections can adequately manage him.” App. 2112, ll. 16-20.

Aiken testified that he was prepared for Petitioner’s trial, but was not called to testify as a witness. App. 2097, l. 24 – 2098, l. 3. Aiken would have testified the same in 2001 as he did during the post-conviction relief hearing. App. 2113, ll. 1-4.

On cross-examination, Aiken admitted Petitioner had received several disciplinary write-ups while on death row, including a verbal altercation with staff concerning opening a window and attempting to possess a cell phone. App. 2117, ll. 5-20; App. 2118, ll. 11-18. Additionally, Aiken testified Petitioner received disciplinary write-ups while incarcerated in Spartanburg County, including refusing a direct order from an officer, abuse of telephone privileges, and arguing with a correctional officer. App. 2119, l. 25 – 2121, l. 23.

Aiken also reviewed Petitioner’s criminal record. Aiken disagreed that Petitioner’s record showed a history of escalating violence. App. 2122, l. 20 – 2123, l. 7. Aiken opined Petitioner’s actions did not reflect that he was a predator and unable to adapt to prison. App. 2124, ll. 8-13. According to Aiken, Petitioner did not “come anywhere near the level of predator inmate population and the intensive type of management that’s required for that type of population.” App. 2127, ll. 12-15. Aiken further concluded that the prison system could adequately manage Petitioner for the remainder of his life. App. 2126, ll. 4-5.

Michael Morin

Trial counsel, Michael Morin, testified that that he could not think of a reason not to call an adaptability expert to testify even if doing so would have allowed the prosecutor to introduce evidence of Petitioner's infractions within the county detention center. App. 2497, ll. 13-23. Morin testified that the state would argue that based upon the infractions, Petitioner refused to follow the rules, and as a result, the attorney would have to "weigh that back and forth." App. 2499, ll. 9-18.

Keith Kelly

Keith Kelly, who served as trial counsel, testified that he consulted with Aiken prior to Petitioner's trial. His recollection was that Aiken would have testified that the Department of Corrections could house Petitioner and keep the population safe. "In other words, he's never gonna get out and we can control him." App. 2649, ll. 13-25. Additionally, Aiken would have testified that Petitioner was "not a monster" and was "not uncontrollable." App. 2650, l. 1.

Kelly testified that he decided not to call Aiken to testify because the prosecution had a witness from Michigan to testify concerning Petitioner's lengthy record in Michigan. Kelly testified the state would have used the witness to rebut Aiken's testimony. App. 2650, ll. 5-18. Kelly testified that he wanted to keep out evidence relating to Petitioner's discipline while incarcerated and such evidence would have been admitted had Aiken testified. App. 2650, l. 23 – 2651, l. 14.

On cross-examination, Kelly admitted that the potential state's witness from Michigan was not an expert; rather, the witness was a records custodian. App. 2686, l. 23 – 2687, l. 2. Kelly maintained that based on Petitioner's previous incarceration and "whatever disciplinary

may have been documented as a result,” he decided not to call Aiken. App. 2687, l. 24 – 2688, l. 4.

Order of Dismissal

Concerning Petitioner’s claim that trial counsel provided ineffective assistance by failing to present evidence of his adaptability to prison through the retained expert, the PCR court found “counsel made a reasonable strategic decision not to present Aiken’s testimony.” The PCR court further found no prejudice resulted from counsel’s decision.

The court’s order summarized Aiken’s testimony, including that Petitioner “would be of low risk of presenting a future danger in the prison system” and that Petitioner could “be controlled in a prison environment for the remainder of his life without causing an undue risk of harm to staff, inmates, or the general public.” App. 2971. The court found Aiken was present at the trial and prepared to testify favorably on Petitioner’s behalf. App. 2972. Additionally, the court found that the prosecution was prepared to introduce the testimony of a records custodian from Michigan concerning Petitioner’s misconduct while incarcerated there. Kelly, who could not recall the nature of those records, decided not to call Aiken in fear of the state calling the witness from Michigan. App. 2972.

The PCR court concluded trial counsel’s decision not to call Aiken was reasonable because the presentation of Aiken’s testimony would have resulted in the prosecution being allowed to present damaging testimony in reply. The court found “Respondent significantly impeached [Aiken’s] opinion of [Petitioner]’s adaptability with a contrary history of disciplinary infractions that [Petitioner] has committed while incarcerated.” App. 2974. The PCR court was particularly concerned about Petitioner’s possession of a cell phone and cell phone charger while on death row, which was considered a major infraction by the institution. App. 2974. The PCR

court characterized Aiken as “dismissive of all the disciplinary infractions that Respondent elicited” as he testified that these infractions would not alter his opinion of Petitioner’s ability to adapt to life in prison. App. 2974. The PCR court admitted that Respondent did not impeach Aiken with an offense listed on the mitigation investigator’s report that Petitioner allegedly absconded from parole in Michigan; however, the PCR considered this in its analysis.⁵ App. 2975.

As a result, the PCR court concluded that the numerous disciplinary infractions that Petitioner committed in South Carolina prior to trial would have minimized the effectiveness of Aiken’s testimony. The court held “[t]his is particularly true if there [were] further evidence of misconduct that [Petitioner] committed in the Michigan incarcerations, as there appears to be.” App. 2975 (emphasis added). Thus, the court found “Aiken’s expert testimony would have been of slight value, at best, and that it would have permitted the introduction of evidence that would be damaging to the defense’s case in mitigation.” App. 2975.

Discussion

In order to obtain relief based upon a claim of ineffective assistance of counsel, a petitioner must show that counsel’s performance was deficient and such deficiency prejudiced petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984).

An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Id. at 688. An attorney’s performance is measured against prevailing professional norms. Id. at 688. The United States Supreme Court explained the ABA Guidelines provide evidence of the well-defined and prevailing professional norms. “The ABA Guidelines provide that investigations into mitigating evidence ‘should comprise efforts to

⁵ The only evidence before the PCR court of Petitioner’s alleged absconding was the mitigation

discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” Wiggins v. Smith, 539 U.S. 510, 524 (2003)(citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C)(1989)). The 1989 Guidelines also provide that trial counsel should consider presenting evidence of the client’s rehabilitative potential and expert testimony concerning such. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6(B)(6) & (8)(1989).

The purpose of the sentencing phase of a capital trial is to direct the jury’s attention to the specific circumstances of the crime and the characteristics of the defendant. Woodson v. North Carolina, 428 U.S. 280 (1976); State v. Stewart, 283 S.C. 104, 107, 320 S.E.2d 447, 450 (1984); State v. Owens, 346 S.C. 637, 665, 552 S.E.2d 745, 760 (2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Haselden, 353 S.C. 190, 199, 577 S.E.2d 445, 450 (2003). The United States Supreme Court held that a penalty phase jury may consider any aspect of a defendant’s character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death as a mitigating factor. Lockett v Ohio, 438 U.S. 586, 604 (1978); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982).

In Skipper v. South Carolina, 476 U.S. 1, 4 (1986), the United States Supreme Court held that evidence of good behavior of a previously-incarcerated defendant is relevant evidence in mitigation of punishment. Skipper sought to introduce the testimony of two jailers and a regular visitor to the jail. The witnesses would have testified that Skipper adjusted well to life in jail. Id. at 2. This testimony would have allowed the jury to draw favorable inferences concerning Skipper’s character and his probable future conduct if sentenced to life imprisonment. Id. at 4.

investigator’s report.

The Court held there was no question that such inferences were mitigating because they may serve as a basis for a sentence less than death. Id. “The exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury’s ability to carry out its task of considering all relevant facets of the character and record of the individual offender.” Id. at 8.

As explained by the Skipper Court, “[c]onsideration of a defendant’s past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing.” Id. Thus, evidence that a defendant would pose a danger in the future may be treated as an aggravating factor in capital sentencing proceedings. Jurek v. Texas, 428 U.S. 262, 275-276 (1976); Barefoot v. Estelle, 463 U.S. 880 (1983). “A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.” Jurek, 428 U.S. at 271.

The trial judge may allow the introduction of additional evidence of aggravation to aid the jury in determining whether to recommend a death sentence. State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442, (2003). In fact, this Court has held that the prosecution may introduce testimony that a defendant has attempted a similar crime to that for which the defendant is on trial during the penalty phase because the evidence is relevant to the defendant’s individual characteristics and predisposition to commit similar crimes. State v. Green, 301 S.C. 347, 358, 392 S.E.2d 157, 162-163 (1990). Evidence of a defendant’s violent behavior in prison is relevant to future dangerousness, an issue properly before the sentencing jury. State v. Shafer, 352 S.C. 191, 198-199, 573 S.E.2d 796, 799-800 (2002).

As explained by this Court, “it is well-settled evidence of the defendant’s behavior in prison is admissible in capital sentencing because it bears upon his character.” State v. Hughes, 336 S.C. 585, 591-592, 521 S.E.2d 500, 503-504 (1999)(holding evidence that defendant killed a

sleeping cellmate by stabbing him with a shank was admissible as evidence of the defendant's character and future dangerousness). There is a tension between evidence regarding the defendant's adaptability to prison life, which is admissible, and evidence regarding prison life in general, which is not admissible. State v. Burkhart, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007); State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005). However, when the prison conditions are narrowly tailored to demonstrate the defendant's personal behavior in those conditions, then the evidence is admissible. Id. Although the issue was not preserved for appeal, in State v. Whipple, 324 S.C. 43, 52, 476 S.E.2d, 683, 688-689 (1996), this Court held the introduction of Whipple's disciplinary record by the prosecution was not in error as the records were relevant to a matter properly before the jury – Whipple's adaptability. As explained in State v. Tucker, 324 S.C. 155, 173-174, 478 S.E.2d 260, 270 (1996), a defendant's future dangerousness and his adaptability to prison life are legitimate interests in the penalty phase of a capital case.

Relying upon Burkhart, this Court held the prosecution's introduction during its case-in-chief of a video recording of a capital defendant refusing an order of prison guards and the guards using pepper spray to force his compliance was “probative on the issue of Torres' adaptability to prison life, which is a legitimate concern in the sentencing phase of a capital case.” State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010). This Court held “[t]he video recording presented the jury with competent evidence to showcase Torres' character and an actual routine prison situation.” Id. Although the prosecution had introduced evidence of Torres' prior convictions and his inability to abide by conditions of parole, this Court held the video was still admissible as it “was unique in its application to a specific parameter held by this

Court to not be arbitrary in the sentencing phase of a capital murder trial.” Id. at 625-626; 703 S.E.2d at 230.

Without question evidence of a defendant’s future adaptability to prison life is admissible during the penalty phase as it is evidence of a mitigating circumstance. Exclusion of such testimony is reversible error. State v. Matthews, 291 S.C. 339, 348-349, 353 S.E.2d 444, 449-450 (1986); State v. Patterson, 290 S.C. 523, 530-531, 351 S.E.2d 853, 857 (1986); State v. Riddle, 291 S.C. 232, 235-236, 353 S.E.2d 138, 140-141 (1987), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

If trial counsel articulates a valid reason for employing certain strategy, then the conduct is not ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). In Stokes, this Court determined trial counsel employed a valid strategy in not calling witnesses that he believed lacked credibility. Id. On the other hand, this Court found counsel deficient in Gilchrist v. State, 350 S.C. 221, 228 n.2, 565 S.E.2d 281, 285 n.2 (2002) for failing to object to the state’s vouching for the credibility of a witness where counsel stated he decided not to object based upon a strategy, but never articulated that strategy. In Sanchez v. State, 351 S.C. 270, 276, 569 S.E.2d 363, 366 (2002), this Court determined trial counsel’s reason for not objecting to an officer’s hearsay testimony of the alleged assault on a child victim, which was that the testimony would help show the allegations were vague, was unreasonable because the hearsay corroborated the victim’s testimony.

In Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993), this Court held trial counsel’s decision not to present evidence of Drayton’s ability to adapt to prison was not ineffective assistance of counsel. Trial counsel testified during post-conviction proceedings that he decided not to present adaptability evidence because the evidence included unfavorable psychiatric

evaluations, poor disciplinary reports, and some accounts of misconduct while incarcerated. Id. at 10, 430 S.E.2d at 521. This Court noted that Drayton’s past actions in juvenile detention and when incarcerated as an adult reflected “a mixed picture of his ability to function in a prison setting.” As such “[a]n attempt to develop favorable evidence of future adaptability would have opened the door for the prosecution to reveal Drayton’s earlier misconduct in prison.” Id. at 11, 430 S.E.2d at 521.

Petitioner’s trial counsel testified that he did not present testimony of Aiken because to do so would have opened the door for the prosecution to present evidence of Petitioner’s prior discipline record in Michigan. The PCR court determined trial counsel employed sound strategic reasoning, and thus, trial counsel rendered effective assistance. However, the basic premise is flawed. As explained supra, evidence of Petitioner’s conduct while in prison was admissible by the prosecution without waiting for Petitioner to open the door to such testimony. This Court and the United States Supreme Court have held that a defendant’s conduct while in prison is relevant to the defendant’s character, adaptability to prison, and future dangerousness, all of which are proper considerations of a penalty phase jury. Thus, trial counsel’s decision not to call Aiken based upon a fear of opening the door to presentation of harmful evidence by the prosecution was unfounded. The PCR court’s determination that trial counsel employed sound strategy is legal error.

Although Drayton, supra, appears to support the PCR court’s order that trial counsel made a valid strategic decision concerning the admission of adaptability evidence, the case law is clear – the prosecution was not required to wait for Petitioner to present evidence of his ability to adapt. Petitioner’s prison record was relevant to his character, his future dangerousness, and his ability to adapt to life in prison; therefore, nothing prevented the prosecution from presenting this

evidence during its case-in-chief. Unlike the Drayton evidence, Aiken's testimony was very favorable to Petitioner, not interlarded with damaging evidence as that in Drayton.

In addition, concluding that the evidence of Petitioner's conduct while incarcerated in Michigan was harmful is entirely speculative. Neither the trial record nor the PCR record contained evidence of what was contained within Petitioner's prison records in Michigan. Even the PCR court order admitted that its decision was based upon speculation when the court noted that there "appear[ed]" to be evidence of misconduct by Petitioner while in Michigan, but could point to no evidence of such as Respondent failed to produce any of the records or attempt to impeach Aiken with the records.

Prejudice

"When a defendant challenges a death sentence, prejudice is established when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998)(quoting Strickland, 466 U.S. at 695 (1984)). As this Court noted "the evaluation of the consequences of an error in the sentencing phase of a capital case [is] more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all." State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000).

Prejudice is apparent in this case in light of the minimal case presented by trial counsel during the penalty phase and the weak case for death offered by the prosecution. The only evidence presented during the penalty phase by Petitioner was from his wife and stepson who testified that Petitioner continued to be a good parent while in prison and asked for mercy. The prosecutor's case in aggravation concerned the circumstances of the crime at issue and

Petitioner's prior criminal record. Although the victim's family suffered a tremendous loss and Petitioner's argument in no way seeks to minimize the loss suffered by the family, the circumstances of the crime were not of the brutal or torturous nature as is typical of most death penalty cases. The evidence adduced during the guilt phase and penalty phase was undisputed that Petitioner did not enter the convenience store with the murder weapon and Petitioner was shot by a bullet fired by the victim. Although Petitioner had a lengthy criminal record, the vast majority of his convictions were for traffic offenses. The prosecution used Petitioner's criminal record to demonize him and argue he had "earned" death.

Evidence of an undisputed expert in the field of classifications of inmates and the security of staff and inmates within those institutions and classifications was "not self-serving evidence a jury would naturally tend to discount." See Skipper, 476 U.S. at 8. Due to the damaging character evidence presented by the state, Petitioner's character could not have been further damaged by the presentation of adaptability evidence or evidence of misconduct while in prison in Michigan, if such evidence existed. See Council, 380 S.C. at 175, 670 S.E.2d at 364. Like the attorneys in Council, "[t]rial counsel essentially would have had 'nothing' to lose' and 'everything to gain' by presenting this evidence." Id. at 176, 670 S.E.2d at 364-365. Due to trial counsel's deficient performance, the jury never heard the impartial testimony of Aiken that in his expert opinion, Petitioner would adapt well to life in prison and the Department of Corrections was equipped to maintain custody and control over Petitioner. Had the jury learned of Petitioner's high likelihood of adaptability and low risk of future dangerousness from an expert and placed this evidence on the mitigating side of the scale, there is a reasonable probability that at least one jury would have struck a different balance. See Wiggins, 539 U.S. at 537.

Trial counsel was ineffective, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, by failing to adequately prepare and rebut evidence Petitioner shot the decedent with premeditation while behind the store counter since how the decedent came to be shot was critical to the extent of Petitioner's culpability.

Relevant Facts

Everyone knew the third shift clerk at Nikki's convenience store, James Mahoney, carried a gun in his waistband behind his back. That gun was a .44 Magnum. Keith Fowler, whose wife owned the store, testified in addition to Mahoney's .44 Magnum bulldog revolver, there was also a .45 and a .32 caliber Magnum kept under the counter. App. 1347, l. 23 – 1348, l. 20.

Petitioner testified at the PCR hearing that he knew Mahoney from patronizing the store, and he is sure Mahoney recognized him on the night of the incident. Petitioner also knew there was the security camera that monitored what occurred in the convenience store. App. 2266, l. 24 – 2267, l. 5.

Defense counsel Michael Morin testified at the PCR hearing that petitioner had consistently told him he went into the store to purchase beer and cigarettes and he put them on the counter. The photographs of the store and the diagram of the store are before this Court to review. Morin recalled that Petitioner did not have quite enough money -- just some small change short to buy the beer and cigarettes -- and he asked the clerk to "let him slide because he was in there all the time. Then the clerk made some offensive remarks to [petitioner] and told him he'd have to leave or what have you. Mr. Moore didn't want to. That the clerk pulled out a gun and Mr. Moore immediately tried to disarm him for his own safety. Then after he got that

gun away from the, him, the clerk pulled out a second gun and shot him and he [Petitioner] returned fire.” App. 2511, ll. 11-25.

Petitioner, at the PCR hearing, described what happened largely the same way as Morin. He asked Mahoney to allow him to take some small change out of the little container on the counter because he had put in his small change in that container in the past to help others similarly situated. Petitioner remembered he was eleven or twelve cents short, but Mahoney told him he could not take change out of the container to have enough to purchase his beer and cigarettes. He reminded Mahoney that he had contributed to the small change cup in the past. Mahoney was not a big man and he really did not think he was intimidated by Mahoney even though knew Mahoney always kept a pistol in his waistband behind his back. App. 2267, l. 10 – 2268, l. 20.

Mahoney told Petitioner to get his “black ass out of my store.” App. 2268, ll. 3-9. When Mahoney told him to get “my black ass out of the store, that’s when I, I must have said something like I’m not going nowhere.” He may have cursed back at Mahoney. Mahoney reached under the counter and came back up with “a pistol in his hand.” “I automatically responded and, and I wouldn’t allow him to point the pistol at me. So, I reached for it. We struggled over that particular pistol, and it fired, it went off, and it jammed, and that’s how I was able to get it from his hands.” App. 2268, l. 3 – 2274, l. 13.

Mahoney then reached behind his back and pulled out the .44 Magnum and shot petitioner with it. Petitioner recalled he was able to fire three or four shots at Mahoney and Mahoney fell to the floor. Petitioner denied he pointed the gun at Hadden, who was playing the video poker machine. Petitioner admitted he grabbed the bag of money and left. App. 2268, l. 3 – 2274, l. 13.

Hadden's trial testimony

Defense counsel Morin repeatedly acknowledged during the PCR hearing that discrediting Hadden's trial version of what occurred was critical. App. 2384, ll. 12-23; 2398, l. 13 – 2399, l. 23; 2400, l. 4 – 2401, l. 15; 2549, l. 16 – 2550, l. 13.

At trial Hadden described petitioner as “a big guy.” Petitioner walked into the store at about three o'clock that morning. Hadden was playing the video poker machine and he claimed he heard Mahoney say: “What the hell do you think you are doing?” Hadden said he turned around and he saw petitioner had Mahoney by both of his hands, Hadden claimed petitioner got a weapon away from Mahoney and told him not to move. Hadden claimed petitioner shot at him so he fell to the floor and played dead. App. 1204, l. 12 – 1209, l. 17.

Hadden also told the jury that everyone could see that Mahoney carried a gun in his back waistband. App. 1212, ll. 7-13. Defense counsel Morin's cross-examination of Hadden consisted of less than ten pages of transcript. Hadden's only concession to defense counsel was his acknowledgement that nowhere in his statement to the police did he tell them that petitioner held Mahoney's hands down. App. 2224, ll. 8-10. However, Hadden insisted that he told the police that at some point. App. 1227, ll. 12-19.

Lesser-included offense and self-defense

Morin further testified he tried to present evidence to obtain a voluntary manslaughter instruction “[w]ithout him [Petitioner] testifying, the best we could try to do is a get a [voluntary] manslaughter.” App. 2494, l. 12 – 2495, l. 3. Morin said he discussed voluntary manslaughter and self-defense with petitioner. App. 2495, ll. 1-5.

Morin told the PCR judge that petitioner refused to plead guilty in return for a life sentence. Morin agreed repeatedly that Petitioner was consistent in what he said occurred in the

store that morning. Morin claimed petitioner was not interested in testifying, which Morin said would have helped him get jury instructions on self-defense and voluntary manslaughter. App. 2515, l. 9 – 2517, l. 5; App. 2532, ll. 7-21.

Morin testified the state did not really have a clear theory of what occurred in the store that morning, but they put it to the jury that petitioner went into the store with the intention of robbing it. Morin said on cross-examination: “[I]t didn’t really [matter] how many shots were going off because he’s contended he is defending himself, and, and I think, in any argument, the fact that you’ve got a gun, a .45 pointed in your face or chest, that right there causes a defensive reaction. Whether it’s to run or fall down or take the gun. And then when you get shot, you return fire. That’s not unreasonable I didn’t think, and I was concerned about the bullets and, and the other things that had to do with where Mr. Mahoney was so that we could develop that, that, that defensive struggle between two armed, one man armed twice, one [Petitioner] not armed, now they’re both armed, now they’re both shot. That’s the - - that right there is where we were trying to go with it, and how many times the .45 got shot, once the gun’s pointed at you, you, you kind of - - he’s kind of reacting.” App. 2549, l. 16 – 2550, l. 8.

Morin talked with two retained experts only one time each. Strangely, as would be acknowledged in the order of dismissal, “*Mr. Morin did not tell his experts what Moore said had occurred.*” App. 2898. “Mr. Morin met with both his pathologist and his crime scene expert, at the same time, to discuss their findings.” App. 2898. (emphasis added).

As will be argued infra, this is certainly unusual since surely Morin in his practice now as a solicitor, has the police brief the pathologist with their version of what law enforcement thought occurred. Morin said he only spoke to Dr. McMahon, forensic pathologist and potential

witness, “only one time.” Morin admitted he did not talk to the State’s crime scene investigator, Paul Dorman, *at all* before trial. App. 2371, l. 15 – 2372, l. 2.

The unfortunate part of this case was, as Paul Dorman said during the trial, the video in Nikki’s was not working. “The video. The whole system was turned off. It wasn’t working at all....it was inoperable.” App. 1331, l. 15 – 1333, l. 23. Dorman testified at trial: “I don’t remember a tape being in the machine.” App. 1333, ll. 22-23.

The bag containing the items petitioner was going to purchase, the beer and cigarettes, became a critical piece of evidence. The following occurred with State’s witness Dorman on cross-examination by Morin at trial:

Q. This is a photograph of the bag, is that right?

A. Yes, sir, it is.

Q. And the bullet was fired from what side of the counter based on this bag?

A. Looking at the bag, *it was fired from the outside in*. I believe that’s - -

Q. Well, this bag is on what part of this counter?

A. There is the counter.

App. 1327, ll. 4-11. (emphasis added).

This left the jury with impression that petitioner’s gun may have fired the shot from outside the counter into the counter area. When properly questioned at PCR, Dorman made clear that the bullet that went through the bag containing the two beer cans came from behind the counter. (I.e. it was fired by Mahoney). App. 1309, ll. 6-8; 1327, ll. 4-11.

Although the bag was a critical piece of evidence, all Morin said at PCR was: “I don’t remember this bag.” App. 2356, l. 10- 2357, l. 12. Dorman testified unequivocally at the PCR

hearing that the bullet that went through the bag “came from the server side toward the customer side” and that the exit hole “would be on the customer side.” App. 2207, l. 11 – 2208, l. 6.

In his single conversation with Dr. Carol McMahon and crime scene reconstructionist Donald Girndt, Morin recalled they both believed petitioner fired shots from behind the counter and Morin admitted he did not consult with any other potential experts. He admitted he did not attempt to relay to them what Petitioner said actually occurred. App. 2358, l. 8 – 2363, l. 2. Morin reasoned: “I mean obviously Mr. Moore had told me consistently what his part, version was and that was fine. But I needed to be able to have somebody telling me what their professional opinion was so that, when I got to the point where I was gonna (sic) be faced with cross-examining them, I would have some education as to what that evidence may reflect.” App. 2361, l. 25 – 2362, l. 6.

Morin admitted he thought there were “holes in this [the state’s] story.” App. 2362, l. 18 – 2363, l. 10. However, in addition to not telling his retained experts what Petitioner consistently said happened, Morin acknowledged he did not attempt to engage a crime scene reconstruction expert or crime scene expert to testify following the negative opinions of McMahon and Girndt. App. 2363, ll. 8-10.

When Morin was asked to admit that it would have been helpful to have a crime scene reconstruction expert testify and corroborate available helpful evidence which came out at PCR, that “the .45 was fired as it was shooting out toward the customer side,” Morin answered: “Without any more thoughts than what you’ve gave (sic) me, I don’t know that it would have.” App. 2373, ll. 7-16.

One bullet wound

At the PCR hearing Dr. Sandra Conradi testified that “the cause of death is a single gunshot wound to the chest with perforation of the heart . . . which means bleeding into the sac around the heart causing the heart to become unable to beat.” App. 2326, ll. 16-20. Dr. Conradi acknowledged on cross-examination that it was “a close range wound” but that the decedent was only shot one time and “he could’ve been conscious for seconds to a minute or two . . .” App. 2331, l. 10 – 2389, l. 20.

Dr. Conradi had trained Dr. John David Wren who was the state’s pathologist at trial. Dr. Wren testified during the trial the decedent was shot “21 and a half inches from the top of his head . . . and then he had another gunshot wound in his lower right arm.” Dr. Wren stated the second wound could have been a re-entry wound, but he said the wound, while not a contact wound, gunshot was only “12 to 15 inches away.” App. 1492, l. 15 – 1502, l. 9.

Dr. Wren, in contrast to Dr. Conradi, testified “this person probably lived six to ten, maybe fifteen minutes. He could have live fifteen minutes, but I would say less than ten minutes.” App. 1502, ll. 10-12. Dr. Wren opined: “This person bled to death.” App. 1502, ll. 4-12.

Order of dismissal

In the order of dismissal the PCR court wrote: “Mr. Morin reviewed the physical evidence with both his crime scene expert and his investigator. Counsel’s investigation and the information that the state provided to him through discovery revealed that Moore did not have a handgun on him when he entered Nikki’s and that both the murder weapon (a .45 caliber handgun) and a .44 caliber revolver, originated with the victim. There were a number of shots fired at the store and a number of shell casings. He had his experts to assist him in reviewing the

physical evidence and determining what the physical evidence indicated as to the relative positions of Moore and Jamie Mahoney and what had occurred. Also, Mr. Morin reviewed the physical evidence with his crime scene expert, Donald Girndt, and he provided Girndt with crime scene photographs. Mr. Morin met with his pathologist and his crime scene expert, at the same time, to discuss their findings.” App. 2897 – 2898.

The PCR court wrote of its belief that Moore was shot by the clerk in self-defense and it found some significance in the fact petitioner was “just a few short blocks to Spartanburg Regional Hospital and receiving treatment for his serious gunshot wound, Moore [instead] drove approximately six miles in the opposite direction. Moore did not drive to the hospital or even his own home, but directly to George Gibson’s house.” App. 2900.

The court wrote that Dr. McMahon’s testimony would have been harmful to petitioner and the court found that counsel was not ineffective for failing to retain and call Dr. Conradi because “counsel is not required to search for another expert who will testify favorably. Counsel is not required to ‘expert shop.’” App. 2901 – 2902.

As seen, Dr. Conradi testified that the decedent was only shot once, and that he died within seconds or minutes. His pain did not linger. The court stated that Conradi’s testimony would have hurt Petitioner because she also opined that the decedent was shot at close range. App. 2904.

The order stated that Paul Dorman, the state’s crime-scene technician, “was not the state’s expert at trial” even though he was a state’s witness.⁶ The PCR court rejected petitioner’s contention that defense counsel was ineffective for failing to cross-examine Dorman to reveal, as came out at the PCR hearing, that the victim shot at petitioner first with the .45 caliber revolver.

⁶ The solicitor called Dorman as a witness at App. 1271, l. 19.

Interestingly, the PCR court wrote that the PCR testimony of Dorman, a life-long law enforcement officer, was not credible.⁷ App. 2906.

The court wrote that petitioner did not prove prejudice even if this useful testimony had been admitted because several factors could have contributed or caused the shell casings to end up behind the counter. The Court found it was impossible to tell how the shell casings ended up behind the counter, and the court wrote that found petitioner's version of the shooting implausible. The court also stated there was overwhelming evidence of "Moore's guilt of these crimes." App. 2907.

Discussion

As seen, Morin did not even tell Dr. McMahon and Donald Girndt petitioner's "consistent," --Morin's words -- version of what occurred in Nikki's store that morning to his retained experts. As seen, the videotape at the store was unfortunately not working, which left the jury to speculate about what had occurred. Petitioner, who Morin again stated was consistent in his statement about what happened, turned down an offer to plead guilty.

Petitioner testified during the PCR hearing that defense counsel made it very clear that if he testified at his trial that his prior record would come before the jury. Petitioner also said defense counsel did not explain or emphasize to him that his testimony might be necessary for the judge to charge the jury on self-defense and voluntary manslaughter. App. 2280, l. 1 – 2281, l. 24. Morin conversely maintained that petitioner "had no interest" in testifying.

⁷ Petitioner assumes the proposed order was written by counsel for the respondent. Other than this bold statement the court articulated no factual reasoning for this finding. See Collins v. Bisson Moving and Storage, Inc., 337 S.C. 290, 304, 504 S.E.2d 347, 355 (Ct.App. 1998): "[A] jury is not required to believe testimony when reasonable people could disagree as to facts, but *it is not permitted to disbelieve testimony unless there is a good reason for questioning the credibility of the witnesses.*" [Emphasis added].

While Morin thought there were “holes” in the state’s version of what occurred, he did not even bother to tell his retained experts what petitioner said had occurred at the store that morning. At PCR, Dorman clearly stated that the shot through the bag with the beer cans petitioner was going to purchase came from behind the counter towards petitioner. This was critical evidence, yet the jury was left with the impression at trial that the shot came from the “outside in,” meaning, in a normal sense of the words, that the shots came from the customer side of the store toward the counter and the decedent.

Further, the PCR court’s finding that Dr. Conradi’s testimony would have been damaging to petitioner in its totality is simply incorrect. Dr. Conradi’s testimony that the clerk was shot at close range one time was not inconsistent with petitioner’s testimony that he frantically reacted to the decedent pulling a gun on him, cursing, and telling him to get out of the store. Dr. Conradi’s testimony that the decedent was only shot one time and died quickly far outweighed any downside it had.

This is a highly unusual death penalty case since self-defense and voluntary manslaughter, given Morin’s PCR testimony about what petitioner *consistently* told him prior to trial, would have been verdict options had petitioner testified. The worst case scenario was that Petitioner intended for this to be a larceny or common-law robbery since he did not have a firearm with him.

If the jury found Petitioner intended to steal money but was not armed it could reasonably found that the murder was not the natural or probable consequence of the larceny. It could have further concluded that the state had failed to prove beyond a reasonable doubt that the homicide was the natural or probable consequence of a plan to steal money from the store, and Petitioner

would have been entitled to an acquittal on the murder charge. Cf. State v. Peterson, 287 S.C. 244, 246-247, 335 S.E.2d 800, 801 (1985).

It is highly implausible that Petitioner anticipated that the decedent would point a firearm at him and that petitioner would successfully disarm the decedent and exchange gunfire with him. It was therefore critical at both the guilt phase and penalty phase that the Dorman and Conradi PCR testimony was given to the jury.

Defense counsel was ineffective in cross-examining state's witness Paul Dorman during the trial to elicit testimony that gunshot did through petitioner's bag from behind the counter. Defense Counsel Morin did not even bother to interview Dorman prior to the trial even though his forensic testimony was very important.

The PCR court's refusal to call Dorman anything other than a neutral witness was, respectfully, as unusual as law enforcement not giving the pathologist their version of how a shooting occurred. Defense counsel was deficient for failing to provide his retained experts with petitioner's version of what had occurred, and for failing to find available expert testimony of Dr. Conradi, or somebody similar to her, and for not cross-examining Dorman with the evidence that the hole in the bag was from a shot fired by the decedent. See Strickland v. Washington, 466 U.S. 668 (1984). Counsel's performance fell below an objectionable standard of reasonableness. See Franklin v. Catoe, 346 S.C. 563, 570-571, 552 S.E.2d 718, 722 (2001).

Morin's failure to interview Dorman, and his inept cross-examination of him constituted deficient performance. It was completely unreasonable under prevailing professional norms and therefore constituted deficient performance under the Sixth Amendment. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Dorman's PCR testimony was critical guilt phase evidence, and strong evidence in

mitigation at the penalty stage. Evidence petitioner was being shot at, and shot at first, would have entitled him, at a minimum, to a voluntary manslaughter instruction. Even if not manslaughter the testimony was strong evidence of the statutory mitigating circumstance that the “defendant was provoked by the victim into committing the murder.” See S.C. Code §16-3-20 (C)(b)(8). Morin’s decision not to interview Dorman prior to trial and not to tell his experts petitioner’s consistent version of how the shooting came about was objectively unreasonable. It was not a reasonable strategic decision. See Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008).

Defense counsel’s failure to interview Dorman so that he could effectively cross-examine him was unreasonable since defense counsel could easily have interviewed Dorman and discovered there was available evidence corroborating petitioner’s testimony, which could have been a game changer in this case. See Cobbs v. State, 305 S.C. 209, 408 S.E.2d 223 (1991).

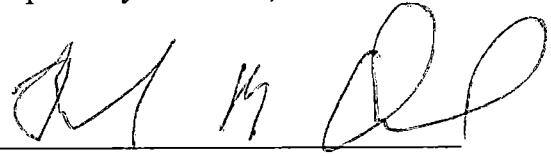
Defense counsel’s deficient performance was prejudicial to petitioner because the state was able to argue that petitioner entered the store with the intent to rob it – though it was undisputed he was not armed with a gun -- and shot the “helpless” decedent in cold blood. This is a much different version of events than what Morin admitted petitioner had consistently told him: Everyone knew that the decedent was always armed, Petitioner knew there was a video camera in the store, and Petitioner only returned fire in self-defense after the decedent pointed a gun at him and ordered him out of the store because he did not have enough money to purchase the beer and cigarettes. Petitioner’s consistent statement about what occurred should have been told to the retained experts, and Dr. Conradi or another similarly situated expert should have been retained, and Dorman would have easily stated what he did at the PCR hearing had defense counsel’s cross-examination not been so deficient.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on this issue.

Respectfully submitted,

By: _____

Three handwritten signatures in black ink are written over a horizontal line. The first signature is a stylized 'S' for Susan Barber Hackett. The second is a stylized 'R' for Robert M. Dudek. The third is a more complex, cursive signature.

Susan Barber Hackett
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

This 18th day of July, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Roger L. Couch, Circuit Court Judge

RICHARD BERNARD MOORE,

PETITIONER,

V.

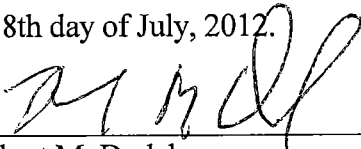
STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2011-198472

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of July, 2012.


Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of July, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.

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

**Appeal From Spartanburg County
The Honorable Roger L. Couch, Circuit Court Judge
Appellate case No. 2011-198472**

S.C. Supreme Court

NOV 16 2012

RECEIVED

RECEIVED

NOV 16 2012

RICHARD BERNARD MOORE, ,

S.C. Supreme Court

Petitioner,

vs.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

**ALAN WILSON
Attorney General**

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

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

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

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

ATTORNEYS FOR RESPONDENT.

TABLE OF CONTENTS

PETITIONERS' ISSUES PRESENTED	i
COUNTERSTATEMENT OF ISSUES PRESENTED.....	i
STATEMENT OF THE CASE	1
ARGUMENTS	
I. This Court must deny certiorari because there is evidence of probative value to support the PCR judge's finding that counsel made a reasonable investigation for and presentation of evidence in mitigation of sentence, but that Moore and his extended family in Michigan did not cooperate. Also, there is evidence supporting the finding that Moore did not establish prejudice from counsel's failure to present the family members whose testimony was offered in PCR, particularly where one witness - Moore's brother James - was incarcerated at the time of Moore's trial	7
A. Standard of Review on Certiorari	7
B. Evidence presented at PCR Hearing	7
B. The PCR Judge's ruling	22
C. Discussion	24
II. This Court must deny certiorari because there is evidence of probative value to support the PCR judge's findings that trial counsel made an objectively reasonable decision under <i>Strickland v. Washington</i> not to present opinion evidence of Moore's adaptability to prison life through James E. Aiken, who was present for the sentencing, "since the presentation of Aiken's testimony would have resulted in the State being allowed to present damaging testimony in reply;" and that Moore was not prejudiced by counsel's failure to present Aiken's opinion on his adaptability	33
A. Evidence presented at PCR hearing	34
B. The PCR Judge's Ruling	37
C. Discussion	37
III. This Court must deny certiorari because there is evidence of probative	

value to support the PCR judge’s findings that trial counsel’s efforts to investigate the physical evidence at the crime scene and rebut the State’s evidence that Moore shot the victim while he was behind the counter in the store were objectively reasonable and that Moore had not established prejudice under *Strickland* 44

A. The prosecution’s evidence at trial 45

B. Evidence in PCR 48

C. The PCR Judge’s ruling 56

D. Discussion 58

CONCLUSION 67

PETITIONER'S ISSUES PRESENTED

1. Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to perform a reasonable investigation concerning Petitioner's background and family life and present evidence of the investigation during the sentencing proceeding?
2. Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to call James Aiken to testify regarding Petitioner's adaptability to life in prison?
3. Whether trial counsel was ineffective, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, by failing to adequately prepare and rebut evidence Petitioner shot the decedent with premeditation while behind the store counter since how the decedent came to be shot was critical to the extent of Petitioner's culpability?

COUNTERSTATEMENT OF ISSUES PRESENTED

- I. Whether this Court must deny certiorari because there is evidence of probative value to support the PCR judge's finding that counsel made a reasonable investigation for and presentation of evidence in mitigation of sentence, but that Moore and his extended family in Michigan did not cooperate? Also, whether there is evidence supporting the finding that Moore did not establish prejudice from counsel's failure to present the family members whose testimony was offered in PCR,

particularly where one witness - Moore's brother James - was incarcerated at the time of Moore's trial?

II. Whether this Court must deny certiorari because there is evidence of probative value to support the PCR judge's findings that trial counsel made an objectively reasonable decision under *Strickland v. Washington* not to present opinion evidence of Moore's adaptability to prison life through James E. Aiken, who was present for the sentencing, "since the presentation of Aiken's testimony would have resulted in the State being allowed to present damaging testimony in reply;" and that Moore was not prejudiced by counsel's failure to present Aiken's opinion on his adaptability?

III. Whether this Court must deny certiorari because there is evidence of probative value to support the PCR judge's findings that trial counsel's efforts to investigate the physical evidence at the crime scene and rebut the State's evidence that Moore shot the victim while he was behind the counter in the store were objectively reasonable and that Moore had not established prejudice under *Strickland*?

STATEMENT OF THE CASE

Petitioner, Richard Bernard Moore (Moore), is currently confined on death row at Lieber Correctional Institution, of the South Carolina Department of Corrections (S.C.D.C.), as the result of his Spartanburg County murder conviction and death sentence for murdering Jamie Mahoney during the commission of an armed robbery at Nikki's Speedy Mart, early in the morning of September 16, 1999. The Spartanburg County Grand Jury indicted him at the January 2000 term of court for murder, assault with intent to kill (AWIK), armed robbery and possession of a firearm during the commission of a violent crime. (00-GS-42-617 through -619). **App. pp. 2980-81; 2984-85.**

The State thereafter served notice of its intention to seek the death penalty. The Spartanburg County Grand Jury handed down another armed robbery indictment at the October 2001 term of court. **App. pp. 2987-88.** Ralph Keith Kelly, Michael David Morin and Jennifer Johnson, Esquires, represented Moore at trial. Seventh Circuit Solicitor Harold W. Gowdy, III, as well as Assistant Solicitors James Donald Willingham, II, and Barry J. Barnette, represented the prosecution.

The Honorable Gary E. Clary held motions hearings in the case on April 3, September 28, and October 15, 2001.¹ On October 16-22, 2001, Moore received a jury trial, pursuant to S.C. Code Ann. § 16-3-20 (Supp. 2012), in front of Judge Clary. The jury convicted him of each of the indicted offenses. **App. pp. 73-1607; 1765.** Following Moore's exercise of the twenty-four hour waiting period in § 16-3-20(B), a sentencing proceeding was conducted in front of the same jury. The prosecution relied upon the statutory aggravating circumstances that the murder was committed

¹ The transcripts of these hearings are found in the Appendix to the Petition for Writ of Certiorari at **App. pp. 1-14; 15-33; & 34-72**, respectively.

while in the commission of robbery while armed with a deadly weapon; that Moore, by his act of murder, had knowingly created a risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and that Moore had committed the murder for the purpose of receiving money or a thing of monetary value. § 16-3-20(C)(a)(1), (3)-(4) & (d). Judge Clary also submitted the statutory mitigating circumstances found in § 16-3-20(C)(b)(2), & (6)-(7).

The jury found the existence of each of the statutory aggravating circumstances alleged by the prosecution and it sentenced Moore to death. Judge Clary imposed the sentence of death for murder, and he sentenced Moore to five years for the weapons charge, ten years for AWIK and thirty years for armed robbery. **App. pp. 1609-1763; 2982-83; 2986; 2989.**

Moore timely served and filed a notice of appeal. Deputy Chief Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, represented Moore on direct appeal. On October 16, 2003, Moore filed a Final Brief of Appellant, in which he raised the following issues:

1. The judge erred in the guilt phase by preventing Moore from stressing the gravity of the decision facing the jury by arguing, "The State is seeking the death penalty on me, which means my very life is at stake." The judge abused his discretion by ruling that Moore could not mention punishment, but was limited solely to a discussion of "the testimony and evidence that has been presented."
2. The judge erred during the sentencing phase by once again limiting Moore's closing argument "to the evidence that has been presented and to the issues concerning the sentence imposed." Since S.C. Code Sections 16-3-20© and 16-3-28 afford a capital defendant the opportunity to ask for mercy and express feelings of remorse, this arbitrary limitation was an abuse of discretion and rendered Moore's purported waiver of closing argument involuntary.

The State filed a Final Brief of Respondent on September 15, 2003. It restated the issues as follows:

I. The trial judge did not abuse his discretion by ruling that Appellant could not argue "my very life is at stake" in his guilt phase closing argument because Appellant's argument was not relevant to the question of his guilt or innocence, which was the only question before the guilt phase jury.

II. Appellant's complaints about the trial judge's conduct of the on-the-record waiver of Appellant's right to make a closing argument in the sentencing phase is not properly before the Court because there was no objection at trial.

The South Carolina Supreme Court affirmed Moore's convictions and death sentence in a published decision filed on March 1, 2004. *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004). It sent the Remittitur to the Spartanburg County Clerk of Court on March 18, 2004.

On March 16, 2004, Moore (through Mr. Dudek) petitioned the South Carolina Supreme Court for a stay of execution. In an Order dated April 4, 2004, the Court granted a stay, pursuant to *In Re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996); it appointed the Honorable Larry R. Patterson to preside over the case; and it granted him exclusive jurisdiction over the matter. In accordance with *In Re Stays of Execution*, Judge Patterson held a hearing on July 22, 1999, to determine whether Moore desired to pursue Post-Conviction Relief and whether he wished to have counsel appointed. On June 17, 2004, Judge Patterson appointed Ms. Armstrong and Kathryn Hudgins, Esquire, to represent Moore. James M. Morton, Esquire, was thereafter substituted for Ms. Hudgins.

Moore then filed an Initial Application for Post-Conviction Relief (2004-CP-42-2713), which was dated August 8, 2004. **App. pp. 1766-69.** He raised two allegations of ineffective assistance of counsel in his Initial PCR Application:

[A] Ineffective assistance of counsel in violation of the Fifth, sixth and Fourteenth Amendments to the United States Constitution. Counsel was ineffective for failing to preserve for appellate review the question of whether defendant's waiver of his right to make a closing phase argument was rendered involuntary due to the trial

court's admonition to him. State v. Perez, 334 SC 563, 514 S.E.2d 754 (1999); State v. Hall, 312 SC 95, 439 S.E.2d 278 (1994).

[B] Ineffective assistance of counsel in violation of the Fifth, sixth and Fourteenth Amendments to the United States Constitution. Counsel failed to perform an adequate investigation into evidence in mitigation. Counsel produced only two lay witnesses during the penalty phase, and presented no expert evidence on applicant's behalf. Eddings v. Oklahoma, 455. US 104 (1982).

The State made its Return on August 4, 2005. **App. pp. 1770-87.** After Judge Patterson's retirement, the case was assigned to the Honorable Roger L. Couch.

Moore submitted his Amended Application for Post-Conviction Relief on December 31, 2010. **App. pp. 1788-95.** In pertinent part, he alleged that:

10.b. Trial counsel was ineffective in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and federal laws, South Carolina Constitution and South Carolina state law due to their failure to perform a reasonable investigation into Applicant's background and family life, resulting in a sentencing proceeding that was fundamentally unfair and assured a death verdict for Applicant would be returned by the jury. Trial counsel failed to conduct any investigation in the state of Michigan, where Applicant was born and raised. Had counsel conducted a reasonable investigation into Applicant's background, they would have learned that Applicant comes from a large family, had numerous relatives who could have testified to his good character and struggle with addiction, and these relatives and/or friends would have been willing to testify on Applicant's behalf during his sentencing proceeding at trial. Failure to conduct a reasonable investigation into potential avenues of mitigation is conduct failing below what is required of trial counsel in a capital case. Wiggins v. Smith, 539 U.S. 510 (2003); Strickland v. Washington, 466 U.S. 688 (1984) ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id., 466 U.S. at 691); Eddings v. Oklahoma, 455 U.S. 104 (1982).

10.c. Applicant was denied the right to effective assistance of counsel at both the trial and sentencing phases in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, federal law, South Carolina State Constitution, and South Carolina law in that trial counsel failed to properly and adequately investigate and prepare to confront and rebut the State's alleged physical evidence, and further trial counsel failed to

present its own expert or evidence to rebut or explain such physical evidence and/or object that ballistics and firearms and serology testimony was inadmissible in that it failed to meet the mandates of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and State v. Jones, 273 S.C. 723 (1979). Counsel's unreasonable omissions denied Applicant an opportunity to show to the jury he acted in self defense[.]

This incident involved a late night shoot out in a convenience store. Multiple gun shots involving two guns were fired. The defendant was wounded in the arm and chest and the victim was mortally wounded. There is undisputed evidence that the victim owned and/or possessed both guns involved and no evidence Applicant possessed any gun until he wrestled one of the guns from the victim. There was a great deal of evidence and testimony presented by the Solicitor regarding multiple guns, ballistics, shell casings, bullet jackets, bullet fragments, fingerprints, trace evidence, [gunshot] residue, blood, blood spatter, DNA, and pathology. Much of this testimony is subject to attack on the basis of its questionable admissibility. Even if admissible, the evidence was easily contradicted and/or explained in a manner consistent with "circumstances other than the guilt of the accused." Trial counsel never retained its own expert to assist with the forensic issues involved with the during his sentencing proceeding at trial. Thus, trial counsel did not adequately investigate or prepare to deny, rebut, or explain the State's physical evidence. Gardner v. Florida, 430 U.S. 122, 50 1.Ed.2d 339, 97 S.Ct. 399 (1976). Had counsel hired appropriate forensic experts, including a forensic pathologist, who could have testified as to the single bullet having killed James Mahoney, rather than two as opined by the state, and a crime scene analyst, who could have provided testimony concerning the likely origin of bullets, bullet fragments, shell casings, and general crime scene analysis, there is a reasonable probability that the guilt and/or penalty phase would have had a different outcome. Strickland v. Washington, *supra*.

- 10.g. Applicant was denied due process of law and also denied the right to effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, the South Carolina Constitution and South Carolina law because trial counsel failed to present adaptability evidence from James Aiken, a nationally recognized expert in the field of penal institution safety and management. Mr. Aiken was prepared and available to testify on behalf of Applicant, but was never called as a witness. Counsel's unreasonable decision to not call Mr. Aiken opened the door for the state's damning closing argument that Applicant had shown "escalating violence," thereby injecting the fear of Applicant's future dangerousness into the minds of the jurors, who were never told that Applicant would be safely housed for the duration of his life. The prejudice to Applicant stemming from

counsel's inexplicable (and seemingly eleventh hour) decision to discard the only defense expert is manifest. Strickland v. Washington, *supra*.

App. pp. 1789-90; 1792-93. His Supplemental Amendments to Application for Post Conviction Relief were dated January 5, 2011. **App. 1796-97.**

Judge Couch held a hearing into the matter on January 30, February 1 and February 3-4, 2011, at the Spartanburg County Courthouse. Moore was present at the hearing; and Ms. Armstrong and Mr. Morton represented him. Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General Anthony Mabry represented the State.² **App. pp. 1962-2740.**

Judge Couch filed an Order of Dismissal on August 1, 2011. **App. 2879-2979.** Moore timely served his notice of appeal. He filed his Petition for Writ of Certiorari on July 18, 2012. He is currently represented by Chief Appellate Defender Robert M. Dudek and Appellate Defender Susan Barber Hackett. Respondent now makes its Return to the Petition.

² Moore testified on his own behalf at the hearing, and he presented testimony from Mr. Mabry; George Gibson; Pete Skidmore; Wilbert Casey; Charles R. "Rusty" Clevenger; James Aiken; Stephen L. Denton; Paul Dorman; Dr. Sandra E. Conradi; and Michael Morin Esquire. He also introduced the depositions of family members Harold Harrington, Dorothy J. Hooper, Cecil J. Hooper, Arma Nell Hadley, Maurice Moore and James A. Moore. **App. pp. 1798-1923.** The State presented testimony from Susan Porter, Esquire; R. Keith Kelly, Esquire; and the Honorable Donnie Willingham.

ARGUMENTS

I. This Court must deny certiorari because there is evidence of probative value to support the PCR judge's finding that counsel made a reasonable investigation for and presentation of evidence in mitigation of sentence, but that Moore and his extended family in Michigan did not cooperate. Also, there is evidence supporting the finding that Moore did not establish prejudice from counsel's failure to present the family members whose testimony was offered in PCR, particularly where one witness - Moore's brother James - was incarcerated at the time of Moore's trial.

Moore's first argument is that trial counsel was ineffective because they failed to adequately investigate for, develop and present mitigation evidence from family members of Moore. Respondent submits that certiorari must be denied because there is evidence of probative value to support the PCR judge's finding that counsel made a reasonable investigation for and presentation of evidence in mitigation of sentence, but that Moore and his extended family in Michigan did not cooperate. Also, there is evidence supporting the finding that Moore did not establish prejudice from counsel's failure to present the family members whose testimony was offered in PCR, particularly where one witness - Moore's brother James - was incarcerated at the time of his trial.

A. Standard of Review on Certiorari.

This Court must deny certiorari if there is any evidence of probative value to support the PCR judge's findings, *Suber v. State*, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007); *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989), and it will only reverse the decision of the PCR judge when there is no probative evidence to support his findings or the decision is controlled by an error of law. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000). Moore cannot meet this burden of proof.

B. Evidence presented at PCR hearing.

In support of this claim, Moore presented the deposition testimony of family members Harold

Harrington, Dorothy J. Hooper, Cecil J. Hooper, Arma Nell Hadley, Maurice Moore and James A. Moore. **App. pp. 1798-1923.**

Mrs. Hooper is Moore's aunt. She was never contacted by defense counsel and was unaware of Moore's death sentence until 2006. However, she claimed that she would have spoken to an investigator if she had been contacted prior to the trial. She also indicated that Moore's mother, her sister, had died by the time of the trial and that no family members contacted her and asked her to testify on Moore's behalf. Nor did either Moore's father or sister tell her that they had been contacted by an investigator who wanted to talk to them about Moore. **App. pp. 1801-04; 1807-08; 1814.**

Mrs. Hooper testified that Moore was a good child; that he played with her children; that he never gave her any trouble; that he was respectful; and that he was not aggressive. Also, he came from a good family and they made him go to church. If she had testified, she would have asked the jury to spare Moore's life. **App. pp. 1804-06; 1812.** On cross-examination, she indicated that Moore's family was upset about him being charged with murder, but she claimed that they had never told her that he had been in trouble before the murder and that she was unaware of any of his prior criminal the street. **App. pp. 1808-11.**

Cecil J. Hooper is Dorothy Hooper's husband and he has known Moore all of Moore's life. Moore grew up with Mr. Hooper's son, and Hooper was around him until Moore left Michigan. He learned of the murder charge against Moore through his wife. He likewise indicated that he was never contacted by defense counsel and that he would have been willing to testify if he had been asked to do so. **App. pp. 1819-22; 1824.**

According to Mr. Hooper, Moore was "a nice kid growing up," and did not have any

behavioral problems. Moore played football with Mr. Hooper and Mr. Hooper's children.³ He would have asked for mercy on behalf of Moore. **App. pp. 1821-22.** On cross-examination, Mr. Hooper admitted that he had no idea when Moore first began getting into trouble, and that Moore's family did not tell him about Moore's prior criminal history. Also, none of Moore's family members asked him to come the South Carolina and testify or otherwise contacted him about the case. **App. pp. 1822-25.**

Harold Harrington testified that he is Moore's the maternal uncle and that he has known Moore all of Moore's life. However, he was unaware of in this case until PCR counsel contacted him. If he had been called as a witness, he would have asked the jury to be lenient. Also, he would have told the jury that Moore "was a good person and not the type of person to go out and try to harm anybody." Further, Mr. Harrington would have asked jurors not to impose the death penalty because Moore's family loved him, and "we've known him a long time and he's always been a good person." **App. pp. 1831-34.**

On cross-examination, Mr. Harrington claimed that he saw Moore "several times a week," and that he saw him Moore until Moore had reached his twenties. Mr. Harrington likewise claimed it he could not remember Moore acting aggressively. However, Mr. Harrington admitted that he was unaware of Moore's prior criminal history or incarceration. Likewise, Mr. Harrington was unaware of Moore's use of alcohol or drugs and he did not learn of the murder charge until shortly after the trial. Finally, Mr. Harrington admitted that he didn't stay close to Moore as Moore grew older and he lost contact with Moore after Moore left the Michigan area. **App. pp. 1835-37.**

Arma Nell Hadley testified that she is also a maternal aunt of Moore. She was unaware of

³ To the contrary, Moore came from a good family and he was told right from wrong. **App p. 1825.**

the murder charge in South Carolina until a couple of years before her deposition, and she never spoke to any attorneys about the case before speaking with collateral counsel. Ms. Hadley testified that she would have been willing to testify on Moore's behalf if she had been asked to do so. **App. pp. 1844-47.**

Ms. Hadley described Moore as "a really nice guy, sweet guy, very sweet, friendly." She indicated that he respected her as his aunt, that he worked hard, that he played on the basketball team at school, and that "he grew up in a family of being around people that was loving." (Sic).⁴ Also, she never had any disciplinary problems with him and she never saw him behave aggressively. She claimed that if she had been called upon to testify on Moore's behalf, she would have testified that "he wasn't that type of guy, he didn't seem to be what I knew him, when we grew up together with my family ... he didn't seem to have that kind of personality." Further, she would have told the jury that she loved him, and she would have asked the jury to be considerate of him as a human being because she did not think that he deserved to die. **App. pp. 1847-49.**

On cross-examination, she admitted that Moore's father never told her about the murder, even though he lived next door to her, because during this time period "he didn't tell me too much." Also, she was only aware of one occasion in which Moore had gotten into trouble before the murder. She did not ask his family why he was in jail on that occasion, and his family never told her about any of his other convictions.⁵ Moore moved to Detroit with his girlfriend after he graduated from high school, Ms. Hadley lost track of him when he moved, and she did not know what kind of life

⁴ She testified that Moore came from a "very good home," and that he was made to go to church. **App. p. 1858.**

⁵ Likewise, she was unaware if of whether his brothers had been in any trouble with the law. **App. p. 1857.**

he was living after he moved. **App. pp. 1850-59.**

Maurice Moore testified that he is Moore's older brother. He testified on direct examination that he became aware of the murder charge from his brother's wife "a few months after it happened." While no one ever came and spoke with him before Moore's trial, he remembered receiving a phone call from someone he thought had said that she was Moore's lawyer and had explained Moore's situation. This caller said she was going to call back, but she did not do so. He further claimed that he would have been willing to come to South Carolina and testify if he had been asked. **App pp. 1896-1900; 1904-05.**

Maurice claimed that his brother "was a loving person. I know he got in a little bit of trouble, but as far as I know as my brother, he didn't go around looking for trouble, ... it seemed like, you know, sometimes... you be in a certain situation where you be around the wrong people and I know he would do that a couple times, but other than that, I can't see him in the crime that he's and now to do something like that." He admitted that Moore had gotten into some "minor trouble" but reiterated that Moore was "a caring, loving person" and a "good brother," whom he loved. **App. pp. 1900-01.**

Maurice further claimed that he would liked to ask the jury to have mercy and spare his brother's life. Although Maurice was sorry that someone else's life had been taken, he did not think taking his brother's life was necessary. He added that Moore was "not a monster or nothing like that ... He didn't go around carrying a gun looking for trouble. I guess he was just in bad situations." **App. pp. 1902-03.**

On cross-examination, he admitted that he and Moore's wife "lost contact" about three or four months after the murder. He also admitted that Moore's wife had called his girlfriend and not

him. Although Maurice had the telephone number of Moore and Moore's wife, he did not call her back because he no longer had her telephone number and she did not call him. Maurice never called South Carolina and he never wrote any letters because he does not write letters. Moore wrote letters to Maurice's girlfriend, but Maurice did not read the letters because he was upset with his brother for not writing him. **App. pp. 1903-10.**

Maurice contradicted himself and stated that Moore had telephoned him on either one or three occasions and that they had discussed the charges. However, Maurice claimed that he could not remember whether or not Moore told him about the trial date. Also, Moore did not ask him to come testify at trial, and Maurice did not offer to testify.⁶ Moore had called their father, "but they didn't have no conversation." Maurice further claimed that Moore was in contact with other family members after being arrested for murder. **App. pp. 1908-12.**

Maurice was unaware of several of his brother's prior convictions and he lost track of his brother after Moore moved to South Carolina. However, Maurice knew of Moore's 1987 conviction for attempted breaking and entering, and admitted that the this was "looking for trouble." He also knew of two other occasions where Moore had been convicted, and he had heard "in the streets" that Moore was using crack. **App. pp. 1912-16.**

Finally, Maurice admitted that he had been convicted in 1988 of larceny and conspiracy, for which she received a six month sentence. He further admitted that all of the brothers were raised in a good family; that they had been taught right from wrong by their parents; and that Moore knew that it was wrong to steal, break into businesses or assault people. **App. pp. 1916-18; 1924-35.**

⁶ Maurice could not give a reason for his failure to offer to come to South Carolina and testify. **App. pp. 1908-09.**

James Allen Moore testified that he is the youngest of the brothers in Moore's family and that Moore was eight or nine years older than him. He did not become aware of the murder charge until after Moore had been convicted. He was not contacted by his brother's lawyers and he indicated that he would have been willing to testify if he had been asked. **App. pp. 1865-69.**

James claimed that Moore "was a real nice, nice man as I can remember growing up." James would have wanted the jury to know that Moore was a good man and that Moore had a lot of people who loved him. He also would have asked the jury for mercy. Yet, he had to admit that he had not seen his brother "in I don't know how many years."⁷ **App. pp. 1869-70.**

On direct examination and throughout most of cross-examination, James claimed that he did not know why his family had not told him about Moore's charges and he suggested that it was because he was the baby of the family. **App. pp. 1868; 1870; 1882-83.** On cross-examination, however, he reluctantly admitted that he had two drug-related convictions in 2000, and that he was sentenced on March 27, 2000 to "[a] couple years" in prison. As a result, he was incarcerated at the time of his brother's trial. **App. pp. 1884-85.**⁸

Further, James admitted that Moore had lived in Detroit for a period of time and that he lost track of Moore after Moore moved to South Carolina. Moore finally began writing him after Moore was in SCDC. **App. pp. 1871-73.** Cross-examination further established that although James claimed that he had been living in his father's home, he never heard his family discussing the various

⁷ He thought that he had last seen Moore when James was eighteen. **App. pp. 1871; 1876.**

⁸ His first conviction was for possession of a controlled substance an amount less than fifty grams. He received a sentence of between two years and 240 months. The other 2000 conviction was an identical charge and he received an identical sentence. James likewise had a 1994 conviction for possession of a controlled substance, for which she received a sentence of between two and twenty years in prison. **App. pp. 1884-85.**

legal problems that Moore had, and he was supposedly unaware of whether or not his father was upset with Moore as a result of the murder charge. Likewise, Moore supposedly never mentioned the murder in their letters and James refused to admit that his brother had taken someone else's life. **App. pp. 1872-79.**

Moore testified that he had moved to South Carolina roughly ten or twelve years before the murder. He has two children but he has never been legally married. Linda Byrd is the mother of his two children. The rest of his family is in Michigan. He testified that he has his father, five brothers and two sisters, as well as multiple aunts, uncles, first cousins, nieces and nephews. While in high school, he played basketball and wrestled. He also graduated from high school. **App. pp. 2256-57; 2259.**

Moore claimed that when his attorneys asked him about his family in Michigan, he provided them with names, addresses and telephone numbers. He further contended that "I think maybe they tried to call a few of the numbers and that's as far as they went." Neither of his attorneys went to Michigan and he was unaware of whether anybody went there on their behalf. Counsel did not call any of his family members from Michigan as witnesses in the sentencing phase of the trial. **App. pp. 2259-62; 2278-79; 2282.**

On cross-examination, Moore denied that his family did not want anything to do with him following his arrest for murder. However, he admitted that he wrote **Respondent's Exhibit 19**, and that his family, "to some extent," had told him to get himself out of the situation. **App. pp. 2286-89.** Also, he remembered the defense's mitigation expert, Ms. Drucy Glass, but he claimed that "I am sure I gave her all the information that I had," which may have included information that two of his brothers were in prison. He was unsure of whether she had made any effort to contact his family

members and he testified that she never told him she had contacted any of his family. He likewise denied that she told him that no one had responded to certified letters sent to family members. **App. pp. 2289-91.**

Moore claimed that he had only been expelled once in high school for fighting, but he admitted that his problems with the law began while he was in high school. Nevertheless, he attempted to downplay his various parole violations and other criminal convictions. In particular, he denied that he committed any of the crimes while addicted to crack cocaine. While he admitted that he was using crack during the time period when the murder occurred, he denied using crack that night or telling anyone he had used it. Also, he denied that his blood had been drawn that night or that crack was the motive for the armed robbery. Further, and contrary to testimony from several of his relatives, he claimed that he had never lived in Detroit. **App. pp. 2261; 2277; 2291-93; 2304-05; 2313-17.**

Michael Morin, Esquire, testified that he was appointed as lead counsel in this case shortly after Moore's arrest. Before his appointment in this case, he had tried between two and four non-capital murder cases. He also sat as third chair in the death penalty trials of Theodore Kelly and Jimmy Locklair.⁹ **App. pp. 2342-45; 2508-09.**

Once the State had served the notice of intent to seek the death penalty, Mr. Morin knew that a second attorney would be appointed; and he wanted to have some say-so in deciding who would be appointed because he was concerned that the court might appoint an attorney who lacked

⁹ Mr. Morin graduated from law school in 1992 and he went to work for Brooks law firm in the Fall, where he remained until 1995. In April 1995, he was hired by the Spartanburg County Public Defender's Office. He worked in the public defender's office until December 2002. He then began working in the Seventh Circuit Solicitor's Office on January 1, 2003 and he was currently employed by the Seventh Circuit Solicitor's Office in Spartanburg. **App. pp. 2342-43.**

experience in criminal trial work. He had previously worked with Mr. Kelly and was aware that Mr. Kelly had experience in trying criminal cases. Therefore, he asked Mr. Kelly if Mr. Kelly would accept appointment in this case, and Mr. Kelly agreed. The two lawyers first met and discussed the case of September 19, 2004, and they subsequently met between fifteen and twenty times before the trial.¹⁰ **App. pp. 2345-46; 2519-20.**

Following his appointment, Mr. Morin met with Moore a number of times. **App. pp. 2509-14.** However, the attorneys agreed that his primary responsibility was handling the guilt phase of the trial, whereas the sentencing phase was Mr. Kelly's responsibility. They divided their responsibilities in this fashion based on Mr. Morin's experience in the two other death penalty cases in which he was involved, as well as information learned at CLEs that a lawyer who argues for client's innocence of the guilt phase may lose credibility with the jury in its sentencing phase. He took the responsibility for the guilt phase because he had already investigated the facts related to the guilt phase. **App. pp. 2521-22.**

Nevertheless, Mr. Morin was also involved in the investigation for mitigating evidence. First, he explained to Moore the need for Moore to cooperate with the experts hired by the defense and he would have explained the types of mitigating information that the defense was seeking. Also, his notes of January 10, 2001 reflect that he gave Moore a copy of a social history packet prepared by Ms. Drucy Glass, who had been hired by the defense as a mitigation specialist. After Moore had filled out the packet, counsel had some conversations with him about his family. **App. pp. 2551-52.**

Moore had a lot of extended family in Michigan. When counsel tried to contact them,

¹⁰ Some meetings were in the Public Defender's Office, while others were with Moore and/or Drucy Glass, the defense mitigation expert. **App. pp. 2520-21.**

however, the family members told the defense that “he’s gonna have to take care of it or something to that effect.” According to Mr. Morin, Moore was mad at his family and there was friction between his family and him. **App. pp. 2552-53; 2668-69.**

For his part, Moore wrote counsel a letter on April 20, 2001 (**Respondent’s Exhibit 19**), in which he stated “I’m writing to inform you that I am unable to supply you the information you want about my family in Michigan.” He thought that his sister, Vanessa, could provide the information and he listed her contact information. He also said,

Whether you call or write, explain the reason for this information. I have not informed them of the [State’s] intention to seek the death penalty. When I was first arrested I asked for their help, and was told “there would be no help coming and to get myself out of this mess.” At that point I made up my mind not to call them ever again for any reason. I [meant] then, I mean it now. This is why if you really want this information, you need to contact her for yourself. I’m not trying to be uncooperative, it’s just the way it is.

Respondent’s Exhibit 19, App. p. 2805. Counsel felt that Moore was competent to make this decision. **App. p. 2577.**

Additionally, Mr. Morin’s May 9, 2001 notes reflect that when he called Moore’s father in Michigan, the person answering the phone told him, “nobody by the name of Moore lived there.” Mr. Morin then called one of Moore’s sisters, but no one answered the phone. When counsel spoke with Moore’s common-law wife, she was unable to help because she did not know much about his family in Michigan. **App. pp. 2553-54.**

Mr. Morin described Ms. Glass’s main function as trying to collect “as much ... background information, family information, those kind of things, that were specific to Mr. Moore that would be in the penalty phase.” The information developed by her would have gone more directly to Mr. Kelly. **App. p. 2555.**

Also, Mr. Morin had retained the services of a private investigator, Pete Skidmore. Although Mr. Skidmore's primary responsibilities concerned interviewing potential guilt phase witnesses, Mr. Morin also had Mr. Skidmore attempt to locate ten co-workers who might be potential witnesses in the sentencing phase. Unfortunately, none of these witnesses provided information that was beneficial to the case in mitigation. **App. pp. 2057-58; 2532-38; Respondent's Ex. 21, App. pp. 2808-09.**

Additionally, Mr. Morin had Moore evaluated by a neuropsychologist, Dr. James Evans. Mr. Morin explained that "the State was trying to get Mr. Moore to be sent to the state mental hospital, which I wanted to prevent because that would get the State information about his mental health. Plus would... [it] may give them an insight into what he was saying."¹¹ (Sic). **App. pp. 2528-30.**

Dr. Evans' report (**Respondent's Exhibit 20, App. pp. 2606-07**) reflects that Moore "claimed no history of significant head injuries, serious illnesses, psychiatric type treatment or seizures. Moore likewise denied "ever having used alcohol, or illegal drugs to any significant degree." Moore scored within average range on the Weschler Adult Intelligence Scale – III, and the primary findings of the other neuropsychological testing were that Moore "showed evidence of significant problems with response control (tendency to respond impulsively) and mild problems with visual attention." Dr. Evans also reported that Moore "showed some evidence of difficulty dealing with emotional responsivity. Specifically, it seems likely that he would lose intellectual efficiency to greater than average degrees under conditions of continuing emotional arousal." Dr. Evans told Mr. Morin that this meant that Moore was showing signs of antisocial behavior, a finding

¹¹ The trial judge had given counsel a deadline by which to decide whether or not Moore's mental health was appointed be at issue. Therefore, Mr. Morin asked Dr. Evans to evaluate Moore than provide the defense with its own evaluation of Moore's mental status. **App. p. 2528.**

which Mr. Morin did not want to present to the jury because the State's doctors would be able to portray Moore as a monster. **App. pp. 2528-30; Respondent's Ex. 20, App. pp. 2606-07.**

Keith Kelly testified that he was appointed as the second chair in the defense of Mr. Moore on April 3, 2001. He confirmed that he and Ms. Morin had previously practiced together in the same law office, and that they knew each other. Also, he had been counsel in three death penalty cases, he had tried two or three non-capital murder cases and he had extensive experience in handling drug cases, prior to his appointment and this case. **App. pp. 2626-29; 2835-36; 2659-60.**¹²

Mr. Kelly and Mr. Morin had first met on March 14, 2001. At some point, they decided that one lawyer should be in charge of the sentencing phase and one lawyer in charge of the guilt phase of the trial. Mr. Morin elected to assume responsibility for the guilt phase and Mr. Kelly handled the sentencing phase. **App. p. 2629; 2660.**¹³

Following his appointment, Mr. Kelly and Mr. Morin met with Teresa Norris, Esquire, at the Center for Capital Litigation. There, they were given the name of Drucy Glass as a mitigation expert.¹⁴ Also, Mr. Kelly had telephone conversations with her husband, John H Blume, Esquire, an attorney with experience in handling capital cases, on several occasions before and during the trial. He had likewise spoken with Rick Vieth and Mitch Slade, Esquires, because they had previously

¹² Between 40 and 50% of his practice has been in General Sessions since he was admitted to practice in 1988. **App. p. 2628.** Respondent introduced a copy of Mr. Kelly's time sheet for the trial, as **Respondent's Exhibit 24.** Mr. Kelly indicated that he actually spent more time on the case and was reflected in his time sheet, but that he had done everything set forth in the time sheet. **App. 2631-33; Respondent's Ex. 24, App. pp. 2837-45.**

¹³ He corroborated Mr. Morin's testimony that this was done to maintain credibility with the jury. **App. pp. 2629-30.**

¹⁴ Ms. Glass was hired before September 4, 2001. **App. pp. 2695-97.**

defended capital cases. **App. pp. 2635-36; 2640; 2661-63.**

Mr. Kelly met with Moore between a dozen and eighteen times before trial. In their meetings, they discussed a possible plea or a life sentence.¹⁵ **App. pp. 2630-31.** Mr. Kelly testified that, based on his conversations with Ms. Glass and her notes, it appeared that Moore's mother "had been a matriarch of the family and that she... sort of held the family together," and that the family was not as close after her death. Although Mr. Kelly did not recall whether Moore had cut off his family or they had cut him off, counsel was aware that Moore and his family were no longer close. Counsel tried to get Moore's cooperation in developing the family information, but Moore wrote the April 20, 2001 letter discussed above (**Respondent's Exhibit 19, App. p. 2805**). **App. pp 2638-40; 2664-70.**

Mr. Kelly could not recall whether or not Moore had related a history of alcohol or drug addiction, but he was aware of this information from records provided to him by Ms. Glass. Ms. Glass also provided counsel with a thirteen page report detailing her efforts to contact Moore's family members, her search for school records, and a history of Moore's various arrests and convictions (*see Respondent's Ex. 25, App. pp. 2848-60*). **App. pp. 2637-38; 2663-64; 2668-69.** Mr. Kelly felt that Ms. Glass "was good about telling us what she found. I mean, she had experience and [was] suppose[d] to know what she was doing, and [she] was putting ... her report together about the family and so forth." **App. p. 2663.**

Mr. Kelly explained that he is a pilot and that counsel would have personally flown to

¹⁵ In every conversations with the Deputy Solicitor, the defense was asked to "come to them with a number [of years] before they would go to the family to see ... if the family would be willing to do to do that versus a trial." However, Moore wanted to serve only fifteen years "and that was not a possibility." Counsel explained this to Moore. **App. p. 2631.**

Michigan and interviewed family members. However, Ms. Glass was unable to get in touch with any of the family members. Also, Moore did not try to assist by writing his family and he did not provide counsel with any names or contact information for family members by that justified further investigation of his family members. Further, Mr. Kelly did not see any advantage to Moore in presenting the brothers who were incarcerated for drug related offenses as witnesses “[b]ecause they were inmates according to this in the Michigan State Prison. I mean they would not be helpful witnesses for us.” **App. 2664-73; 2692-95.**

Ms. Glass’ report reflects that she left numerous messages for Moore’s father, James Maurice Moore, on his home telephone in Mount Clemens, Michigan. She also sent him a certified letter on September 17, 2001. However, he did not return her phone calls and apparently did not respond to the letter. The report also reflects that Moore stated that he did not believe he would be cut off from his family if his mother was still alive time of trial. Ms. Glass also attempted to contact Moore’s brother, Maurice Moore, but his telephone had a privacy line and was not set up to accept incoming calls unless the caller had been approved. Maurice likewise did not respond to a certified letter dated September 17, 2001. **App. pp. 2848-49.**

Ms. Glass’ report further reflects that there was no listing in the telephone directory for Moore’s brother, Jerry Lee Moore; and that Moore told her that his brother Michael lived “somewhere in Alabama.” However, he did not give her an address. Also, Moore’s sister, Vanessa, told Moore’s common-law wife (Linda Byrd) that “Richard is dead to us.” Additionally, the report lists the names of another sister and brothers Phillip Duran Moore and James Allen Moore. However, the address for both men is “Michigan State Prison” and there is a notation that “*[a]ccording to Richard, both of his younger brothers or in prison for drugs.” **App. pp. 2849-50.**

Mr. Kelly advised Moore of his right to testify in the sentencing phase of the trial. While Mr. Kelly did not give advice as to whether or not Moore should testify, Moore did not wish to do so. **App. pp. 2641-42.**

With respect to the two mitigation witnesses who testified and sentencing, Linda Byrd and Moore's stepson, counsel explained the reason for presenting them:

we were begging for mercy here at this point, and I think that ... you'll see that the State's theory was he is death eligible, and I was saying he's life eligible because he has a family. He has a wife who loves him. ... Drucy's report shows that ... Mrs. Byrd, even though he's incarcerated for a long time here in Spartanburg, she visited regularly. She left money for him, I think it was about \$20 that he could have. I don't think she missed a single week.

Her child, his stepson, as I recall, called him daddy, referred to him as daddy. And the other two children were smaller children. They did not testify because of their ages. And... I recall making my notes for the closing and at my house sitting... In my glassed in room that night, and ... the whole theory was put these folks up ... to [show] that he's life eligible. He can parent from behind bars. He can talk about basketball games. He can talk about soccer. He... can help with Spanish lessons, if necessary.... But ... he can do all of those things.

App. pp. 2645-46.

B. The PCR judge's ruling.

The PCR judge found that Moore had failed to prove either deficient performance or prejudice. **App. pp. 2962-71.** He found that counsel made a reasonable investigation for and presentation of mitigating evidence. He further found that counsel had made a reasonable effort to locate Moore's family members in Michigan, even though Moore "was largely uncooperative it in their endeavor and initially did not want these members to assist." The PCR judge also found that counsel had made a reasonable investigation for potential co-workers to testify in the sentencing phase, with the use of their private investigator. **App. pp. 2963-64.**

The PCR judge found that the reasonable efforts to search for mitigating witnesses included hiring Ms. Glass, and that Ms. Glass' report revealed why Moore's father did not respond to either telephone calls or a certified letter: "Moore related to Ms. Glass that he had been 'cut off' by his family in Michigan. Moore also told trial counsel that he had asked his family for help and he was told 'there would be no help coming, and to give myself out of this mess.'" The Court further found that **State's Exhibit 25**¹⁶ reflected Moore's criminal history, and that "[h]is life of crime set forth in detail in Ms. Glass' report explains why his sister, Vanessa, stated to Moore's wife: 'Richard is dead to us. ... It also explains why applicant's family told him: 'there would be no help coming [from Michigan], and to get myself out of this mess.'" **App. pp. 2964-66.**

The PCR judge found that counsel's testimony was credible. Further, he found that both trial counsel and Ms. Glass made unsuccessful but reasonable attempts to locate and obtain the cooperation of Moore's family members in Michigan, but that these family members would not answer telephone calls or respond to certified letters sent to them. Finally, the PCR judge found that Moore had failed to prove that he was prejudiced by counsel's performance. He found that the deposition testimony of Moore's family members concerning their willingness to testify was not credible; that it was objectively reasonable for counsel not to seek out Moore's two brothers who were incarcerated at the time of his trial; and that the family members who testified by way of deposition did not offer any additional mitigating evidence that would create a reasonable probability that "the balance of aggravating and mitigating circumstances did not warrant death' if his Michigan family members had testified at sentencing." **App. pp. 2967-71.**

¹⁶ While the Order erroneously refers to "State's Exhibit 19," the letter by Moore, it is clear that the PCR judge was referring to and relying upon Ms. Glass' report, **Respondent's Exhibit 25.**

C. Discussion.

To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. See *Wiggins v. Smith*, 539 U.S.510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). "Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective as the time." *Id.* at 689. Also, a reviewing court must apply a "strong presumption" that counsel's representation was within the 'wide range' of reasonable professional assistance. *Id.* "The challenger's burden is to 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*, 131 S.Ct. 770, 787 (2011) (quoting *Strickland*, 466 U.S. at 687).¹⁷

The inmate must also demonstrate that he was prejudiced by counsel's deficient performance. *Strickland*, 466 U.S. at 691. To do so, he must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.¹⁸ In a capital sentencing proceeding, he must prove that "there is a reasonable probability that

¹⁷ "Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" *Id.* at 787 (citation omitted). See also *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight").

¹⁸ It is insufficient to prove "that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, "[c]ounsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Richter*, 131 S.Ct. at 787 (quoting *Strickland*, 466 U.S. at 687).

... the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. *See also Wiggins*, 539 U.S. at 537.

Counsel has a duty to adequately investigate and present evidence in mitigation of punishment. *Williams v. Taylor*, 529 U.S. 362, 395 (2000); *Byram v. Ozmint*, 339 F.3d 203, 209 (4th Cir. 2003). However, counsel is only required to make a reasonable investigation for possible mitigating evidence. *Matthews v. Evatt*, 105 F.3d 907, 919 (4th Cir.1997). As the Court emphasized in *Wiggins*,

we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*, 466 U.S., at 689. **We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation."** *Id.*, at 690-691. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id.*, at 691.

Wiggins, 539 U.S. at 533 (emphasis added). *See also Lovitt v. True*, 403 F.3d 171, 179 (4th Cir. 2005); *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005); *Id* at 157 (Traxler, J., concurring) (citing *Wiggins* and *Strickland*).

This Court must deny certiorari because there is evidence to support the PCR judge's findings. First, there is nothing in the record to refute the PCR judge's finding that counsel's testimony was credible. To the contrary, the testimony of both attorneys is internally consistent. Also, counsel's testimony is consistent with Ms. Glass' report (**Respondent's Exhibit 25, App pp. 2848-60**; Moore's April 20, 2001 letter (**Respondent's Exhibit 19, App. p. 2805**); and the letter

from Mr. Morin to the defense's private investigator, **Respondent's Ex. 21, App. pp. 2808-09.** Likewise, the findings that the testimony of Moore and several of his family members, whose depositions were taken, lacked credibility is supported by the record, as was the finding that the family had "cut off" Moore, as the result of his lengthy history of criminal behavior, which had escalated in violence over the years.

Based upon this credible evidence, it is clear that counsel made more than reasonable efforts to secure the assistance of Moore's family members in presenting the defense's case in mitigation. Mr. Morin made efforts under *Strickland* and *Wiggins* to contact Moore's father and his sister. However, his family refused to cooperate: when Mr. Morin called Moore's father on May 9, 2001, the person answering the phone told him, "nobody by the name of Moore lived there." Mr. Morin then called one of Moore's sisters, but no one answered the phone.

Even though counsel had been unsuccessful in his efforts to contact Moore's family in Michigan, they did not stop the efforts to interview his family members there. Instead, they hired Ms. Glass, an experienced mitigation specialist. Unfortunately, she, too, was unable to get family members to cooperate in Moore's defense, with her phone calls being unanswered and certified letters being ignored. Instead, Moore's sister told Ms. Byrd that "Richard is dead to us," and Moore indicated that his two youngest brothers were serving sentences on drug-related charges at the time.

Likewise, Moore refused to independently contact family members or otherwise assist counsel in getting any of his family to testify in mitigation because his family had refused to help him when he was first arrested and they told him to get himself out of the "mess." As discussed by Mr. Kelly, he simply did not give counsel any information that justified further investigation of his

Michigan family members.¹⁹ Indeed, if Moore's trial counsel's case in mitigation evidence was somehow inadequate because the Michigan family members were not called, any deficiency would be directly attributable to Moore and to no one else, since he refused to assist counsel in their efforts to secure the cooperation of his family members, even though counsel explained the information that they were seeking and Moore was aware that his family was not cooperating. *See Lovitt*, 403 F.3d at 179 (client's instruction not to talk to family, while not a *per se* justification, does figure into counsel's judgment). *See also Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.... In particular, what investigation decisions are reasonable depends critically on such information"); *DeCastro v. Branker*, 642 F.3d 442, 456 (4th Cir. 2011) ("the state court did not act unreasonably in refusing Petitioner's attempt to upend his conviction and sentence based on the information that he failed to timely provide to counsel"); *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005); *Id* at 157 (Traxler, J., concurring) (citing *Wiggins* and *Strickland*); *Sims v. Singletary*, 155 F.3d 1297, 1316 (11th Cir. 1998) (counsel told client of need for mitigating evidence but client said not to bother the family which excused non-presentation of evidence of troubled childhood); *Soria v. Johnson*, 207 F.3d 232, 251 (5th Cir. 2000) (petitioner concealed abuse information despite exhortations to be candid).

¹⁹ Moore contends that the "question presented in the instant case is whether trial counsel's decision not to investigate [Moore's] family history in Michigan was reasonable." **Petition for Writ of Certiorari, p. 27.** As demonstrated, however, counsel did not decide to not to investigate Moore's family history. Rather, they made a decision not to *further* investigate after both counsel and their mitigation specialist had been rebuffed in their reasonable efforts to make contact with his family and Moore had refused to assist them by providing any information that would justify further investigation. *Cf. Bobby v. Van Hook*, 130 S.Ct. 13, 19 (2009) (Court, in pre-AEDPA case, characterizing the issue not as counsel's failure to investigate while potential mitigating evidence stared them in the face, but as a professionally reasonable judgment not to seek more by contacting remote family members).

Further, it was objectively reasonable for counsel to use surrogates, such as Ms. Glass, to attempt to locate and interview potential witnesses, rather than doing so personally. *E.g.*, *Walls v. Bowersox*, 151 F.3d 827, 834, n. 4 (8th Cir. 1998) (interviews conducted by second chair and social worker); *Rhode v. Hall*, 582 F.3d 1273, 1283-84 (11th Cir. 2009) (counsel utilized investigators, reviewed their investigative product, and thereby satisfied investigative responsibilities). Their decision was particularly reasonable once counsel's initial efforts to speak with family members had been rebuffed.²⁰

Moreover, counsel made a reasonable presentation of mitigating evidence through Ms. Byrd and her son, Moore's stepson, since these were the only adult family members willing to cooperate with counsel. In support of his Petition, Moore quotes *Wiggins* for the proposition 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 prosecutor.' [539 U.S.] at 524 (citing *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 11.4.1© (1989))." **Petition for writ of Certiorari, p. 22** (emphasis deleted). However, his argument is not properly before this Court on certiorari because it was not presented to the PCR judge.²¹ *See Evans v. State*, 363 S.C. 495, 503-04, 611 S.E.2d 510, 515 (2005) (an issue must have been raised to and ruled upon by the PCR judge to be preserved for appellate review); *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992) (issue or argument which is neither

²⁰ Although Moore does not challenge counsel's performance for failing to present the testimony of co-workers or an expert opinion on his mental health, the record demonstrates that counsel made a reasonable investigation into these matters, as well.

²¹ In particular, Respondent notes that Moore did not present this argument either in his Amended Application (**App. pp. 1788-97**) or his proposed Order, which he did not include in the Appendix.

raised at PCR hearing nor ruled upon by the PCR court is procedurally barred from appellate review); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (petitioner failed to preserve for review on appeal claim that trial counsel was ineffective for failure to object that sentences constituted cruel and unusual punishment where point was not raised in PCR application or at hearing); *Gary v. State*, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001) (“This issue was not raised below and is not properly before us”). *See also Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (“Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review, and the Court of Appeals erred in addressing the merits of the issues and remanding the matter to the PCR judge”); *Simpson v. Moore*, 367 S.C. 587, 600 n.3, 627 S.E.2d 701, 708 n.3 (2006) (holding that question of whether the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose “a memo to the file written by one of the solicitors” was not properly before state supreme court on certiorari where “the PCR court did not consider whether the State's failure to disclose this memo constituted a *Brady* violation nor did PCR counsel raise the issue in the Rule 59(e), SCRCF, motion to alter or amend”) (citation omitted).

Moreover, his reliance upon the ABA Guidelines must be rejected for two reasons. First, the United States Supreme Court re-emphasized in *Bobby v. Van Hook*, 130 S.Ct. 13 (2009), that these are merely guidelines, at best, and that trial counsel need not comply with them to render objectively reasonable representation *See Bobby v. Van Hook*, 130 S.Ct. 13, 17 (2009) (the court of appeals erroneously treated the ABA's 2003 Guidelines “as inexorable commands with which all capital defense counsel “must fully comply” because these “are ‘only guides’ to what reasonableness means, not its definition;” and holding that “ ‘[w]hile States are free to impose whatever specific

rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices’’) (citations omitted).²²

Second, counsel’s investigation satisfied § 11.4.1© of the ABA Guidelines, upon which Moore relies. Counsel made “efforts to discover all reasonably available mitigating evidence.” The problem with his argument is that the testimony of the family members living in Michigan was not “reasonably available.” To the contrary, it was unavailable in spite of very reasonable efforts by counsel to interview these witnesses and present their testimony.

Similarly, *Wiggins* is distinguishable. In *Wiggins*, the only significant mitigating factor that the sentencing jury heard was that Wiggins did not have any no prior convictions. Although defense counsel had indications that Wiggins’ childhood had been miserable, counsel conducted only a minimal investigation and failed to discover that he had experienced severe, long-term physical and sexual abuse and torment throughout his childhood, including repeated rape while in foster care. *Id.* at 535. The Court held that such compelling mitigating evidence might well have produced a

²² Justice Alito wrote a separate concurring opinion in *Bobby*, to more forcefully emphasize his “understanding that the [majority] opinion in no way suggests that the American Bar Association’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (2003 Guidelines or ABA Guidelines) have special relevance in determining whether an attorney’s performance meets the standard required by the Sixth Amendment.” *Bobby*, 130 S.Ct. at 20 (Alito, J., concurring). He explained that “[t]he ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association’s members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.” *Id.* (emphasis added). See also *Montejo v. Louisiana*, 129 S.Ct. 2079, 2087 (2009) (the Constitution does not codify ABA Model Rules); *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983) (ABA standards do not necessarily establish what the Constitution commands in a given context); see also *Yarborough v. Johnson*, 520 F.3d 329, 338-39 (4th Cir. 2008) (finding that the state court properly distinguished *Wiggins* and observing that ABA standards do not define minimum Constitutional standards).

different outcome and that counsel's scant efforts were prejudicially deficient. *Id.* at 536.

Here, on the other hand, counsel did not unreasonably limit their investigation. Instead, their reasonable investigative efforts were thwarted by a lack of cooperation from both Moore and his family. Moore's reliance upon *Rompilla v. Beard*, 545 U.S. 374 (2005),²³ *Council v. State*, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008), and *Von Dolen v. State*, 360 S.C 598, 608, 602 S.E.2d 738, 743 (2004), is misplaced for this same reason.

Likewise, the record supports the PCR judge's conclusion that Moore did not prove any prejudice from counsel's failure to interview and present the family members who were deposed for the PCR hearing. To establish prejudice, he had the burden to prove that "there is a reasonable probability that, absent the errors, the sentencer-including an appellate court, to the extent it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. In other words, "[t]o

²³ In *Rompilla*, the Supreme Court reaffirmed that a trial counsel's performance cannot be found adequate if it is supported by an unreasonably limited investigation. 545 U.S. ---, 125 S.Ct. 2456 (2005). *Rompilla*'s mitigation evidence consisted of testimony from five of his family members who pleaded with the jury for mercy, and asserted that *Rompilla* was an innocent and good man. *Id.* at 378. Nonetheless, the jury found that the aggravating factors outweighed the mitigation evidence and sentenced *Rompilla* to death. *Rompilla* later presented a habeas claim for ineffective assistance, based upon the inadequacy of counsel's investigation for mitigating evidence.

The Supreme Court reversed the denial of habeas relief. The Court found that trial counsel's investigation was unreasonable because counsel failed to examine *Rompilla*'s prior conviction file even though the prosecution had acknowledged that it was going to use *Rompilla*'s prior convictions as an aggravating factor to push for the death penalty. *Id.* at 383-85. The *Rompilla* Court rejected the argument that trial counsel sufficiently investigated *Rompilla*'s prior convictions by reviewing his rap sheet. *Id.* at 385 n. 3.

The Court held that if trial counsel had examined *Rompilla*'s prior conviction file, counsel would have found information that would have made them skeptical of the impression of *Rompilla*'s background they had gotten from the family members thus far. Therefore, counsel would have undoubtedly investigated further and uncovered the voluminous mitigating evidence not introduced at trial. *Id.* at 390-93. The Court also rejected the contention that the efforts that counsel did take--namely, extensively interviewing *Rompilla* and his family, and consulting three mental health experts--were enough to release counsel from investigating further. *Id.* at 387-90.

assess [the] probability [of a different outcome under *Strickland*], [the Court must] consider the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding-and reweig[h] it against the evidence in aggravation.” *Porter v. McCollum*, 130 S.Ct. 447, 449 (2009) (*per curiam*).

Again, the record supports the finding that these witnesses lacked credibility. Moore’s brother Maurice was not credible for the reasons noted by the PCR judge (**App. pp. 2967-69**) and James Moore’s testimony that he would have testified at trial if he had known about the case but he was not told because he was the baby in the family was undermined by his veery reluctant admission that he was incarcerated on two drug possession charges at the time Moore was tried. Additionally,

most of the Michigan family members testified that they had little contact with Moore after he reached the age of 18 or after he moved to South Carolina. These witnesses would have been thoroughly impeached with their lack of knowledge of Moore. Even though they lived in the same small community in Michigan and lived in close proximity to him, they testified that they were unaware of his convictions in Michigan for possession of a weapon, and attempted burglary. Additionally, they had no knowledge and were unaware of his criminal convictions for common law robbery, habitual traffic offender, and ABHAN.”

App. pp. 2969-70.²⁴

Likewise, Ms. Hadley, Moore’s maternal aunt, contradicted Moore’s PCR testimony that he never lived in Detroit, by testifying that she lost contact with him after he moved to Detroit when

²⁴ Moore’s only argument in support of his claim that he was prejudiced by counsel’s alleged error is that the family members presented in PCR would have asked jurors to spare Moore’s life. However, the PCR judge found that these witness’ supposed willingness to testify at trial was not credible and, again, his finding is supported by evidence in the record. Further, the testimony of his extended family members would have been fodder for cross-examination that they did not know anything about Moore as a late teen or as an adult, while his brothers’ testimony is likewise not credible or beneficial to Moore, for the reasons shown. Moreover, any plea of mercy by these witnesses would have been cumulative to the testimony of Linda and James Byrd that counsel offered in mitigation of punishment. **App. pp. 1687-1703.**

he was roughly eighteen. *Compare App. p. 1855 with App. p. 2293.*²⁵ Also, the PCR judge correctly found that, although the proffered family witnesses had favorable things to say about Moore's behavior when young, none offered any "evidence that he suffered from any mental illness, mental retardation, personality disorder, physical or sexual abuse, or deprivation or poverty. Nor was there any testimony from any of these family members that Moore witnessed any physical or sexual abuse during his formative years. In fact, they each testified that Moore came from a good family, had good parents, had positive role models, and was made to attend church growing up and taught the difference between right and wrong." **App. p. 2970.**

As a result, this Court must deny certiorari. *See Cherry, supra.*

II. This Court must deny certiorari because there is evidence of probative value to support the PCR judge's findings that trial counsel made an objectively reasonable decision under *Strickland v. Washington* not to present opinion evidence of Moore's adaptability to prison life through James E. Aiken, who was present for the sentencing, "since the presentation of Aiken's testimony would have resulted in the State being allowed to present damaging testimony in reply;" and that Moore was not prejudiced by counsel's failure to present Aiken's opinion on his adaptability.

Next, Moore claims that counsel were ineffective because they failed to present evidence of Moore's adaptability to prison life through James E. Aiken, who was present for the sentencing phase of the trial but was not called as a witness. Again, Respondent submits that this Court must deny certiorari because there is evidence of probative value to support the PCR judge's finding that counsel made an objectively reasonable strategic decision not to present Aiken's testimony, once counsel became aware that the State would present damaging rebuttal evidence of Moore's misconduct while incarcerated in Michigan. **App. pp. 2971-73.** Also, there is evidence to support

²⁵ James also thought that his brother had lived in Detroit (**App. p. 1871**) and Maurice was uncertain. **App. p. 1913.**

the PCR judge's finding that Moore failed to prove that he was prejudiced by counsel's performance. **App. pp. 2973-76.**²⁶

A. Evidence presented at PCR hearing.

Mr. Aiken, an expert in correctional institution management, was presented by Moore at the PCR hearing. Mr. Aiken testified that he is President of James E. Aiken & Associates, and he gave a summary of his work experience, both of working for various departments of corrections and as a prison consultant. He explained prison classification systems, his own assessment of Moore's classification and his opinion that Moore would be of low risk of presenting a future danger in the prison system. Based on Mr. Aiken's review of Moore's records while incarcerated, Aiken opined that Moore can be controlled and managed in a prison environment for the remainder of his life without causing an undue risk of harm to staff, inmates or the general community. **App. pp. 2098-2107; 2109-13; 2126.**

In part, the basis for Aiken's favorable opinion is that Moore does not have a history of escape attempts, use of weapons against other inmates or officers and there was no indication that he participates in gang or other predatory activity. **App. 2126-27.** Aiken testified that he had been prepared to testify at Moore's trial, but the defense did not call him as a witness. Also, he would have testified to the same matters and 2001 as he did at the PCR hearing. **App. pp. 2097-98; 2113.**

On cross-examination, Respondent elicited that of the fifteen or so capital trials or PCR hearings at which Mr. Aiken had testified in South Carolina, he had always testified on behalf of the inmate and never on behalf of the State. More importantly, Mr. Aiken acknowledged that Moore has committed several disciplinary violations while the car serrated on death row. While Mr. Aiken was

²⁶ See *Suber*, 371 S.C. at 558-59, 640 S.E.2d at 886.

dismissive of the serious nature of these offenses, he conceded that Moore was convicted for using obscene or vulgar language in connection with an altercation that he had with staff concerning an open window. Moore was also convicted in August 2006 of possessing or attempting to possess excelled bone and a cell phone charger. Mr. Aiken admitted that this was “a problem for the [D]epartment because inmates can have a communication without authorization, and what you have to do is control that communications.” In fact, this was such a problem that SCDC has moved for permission to jam all cell phone signals at its various institutions.²⁷ **App. pp. 2113-19.**

Respondent likewise elicited evidence of disciplinary infractions committed by Moore while incarcerated in the Spartanburg County Jail, including one that occurred while he was awaiting trial. **App. pp. 2119-22.** Mr. Aiken could not recall any of the disciplinary infractions Moore may have committed during his incarceration in Michigan, but Aiken could not deny that these had occurred. In concluding that Moore was not a predator, Mr. Aiken downplayed the escalating violent nature of the various prior offenses that Moore had committed, both in the community and while incarcerated. Aiken also emphasized that the violent criminal offenses had not occurred in prison. **App. pp. 2122-26.**

Although Mr. Morin recalled that the defense had retained Mr. Aiken to assist on the issue of whether Moore was adaptable to prison life, this was a matter handled by Mr. Kelly, and Mr. Morin did not recall why the defense did not present Mr. Aiken’s testimony. **App. pp. 2568-69.**

²⁷ However, Aiken felt that the security measures in place at work because the cell phone was discovered and seized, and Moore was punished for the infraction. **App p. 2119.** for his part, Moore testified that while he had “some right-up this answering infractions” that he committed while in the Department of Corrections, he felt that his behavior was “fairly, if not above-average. There is extreme behavior in the Department of Corrections. I don’t... do nothing like that.” he explained that he does not assault officers or other inmates, but he admitted that he charged that he fought with another inmate had been dismissed. **App pp. 2262-63; 2318.**

Mr. Kelly testified that they had retained Mr. Aiken to testify about Moore's adaptability to prison. He specifically remembered working a lot with Mr. Aiken. Mr. Aiken's testimony would have been to the effect that Moore was uncontrollable; the Department of Corrections could safely incarcerate Moore; that he would never get out of prison; and that he would not be a danger to the population. Counsel could not recall what documents he provided to Mr. Aiken, but he indicated that he provided anything that Mr. Aiken requested. Also, Mr. Aiken was present in the courthouse at the time of the trial and prepared to render a favorable opinion. **App. pp. 2649-50; 2681-24.**

However, the State had brought down the records custodian from Michigan, and the custodian was prepared to offer evidence about Mr. Moore's various problems while incarcerated in Michigan. Additionally, Moore had a lot of disciplinary infractions while incarcerated in this Spartanburg County Jail. **App pp. 2650; 2681-22; 2684-88.**²⁸

The State was prepared to introduce the evidence of Moore's prior incarcerations in rebuttal, if Mr. Aiken testified. Otherwise, the State would not present this evidence. Mr. Kelly testified that, after reviewing the evidence of Michigan disciplinary infractions with Mr. Aiken and Ms. Glass, defense counsel jointly made a strategic decision not to present Mr. Aiken as a witness because counsel did not want the sentencing jury to hear all of the negative information about Moore's prior incarcerations. "I just wanted to keep all of that out, every bit of it." according to Mr. Kelly, "I

²⁸ Mr. Kelly telephoned Mr. Aiken, shortly before the PCR hearing, in an effort to obtain a copy of the records from Mr. Aiken and refresh his recollection. Although Mr. Aiken did not return his call, he was informed that Aiken did not have the records. Therefore, Mr. Kelly could not recall whether Mr. Moore was involved in gangs, assaults or escape or some other misconduct. Although he did not have a specific recollection, the report sent to him by Ms. Glass (**Respondent's Ex. 25**) shows a detailed account of his criminal history in both Michigan and South Carolina, including several offenses that the State did not introduce at trial. See **Argument I**. Included in the information provided to counsel was that Moore absconded from parole in Michigan on January 10, 1990. **Respondent's Ex. 25, p. 8, App. p. 2855.**

thought we were gonna get hammered with... that.” So, the defense did not call Mr. Aiken. **App pp. 2650-51; 2681-22; 2684-88.**

B. The PCR judge’s ruling.

The PCR judge initially found that Mr. Aiken had been retained to present testimony that Moore would be adaptable to prison; that counsel had given Mr. Aiken a copy of all of Moore’s prison records to counsel had obtained; that Mr. Aiken was prepared to give a favorable opinion as to Moore’s adaptability; that Mr. Aiken was present during the sentencing phase of the trial; and that trial counsel had originally planned to present his testimony. **App. p. 2972.** The PCR judge further found that counsel, however, decided not to present Mr. Aiken’s testimony once counsel learned that the State had brought the a records custodian from Michigan; that the custodian was prepared to testify about Moore’s misconduct while incarcerated in Michigan; and that this information would be damaging to the defense. The PCR judge found that counsel made a reasonable decision under *Strickland* not to present Mr. Aiken’s testimony, “since the presentation of Aiken’s testimony would have resulted in the State being allowed to present damaging testimony in reply.” **App. pp. 2972-73.** Alternatively, the PCR judge found that Moore had not established any prejudice from counsel’s failure to present Mr. Aiken’s testimony at trial. **App. pp 2973-76.**

C. Discussion.

Certiorari should be denied to review this claim because there is evidence to support the PCR judge’s findings in rejecting it. First, there is nothing in the record to refute the PCR judge’s finding that counsel’s testimony was credible. To the contrary, counsel’s testimony is consistent with Ms. Glass ’ report, **Respondent’s Exhibit 25, App pp. 2848-60;** the other evidence elicited in the PCR hearing concerning Moore’s disciplinary infractions while incarcerated in the Spartanburg County

Jail; and Mr. Aiken's own testimony that he could not dispute that Moore had committed a number of disciplinary infractions during the time he is incarcerated in Michigan. Counsel's testimony is likewise circumstantially corroborated by evidence of Moore's extensive history of convictions in Michigan.

Based on counsel's testimony, it is clear that Mr. Kelly made the reasonable strategic decision not to present Mr. Aiken as a witness, with a full understanding of the right to present evidence of Moore's adaptability to prison life in mitigation of sentence and after originally planning to call Aiken as a witness.²⁹ Also, this decision was only made after counsel had provided all available records to Mr. Aiken, and Mr. Kelly had reviewed the damaging information that the State intended to present with Mr. Morin, Mr. Aiken and Ms. Glass.

Further and contrary to the position espoused by Moore, counsel's decision not to present Aiken as a witness because the State would present rebuttal evidence damaging to the defense was clearly reasonable under *Strickland*. In *Strickland*, the Court observed that "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. *See also United States v. Guerrero*, 938 F.2d 725, 730 (7th Cir.1991) (under *Strickland*, there is no ineffective assistance of counsel where the attorney chooses one reasonable strategy to the exclusion of another). As correctly recognized by the PCR judge, "[i]n light of 'the variety of circumstances faced by

²⁹ Moore spends a good portion of his current argument arguing that a capital defendant has the right to present evidence of adaptability to prison life under *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (evidence of good behavior of previously incarcerated defendant is relevant evidence in mitigation of punishment), and that a trial judge's ruling prohibiting the introduction of such evidence may be reversible error. Respondent does not dispute either of these points. However, neither of these points is at issue because the trial judge did not prohibit counsel from introducing Mr. Aiken's opinion in this case, and counsel was unquestionably aware of the right to present evidence of Moore's future adaptability to prison.

defense counsel [and] the and a legitimate decisions regarding how best to represent a criminal defendant,' the performance informative inquiry necessarily turns on 'whether counsel's assistance was reasonable considering all the circumstances.'" *Belmontes*, 130 S.Ct. at 384-85 (citing *Strickland*, 466 U.S. at 688-689)." **Order, p. 94, App. p. 2972.**

Additionally, it is objectively reasonable under *Strickland* for trial counsel to refrain from presenting favorable evidence where introduction of this evidence will lead to the introduction of damaging evidence by the prosecution. *E.g.*, *Gaskin v. Secretary, Dept. of Corrections*, 494 F.3d 997, 1002-03 (11th Cir. 2007) (petitioner did not present clear and convincing evidence to rebut presumption that defense counsel's decisions not to present retained mental health expert's findings or further evidence regarding petitioner's educational history were tactical: counsel purposely withheld information about defendant's past, including school records, because he had reason to believe that it would lead to damaging testimony regarding defendant's past violent and criminal conduct); *Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003) (counsel's strategic decision not to present psychological evidence, where experts' findings contained suggestions of antisocial behavior that could have been harmful to client's defense "was a reasonable one because such evidence 'is a double-edged sword that might as easily have condemned [defendant] to death as excused his actions.'" (citation omitted); *Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir. 2001) ("The clearest respect in which the lawyer's representation fell below the minimum level was the decision to put the psychologist on the stand, knowing what the lawyer knew"), *order directing district court to issue a conditional writ of habeas corpus vacated and petition for rehearing dismissed*, 268 F.3d 485 (7th Cir. 2001); *Bonin v. Calderon*, 59 F.3d 815, 834 (9th Cir. 1995) (Counsel's presentation of childhood mitigation evidence was reasonable since expert testimony would have been of "slight

value at best" and it "would have opened the door to precisely the type of cross-examination that [counsel] sought to avoid by refusing to call psychiatric experts-another recitation of all of Bonin's atrocities for the purpose of determining whether, in the expert's opinion, such behavior is the likely product of such abuse"); *Smith v. Workman*, 550 F.3d 1258, 1269-71 (10th Cir. 2008) (mitigation described by the district court as "shocking in its brevity" nevertheless involved understandable reluctance to open the door to a lifetime of a propensity for fighting); *Gilson v. Sirmons*, 520 F.3d 1196, 1247-48 (10th Cir. 2008) (evidence of brain injury and inability to control explosive behavior reasonably found by the state court to be two-edged and dangerous rather than emphasizing non-violent past). *Cf. Gardner v. Ozmint*, 511 F.3d 420, 429-30 (4th Cir. 2007) (defense counsel's agreement on cross examination of co-defendant, to admission of all of co-defendant's pretrial statements after the prosecutor objected to defense counsel's detailed cross-examination of co-defendant regarding one of those statements was deficient performance, since jury would not have otherwise heard inflammatory statements of racial motive for gang raping and murdering victim).

Respondent further notes that the PCR judge's decision is consistent with this Court's decision in *Drayton v. Evatt*, 312 S.C. 4, 430 S.E.2d 517 (1993). In *Drayton*, this Court held that trial counsel's decision not to present evidence of Drayton's future adaptability to prison life was not deficient performance because counsel testified that, although aware that Skipper was pending in the United States Supreme Court, he had decided not to present evidence of future adaptability because the evidence included unfavorable psychiatric evaluations, Drayton's poor disciplinary reports and evidence of Drayton's misconduct while incarcerated. *Id* at 10, 430 S.E.2d at 521. This Court found that "Drayton's past actions in juvenile detention and when incarcerated as an adult reflect a mixed picture of his ability to function in a prison setting. An attempt to develop favorable evidence of

future adaptability would have opened the door for the prosecution to reveal Drayton's earlier misconduct in prison. Trial counsel also determined that testimony from prison guards that Drayton had behaved well on death row would have had a negative impact on the jury. In our view, there is evidence to support the PCR judge's finding that trial counsel was not ineffective for failing to present evidence of Drayton's future adaptability to prison.” *Id* at 11, 430 S.E.2d at 521. *See also Smith v. Quarterman*, 515 F.3d 392, 403-06 (5th Cir. 2008) (“Smith's good behavior during previous imprisonment constitutes evidence capable of both mitigating and aggravating his punishment. While Smith's good behavior in institutional settings shows an ability to not cause problems in controlled environments, this attribute also shows his propensity to not abide by the laws of our society.” Also, noting that the State would have elicited evidence of three disciplinary violations if evidence had been presented).

Moore asserts that the PCR judge erroneously found that counsel’s stated reason was objectively reasonable under Strickland because the prosecution had the right to introduce evidence of Moore’s misconduct in prison, “without waiting for [Moore] to open the door to such testimony.” **Petition for Writ of Certiorari, p. 44.** Regardless of whether the prosecution may introduce evidence of a defendant’s conduct in prison without waiting for the defense to present evidence of adaptability in other cases, no such evidence was presented by the State *in this case*. Rather, the State elected to reserve such evidence for rebuttal. However, the State clearly would have presented this evidence if Mr. Aiken had offered his opinion that Moore was adaptable to prison. *The only reason* the jury did not hear the evidence of Moore’s misconduct in the Michigan prison system and while

incarcerated in the Spartanburg County Jail is because of trial counsel's chosen strategy.³⁰

There is also no merit to Moore's assertion that the evidence of his misconduct while incarcerated in Michigan was "entirely speculative." **Petition for Writ of Certiorari, p. 44.** This assertion ignores the record before this Court. Mr. Kelly testified that there was such information, and Mr. Aiken did not dispute that those disciplinary infractions existed. Respondent's cross-examination of him about the Michigan infractions was curtailed after his response. More importantly, Respondent's Exhibit 25 clearly indicates that Moore absconded from parole on January 10, 1990. **App. p. 2855.**³¹

Further, Respondent submits that the record supports the PCR judge's finding that Moore did not prove that he was prejudiced by counsel's failure to present Mr. Aiken's testimony. **App. pp. 2973-76.** To establish that he was prejudiced by counsel's performance, Moore was required "to establish 'a reasonable probability that a competent attorney, aware of [the available mitigating evidence], would have introduced it at sentencing,' and 'that had the jury been confronted with this ... mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.'" *Belmontes*, 130 S.Ct. at 386 (citing *Wiggins*, 539 U.S. at 535, 536). He did not meet this burden.

Again, the PCR judge's findings that Respondent "significantly impeached" Aiken's opinion on Moore's prison adaptability, with a contrary history of disciplinary infractions that Moore had committed while incarcerated and that the history of Moore's behavior while incarcerated shows an

³⁰ In light of counsel's strategy, the State did not seize the opportunity to finish the case by presenting evidence of Moore's extensive history of misbehavior and refusing to adapt to confinement.

³¹ Additionally, his argument in this regard is disingenuous, since the evidence was never introduced in the sentencing phase, in light of the strategy chosen by counsel.

unwillingness to adapt to prison (**App. pp. 2974-75**) are supported by the record. As demonstrated, Respondent elicited evidence of disciplinary infractions committed by Moore while incarcerated in the Spartanburg County Jail and while housed within the apparently strict confines of death row. Perhaps the most serious of these infractions was Moore's possession of a cell phone and cell phone charger in July 2006, which SCDC considers a major infraction.³²

Further, if Aiken had testified at trial, his opinion would have been impeached with the January 10, 1990 offense that Moore absconded from parole in Michigan (**App. p. 2855**), as well as any other infractions that he committed during his incarceration in Michigan. The PCR judge also correctly found that these offenses and the numerous disciplinary infractions that Moore committed in South Carolina prior to the trial would have minimized the effectiveness of Aiken's testimony, and that "[u]nder these circumstances, ... Aiken's expert testimony would have been of slight value, at best, and ... it would have permitted the introduction of evidence that would be damaging to the defense's case in mitigation."

Therefore, while counsel's strategic decision not to present Mr. Aiken as a witness "meant that the defense did not present expert testimony to rebut any argument by the State as to Moore's future dangerousness," it likewise "avoided the introduction of much evidence that circumstantially tended to demonstrate his future dangerousness: *i.e.*, his inability or unwillingness to adjust to life in prison." Also, "counsel presented Moore's wife and stepson at trial and counsel argued that these witnesses suggested that Moore's actions after his arrest proved that he 'is being a productive member of society.' R. p. 1730. Thus, the defense did present evidence to rebut the State's argument

³² See <http://www.wncn.com/news/regional/SC-prisons-try-to-block-contraband-cell-phones-149483305.html>; <http://www.wistv.com/story/13244837/fcc-discussing-cell-phone-jamming-in-prisons>; <http://www.nytimes.com/2011/01/03/us/03prisoners.html>.

on future dangerousness.” **App. pp. 2975-76.**

Further, the PCR judge correctly found that there was overwhelming proof that Moore was guilty of murdering Jamie Mahoney and the aggravating circumstances. “There was also overwhelming proof of Moore’s future dangerousness, through the introduction of evidence concerning his prior criminal history,” which tended to show escalating violence by Moore. This history “included convictions for common law robbery, aggravated assault and battery, thefts of valuables the theft or possession of weapons, and parole violations. There was also a similar robbery where he went behind the counter threatened and assaulted the victim.” **App. p. 2976.**

Finally, the record reflected that Moore had been incarcerated several times before and that he had not been rehabilitated during his previous incarcerations. As a result, the record supports the PCR judge’s finding that “Moore did not meet his burden of proving that ‘there is a reasonable probability . . . that the balance of aggravating and mitigating circumstances did not warrant death’ if such an instruction had been given. *See Strickland*, 466 U.S. at 695. *See also Wiggins*, 539 U.S. at 537.” **App. p. 2976.**

III. This Court must deny certiorari because there is evidence of probative value to support the PCR judge’s findings that trial counsel’s efforts to investigate the physical evidence at the crime scene and rebut the State’s evidence that Moore shot the victim while he was behind the counter in the store were objectively reasonable and that Moore had not established prejudice under *Strickland*.

Moore’s remaining claim is that trial counsel were ineffective in their efforts to investigate the physical evidence at the crime scene and rebut the State’s evidence that Moore shot the victim while he was behind the counter in the store. Respondent submits that this Court must deny certiorari because there is probative evidence in the record supporting the PCR judge’s findings that counsel’s performance was not deficient and that Moore had not established prejudice under *Strickland*.

A. The prosecution's evidence at trial.

Sometime between 8:00 and 10:00 p.m. on September 15, 1999, Moore went to the residence of George Gibson, on Hillside Drive in Whitney, S.C. He asked Gibson to get him some crack cocaine. Gibson, who knew Moore as "Mo," refused because Moore did not have any money. Gibson also told Moore that he could not get the crack for Moore on credit. Moore, who was unemployed at the time, told Gibson he was going to work and would return the following morning. He then left. **App. pp. 1245-48; 1253; 1255; 1371-72.**

Meanwhile, Mr. Jamie Mahoney (the murder victim) was working the third shift at Nikki's Speedy Mart, a restaurant-convenience store located at the corner of Highway 221 and California Avenue in Whitney, South Carolina. He had worked there for over three years. The owner of Nikki's kept a .32 caliber pistol and a .45 caliber semi-automatic pistol (**State's Ex. 3**) in the store for protection. Also, Jamie Mahoney carried a .44 caliber handgun (**State's Ex. 1**) behind his back and in his waistband for protection. However, his hands were ravaged by arthritis and he was slightly built.³³ None of his co-workers or friends had seen him ever be physically aggressive towards anyone in Nikki's. **App. pp. 1195-96; 1346-57; 1361-63; 1366-70; 1489.**

Terry Hadden (the AWIK victim) was a regular customer at Nikki's. He stopped in to eat around 12:15 a.m. on September 16, 1999. After eating and talking to Jamie for awhile, he began playing on one of several video poker machines, around 1:00 a.m. The store was busy for a short period, and Jamie had a brief rush of customers around 1:15 a.m. Later, Jamie loaned his lug wrench to an African-American customer who had trouble with his tire in the parking lot.

Otherwise, the early morning hours remained relatively uneventful, until Moore walked into

³³ He was between 5' 7" and 5' 9" tall and weighed approximately 145 pounds.

the store shortly after 3:00 a.m.; and it does not appear that anyone came into Nikki's between the time the man with a flat tire left and Moore arrived. Mr. Hadden and Moore glanced at each other briefly when Moore first entered. Then, Mr. Hadden turned around and continued playing video poker. Moore went to a cooler and, apparently, retrieved two cans of beer. **See App. pp. 1193-1205; 1309.**

Mr. Hadden testified that:

The next thing I know of anything going on in the store is when I heard Jamie say, 'What the hell do you think you are doing?' . . . in a loud tone of voice.

App. p. 1205, ll. 9-14.

Once Mr. Hadden heard this exclamation, he swiveled around in his chair and saw Moore holding both of Jamie's hands in one of Moore's hands. Moore immediately "come around and come up with a gun and told me not to move." Without giving Hadden an opportunity to comply with his directions, Moore fired the .45 caliber semi-automatic (**State's Ex. 3**), which he had taken from the victim's constructive possession, at Mr. Hadden. Mr. Hadden instantly fell to the floor and played dead. He then heard a number of gunshots but he did not count how many were fired. **App. pp. 1204-09; 1215-17; 1288-89; 1424.**

During the exchange of gunfire, at least one shot mortally wounded Jamie Mahoney. The pathologist explained that the victim had a gunshot wound which "passed through the lower border of the eighth rib" before going through his liver, through and through his stomach, through and through his diaphragm, through and through his heart and his left lung. It then exited Jamie's right chest. Jamie also had a gunshot wound to his lower right arm, which broke his right arm. **App. pp. 1491-1502.**

The pathologist opined that it is possible that either there were two gunshot wounds or all of Jamie's injuries could have been caused by a single gunshot if his body had been positioned in such a manner in which that could have occurred. He died from internal hemorrhaging caused by the wound to his torso and would have died within six to ten minutes after receiving this wound. **App. pp. 1491-1502.** A bullet from Jamie's .44 caliber weapon went through Moore's left arm. **App. pp. 1380-84.**

Mr. Hadden continued to play dead until he heard Moore say, "Let's get the hell out of here" and exit the store. Mr. Hadden ran out of the building after he heard Moore's vehicle leave. He then went back into the store, saw that his friend was dead and called 911. **App. pp. 1205-13.**

Before Moore left the store, he took a money bag containing \$1,408.00. Although he was profusely bleeding from a gunshot wound, he immediately drove his pickup truck to Gibson's house. Along the way, he discarded the .45 caliber handgun which had his blood on it. **App. pp. 1211; 1262-64; 1267; 1312-13; 1352-54; 1466-69; 1478.** When he reached Gibson's residence, he asked for Gibson to get him some crack. Gibson refused because of the late hour. During their conversation, Moore told Gibson, "I done something bad, and I got to go turn myself in, and I got money." **App. pp. 1248-49.**

Moore was obviously bleeding and Gibson asked him what had occurred. Moore told him that he had been shot, and he asked Gibson to take him to the emergency room. Gibson refused because he did not want to become involved. When Moore tried to back his truck out of Gibson's driveway, he struck a telephone pole. **App. pp. 1249-50; 1256-57.**

Spartanburg County Deputy Sheriff Bobby Rollins was searching for "a black male, possibly injured, driving a loud vehicle" since this was the description of the suspect he had received. He

passed by as Moore backed into the telephone pole. Therefore, he quickly turned his car around, "threw all of my light in that general area" and exited his vehicle with his weapon drawn. **App. pp. 1234-38.**

Moore approached Deputy Rollins with his hands in the air and "bleeding profusely" from his left arm. The whole time Moore was complying with Deputy Rollins' instructions to get on the ground, he repeatedly said, "I did it, I did it, I give up, I give up." A search of Moore's truck resulted in the seizure of the stolen money and an open pocketknife. Officers found Moore's wallet in the roadway and the bloody shirt Moore had been wearing near Gibson's residence. **App. pp. 1238-40; 1311-18.** Later, Moore told the emergency room nurse that he was using alcohol and cocaine. **App. pp. 1377-78.**

At the crime scene at Nikki's, officers found the victim lying in the kitchen floor. He was deceased, and his right arm was bent at such a peculiar angle that it was clearly broken. In addition to finding evidence of the victim's blood, Moore's blood was found across the back of the victim's clothing and a trail of his blood led out the front door. Also, a meat cleaver, which did not belong to Nikki's Speed Shop (**State's Ex. 83**), was found at the victim's feet with Moore's blood on it. Further, officers found six shell casings, two lead bullet cores and two fired bullets that had been fired by the .45 automatic, as well as several fragments that were consistent with having been fired by it. **App. pp. 1271-93; 1305-18; 1352-53; 1364-65; 1368; 1421-32; 1460-80.**

It was undisputed at trial and in PCR that both of the guns involved in the shoot out between Moore and the victim were initially within the victim's control, and that Moore did not bring either gun to the store.

B. Evidence in PCR.

Moore testified at the PCR hearing that he knew Jamie Mahoney from patronizing the store “two or three times a week.” Moore claimed that he had gone into the store to buy beer and cigarettes on the night of the incident, but that Jamie suggested that Moore purchase a certain type of cigarette lighter. Moore supposedly knew there was the security camera that was supposed to monitor what occurred in the store, and that Jamie kept a pistol in his waistband. **App. pp. 2264-67; 2304-05; 2316.**³⁴

With respect to the shooting, Moore claimed that he went to a cooler, selected two 22 ounce beers and went to the counter. He asked Jamie for a pack of New Port cigarettes. After Jamie rang up the transaction and placed these bagged items on the counter, Moore contended that he and Jamie got into an argument over 11 or 12 cents. At some point, Jamie made a racial slur in the course of directing Moore to leave the store and a struggle ensued. Jamie then reached under the counter and came back up with “a pistol in his hand.” **App. pp. 2267-68; 2305-08.**

Moore further claimed that he “automatically responded and, and I wouldn't allow him to point the pistol at me. So, I reached for it. We struggled over that particular pistol, and it fired, it went off, and it jammed, and that's how I was able to get it from his hands.” With Moore now in possession of the .45, Jamie reached behind his back, pulled out the .44 magnum and shot Moore with it. **App. pp. 2263-64; 2268-77; 2308-11; 2315.**

Moore claimed that he retreated behind a “pillar” near the Pepsi stand, and that he was able to fire three or four shots at Jamie. Jamie fell to the floor. Moore specifically denied that he had pointed the gun at Hadden, who was playing the video poker machine. He also denied that he had

³⁴ He claimed that he had been riding with a friend earlier that morning and he admitted that he had been to see Gibson. However, he denied that he had used crack.

fired a shot from behind the counter and he claimed that he only grabbed the bag of money, as an afterthought, before fleeing with it to Gibson's house to secure treatment for his gunshot wound from Gibson - a man whom he knew used crack. **App. pp. 2263-64; 2268-77; 2308-11; 2315.**

Although Moore admitted that trial counsel had explained his right to testify to him, he denied that counsel told him that his testimony would be necessary to potentially receive a voluntary manslaughter instruction. **App. pp. 2280-81.** He admitted that he elected not to testify on counsel's advice. However, he denied not wanting to testify because of his prior record. **App. pp. 2295-96.**

Moore also presented the testimony of Dr. Sandra Conradi, a forensic pathologist. She opined that, based upon her review of the record,³⁵ "the cause of death is a single gunshot wound to the chest with perforation of the heart ... which means bleeding into the sac around the heart causing the heart to become unable to beat." **App. 2326-27.**

She further opined that:

"[t]he exit wound from the chest is ... somewhat atypical for an exit wound in that it has a lot of bruising around it, ... The entrance wound into the arm is also atypical. It should be a nice round hole surrounded by an abrasion border There is somewhat of an abrasion border, but, in my opinion, that wound to the arm is caused by a tumbling bullet going into the arm and staying there after breaking the humerus, the large bone of the right upper arm.

App. 2327. Also,

due to the force of the bullet, he would of been down on the ground if not immediately, very close to immediately after being shot and passed out, became unconscious very quickly, and then died very quickly because every time the heart beat there was more and more blood going into that sac and compressing the heart so it couldn't beat any further. So, he was probably dead **in a matter of minutes.** I

³⁵ Dr. Conradi testified that she had reviewed the case notes from the trial; the autopsy report and trial testimony of Dr. Wren, the forensic pathologist who conducted the autopsy; Paul Dorman's trial testimony; Terry Hadden's statement; "Deputy Murphy's statement at trial;" crime scene and autopsy photographs; diagrams of the crime scene, and other matters in preparation for her testimony. **App. pp. 2325-26.**

can't give you the exact number, but ... **in the range of five to ten** I would say.

App. p. 2329 (emphasis added).

On cross-examination, Dr. Conradi admitted that she had not spoken to the defense's forensic pathologist, Dr. McMahon. More importantly, she testified that a crime scene photograph introduced at trial showed the presence of stippling slightly above the entrance wound to the victim's chest. This indicated "a fairly close range wound due to the powder put out by the gun and, and going through the shirt and stippling his skin. Although the gun used would have to be test-fired in order to determine an exact range, she opined that this shot was from "12 to 15 inches" from the victim. **App. pp. 2331-32.**

Moore likewise presented the testimony of Paul Dorman, the crime scene technician who processed the crime scene for the Spartanburg County Sheriff's Department. He was qualified at PCR only as an expert in crime scene investigation. **App. pp. 2182-86; 2230-31.** Dorman testified at the PCR hearing that, in his opinion, one of the shell casings found behind the counter must have come from someone firing the gun from behind the counter. **App. pp. 2186-2214; 2245-52.**

However, Dorman admittedly was not an expert in crime scene reconstruction or ballistics; and Moore did not qualify him as such at the PCR merit's hearing. Also, Dorman admitted that a firearms expert was better qualified to testify how or why one of the fired shell casings ended up behind the counter on the floor. **App. pp. 2229-30; 2252.**

According to Mr. Morin, the State's theory at trial was that Moore had entered the store with the intention of robbing the victim, but the State was unclear about whether he was armed when he entered or whether it was a strong armed robbery that escalated into an armed robbery after Moore's struggle with the victim, as the victim sought to defend himself. Counsel had a copy of a

investigative report prepared by an investigator from the Solicitor's Office, Rusty Clevenger, shortly after the incident (**Applicant's Ex. 25, App. pp. 2755-64**), which suggested that Moore was armed upon entering the store. **App. pp. 2348-52.**

Mr. Morin recalled that there were two guns used; that the evidence showed bullets were fired from both weapons; and that there were a number of shell casings found at the scene. He did not remember the paper bag on the counter with a bullet hole in it (**State's Exhibit 17** at trial). However, counsel felt that, to discredit Hadden, an expert "would have to not just say the bullet came from the .45, and not just say it came from that direction. He would have to say that it came from that side of the counter. ... And if he could say all that, then that would of discredited Mr. Hadden's testimony that he saw it." Nor did counsel feel that the location of the shell casings was necessarily determinative of the shooter's location because his experience from other trials was that too many factors can cause casings to bounce or roll. **App. pp. 2353-58; 2363-66; 2382; 2385; 2400-01.**

Also, Mr. Morin did not recall speaking with Mr. Dorman, but he had a copy of Dorman's report in his file. **App. pp. 2367-68; 2372.** The same was true of the other officers involved in the case. **App. p. 2539.**

Mr. Morin testified that he met with Moore on numerous occasions and that they had discussed his version of what had occurred. Mr. Kelly was also present in a number of these meetings. Moore repeatedly denied that he had intended to rob Nikki's when he entered the store, and he told counsel that he did not have a gun when he entered the store. However, he gave conflicting accounts about whether he had used crack that night. **App. pp. 2252-53; 2509-15; 2523-24; 2565-66.**

With respect to the shooting, he told counsel that:

he went into that store to buy ... beer and cigarettes. That he didn't have enough money. That he asked the clerk to let him slide because he was in there all the time. That the clerk made some offensive remarks to him and told him he'd have to leave or what have you. Mr. Moore didn't want to. That the clerk pulled out a gun and Mr. Moore immediately tried to disarm him for his own safety. That after he got that gun away from the, him, the clerk pulled out a second gun and shot him and he returned fire.

App. p. 2511. See also App. p. 2433.

To assist him in dealing with the guilt phase evidence, Mr. Morin retained a forensic pathologist, Dr. Carol McMahon, a crime scene expert, former SLED Agent Donald Girndt, and a private investigator, Pete Skidmore. Mr. Morin hired Skidmore because the Public Defender's Office did not have an investigator skilled at interviewing people. Also, counsel and Skidmore met at the Sheriff's Department and reviewed the State's evidence on July 23, 2001. **App. pp. 2532-35.**

A billing statement from Mr. Skidmore, **Respondent's Exhibit 1**, reflects that Mr. Skidmore met with Mr. Morin and Mr. Moore for 5.5 hours on July 2, 2001, and he reviewed the case file on July 23-24, 2001. Thereafter, either Mr. Skidmore or his associate

- prepared a list of people who need to be interviewed;
- again met with Moore;
- spoke to Ann Yarborough (a Nikki's employee);
- spoke to Lynda Byrd;
- (5) after repeatedly unsuccessful attempts to locate and speak to Terry Hadden, interviewed him;
- interviewed several of Moore's former co-workers;
- attempted to locate Gibson at Perry Correctional Institution and at Kirkland Correctional Institution on October 12, 2001, and discovered that Gibson was in the Spartanburg County jail "waiting to be transported;"

- spoke to another potential witness;
- met with Mr. Morin and reviewed the physical evidence; and .
- attended trial on October 19, 2001, where he again interviewed Gibson, reviewed his statement and ascertained that Gibson's "answers seemed fairly consistent with report.

App. pp. 2800-03.

Mr. Morin mainly employed Mr. Girndt

to try and determine ... what the evidence was showing where Mr. Mahoney and Mr. Moore were at the time of the shooting. Where the bullets were going, who was holding where, who was standing where, to try to get a clear picture of ... the [State's evidence], and, ... in the event that Mr. Dorman or Mr. Clevenger were gonna present their interpretation of it, I would be able to adequately cross-examine them as to where these people were standing aside from what Mr. Moore had told me. ... I needed to be able to have somebody telling me what their professional opinion was so that, when I got to the point where I was gonna be faced with cross-examining them, I would have some education as to what that evidence may reflect.

App. pp. 2358-62; p. 2541-42. Based upon his notes, he thought that he had effectively used Girndt.

App. p. 2363.

Mr. Morin initially did not recall what information he provided to Girndt or whether he had provided Girndt with Moore's version of the shooting. **App. pp. 2368-69; 2371-72; 2441.** However, he later testified that Girndt had received Dorman's report, the crime scene photos and a video; and that he had told Girndt Moore's version of what occurred. **App. p. 2540.** He was sure Dr. McMahon had the autopsy report. **App. p. 2450.**

Mr. Morin explained that he had met with both Dr. McMahon and Girndt, together, at Mr. Girndt's residence on August 21, 2001.³⁶ They both indicated that, in their opinion, the fatal shot was

³⁶ Mr. Morin had previously spoken to Girndt on August 14th as well. He had likewise met with Dr. McMahon earlier on the 21st. **App. pp. 2437-38.**

fired from behind the counter and inside the kitchen door. Dr. McMahon's opinion was that the victim was "six to eighteen inches from gun." She likewise noticed the presence of stippling. Counsel did not want to present the jury with these opinions because they were consistent with the State's evidence and inconsistent with Moore's account. **App. pp. 2365-72; 2401; 2436-39; 2545-46.**

Mr. Morin was satisfied that the experts he used were competent; he did not consider the physical evidence in this case as overly-complex; and he did not see the need for employing another expert. **App. pp. 2437; 2441; 2449-50; 2544-45.** Mr. Morin testified that he repeatedly discussed with Moore whether Moore would testify in the guilt phase. Counsel explained that the only hope at getting instructions on voluntary manslaughter or self-defense was if Moore testified. However, Moore refused because of his prior record. **App. pp. 2454; 2456-57; 2532; 2546-51.**

Therefore, Morin felt the best strategy was to try and discredit the State's witnesses on cross-examination. He was unable to get a manslaughter charge based on the evidence presented. **App. pp. 2546-47.**

Although Mr. Kelly was primarily responsible for the sentencing phase, he testified that the decision was made for him to cross-examine the State's ballistics expert because he has a great deal of experience with and knowledge of the use of firearms, he owns several weapons, he is ex-military and he was qualified in the military as an expert with a .45. Strategically, he attempted to attack the ballistic expert's theory of the case, but he could not recall his precise strategy at the time of his testimony. **App. pp. 2642-43.**

He concurred with Mr. Morin's assessment that Donald Girndt's findings "were negative to us. They were very adverse to us." He explained that "Mr. Girndt's theory of the case would of fit

right in with the government's theory in that all the shooting took place behind that counter and we absolutely could not use that.” Mr. Kelly also recalled expressly asking Mr. Girndt not to send a report to counsel. **App. pp. 2643-44.**

C. The PCR judge’s ruling.

The PCR judge found that “counsel's investigation to ‘prepare to confront and rebut the State's alleged physical evidence’ was objectively reasonable, and that they had the services of a forensic pathologist, a crime scene expert and a private investigator to assist them in their efforts. Mr. Morin thought that both were competent. He did not see the need for employing another expert and was unsure that funding would be approved for such a request. Also, Mr. Kelly has a great deal of experience with and knowledge of the use of firearms.” **App. p. 2897.**

The PCR judge further found that counsel had reviewed the State’s physical evidence with both his crime scene expert and his private investigator, and that the investigator, Mr. Skidmore, had done the various matters discussed, *supra*. Both the discovery provided to the defense by the State and the opinion of the defense experts was that revealed that Moore did not have a handgun on him when he entered the store. Rather, both the murder weapon, the .45 caliber handgun, and the .44 caliber revolver “originated with the victim.” **App. pp. 2897-98.**

Also, “[t]here were a number of shots fired at the store and a number of shell casings. [Mr. Morin] had his experts to assist him in reviewing the physical evidence and determining what the physical evidence indicated as to the relative positions of Moore and Jamie Mahoney and what had occurred. ... Also, Mr. Morin reviewed the physical evidence with his crime scene expert, Donald Girndt, and he provided Mr. Girndt with crime scene photographs. Mr. Morin met with both his pathologist and his crime scene expert, at the same time, to discuss their findings.” **App. pp. 2898.**

The PCR judge further found that counsel did not perceive the case as overly complex in terms of the physical evidence, and that counsel made a reasonable strategic decision “to attack the credibility of the State's witnesses and attempt to use those witnesses to demonstrate that Moore was in the heat of passion when the shooting occurred.” In reaching this conclusion, the PCR judge found that there was overwhelming evidence of Moore’s guilt, including Mr. Hadden’s eyewitness testimony identifying him; that the motive for the crime was “clearly robbery;” that Moore had taken the money from the store to purchase crack from Gibson; and that Moore’s PCR testimony about the shooting was not credible. **App. pp. 2898-2902.**

Likewise, the PCR judge found that counsel was not deficient for not presenting a defense forensic pathologist because counsel had retained Dr. McMahon, who had given her opinion as to the autopsy findings. The PCR judge also found that it was reasonable for counsel to rely upon her findings, and not seek another expert. He further found that counsel made a reasonable decision not to present her because her findings would have been damaging to the defense in both phases of the trial, since she opined that the shooting occurred behind the counter. **App. pp. 2901-02.**

The PCR judge found that there was neither deficiency nor prejudice from the failure to present Dr. Conradi’s testimony. There was no prejudice because Dr. Conradi’s opinion that stippling was present would have placed “Moore going through the doorway leading to the area behind the counter and shooting Mahoney in the side after Moore entered the door-way to the area behind the counter. The significance of this testimony is that it would demonstrate that Moore was not going behind the counter to see if Mahoney was dead. He was going behind the counter to murder Mahoney and to steal the store's money.” The PCR judge found that her opinion was credible in this regard and that it demonstrated that Moore’s version was not credible. **App. pp. 2902-04.**

The PCR judge further found that counsel was not ineffective for not retaining an independent crime scene expert because they had retained Girndt, who had rendered an unfavorable opinion, and because Moore had not presented such an expert. **App. pp. 2904-05.**

The PCR judge further found that counsel was not ineffective in failing to adequately cross-examine Dorman, the crime scene technician, who was not a ballistics expert. The PCR judge found that Dorman's testimony on the specific issue of whether one of the shell casings found behind the counter must have come from someone firing the gun from behind the counter was not credible in light of the evidence presented as to the incident and he concluded that "[t]he shell casing could have landed on the counter and been knocked to the floor by either Moore or Mahoney, or the shell casing could have simply bounced off the counter and rolled onto the floor behind the counter[,] or ... depending on the position of the gun at the time it was fired by Moore, the shell casing could have landed on the floor behind the counter. This was in essence the testimony of the qualified ballistics expert at trial, and this Court finds that the ballistics experts' testimony is credible, given his qualifications and all of the evidence and the record in this case." **App. pp. 2905-06.**

Moreover, the PCR judge also found that Dorman's testimony would not be admissible at trial because there was not an adequate foundation for his conclusions, and he noted Dorman's admission that a ballistics expert was the more appropriate witness to render such an opinion. Finally, the PCR judge found that there was no prejudice from not presenting Dorman's "opinion." **App. pp. 2506-07.**

D. Discussion.

This Court must deny certiorari because there is evidence to support the PCR judge's findings. First, nothing in the record refutes the PCR judge's finding that counsel's testimony was

credible. To the contrary, the testimony of both attorneys is internally consistent, and it is circumstantially corroborated by counsel's notes that are referenced in their testimony, as well as **Respondent's Exhibit 1** and other exhibits presented in the PCR court. Likewise, the record supports the finding that Moore's testimony as to the events that night was not credible. Indeed, Respondent submits it would be preposterous to accept, as credible, his claims that: (1) the victim would have gotten into an argument with him over less than a quarter that would lead to a shooting; (2) that the victim used a racial slur during the argument, but went out of his way to accommodate another African American customer; (3) that he was not using crack that night and that he did not tell anyone he had done so; (4) that his blood was not drawn that night; (5) and, that instead of traveling the short distance to the hospital after the shooting, he went in the opposite direction to Gibson's house, supposedly to seek treatment for his wound, from a crack dealer with no medical training

Based upon this credible evidence, the PCR judge correctly found that "counsel's investigation to 'prepare to confront and rebut the State's alleged physical evidence' was objectively reasonable, and that they had the services of a forensic pathologist, a crime scene expert and a private investigator to assist them in their efforts. Mr. Morin thought that both were competent. He did not see the need for employing another expert and was unsure that funding would be approved for such a request. Also, Mr. Kelly has a great deal of experience with and knowledge of the use of firearms." **App. p. 2897.**

Contrary to Moore's allegations, trial counsel had made reasonable efforts to challenge the forensic evidence against Moore by retaining and their private investigator and their experts in crime scene analysis and forensic pathology. Unfortunately for Moore, both experts rendered opinions that

were unfavorable to Moore. Further, counsel was entitled to rely upon the conclusions of each of their experts, and their failure to shop for a more favorable opinion was objectively reasonable under *Strickland*. E.g., *Poyner v. Murray*, 964 F.2d 1404, 1418-19 (4th Cir.1992) (holding that there is no right to effective assistance of expert witnesses exists distinct from the right to effective assistance of counsel, and that the Constitution does not require attorneys to “shop around” for more favorable expert testimony); *Pruett v. Thompson*, 996 F.2d 1560, 1574 (4th Cir. 1993) (counsel was entitled to rely on the information he obtained from his retained experts and not second-guess this information just because the experts he had retained and had evaluated petitioner rendered an unfavorable or less than desirable opinion); *Walton v. Angelone*, 321 F.3d 442, 464-66 (4th Cir. 2003) (counsel was not constitutionally required to continue looking for an expert, or “shop” for an expert, just because the experts he had retained and had evaluated petitioner rendered an unfavorable or less than desirable opinion); *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995) (“If an attorney has the burden of reviewing the trustworthiness of a qualified expert’s conclusion before the attorney is entitled to make decisions based on that conclusion, the role of the expert becomes superfluous”). See also *Reynolds v. Bagley*, 498 F.3d 549, 557 (6th Cir.2007) (defense counsel is not obligated to shop for “the ‘best’ experts” who will testify in the most advantageous way possible); *Sidebottom v. Delo*, 46 F.3d 744, 753 (8th Cir.1995) (finding that defense counsel did not render ineffective assistance by not seeking a “second opinion” where counsel reasonably relied on the results of a psychological examination).

Moore does not currently assert that counsel were ineffective in not offering the unfavorable opinions of either Dr. McMahon or Mr. Girndt. Also, the record supports the PCR judge’s rejection of Moore’s ineffectiveness claim based upon counsel’s failure to present their testimony. **App. pp.**

2901-02.

On certiorari, however, Moore asserts that “[Mr.] Morin did not even tell Dr. McMahon and Donald Girndt petitioner’s “consistent,” --Morin’s words - version of what occurred in Nikki’s store that morning.” **Petition for Writ of Certiorari, p. 55. See also *id* at 56.** There is also a finding to this effect in the Order of Dismissal (**App. 2898**), and Mr. Morin initially testified Mr. Morin that he did not recall what information he provided to Girndt or whether he had told Girndt Moore’s version of the shooting. **App. pp. 2368-69; 2371-72; 2441.** However, Mr. Morin later testified that his notes would have more accurately reflected what he did. Those notes showed that Girndt had received Dorman’s report, crime scene photos and a video, and that he had told Girndt Moore’s version of what occurred. **App. p. 2540.**³⁷ Thus, Moore’s assertion is wrong.

Although the PCR judge’s finding is likewise incorrect and not supported by the record, Moore is not entitled to relief based upon this error. To the contrary, it appears that counsel did what Moore contends he should have done by informing Girndt of Moore’s account. Even though provided with this information, Girndt did not provide a favorable analysis of the physical evidence found at the scene.

Respondent further submits that the PCR judge correctly found neither deficient performance nor prejudice in counsel’s failure to seek out DR. Conradi’s opinion. Their failure to search out her opinion or that of another favorable forensic pathologist was not deficient because counsel was entitled to rely upon the expert opinions of Girndt and Dr. McMahon, and they were not required to “expert shop.” *Poyner*, 964 F.2d at 1418-19; *Pruett*, 996 F.2d at 1574; *Walton*, 321 F.3d at 464-66. Also, under *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), Moore “had no constitutional right to insist

³⁷ Mr. Morin was also sure Dr. McMahon had the autopsy report. **App. p. 2450.**

on the appointment of any particular expert,” such as Dr. Conradi. *Walton*, 321 F.3d at 464.

Also, Moore did not prove any prejudice from counsel’s failure to present her opinion. First, her findings that there was a single gunshot that caused both wounds found on the victim’s body (**App. p. 2327**) and that the victim would have died within five or ten minutes of the shooting (**App. p. 2329**) were merely cumulative to Dr. Wrenn’s trial testimony that all of Jamie’s injuries could have been caused by a single gunshot if his body had been positioned in such a manner in which that could have occurred and that he would have died within six to ten minutes after receiving this wound. **App. pp. 1491-1502**. More importantly and as the PCR judge correctly found, Dr. Conradi’s opinion “further incriminated and damned applicant Moore.” **App. p. 2903**.

As discussed and found by the PCR judge (**App. p. 2903**), Dr. Conradi opined that there was stippling around the fatal wound to the victim’s left side. She further opined that Moore would had to have been within 12" to 15" of the victim when he fired the fatal shot into the victim because the victim was wearing a shirt at the time he was shot, and the stippling penetrated the outer clothing of the victim, which is visible on the autopsy photograph introduced as State’s Exhibit 17 at trial. **App. pp. 2331-32**. Thus, the record support’s PCR judge’s conclusion that:

Dr. Conradi’s testimony would place Moore going through the doorway leading to the area behind the counter and shooting Mahoney in the side after Moore entered the door-way to the area behind the counter. The significance of this testimony is that it would demonstrate that Moore was not going behind the counter to see if Mahoney was dead. He was going behind the counter to murder Mahoney and to steal the store’s money.

App. pp. 2903-04.

Her finding corroborates “trial counsel’s expert pathologist and trial counsel’s forensic expert that the fatal shooting of the deceased victim in this case occurred when Moore and the victim were

both in the area behind the counter and in the kitchen area. ... [I]f trial counsel had called Dr. Conradi to the stand, this damaging testimony would have been elicited on cross-examination by the State, as it was by the Attorney General at PCR.” **App. p. 2904.** As a result, there can be neither deficiency nor prejudice. *See Byram*, 339 F.3d at 210 (counsel's strategic decision not to present psychological evidence, where experts' findings contained suggestions of antisocial behavior that could have been harmful to client's defense “was a reasonable one because such evidence 'is a double-edged sword that might as easily have condemned [defendant] to death as excused his actions.'”) (citation omitted); *Miller*, 255 F.3d at 459 (“The clearest respect in which the lawyer's representation fell below the minimum level was the decision to put the psychologist on the stand, knowing what the lawyer knew”); *Bonin*, 59 F.3d at 834 (counsel's presentation of childhood mitigation evidence was reasonable since expert testimony would have been of “slight value at best” and it “would have opened the door to precisely the type of cross-examination that [counsel] sought to avoid by refusing to call psychiatric experts-another recitation of all of Bonin's atrocities for the purpose of determining whether, in the expert's opinion, such behavior is the likely product of such abuse”).

Counsel had already made an objectively reasonable strategic decision not to present Dr. McMahon’s or Mr. Girndt’s findings and such cross-examination of Dr. Conradi would have undermined this reasonable strategy and it “would have been devastating to Moore's guilt phase defense and to his mitigation presentation during the sentencing phase. Therefore, Moore cannot show any prejudice from failing to present Dr. Conradi's testimony. *Strickland*[.] *See also Belmontes*, 130 S.Ct. at 386].” **App. p. 2904.**

Moore’s remaining contention is that counsel in failing to properly cross-examine the State's crime-scene technician, Paul Dorman. Respondent submits that the record supports the PCR judge’s

rejection of this claim. **App. pp. 2905-07.** As observed by the PCR judge, Moore repeatedly referred to the crime-scene technician as "the State's expert" during the PCR hearing and he continues to do so before this Court. However, this distorts the record because "Dorman was not the State's expert at trial or at PCR." **App. p. 2905.**

Rather, he was called "at trial as a crime scene technician, *i.e.* to testify about where he located particular pieces of evidence and his retrieval of the same." As such, "he was simply the person from the Sheriff's Office who was designated to film the crime-scene, photograph it, and recover all of the physical evidence found at the scene." **App. p. 2905.** Also, Dorman was Moore's witness at the PCR hearing, and he was only qualified as an expert in "crime scene investigation." **App. pp. 2186; 2905.**

Over Respondent's objection, Dorman was allowed to testify "at the PCR hearing that, in his opinion, one of the shell casings found behind the counter must have come from someone firing the gun from behind the counter. Moore argued that this indicated that the victim shot at him first with the .45, and that trial counsel was ineffective in failing to cross-examine Mr. Dorman on this specific issue." The PCR judge found that Dorman's opinion about how the shell casing ended up behind the counter was not credible. **App. pp. 2905-06.** Again, his finding is supported by the record.

Dorman clearly admitted that he is not an expert in crime scene reconstruction or ballistics, and he admitted that a firearms expert was more qualified to testify how or why one of the fired shell casings ended up behind the counter on the floor. **App. pp. 2229-30; 2252.** The PCR judge also correctly found that "[t]he record shows *the firearms expert* did so testify at trial. The forensic firearms examiner testified at trial that there were a myriad of ways in which the fired shell casing found behind the counter could have ended up behind the counter. **R. pp. 1419-50.**" **App. p. 2906.**

Moore repeatedly and disparagingly attacks the PCR judge's finding that Dorman's opinion on this limited issue was not credible. However, Dorman's opinion is at odds with the opinion of the expert whom he admitted was the appropriate witness to explain this issue. The PCR judge merely resolved the credibility issue adversely to Moore, and this finding is supported by the record. *See Cherry, supra.*

The trial testimony of the ballistic's expert supports the PCR judge's findings that:

There are a myriad of ways that the shell casing could have ended up behind the counter and in the location it was found. The shell casing could have landed on the counter and been knocked to the floor by either Moore or Mahoney, or the shell casing could have simply bounced off the counter and rolled onto the floor behind the counter.

Additionally, depending on the position of the gun at the time it was fired by Moore, the shell casing could have landed on the floor behind the counter. This was in essence the testimony of the qualified ballistics expert at trial, and this Court finds that the ballistics experts' testimony is credible, given his qualifications and all of the evidence and the record in this case.

App. p. 2906.

Likewise, the record supports the PCR judge's rejection of Dorman's opinion because his "testimony on this specific issue ... does not meet the standard of admissibility required for admission of such evidence at a trial before a jury ... [since] Mr. Dorman did not perform specific testing of the weapon fired in this case to determine how this specific weapon ejects shell casings, the distance this specific weapon would eject shell casings, and in what direction it would eject shell casings depending on the angle the gun was held when fired. Mr. Dorman's testimony on this issue is thus speculative." Given this record, the PCR judge correctly reasoned that "trial counsel was not ineffective in failing to cross-examine him on his personal opinion regarding how the shell casing could have ended up on the floor behind the counter because this was outside of his expertise and,

by his own admission, the firearms examiner was person qualified to testify to such matters.” **App. pp. 2906-07.** *See, e.g., 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 the burden of producing admissible evidence in accordance with the rules of evidence); *State v. Schumpert*, 312 S.C. 502, 505, 435 S.E.2d 859, 861 (1993) (“The party offering the expert has the burden of showing his witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony”); *Nelson v. Taylor*, 347 S.C. 210, 218, 553 S.E.2d 488, 492 (Ct.App. 2001) (permitting an expert witness to testify beyond the scope of his or her expertise can constitute reversible error); *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541 (Tenn. 1992) (finding that physical therapist was not qualified to give expert opinion on medical causation in worker's compensation case); *First United Fin. Corp. v. U.S. Fid. & Guar. Co.*, 96 F.3d 135, 136 (5th Cir.1996) (noting that expert testimony was properly rejected by the court because the “opinion of dishonesty goes beyond the scope of expertise”); *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir.1994) (“[t]he issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question”), *cert. denied*, 513 U.S. 1111 (1995); *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 516 F.2d 33, 37 (10th Cir. 1975) (trial court’s rejection of “expert opinion” testimony of witness offered by purchaser of pipe as to whether pipe violated the institute standards specified in purchase order was not an abuse of discretion in absence of showing that witness possessed expertise that would have qualified him to render an opinion as to what in fact the institute intended its standards to mean and in view of the fact that trial court had before it the institute's own official interpretation of its standards). Indeed, the only person who could render such an opinion was the firearms

examiner, Agent Whittler, who would have obviously disagreed with Dorman's non-expert "opinion." *Id.*

Finally, the record supports the PCR judge's conclusion that, even if Dorman's opinion was admissible, Moore failed to establish how he was prejudiced by counsel's failure to elicit it. **App. p. 2907.** First, there was overwhelming evidence that Moore was guilty of murder and armed robbery. *See Strickland*, 466 U.S. at 694. Moreover, Dorman's "opinion" was subject to thorough impeachment for the reasons set forth, *supra*. Third and as found by the PCR judge,

Given that (1) there are several other factors that could have contributed to or caused the shell casing to have ended up on the floor behind the counter; (2) Dorman's admission that the firearms examiner was qualified person to explain how the shell casing could have ended up behind the counter; (3) the firearms examiner testified it was impossible to tell how the shell casing ended up behind the counter; (4) the implausibility of Moore's version of the shooting; (5) Moore's own expert, Dr. Conradi, testified that Moore would had to have been behind the counter when he fired the fatal shot given the stippling around the victim's wound; and (6) the overwhelming evidence of Moore's guilt of these crimes, the Court finds that Moore was not prejudiced by counsel's alleged deficient performance in this regard. Moore has failed to show that had this testimony been admitted there is a reasonable probability the result of the proceeding would have been different. *Strickland*.FN13

FN13/ By this time, he had taken the .45 caliber semi-automatic from the victim, which would explain how one fired shell casing ended up behind the counter, i.e., he was behind the counter when he fatally shot the victim.

App. p. 2907.

In the absence of prejudice under *Strickland*, this claim lacks merit.

CONCLUSION

Respondent submits that the Court should deny the Petition for Writ of Certiorari for the above-stated reasons.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

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

November 16, 2012.

By: 
ATTORNEYS FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

November 16, 2012

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

RECEIVED

NOV 16 2012

S.C. Supreme Court

Re: *Richard Bernard Moore v. State of South Carolina*
Appellate Case No. 2011-198472

Dear Mr. Shearouse:

Enclosed for filing please find the original and six (6) copies of the Return to Petition for Writ of Certiorari, along with proof of service in the above-referenced case. Also enclosed is an original and six (6) copies of a Motion to Allow the Filing of a Return to Petition for Writ of Certiorari Exceeding the Twenty-Five Page limit.

Respondent has contacted Petitioner's counsel to obtain consent to this motion.

Thank you for your assistance in this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd
Enclosures

cc: Robert Dudek, Esq. (w/two (2) copies of encls.)
Honorable Barry J. Barnette, Solicitor, 7th Judicial Circuit (w/copy of encls.)
Ms. Sandi Wofford, Victim Services (w/copy of encls.)

The Supreme Court of South Carolina

Richard Bernard Moore, Petitioner,

v.

State of South Carolina, Respondent.

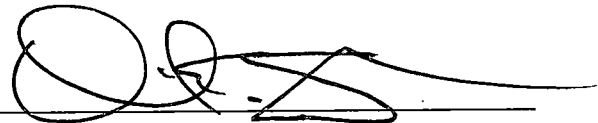
Appellate Case No. 2011-198472

ORDER

The Motion to Substitute the Appendix in the above entitled matter is granted. The redacted appendix received in this office on August 15, 2014 is accepted as filed.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

August 18, 2014

cc:

Robert Michael Dudek, Esquire

W. Edgar Salter, III, Esquire

J. Anthony Mabry, Esquire

Susan Barber Hackett, Esquire



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 15, 2014

RECEIVED

AUG 15 2014

S.C. Supreme Court

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

Re: Richard Bernard Moore v. State of South Carolina

Dear Mr. Shearouse:

Enclosed are an original and six copies of the Motion to Substitute Appendix in the above-captioned case. Thank you for your assistance in this matter.

Sincerely,

Susan B. Hackett
Appellate Defender

SBH/smf

Enclosure

cc: William Edgar Salter, III, Esquire
Mr. Richard Bernard Moore, #6003

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Roger L. Couch, Circuit Court Judge

RECEIVED
AUG 15 2014
S.C. Supreme Court

RICHARD BERNARD MOORE.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2011-198472

MOTION TO SUBSTITUTE APPENDIX

The undersigned respectfully seeks to supplement the Appendix on the following grounds:

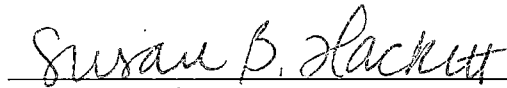
1. Richard Moore was convicted of capital murder and sentenced to death in October of 2001. His conviction and sentence were affirmed in 2004. See State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004).
2. Moore filed an application for post-conviction relief (PCR) on January 19, 2011. Relief was denied on August 1, 2011. Undersigned counsel and Chief Appellate Defender, Robert Dudek, filed a petition for writ of certiorari and accompanying six-volume appendix concerning this matter on July 18, 2012.
3. At the time of the filing of the petition for writ of certiorari and appendix, undersigned counsel made diligent efforts to redact the appendix of personal identifying information pursuant to the interim order in place at the time.

4. On August 8, 2014, undersigned counsel learned from this Court that the appendix contained many unredacted personal identifiers despite counsel's diligent efforts. Upon learning of the oversights with the redactions, undersigned counsel has made every effort to completely redact the appendix to eliminate all personal identifiers.

5. Due to the number of volumes of the appendix and the number of redactions necessary, undersigned counsel has not redacted the copy on file with the Court. Therefore, Petitioner respectfully requests the appendix currently on file with this Court be substituted for the redacted appendix accompanying this motion. If the appendix on file with this Court may not be completely withdrawn, Petitioner requests that it be marked non-public so that the personal identifiers not redacted will not become available to the public.

6. Petitioner consulted with Donald Zelenka of the Attorney General's Office on August 8, 2014 regarding this matter. Mr. Zelenka agreed to the procedure proposed above. Further, Mr. Zelenka requested that undersigned counsel direct future inquiries to W. Edgar Salter.

Respectfully submitted,



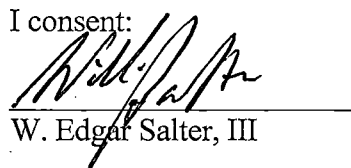
Susan B. Hackett
Appellate Defender

Robert M. Dudek
Chief Deputy Appellate Defender

Attorneys for Petitioner

This 15th day of August, 2014

I consent:



W. Edgar Salter, III

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

RICHARD BERNARD MOORE.,

PETITIONER,

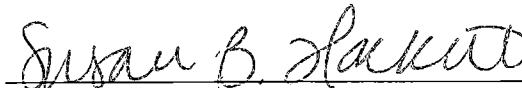
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Motion to Substitute Appendix in the above referenced case has been served upon opposing counsel, William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Richard Moore, #6003, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 15th day of August, 2014.


Susan B. Hackett
Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 15th day of August, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022



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 13, 2014

RECEIVED

AUG 14 2014

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

S.C. Supreme Court

Re: Richard Moore v. State, Appellate Case No. 2011-198472

Dear Mr. Shearouse:

Please accept this letter as a follow-up to a telephone conversation between Debbie Hopkins of your office and Kimberly McCall of our office last week and a conversation between Ms. Hopkins and me today. Ms. Hopkins alerted our office that the appendix filed in Mr. Moore's case contains many personal identifiers that should have been redacted. This is terribly embarrassing, and we hope to make it right as soon as possible. Due to the number of volumes and the number of personal identifiers requiring redaction, we are going to redact the appendix and provide the Court with a newly redacted appendix. I have been in contact with the Attorney General's Office and obtained consent for this procedure. Currently, we are going through the appendix to ensure all personal identifiers are redacted. We will provide the Court with the redacted appendix as soon as it is available.

I apologize for any inconvenience this has caused the Court or opposing counsel. If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Susan B. Hackett
Appellate Defender

SBH/

cc: Robert M. Dudek, Esquire
W. Edgar Salter, Esquire

The Supreme Court of South Carolina

Richard Bernard Moore, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-198472

ORDER

By order dated November 22, 2013, the post-conviction relief appeal in this capital case was inadvertently transferred to the Court of Appeals. The order transferring this case is hereby rescinded and the appeal in this matter will remain in the Supreme Court. This order has no effect on the remaining post-conviction relief cases transferred to the Court of Appeals by order dated November 22, 2013.



C.J.
FOR THE COURT

Columbia, South Carolina

November 25, 2013

cc:

Robert Michael Dudek, Esquire
W. Edgar Salter, III, Esquire
J. Anthony Mabry, Esquire
Susan Barber Hackett, Esquire
Donald J. Zelenka, Esquire
The Honorable Jenny Kitchings

The Supreme Court of South Carolina

RE: TRANSFER OF CASES FROM SOUTH CAROLINA SUPREME COURT TO THE COURT OF APPEALS

ORDER

Pursuant to Rule 243(1), SCACR, the following post-conviction relief cases are hereby transferred to the South Carolina Court of Appeals:

1. 2010-178866 Darrell Efrid v. State
2. 2011-193110 Preston Costa v. State
3. 2011-193113 McCenia Amouri Dials v. State
4. 2011-193527 Tyrone Ransom v. State
5. 2011-193709 Reginald Davis v. State
6. 2011-195226 Marty Craig McKinsey v. State
7. 2011-196591 Juan Ramos v. State
8. 2011-196599 Phillip Antonio Byrd v. State
9. 2011-197706 Victor C. Penny v. State
10. 2011-197707 Daniel B. Stratten v. State
11. 2011-197708 Kimjaro Presley v. State
12. 2011-198349 Troy Robinson v. State
13. 2011-198472 Richard Bernard Moore v. State
14. 2011-199414 Bobby Shay Rathburn v. State
15. 2011-199417 Tyrone Lewis Jr. v. State
16. 2011-199927 Anthony Williams v. State
17. 2011-200190 Christopher J. Hickman v. State
18. 2011-200548 Quentes S. Wells v. State
19. 2011-201107 Demetrius Lewis v. State
20. 2011-201129 Chan Bun v. State
21. 2011-201146 Thaddeuss Starks v. State
22. 2011-201589 Adam Bickham v. State
23. 2011-202767 Fredrick Alphonso Irby v. State
24. 2011-202769 Drew John Monahan v. State

25.	2011-202770	Michael D. Day v. State
26.	2011-202773	Richard F. Whelchel v. State
27.	2011-204347	Lance Lyles v. State
28.	2011-204375	Russell Fred Spitzer v. State
29.	2011-204386	Darrell L. Goss v. State
30.	2011-204847	Kenaz Collier v. State
31.	2011-204966	Clarence Bamberg v. State
32.	2012-205988	Chadrick Cole v. State
33.	2012-206006	Richard Stegall v. State
34.	2012-206007	Dustin Tiller v. State
35.	2012-206008	Frankie Lee Bryant III v. State
36.	2012-206048	Kevin D. Cook v. State
37.	2012-206227	Tashon Sampson v. State
38.	2012-206228	Douglas L. Rice v. State
39.	2012-206648	Tippy Marie Retana v. State
40.	2012-206672	Vante R. Birch v. State
41.	2012-207129	Keith R. Bradley v. State
42.	2012-207131	David A. Fowler v. State
43.	2012-207133	James F. Russell v. State
44.	2012-207147	Cecil Allen Simmons v. State
45.	2012-207246	Andre Lee Reed v. State
46.	2012-207555	Steven R. Johnson v. State
47.	2012-207626	Archie Hoover v. State
48.	2012-207627	Stanley Bradley v. State
49.	2012-207628	Marcus Martin v. State
50.	2012-207816	Darrell Gleaton v. State
51.	2012-207817	Evelyn Buckle v. State
52.	2012-208011	James Wilkinson v. State
53.	2012-208012	Kenneth L. Young v. State
54.	2012-20826	Wiley Post James v. State
55.	2012-208047	Korrell Battle v. State
56.	2012-208666	Larry Mitchell v. State
57.	2012-208667	Wilbur G. Moses Jr. v. State
58.	2012-208889	Dennis L. Snipes v. State
59.	2012-208906	Tommie Watts v. State
60.	2012-209526	Kareem Wiley v. State
61.	2012-209532	Brian Powell v. State
62.	2012-209536	Phillip A. Hingleton v. State
63.	2012-209537	John P. Hendrix v. State
64.	2012-210228	Clark Inabinett v. State

65.	2012-210669	Sean D. Wells v. State
66.	2012-210670	Christian Harris v. State
67.	2012-210671	James Matthews v. State
68.	2012-210672	Jason D. Parker v. State
69.	2012-211090	Nathaniel Caldwell III v. State
70.	2012-211269	Nancy E. VonCannon v. State
71.	2012-211289	Christopher M. Vaughn v. State
72.	2012-211296	Douglas Thompson v. State
73.	2012-211389	Teddie Lee Grant v. State
74.	2012-211391	Jerod Juan Cook v. State
75.	2012-211592	Michael Freeman v. State
76.	2012-211874	Ackief Pauling v. State
77.	2012-212070	Vondell Sanders v. State
78.	2012-212076	Fredy Sibrian v. State
79.	2012-212079	Jamal Lindsey v. State
80.	2012-212090	DeRoyick Montgomery v. State
81.	2012-212099	Clinton F. Stephens v. State
82.	2012-212155	Terrance Tompkins v. State
83.	2012-212162	Wayne Cooley v. State
84.	2012-212227	Montavis K. Gaines v. State
85.	2012-212300	Alfred Redwine v. State
86.	2012-212303	Tyquan Jared Amir Jones v. State
87.	2012-212304	Harry N. Charles II v. State
88.	2012-212312	Tyrone A. Ravenell v. State
89.	2012-212315	Matthew William Gilliard III v. State
90.	2012-212317	Michael Anthony York v. State
91.	2012-212353	Donald Hurlbert v. State
92.	2012-212400	West Webb Mitchem v. State
93.	2012-212401	Kieve Malik Smith v. State
94.	2012-212408	Derrick F. Williams v. State
95.	2012-212411	Jason Maness v. State
96.	2012-212505	Floyd Randolph Granger III v. State
97.	2012-212520	Kimberly Taylor v. State
98.	2012-212580	Brandon Lav'ar Johnson v. State
99.	2012-212591	Robert Young v. State
100.	2012-212592	Joseph A. Dozier v. State
101.	2012-212649	Tony Lynn v. State
102.	2012-212733	Leon Billups v. State
103.	2012-212737	Harry H. Jones v. State
104.	2012-212780	Boyce Lee Nesbitt v. State

105.	2012-212783	Clarence Miller v. State
106.	2012-212785	Albert Spann v. State
107.	2012-212811	Devin Gantt v. State
108.	2012-212826	Frank Green Jr. v. State
109.	2012-212831	Stephen Paul Casillo v. State
110.	2012-212869	Jose M. Maldonado v. State
111.	2012-212877	Little Johnny Lee Mackey v. State
112.	2012-212882	Randy Bryant v. State
113.	2013-000427	Lamont Valentine Poole v. State
114.	2013-000429	Larry Prophet v. State
115.	2013-000627	Rachion Omar Robinson v. State
116.	2013-000654	Pernell Thompson v. State
117.	2013-000870	Lavar Sanders v. State
118.	2013-000872	Casio Mack Richardson v. State
119.	2012-213129	Billy Nathan Lee v. State
120.	2012-213201	Stacey Abney v. State
121.	2012-213240	Gary Waiters v. State
122.	2012-213292	Ronald Footman v. State
123.	2012-213308	Melcelus Toland v. State
124.	2012-213338	Sylvester Boone v. State
125.	2012-213420	Morris Stewart v. State
126.	2012-213562	Christopher Shell v. State
127.	2012-213573	Randy Jennings v. State
128.	2012-213619	Matthew Taylor v. State
129.	2012-213661	Robert L. Dickerson v. State
130.	2012-213667	Kamala Creighton v. State
131.	2012-213668	David Heath v. State
132.	2012-213671	Henry Lee Bradley v. State
133.	2012-213684	Christopher Dale Shirley v. State
134.	2012-213700	David Lee Rose v. State
135.	2013-000043	Steven William Roberts v. State
136.	2013-000045	Christopher Dean Johnson v. State
137.	2013-000069	Ricky Price v. State
138.	2013-000079	Anthony M. Brown v. State
139.	2013-000111	Pamela Marie Teal v. State
140.	2013-000127	(Bobby) Robert James Rippy v. State
141.	2013-000128	Travis Sentell Rice v. State
142.	2013-000137	Michael A. Williams v. State
143.	2013-000139	Timothy Stahlnecker v. State
144.	2013-000362	Stanley L. Butler v. State

145. 2012-212890 Antoine J. China v. State
146. 2012-212936 Christopher O'Neal Pringle v. State
147. 2012-213032 Angel Gonzales v. State
148. 2012-213036 David Andres Ortiz Molina v. State
149. 2012-213038 Travis D. Bellamy v. State
150. 2012-213118 Kareem J. Leaphart v. State

IT IS SO ORDERED.


C.J.
FOR THE COURT

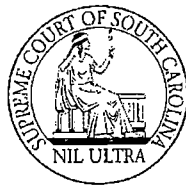
Columbia, South Carolina

November 22, 2013

cc: Chief Appellate Defender Robert M. Dudek
Deputy Chief Appellate Defender Wanda H. Carter
Appellate Defender Robert M. Pachak
Appellate Defender Kathrine H. Hudgins
Appellate Defender LaNelle C. DuRant
Appellate Defender Susan B. Hackett
Appellate Defender Benjamin J. Tripp
Appellate Defender Carmen V. Ganjehsani
Appellate Defender David Alexander
Assistant Deputy Attorney General Salley W. Elliott
Assistant Attorney General John W. Whitmire
Assistant Attorney General Tyson A. Johnson
Assistant Attorney General Suzanne H. White
Assistant Attorney General Ashleigh R. Wilson
Assistant Attorney General Megan E. Harrigan
Assistant Attorney General Karen C. Ratigan
Assistant Attorney General Daniel F. Gourley
Assistant Attorney General David A. Spencer
Assistant Attorney General J. Rutledge Johnson
John Benjamin Aplin, Esquire
Tricia Blanchette, Esquire
J. Falkner Wilkes, Esquire

Tara D. Shurling, Esquire
Joshua Snow Kendrick, Esquire
Ernest Charles Grose, Jr., Esquire
Jeremy Adam Thompson, Esquire
Glenn Walters, Esquire
R. Bentz Kirby, Esquire
Hemphill P. Pride, III, Esquire
William Joseph Barr, Esquire
Arie D. Bax, Esquire
Bruce A. Bryholdt, Esquire
Tommy Thomas, Esquire
Teddie Lee Grant #342172
Wilbur G. Moses Jr. #244241
Michael Freeman #262416
Kevin D. Cook #268901
Phillip A. Hingleton #166888
Michael D. Day #318713
Larry Mitchell #264463
Korrell Battle #292294
Steven R. Johnson #245428
Frederick Alphonso Irby #339195
Andre Lee Reed #218837
Fredy Sibrian #338184
Tashon Sampson #261273
James Matthews #258992
Jason D. Parker #328223
Kimberly Taylor #316813
Nancy E. VonCannon #315528
Christopher M. Vaughn #339181
Travis D. Bellamy #323612
Terrance Tompkins #318169
Clinton F. Stephens #246685
Morris Stewart #343460
Tyquan Jared Amir Jones #320934
Harry N. Charles II #268775
Tyrone A. Ravenell #318711
Derrick F. Williams #331226
Albert Spann #324640
Pamela Marie Teal #343575
Wayne Cooley #168807

Jose M. Maldonado #340872
Alfred Redwine #291230
Little Johnnie Lee Mackey #294652
Travis Sentell Rice #304580
Joseph A. Dozier #255343
Gary Waiters #273876
Pernell Thompson #336975
Clarence Miller #267397
Larry Prophet #304134
Christopher Dale Shirley #339568
David Lee Rose #091858
Lemont Valentine Poole #265389
Christopher Shell #181291
Robert L. Dickerson #113793
Floyd Randolph Granger III #339558
Brandon Lav'ar Johnson #321109
Sylvester Boone #341082
Christopher Dean Johnson #343032
Ricky Price #285743
Kareem J. Leaphart #297361
Casio Mack Richardson #339735
Devin Gantt #337539
Randy Jennings #259845
Anthony M. Brown #341644
Michael A. Williams #273114
David Heath #128440
Antoine J. China #292911
The Honorable Jenny Kitchings



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

February 26, 2013

Mr. Richard B. Moore, #6003
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472

Re: Richard Bernard Moore v. State
Appellate Case No. 2011-198472

Dear Mr. Moore:

This responds to your recent letter and supplemental petition. Since you are represented by counsel in this matter, I cannot accept these documents for filing and they are being returned to you. *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010); *Jones v. State*, 348 S.C. 13, 558 S.E.2d 517 (2002); *State v. Stuckey*, 333 S.C. 56, 508 S.E.2d 564 (1998); *Foster v. State*, 298 S.C. 306, 379 S.E.2d 907 (1989). I am providing your counsel with a copy of these documents.

Very truly yours,

CLERK

Enclosure

cc: Robert Michael Dudek, Esquire (with enclosure)
W. Edgar Salter, III, Esquire
J. Anthony Mabry, Esquire
Susan Barber Hackett, Esquire

Attn: Honorable Clerk of Court
P.O. Box 11330
Columbia, SC 29211

RECEIVED

FEB 25 2013

S.C. SUPREME COURT

Re: Writ of Certiorari 2011-198472
Richard B. Moore #16003 v. State of S.C.

FEB 26, 2013
RETURNED FOR
FILING

[Signature]
CC Clerk

Honorable Clerk of Court,

After communicating with my present counsel, Robert M. Dudick, SCJD, to have the enclosed issues added to my Petition, he expressed his unwillingness to add them to my Petition.

On January 7, 2013, you received my Motion for Leave to file a Supplemental Petition in this case. Your subsequent letter to me explained that "no action will be taken on" my filing.

Knowing that if I have to proceed into the Federal Court on a Writ of Habeas Corpus or other filings, the enclosed issues must be presented before the Court to ensure that they have been exhausted.

Though I specifically requested counsel allow me to file the Supplemental Petition in order to guarantee this, he did not respond in any way.

Upon receipt of the enclosed original and also included copy, please clock-stamp these documents and return the copies (of both the letter and Supplemental Filing) and return them to me in the also enclosed SASE.

Upon receipt of these clock-stamped copies, I will then forward copies, as a courtesy, all both Mr. Dudek as well as the Attorney General's office.

I greatly appreciate all of your cooperation and efforts in this request.

Thank You, in advance.

Respectfully Submitted... I am,

Richard B. Moore

Richard B. Moore #6003

Letter C-1 (RB #270)

P.O. Box 205

Ridgerville, SC 29472

en: orig. and encl) copy (ltr. and petition)

cc: file

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
THE HONORABLE ROGER L. COUCH, CIRCUIT COURT JUDGE
APPELLATE CASE NO. 2011-198472

FEB 25 2013

RECEIVED

RICHARD BERNARD MOORE,

PETITIONER,

VS.

STATE OF SOUTH CAROLINA,

RESPONDENT.

SUPPLEMENTAL PETITION FILED BY PETITIONER
ON WRIT OF CERTIORARI (RULE 212(a)(b))

RICHARD B. MOORE #6003
LIEBER C.I. (RB #220)
P.O. BOX 205
RIDLEVILLE, SC 29472

FEB 26, 2013

REFUSED FOR
FILING.

*MOTION FOR CONSENT
RECEIVED BY SUPREME
COURT OF SOUTH CAROLINA
ON JANUARY 7, 2013

RECEIVED

FEB 25 2013

S.C. Supreme Court

ARGUMENTS

I This Court must grant certiorari because there is evidence of probative value to show that counsel was ineffective and the PER judge's finding was in error. Counsel failed to research, investigate and present evidence necessary on the Petitioner's behalf.

Pages 1-12 (combined issue)
same facts

II This Court must grant certiorari because there is evidence which proves the prosecutorial misconducts committed by the Solicitor's Office

Pages 1-12 (combined issue)
same facts

III This Court must grant certiorari because there is clear and convincing supportive evidence that the jury was unconstitutional by Batson standards.

Pages 13-18

STATEMENT OF FACTS

In the instant SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI filed Pro Se by the Petitioner, the Petitioner herein adopts the "Statement of Facts" as is provided in the PETITION FOR WRIT OF CERTIORARI filed by the South Carolina Commission on Indigent Defense (Pgs. 3-6)

ARGUMENTS / ISSUES

AS FOLLOWS (Pgs. 1-18)

At trial, the State presented a case based on theories conjured up by their own crime scene analyst. At best, the prosecution was one created in doubt that used evidence attempting to fill in their argument rather than following the evidence to gain understanding of the facts. The State was entirely unable to conclusively establish any sensible or plausible explanation of what really occurred. The alleged "witness," Terry Hadden, could neither be called an "eye-witness" as he, admittedly, did not see the events which were the catalyst of the incident, nor were his statements consistent with the evidence taken at the scene.

At PCR, the Court erred in not finding trial counsel ineffective or prosecutorial misconduct as an examination of the reports and testimony provided that had defense counsel conducted a complete and adequate investigation of the evidence, used said results to confront/rebut State's testimony and theories, and presented expert testimony to challenge the grossly prejudicial representations by the State, the result of the case at trial would have been different.

In review, the INVESTIGATIVE REPORT taken in the case listed Terry Hadden as stating, "...he was inside the store playing poker machines... at approximately 3:20 a.m., [a] black male entered the store... He [heard] Jamie say, 'What the Hell!' [He heard] the black male tell Jamie... He states he [then] turned around and looked at both of them and [the] black male said, 'I told you

not to move, 'pointed a gun at him and fired one shot toward him... .. He heard about 7 or 8 shots being fired... and then he [heard] him say, '[Let's] get the hell out of here.'... " (Pages 1 and 2 of Steve Denton's INVESTIGATIVE REPORT) (emphasis added, citations omitted)

Denton finalized his report, "I spoke with Terry at length and that's pretty much everything he [saw and heard]."

This is instantly inconsistent and contradictory of the facts. Hadden states, "a black male... the black male..." and then claims to hear "Let's." The initial references of "a" and "the" indicate a single individual while "Let's" invokes a plural/multiple situation. This is ONLY the first of many discrepancies that went unchallenged.

In the same report, Denton provides information that counsel failed to present later on the Appellant/Petitioner's behalf:

"I went back to crime scene #1 (the store) and met with the owner, Keith Fowler. Keith stated that the victim, James Mahoney, [always carried a .44 magnum] while he worked at the store; however, he did tell me [there was a .45 semi-automatic pistol] that laid in an area on the desk between the counter and the floor area."
"... .. He also stated there was a .32 magnum..."
(Page 7 of 10, emphasis added/citations omitted)

Most importantly, Denton stated, "I advised him I [could not find that weapon there]," when referencing the .45 semi-automatic.

Clearly, the weapons which the owner, himself, proved were either ON the victim or IN the store ALL MATCHED the

bullets and casings collected by the analysts. The combination of Denton's REPORT and the owner's statement PROVE that Petitioner Moore did NOT enter the establishment armed and could only gain possession of a weapon presented by the victim.

In Officer Dan Jeter's INVESTIGATION REPORT, it becomes apparent that the State had no intention of allowing facts to guide the investigation:

"It is [speculated] that during the robbery, the victim reached and grabbed a .45 caliber pistol from behind the counter, brandished it and ultimately ended up in a struggle with the suspect. At some point, the victim brandished an additional firearm and exchanged fire with the suspect." (See Jeter's REPORT, Pg. 2 of 3, Paragraph 1)

Using "speculation" immediately rather than gathering the information and evidence, the State provided current proof of their misconduct and gross inconsistencies. Look, again, at Hadden's Statement:

"At that very moment, according to Hadden, he turned around in his swivel chair and looked at the suspect. The suspect [initially pointed at him and ordered him not to move] while almost simultaneously shooting at him once." (Jeter's INVESTIGATION REPORT, Pg. 2, Para. 2)

Jeter's and Denton's REPORT(s) are immediately inconsistent. Hadden's initial statement was that the individual stated, "I told you not to move." (Denton's REPORT). This indicates that he HAD been "told" something. Then, at a later point, the individual is supposed to have repeated the command and THEN fired a shot at him.

The issue at hand here is to show that there are constant

contradictions and inconsistencies in testimony and investigation showing that counsel failed to challenge countless prosecutorial misconducts.

The evolution of Hadden's testimony becomes more apparent as is seen in his statements. In the statement prepared by Det. T.E. Brown "at request of Mr. Hadden," (Dund1) Page, Dated 9-16-99:

"A blin came into the store and walked forward the beer cooler. I then turned back looking at the video machine. [A moment later] I heard the employe of the store, Jamie, say, 'what the hell are you doing?' The black male"

Here, again, Hadden says a man came in, walked forward the beer cooler, and says NOTHING to him. There is no comment until the individual supposedly says, "I [told] you not to move." It does NOT make sense.

Later that day, Hadden gave ANOTHER subsequent statement, "I gave a statement to detectives earlier and this statement is an addition to that one." (See VOLUNTARY STATEMENT, 9-16-99). Here, Hadden becomes more creative by adding, "The black male [swung a pistol at me and said, 'don't move'] about the same time as he shot at me," and added "About that time, all hell broke loose. I heard shots being fired back and forth, maybe 14 all told." Earlier statements told NONE of this and specifically claimed, "... 7 or 8 " shots.

Interesting to note - and unchallenged by counsel - Hadden's hand-written statement is written with a "9-24-99" date but it has a transcribed date of 9-16-99. So, did Hadden come eight(8) days later to make the "VOLUNTARY" changes? What date were

the "additions" made? It seems convenient to the prosecution that all of these voluntary additions were added to statements. Had defense counsel questioned these additions and used experts to discredit the statements of these "REPORTS" and "VOLUNTARY STATEMENTS" for the speculations that they created, the jury would have been provided an opportunity to see the case was produced as compared to researched / investigated.

Hadden's additional statement brought more "new" info.:

"Before all this happened, a black guy came into the store and said he was having car trouble. The guy was dressed in greasy overalls and was short. Jamie acted like he knew him. Jamie went out with him and came back a few seconds later. The black guy [came back in and gave Jamie a hammer]"

(Hadden's hand-written VOLUNTARY STATEMENT - transcribed)

Here, the State introduced NEW statements that suddenly described tools and equipment in the store. Another opportunity that defense counsel failed to attack. Hadden - and the State - had created a myriad of questionable challenges to provide to the jury.

Hadden's court testimony provided the proof of his inability to give honest, factual account of that night. He admitted to having "zero" vision in one eye, (Tr. P. 1194, Ls. 18-21). How could he provide witness to the events at 3:20 a.m.?

His testimony surrounding the man who needed assistance with his car (Tr. P. 1203, L. 13 - P. 1204, L. 6) is significant in proving the State used predisposed speculations to prosecute Moore:

"I immediately realized that probably the suspect had brought the fire tool in and was going to

do the robbery with that weapon."
(Denton's INVESTIGATION REPORT, Pg. 8 of 10, Para. 2)

Proof that there was NO investigating. The State simply made numerous speculative implications toward Moon and then merely altered/modified the case when the truth proved their speculations to be grossly and prejudicially wrong.

As Hadden's testimony at trial continued, the gross discrepancies were brought forward. When discussing the movement of the suspect (Tr. P. 1205, Ls. 8-11). Hadden's story changes to accommodate the prosecution's speculations. No previous statement referenced that the suspect, "had Jamie by both of his hands with one of his hands," but now, in front of the jury (much later and after multiple VOLUNTARY ADDITIONS), Hadden has the suspect using one hand to wrestle "BOTH" of the victim's (a grown man) hands.

Suddenly, the suspect is able to wrestle a grown man's set of hands in a highly energized situation and had them "COVERED" (See Tr. P. 1206, L. 17) as a grown man might do a small child.

The unbelievable testimony continues. By Hadden's words on stand, the suspect used his LEFT hand (See Tr. P. 1208, Ls. 18-23) to hold both of the victim's and then raised the gun. Petitioner Moon is RIGHT-handed but must have an incredibly strong left so as to literally control and cover a pair of another man's hands.

The fabrications continue: Now Hadden's testimony has been added to, altered and brought to a final draft of sorts, and in his testimony, he states, "Right as he walked in the cooler,..." (Tr. P. 1205, L. 8). Hadden, playing poker with one blind eye at 3:20 a.m. claims the suspect now, "turned around and

was shooting at the poker machine." More charges: "The next thing I know of anything going on in the store is when I heard Jamie say, 'what the hell do you think you are doing?'" (Tr.P. 1205, Ls. 9-11) Initial statements (of Hadden's) claim he heard, "Get the hell back!" and "what the hell!" and then, "I told you not to move."

By using the testimony of Mr. Hadden AND the VOLUNTARY STATEMENT, "The next thing I know of..." is only "A moment later..." and yet, in only "A moment..." which was "The next thing..." Petitioner Moore was somehow supposedly able to: (1) reach around/over a counter and miraculously go straight to an exact point where a gun was; (2) wrestle a grown man so quickly and efficiently with incredible strength that he held a gun in his primary (right) hand while he "covered" the employe's TWO ("BOTH") hands with his secondary (left) hand; and (3) through all of this maintain control of the grown man while raising and firing a gun in just "A moment."

Amazingly, Hadden had said that the suspect was just at the cooler.

Were there two(2)? That would explain the "Left's..." Defense counsel NEVER posed the question.

In order to proceed with capital charges, the state had to meet certain criterias. The addition of the commission of a crime to the charges satisfied that need. Using these grossly egregious and vastly inconsistent statements, the state generated/created/built the elements and story that they needed to prosecute the case as they wished. A suspect that did NOT enter

the establishment with any weapon would NOT do. A man defending himself against an over-reacting clerk with a gun would NOT do. Over a series of re-written INVESTIGATION REPORTS, VOLUNTARY STATEMENTS and additions, the State created what it needed.

Defense counsel failed in its duties and obligations to make the arguments against these misconducts.

The Solicitor knowingly attempted to fill gaps and work at making Hadden's testimony plausible. The inconsistencies were becoming obvious. Knowing these discrepancies were becoming so blatantly obvious (Tr. P. 1214, Ls. 11-23), he began guiding Hadden. The first change that the witness needed to make concerned his previous statements, "... I don't remember giving that statement..." that Mr. Moore now argues (Tr. P. 1215, Ls. 3-4).

The Solicitor attempts to create the scenario that what the witness says now is what matters:

"Q. Regardless of whether you remember giving it or not, Mr. Hadden, as you testify this morning, did the defendant say, 'Get the hell back'?"
(Tr. P. 1215, Ls. 5-8)

This was most definitely NOT a "Regardless of..." situation. (A) If Hadden did NOT write the statement, who did? If he could NOT remember, why NOT? This was a Death Penalty trial. Was this yet another attempt by the investigating officers to give another one of their "speculations" evidence? "Who and why" were both immensely and incredibly relevant.

In order to show that these statements and all of this

information used to arrest, detain, prosecute and bring the Death Penalty against Petitioner Moore were fabricated, egregious, wrongful and unconstitutional, these questions required answering.

(B) If Hadden had said or written these statements, why was he now having no recall of them or the incident as he had reported it?

(C) Why did defense counsel allow these picking of parts and pieces without argument?

The State next goes to the 9-24-99 VOLUNTARY STATEMENT. The number of shots is discussed as the solicitor and Mr. Hadden literally create an explanation for the inconsistencies: (See Tr. P. 1217, L. 9 - P. 1218, L. 5).

Solicitor Gowdy creates an opportunity for Hadden to discuss the variance in number.

"Hadden: Yes, sir. I was asked how many shots was fired in there. I answered that with I don't know."

Not so, in the REPORT(s), he was quoted with numbers, "I heard 7 or 8 shots being fired," (Denton's REPORT). The VOLUNTARY STATEMENT that he - himself - gave quoted him as making the direct statement, "I then heard 7 or 8 more shots." There was NO "I don't know."

Of course, after the State, and its many crime scene analysts viewed the scene, more exact "speculations" and numbers that reflected bullets and casings provided a different number. Then, Hadden gave "additional" information and came up with "14," or did the prosecution?

The fact that the solicitor specifically covered each of these many inconsistencies and fabrications.

The solicitor discusses the "additional" information concerning the suspect's ability to control "Booth" of the victims and have control of the gun, (Tr. P. 1218, Ls. 18-20). He is, once again, using guided arguments to insure that the witness picks the right statement from multiple reports, statements and additions.

Though defense counsel does obtain some answers during cross that result in proof of Hadden's fabrications, he abandons the impeaching arguments and never raises any motion before the Court.

Morin gets him to admit he did NOT tell one of the officers that the suspect walked up to the counter and said "Get your damn hands up?" He states, "No, sir. I did not say that." (See Tr. P. 1223, Ls. 13-16).

So, either (A) Hadden did NOT make the statement and it was incorrect from the very beginning, proving his statements were entirely unreliable, or (B) once again, the State was fabricating a case around an individual instead of researching/investigating to get the truth from factual evidence.

Both of the only two available options prove misconduct in the prosecution.

The discrepancies continue:

"OKAY, ANYWHERE IN THAT STATEMENT, ANYWHERE, DID YOU TELL THIS OFFICER ABOUT MR. MOORE HOLDING JAMES' HANDS DOWN?"

A. NO, SIR. "

(Tr. P. 1224, Ls. 8-17)

The cross-examination proves that it was police officials who were the catalysts for making changes, additions and the subsequent VOLUNTARY STATEMENTS:

"Q OKAY, NOW AS YOU STATED, YOU THEN CAME BACK A FEW DAYS LATER.

A. [I WAS CALLED TO COME BACK] AND GO OVER MY STATEMENT, SIR."
(Tr. P. 1226, Ls. 5-8)

Undeniable proof that "VOLUNTARY" is not a correct word.

(Tr. P. 1226, Ls. 13-24)

"A. SIR, WHEN THE POLICE OFFICER PULLED UP, I DIDN'T TELL THEM NOTHING BUT THAT THERE HAD BEEN A SHOOTING. THAT'S ALL I SAID TO THEM.

"... THIS IS YOUR SECOND STATEMENT. DID YOU WRITE THIS ONE YOURSELF?

A. NO, SIR.

"Q. DID YOU READ IT BEFORE YOU SIGNED IT?

A. NO, SIR.

When defense counsel asked Hadden to identify the very officer (Steve Denton) who supposedly spoke to him at length, more truth is revealed:

"NO, SIR, I DON'T RECOGNIZE HIM."

(Tr. P. 1229, L. 2)

Nor the officers in the "additional" statements:

"Q. AND THAT WAS A DIFFERENT OFFICER OR WAS THAT THE SAME OFFICER?

A. I HAVE NO IDEA."

(Tr. P. 1229, Ls. 18-20)

Aside from Strickland v. Washington, 466 U.S. 691, the ineffectiveness

of attorneys who for failing to argue inconsistencies is made in Hall v. Washington, 106 F.3d 742, 749-750 (7th Cir. 1997) while the "Constitution does not impose a duty on defense counsel to have a 'scorch-the-earth-strategy' in conducting investigations and case preparations, it does impose a requirement that trial counsel investigate readily available sources of evidence." This understanding was echoed by Hall from an already long-standing South Carolina Supreme Court ruling which clearly mandated that attorneys in capital cases had an absolute duty to "investigate the facts and circumstances of the alleged crime with no less vigor and thoroughness than the publicly compensated solicitor." See Bailey v. State, 309 S.C. 455, 460, 424 S.E.2d 503, 506 (1992).

The solicitor's office chose to create its own case and speculate ideas, altering statements and evidence until they came that they wanted to prosecute existed.

Then, they were guilty of prosecutorial misconduct in fabricating the case.

Defense Counsel failed to bring these fabrications and misconducts before the Court and jury.

This conviction is unconstitutional and should be REVERSED and REMANDED.

Batson

The PCR Court failed to acknowledge trial counsel's ineffectiveness and the State's misconduct concerning the Batson v. Kentucky, 476 U.S. 79 (1986) claim as the State struck the only two African-Americans that were qualified to serve as jurors thereby rendering the jury as exclusively white, the strikes were prejudicial.

During jury selection, the State struck four (4) white jurors which included Joyce Smythe #251, Debra Perkins #213, Charles Kent #145 and Edward Huffman #132 (alternate). The State further struck African-American jurors Joyce Morrow #191 and Douglas Alexander #2. See TR. pp. 1134; 1765

At the conclusion of jury selection, defense counsel Marin presented the Court with a Batson Motion, referencing that the State had struck the ONLY two African-American jurors that had been qualified. TR. pp. 1134-35. In rebuttal of defense's Motion, Solicitor Lowdy claimed that Ms. Morrow was struck based on his initial misunderstanding of how the Court had qualified jurors, and further, he would have moved to disqualify for cause "BECAUSE HER ANSWERS WERE, FRANKLY, CLOSER, I THOUGHT, TO MR. ROOKARDS WHO WAS DISQUALIFIED THAN THEY WERE, ANY OF THE OTHER PEOPLE WHO HAD AN INNOCENT MIS-RECOLLECTION." TR. p. 1135, 11. 10-21

Lowdy went on to note that he was uncomfortable with Ms. Morrow's phrases surrounding guns. Though he never made any attempt to clarify the comments, Lowdy claimed them to be different from other jurors' "reluctance about guns."

ultimately, Lowdy claimed the principle reason for striking Ms. Morrow was "the withholding of information about her prior convictions, and only when confronted with the fact that she had an alias did we begin to get any truthful responses." R.p. 1135, l. 22-p. 1136, l. 10. A review of the record will show Lowdy's characterization as inaccurate. The solicitor may be alleging the answers unfavorable to him as dishonest and those leaning toward him as "truthful."

The Solicitor categorized a nineteen(19)-year old criminal charge for "simple" possession of marijuana on her record as not being "forthcoming." Defense counsel specifically cited to everyone's attention other jurors that failed to disclose criminal charges from their past. Solicitor Lowdy's ability to try and classify other jurors as having merely suffered from an "innocent" misrecollection while Ms. Morrow's was suddenly cause to be struck is the crux of the Batson argument. One "innocent," the other one not "forthcoming" though the record allows no reasonable inference on either one in either direction, and yet, Lowdy struck the African-American juror in an instance with an African-American defendant and a caucasian victim.

Juror Stacy Grant was allowed to be seated on the jury. Ms. Grant was white and had been prosecuted by the Seventh Circuit Solicitor's Office during the very same year as Moore's trial was held. She, too, failed to disclose this fact until confronted with it by the solicitor.

The African-American teacher with a nineteen (19)-year old "simple" possession of marijuana is struck for not being "forthcoming" while the white juror prosecuted the same year of the Appellant in this case is seated.

Lowdy's "improperly" reference was also inaccurate. The record definitively reflects during voir dire that Ms Morrow said that when guns are "used inappropriately" then "wrong things can happen." (Tr. p. 326) This is not at all an incorrect or prejudicial statement. Lowdy's arguments to the court were of deception in misquoting the testimony of record.

Finally, the "alias" that Lowdy used as an argument was, in fact, Ms. Morrow's maiden name. This was the solicitor's primary reason for striking this juror. (Tr. p. 1135-1136).

There is no actual plausible reason or factual reference for the solicitor's claims in striking juror Morrow. In fact, all three (3) stated arguments for the strike are grossly inaccurate and/or factually incorrect. When compared, honestly, with the facts and testimony surrounding a seated juror in the trial, the strike of Ms. Morrow is undeniable proof that the Batson Motion was not only valid but it was also warranted.

Reviewing Juror Huffman's strike, Solicitor Lowdy claimed to have exercised this strike as a result of the juror having a close family member who had recently been prosecuted and sent to prison. (Tr. p. 1136). Once again, a comparison of Juror Huffman with Juror Alexander

and Juror Grant provide the inconsistent claims made by Lowdy in his argument concerning executing his strikes. Juror Grant, herself, a white female, had been prosecuted by Solicitor Lowdy's office within a year of Appellant Moore's trial, yet, she was allowed to be seated as a juror in the case.

The Equal Protection Clause of the United States Constitution denies any party at trial purposeful racial discrimination in the jury selection process. In Batson v. Kentucky, 476 U.S. 79 (1986), the Court found, "Once the proponent states a reason that is race-neutral, the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race were seated on the jury or that the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment." State v. Adams, 322 S.C. 114, 123-124 (1996) A tainted strike may not be vitiated by an alternate non-pretextual strike. Payton v. Kears, 329 S.C. 51, 59-60 (1998).

The matter of record in the instant case provides clear and convincing argument in Moore's behalf. With regard to Juror Morrow, the solicitor made three claims:

- 1) Not being forthcoming of prior criminal charges;
- 2) a statement, according to Lowdy, about "improperly" used guns; and
- 3) an "alias."

The record clearly proves Lowdy's deceptions:

1) Lowdy claimed Morrow was struck concerning a "simple" possession of marijuana from almost 20 years prior. However, Defense Counsel cited other jurors that Lowdy conveniently classified as "innocent" misrecollections. Juror Morrow was struck while the rest were "innocent." The record provides no testimony to substantiate an inference that would allow Morrow's strike while others were seated, others similarly situated.

In fact, one juror (Stacey Gantt) was literally seated in the case while she - herself - had been prosecuted by the Seventh Circuit Solicitor's Office within a year of the trial of Appellant Moore.

2) Lowdy misquotes the testimony of another juror statement of Morrow's claiming to the Court she said "improper" with regard to guns. Her words were "inappropriate" where gun use is involved. To say using guns in illegal situations is "inappropriate" makes great sense.

This was merely deception and grossly inaccurate representation in the process of disguising the wrongful strike of an African-American juror.

3) The "alias" of Lowdy's implied deception was the juror's maiden name. If jurors may suddenly be struck under the claim that a maiden name can be used as an excuse to disqualify a juror, it completely undermines the entire judicial process.

With both Huffman and Alexander ~~AND~~ Gantt, the

record very clearly reflects that the reasons expressed by Solicitor Gowdy to strike the 2nd qualified (and last) African-American juror were overlooked / ignored in the process of selecting other - white - jurors.

The Appellant has herein shown via the Matter of Record that similarly situated members of another race were seated though BOTH of the qualified African-American jurors were struck.

The record further reflects that Solicitor Gowdy openly and clearly misrepresented the facts surrounding the jurors AND his reasons is striking them. There were tainted strikes and the prejudice created has only one avenue of relief.

Under the Equal Protection Clause and through Batson v. Kentucky, 476 U.S. 79 (1986), this case both merits and warrants REVERSAL and REMAND FOR A NEW TRIAL.

IT IS SO MOTIONED / PETITIONED.

Richard B. Moore

Richard B. Moore #6003

Lieber C.I. (RB #220)

P.O. Box 205

Ridgerville, S.C. 29472

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
THE HONORABLE ROGER L. COUTH, CIRCUIT COURT JUDGE
APPELLATE CASE NO. 2011-198472

CERTIFICATE OF SERVICE BY MAIL

The undersigned Petitioner certifies that on the 21ST day of February, 2013, he properly mailed the SUPPLEMENTAL PETITION FILED BY PETITIONER ON WRIT OF CERTIORARI, with included Cover Letter to The Supreme Court of South Carolina, as below addressed, by depositing same in the FEB 26, 2013 United States Mail, first class, postage prepaid.

The Supreme Court of South Carolina
Attn: Honorable Clerk of Court
P.O. Box 11330
Columbia, S.C. 29211

RECEIVED FOR
FILING
DEB
Eden
FEB 26 2013
S.C. Supreme Court

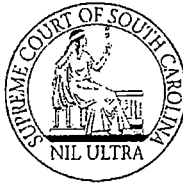
Richard B. Moore

Richard B. Moore #6003
Licker C.I. (CRB #220)

Sworn to and Subscribed by Me
this 21ST day of February, 2013

Sylvia Jones
Notary Public for South Carolina

My Commission Expires: 1/24/2018



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

January 8, 2013

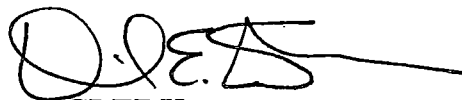
Richard Bernard Moore, #6003
Lieber Correctional Institution
RB#220
P. O. Box 205
Ridgeville, SC 29472

Re: Richard Bernard Moore v. State
Appellate Case No. 2011-198472

Dear Mr. Moore:

This responds to your Motion for Leave to File Supplemental Petition on Writ of Certiorari dated December 28, 2012 received in this office on January 7, 2013. Since you are represented by counsel in this matter, no action will be taken on this *pro se* filing. *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010); *Jones v. State*, 348 S.C. 13, 558 S.E.2d 517 (2002); *State v. Stuckey*, 333 S.C. 56, 508 S.E.2d 564 (1998); *Foster v. State*, 298 S.C. 306, 379 S.E.2d 907 (1989).

Very truly yours,


CLERK

cc:

Robert Michael Dudek

W. Edgar Salter, III

J. Anthony Mabry

Susan Barber Hackett

December 28, 2012

The Supreme Court of South Carolina
ATTN: Honorable Clerk of Court
P.O. Box 11330
Columbia, S.C. 29211

Re: WRIT OF CERTIORARI

Richard B. Moore #6003 v. State of S.C.

RECEIVED

Honorable Clerk of Court,

JAN 07 2013

S.C. SUPREME COURT

Enclosed please find:

1. Original and one (1) copy of:
MOTION FOR LEAVE TO FILE SUPPLEMENTAL PETITION ON
WRIT OF CERTIORARI
2. Original:
CERTIFICATE OF SERVICE BY MAIL
3. Copy of:
DECEMBER 28, 2012 letter to Robert Dudek
4. Self-Addressed Stamped Envelope

Please file the Original MOTION FOR LEAVE and return
the copy of same to me in the envelope provided
"clock-stamped" for my records.

Pg. 2 (cont.)

by copy of the CERTIFICATE OF SERVICE, I have forwarded documents (as stated) to All parties.

Rule 212(b), SCACR, specifically states:

"With the written consent of all attorneys of record, a party may supplement the Record on Appeal [at any time before argument commences]." (emphasis added)

The issues I would like to raise have already been discussed with counsel. His choice to raise only those with "the most merit," by his opinion, will prejudice me now and in the future. I ask that this MOTION be considered.

Thank You, in advance, for your considerations and efforts.

Respectfully... I am,

X Richard B. Moore

Richard B. Moore #6003
Lieber C.I. (RB #220)
P.O. Box 205
Ridgerville, SC 29472

RECEIVED

JAN 07 2013

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
The Honorable Roger L. Couch, Circuit Court Judge
Appellate Case No. 2011-19-8472

RECEIVED

JAN 7 - 2013

RICHARD BERNARD MOORE, #6003,

Petitioner, S.C. Supreme Court

v.

STATE OF SOUTH CAROLINA,

Respondent.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL
PETITION ON WRIT OF CERTIORARI

Pursuant to Rule 212(a)-(b), SCACR, the undersigned Petitioner respectfully asks this Court to permit the filing of a SUPPLEMENTAL PETITION ON WRIT OF CERTIORARI in the above-captioned and referenced case.

This is a capital case on certiorari following the denial of a Post-Conviction Relief (PCR). The PCR Hearing convened for almost one week and resulted in a 3,000+ page Appendix / Matter of Record.

On July 12, 2012, the South Carolina Comm. on Indigent Defense filed a Petition to Exceed the Twenty-Five (25) page limit for a Petition for Writ of Certiorari. Said Petition cited the massive Appendix and "... numerous

[meritorious issues]...raised during the post-conviction hearings," and further specified his request with the "...justice to the [highly unusual facts] of this death penalty case," (see MOTION TO EXCEED). This Court granted the MOTION in an Order on July 17, 2012. The Petitioner's 59 page Writ of Certiorari was subsequently filed.

On November 16, 2012, the Respondents subsequently filed a MOTION TO ALLOW THE FILING OF A RETURN TO PETITION FOR WRIT OF CERTIORARI EXCEEDING THE TWENTY-FIVE PAGE LIMIT and included a 68 page Response to Petition for Writ of Certiorari.

The undersigned Petitioner, Richard B. Moore, #6003, now herein respectfully makes this MOTION FOR LEAVE TO FILE SUPPLEMENTAL PETITION ON WRIT OF CERTIORARI.

In support of said MOTION, the Petitioner provides the following as Affidavit in Support:

1. Immediately after receiving a copy of the Petition filed on his behalf by the S.C. Comm. on Indigent Defense, the Petitioner telephoned, and spoke with, Chief Appellate Defender Robert Dudek. During said conversation, the Petitioner asked Dudek of issues including, but not limited to, the Batson argument related to the jury and issues of ineffective assistance surrounding the crime scene and evidentiary claims.

The Petitioner specifically cited that the failure to present these issues in the lower / state courts and allow for exhaustion at same would negate the ability to present them and argue their merits in latter-stage appellate venues including, but not limited to, State and Federal

Habeas Corpus.

The only way to obtain a true "one-bite-at-the-apple" on ALL possibly meritorious claims is to insure ^{their} presentment, argument and exhaustion. By only presenting a "pick-3" scenario of the "best" arguments is not justice at any level.

2. After the conversation, Chief App. Def. Dudek still did NOT file any of the issues asked of by the Petitioner. If these issues are NOT raised NOW, they will be procedurally barred at all stages following this venue.
3. The Respondents have herein filed their Response to the Petition arguing ONLY those issues presented in the Petitioner's Writ.
4. The Petitioner, Richard B. Moore, #6003, has forwarded a letter to Chief App. Defender Dudek with copies to all parties in this case making formal request for consent to file a SUPPLEMENTAL PETITION. A copy of said letter accompanies this MOTION.
5. As the State's Response has numerous citations in the Appendix/Pet. which incorrectly state facts in evidence, inaccurately cite and interpret testimony at trial and PER, and attempt to misguide this Court, it would further be an egregious error to not cite said instances (seen by the Petitioner).
6. This stated, the Petitioner herein respectfully asks this Most Honorable Court to allow him to FILE SUPPLEMENTAL

PETITION ON WRIT OF CERTIORARI, not to Exceed Twenty-Five (25) pages, for the purpose of raising two (2) meritorious issues NOT raised by appellate counsel and to properly cite grossly incorrect and deceptive matters filed by the State.

7. If the Petitioner's herein MOTION were to be denied, the result would be multiple issues being procedurally barred from review in later appellate stages.

Pursuant to Rule 212(a)-(b), the Petitioner MOTIONS this Most Honorable Court FOR LEAVE TO FILE SUPPLEMENTAL PETITION ON WRIT OF CERTIORARI, and Forty-Five (45) days to properly complete Petition, based on the facts presented in the above-MOTION with Affidavit in Support and the interest of justice/law in this capital case.

IT IS SO MOTIONED AND REQUESTED.

Richard B. Moore

Richard B. Moore #6003

Lieber C.I. (RB #220)

P.O. Box 205

Ridgerville, S.C. 29472

December 28, 2012
Ridgerville, S.C.

CERTIFICATE OF SERVICE

S.C. Supreme Court

JAN 7 - 2013

RECEIVED

The undersigned Petitioner, Richard B. Moore, #6003, herein states that I have forwarded the following documents to the individuals stated by placing same in the U.S. Mail, postage paid, in the Death Row housing unit at Liber Correctional Institution:

1. THE SUPREME COURT OF SOUTH CAROLINA
ATTN: HONORABLE CLERK OF COURT
P.O. BOX 11330
COLUMBIA, S.C. 29211
 - Original plus one (1) copy of:
MOTION FOR LEAVE TO FILE
SUPPLEMENTAL PETITION ON
WRIT OF CERTIORARI
 - Copy of letter:
DECEMBER 28, 2012 to
ROBERT DUDUK
 - Original &
CERTIFICATE OF SERVICE
 - SAS Envelope
2. SCCLID
ATTN: ROBERT W. DUDUK, CHIEF APP. DEF
P.O. BOX 11589
COLUMBIA, SC 29211-1589
 - Original letter:
DECEMBER 28, 2012 to
Robert Duduk
 - Copy of:
MOTION FOR LEAVE TO FILE
SUPPLEMENTAL PETITION ON
WRIT OF CERTIORARI
3. OFFICE OF ATTORNEY GENERAL
ATTN: EDGAR SALTER, III, SEN. ASST. ATTY GEN
P.O. BOX 11549
COLUMBIA, SC 29211-1549
 - Copy of:
December 28, 2012 letter to
Robert Duduk
 - Copy of:
MOTION FOR LEAVE TO FILE
SUPPLEMENTAL PETITION ON
WRIT OF CERTIORARI

SO STATED BY MY SIGNATURE.

Richard B. Moore

Richard B. Moore, #6003
Petitioner

12/28/2012

SCCID

Attn: Robert M. Dudek, Chief Appellate Defender

P.O. Box 11589

Columbia, S.C. 29211-1589

Re: Writ of Certiorari - Richard B. Moore # 6003

Mr. Dudek,

I am in receipt of the State's Return in my case along with your cover letter. There are just a couple of matters that I need to ask.

Having read both my Petition and the State's Return, there are no issues at all with regard to the jury (and the Batson issue) even though that argument was clearly raised in the PCR (PCR App. Pg. 13, Section "e") and discussed at PCR. As we have discussed in previous phone conversations, if we do not raise it in the lower/state courts and allow exhaustion of the issue, I will not be allowed to raise it in the Habeas Corpus venues. It will be procedurally barred.

Next, the State's Response is quite deceptive. In reviewing it, I have found numerous misquotes and equal numbers of misinterpretations. If the Court were to simply accept their brief/petition at face value - without reviewing their cites from the Matter of Record - it would quite possibly result in an

unfavorable ruling based on non-factual and incorrect/in-accurate information.

Next, since your letter states that, "all documents have now been filed..." am I correct in saying that you have no intent on filing any further arguments and/or any response to their petition?

If not, Mr. Dudek, Rule 212 allows me to supplement the Record on Appeal. Section (b) requires me to make "... Written consent." By copy of this letter, if you are NOT going to make any further arguments, I am formally requesting consent to supplement My Petition. I am ALSO forwarding a copy of this to the office of the Attorney General as I will be making the necessary formal MOTION to the Court that is required by Rule, SCACR.

Surely you understand that in the event of an unsuccessful opinion in this Writ, I must prepare for the latter appellate procedures. I cannot allow any avenue to go without opportunity. In our conversation, your explanation that raising this argument might have negative affects on the Court's attitude was clear. I believe the Supreme Court will rule on law - not by emotion. No matter what, at the Federal Court level, the only thing that matters is the constitutionality of the issues raised and the parties (including the Court's) application of them.

Again, to not make every attempt at every level to raise every meritable issues is not sound. I must raise them.

As always, I do appreciate all of your efforts in my case.
Also, Thank You, for your explanations. However, you know that
if I do NOT raise these issues NOW, I will NOT be ABLE to
raise them later.

Respectfully... I am,

Richard B. Moore
Richard B. Moore #6003
Lieber Corr. Inst. (RB-220)
P.O. Box 205
Ridgeville, S.C. 29472

cc:- William Edgar Salter, III, Senior Asst. Atty. Gen.) (Office of the
Attorney General, Post Office Box 11549, Columbia, SC. 29211)
- South Carolina Supreme Court, Clerk of Court, Columbia, S.C.
- file

The Supreme Court of South Carolina

Richard Bernard Moore, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-198472

ORDER

The Motion to Allow the Filing of a Return to Petition for a Writ of Certiorari Exceeding the Twenty-Five Page Limit is granted.



C.J.
FOR THE COURT

Columbia, South Carolina

November 27, 2012

cc:

Robert Michael Dudek

W. Edgar Salter, III

J. Anthony Mabry

Susan Barber Hackett

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

**Appeal From Spartanburg County
The Honorable Roger L. Couch, Circuit Court Judge
Appellate case No. 2011-198472**

RECEIVED
NOV 16 2012
S.C. Supreme Court
RECEIVED
NOV 16 2012
S.C. Supreme Court

RICHARD BERNARD MOORE, ,

Petitioner,

vs.

THE STATE,

Respondent.

**MOTION TO ALLOW THE FILING OF A RETURN TO PETITION
FOR WRIT OF CERTIORARI EXCEEDING THE TWENTY-FIVE PAGE LIMIT**

Pursuant to Rule 243(g), SCACR, the undersigned counsel for Respondent respectfully asks this Court to permit the filing of the Return to Petition for Writ of Certiorari exceeding the fifty page limit for the following reasons.

This is a capital case on certiorari following the denial of Post-Conviction Relief. The PCR hearing lasted almost one week and the Appendix to the Petition for Writ of Certiorari is in roughly 3,000 pages long.

On July 12, 2012, Petitioner Moore filed a Petition to Exceed Twenty-five Page Limit for a Petition for Writ of Certiorari. Collateral appellate counsel based the motion upon the existence of an appendix that "is almost three thousand pages" and that "numerous meritorious issues were raised during the post-conviction hearings." Counsel further represented that "counsel does not think that

justice to the highly unusual facts of this death penalty case can be done in the twenty-five pages authorized by Rule 243(e)(3), SCACR.” Counsel therefore asked for permission to file a certiorari petition not to exceed eighty-five pages.

This Court granted her motion in an Order filed on July 17, 2012. Moore thereafter filed his Petition for Writ of Certiorari. It is 59 pages long and contains three issues, including an important question as to the propriety of the PCR judge’s ruling on his claims that counsel were ineffective for failing to perform a reasonable investigation concerning Moore’s background and family life and present evidence of the investigation during the sentencing proceeding; that counsel rendered ineffective assistance by failing to call James Aiken to testify regarding Moore’s adaptability to life in prison; and that trial counsel was ineffective ... by failing to adequately prepare and rebut evidence Petitioner shot the decedent with premeditation while behind the store counter since how the decedent came to be shot was critical to the extent of Petitioner's culpability.”

Likewise, the first and third issues raised are very fact intensive. In order to fairly and adequately respond to the issues presented, Respondent would likewise ask the Court to grant it permission to file a Return to Petition for Writ of Certiorari exceeding the twenty-five page limit. The Return to Petition for Writ of Certiorari submitted contemporaneously with this motion is 68 pages. Respondent has contacted Petitioner’s counsel to obtain consent to this motion.

Therefore, Respondent would ask the Court to grant it permission to file a Return to Petition for Writ of Certiorari exceeding the twenty-five page limit in Rule 243(g), SCACR.

Respectfully submitted,

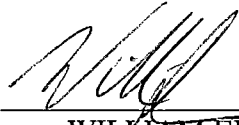
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

By: 

WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

November 16, 2012.

The Supreme Court of South Carolina

Richard Bernard Moore, Petitioner,

v.

State of South Carolina, Respondent.

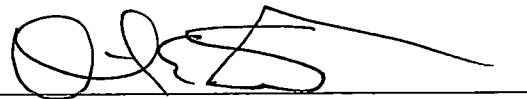
Appellate Case No. 2011-198472

ORDER

For good cause shown, the request for an extension to serve and file the Return to Petition for a Writ of Certiorari is granted and extended until November 16, 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



CLERK

Columbia, South Carolina

October 18, 2012

cc:

Robert Michael Dudek

W. Edgar Salter, III

J. Anthony Mabry

Susan Barber Hackett

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Honorable Roger L. Couch, Circuit Court Judge
Appellate Case No.: 2011-198472

RECEIVED

OCT 17 2012

RICHARD BERNARD MOORE,

S.C. Supreme Court
Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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

The undersigned counsel would respectfully request a thirty (30) day extension in which to file the Return to Petition for Writ of Certiorari in the above-referenced case. This is Respondent's third extension request. Respondent's Return is due to be served and filed today, October 17, 2012, this Court having granted Respondent's first request for an extension filed on September 18, 2012.

The South Carolina Supreme Court's *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, 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.” Respondent has been scheduled for a number of state and federal matters in the last thirty-six (36) days, that include, but are not limited to, the following:

1. Counsel has spent a significant amount of time assisting in the Lexington County Capital Post-Conviction Relief matter of *The State vs. Norman Starnes*. Specifically, reviewing emails in preparation for the proposed Order memorializing the arguments which took place before the Honorable Alexander S. Macaulay on September 11, 2012. Counsel represented the Respondent in the PCR action in the September 11, 2012 hearing. Counsel prepared for and represented the State at oral argument before the South Carolina Court of Appeals in the Charleston County murder appeal matter of *The State vs. Kendrick Taylor*, also on September 11, 2012;

2. Counsel prepared the Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of *Alfred T. Walker, #307941 vs. Warden Leroy Cartledge, C/A No.: 6:12-1450-TLW-KFM* on September 17, 2012;

3. Counsel prepared Respondent’s Response Opposing Motion for Hearing in the matter of *Detrick Freeman, #328569 vs. Warden, Broad River C.I., C/A No.: 1:12-1105-CMC-SVH* on September 24, 2012;

4. Counsel prepared the Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of *Terrance Adams, #229165 vs. Robert M. Stevenson, III, Warden, Broad River Corr. Inst., C/A No.: 3:12-1482-JFA-JRM* on September 26, 2012;

5. Counsel prepared the Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of *Curtis Jerome Mitchell, #301495 vs. Ms. Cecelia Reynolds, Warden Kershaw Corr. Inst., C/A No.: 0:12-01501-CMC-PJG* on September 27, 2012;

6. Counsel prepared the Final Brief of Respondent in the matter of *The State vs. Christopher Watson*, a Kershaw County murder case on October 9, 2012;

7. Counsel prepared Respondent's Response Opposing Motion for Miscellaneous Relief [Doc. #56] in the matter of *Jody Lynn Ward, #300644 vs. Warden, Lieber C.I.*, C/A No.: 0:11-3277-RBH-PJG on October 15, 2012;

8. Counsel prepared Respondent's Response Opposing motion to Compel Discovery [Doc. #20] in this matter on September 17, 2012, together with Respondent's Response to Motion to Dismiss [Doc. #31] on October 15, 2012; and

9. Counsel prepared for and represented Respondent at oral argument today, October 17, 2012 before the South Carolina Supreme Court in the matter of *The State vs. Gene Tony Cooper, Jr.*, a Lexington County direct appeal matter.

I am informing opposing counsel of my request by service of two copies of this Petition. The thirty (30) day extension requested will make the Return to Petition for Writ of Certiorari due on November 16, 2012. I understand the desire of the Court and Petitioner's counsel for a speedy resolution of this case, but I reasonably believe this extension is essential to allow me to complete the Return to Petition for Writ of Certiorari with reasonable effectiveness.

Respectfully submitted,

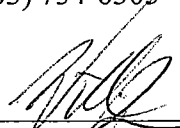
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

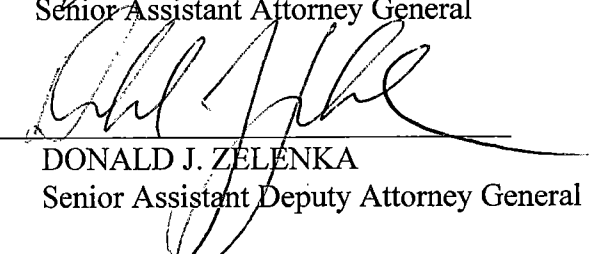
DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III,
Senior Assistant Attorney General

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

BY: 

WILLIAM EDGAR SALTER, III,
Senior Assistant Attorney General

BY: 

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

I support the finding of good cause.

October 17, 2012.

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Honorable Roger L. Couch, Circuit Court Judge
Appellate Case No.: 2011-198472

RECEIVED

OCT 17 2012

S.C. Supreme Court

RICHARD BERNARD MOORE,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

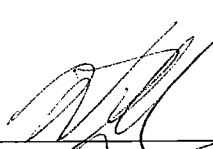
Respondent.

PROOF OF SERVICE

I, William Edgar Salter, III, do hereby certify that on this date, I served the *Petition for Third Extension of Time to File Return to Petition for Writ of Certiorari* in the foregoing action on counsel for the Petitioner by depositing two (2) copies of the same in the United States mail, first-class, postage prepaid, and addressed as follows:

Robert M. Dudek, Esq.
SCCID-Division of Appellate Defense
1330 Lady St., Ste. # 401
Columbia, SC 29201-3332

This 17th day of October, 2012.

By: 

ATTORNEYS FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

October 17, 2012

RECEIVED

OCT 17 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
Richard Bernard Moore vs. State
Appellate Case No.: 2011-198472

Dear Mr. Shearouse:

I hereby request an extension of thirty (30) days in which to file the Return to Petition for Writ of Certiorari in the above-referenced case. The Return is currently due to be served and filed today, October 17, 2012. However, because of my involvement in other matters in state and federal court, I have been unable to timely complete the Return.

Therefore, I am enclosing an original and six (6) copies of a Petition for Extension of Time to File Return to Petition for Writ of Certiorari. I am informing opposing counsel of my request by copy of this letter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd
Enclosures

cc: Robert M. Dudek, Esq. (w/two (2) copies of encls.)

The Supreme Court of South Carolina

Richard Bernard Moore, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-198472

ORDER

For good cause shown, the request for an extension to serve and file the Return to Petition for a Writ of Certiorari is granted and extended until October 17, 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

September 18, 2012

cc:

Robert Michael Dudek

W. Edgar Salter, III

Susan Barber Hackett

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Honorable Roger L. Couch, Circuit Court Judge
Appellate Case No.: 2011-198472

RICHARD BERNARD MOORE,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RECEIVED

SEP 17 2012

S.C. Supreme Court

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

The undersigned counsel would respectfully request a thirty (30) day extension in which to file the Return to Petition for Writ of Certiorari in the above-referenced case. This is Respondent's second extension request. Respondent's Return is due to be served and filed today, September 17, 2012, this Court having granted Respondent's first request for an extension filed on August 20, 2012.

The South Carolina Supreme Court's *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:

1. Counsel prepared Respondent’s Response Opposing Motions for Executive Clemency and Miscellaneous Relief in this matter on August 20, 2012;

2. Counsel has assisted in the preparation for and attended the depositions in the Lexington County Capital Post-Conviction Relief matter of *The State vs. Norman Starnes* which took place on August 23, 2012 and on Saturday, August 25, 2012;

3. Counsel prepared the Return and Memorandum of Law in Support of Motion for Summary Judgment in the Death Penalty/Federal Habeas matter of *Gary Dubose Terry, #5054 vs. William R. Byars, Jr., Commissioner, et al.*, C/A No.: 4:12-01798-SB-TER on August 27, 2012. Counsel also prepared a Motion to Strike in this same matter;

4. Counsel prepared Respondent’s *Response to Court’s Order Granting Partial Discovery* in the matter of *Jody Lynn Ward, #300644 vs. Warden, Lieber C.I.*, C/A No.: 0:11-3277-RBH-PJG on August 28, 2012; and

5. Counsel prepared the Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of *Alfred T. Walker, #307941 vs. Warden Leroy Cartledge*, C/A No.: 6:12-1450-TLW-KFM, and will be filing same this week.

I am informing opposing counsel of my request by service of two copies of this Petition. The thirty (30) day extension requested will make the Return to Petition for Writ of Certiorari due on October 17, 2012. I understand the desire of the Court and Petitioner’s counsel for a speedy resolution of this case, but I reasonably believe this extension is essential to allow me to complete the Return to Petition for Writ of Certiorari with reasonable effectiveness.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III,
Senior Assistant Attorney General

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

September 17, 2012.

BY: 

WILLIAM EDGAR SALTER, III,
Senior Assistant Attorney General

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Honorable Roger L. Couch, Circuit Court Judge
Appellate Case No.: 2011-198472

RICHARD BERNARD MOORE,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

PROOF OF SERVICE

I, William Edgar Salter, III, do hereby certify that on this date, I served the *Petition for Extension of Time to File Return to Petition for Writ of Certiorari* in the foregoing action on counsel for the Petitioner by depositing two (2) copies of the same in the United States mail, first-class, postage prepaid, and addressed as follows:

Robert M. Dudek, Esq.
SCCID-Division of Appellate Defense
1330 Lady St., Ste. # 401
Columbia, SC 29201-3332

This 17th day of September, 2012.

By: 

ATTORNEYS FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

September 17, 2012

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

RECEIVED

SEP 17 2012

S.C. Supreme Court

Re: *Second Extension Request*
Richard Bernard Moore vs. State
Appellate Case No.: 2011-198472

Dear Mr. Shearouse:

I hereby request an extension of thirty (30) days in which to file the Return to Petition for Writ of Certiorari in the above-referenced case. The Return is currently due to be served and filed today, September 17, 2012. However, because of my involvement in other matters in state and federal court, I have been unable to timely complete the Return.

Therefore, I am enclosing an original and six (6) copies of a Petition for Extension of Time to File Return to Petition for Writ of Certiorari. I am informing opposing counsel of my request by copy of this letter.

Sincerely,


William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd

Enclosures

cc: Robert M. Dudek, Esq. (w/two (2) copies of encls.)

The Supreme Court of South Carolina

Richard Bernard Moore, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-198472

ORDER

The request for an extension to serve and file the Return to the Petition for Writ of Certiorari is granted and extended until September 17, 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.

FOR THE COURT

BY *Brenda L. Shealy*
Chief Deputy CLERK

Columbia, South Carolina

August 20, 2012

cc:

Robert Michael Dudek

Susan Barber Hackett

W. Edgar Salter, III

J. Anthony Mabry



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

AUG 17 2012

August 17, 2012

S.C. Supreme Court

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

Re: *Richard Bernard Moore vs. The State*
Appellate Case No.: 2011-198472

Dear Mr. Shearouse:

I hereby request an extension of thirty (30) days in which to file the Return to Petition for Writ of Certiorari in the above-referenced case. The Return is currently due to be served and filed today, August 17, 2012. However, because of my involvement in other matters in state and federal court, I have been unable to timely complete the Return.

Therefore, I am requesting 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,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd

cc: Robert M. Dudek, Esq.

The Supreme Court of South Carolina

Richard Bernard Moore, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-198472

The Honorable Roger L. Couch
Spartanburg County
Trial Court Case No. 2004CP4202715

ORDER

Pursuant to Rule 210(f) of the South Carolina Appellate Court Rules, IT IS ORDERED that the Clerk of Court for Spartanburg County release:

Applicant's Exhibit 5	Diagram
Applicant's Exhibits 6-23	Photographs
Respondent's Exhibits 2-7	Photographs
Respondent's Exhibits 9-18	Photographs

to be transported to this Court by the South Carolina Attorney General's Office, for consideration in the above referenced matter.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

July 23, 2012

cc:

Robert Michael Dudek

W. Edgar Salter, III

J. Anthony Mabry

Susan Barber Hackett

The Honorable M. Hope Blackley

ORIGINAL



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, Acting Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

July 20, 2012

RECEIVED

JUL 20 2012

S.C. Supreme Court

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

Re: Richard Bernard Moore v. State of South Carolina

Dear Mr. Shearouse:

Enclosed is a proposed order in the above case. By copy of this letter, we are also forwarding a copy of this proposed order to William Edgar Salter, III. Thank you for your assistance in this matter.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/kam

cc: William Edgar Salter, III

The Supreme Court of South Carolina

Richard Bernard Moore, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-198472

ORDER

The Petition to Exceed the Page Limit for a Petition for a Writ of Certiorari in the above entitled matter is granted.



C.J.
FOR THE COURT

Columbia, South Carolina

July 17, 2012

cc: Robert Michael Dudek
W. Edgar Salter, III
J. Anthony Mabry
Susan Barber Hackett

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

RECEIVED

JUL 12 2012

S.C. Supreme Court

RICHARD BERNARD MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO EXCEED TWENTY-FIVE
PAGE LIMIT FOR A PETITION FOR
A WRIT OF CERTIORARI

The undersigned counsel would respectfully request an order allowing him to file a petition for writ of certiorari in this case in excess of the twenty-five page limit imposed by Rule 243(e)(3), SCACR. In support of this motion, counsel would respectfully show the Court:

1. The petition for writ of certiorari and the appendix in this case are due on July 18, 2012. The appendix is almost three thousand pages, and numerous meritorious issues were raised during the post-conviction hearings.

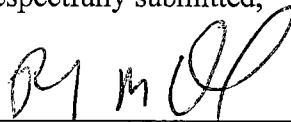
2. Counsel does not think that justice to the highly unusual facts of this death penalty case can be done in the twenty-five pages authorized by Rule 243(e)(3), SCACR.

3. Consequently, counsel respectfully moves that this Court allow him to file a petition for a writ of certiorari not in excess of eighty-five pages. Counsel will make every effort for brevity, and hopefully will be considerably short of that eight-five page limit in the final analysis.

4. Opposing counsel, W. Edgar Salter, III, of the Office of the Attorney General, graciously does not oppose this request as indicated by his signature below.

WHEREFORE, undersigned counsel would respectfully request an order from this Court granting him the right to exceed the twenty-five page limit of Rule 243(e)(3), SCACR. Counsel would also request that the order grant him the right to file a petition for a writ of certiorari in this death penalty case not in excess of eighty-five pages.

Respectfully submitted,

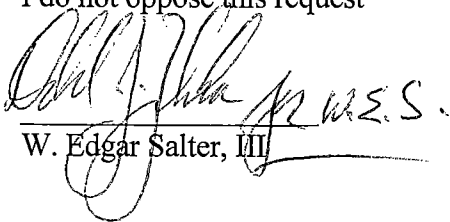


Robert M. Dudek
Chief Appellate Defender

Susan B. Hackett
Appellate Defender

Attorneys for Petitioner

I do not oppose this request



W. Edgar Salter, III

July 12, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge

RICHARD BERNARD MOORE,

PETITIONER,

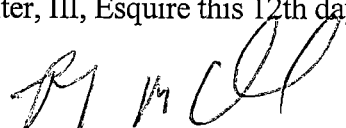
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

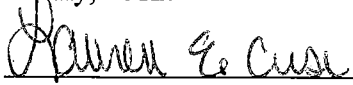
I certify that a true copy of the petition to file a petition for writ of certiorari in excess of the twenty-five page limit has been served on W. Edgar Salter, III, Esquire this 12th day of July, 2012.


Robert M. Dudek
Chief Appellate Defender

Susan B. Hackett
Assistant Appellate Defender

ATTORNEYS FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of July, 2012.


(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014

The Supreme Court of South Carolina

Richard Bernard Moore, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-198472

ORDER

Petitioner requests an extension to serve and file the Petition for a Writ of Certiorari and Appendix and alleges there are extraordinary circumstances justifying this extension. The extension is granted until July 18, 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.



C.J.
FOR THE COURT

Columbia, South Carolina

June 29, 2012

cc: Robert Michael Dudek
Susan B. Hackett
W. Edgar Salter, III
J. Anthony Mabry

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

RECEIVED

JUN 28 2012

S.C. Supreme Court

RICHARD BERNARD MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI AND THE ACCOMPANYING APPENDIX

The undersigned counsel respectfully requests a **final twenty-day extension, until July 18, 2012**, in which to file the petition for writ of certiorari and accompanying appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

1. The petition for writ of certiorari and accompanying appendix in this case are due to be served and filed today **in this death penalty case**.

2. Counsel has had several medical consultations over the last few weeks and will require back surgery, to be done by Scott B. Boyd, M.D. **Counsel intends to file this petition for writ of certiorari and accompanying appendix before having the surgical procedure done.**

3. Counsel is filing the petition for rehearing in the case of State v. Christopher Heller in the Court of Appeals today, June 28, 2012. Counsel had an oral argument in the case of

State v. Derrick McDonald in the Court of Appeals on June 19, 2012. Counsel filed the petition for rehearing in the case of State v. Robert S. Jolly in the Court of Appeals on June 15, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Brandon M. with the Court of Appeals on June 13, 2012, arguing a directed verdict of acquittal should be issued. Counsel filed the petition for writ of certiorari in Jerry Buck Inman v. South Carolina with the Supreme Court of the United States on June 11, 2011. Counsel filed the brief of petitioner in the case of State v. Tracy Baker with this Court on June 8, 2012. Counsel had an oral argument in the case of State v. Tommy Toomer in the Court of Appeals on June 6, 2012. Counsel is currently working on three death penalty cases: Richard Bernard Moore v. State, (certiorari from PCR) Marion Alexander Lindsey v. State, (certiorari from PCR) and James Robertson v. South Carolina (Stay of execution in federal court to pursue certiorari in the State Supreme Court). Counsel filed the brief of appellant in State v. Andre T. Richardson with the Court of Appeals on June 1, 2012. Counsel filed the petition for writ of certiorari and accompanying appendix in Justin O. Byers v. State with this Court on May 25, 2012. Counsel filed the petition for writ of certiorari and accompanying appendix in Tyrone Ransom v. State with this Court on May 24, 2012. Counsel filed the petition for writ of certiorari in Michael Joseph Fleming v. State with this Court on May 23, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Ricky Shane Black with the Court of Appeals on May 21, 2012. Counsel met with a client at Lieber Correctional Institution on May 17, 2012. Counsel filed the brief of petitioner in State v. Gene Tony Cooper with this Court on May 14, 2012. Counsel also filed the petition for writ of certiorari and accompanying appendix in Tyrone Lewis, Jr. v. State with this Court on May 14, 2012. In addition to the above, counsel has very extensive administrative duties on a daily basis as the Chief Appellate Defender.

Co-Counsel, Susan Hackett, will file the petition for writ of certiorari and accompanying appendix in the case of Eric Joshua Turner v. State with this Court by tomorrow, June 29, 2012.

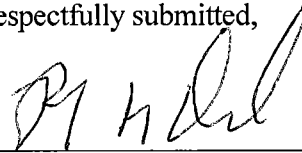
Additionally, Counsel will file the Petition for Rehearing in the case of State v. Thomas Smart in the Court of Appeals by tomorrow, June 29, 2012. Counsel filed the petition for writ of certiorari and accompanying appendix for Gene W. Hall v. State in this Court on June 22, 2012. Counsel filed the petition for writ of certiorari and accompanying appendix for Drew John Monahan v. State in this Court on June 15, 2012. Counsel filed the initial brief of appellant and designation of matter in the case of State v. Jonta Green in the Court of Appeals on June 7, 2012. Counsel filed the petition for writ of certiorari and accompanying appendix and brief of appellant pursuant to White v. State in the case of Courtney Sease v. State in this Court on June 5, 2012. Counsel filed the initial brief of appellant and designation of matter in the case of State v. Robert Terrance Hooker in the Court of Appeals on June 1, 2012. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Robdrecko Andray Niles v. State in this Court on May 30, 2012. Counsel filed the initial brief of appellant and designation of matter in the case of State v. Rodriques Carter in the Court of Appeals on May 23, 2012. Counsel filed the initial brief of appellant and designation of matter in the case of State v. Chris Teasley in the Court of Appeals on May 17, 2012. Counsel filed the petition for rehearing in the case of State v. James Craig White in the Court of Appeals on May 16, 2012. Counsel filed the brief of respondent in the case of State v. Ricky Darren Sanders in this Court on May 15, 2012. Counsel filed the initial brief of appellant and designation of matter in the case of State v. Tyrone Beaty in the Court of Appeals on May 9, 2012. Counsel filed the initial brief of appellant and designation of matter in the case of State v. Ladorrean Collington in the Court of Appeals on May 4, 2012. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Tyrone Jacobs v. State in this Court on May 3, 2012.

4. As indicated by his consent below, counsel for the state does not oppose this request.

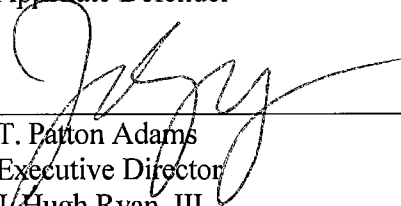
5. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

WHEREFORE, the undersigned counsel would respectfully request **a final twenty-day extension, until July 18, 2012**, or, in the alternative, a lesser time that the Court will grant, in which to file the petition for writ of certiorari and accompanying appendix. Counsel respectfully requests that the time limits for filing the petition for writ of certiorari and accompanying appendix be held in abeyance pending a ruling on this motion.

Respectfully submitted,



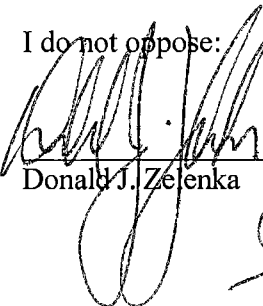
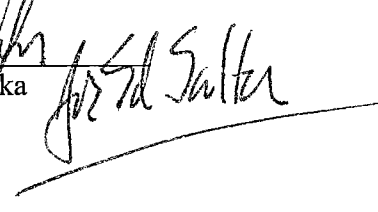
Robert M. Dudek
Chief Appellate Defender
Susan B. Hackett
Appellate Defender



T. Patton Adams
Executive Director
J. Hugh Ryan, III
General Counsel

June 28, 2012

I do not oppose:


Donald J. Zelenka


The Supreme Court of South Carolina

Richard Bernard Moore, Petitioner,

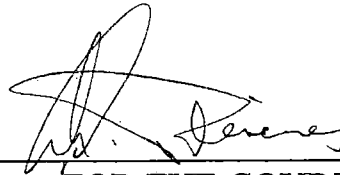
v.

State of South Carolina, Respondent.

Appellate Case No. 2011-198472

ORDER

Petitioner requests an extension to serve and file the Petition for a Writ of Certiorari and Appendix and alleges there are extraordinary circumstances justifying this extension. The extension is granted until June 28, 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.



C.J.

FOR THE COURT

Columbia, South Carolina

May 31, 2012

cc: Robert M. Dudek
William Edgar Salter, III

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

RECEIVED

MAY 29 2012

S.C. Supreme Court

RICHARD BERNARD MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI AND THE ACCOMPANYING APPENDIX

The undersigned counsel respectfully requests a **final thirty day extension, until June 28, 2012**, in which to file the petition for writ of certiorari and accompanying appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

1. The petition for writ of certiorari and accompanying appendix in this case are due to be served and filed today **in this death penalty case**.

2. Counsel filed the petition for writ of certiorari and accompanying appendix in Justin O. Byers v. State with this Court on Friday, May 25, 2012. Counsel filed the petition for writ of certiorari and accompanying appendix in Tyrone Ransom v. State with this Court on Thursday, May 24, 2012. Counsel filed the petition for writ of certiorari in Michael Joseph Fleming v. State with this Court on Wednesday, May 23, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Ricky Shane Black with the Court of Appeals on May 21, 2012. Counsel met with a client at Lieber Correctional Institution on Thursday, May 17, 2012. Counsel filed the brief of petitioner in State v. Gene Tony Cooper with this Court on May 14, 2012. Counsel also filed the petition for writ of certiorari and accompanying appendix in Tyrone Lewis, Jr. v. State with this Court on May 14, 2012. Counsel filed the initial brief of appellant

and designation of matter in State v. Darren Scott with the Court of Appeals on May 9, 2012. Counsel had an oral argument in State v. Thomas Patrick Hilliard before the Court of Appeals on May 7, 2012. Counsel had an oral argument in State v. Anthony Gracely before this Court on May 2, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Anthony Nation with this Court on April 27, 2012. Counsel is currently working on **three death penalty cases**: Richard Bernard Moore v. State, Marion Lindsay v. State, and James Robertson v. State. In addition to the above, counsel has very extensive administrative duties on a daily basis as the Chief Appellate Defender.

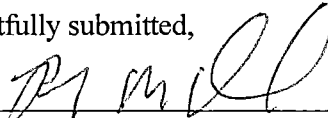
Co-Counsel, Susan Hackett, filed the initial brief of appellant and designation of matter in the case of State v. Rodriques Carter in the Court of Appeals on May 23, 2012. Counsel filed the initial brief of appellant and designation of matter in the case of State v. Chris Teasley in the Court of Appeals on May 17, 2012. Counsel filed the petition for rehearing in the case of State v. James Craig White in the Court of Appeals on May 16, 2012. Counsel filed the brief of respondent in the case of State v. Ricky Darren Sanders in this Court on May 15, 2012. Counsel filed the initial brief of appellant and designation of matter in the case of State v. Tyrone Beaty in the Court of Appeals on May 9, 2012. Counsel filed the initial brief of appellant and designation of matter in the case of State v. Ladorrean Collington in the Court of Appeals on May 4, 2012. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Tyrone Jacobs v. State in this Court on May 3, 2012. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Adrian J. Robinson v. State in this Court on April 23, 2012. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Luzinski Allen Cottrell v. State in this Court on April 19, 2012. Counsel filed the brief of petitioner in the case of James Robinson v. State in the Court of Appeals on April 13, 2012. In March, 2012, Counsel filed the initial briefs of appellant and designations of matter in the cases of State v. Elbert Wallace, State v. Sasha A. Gaskins and State v. Connie Dumas, as well as the petition for writ of certiorari and accompanying appendix in the case of Johnson J. Mitchell v. State.

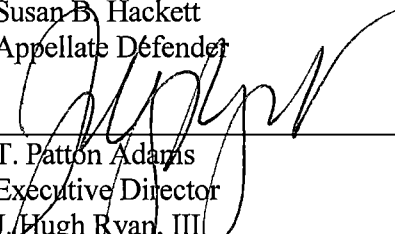
3. As indicated by his consent below, counsel for the state does not oppose this request.

4. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

WHEREFORE, the undersigned counsel would respectfully request **a final thirty day extension, until June 28, 2012**, in which to file the petition for writ of certiorari and accompanying appendix. Counsel respectfully requests that the time limits for filing the petition for writ of certiorari and accompanying appendix be held in abeyance pending a ruling on this motion.

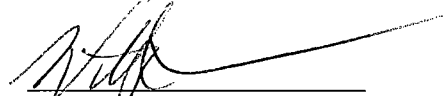
Respectfully submitted,


Robert M. Dudek
Chief Appellate Defender
Susan B. Hackett
Appellate Defender


T. Patton Adams
Executive Director
J. Hugh Ryan, III
General Counsel

May 29, 2012

I do not oppose:


~~Donald M. Zelenka~~
WILLIAM EDGAR SALTER, JR.

The Supreme Court of South Carolina

Richard Bernard Moore, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-198472

ORDER

Petitioner requests an extension to serve and file the Petition for a Writ of Certiorari and Appendix and alleges there are extraordinary circumstances justifying this extension. The extension is granted until May 27, 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.



C.J.
FOR THE COURT

Columbia, South Carolina

May 15, 2012

cc: Robert Michael Dudek
J. Anthony Mabry

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

COPY
RECEIVED

APR 27 2012

S.C. Supreme Court

RICHARD BERNARD MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI AND THE ACCOMPANYING APPENDIX

The undersigned counsel respectfully requests a thirty day extension, in which to file the petition for writ of certiorari and accompanying appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

1. The petition for writ of certiorari and accompanying appendix in this case are due to be served and filed today **in this death penalty case**.

2. Counsel is filing the initial brief of appellant and designation of matter in State v. Anthony Nation with this Court today, April 27, 2012. Counsel filed the petition for writ of certiorari in Johnny A. Gainey v. State with this Court on April 24, 2012. Counsel filed the return to petition for writ of certiorari in Randy Lee Hill v. State with this Court on April 23, 2012. Counsel filed the brief of petitioner in the death penalty case of Brad Keith Sigmon v. State with this Court on April 20, 2012. Counsel filed the initial brief of appellant and

designation of matter in State v. David Lewis with this Court, April 13, 2012. Counsel filed the initial brief of respondent in State v. Robert Jolly #2 with the Court of Appeals on April 6, 2012. Counsel filed the brief of petition in State v. David M. Rocquemoire with this Court on April 4, 2012. Counsel had an oral argument on March 29, 2012, in State v. Randy Vickery before the Court of Appeals. Counsel is working on this death penalty case in this case along with co-counsel Susan Barber Hackett. Counsel also is handling the death penalty cases of James Robertson v. State and Marion Lindsey v. State. In addition to the above, counsel has very extensive administrative duties on a daily basis as the Chief Appellate Defender.

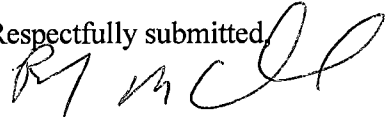
Co-Counsel, Susan Hackett, is working on and plans to file the initial brief of appellant and designation of matter in the case of State v. Ladorrean Collington in the Court of Appeals on May 4, 2012, if not sooner. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Adrian J. Robinson v. State in this Court on April 23, 2012. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Luzinski Allen Cottrell v. State in this Court on April 19, 2012. Counsel filed the brief of petitioner in the case of James Robinson v. State in the Court of Appeals on April 13, 2012. Counsel filed the initial brief of appellant and designation of matter in the case of State v. Elbert Wallace in the Court of Appeals on March 28, 2012. Counsel filed the initial brief of appellant and designation of matter in the case of State v. Sasha A. Gaskins with the Court of Appeals on March 23, 2012. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Johnson J. Mitchell v. State in this Court on March 9, 2012. Counsel filed the initial brief of appellant and designation of matter in the case of State v. Connie Dumas in the Court of Appeals on March 8, 2012. Counsel is also working on this death penalty appeal.

3. As indicated by his consent below, counsel for the state does not oppose this request.

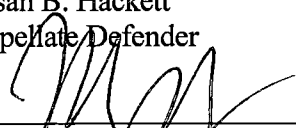
4. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested. **Counsel would ask this Court to give every consideration to not making this a final extension in this death penalty case given his caseload, and the caseload of co-counsel. Further, counsel is reassigning cases that were handled by Elizabeth Franklin-Best since her last day as an Appellate Defender is Monday, April 30, 2012.**

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension, in which to file the petition for writ of certiorari and accompanying appendix. Counsel respectfully requests that the time limits for filing the petition for writ of certiorari and accompanying appendix be held in abeyance pending a ruling on this motion. In addition, **Counsel would ask this Court to give every consideration to not making this a final extension in this death penalty case.**

Respectfully submitted,



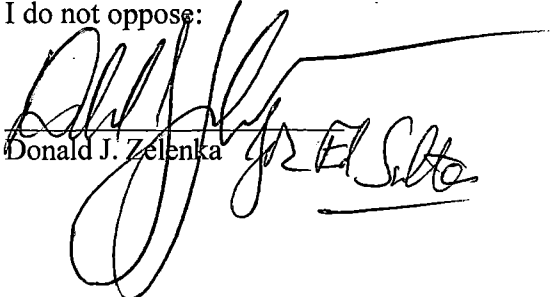
Robert M. Dudek
Chief Appellate Defender
Susan B. Hackett
Appellate Defender



T. Patzon Adams
Executive Director
J. Hugh Ryan, III
General Counsel

April 27, 2012

I do not oppose:



Donald J. Zelenka

The Supreme Court of South Carolina

Richard Bernard Moore,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Roger L. Couch
Spartanburg County
Trial Court Case No. 2004-CP-42-02715

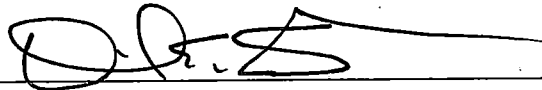
ORDER

For good cause shown, the request for an extension to serve and file the Petition for Writ of Certiorari and Appendix is granted and extended until April 27, 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 30, 2012

cc: Chief Appellate Defender Robert M. Dudek
Senior Assistant Attorney General William Edgar Salter, III
Assistant Attorney General J. Anthony Mabry
The Honorable Jenny Kitchings

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

RECEIVED

MAR 28 2012

S.C. Supreme Court

RICHARD BERNARD MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI AND THE ACCOMPANYING APPENDIX

The undersigned counsel respectfully requests a thirty day extension, in which to file the petition for writ of certiorari and accompanying appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

1. The petition for writ of certiorari and accompanying appendix in this case are due to be served and filed today **in this death penalty case**.

2. Counsel has an oral argument tomorrow, March 29, 2012, in State v. Randy Vickery before the Court of Appeals. Counsel filed the initial reply brief in the death penalty case of State v. Stephen Christopher Stanko with this Court on March 26, 2012. Counsel filed the initial brief of respondent and designation of matter in State v. Robert Jolly #2 with the Court of Appeals on Friday, March 23, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Matthew Taylor Hinton with the Court of Appeals on Thursday, March 22, 2012. Counsel filed the petition for writ of certiorari to the Court of Appeals and accompanying appendix in State v. Terrell McCoy with this Court on March 16, 2012. Counsel filed the petition for rehearing in State v. Garvin Duvall with the Court of Appeals on March 15, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Donald Petty with the Court of Appeals on March 15, 2012. Counsel and co-counsel had a further meeting on State v. Richard Gagnon on March 15, 2012.

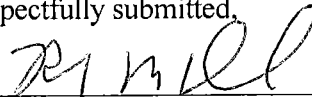
Counsel had an oral argument in State v. Christopher Heller before the Court of Appeals on March 13, 2012. Counsel filed the return to the petition for writ of certiorari in Michael A. Hough v. State with this Court on March 8, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Charles Berlin Pennell with the Court of Appeals on March 5, 2012. Counsel also filed the brief of petitioner in State v. Miama Kromah with this Court on March 5, 2012. Counsel also is working on the brief of petitioner with co-counsel in the death penalty case of State v. Brad Sigmon. In addition to the above, counsel has very extensive administrative duties on a daily basis as the Chief Appellate Defender.

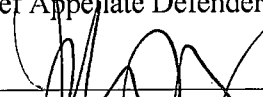
3. As indicated by his consent below, counsel for the state does not oppose this request.

4. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension, in which to file the petition for writ of certiorari and accompanying appendix. Counsel respectfully requests that the time limits for filing the petition for writ of certiorari and accompanying appendix be held in abeyance pending a ruling on this motion.

Respectfully submitted,

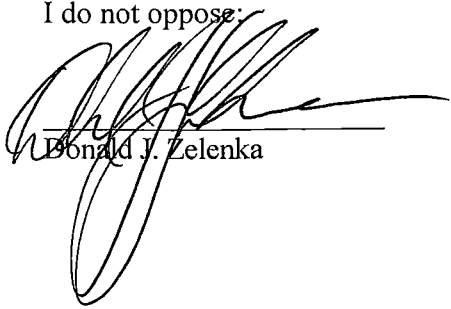


Robert M. Dudek
Chief Appellate Defender

T. Patton Adams
Executive Director
J. Hugh Ryan, III
General Counsel

March 28, 2012

I do not oppose:



Donald J. Zelenka

The Supreme Court of South Carolina

Richard Bernard Moore,

Petitioner,

V.

State of South Carolina,

Respondent.

The Honorable Roger L. Couch
Spartanburg County
Trial Court Case No. 2004-CP-42-02715

ORDER

For good cause shown, the request for an extension to serve and file the Petition for Writ of Certiorari and Appendix is granted and extended until March 28, 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 Kendra J. Shealy
Chief Deputy CLERK

Columbia, South Carolina

February 28, 2012

cc: Chief Appellate Defender Robert M. Dudek
Senior Assistant Attorney General William Edgar Salter, III
Assistant Attorney General J. Anthony Mabry

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

ORIGINAL

RECEIVED

FEB 27 2012

S.C. Supreme Court

RICHARD BERNARD MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI AND THE ACCOMPANYING APPENDIX

The undersigned counsel respectfully requests a thirty day extension, in which to file the petition for writ of certiorari and accompanying appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

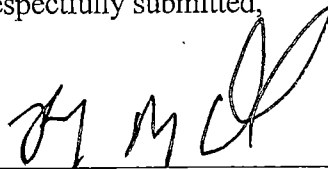
1. The petition for writ of certiorari and accompanying appendix in this case are due to be served and filed today.
2. Counsel presented at the Best Practices Seminar sponsored by the South Carolina Commission on Indigent Defense and the Charleston Law School in Charleston on February 24, 2012. Counsel filed the five issue death penalty brief in the case of State v. Steven Barnes on February 22, 2012, with this Court. Counsel argued part of the case of State v. Kathy Salley along with Matt Bogan Nelson-Mullins firm before this Court on February 22, 2012 after the Court of Appeals sought certification. On February 23, 2012, counsel argued part of the case of State v. Chris Anthony Liverman before this Court, also along with Matt Bogan. Counsel filed a petition of for writ of certiorari with the United States Supreme Court in the death penalty case State v. William O. Dickerson on February 15, 2012. Counsel argued State v. Gavin Duvell before the Court of Appeals on February 16, 2012. Counsel argued part of, along with Reid

Sherard of the Nelson-Mullins firm, the murder case of State v. Richard Bill Niles, Jr. with the Court of Appeals on Tuesday, February 14, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Jason Will Williams with the Court of Appeals on February 8, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Stephania Murray with the Court of Appeals on February 2, 2012. Counsel is reading the state's brief in the death penalty case of State v. Steven Stanko where he anticipates filing a reply brief. Moreover, two other major cases have just arrived in this office that require attention: Marion Lindsey v. State, a death penalty PCR case, and Steven Beckham v. State, which originally was a death penalty case at the trial level. In addition to the above, counsel has very extensive administrative duties on a daily basis as the Chief Appellate Defender.

3. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension, in which to file the petition for writ of certiorari and accompanying appendix. Counsel respectfully requests that the time limits for filing the petition for writ of certiorari and accompanying appendix be held in abeyance pending a ruling on this motion.

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

February 27, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

RICHARD BERNARD MOORE,

PETITIONER,

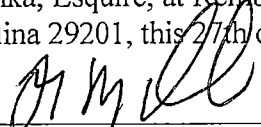
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

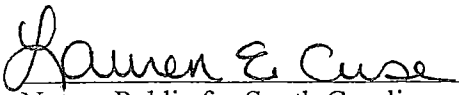
The undersigned attorney hereby certifies that a true copy of the petition for extension of time in which to file the petition for writ of certiorari and accompanying appendix in the above referenced case has been served upon Donald Zelenka, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 27th day of February, 2012.



Robert M. Dudek
Appellate Defender

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 27th day of February, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

The Supreme Court of South Carolina

Richard Bernard Moore, Petitioner,
 v.
State of South Carolina, Respondent.

The Honorable Roger L. Couch
Spartanburg County
Trial Court Case No. 2004-CP-42-02715

ORDER

The request for an extension to serve and file the Petition for Writ of Certiorari and Appendix is granted and extended until February 27, 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 24, 2012

cc: Chief Appellate Defender Robert M. Dudek
Senior Assistant Attorney General William Edgar Salter, III
Assistant Attorney General J. Anthony Mabry



ORIGINAL

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

January 23, 2012

RECEIVED

JAN 23 2012

S.C. Supreme Court

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

Re: Richard Moore v. The State (capital case)

Dear Mr. Shearouse:

The petition for writ of certiorari and accompanying appendix in the above referenced case are due to be served and filed **Friday, January 27, 2012**. However, because of my current caseload, I have been unable to complete this petition. For that reason, I would respectfully request an extension of thirty days, **until February 27, 2012** in which to serve and file this petition.

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

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD:lec

cc: Donald J. Zelenka, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

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

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

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

December 2, 2011

RECEIVED

DEC - 2 2011

S.C. Supreme Court

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

Dear Mr. Shearouse:

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

Richard Bernard Moore v. State

11/28/2011

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

Thank you for your assistance in this matter.

Sincerely,

Lauren E. Cruse
Legal Assistant

ORIGINAL



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

RECEIVED

September 20, 2011

SEP 21 2011

S.C. Supreme Court

Ms. Pamela E. Green
Circuit Court Reporter
121 Bradford Crossing Drive
Roebuck, SC 29376

Dear Ms. Green:

Please provide us with the following transcript:

Richard Bernard Moore v. State

Case #:

2004-CP-42-2715

County: Spartanburg

Date of Trial: January 31- February 1, 2011 and February
3-4, 2011

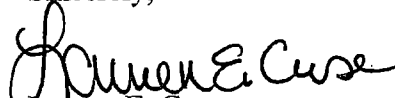
Presiding Judge: Roger L. Couch

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

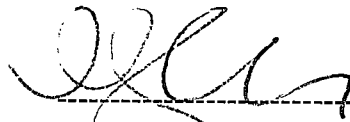

Lauren E. Cruse
Legal Assistant

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

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Richard Moore,)
)
V.)
)
STATE OF SOUTH CAROLINA,)
DEFENDANT)

NOTICE OF APPEAL
04-CP-42-2715

The Petitioner by and through counsel undersigned hereby serves notice of his intent to appeal the denial of his application for post-conviction relief, denied and dismissed by the Honorable Roger L. Couch, on August 1, 2011, with notice having been received on August 2, 2011.



Melissa J. Armstrong, Esquire
Attorney for the Applicant
1830 Marion Street
Columbia, S.C. 29201
(803) 765-2796.

This 1st day of September, 2011.

RECEIVED

SEP 02 2011

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF SPARTANBURG	)	CERTIFICATE OF SERVICE
	)	
RICHARD MOORE,	)	APPEAL: 04-CP-42-2715
Appellant	)	
V.	)	
	)	
SOUTH CAROLINA,	)	
Respondent	)	

On today's date, September 1, 2011, Counsel for the Applicant did serve the following persons with Applicant's notice of appeal:

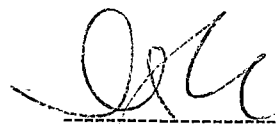
Honorable Roger L. Couch
 Judge, Seventh Judicial Circuit
 P.O. Box 2614
 Spartanburg, S.C. 29304

S.C. Supreme Court
 P.O. Box 1330
 Columbia, S.C. 29211

Spartanburg County Clerk of Court
 P.O. Drawer 299
 Winnsboro, S.C. 29180

Wm. Edgar Salter, III, Esquire
 S. C. Office of The Attorney General
 P.O. Box 11549
 Columbia, S.C. 29211-1549

This 1st day of September, 2011.



 Melissa J. Armstrong, Esquire
 1830 Marion Street
 Columbia, S.C. 29201
 (803) 765-2796.

ATTORNEY FOR APPLICANT.

Melissa J. Armstrong, Esquire
1830 Marion Street
Columbia, S.C. 29201

(803) 765-2796 (telephone)
(803) 765-2750 (telecopier)

September 1, 2011

Honorable Roger L. Couch
Judge, Seventh Judicial Circuit
P.O. Box 2614
Spartanburg, S.C. 29304

Dear Judge Couch:

Enclosed please find a notice of intent to appeal this Court's Denial of Post-Conviction Relief, filed August 1, 2011, and received by counsel on August 2, 2011. I am further serving notice of appeal on Respondent, the Spartanburg County Clerk of Court, the South Carolina Supreme Court and the Office of Appellate Defense, which will assume future responsibility for the handling of Mr. Moore's appeal.

Very truly yours,



Melissa J. Armstrong

MJA/an
Enclosures

cc: South Carolina Supreme Court
Wm. Edgar Salter, III, Esquire
South Carolina Office of Appellate Defense
Spartanburg County Clerk of Court

RECEIVED

SEP 02 2011

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
Richard Bernard Moore)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS

2004-CP-42-2715

ORDER OF DISMISSAL

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:06
M. HOPE BLACKLEY

This death penalty Post-Conviction Relief (PCR) action is before the Court pursuant to an August 8, 2004 Application filed on behalf of the Applicant, Richard Bernard Moore (Moore), as amended. The Court held an evidentiary hearing into the matter on January 30, February 1 and February 3-4, 2011, at the Spartanburg County Courthouse. Moore was present at the hearing; and Lisa J. Armstrong and James M. Morton, Esquires, represented him. Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General Anthony Mabry represented the State. Moore testified on his own behalf at the hearing, and he presented testimony from Mr. Mabry; George Gibson; Pete Skidmore; Wilbert Casey; Charles R. "Rusty" Clevenger; James Aiken; Stephen L. Denton; Paul Dorman; Dr. Sandra E. Conradi; and Michael Morin Esquire. He also introduced the depositions of family members Harold Harrington, Dorothy J. Hooper, Cecil J. Hooper, Arma Nell Hadley, Maurice Moore and James A. Moore. The State presented testimony from Susan Porter, Esquire; R. Keith Kelly, Esquire; and the Honorable Donnie Willingham. The Court now denies relief and dismisses the Application with prejudice for the following reasons:

I. PROCEDURAL HISTORY

COMPUTER

Bill
PI

Moore is currently on death row at Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC), pursuant to commitment orders from the Spartanburg County Clerk of Court. The Spartanburg County Grand Jury indicted him at the January 2000 term of court for murder, assault with intent to kill (AWIK), armed robbery and possession of a firearm during the commission of a violent crime. (00-GS-42-617 through -619).

The State thereafter served notice of its intention to seek the death penalty. The Spartanburg County Grand Jury handed down another armed robbery indictment at the October 2001 term of court. The Honorable Gary E. Clary held motions hearings in the case on April 3, September 28, and October 15, 2001.

On October 16-22, 2001, Moore received a capital jury trial, pursuant to S.C. Code Ann. § 16-3-20 (Supp. 2002), in front of Judge Clary. The jury convicted him of each of the indicted offenses. Following Moore's exercise of the twenty-four hour waiting period in § 16-3-20(B), a sentencing proceeding was conducted in front of the same jury.

The prosecution relied upon the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon; that Moore, by his act of murder, had knowingly created a risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and that Moore had committed the murder for the purpose of receiving money or a thing of monetary value. § 16-3-20(C)(a)(1), (3)-(4) & (d). Judge Clary submitted the statutory mitigating circumstances found in § 16-3-20(C)(b)(2), (6)-(7). The jury found the existence of each of the statutory aggravating circumstances alleged by the prosecution and it sentenced Moore to death. Judge Clary imposed the sentence of death for murder, and he sentenced Moore to five years for the weapons charge, ten years for AWIK and thirty years for

armed robbery. Ralph Keith Kelly, Michael David Morin and Jennifer Johnson, Esquires, represented Moore at trial. Seventh Circuit Solicitor Harold W. Gowdy, III, as well as Assistant Solicitors James Donald Willingham, II, and Barry J. Barnette, represented the prosecution.

A timely Notice of Appeal was served and filed. On October 16, 2003, Moore filed a Final Brief of Appellant, in which he raised the following issues:

1. The judge erred in the guilt phase by preventing Moore from stressing the gravity of the decision facing the jury by arguing, "The State is seeking the death penalty on me, which means my very life is at stake." The judge abused his discretion by ruling that Moore could not mention punishment, but was limited solely to a discussion of "the testimony and evidence that has been presented."
2. The judge erred during the sentencing phase by once again limiting Moore's closing argument "to the evidence that has been presented and to the issues concerning the sentence imposed." Since S.C. Code Sections 16-3-20(C) and 16-3-28 afford a capital defendant the opportunity to ask for mercy and express feelings of remorse, this arbitrary limitation was an abuse of discretion and rendered Moore's purported waiver of closing argument involuntary.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG -1 AM 10:06
M. HOPE BLACKLEY

The State filed a Final Brief of Respondent on September 15, 2003. It restated the issues as follows:

- I. The trial judge did not abuse his discretion by ruling that Appellant could not argue "my very life is at stake" in his guilt phase closing argument because Appellant's argument was not relevant to the question of his guilt or innocence, which was the only question before the guilt phase jury.
- II. Appellant's complaints about the trial judge's conduct of the on-the-record waiver of Appellant's right to make a closing argument in the sentencing phase is not properly before the Court because there was no objection at trial.

The South Carolina Supreme Court affirmed Moore's convictions and death sentence in a published decision filed on March 1, 2004. *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004). It sent the Remittitur to the Spartanburg County Clerk of Court on March 18, 2004. Deputy Chief

Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, represented Moore on direct appeal. William Edgar Salter, III, of the Attorney General's Office, represented Respondent.

On March 16, 2004, Moore (through Mr. Dudek) petitioned the State Supreme Court for a stay of execution. In an Order dated April 4, 2004, the Court granted a stay, pursuant to *In Re Stays of Execution in Capital Cases*, it appointed the Honorable Larry R. Patterson to preside over the case and it granted him exclusive jurisdiction over the matter. In accordance with *In Re Stays of Execution*, Judge Patterson held a hearing on July 22, 1999, to determine whether Moore desired to pursue Post-Conviction Relief and whether he wished to have counsel appointed. On June 17, 2004, Judge Patterson appointed Ms. Armstrong and Kathryn Hudgins, Esquire, to represent Moore. Mr. Morton was thereafter substituted for Ms. Hudgins.

Moore raised two allegations of ineffective assistance of counsel in his August 4, 2004, PCR Application:

[A] Ineffective assistance of counsel in violation of the Fifth, sixth and Fourteenth Amendments to the United States Constitution. Counsel was ineffective for failing to preserve for appellate review the question of whether defendant's waiver of his right to make a closing phase argument was rendered involuntary due to the trial court's admonition to him. *State v. Perez*, 334 SC 563, 514 S.E.2d 754 (1999); *State v. Hall*, 312 SC 95, 439 S.E.2d 278 (1994).

[B] Ineffective assistance of counsel in violation of the Fifth, sixth and Fourteenth Amendments to the United States Constitution. Counsel failed to perform an adequate investigation into evidence in mitigation. Counsel produced only two lay witnesses during the penalty phase, and presented no expert evidence on applicant's behalf. *Eddings v. Oklahoma*, 455. US 104 (1982).

After Judge Patterson's retirement, the case was assigned to this Court. Moore submitted his amended allegations on December 31, 2010.

II. STATEMENT OF FACTS



FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:06
M. HOPE BLACKLEY

Sometime between 8:00 and 10:00 p.m. on September 15, 1999, Moore went to the residence of George Gibson, on Hillside Drive in Whitney, S.C.¹ He asked Gibson to get him some crack cocaine. Gibson, who knew Moore as "Mo," refused because Moore did not have any money. Gibson also told Moore that he could not get the crack for Moore on credit. Moore, who was unemployed at the time, told Gibson he was going to work and would return the following morning. He then left. R. pp. 1245-48; 1253; 1255; 1371-72.

Meanwhile, Mr. Jamie Mahoney (the murder victim) was working the third shift at Nikki's Speedy Mart, a restaurant-convenience store located at the corner of Highway 221 and California Avenue in Whitney, South Carolina. He had been employed there for over three years. The owner of Nikki's kept a .32 caliber pistol and a .45 caliber semi-automatic pistol (State's Ex. 3) in the store for protection.² Also, Jamie Mahoney carried a .44 caliber handgun (State's Ex. 1) behind his back and in his waistband for protection. However, his hands were ravaged by arthritis and he was of slight build. (He was between 5' 7" and 5' 9" tall and weighed approximately 145 pounds). None of his co-workers or friends had seen him ever be physically aggressive towards anyone in Nikki's. R. pp. 1195-96; 1346-57; 1361-63; 1366-70; 1489.

Terry Hadden (the AWIK victim) was a regular customer at Nikki's. He stopped in to eat around 12:15 a.m. on September 16, 1999.³ After eating and talking to Jamie for a while, he began playing on one of several video poker machines, around 1:00 a.m. The store was busy for a short period, and Jamie had a brief rush of customers around 1:15 a.m. Later, Jamie loaned his lug wrench to an African-American customer who had trouble with his tire in the parking lot.

¹ All locations referred to in the Statement of Facts are in Spartanburg County unless otherwise specified.

² Neither weapon was visible to customers: the .45 was kept under a towel by the cash register and the .44 was kept in Mr. Mahoney's waistband. There was also a .32 revolver that was kept under the counter. It was not involved in this case.

³ Mr. Hadden worked the second shift at Wise Snacks Company. R. pp. 1193-94; 1196.

Otherwise, the early morning hours remained relatively uneventful, until Moore walked into the store shortly after 3:00 a.m.; and it does not appear that anyone came into Nikki's between the time the man with a flat tire left and Moore arrived. Mr. Hadden and Moore glanced at each other briefly when Moore first entered. Then, Mr. Hadden turned around and continued playing video poker. Moore went to a cooler and, apparently, retrieved two cans of beer. See R. pp. 1193-1205; 1309.

Mr. Holland testified that:

The next thing I know of anything going on in the store is when I heard Jamie say, 'What the hell do you think you are doing?' ... in a loud tone of voice.

R. p. 1205, ll. 9-14.

Once Mr. Hadden heard this comment, he swiveled around in his chair and saw Moore holding both of Jamie's hands in one of Moore's hands. Moore immediately "come around and come up with a gun and told me not to move." Without giving Hadden an opportunity to comply with his directions, Moore fired the .45 caliber semi-automatic (State's Ex. 3), which he had taken from the victim's constructive possession, at Mr. Hadden. Mr. Hadden instantly fell to the floor and played dead. He then heard a number of gunshots but did not count how many were fired. R. pp. 1204-09; 1215-17; 1288-89; 1424.

During the exchange of gunfire, at least one shot mortally wounded Jamie Mahoney. The pathologist explained that the victim had a gunshot wound which "passed through the lower border of the eighth rib" before going through his liver, through and through his stomach, through and through his diaphragm, through and through his heart and his left lung. It then exited Jamie's right chest. Jamie also had a gunshot wound to his lower right arm, which broke his right arm. R. pp. 1491-1502.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:06
M. HOPE BLACKLEY

The pathologist opined that it is possible that either there were two gunshot wounds or all of Jamie's injuries could have been caused by a single gunshot if his body had been positioned in such a manner in which that could have occurred. He died from internal hemorrhaging caused by the wound to his torso and would have died within six to ten minutes after receiving this wound. **R. pp. 1491-1502.** A bullet from Jamie's .44 caliber weapon went through Moore's left arm. **R. pp. 1380-84.**

Mr. Hadden continued to play dead until he heard Moore say, "Let's get the hell out of here" and exit the store. Mr. Hadden ran out of the building after he heard Moore's vehicle leave. He then went back into the store, saw that his friend was dead and called 911. **R. pp. 1205-13.**

Before Moore left the store, he took a money bag containing \$1,408.00. Although he was profusely bleeding from a gunshot wound, he then immediately drove his pickup truck to Gibson's house. Along the way, he discarded the .45 caliber handgun which had his blood on it. **R. pp. 1211; 1262-64; 1267; 1312-13; 1352-54; 1466-69; 1478.** When he reached Gibson's, he asked for Gibson to get him some crack. Gibson refused because of the late hour. During their conversation, Moore told Gibson, "I done something bad, and I got to go turn myself in, and I got money." **R. pp. 1248-49.**

Moore was obviously bleeding and Gibson asked him what had occurred. Moore told him that he had been shot, and he asked Gibson to take him to the emergency room. Gibson refused because he did not want to become involved. When Moore tried to back his truck out of Gibson's driveway, he struck a telephone pole. **R. pp. 1249-50; 1256-57.**

Spartanburg County Deputy Sheriff Bobby Rollins was searching for "a black male, possibly injured, driving a loud vehicle" since this was the description of the suspect he had received. He passed by as Moore backed into the telephone pole. Therefore, he quickly turned

Ryl
07

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2017 AUG 1 AM 10:06
MICHELLE BLACKLEY

his car around, "threw all of my light in that general area" and exited his vehicle with his weapon drawn. R. pp. 1234-38.

Moore approached Deputy Rollins with his hands in the air and "bleeding profusely" from his left arm. The whole time Moore was complying with Deputy Rollins' instructions to get on the ground, he repeatedly said, "I did it, I did it, I give up, I give up." A search of Moore's truck resulted in the seizure of the stolen money and an open pocketknife. Officers found Moore's wallet in the roadway and the bloody shirt Moore had been wearing near Gibson's residence.⁴ R. pp. 1238-40; 1311-18. Later, Moore told the emergency room nurse that he was using alcohol and cocaine. R. pp. 1377-78.

At the crime scene at Nikki's, officers found the victim lying in the kitchen floor. He was deceased, and his right arm was bent at such a peculiar angle that it was clearly broken. In addition to finding evidence of the victim's blood, Moore's blood was found across the back of the victim's clothing and a trail of his blood led out the front door. Also, a meat cleaver, which did not belong to Nikki's Speed Shop (State's Ex. 83), was found at the victim's feet with Moore's blood on it. Further, officers found six shell casings, two lead bullet cores and two fired bullets that had been fired by the .45 automatic, as well as several fragments that were consistent with having been fired by it.⁵ R. pp. 1271-93; 1305-18; 1352-53; 1364-65; 1368; 1421-32; 1460-80.

In the penalty phase of Moore's trial, the State presented victim impact evidence (R. pp. 1618-24; 1632-35; 1641-47) as well as photographs and additional testimony from the pathologist who performed the autopsy. R. pp. 1675-81. The remainder of the State's evidence

⁴ The presence of Moore's shirt in Gibson's yard corroborates that Moore was the person who had been in the yard yelling for Gibson to come outside.

⁵ A reasonable inference from the presence of the cleaver at the store and the opened pocket knife is that Moore may have very well been armed before he entered the store. In any event, his crimes were certainly premeditated by the time he fired at Mr. Hadden, who was unarmed and had not spoken to him.

was devoted to presenting evidence related to Moore's character.

The State presented evidence of a 1985 Michigan conviction for unlawful possession of a weapon and a May 15, 1987, Michigan conviction (*see State's Ex. 49*) for attempted breaking and entering with intent. At the time, Moore had described the crime by saying that he had pushed open the front door of the Broadway Mark, entered the store and removed two handguns as well as \$10.00 in quarters. When later stopped by police, he managed to get away from them. Moore spoke to David Saad (a parole and probation officer from the Michigan Department of Corrections) and said that his addiction to cocaine and crack cocaine caused him to commit the crime. **R. pp. 1648-57.**

Michelle Crowder testified to a September 1991 incident in South Carolina, in which Moore robbed her and beat and kicked both her and her boyfriend. Her boyfriend was so badly injured that he had to go to the hospital. **R. pp. 1658-60.** Valerie Wisniewski testified about a September 13, 1991, incident in which Moore stole money from her at the Rack Room where she was working as a cashier. **R. pp. 1662-64.**

Additionally, the State introduced evidence concerning Moore's South Carolina convictions. On September 15, 1993, he was convicted of second offense DUS (92-GS-63-59), habitual traffic offender (93-GS-42-1804), DUS third offense (93-GS-42-1805). He was convicted of habitual traffic offender again on August 23, 1994 (94-GS-42-3666). On the same date, he was convicted of common law robbery in connection with the incident at Rack Room Shoes (92-GS-42-2606). On July 13, 1995, he was convicted of driving under suspension (third offense) (95-GS-42-160). On January 18, 1996, he was convicted of driving under suspension (sixth offense) (95-GS-42-3836) and driving under suspension (fifth offense) (96-GS-42-387).

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2021 AUG - 1 AM 10:06
MOORE BLACKLEY

On August 7, 1997, he was convicted of assault and battery of a high and aggravated nature on Ms. Sonja Harrison. R. pp. 1665-70.

III. ALLEGATIONS

Moore raises the following allegations in the December 31, 2010 Amended Application:
allegations:

- 9&10. Applicant maintains, as the grounds on which he bases his claims of unlawful custody, that:
- a. Trial Counsel was ineffective in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and federal laws, South Carolina Constitution and South Carolina state law due to counsel's failure to object to the trial court's erroneous limitation on Applicant's right to allocution/ right to address his jury at the end of the penalty phase and/or make a plea for mercy during his penalty phase closing statement. Counsel's failure to object to the trial court's improper admonition to Applicant deprived Applicant of the fundamentally important right to seek mercy from his sentencing jury, and prevented review of this issue on direct appeal. *State v. Perez*, 334 S.C. 563, 514 S.E.2d 754 (1999); *State v. Hall*, 312 S.C. 95, 439 S.E.2d 278 (1994).
 - b. Trial Counsel was ineffective in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and federal laws, South Carolina Constitution and South Carolina state law due to their failure to perform a reasonable investigation into Applicant's background and family life, resulting in a sentencing proceeding that was fundamentally unfair and assured a death verdict for the Applicant would be returned by the jury. Trial counsel failed to conduct any investigation in the state of Michigan, where the Applicant was born and raised. Had counsel conducted a reasonable investigation into Applicant's background, they would have learned that Applicant comes from a large family, had numerous relatives who could have testified to his good character and struggle with addiction, and these relatives and/or friends would have been willing to testify on Applicant's behalf during his sentencing proceeding at trial. Failure to conduct a reasonable investigation into potential avenues of mitigation is conduct falling below what is required of trial counsel in a capital case. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Strickland v. Washington*, 466 U.S. 668 (1984)

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:06
M. HOPE BLACKLEY

("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*, 466 U.S. at 691); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

- c. Applicant was denied the right to effective assistance of counsel at both the trial and sentencing phases in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, federal law, South Carolina State Constitution and South Carolina law in that trial counsel failed to properly and adequately investigate and prepare to confront and rebut the State's alleged physical evidence, and further trial counsel failed to present its own expert or evidence to rebut or explain such physical evidence and/or object that ballistics and firearms and serology testimony was inadmissible in that it failed to meet the mandates of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *State v. Jones*, 273 S.C. 723 (1979). Counsel's unreasonable omissions denied Applicant an opportunity to show to the jury he acted in self-defense or (sic).

This incident involved a late night shoot out in a convenience store. Multiple gun shots involving two guns were fired. The defendant was wounded in the arm and chest and the victim was mortally wounded. There is undisputed evidence that the victim owned and/or possessed both guns involved and no evidence the defendant possessed any gun until he wrestled one of the guns from the victim. There was a great deal of evidence and testimony presented by the Solicitor regarding multiple guns, ballistics, shell casings, bullet jackets, bullet fragments, finger prints, trace evidence, gun[] shot residue, blood, blood spatter, DNA, and pathology. Much of this testimony is subject to attack on the basis of its questionable admissibility. Even if admissible, the evidence was easily contradicted and/or explained in a manner consistent with "circumstances other than the guilt of the accused." Trial counsel never retained its own expert to assist with the forensic issues involved with the State's physical evidence. Trial counsel never called as witnesses its own experts for the jury to hear an opposing view and opinion as to the physical evidence. Thus, trial counsel did not adequately investigate or prepare to deny, rebut, or explain the State's physical evidence. *Gardner v. Florida*, 430 U.S. 122, 50 L.Ed.2d 339, 97 S. Ct. 399 (1976). Had counsel hired appropriate forensic experts, including a forensic pathologist, who could have testified as to the single bullet having killed James Mahoney, rather than two as opined by the state, and a crime scene analyst, who could have provided testimony concerning the likely origin of bullets, bullet fragments, shell casings, and general crime scene

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:06
M. HOPE BLACKLEY

analysis, there is a reasonable probability that the guilt and/or penalty phase would have had a different outcome. *Strickland v. Washington, supra*.

- d. Applicant was denied due process of law and also denied the right to effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, the South Carolina Constitution and South Carolina law because the State failed to disclose material evidence to the defense concerning State's Witness George Gibson. *Brady v. Maryland*, 373 U.S. 83 (1963). Alternatively, if trial counsel was aware of all of the information set forth below about George Gibson, then trial counsel acted unreasonably in not cross-examining Gibson as to his pending charges and/or investigating the other witnesses at Gibson's home the night of the incident. *Strickland v. Washington, infra*.

George Gibson, a State witness had told detectives immediately after the shootings, in 1999, that Applicant came to Gibson's home and asked him for a ride to the hospital, which Gibson refused to do. On October 18, 2001, the first day of trial, defense counsel told the Court that the State now had an additional statement from Gibson. This new statement had been provided to counsel the previous week in a summary of supplemental aggravating circumstances notice, Gibson's new statement said that defendant robbed and murdered the store clerk in order to buy cocaine, and that was why Applicant showed up at Gibson's home after the shooting. Although other witnesses were at Gibson's residence on the night of the incident at the time of Moore's visit there, and had talked to law enforcement, defense counsel was either unaware of these other witnesses, which the state failed to name or take statements from, or had not been able to locate or interview them before trial.

Additionally, defense counsel was not informed that, at the time of his testimony, George Gibson was incarcerated at Allendale Correctional Institution and was brought to Spartanburg to testify at the solicitor's direction. Defense counsel was never told that Mr. Gibson was also out on bond for a then-new (July 2001) possession of crack arrest (although counsel had been informed of Gibson's 2000 Trafficking Crack charge that was pending in the 7th Circuit). Assuming, *arguendo*, that the State did provide the above information to the defense about Mr. Gibson, then counsel failed to adequately investigate this matter. Impeachment evidence related to a critical witness, such as George Gibson, whose testimony formed the centerpiece/lynchpin of the state's case against Applicant, and whose second statement to law enforcement, given at the eleventh

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:06
M. HOPE BLACKLEY

2011 AUG - 1 AM 10:06

M. HOPE BLACKLEY

hour, became their basis for *res gestae* testimony, that was used to prove a sketchy, yet overwhelmingly prejudicial, "motive" and should have been disclosed to defense counsel. George Gibson had substantial charges for which he faced significant prison time, which fact, had it been known to the jury, would certainly have cast doubt on Gibson's credibility. *State v. Mizzell*, 394 S.C. 326 (2002). The State's nondisclosure of critical impeachment evidence against its star witness undermines any confidence that can be had in the jury's guilt and/or sentencing verdict(s). *Brady v. Maryland, supra*; *Strickland v. Washington, supra*. Alternatively, if trial counsel were aware of the information, they were ineffective in failing to use it during cross-examination and for investigation. *Strickland v. Washington, supra*.

- e. Applicant was denied due process of law and also denied the right to effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, the South Carolina Constitution and South Carolina law because trial counsel failed to pursue their *Batson v. Kentucky*, 476 U.S. 79 (1986) claim, despite the fact that Applicant's jury was exclusively white and the state struck the only two African-Americans qualified to serve as jurors. Applicant is African-American and the alleged victim, James Mahoney, was Caucasian. The State's decision to strike the only two qualified African-American jurors on the jury panel established a prima facie case of racial discrimination. Trial Counsel raised a *Batson* challenge, but later abandoned it. (Tr. P. 1137). Trial Counsel's failure to pursue and/or preserve for direct appeal a *Batson* challenge was unreasonable, as the State's alleged race-neutral reasons for striking jurors Morrow and Huffman were pre-textual, as white jurors who gave almost mirror like responses and/or were similarly-if not exactly-situated insofar as having relatives who were prosecuted, were not challenged by the State and were seated on Applicant's jury. Counsel's failure to preserve this meritorious issue was deficient and unreasonable, as well as prejudicial. *Strickland v. Washington, supra*.
- f. Applicant was denied due process of law and also denied the right to effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, the South Carolina Constitution and South Carolina law because trial counsel failed to preserve their objection to the trial court's refusal to give a jury charge on voluntary manslaughter. Assuming, *arguendo*, that the issue of the trial judge failing to give a voluntary manslaughter charge was properly preserved, appellate counsel was ineffective in failing to raise this issue on direct appeal. Applicant was entitled to a charge of voluntary manslaughter based on the

Pyl
p13

facts of his case. It is undisputed that Applicant was shot by James Mahoney and he was shot by a weapon owned by either James Mahoney or the owner of Nikki's Convenience Store. James Mahoney's death was likewise the result of being shot with his own weapon. The fact that all three firearms collected from the crime scene in and near Nikki's Convenience Store belonged to either Mahoney or the store owner establishes that: (1) Applicant entered the store without a firearm and (2) that James Mahoney initiated what later became a deadly gun fight.

Voluntary manslaughter is a lesser-included offense of murder. Voluntary manslaughter is defined as an "unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *State v. Cole*, 338 S.C. 97 (2000). The only time a voluntary manslaughter charge should not be provided to the jury is when there is "no evidence whatsoever tending to reduce murder to voluntary manslaughter." *State v. Pittman*, 373 S.C. 527 (2007). In Applicant's case, there was ample evidence that Mahoney was killed as a result of a gun battle he initiated with a weapon that did not belong to Applicant. These facts alone establish sufficient provocation by Mahoney to entitle Applicant to a charge on voluntary manslaughter.

Trial counsel's failure to preserve this issue or, alternatively, appellate counsel's failure to raise it on direct appeal amounts to ineffective assistance of counsel. *Strickland v. Washington*, *supra*.

- g. Applicant was denied due process of law and also denied the right to effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, the South Carolina Constitution and South Carolina law because trial counsel failed to present adaptability evidence from James Aiken, a nationally recognized expert in the field of penal institution safety and management. Mr. Aiken was prepared and available to testify on behalf of Applicant but never called as a witness. Counsel's unreasonable decision to not call Mr. Aiken opened the door for the state's damning closing argument that Applicant had shown "escalating violence," thereby injecting the fear of Applicant's future dangerousness into the minds of the jurors, who were never told that Applicant could be safely housed for the duration of his life. The prejudice to Applicant stemming from counsel's inexplicable (and seemingly eleventh hour) decision to discard the only defense expert is manifest. *Strickland v. Washington*, *supra*.
- h. Applicant was denied due process of law and also denied the right to effective assistance of counsel in violation of the Fifth, Sixth,

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG -1 AM 10:07
M. HOPE BLACKLEY

Eighth and Fourteenth Amendments to the U.S. Constitution, the South Carolina Constitution and South Carolina law because trial counsel failed to request a charge on the statutory mitigating circumstance of provocation by the victim, as set forth in S.C. Code Section 16-3-20 (c)(b)(8). Failure to request this mitigating circumstance was both deficient and prejudicial to Applicant. Counsel argued to the jury that Applicant was also a "victim," so there is no conceivable professionally reasonable basis for not seeking instruction to the jury that the victim's provocation could be considered by them as a factor in mitigation of punishment. Without such an instruction, the jury was left with no guidance to assist them in taking into consideration the fact that Mahoney shot Applicant, which was the whole basis of counsel's argument that Applicant was a victim, too. Trial counsel's failure to request the statutory mitigator of provocation by the victim was ineffective assistance of counsel. *Strickland v. Washington*, *supra*.

- i. Trial Counsel was ineffective in failing to object to the State's request to charge the statutory aggravating circumstance found at S.C. Code Section 16-3-20(c)(3) because it was not appropriate to the facts of Applicant's case. Alternatively, if the trial court correctly held that S.C. Code Section 16-3-20(c)(3) is properly applied to the facts of Applicant's case, then this code section is unconstitutional due to its over-breadth, in that it fails to sufficiently narrow the class of offenders who are eligible for a death sentence.

South Carolina Code Section 16-3-20(c)(3) reads as follows: The Offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

Applicant's case involved use of a pistol. A pistol is not "a weapon or device which normally would be hazardous to the lives of more than one person." Alternatively, if a single-shot pistol meets the criteria of 16-3-20(c)(3), then this aggravating factor would make any non-residential intentional shooting death occurring near a third-party eligible for the death penalty. Clearly, this is not what the legislature intended. The more reasonable construction of 16-3-20(c)(3) is to apply it in those few cases where an incendiary device, bomb or other explosive type of weapon is used to kill people in a public place. To hold otherwise would violate the basic Eighth Amendment principle that death penalty statutes must sufficiently narrow the class of death-eligible offenders.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:07
M. HOPE BLACKLEY

Applicant either received ineffective assistance of counsel or S.C. Code Section 16-3-20(c)(3) is unconstitutional. *Strickland v. Washington, supra, Lewis v. Jeffers*, 497 U.S. 764,774 (1990).

Additionally, Moore submitted the following allegations, without objection, on January 5,

2011:

(9/10j). Appellant was denied the right to effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution during the appellate proceedings when appellate counsel failed to raise on appeal the trial court's error in admitting the testimony of State's witnesses George Gibson and Jeanie Smith as res gestae witnesses. These witnesses' testimony should not have been admitted under a res gestae theory and, as such, the probative value of such testimony was substantially outweighed by its prejudicial nature.

(9/10k). Appellant was denied the right to effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution in that trial counsel failed to object to the admission of testimony by State's witness Jeanie Smith in that such testimony was inadmissible hearsay.

At the PCR hearing, Moore, through his attorneys, abandoned allegation 10(i). *See State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000) (a firearm is a "weapon or device which would normally be hazardous to the lives of more than one person;" thus, the trial judge properly refused to direct a verdict on the statutory aggravating circumstance in S.C. Code Ann. § 16-3-20(C)(a)(3) (Supp. 2000)).

IV. DISCUSSION

To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. *See Wiggins v. Smith*, 539 U.S.510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). "[E]very effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective as

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG -1 AM 10:07
M. HOPE BLACKLEY

Roll
p16

the time.” *Id.* at 689. “A court considering a claim of ineffective assistance must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance. *Id.*, at 689, 104 S.Ct. 2052. The challenger’s burden is to show ‘that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.’ *Id.*, at 687, 104 S.Ct. 2052.” *Harrington v. Richter*, 131 S.Ct. 770, 787 (2011) (quoting *Strickland*).⁶

The inmate must also demonstrate that he was prejudiced by counsel’s deficient performance. *Strickland*, 466 U.S. at 691. To do so, he must prove “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. It is insufficient to prove “that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693. Rather, “[c]ounsel’s errors must be ‘so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *Richter*, 131 S.Ct. at 787 (quoting *Strickland*, 466 U.S. at 687).

Applying these principles to the present case, the Court finds that Moore has failed to meet either prong of the *Strickland* test as to any and all of the issues raised at PCR. I specifically find that Mr. Moore was represented by capable and experienced counsel at both the jury trial and on appeal, and that each of the complaints now asserted at PCR were the result of either an articulated and reasonable trial strategy, they were not raised due to a lack of meritorious proof or supporting law, or there was no prejudice to Moore based upon counsel’s alleged errors.

A. Guilt Phase Allegations.

GROUND 10(c)

⁶ “Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is ‘all too tempting’ to ‘second-guess counsel’s assistance after conviction or adverse sentence.’” *Id.* at 787 (citation omitted).

Moore first alleges that trial counsel failed to properly and adequately investigate and prepare to confront and rebut the State's alleged physical evidence, and that counsel failed to present its own expert or evidence to rebut or explain this physical evidence. The Court finds that he has not proven either deficient performance or resulting prejudice.⁷

The Court in *Strickland* explained the deference owed counsel's strategic judgments in terms of the adequacy of the investigations supporting those judgments:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-691. See also *Wiggins*, 539 U.S. at 521-22.

Further, "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. In assessing counsel's investigation, the Court "must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' *Strickland*, 466 U.S., at 688, [. . .], which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time,' *id.*, at 689 [. . .] ('[E]very effort [must] be made to eliminate the distorting effects of hindsight')" *Wiggins*, 539 U.S. at 523.

⁷ He also claims that "trial counsel failed to present its own expert or evidence to rebut or explain such physical evidence and/or object that ballistics and firearms and serology testimony was inadmissible in that it failed to meet the mandates of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *State v. Jones*, 273 S.C. 723 (1979)." However, he failed to present any evidence in support of this portion of his allegation and he did not address it in his proposed Order. Therefore, the Court finds that he has abandoned this allegation.

PSL
P18

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:07
M. HIGDON

Based upon the credible evidence before the Court, the Court finds that counsel's investigation to "prepare to confront and rebut the State's alleged physical evidence" was objectively reasonable. Both of Moore's attorneys had a great deal of experience in trying major felony cases when they were appointed to represent him. Also, Mr. Morin, who was the lead attorney, sought and obtained Mr. Kelly's appointment as second chair because they had a good working relationship. Both Mr. Morin and Mr. Kelly met with Moore on numerous occasions and they had discussed his version of what had occurred. He repeatedly denied that he had intended to rob Nikki's when he entered the store, which was the State's theory of the case, but he gave conflicting accounts about whether he used crack that night.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG 1 AM 10:07
M. JOPPE BLANKLEY

The Court further finds that Mr. Morin employed the services of a forensic pathologist, a crime scene expert and a private investigator to assist them in their efforts. Mr. Morin thought that both were competent. He did not see the need for employing another expert and was unsure that funding would be approved for such a request. Also, Mr. Kelly has a great deal of experience with and knowledge of the use of firearms.

Mr. Morin reviewed the physical evidence with both his crime scene expert and his investigator.⁸ Counsel's investigation and the information that the State provided to him through

⁸ Respondent's Ex. 1, a billing statement from Pete Skidmore, the investigator, reflects that Mr. Skidmore met with Mr. Morin and Mr. Moore for 5.5 hours on July 2, 2001, and he reviewed the case file on July 23-24, 2001. Thereafter, either Mr. Skidmore or his associate (1) prepared a list of people who need to be interviewed; (2) again met with Moore; (3) spoke to Ann Yarborough (a Nikki's employee); (4) spoke to Lynda Byrd; (5) after repeatedly unsuccessful attempts to locate and speak to Terry Hadden, interviewed him; (6) interviewed several of Moore's former co-workers; (7) attempted to locate Gibson at Perry Correctional Institution and at Kirkland Correctional Institution on October 12, 2001, and discovered that Gibson was in the Spartanburg County jail "waiting to be transported;" (8) spoke to another potential witness; (9) met with Mr. Morin and reviewed the physical evidence; and (10) attended trial on October 19, 2001, where he again interviewed Gibson, reviewed his statement and ascertained that Gibson's "answers seemed fairly consistent with report." Counsel had a copy of the report prepared by Mr. Clevenger, an investigator with the Solicitor's Office (Applicant's Ex. 25) in his file. This report was prepared shortly after the crimes and contains hearsay evidence of some matters that were later determined to be incorrect.

Bl
p19

discovery⁹ revealed that Moore did not have a handgun on him when he entered Nikki's and that both the murder weapon (a .45 caliber handgun) and a .44 caliber revolver, originated with the victim. There were a number of shots fired at the store and a number of shell casings. He had his experts to assist him in reviewing the physical evidence and determining what the physical evidence indicated as to the relative positions of Moore and Jamie Mahoney and what had occurred. Mr. Morin did not tell his experts what Moore said had occurred. Also, Mr. Morin reviewed the physical evidence with his crime scene expert, Donald Girndt, and he provided Mr. Girndt with crime scene photographs. Mr. Morin met with both his pathologist and his crime scene expert, at the same time, to discuss their findings.

After counsel's investigation was concluded, Mr. Morin did not perceive this case as extremely complex from a factual standpoint, and he ranked it somewhere in the middle of the cases that he had tried. His theory of defense was to attack the credibility of the State's witnesses and attempt to use those witnesses to demonstrate that Moore was in the heat of passion when the shooting occurred.

The Court finds that the evidence of Moore's guilt was overwhelming. Terry Hadden, who survived the assault, positively identified Moore as the perpetrator of the crimes. Hadden, who was sitting just a few feet from Moore when Moore fired the first shot at Hadden, positively identified Moore from a photo line-up and he positively identified Moore at trial as the perpetrator of the crimes against him and against James Mahoney. Also, Moore's DNA was found inside the store, outside the store, on the murder weapon, on the side of the getaway vehicle, and inside the getaway vehicle after Moore was arrested.

⁹ This would have included the reports of the officers involved in the investigation.

The motive for the crime was clearly robbery. Moore went to George Gibson's house before the crime in search of crack cocaine. Gibson told Moore that he would not sell or give Moore any crack cocaine, unless Moore had some money to purchase it. Moore told Gibson he was going to work but would be back later. Moore was unemployed at the time and had no way to get money legally.¹⁰

Moore eventually went to the convenience store where the victim worked which contained readily available cash that Moore could steal. Moore entered Nikki's around 8:00 a.m. From the evidence in the record, it is clearly inferable that Moore placed items on the counter pretending to be there to purchase these items, and then attempted to steal money from Mahoney and the store.¹¹ Moore went behind the counter to the cash register and took the bank bag that contained over \$1,400 in cash, the video-poker money, evidencing his intent when he went into the store. Moore's jury heard this information.

Moore did not testify at his capital trial, but the Court viewed and heard Moore's PCR testimony of how and why the shooting occurred. Moore claimed that he went into the store only to purchase the items he placed on the counter; that he and the victim got into an argument over 11 or 12 cents; that the victim made a racial slur in the course of directing Moore to leave the store; and that a struggle ensued. The Court finds that Moore's testimony is not credible. Moore's contention that he only took the money as an after-thought is completely beyond belief.

¹⁰ At the time he testified at trial, Gibson had pending charges for possession of crack cocaine and trafficking in crack cocaine. Moore's jury knew of the trafficking charge.

¹¹ As discussed, Hadden testified at the trial that he heard James Mahoney state "What the hell are you doing?" Hadden heard no other argument or discussion. When Hadden turned to see what was occurring, Moore had the victims' hands in one of his hands and came up with a pistol, pointed it at Hadden and told him not to move. Moore fired a shot at Hadden. Hadden then heard an exchange of gunfire. Hadden testified at the trial that he heard James Mahoney state "What the hell are you doing?" Hadden heard no other argument or discussion. When Hadden turned to see what was occurring, Moore had the victims' hands in one of his hands and came up with a pistol, pointed it at Hadden and told him not to move. Moore then fired a shot at Hadden. Hadden thereafter heard an exchange of gunfire, as he pretended to be dead.

The Court finds that as the victim lay helpless on the floor behind the counter, Moore, who had been seriously shot in the arm by the victim in self-defense, stole the bank bag from behind the counter. While doing so, he bled onto the victim's clothing. This required Moore to go behind the counter of the store. Moore left Nikki's only after stealing the money-bag containing the \$1,400 in cash and not before doing so.

Moore fled the crime-scene leaving a trail of his own DNA out of the store and into the parking-lot. Moore bled profusely down the side of his truck as he drove away from the scene. Instead of turning right out of the parking lot of the convenience store and driving just a few short blocks to Spartanburg Regional Hospital and receiving emergency treatment for his serious gunshot wound, Moore drove approximately six miles in the opposite direction. Moore did not drive to the hospital or even to his own home, but directly to George Gibson's house. This was the same house where he had earlier tried to purchase crack. Only now, Moore had over \$1,400 in cash with which to purchase it.

Once he arrived there, Gibson refused to sell crack to or assist Moore, not wanting to get involved in what Moore had done. Moore then tried to back out of the driveway, wrecked his truck, and eventually passed out in the roadway. He told a Spartanburg County deputy that "he did it." The blood soaked money-bag and money was recovered from the front seat of Moore's truck. Moore told either EMS personnel or the emergency room nurse that he had been using alcohol and cocaine that day. However, Moore denied before this Court that crack cocaine had anything to do with the crime and he denied that he was addicted to crack. Rather, Moore testified that he went to Gibson's residence only because he wanted Gibson's assistance in bandaging his wound. Again, the Court finds that his testimony is simply not credible given the entire record in this case.

Ryl
p 22

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG 1 11 10:37
M. HOPKINS

George Gibson has no medical training whatsoever. The credible evidence shows that Gibson is a crack cocaine dealer or one who facilitates crack cocaine sales. Further, the testimony at PCR established that when one exits Nikki's convenience store, Spartanburg Regional Hospital is visible to one's right, just a few blocks from Nikki's. Although Moore was seriously wounded, he went in the opposite direction of the hospital, travelling over six miles to Gibson's house. As previously stated, the evidence of Moore's guilt was overwhelming.

Moore alleges that counsel was ineffective for not retaining and calling their own pathologist to rebut the State's evidence presented at trial and in the sentencing phase. However, as discussed, the record shows trial counsel retained a forensic pathologist to review the evidence in the case. Specifically, counsel retained Dr. Susan McMahon, a forensic pathologist from MUSC in Columbia, S.C. Counsel met with Dr. McMahon and his crime scene expert before trial, together, to review their findings.

Dr. McMahon informed trial counsel that, in her opinion, Moore shot the victim while Moore was behind the counter with the victim and a relatively short distance from the victim. The significance of this opinion is that Moore did not fatally shoot the victim in an exchange of gunfire while Mahoney was on one side of the counter and Moore was on the customer side of the counter. Instead, Moore went through an entrance doorway which led to the area behind the counter in pursuit of the victim Mr. Mahoney and to where the cash register and video-poker money was located.

This testimony would have been damaging to Moore's defense and mitigation presentation. Counsel did not want to introduce any evidence showing that Moore had fired a shot behind the counter. The Court finds that counsel reasonably determined under *Strickland* not

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:07
MOORE BEAUCHAMP

to present her to testify to facts that would have incriminated Moore and was inconsistent with his version of the shooting. *E.g., Pruett v. Thompson*, 996 F.2d 1560, 1574 (4th Cir. 1993) (counsel was entitled to rely on the information he obtained from his retained experts and not second-guess this information just because the experts he had retained and had evaluated petitioner rendered an unfavorable or less than desirable opinion); *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995) ("If an attorney has the burden of reviewing the trustworthiness of a qualified expert's conclusion before the attorney is entitled to make decisions based on that conclusion, the role of the expert becomes superfluous"); *Murtishaw v. Woodford*, 255 F.3d 926, 947 (9th Cir. 2001) (counsel is entitled to rely on the expert(s) consulted).

In an attempt to meet his burden of proving that he was prejudiced by counsel's failure to present a pathologist at trial, Moore alleges that Dr. Sandra Conradi, the forensic pathologist his collateral attorneys retained and had testify at the PCR hearing, could have rebutted the findings of the State's pathologist. The Court finds that counsel was not ineffective for failing to retain and call Dr. Conradi at the trial for several reasons.

First, counsel is not required to call a specific expert, such as Dr. Conradi. If counsel has retained a qualified pathologist, who gives him an unfavorable opinion regarding the evidence in the case, counsel is not required to search for another expert who will testify favorably. Counsel is not required to "expert shop." *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992) (petitioner could not establish ineffective assistance because counsel did not expert shop until he found one that who would testify favorably); *Pruett v. Thompson*, *supra* (same); *see also Walton v. Angelone*, 321 F.3d 442, 464 (4th Cir. 2003) (defendant has no constitutional right to insist on the appointment of any particular expert under *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985); and the Constitution does not entitle a criminal defendant to the effective assistance of an expert

Asyl
p24

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:07
N HOE BRACKLEY

witness). More importantly, Moore's own expert, Dr. Conradi, further incriminated and damned applicant Moore by her own testimony at PCR.

Moore testified at the PCR hearing that the victim fired first and shot him in the arm with the .44 pistol after Moore took the .45 pistol away from the victim. Moore claimed that he retreated to a door frame approximately six feet away located directly in front of the counter and returned fire from this location with the .45. He then fired no more shots. Moore thereafter went around an entrance door, which led to the area behind the counter, to see if Mahoney was dead. This entrance door, which is different from the door frame from which Moore testified he fired all of his shots, leads to the area behind the counter, *i.e.* the kitchen area.

It is clear from Moore's testimony at PCR that he allegedly shot Mahoney with one of the bullets he fired from the door frame approximately six feet away and directly in front of the store counter. According to Moore he saw the victim lying on the floor, wounded, after he went through the door-way leading to the area behind the counter. Moore claimed that he then saw the money bag and, as an after-thought, he decided to take the money-bag from behind the counter despite his own serious wound.

However, and importantly, Dr. Conradi opined that there was stippling around the fatal wound to the victim Mahoney's left side. She also admitted that Moore would had to have been within several inches of the victim when he fired the fatal shot into the victim because the victim was wearing a shirt at the time he was shot, and the stippling penetrated the outer clothing of the victim and is visible on the autopsy photographs. Dr. Conradi's testimony would place Moore going through the doorway leading to the area behind the counter and shooting Mahoney in the side after Moore entered the door-way to the area behind the counter. The significance of this testimony is that it would demonstrate that Moore was not going behind the counter to see if

PC
25

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG 1 AM 10:07
M. MOORE-BLANKLEY

Mahoney was dead. He was going behind the counter to murder Mahoney and to steal the store's money.

If Dr. Conradi's opinion in this regard is accepted, and the Court accepts it as credible, then Moore's testimony regarding how the shooting occurred is simply not credible given the physical evidence. More importantly, Dr. Conradi's testimony agrees with trial counsel's expert pathologist and trial counsel's forensic expert that the fatal shooting of the deceased victim in this case occurred when Moore and the victim were both in the area behind the counter and in the kitchen area.

The Court finds that if trial counsel had called Dr. Conradi to the stand, this damaging testimony would have been elicited on cross-examination by the State, as it was by the Attorney General at PCR. It would have been devastating to Moore's guilt phase defense and to his mitigation presentation during the sentencing phase. Therefore, Moore cannot show any prejudice from failing to present Dr. Conradi's testimony. *Strickland*; *See also Wong v. Belmontes*, 130 S.Ct. 383, 386 (2009).¹²

Moore also alleges trial counsel was ineffective in failing to retain their own crime-scene expert. The Court disagrees. First, Moore did not meet his burden of proof on this issue because he did not call a crime scene expert of his own at PCR to testify to how counsel was ineffective in failing to call a crime-scene expert. He failed to establish deficient performance or prejudice in this regard. *Lorenzen v. State*, 376 S.C. 521, 657 S.E.2d 771 (2008) (defendant's testimony that expert would have helped his case was merely speculative where he failed to call expert to testify at PCR). Therefore, this ground must be dismissed with prejudice.

¹² Although *Belmontes* involved an assessment of prejudice in the sentencing phase of a capital trial, the Court makes clear that an assessment of prejudice under *Strickland* requires a reviewing court "to consider all the relevant evidence that the jury would have had before it if [counsel] had pursued the different path" not just the positive information that counsel could have presented" through the witness(es), but also the damaging evidence from the prosecution "that almost certainly would have come in with it." *Id.*

Second, the record shows that trial counsel did retain its own crime-scene expert to review the crime-scene photographs and the evidence recovered by law enforcement. The record shows trial counsel met with this expert, Donald Girndt, prior to trial to discuss his findings. Mr. Girndt, who was present with counsel when Dr. McMahon stated her findings, agreed with Dr. McMahon that the evidence indicated that Moore shot the victim while both he and the victim were in the area behind the store's counter. This Court finds that it was objectively reasonable trial strategy for trial counsel not to call Mr. Girndt to testify to evidence that would have further incriminated Moore or to have Girndt prepare a report with these findings; *Strickland*. This ground must be dismissed with prejudice.

Moore also alleges that trial counsel were ineffective in failing to properly cross-examine the State's crime-scene technician, Paul Dorman. The Court disagrees. Moore repeatedly referred to the crime-scene technician as "the State's expert" during the PCR merit's hearing. This is a misnomer. Mr. Dorman was not the State's expert at trial or at PCR. Mr. Dorman was called at trial as a crime scene technician, *i.e.* to testify about where he located particular pieces of evidence and his retrieval of the same. Moore called Mr. Dorman at the PCR hearing.

Dorman testified at the PCR hearing that, in his opinion, one of the shell casings found behind the counter must have come from someone firing the gun from behind the counter. Moore argued that this indicated that the victim shot at him first with the .45, and that trial counsel was ineffective in failing to cross-examine Mr. Dorman on this specific issue.

However, as previously set forth, Mr. Dorman was not "the State's expert" as Moore contends. Rather, as the crime scene technician, he was simply the person from the Sheriff's Office who was designated to film the crime-scene, photograph it, and recover all of the physical evidence found at the scene. He is not an expert in crime scene reconstruction or ballistics, and

psl
p27

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 AUG - 1 PM 10:07
MOORE, BLAISE

Moore did not qualify him as such at the PCR merit's hearing. (He was qualified at PCR only as an expert in crime-scene processing). Further, Mr. Dorman, admitted at PCR that *a firearms expert* was more qualified to testify how or why one of the fired shell casings ended up behind the counter on the floor. The record shows *the firearms expert* did so testify at trial. The forensic firearms examiner testified at trial that there were a myriad of ways in which the fired shell casing found behind the counter could have ended up behind the counter. R. pp. 1419-50.

This Court listened to Mr. Dorman's, PCR testimony and finds that his testimony on this specific issue, *i.e.* how the shell casing ended up behind the counter, is not credible. The record shows that Moore struggled with the victim and items were knocked over on the counter. There are a myriad of ways that the shell casing could have ended up behind the counter and in the location it was found. The shell casing could have landed on the counter and been knocked to the floor by either Moore or Mahoney, or the shell casing could have simply bounced off the counter and rolled onto the floor behind the counter.

Additionally, depending on the position of the gun at the time it was fired by Moore, the shell casing could have landed on the floor behind the counter. This was in essence the testimony of the qualified ballistics expert at trial, and this Court finds that the ballistics experts' testimony is credible, given his qualifications and all of the evidence and the record in this case.

The Court further finds that Mr. Dorman's testimony on this specific issue at PCR does not meet the standard of admissibility required for admission of such evidence at a trial before a jury. Indeed, Mr. Dorman admitted that it would be better to ask a firearms examiner about this specific issue than him. The record shows that Mr. Dorman did not perform specific testing of the weapon fired in this case to determine how this specific weapon ejects shell casings, the distance this specific weapon would eject shell casings, and in what direction it would eject shell

psl
p28

FILED
CLERK OF COURT
STANTBORG COUNTY
2011 AUG 10 10:07
M. HOPKINS

casings depending on the angle the gun was held when fired. Mr. Dorman's testimony on this issue is thus speculative. The Court finds that trial counsel was not ineffective in failing to cross-examine him on his personal opinion regarding how the shell casing could have ended up on the floor behind the counter because this was outside of his expertise and, by his own admission, the firearms examiner was person qualified to testify to such matters. Therefore, Moore has failed to show deficient performance or prejudice in this regard. *Bannister v. State*, 333 S.Ct. 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 the burden of producing admissible evidence in accordance with the rules of evidence).

Even if this testimony could have been admitted, this Court finds that Moore has failed to show prejudice. *Strickland*. Given that (1) there are several other factors that could have contributed to or caused the shell casing to have ended up on the floor behind the counter; (2) Dorman's admission that the firearms examiner was qualified person to explain how the shell casing could have ended up behind the counter; (3) the firearms examiner testified it was impossible to tell how the shell casing ended up behind the counter; (4) the implausibility of Moore's version of the shooting; (5) Moore's own expert, Dr. Conradi, testified that Moore would had to have been behind the counter when he fired the fatal shot given the stippling around the victim's wound; and (6) the overwhelming evidence of Moore's guilt of these crimes, the Court finds that Moore was not prejudiced by counsel's alleged deficient performance in this regard. Moore has failed to show that had this testimony been admitted there is a reasonable probability the result of the proceeding would have been different. *Strickland*.¹³

GROUND 10(d)

¹³ By this time, he had taken the .45 caliber semi-automatic from the victim, which would explain how one fired shell casing ended up behind the counter, i.e., he was behind the counter when he fatally shot the victim.

In his **Ground 10(d)**, Moore maintains that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) by failing to disclose material evidence to the defense concerning prosecution witness George Gibson. Alternatively, he asserts that trial counsel were ineffective if they had but did not impeach Gibson with the information at issue. Moreover, he alleges that counsel were ineffective because other witnesses were at Gibson's residence on the night of the murder when Moore went there, and these witnesses had spoken to law enforcement. However, "defense counsel was either unaware of these other witnesses, which the state failed to name or take statements from, or had not been able to locate or interview them before trial." For the following reasons, the Court finds that Moore has not established a *Brady* violation or that counsel was ineffective as urged by Moore.

1. **Gibson's statements.**

First, Moore claims that the State did not disclose that Gibson had given two statements to law enforcement, after September 16, 1999, in which he confirmed his September 16th statement that did not mention Moore's visit on the night of the 15th and in which Gibson said that Moore had come to his residence to get Gibson to take him to the hospital but Gibson refused. The Court finds that there was no constitutional violation.

Prior to the guilt phase, lead trial counsel, Michael Morin, Esquire, moved to exclude testimony from Gibson related to Moore's efforts to purchase crack from Gibson. Mr. Morin noted that "[u]p until last week when I received the state's supplementary notices of additional evidence in support of aggravating circumstances, this wasn't an issue." However, in the State's "listing of some of their witnesses the issue about Mr. Moore's alleged drug use in or around the time of this incident, they indicated in here there were two specific people who have given statements, but apparently they have supplemented their statements at some point, which I do not

Pyle
p 30

FILED
CLERK OF COURT
HARRISBURG COUNTY
JUL 11 AM 10:07
J. HOPE E. ACLELY

know, but apparently they have, because the summaries that they have given me had in it information that I hadn't previously received." R. pp. 1149-54. As discussed in Ground 10(j), *infra*, he unsuccessfully argued that this evidence should be suppressed.

On direct examination, the State established that Gibson had given a statement to the police on September the 16, 1999 in which Gibson did not mention Moore's September 15th visit to Gibson's house because Gibson "was just scared to get involved." R. pp. 1251-52. Trial counsel Morin thereafter cross-examined Gibson. R. pp. 1254-59.

In pertinent part, counsel established the following:

Q Now, the night that this happened you went down to the police station, is that right?

A That morning, yes, after, you know.

Q You gave a statement to the police.

A Yes.

Q Didn't say anything about the drugs, did you? If you need to see a copy of it, I can give it to you.

A I know. Uh-huh.

Q You didn't say anything about it. Didn't say anything about Steve or Dollar or the other gentleman, did you?

A No.

Q You had crack in the house that night, didn't you?

A No.

Q You told the jury that he wanted to give you -

A I said . . . wanted me to get something for him.

Q Okay.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:07
M. HOPE
ACMELEY

psl
p31

A That is why.

Q So there wasn't any reason for you to leave that part out then, was there?

A At the time I wasn't thinking about it like that, because . . . this man was bleeding. I was concerned about it. I wasn't thinking about it like that.

Q Well, yeah. I understand.

A Okay.

Q Now, this part that you now say that you remember that's not in your statement about the drugs, when did you first tell police or the solicitors about that?

A About - -

Q About this drugs and him wanting to get it on the credit and that kind of stuff. Do you remember when you first told them about that?

A A month ago.

Q A month ago?

A September, I guess.

Q Two years after this happened, is that right?

A Well.

Q September of 2001 . . . ?

A Yeah, yeah, whatever.

See App. pp. 1254-55 (emphasis added).

On redirect examination, the State elicited that:

Q Mr. Gibson, did you give a written statement the night this happened?

A Yes, sir.

Q When is the next time you talked to somebody about this case?

A About as far as a statement or anything?

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:07
M. HOPE BLACKEY

Bill
P 32

Q About the case itself, when you talked to somebody about your statement or your --

A About three days later. The investigator and the solicitor stopped by and asked me, you know, and, about three or four days later, about two or three days later, I think. In fact, it wasn't long. That was -- you know, it was just a brief statement, a brief moment, you know, stopped by. And then this time. That's it.

Q So when was the next time after that you talked to anybody else about that case?

A The 25th of December, of September rather.

Q When you came and talked to the solicitor?

A Yes, sir. That's when I -- yes.

Q And the time that you are talking about happened two or three days afterward, was we any of those three solicitors that was --

A Sir?

Q Was any of us one of those solicitors that came and talked to you two or three days afterwards?

A Really, I'm going to be honest with you. All I remember is Officer -- policeman. He's the one I really saw, you know, because it was hot, and the window was up in the car. That's who I remember talking to. That's the only one that really I could, you know, place his face.

Q But, you know, it was three gentlemen in the car, and they said they were with the solicitor's office. So, you know, that's the only one I recognized at the time.

See R. pp. 1260-61 (emphasis added).

In closing argument, Mr. Morin launched a scathing attack on Gibson's credibility, which included Gibson's failure to mention crack in either his original statement to police or to the Solicitor's Office several days after the offense:

Mr. Gowdy called it a crack house in his own closing. When it helps him, it's a crack house. But the fact of the matter is he never said anything to any police about, or authorities about, any drugs being mentioned.

Page 33

FILED
CLERK OF COURT
SARTANBURG COUNTY
2011 AUG - 1 AM 10: 07
M. HOPE BLACKLEY

Mr. Barnette asked him after I sat down did you ever talk to anybody after the police, and he said, oh, yes. Somebody from the solicitor's office, an investigator, came out there and talked to me about three days later. He didn't say one single thing about any drugs being mentioned. But he did remember it three weeks ago when he met with them again.

What changed? Well, 18 months ago he got a charge for trafficking crack. Eighteen months ago. And has anything happened to that? No. That case is still pending. But, by the way, I just remember that before Mr. Moore said he needed help, he wanted to talk about the crack.

2011 AUG - 1 AM 10:07

FILED
CLERK OF COURT
PARTANBURG COUNTY

R. p. 1565, ll. 2-19.

Mr. Morin then showed jurors a photograph taken from Gibson's house and showing his view of the roadway from that location; which had been introduced as State's Ex. 23. Morin urged jurors that this photograph refuted Gibson's testimony that he looked out in the street and saw Moore laying on the ground because the photograph plainly demonstrated that Gibson's vision at 3:00 a.m. would have been obstructed by large bushes. Mr. Morin argued that Gibson "is not telling the truth. He doesn't want to be involved. He doesn't want to be involved. He has got a pending drug charge as it is." R. pp. 1565-66.

Gibson, Mr. Morin, Susan Porter, Esquire, and Mr. Mabry testified at the PCR hearing on matters related to these allegations. Mr. Mabry, who is currently employed in the South Carolina Attorney General's Office and assigned as second chair in this case, was the senior Deputy Solicitor in Seventh Circuit Solicitor's Office at the time of the murder. He had some involvement in this case and he served notice of intent to seek death penalty. He explained that the hospital is visible as you exit Nikki's. To get to it, one would take a right and it is a two or three minute drive. Moore, however, took a left and drove to George Gibson's residence. Several days after the murder, Mr. Mabry went to the crime scene. He then went to Gibson's residence

Asl
9/34

along with Solicitor Gossett and the Office's investigator, Rusty Clevenger, because this was a death penalty case and Gibson was a potential witness. A policeman met them there.

Gibson was not connected to the armed robbery or murder, but he later provided a motive: Moore's desire for crack cocaine, which was consistent with the emergency room nurse's testimony. Mr. Mabry's instinct was that Gibson had not been truthful in his statement. Mr. Mabry spoke to a family member of Gibson and then to Gibson. He communicated to Gibson that he did not believe Gibson's statement. However, Gibson told Mr. Mabry the same story that he had told police on the night of the murder, *i.e.*, that Moore had come and asked Gibson to take him to the hospital. Mr. Mabry did not tell Mr. Morin about this conversation before he left the Solicitor's Office on January 10, 2001 and he was not called to testify at trial.¹⁴

Mr. Mabry did not recall if he took notes of this conversation. If he did, then they would have been on his computer or in the Solicitor's file.¹⁵ He did not have any further involvement in this case after he left the Solicitor's Office. Neither of Moore's trial attorneys spoke to him about his involvement in this case. He would have written down Gibson's statement to him if Gibson had said that crack was involved in the case.

Gibson testified that he spoke to police on the morning of September 16, 1999 and ultimately gave a statement, **Applicant's Ex. 1**. This statement does not mention crack, cocaine or drugs, and the statement indicates that Moore had asked Gibson to take him to the hospital and Gibson refused. Gibson, however, claimed that he told officers on the 16th that Moore had asked him to get something for Moore. He recalled members of the Solicitor's Office coming to his residence several days after the 16th, but he thought that they had come to check out the scene and he did not recall speaking to anyone at that time.

¹⁴ He also met with the victim's family and he may have spoken to Terry Hadden.

¹⁵ The computer was erased following the election and before he left the Solicitor's Office in January 2001.

From September 16, 1999 until October 2001, he told officers that Moore had come to his residence asking for help. He told Solicitor Gowdy that crack was involved in Moore's visits to his residence on September 15-16, 1999, because Solicitor Gowdy was the first person to ask him about what the "something" was that Moore wanted Gibson to get for him. On cross-examination, Gibson corroborated his trial testimony about Moore's efforts to get crack from him on credit on September 15, 1999, Moore's statement that Moore was going to "work" on the night of the 15th and Moore's activities with him on the morning of September 16th.¹⁶ Gibson admitted that his recollection of these events was better at the time of Moore's 2001 trial.

Gibson's recollection of his criminal history at the time of the offense was somewhat limited and confusing, and he denied his guilt of several charges for which he was convicted. However, he recalled the March 2000 trafficking charge, as well as his arrest on July 22, 2001, for charges of possession of crack, DUS and failure to stop. He admitted that he was incarcerated at the time of Moore's trial and his recollection was that this was at K.C.I. for a sixty day sentence for third offense DUS. Gibson did not remember being interviewed by either Mr. Morin or Mr. Kelly, even though **Respondent's Ex. 1** clearly reflects that Mr. Skidmore interviewed him during Moore's trial.

Mr. Morin testified that he felt that Gibson's testimony may have hurt the defense, but he did not think that the jury convicted Moore based on Gibson's testimony. Mr. Morin first learned that Gibson had changed his story about a week before trial when the State disclosed that Gibson had now given the story to which he testified at trial. Mr. Morin was unaware that Mr. Mabry

¹⁶ Before this Court, Moore admitted that he had lost his job before September 16, 1999. He also testified that he had met Gibson before the crimes, that he knew that Gibson was involved in crack and that someone could get crack from Gibson, but he denied that he went to Gibson's to buy crack on the 15th. Also, he claimed that he had gone to Gibson's on the 16th to seek medical attention because he knew that Gibson would be awake. As noted above, the Court does not find his testimony credible.

had taken a statement from Gibson but he acknowledged that the prosecution had elicited evidence of this statement on re-direct examination of Gibson. *See R. p. 1261.*

Also, he would not have done anything with that statement if he had known that it was given to Mr. Mabry. He further testified that the June 15, 2001 unsigned memo by an investigator from the Solicitor's Office, **Applicant's Ex. 27**, would not have been shared with him. Still, he thought that it would have been helpful to know that Gibson had been consistent with his account of the events in the past. Although counsel could not recall many details about Gibson's record at the time of the PCR hearing, the State had provided him with a "rap" sheet for Gibson.

Also, the bill from the defense investigator, Mr. Skidmore, reflects that Mr. Skidmore attempted to locate Gibson at Perry Correctional Institution and at Kirkland Correctional Institution on October 12, 2001. On that date, it was discovered that Gibson was in the Spartanburg County jail "waiting to be transported." Further, Mr. Skidmore attended trial on October 19, 2001, where he again interviewed Gibson; he reviewed Gibson's statement and ascertained that Gibson's "answers seemed fairly consistent with report." **Respondent's Ex. 1.**

Mr. Morin noted that the defense had been given a "rap sheet" on Gibson, which reflected the then-current charges that Gibson was facing. Mr. Morin may have been willing to use other pending charges to impeach Gibson's credibility if he could do so under the Rules of Evidence. However, he did not believe that Gibson could be impeached with some offenses that did not carry more than one year, such as a bench warrant for failure to appear. Mr. Morin also did not independently recall whether Gibson was incarcerated at the time of trial; but, in deciding how to deal with Gibson's testimony, he did not think whether Gibson was incarcerated or not was important. Instead, he thought that the pending trafficking charge was important because

even if jurors did not fully understand the statutory definition of this offense, he thought that they would understand that it was a serious offense. Further, he had impeached Gibson with evidence that he was a drug dealer. The jury would either believe this or not. His strategy is not to necessarily use every prior available to impeach. Moreover, the simple possession charge would tend to show Gibson was a possessor of drugs, not a seller.

Susan Porter, Esquire, testified that she was formerly employed as an Assistant Solicitor in the Seventh Circuit Solicitor's Office.¹⁷ The Court finds that her testimony is credible and based upon her testimony finds that Gibson's March 2000 trafficking charge was assigned to her to prosecute. Ultimately, she dismissed it because two officers involved in the case were no longer employed by the Spartanburg Police Department. One of these witnesses, who was necessary to establish chain of custody, had moved to Texas and did not want to come back for the trial. If this had been treated as a second offense trafficking, he would have been looking at between seven and twenty years.

Respondent also introduced **Respondent's Ex. 23**, case histories of Gibson with the dispositions of his charges, through Ms. Porter. These records reflect that the March 2000 trafficking charge was *nolle prossed* in May 2003, as Ms. Porter testified. Also, on the indictment stemming from his July 2001 arrest for possession of crack cocaine (02-GS-42-3146), Gibson pled guilty on May 13, 2003 to second offense possession of powder cocaine and received a three year sentence, suspended upon service of sixty days or payment of \$ 200.00, with one year probation.¹⁸

¹⁷ She is currently General Counsel for SLED.

¹⁸ **Respondent's Ex. 23** further reflects Gibson's post-trial arrest for possession with intent to distribute (PWID) crack on December 15, 2003. Gibson entered a plea to distribution, in connection his charge, on November 30, 2005. The Court notes this charge only because it indicates that Gibson is a crack dealer.

“A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused.” *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006). Evidence is favorable if it is either exculpatory or impeaching. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Evidence is material if “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Youngblood*, 547 U.S. at 870 (internal quotation marks omitted); *Strickler*, 527 U.S. at 281 (“the term ‘Brady violation’ is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence;” however, “strictly speaking, there is never a real ‘Brady violation’ unless the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict”). A “showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal,” *Youngblood*, 547 U.S. at 870 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)), but only a “showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,” *Youngblood*, 547 U.S. at 870 (quoting *Kyles*, 514 U.S. at 435). The assessment of materiality is made in light of the entire record. *United States v. Agurs*, 427 U.S. 97, 112 (1976).

An individual asserting a *Brady* violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. *Strickler*, 527 U.S. at 282, 119 S.Ct. 1936.

In the present case, the Court finds that the credible evidence - from counsel, Mr. Mabry and the trial record - is that Gibson spoke to police on the morning of September 16th and that he

gave a written statement that day. He did not mention Moore's visit to his house to try and get crack on September 15th in this statement. He also claimed that Moore came to his house on the morning of the 16th to get Gibson to take Moore to the hospital and again did not mention crack.

Gibson thereafter gave a statement to Mr. Mabry several days later that was consistent with the September 16th statement. He subsequently was brought to the Solicitor's Office roughly a month before trial, and he gave the statement to Solicitor Gowdy in which he first disclosed that Moore had been to his house on the night of the 15th looking for crack, and that Moore's reason for returning to Gibson's residence immediately after the murder and armed robbery was to purchase crack.

The Court finds that the substance of this second statement was disclosed to the defense, but not that the second statement was given to Mr. Mabry, since it was elicited by the State and heard by Moore's jury at trial. The Court finds that it is unclear whether or not **Applicant's Ex. 27** reflects that Gibson gave yet another consistent statement because that document is not signed by anyone and because Moore did not present the author thereof at the PCR hearing.

Even assuming that it does reflect another statement, the Court finds that Moore is still not entitled to relief and that Moore has failed to prove that the prosecution violated *Brady* by the nondisclosure of Gibson's statement that was consistent with the September 16th version. First, the Court rejects this allegation because the defense investigator, Mr. Skidmore, attempted to locate Gibson at Perry Correctional Institution and at Kirkland Correctional Institution on October 12, 2001. On that date, it was discovered that Gibson was in the Spartanburg County jail "waiting to be transported." Mr. Skidmore later interviewed Gibson during the course of Moore's trial. *See Respondent's Ex. 1.*

Therefore, evidence of these other statements was available to counsel through means other than the State's disclosure of them. "[W]here the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine." *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990) (Government did not have obligation to disclose allegedly exculpatory testimony of witness whom defendant was free to question and would naturally have interviewed in preparation for trial); see also *United States v. Hicks*, 848 F.2d 1, 4 (1st Cir.1988) (Government need not disclose details of a witness' grand jury testimony when defendant is aware of the grand jury witness and has access to interview that witness and have the witness testify at trial); *United States v. Grossman*, 843 F.2d 78, 85 (2nd Cir.1988) (concluding that no *Brady* violation occurred when defendant " 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information' ").¹⁹

More importantly, in light of the entire record, *Agurs*, 427 U.S. at 112, the Court finds that there cannot be a *Brady* violation because Moore has failed to demonstrate the materiality of the suppressed evidence by "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Youngblood*, 547 U.S. at 870 (quoting *Kyles*, 514 U.S. at 435). The Court finds that Gibson was a collateral witness, rather than an eyewitness such as in *Riddle*, and that his credibility was thoroughly assailed by defense counsel, through cross-examination and closing argument.

¹⁹ The Court finds that the present case is thus distinguishable from *Riddle v. Ozmint*, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006), where the Court rejected the State's argument that impeaching information with respect to an eyewitness' account could have been learned through interviewing the officer who took notes of the inconsistent statement. The Supreme Court found that it was "unrealistic to require petitioner and his attorneys to reinterview all officers and investigators in the days before the trial," *Id.* Here, however, Gibson was a collateral witness. Also, the defense was obviously aware that Gibson was incarcerated and knew where he was located. Moreover, Mr. Skidmore had, in fact, interviewed him during trial. Thus, this Court finds that counsel could have learned details about other statements Gibson had given and his criminal history that could be used for impeachment in this interview.

Further, one of the two allegedly undisclosed statements was, in fact, disclosed to the defense: his statement to Mr. Mabry several days after the murder. The fact that there was no disclosure that this statement was made to Mr. Mabry is not important to whether the prosecution violated *Brady*, since the statement's existence was brought out at trial and counsel was able to effectively use it for impeachment purposes, as demonstrated. *See State v. Kennerly*, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct.App.1998); *Sheppard v. State*, 357 S.C. 646, 660, 594 S.E.2d 462, 470 (2004) (finding no *Brady* violation when defense counsel was given witness' statements in time for cross-examination, and, thus, there was not a reasonable probability the outcome of the trial would have been different had the statements been disclosed prior to trial).

Additionally, there was overwhelming evidence establishing that Moore was guilty of murder, assault with intent to kill (AWIK), armed robbery and possession of a firearm during the commission of a violent crime as noted from the facts presented in a previous section. Any impeachment of Gibson does nothing to impeach or otherwise lessen the impact of Hadden's eyewitness testimony.²⁰ Given the strength of his identification of Moore and the physical evidence circumstantially corroborating it, Moore cannot prove that the undisclosed statement was material under *Brady* and the Court rejects this claim. *See State v. Gunn*, 313 S.C. 124, 136-38, 437 S.E.2d 75, 82 (1993) (given abundance of other evidence detailing witness' disrespect for law, defendants could not show failure to disclose evidence witness bribed or attempted to bribe magistrate was "material" under *Brady*). *See also Mills v. Singletary*, 161 F.3d 1273, 1288 (11th Cir. 1998) (defendant's Sixth Amendment right to confront witnesses is satisfied where the cross-examination permitted exposes the jury to facts sufficient to evaluate the witness' credibility and "enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable").

²⁰ Indeed, Moore does not challenge identity in PCR.

Further, the Court rejects Moore's alternative argument that counsel's cross-examination and impeachment of Gibson was ineffective because the existence of the June 2001 statement was not presented to the jury. The Court finds that counsel's performance was not deficient and that counsel's chosen manner for impeaching Gibson was objectively reasonable under *Strickland*. "[D]ecisions whether to engage in cross-examination and if so to what extent and in what manner, are . . . strategic in nature" and will not support an ineffective assistance claim." *United States v. Nersesian*, 824 F.2d 1294, 3121 (2nd Cir. 1987); see also *Hunt v. Nuth*, 57 F.3d 1327, 1333 (4th Cir. 1995) (refusing to indulge in a "grading of the quality of counsel's cross-examination"); *Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978).

"In hindsight, there are 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 pass muster." *Willis v. United States*, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel. *Yarrington v. Davies*, 779 F.Supp. 1304, 1308 (D. Kan. 1991), *aff'd*, 992 F.2d 1077 (10th Cir. 1993). 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). In the present case, counsel did cross-examine and thoroughly impeach Mr. Gibson - just not in the manner that Moore and his collateral attorneys suggest that he should have. This does not show deficient performance under *Strickland* because "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689.

More importantly, the Court finds that he cannot show any prejudice resulting from counsel's alleged errors because, for the same reasons that he has not established materiality under *Brady*, he cannot prove that "[c]ounsel's errors [were] 'so serious as to deprive [him] of a fair trial, a trial whose result is reliable.'" *Richter*, 131 S.Ct. at 787 (quoting *Strickland*, 466 U.S. at 687).²¹

2. Gibson's pending charges.

Moore further alleges that the State failed to disclose that Gibson "was incarcerated at Allendale Correctional Institution and was brought to Spartanburg to testify at the solicitor's direction. Defense counsel was never told that Mr. Gibson was also out on bond for a July 2001 possession of crack arrest, although the State had informed counsel of Gibson's 2000 trafficking in crack charge that was still pending at the time of Moore's trial." The Court finds that there is no *Brady* violation and that Moore has alternatively failed to establish either deficient performance or prejudice under *Strickland*.

Initially, the Court finds that there was no violation of *Brady* because the prosecution had provided counsel with a rap sheet for Gibson that accurately reflected Gibson's then-pending charges. See *Kennerly*, *supra*; *Sheppard v. State*, *supra*. Also, Mr. Skidmore's report (Respondent's Ex. 1) shows that the defense was aware of Gibson's incarceration at the time leading up to the trial and the trial itself. This exhibit further reflects that Mr. Skidmore interviewed Gibson during Moore's trial and may have, or at the very least could have, inquired

²¹ Unlike this Court's analysis for alleged *Brady* violations, see *Kyles*, *supra*, the Court will not aggregate any of Moore's ineffectiveness claims and perform a "cumulative prejudice" analysis because every ineffective assistance claim must be analyzed individually. While it is perfectly logical to consider the cumulative effect of failing to disclose evidence under *Brady*, since the determination to be made is whether non-disclosure of evidence deprived the defendant of due process, *id.*, 514 U.S. 419 (1985), the Court finds that the same is not true when focusing upon whether trial counsel rendered ineffective assistance of counsel. Moreover, the Court finds that alleged errors, which are not unconstitutional individually, simply cannot be added together to create a constitutional violation. See *Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998); *United States v. Stewart*, 20 F.3d 911, 917-18 (8th Cir. 1994).

about all of Gibson's pending charges. *See Wilson*, 901 F.2d at 381; *see also Hicks*, 848 F.2d at 4. *Contra Riddle*, 369 S.C. at 44, 631 S.E.2d at 73.

More importantly, in light of the entire record, *Agurs*, 427 U.S. at 112, the Court finds that there cannot be a *Brady* violation because Moore has failed to demonstrate the materiality of the suppressed evidence. *See Youngblood*, 547 U.S. at 870; *Kyles*, 514 U.S. at 435. Again, Gibson was a collateral witness, rather than an eyewitness such as in *Riddle*. Also, his credibility was thoroughly assailed by defense counsel, through cross-examination and closing argument. Further, counsel utilized the pending trafficking charge to impeach Gibson. His credibility was thoroughly impeached.

Thus, he cannot show materiality for any supposed non-disclosure. Additionally, as noted earlier, there was overwhelming evidence establishing that Moore was guilty of murder, assault with intent to kill (AWIK), armed robbery and possession of a firearm during the commission of a violent crime.

Nor has Moore proven ineffectiveness in counsel's handling of Gibson on cross-examination. The Court first finds that counsel's performance was not deficient and that counsel's chosen manner for impeaching Gibson was objectively reasonable under *Strickland*. *See Nersesian*, 824 F.2d at 3121; *see also Hunt*, 57 F.3d at 1333 (refusing to indulge in a "grading of the quality of counsel's cross-examination"). The Court finds that this allegation appears to be primarily based upon the 20/20 vision of hindsight, which almost invariably results in a claim that the cross-examination could have been improved upon. This is not the standard of constitutional effectiveness. *E.g., Willis*, 87 F.3d at 1006. As discussed, *Strickland* does not require counsel to raise every conceivable issue or pursue every avenue of inquiry. Rather, counsel is required only to exercise normal skill, judgment, and diligence. Here, counsel did

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG -1 AM 11:08
M. HOE E. BRADLEY

Handwritten signature/initials
P 45

cross-examine and thoroughly impeach Mr. Gibson - just not in the manner that Moore and his collateral attorneys suggest that he should have. This does not show deficient performance under *Strickland* because "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG 1 AM 10:08
M. MOPELAKLEY

More importantly, the Court finds that he cannot show any prejudice resulting from counsel's alleged errors because, for the same reasons that he has not established materiality under *Brady*, he cannot prove that "[c]ounsel's errors [were] 'so serious as to deprive [him] of a fair trial, a trial whose result is reliable.'" *Richter*, 131 S.Ct. at 787 (quoting *Strickland*, 466 U.S. at 687).

3. Counsel's failure to present other witnesses who were at Gibson's residence on September 15-16, 1999.

The Court likewise rejects Moore's claim that counsel was ineffective in failing to investigate the other persons who were present at Gibson's house and present these individuals as defense witnesses. The Court first notes that Moore has not proven that counsel's performance was deficient because the Court finds that he did not prove that any statements from these witnesses were not disclosed by the prosecution and, more importantly, because this Court concludes that counsel were objectively reasonable under *Strickland* in opposing the introduction of evidence that the unemployed Moore had gone to Gibson's house on September 15th and, when informed that he had to have cash to pay for it, later committed the armed robbery and murder before returning to Gibson's home to purchase crack with the stolen money. This in spite of the serious gunshot wound to his arm.

The Court finds that the reasonableness of counsel's performance on this allegation dovetails into the reasons for the Court finding that Moore cannot show prejudice on this claim.

The only witness that Moore presented in support of this allegation was Wilbert Casey. Casey testified that he is Gibson's friend and that he was present at Gibson's residence on September 16, 1999. Moore, who had been shot, came there and someone told him that he needed to go to the hospital. Four or five people were there at the time.

Casey only saw Moore once that evening. Further, he admitted that he was high the time and did not remember a lot. However, he stated that he had known Gibson for roughly twenty-five years; and he confirmed both that Gibson sold crack and that Gibson's residence was a gathering place to smoke crack. He further corroborated that Moore had asked for Gibson on his visit to Gibson's house. He did not overhear any conversation between Moore and Gibson and his only knowledge of the conversation was based upon what Gibson told him.

There is no prejudice from counsel's failure to present Casey's testimony, which is cumulative to and would have corroborated Gibson's trial testimony. It was not trial counsel's job to corroborate the Gibson's testimony and the State's theory of why the murder and armed robbery occurred. Indeed, the absence of prejudice is demonstrated by the claim in the first part of this allegation, as well as the other allegations in which Moore asserts ineffectiveness in connection with the State's introduction of testimony concerning crack through Gibson and Ms. Smith. The Court finds that Moore cannot show prejudice from counsel's failure to present a witness who is inconsistent both with counsel's chosen theory of defense and Moore's other allegations in collateral proceedings.

Moreover, as stated earlier, there was overwhelming evidence establishing that Moore was guilty of the crimes, including Mr. Hadden's eyewitness testimony and the physical evidence circumstantially corroborating it. Given the strength of his identification of Moore and the physical evidence circumstantially corroborating it, Moore cannot prove a reasonable

P2L
047

FILED
CLERK OF COURT
SARASOTA COUNTY
2009 AUG - 1 4M 10:08
H. HOPE BLOOMER

probability of a different result but for counsel's failure to present Casey. *See Strickland*, 466 U.S. at 694. *See also Richter*, 131 S.Ct. at 787

GROUND 10(e)

Moore alleges that counsel were ineffective because trial counsel failed to pursue their *Batson v. Kentucky*, 476 U.S. 79 (1986) claim, where Moore's jury was exclusively white; the State struck the only two African-Americans qualified to serve as jurors; and the State's facially race-neutral reasons for striking the two African-American jurors were allegedly pretext. The Court finds that this claim lacks merit.

In the course of jury selection, the State struck white jurors Joyce Smythe (# 251); Debra Perkins (# 213), Charles Kent (# 145) and alternate Edward Huffman (# 132). It struck African-American jurors Joyce Morrow (# 191) and Douglas Alexander (# 2). **R. pp. 1134; 1765.**²²

Following jury selection, trial counsel Morin made a *Batson* motion, noting that the State had struck the only two qualified African-American jurors. **R. pp. 1134-35.** Solicitor Gowdy explained that the State struck Ms. Morrow because she had withheld information about her criminal record. The Solicitor observed that but for his initial misunderstanding about how the trial judge qualified jurors, he would have moved to have her disqualified for cause "because her answers were, frankly, closer, I thought, to Mr. Rookard's who was disqualified than they were any of the other people who had an innocent mis-recollection." **R. p. 1135, ll. 10-21.**

Solicitor Gowdy further noted that Ms. Morrow also indicated that "she thought guns were used improperly." While some other jurors may have had "reluctance about guns," no other juror stated that they believed guns are "improperly" used. "That's obviously going to be an issue in this case, if the victim was armed." Moreover, she was a school teacher who initially wanted

²² The jury selection sheet reflects that the State first struck juror Smythe. It then struck jurors Morrow, Alexander, Perkins, Kent and alternate juror Huffman, in that order. **R. p. 1765.**

to be switched to another term, and "only when she was confronted with the fact that she would miss her vacation did she opt to stay." He indicated that the State only wanted petit jurors who wanted to serve. The principle reason for striking her, however was "the withholding of [information about her prior] convictions, and only when confronted with the fact that she had an alias did we begin to get any truthful responses." R. p. 1135, l. 22-p. 1136, l. 10.

The State struck juror Alexander because the Seventh Circuit Solicitor's Office prosecuted Mr. Alexander's son for murder. In fact, Solicitor Gowdy's recollection was that Mr. Alexander was the only juror who had a child incarcerated for murder. This is the same reason that the State struck Mr. Huffman, a white alternate juror, who likewise had a close family member prosecuted for murder. Solicitor Gowdy explained that "Mr. Moore is also somebody's son. And we did not want a juror who had recently had a son sent to prison . . . for the charge of murder." Although this was the primary reason for striking him, Solicitor Gowdy stated that his notes reflected that Mr. Alexander had misunderstood a question from the trial judge and he was the only juror who misunderstood that question. R. p. 1136, l. 11-p. 1137, l. 7.

The trial judge gave trial counsel an opportunity to show that the prosecution's stated reasons for striking the jurors were pretextual, but Mr. Morin stated that "we can't argue with the State." R. p. 1137, ll. 8-14. The trial judge then denied counsel's motion, as follows:

Given the fact that the state has presented the reasons that they have, and that in accordance with our case law of the State vs. Adams, 322 South Carolina 114, 470 S. E. 2d., 366, a 1996 case, wherein a motion is made to hold a Batson hearing where members of a cognizable racial group or gender is struck and the opposing party requests a hearing, that was done by the defendant. The second step of the analysis requires only a race neutral explanation by the proponent of the strike.

Mr. Morin and Mr. Kelly, it's my understanding that you have accepted those reasons. I do find, by the way, that they are race neutral reasons, and, as such, . . . these strikes were not just pretext. And, as such, the motion is denied.

R. p. 1137, l. 15-p. 1138, l. 3.

Trial counsel testified in connection with this issue, as did Mr. Willingham, who was the Deputy Solicitor at the time of trial and part of the prosecution team.²³ The Court finds that their testimony is credible and that counsel's testimony is credible as to all of the issues addressed herein. In light of this credible testimony and the trial transcript, the Court finds that Moore has not proved either deficient performance or prejudice under *Strickland*.

Under *Batson* and its progeny, "parties are constitutionally prohibited from exercising peremptory challenges to exclude jurors on the basis of race, ethnicity, or sex." *Rivers v. Illinois*, 129 S.Ct. 1446, 1451 (2009). As the South Carolina Supreme Court explained in *State v. Rayfield*, 369 S.C. 106, 112, 631 S.E.2d 244, 247 (2006):

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender." *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). "The purposes of *Batson* and its progeny are to protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venireperson's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process." *State v. Haigler*, 334 S.C. 623, 628-29, 515 S.E.2d 88, 90 (1999). Both the State and defendants are prohibited from discriminatorily exercising a peremptory challenge of a prospective juror. *Georgia v. McCollum*, 505 U.S. 42, 58, 112 S.Ct. 2348, 2358-59, 120 L.Ed.2d 33 (1992).

We set forth the proper procedure for a *Batson* hearing in *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996) (citing *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)). After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation. This explanation is not required to be persuasive or even plausible. Once the proponent states a reason that is race-neutral, the

²³ The Court rejects Moore's claim that Mr. Willingham's testimony is irrelevant to the question of whether the State properly exercised his strikes and that "[o]nly Solicitor Gowdy knows why he exercised strikes against African-Americans in a certain way, and his reasons are set forth in the trial record." The Court finds that Mr. Willingham had input into and actively participated in the State's decision of which jurors to strike and, as a result, was permitted to testify about the reason for the State's use of its strikes, even though the Solicitor stated those reasons in the *Batson* hearing. Mr. Willingham's testimony and Respondent's Ex. 26 (his folder for juror Morrow) corroborate the State's use of its challenges at trial.

WZL
p350

FILED
CLERK OF COURT
CHARLESTON COUNTY
JAN 11 AM 10:08
STATE v. RAYFIELD

burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race were seated on the jury or the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment. *Adams*, 322 S.C. at 123-24, 470 S.E.2d at 371-72; *Haigler*, 334 S.C. at 629-30, 515 S.E.2d at 90-91.

See also *Rice v. Collins*, 546 U.S. 333, 338 (2006).

Further, "in *Batson* inquiries, 'the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed.' Because there is rarely any direct evidence of the attorney's state of mind when he made the challenge, 'the best evidence often will be the demeanor of the attorney who exercises the challenge.' This type of credibility assessment lies 'peculiarly within a trial judge's province.'" *Byram v. Ozmint*, 339 F.3d 203, 208 (4th Cir. 2003) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)). See also *Batson*, 476 U.S. at 98 n. 21 ("Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because the finding 'largely will turn on evaluation of credibility'").

Initially, the Court finds that Moore has failed to prove deficient performance based on counsel's failure to argue the reasons proffered by the State for striking jurors Morrow and Anderson were, in fact, pretextual. The Court finds that Mr. Morin, who was primarily responsible for handling the guilt phase, made a reasonable strategic decision not to further argue the *Batson* motion because, based upon his knowledge of the record, the reasons proffered by the State were race-neutral.

Counsel had obviously participated in the lengthy voir dire process and he was aware of the jurors' responses to the questions posed as well as the jurors' demeanor. With respect to juror Morrow, counsel had witnessed the following exchange between Mr. Willingham and Ms. Morrow:

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:08
M. HOPE BLACKLEY

Q And . . . on the questionnaire it does say have you or any other family member been arrested, charged with a crime other than minor traffic offenses, and you indicated yes. And in parenthesis you put gambling or drugs. Who was that convicted of those?

A Can I put what?

Q Let me show you what I believe is your questionnaire. Question number 23, "Have you or any family member been arrested or charged with a crime other than a minor traffic offense?" You put yes. "If so, please explain." Who was charged with what crime, gambling and drugs? Is that your questionnaire?

A Yes, sir.

Q Okay. I am just trying to find out who was charged.

A Oh, my brother.

Q Your brother. Okay. So you have never been charged with anything.

A Yes, sir.

Q What have you been charged with?

A With gambling.

Q Okay. When was that?

A It was in '85.

Q And - -

A It was expunged.

Q Expunged?

A Yeah.

Q Okay. No other prior convictions that you are aware of?

A No, sir.

Q What happened? I know you said it's already been expunged. But before it was expunged, what happened to the trial? Was it a trial or did you plead guilty?

A No, sir.

FILED
CLERK OF COURT
HARTMANBURG COUNTY
2011 AUG - 1 AM 10:08
M. HOPE BLACKLEY

Q What happened?

A It was tickets, ball tickets.

Q Okay. Forfeited, is that what happened?

A Yes.

Q Do you think because you have had this prior dealing with the criminal justice system that would in any way effect your ability to be fair and impartial to the state or to the defense?

A No, sir.

Q Ms. Morrow, is your maiden name or prior name Atchison?

A Yes, sir.

Q Okay. And, again, I don't mean to pry more than I have to, but in 1982 did you have an arrest for simple possession of marijuana?

A In 82? Yes, sir.

Q And what happened to that charge?

A It was expunged.

Q But before -- you say it was expunged. What happened?

A It was a fine.

Q And you didn't have a jury trial or anything?

A No, sir.

Q You just again forfeited the bail bond?

A Yes.

R. p. 322, l. 21-p. 325, l. 1.

Counsel was thus aware that juror Morrow consciously withheld information about her prior criminal *conviction* and that she only revealed a prior conviction when the State confronted

her with its knowledge that she was formerly known by the name Atchison. A prior criminal conviction is a neutral reason to strike. *State v. Dyar*, 317 S.C. 77, 452 S.E.2d 603 (1994) (prior prosecution by that particular solicitor's office); *State v. Casey*, 325 S.C. 447, 453, 481 S.E.2d 169, 172 n. 2 (S.C. App. 1997); *Sumpter v. State*, 312 S.C. 221, 223-24, 439 S.E.2d 842, 844 (1994) (prospective juror had a prior DUI involvement). Counsel was also aware that, when asked how the fact that her stepson being killed made her feel, she had stated that "guns . . . used inappropriately[,] . . . wrong things can happen. And that's my feeling that . . . even one shouldn't be allowed to carry a gun. **R. p. 326.**"²⁴

Counsel was likewise aware of the following information when he made the decision to accept the prosecution's stated reasons for their strikes as race-neutral. Stacey Gannt (# 94), a white juror who became the second alternate juror, had failed to disclose an arrest for receiving stolen goods during the same year as Moore's trial, but she had apparently misunderstood the questionnaire and did not disclose this because she was *acquitted* of the charge. **R. pp. 904-05.**²⁵ Further, the State had already struck white juror Edward Huffman (# 132), who was presented as a possible alternate, with the only challenge that it had for alternate jurors. **R. 1765.** Thus, it could not strike Ms. Gannt. Mr. Alexander, an African-American juror, had informed the trial judge that his son, John Alexander, was incarcerated for a Spartanburg County murder that the Seventh Circuit Solicitor's Office had prosecuted. **R. pp. 191-92.** In addition to striking juror

²⁴ Her stepson had been shot and no one was ever prosecuted for that crime. **R. p. 326.**

²⁵ When it was explained to her that the information requested in the questionnaire was arrests or convictions of herself or other family members, she immediately responded "that's wrong" in referring to her questionnaire responses and she explained that her uncle had served three or four years for a Spartanburg County shoplifting conviction. **R. pp. 903-04.**

Anderson, the State had struck Mr. Huffman, who was white, based upon its knowledge that he had a brother-in-law who was convicted of murder.²⁶

This Court finds that the reasonableness of counsel's acceptance of the reasons given by the State is demonstrated by the trial judge's finding that the State's reasons for striking Mr. Morrow and Alexander were race-neutral and not pretext. The trial judge, unlike this Court, heard the jurors' responses to the questions posed and he viewed their demeanor. He also had the opportunity to view the demeanor of the Solicitor when exercising the State's strikes. His finding is entitled to great deference, and on direct review would have been upheld unless clearly erroneous. *Felkner v. Jackson*, 131 S.Ct. 1305, 1306 (2011); *See also Batson*, 476 U.S. at 98 n. 21; *Miller-El*, 537 U.S. at 340-41 ("Deference is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations. ... In the context of direct review, therefore, we have noted that 'the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal' and will not be overturned unless clearly erroneous"). The Court further finds that Moore has not presented it with any sound reason to disturb the trial judge's finding that there was no pretext.

The Court finds that, much like any other objection, a *Batson* motion can be forgone for strategic or tactical reasons, *Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir.1991); *Scott v. Gomez*, No. C-91-2181-SBA, 1993 WL 303728 *2 (N.D.Cal. July 29, 1993). Here, the Court finds that counsel made an objectively reasonable decision under *Strickland* not to contest the State's strikes after hearing the race-neutral reasons offered by the prosecution because counsel did not

²⁶ Mr. Huffman was the last juror who participated in voir dire. R. pp. 1131-33. The precise relationship of the "close family member" who was prosecuted for murder was not revealed until the PCR testimony of Mr. Willingham.

Asl
p 55

think that those reasons were a pretext for racial discrimination. *See Shabazz v. Com.*, 2006 WL 3751322, 4 (Ky.App., Dec. 22, 2006) (unpublished).

The Court further finds that Moore has not presented this Court with any credible evidence that he was prejudiced by trial counsel's decision. To show prejudice in the context of failing to argue that the reasons proffered by the State were a pretext for racial discrimination, Moore must show a reasonable probability that further argument in support of a *Batson* challenge would have resulted in a different jury. *State v. Pryor*, 2011 WL 1344165, 1 -2 (Ariz.App., Apr. 7, 2011). He has not met that burden. *Id.* See also *United States v. Franklin*, 157 F.3d 90, 92nd Cir.1998) (finding that petitioner, alleging ineffective assistance of counsel based on his attorney's waiver of *Batson* claim, was unable to meet the requirements of *Strickland* where the challenge was meritless); *Williams v. Duncan*, 2007 WL 2177075, 21 (N.D.N.Y., July 27, 2007) ("Significantly, it is entirely possible that [trial counsel] recognized the futility of the *Batson* challenge and strategically decided to abandon the motion. An attorney's purported failure to pursue a meritless *Batson* claim cannot be the basis of an ineffective assistance of counsel claim") (citing *Franklin*).

In an effort to demonstrate prejudice from the strike of juror Morrow, he points out that the State failed to strike juror Gantt, the second alternate. He ignores, however, that the State had exercised its only challenge for alternates to strike juror Huffman. Further, Ms. Gantt failed to disclose a charge of which she was *acquitted*, but Ms. Morrow was not forthcoming about a prior conviction. The Court rejects Moore's contention that the State indicated that Ms. Morrow's use of an alias was one of the reasons for striking her. Rather, it challenged her because she was unwilling to admit her prior marijuana conviction until confronted with the alternate identity.²⁷

²⁷ The Court would note, as did the Solicitor at trial, that the trial judge subsequently excused juror Rookard (# 235) because he had been dishonest in not disclosing a number of arrests and convictions on his questionnaire. Also, the

Further, the State used a peremptory challenge to strike white juror Charles Kent (# 145), who had failed to reveal past offenses, after the trial judge had denied the State's request to strike Kent for cause. **R. pp. 715-18; 1765.** Nor has Moore proved that the State's other reasons for striking Ms. Morrow were pretext.

Although the Solicitor noted that other jurors expressed some concerns over use of firearms, he noted that none had used the term "improperly" in doing so. Moore has not pointed to any other juror that the State accepted who expressed his or her reservations about gun use in this fashion or who had such strong reservations about possessing a weapon. Moreover, because this challenge was based upon an assessment of the juror's concern about gun use, this Court finds that it should defer to the trial judge. Again, he had the opportunity to actually listen to the responses and assess the demeanor of the various jurors when they responded to questioning.

Thus, he was in the best position to determine whether the State's assessment of Ms. Morrow's distrust of gun use was more than fellow members of the venire, whereas this Court must rely solely upon the cold record.²⁸ Likewise, he has not pointed to any other juror that the State accepted who sought to avoid jury service in this case, only to change his or her mind when informed that such a decision would result in loss of vacation time. The Court further finds that Moore has failed to show pretext in the striking of juror Anderson.

trial judge informed Mr. Rookard that he would hold a contempt hearing as to the dishonest responses following Moore's trial. **R. pp. 485-92.**

²⁸ Even if the Solicitor was mistaken in regard to his assessment, the Court finds that Moore has not shown pretext. Rather, the reason proffered was still race-neutral, *see Hurd v. Pittsburg State Univ.*, 109 F.3d 1540, 1546-47 (10th Cir.1997) (finding that a proffered race-neutral explanation for peremptory strike based solely on strike proponent's mistaken belief satisfied the second prong of *Batson* analysis), *abrogated on other grounds, Migneault v. Peck*, 204 F.3d 1003 (10th Cir.2000); *United States v. Watford*, 468 F.3d 891, 912-13 (6th Cir. 2006); and because resolution of this claim rests on credibility, "the best evidence often will be the demeanor of the attorney who exercises the challenge." *Miller-El*, 537 U.S. at 339. For this Court to reverse the trial judge's findings "would require this Court to give greater weight to inferences and assumptions drawn from the cold appellate record concerning what the prosecutor must have known, than to specific credibility determinations made by the [trial judge] . . . with the benefit of firsthand observation." The Court declines to make those inferences and assumptions based upon this record. *Cf. Watford*, 468 F.3d at 914.

PSL
251

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:03
M. HOPE BLACALL

To the contrary, he recognizes that Mr. Anderson and Mr. Huffinan were similarly situated jurors and that they were of different races. However, he has their races reversed, erroneously asserting that Mr. Anderson was white and Mr. Huffinan was African-American. More importantly, he ignores that the prosecution struck both men (R. p. 1736) and for the same reason: a close family member of each juror was prosecuted by the Seventh Circuit Solicitor's Office for murder. *See Applicant's proposed Order*, pp. 4, 17. As noted, this is a race-neutral reason for exercising for the State's exercise of its peremptory challenges. *See Casey*, 254 S.E.2d at 453, 481 S.E.2d at 172 n. 2; *Sumpter*, 312 S.C. at 223-24, 439 S.E.2d at 844. Further and as noted, the State had already exhausted its peremptory challenges by the time Ms. Gantt was presented and, therefore, it could not strike her.

As a result, Moore has not established a reasonable probability that further argument in support of a *Batson* challenge would have resulted in a different jury. Therefore, the Court finds that Moore has failed to prove either deficient performance or resulting prejudice under *Strickland* based upon counsel's failure to assert that the prosecution's stated reasons were, in reality, pretextual.

GROUND 10(f)

Moore further contends that trial counsel were ineffective for not preserving their objection to the trial judge's refusal to give a jury charge on voluntary manslaughter. Alternatively, he maintains that, if "the issue of the trial judge failing to give a voluntary manslaughter charge was properly preserved, appellate counsel was ineffective in failing to raise this issue on direct appeal." The Court finds that he has failed to prove either deficient performance or resulting prejudice on the part of trial counsel because counsel requested a voluntary manslaughter charge that was denied by the trial judge, and because there was no

Asl
p58

evidence to support the requested instruction. The Court further finds that he has not established ineffectiveness on the part of appellate counsel because there was no evidence to support the requested instruction.

1. Trial counsel's performance.

At the charge conference, Mr. Morin requested a voluntary manslaughter charge because "there is evidence that the victim produced the weapon, which certainly would be legal provocation. And there is evidence as to whether or not he was shot, which would be sudden heat of passion." R. p. 1526, ll. 7-11. The State opposed the requested charge. Citing to *State v. Tucker*, 324 S.C. 155, 171-72, 478 S. E.2d. 260, 268-69 (1996) and *State v. Tyson*, 283 S.C. 375, 323 S.E.2d 770 (1984), the Solicitor argued that there was no evidence of voluntary manslaughter. "I can't recall a single shred of evidence that would tend to show that this was a killing based on sufficient legal provocation or heat of passion. It's either murder, or it's not." R. p. 1526, ll. 15-23.

In response, Mr. Morin argued that "there is no doubt that Mr. Mahoney started out armed with all of these weapons. That is not an issue." He further argued that Jamie Mahoney "produced the weapon," and that all that was in question was "whether or not Mr. Moore was . . . shot before he fired any rounds at Mr. Mahoney." It was Mr. Morin's theory that "if Mr. Mahoney produces a weapon, a gun, that's legal provocation itself. But once Mr. Moore is shot and he reacts, that's certainly in sudden heat of passion. Being shot, I think, covers this heat of passion." R. p. 1527, ll. 3-14.

The Solicitor, however, argued that the only evidence "on this point comes from Terry Hadden who was unequivocal in saying that Richard Moore fired the first shot." Relying upon *Tucker, supra* for the proposition that "[e]vidence that the victim was defending himself from an

PSL
p 59

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:09
M. HOPE BLAIR, CLERK

armed robbery and got killed in this process is not sufficient legal provocation to warrant a voluntary manslaughter charge," the Solicitor argued that "even under the facts Mr. Morin just laid out, the only evidence is that Mr. Moore grabbed Mr. Mahoney's hands before anything else happened." Mr. Mahoney was entitled to defend himself and to defend the store. As a result, a manslaughter instruction would be improper. R. p. 1527, l. 15-p. 1528, l. 13.

After the trial judge had re-read *Tucker* and *Tyson*, the trial judge denied the request to charge, as follows:

I think from my, from my recollection of the, of the testimony, the thing that Mr. Hadden testified to was that when he heard the quote, "What the hell do you think you are doing," then he turned to see what was going on. The first shot was fired at him. And the hands were held.

And I think that the *Tucker* case, as well as the *Tyson* case, both stand for the proposition that evidence that a victim was defending himself from an armed robbery and got killed in the process is not sufficient legal provocation to warrant a voluntary manslaughter charge.

Quite frankly, I don't know of any testimony that is persuasive to me that would cause me to charge voluntary manslaughter. And, as a result, your request is denied.

R. p. 1528, l. 25-p. 1529, l. 12.

Mr. Morin objected to the failure to charge manslaughter and he argued that there was no testimony that a robbery was in progress before the guns were drawn. Rather, he asserted that this was an assumption that the Solicitor was making. The trial judge observed that this was a circumstantial evidence case and that he would give a circumstantial evidence charge. R. p. 1529, l. 17-p. 1530, l. 3.

Thus, the Court finds that counsel were not deficient under *Strickland* because they requested a voluntary manslaughter instruction but it was denied by the trial judge based upon the absence of evidence to support it. They thus perfected the issue of whether he was entitled to

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG -1 AM 10:09
M. HOPKINS
CLACK

Asl
P 60

a manslaughter charge for appellate review and further objection unnecessary. *State v. Johnson*, 333 S.C. 62, 64 n. 1, 508 S.E.2d 29, 30 n. 1 (1998) ("neither our opinion in [*State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996)] nor Rule 20(b), SCRCrim.P. (notwithstanding requests to charge, party must object to the giving or failure to give an instruction before the jury retires. Failure to do so constitutes a waiver of objection) have altered the long-standing rule that where a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at conclusion of the court's instructions"). The Court further finds that there was neither deficient performance nor prejudice because, as more fully discussed *infra*, there is no evidence in the trial transcript that supports the requested charge.²⁹

2. Appellate counsel's performance.

The Court rejects his claim that appellate counsel was ineffective because the Court finds that there was no evidence presented at trial that the killing was "in the sudden heat of passion" or "upon sufficient legal provocation," as required for a manslaughter charge.

A defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). "[R]eviewing courts must accord appellate counsel the 'presumption that he decided which issues were most likely to afford relief on appeal.'" *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir.1993). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, since "[t]here can hardly be any question

²⁹ Based upon counsel's PCR testimony, the Court finds that, although Moore provided counsel with differing accounts of the incident in their numerous pretrial meetings, he told counsel, in a June 25, 2001 meeting, that he had been drinking all day on September 16th, 1999 and that had used crack that evening. He never told counsel that he had the intent to rob Nickki's when he entered the store and he relayed a story to them that was similar to his PCR testimony: he claimed that the trouble began after he entered the store because of a dispute with Mr. Mahoney. The Court further finds that counsel advised Moore of his right to testify, that his testimony might permit a jury instruction on voluntary manslaughter or provide a possible defense to the charges, and that the defense might not be able to receive a jury instruction on voluntary manslaughter if he did not testify. Also, Mr. Morin expressly advised Moore that he should testify, but Moore repeatedly refused to do so.

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). To obtain relief a PCR applicant must prove “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).³⁰

The Supreme Court in *Robbins* recognized 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. However, “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*, 800 F.2d at 646). See also *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000) (en banc). Moore, who did not present the testimony of his appellate counsel, Mr. Savitz, even though he has the burden of proving his allegations under *Strickland*, cannot overcome the presumption that his appellate counsel “decided which issues were most likely to afford relief on appeal,” *Pruett*, 996 F.2d at 1568, because the trial judge properly found (R. pp. 1528-29) that no evidence supported a manslaughter instruction.

The law to be charged to the jury is to be determined by the evidence presented at trial. *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989); see also *State v. Dennis*, 468 S.E.2d 674 (S.C. Ct.App.1996). If there is any evidence to warrant a jury instruction, the trial judge

³⁰ *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) (When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine “whether appellate counsel failed to present significant and obvious issues on appeal”). See also *Smith v. South Carolina*, 882 F.2d 895, 899 (4th Cir.1989) (counsel’s failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed “to avoid diverting the appellate court’s attention from what [counsel] felt were stronger claims”).

must, upon request, give the instruction. *State v. Starnes*, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010); *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). However "[t]he trial court should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser rather than the greater offense." *Tucker*, 324 S.C. 176, 478 S.E.2d at 268.

South Carolina defines "murder" as the "killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10. "Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998). It is the doing of a wrongful act intentionally and without just cause or excuse. *Tate v. State*, 351 S.C. 418, 570 S.E.2d 522 (2002).

On the other hand, voluntary manslaughter is an "unlawful killing of a human being in a sudden heat of passion upon sufficient legal provocation. S.C. Code Ann. § 16-3-50 (Supp. 2011); *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001); *State v. Walker*, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). Both heat of passion and sufficient legal provocation must be present for the killing to constitute voluntary manslaughter. *State v. Cole*, 338 S.C. 97, 101-02, 525 S.E.2d 511, 513 (2000).

A defendant is not entitled to a voluntary manslaughter charge merely because he was in a heat of passion. See [*State v. Wharton*, 381 S.C. 209, 215, 672 S.E.2d 786, 788 (2009)]. (holding the State's request for a voluntary manslaughter charge was not warranted where there was no evidence of sufficient legal provocation, although the defendant may have been acting under heat of passion). Conversely, a defendant is not entitled to voluntary manslaughter merely because he was legally provoked. See *State v. Pittman*, 373 S.C. 527, 576, 647 S.E.2d 144, 170 (2007) (holding although sufficient legal provocation arguably existed, there was no evidence the defendant was in a heat of passion). Moreover, there must be evidence that the heat of passion was caused by sufficient legal provocation.

Starnes, 388 S.C. 590, 596-97, 698 S.E.2d at 608.

Abel
p 63

FILED
CLERK OF COURT
SABALBURG COUNTY
2011 AUG - 1 AM 10:00
M. HOPE BLANKLEY

Voluntary manslaughter mitigates an otherwise felonious killing, and while the elements of passion and provocation need not be of such a degree so as to dethrone reason entirely, or shut out knowledge and volition, they must "be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce that, according to human experience, may be called an uncontrollable impulse to do violence." *Walker*, 324 S.C. at 260, 478 S.E.2d at 281 (citing *State v. Byrd*, 323 S.C. 319, 474 S.E.2d 430 (1996)). See also *State v. Smith*, 391 S.C. 408, ___, 706 S.E.2d 12, 14-15 (2011).

Here, the record is completely devoid of any evidence to support the argument that the killing was "in a sudden heat of passion upon sufficient legal provocation." To the contrary, the State presented evidence that reasonably tended to demonstrate that the crimes for which Moore was charged were motivated by his desire to obtain money with which to purchase crack cocaine. This included evidence that Moore went to George Gibson's residence between 8:00 and 10:00 p.m. on September 15, 1999, and he asked Gibson to get him some crack cocaine. Gibson refused because Moore did not have any money and he would not give Moore any crack on credit. Then, Moore, who was unemployed at the time, told Gibson he was going to work and would return the following morning. He then left. R. pp. 1245-48; 1253; 1255; 1371-72.

Even though the victim shot Moore in their exchange of gunfire and Moore was bleeding profusely, Moore did not try to go to the hospital. Instead, he took over \$ 1,400.00 from the store and he drove straight to Gibson's house. Once there, he, again, sought to purchase crack cocaine. R. pp. 1211; 1262-64; 1267; 1312-13; 1352-54; 1466-69; 1478. Gibson refused because of the late hour. During their conversation, Moore told Gibson, "I done something bad, and I got to go turn myself in, and I got money." R. pp. 1248-49. Moore only asked Gibson to take him to the emergency room after Gibson refused to sell him crack and suggested that he needed to go to the

ALL
p64

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG -1 AM 10:09
HODEBROOKLEY

hospital. Gibson refused because he did not want to become involved. When Moore tried to back his truck out of Gibson's driveway, he struck a telephone pole. R. pp. 1249-50; 1256-57.

With respect to the shooting itself, the *only* evidence is Mr. Hadden's eyewitness testimony that the first thing that he heard after Moore had entered the store was Jamie Mahoney exclaiming "What the hell do you think you are doing?" . . . in a loud tone of voice. R. p. 1205.

II. 9-14. Hadden swiveled around on his stool to see what was happening. Hadden saw that Moore had grabbed both of Mr. Mahoney's hands and was holding them in one of his hands. Moore then immediately "come around and come up with a gun and told me not to move." Without giving Hadden an opportunity to comply with his directions, Moore fired the .45 caliber semi-automatic (State's Ex. 3), which he had taken from the victim's constructive possession, at Hadden. Hadden instantly fell to the floor and played dead. He then heard a number of gunshots but did not count how many were fired. R. pp. 1204-09; 1215-17; 1288-89; 1424.

The Court finds that the only reasonable inference from Gibson's testimony and Moore's statement to the emergency room nurse (or EMS personnel) that he had used alcohol and cocaine that night (R. pp. 1377-78) is that Moore's motive for the crimes was robbery; to obtain money, so that he could buy crack. However, even if this Court was to ignore the remainder of the State's case and this evidence of motive, it is clear that Moore did not kill the victim "in sudden heat of passion" that was "caused by sufficient legal provocation" because there is no evidence that the victim - who was much smaller in stature than Moore, had bad eyesight and arthritis in both hands - did anything to provoke Moore. *Starnes*, 388 S.C. 590, 596-97, 698 S.E.2d at 608.

The victim clearly had a right to defend himself and the store from Moore's efforts to rob it. See *State v. Ivey*, 325 S.C. 137, 481 S.E.2d 125 (1997) (voluntary manslaughter charge not required when there was evidence the victim, who was a law enforcement officer, was acting

lawfully and had a right to defend himself); *Tucker*, (victim's attempt to defend herself from a crime could not give rise to legal provocation); *Tyson*, 283 S.C. at 379, 323 S.E.2d at 772 (the trial court properly refused to charge the jury on voluntary manslaughter because evidence of a struggle as the victim resisted an armed robbery showed that the victim was defending himself).

Nor does evidence that the victim was initially armed with both weapons or that he may have produced a weapon first constitute sufficient legal provocation. The Court finds that the record does not clearly reflect that the victim first produced the weapon. It is equally possible that Moore may have somehow discovered the .45 laying under the towel next to the cash register. Yet, even if the victim did first present the .45, it is clear that Moore had managed to take that weapon away from him and completely subdue him before any shots were fired. Further, the *only* evidence is that the victim did not shoot at Moore, until after Moore had fired a shot at Hadden. Again, the victim had the right to defend Mr. Hadden.

Thus, whether Mr. Mahoney was acting to defend himself, the store or Hadden, he was acting lawfully when he finally fired his .44 caliber weapon at Moore, and there could not be sufficient legal provocation. As a result, assuming *arguendo* that heat of passion existed,³¹ any heat of passion that he may have been under was not caused by sufficient legal provocation and he was not entitled to a manslaughter charge. *Starnes*, 388 S.C. 590, 597, 698 S.E.2d at 608. Therefore, Moore cannot prevail on his claim that appellate counsel was ineffective because has not overcome the presumption of effective assistance of counsel, since the ignored issue was not "clearly stronger than those presented." *Robbins*, 528 U.S. at 288 (quoting *Gray*, 800 F.2d at 646).

GROUND 10(j)

³¹ The Court does not find any such evidence in the record. Rather, the record demonstrates that the victim acted lawfully at all times.

Ground 10(j) is that Moore received ineffective assistance of appellate counsel because counsel failed to argue on appeal the trial judge's supposed "error in admitting the testimony of State's witnesses George Gibson and Jeanie Smith as res gestae witnesses." Once again the Court finds that Moore has failed to show deficient performance or prejudice.

1. **Gibson's testimony.**

Prior to the guilt phase, lead trial counsel, Mr. Morin, moved to exclude testimony from Gibson related to Moore's efforts to purchase crack from Gibson and a nurse's testimony that he had crack in his system. Mr. Morin argued that "[u]p until last week when I received the state's supplementary notices of additional evidence in support of aggravating circumstances, this wasn't an issue." However, in the State's "listing of some of their witnesses the issue about Mr. Moore's alleged drug use in or around the time of this incident, they indicated in here there were two specific people who have given statements, but apparently they have supplemented their statements at some point, which I do not know, but apparently they have, because the summaries that they have given me had in it information that I hadn't previously received." He argued that this evidence should be excluded because the State could not establish a sufficient nexus between the crimes with which Moore was charged and his drug use. R. pp. 1149-51; 1153-54.

The State explained the substance of Mr. Gibson's proposed testimony and argued that the evidence was relevant and admissible, citing *State v. Dickerson*, 341 S.C. 391, 535 S.E.2d 119 (2000) (prior bad acts evidence of defendant's drug use during time period of murder was admissible under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) and as part of the *res gestae* of the crime charged). R. pp. 1151-52. The trial judge was inclined to rule that the testimony was admissible, but he deferred his ruling until after hearing an *in camera* proffer of Gibson's testimony. R. pp. 1153-54.

Pl
pb7

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:39
MOORE BLACKLEY

The trial judge later addressed the admissibility of Gibson's testimony *in camera*. Gibson testified that he knew Moore by the name of "Mo" in September 1999. Mo came to Gibson's residence between 8:00 and 10:00 p.m. on September 15th and he asked Gibson "to go get him something," specifically, cocaine. Gibson refused because Moore did not have any money. Moore then told Gibson that "he had to go to work and, he would be back." R. pp. 1166-68.

Early the next morning, Gibson heard someone "calling me from the outside, asking me to come outside." However, Gibson did not go outside because he was in bed. The person then knocked on Gibson's door. Gibson's roommate came and told him that someone was at the door and wanted to see him. So, Gibson went to the back door, and he saw Moore. Moore told Gibson that "I need for you to do something for me." When Gibson asked what, Moore said, "I need you to get me something." Again, Moore was referring to cocaine, and he told Gibson that he had some money. R. pp. 1168-71.

When Gibson told Moore that it was too late, Moore said, "well, look, I been hurt . . . and I need something bad, I got to go turn myself in." Gibson could see that Moore was bleeding badly and he asked Moore what had happened. Moore said "he had been shot, . . . he had to go turn [himself] in." Gibson told him to go to the emergency room and Moore asked Gibson "to take him, go with him to the emergency room, but . . . I got kinda panicked, because I was scared . . . and I didn't want to get involved, because he was shot." R. pp. 1169-70.

Gibson convinced Moore that Moore could drive himself to the hospital and Moore got into his truck. "[H]e was backing out of the yard, and I guess he backed into the post. And at that time there was a county car coming up the street, so he got out of the car and he said I give up, going to turn myself in, and that was it." Gibson witnessed this from his front yard. R. p. 1170.

Pl
p68

On cross-examination, Gibson testified that a Steve Knight and Wilbur Casey had spent the night at his house that night, and that Casey was the roommate who had gone to the front door. Gibson spoke to the police that night. He acknowledged at trial that he had not told them everything that had occurred "[b]ecause I was afraid of getting involved because of the cocaine thing." (Sic). On September 25, 2001, however, he told the story that he gave at trial to the Solicitor and Mr. Barnette. He indicated that this was the truth. R. pp. 1171-73.

Following Gibson's testimony, Mr. Morin argued that Gibson had testified that Moore went to his residence on two occasions and asked Gibson "for some stuff," which Gibson understood to be cocaine. However, Gibson did not testify that Moore asked him for cocaine. Also, Gibson "never saw any monies. He never knew whether or not Mr. Moore had any money." Further, Moore's first visit to Gibson's house was seven or eight hours before "the incident." Mr. Morin argued that "this vague recollection [Gibson] has about something that happened almost eight, or more than six hours, almost eight hours prior to anything happening is not a significant enough connection to what happened at the store to be able to say that it's part of this crime." R. pp. 1174-75.

The Solicitor responded by noting that his research revealed cases where the conduct admitted as part of the *res gestae* occurred more than twenty-four hours before the criminal conduct for which the defendant was on trial. He also observed that Gibson testified that Moore come to Gibson's house "looking for cocaine and said he had no money. He came back immediately after robbing this store, shot in the arm, bleeding and wanted cocaine and had money. And I think that that is part of the context of the crime." R. pp. 1174-75.

The trial judge specifically rejected the argument that Moore had not gone to Gibson's house looking for cocaine and he ruled that Gibson's testimony was admissible:

Roll
pp. 69

FILED
CLERK OF COURT
STANTON COUNTY
2011 AUG - 19 AM 10:09
J. HOE BEACHLEY

Well, sir, I think that his testimony and his credibility is going to speak for itself. I don't believe that from what I have been able to observe from Mr. Gibson that he was selling M & M's or lollipops down there that there would be any confusion about.

It sounds to me like he was a dope dealer, and, you know, that's something that the jury will have to sort out. I think that the case of the State vs. Dickerson is instructive, because it gives an analysis by the Chief Justice of that case, and then also cites back to the case of the State vs. Adams. The case of the State vs. Adams is 322 S. C., 114, 470, S. E. 2d., 366, a 1996 case wherein there was, I think, a series of robberies that were involved, people using the money to buy drugs.

I believe that from my finding or from my review of the cases here that the evidence not only meets the issues that I would consider under, let's say, a Lytle analysis but also would meet a res gestae analysis . . . ; and then also Rule 403 when we look at that, I find that this evidence is clear and convincing in my mind to fall within the exception and that it is probative and outweighs any danger of unfair prejudice to the defendant.

I believe that the issues presented here are such that allow me to allow the state to introduce this evidence.

R. p. 1175, l. 16-p. 1176, l. 14.

The record demonstrates that Mr. Morin did not interpose an objection at the time of Gibson's testimony before the jury. R. pp. 1245-53. Thus, the issue of whether his testimony was admissible was not preserved for appellate review because an *in limine* ruling is not final and does not preserve the issue for appeal. *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993).³² The Court therefore finds that Moore cannot meet his burden of showing either deficient performance or prejudice of appellate counsel under *Robbins*.

Even assuming *arguendo* that the issue of the admissibility of Gibson's testimony was preserved for appellate review, the Court finds that Moore has not met his burden of proof. Generally, "[i]n criminal cases, an appellate court reviews errors of law only and is bound by

³² An exception to this rule is recognized only where the *in limine* ruling is made immediately before where the motion is ruled on immediately prior to the introduction of the evidence in question. In that situation, no further objection is necessary. See *State v. Tufts*, 355 S.C. 493, 497, 585 S.E.2d 523, 525 (Ct.App. 2003); *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct.App.1998).

Boyle
70

2011 AUG - 1 AM 10:09

FILED
CLERK OF COURT
SPARTANBURG COUNTY

the factual findings of the trial court unless clearly erroneous.” *State v. Bixby*, 388 S.C. 528, 541, 698 S.E.2d 572, 579 (2010) (quoting *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007)).

In *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996) the Supreme Court cited, with approval, the following quotation from the Fourth Circuit Court of Appeals’ decision in *United States v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980):

One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence “furnishes part of the context of the crime” or is necessary to a “full presentation” of the case, or is so intimately connected with an explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its “environment” that its proof is appropriate in order “to complete the story of the crime on trial by proving its immediate context or the ‘*res gestae*’” or the “uncharged offense is ‘so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...’ [and is thus] part of the *res gestae* of the crime charged.” And where evidence is admissible to provide this “full presentation” of the offense, “[t]here is no reason to fragmentize the event under inquiry” by suppressing parts of the “*res gestae*.”

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:10
M. HOPE BLANCHLEY

Adams, 322 S.C. at 122, 470 S.E.2d at 370-71 (citations omitted from original). See also *State v. Sweat*, 362 S.C. 117, 132-33, 606 S.E.2d 508, 516-17 (Ct.App. 2004); *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001); *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999); *State v. Gagum*, 328 S.C. 560, 492 S.E.2d 822 (Ct. App. 1997).

This Court finds that appellate counsel was not deficient in failing to challenge the trial judge’s ruling that Gibson’s testimony was admissible as part of the *res gestae* of the charged offenses because the trial judge’s ruling in this regard was correct. Gibson’s testimony of Moore’s efforts to acquire cocaine from him places the murder and robbery of Jamie Mahoney in context. Also, it is so intimately connected with and explanatory of the crimes charged against Moore and is so much a part of the setting of the case and its “environment” that its proof is

appropriate in order "to complete the story of the crime on trial by proving its immediate context or the '*res gestae*.'" *Adams*, 322 S.C. at 122, 470 S.E.2d at 370-71.

His testimony was relevant to his state of mind at the time of the offenses, identity of the perpetrator and a motive for the armed robbery and murder: his desire for crack cocaine.³³ The Court rejects the argument that there was not a sufficient temporal connection between Moore's effort to get cocaine from Gibson on the night of September 15th and the murder and armed robbery on the 16th merely because the charged offenses occurred five to seven hours later. First, the Court would note that the appellate courts in this State have upheld the introduction of evidence under the *res gestae* theory where the temporal connection between the conduct admitted as part of the *res gestae* and the criminal conduct for which the defendant was on trial was similar to or less than that here. *E.g.*, *State v. Martucci*, 380 S.C. 232, 257-58, 669 S.E.2d 598, 611-12 (Ct.App. 2008) (prior incidents of defendant's alleged abuse of child in the weeks immediately preceding child's death were admissible, in prosecution for homicide by child abuse); *State v. Benjamin*, 345 S.C. 470, 549 S.E.2d 258 (2001) (evidence concerning convenience store robbery committed by defendant and accomplice approximately five hours after charged murder and armed robbery at another convenience store was admissible as part of *res gestae*, where weapon that was used and left behind at second convenience store was also the weapon used in charged crimes); *Sweat*, 362 S.C. at 130-32, 606 S.E.2d at 515-16 (passage of two months from date of prior episode of domestic violence and incident in question was not too remote to make evidence of prior act inadmissible).

Further, the facts of this case demonstrate the requisite connection between Moore's two visits to Gibson's house and the crimes at Nikki's so as to support its introduction a part of the

³³ Although Gibson only referred to cocaine *in camera*, his testimony before the jury made clear that Moore wanted crack cocaine.

res gestae. When Gibson refused to get cocaine for Moore because Moore did not have any money, the unemployed Moore told Gibson that "he had to go to work and, he would be back." He committed the charged offenses several hours later. Any doubt about whether proof of the first visit and the reason for that visit was relevant to show the complete, whole, and unfragmented story of Moore's crimes is resolved by Moore's actions immediately after murdering Jamie Mahoney and stealing the \$ 1,400.00.

FILED
CLERK OF COURT
HARRISBURG COUNTY
JUL 11 AM 10:10
J. HOPE BRADLEY

Moore was shot in the arm during the murder around 3:00 a.m. He bled so profusely from this wound that he left a trail of blood from the victim's body to the front door of the store. He also bled on the murder weapon, as well as in the truck and on the driver's side door of the truck. Instead of seeking medical attention for the gunshot wound, however, he immediately drove to Gibson's house and attempted to purchase cocaine with the stolen money. He thought of seeking medical attention only after Gibson refused to get any cocaine for him.

Additionally, the Court cannot say that the trial judge abused his discretion in finding that the State had by proven these other acts by Moore by clear and convincing evidence. "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." *State v. Fletcher*, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008). The Court finds that the proffered evidence in this case met this standard, unlike the evidence introduced in *Fletcher*. Moreover, it was not error for the Court to omit giving the jury a limiting instruction as to its consideration of this evidence, since it was properly admitted as part of the *res gestae*. *State v. Johnson*, 306 S.C. 119, 126-127, 410 S.E.2d 547, 552 (1991).

PJL
8/73

The Court further finds that the probative value of this evidence was not substantially outweighed by its prejudicial effect under Rule 403, SCRE. Gibson's testimony was extremely probative of placing the murder and robbery in proper context. It was also relevant to establishing identity, Moore's state of mind and motive. The Court finds that the logical connection articulated by the State was sufficiently strong that this probative value was not substantially outweighed by the tendency of the evidence to show propensity, or by some other form of unfair prejudice.

Moreover, even if this Court were inclined to find that the trial judge's ruling was erroneous, the Court finds that any error was harmless beyond a reasonable doubt. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result").

Gibson's testimony was cumulative to the testimony of Jeanie Smith, the emergency room nurse at Spartanburg Regional Medical Center who treated Moore on the morning of September 16, 1999. Ms. Smith testified, without objection, that the notes for her assessment of Moore's injury reflected that "he had alcohol and cocaine present; and that I had noted the odor of alcohol; also that he was disoriented." R. pp. 1377-78. Because Gibson's testimony was cumulative to testimony by Ms. Smith, it was harmless. *State v. Haselden*, 353 S.C. 190, 577 S.E.2d 445 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); *State v. Johnson*, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (admission of improper evidence is harmless where it is merely cumulative to other evidence).

Also, there was overwhelming evidence of guilt, separate and apart from the testimony of Gibson or Smith. This evidence included the eyewitness testimony of Terry Hadden (the A.W.K. victim) (R. pp. 1193-1209; 1309; 1215-17; 1288-89; 1424); evidence that Moore's DNA was found on the .45 caliber weapon that was used to kill the victim and which Moore had discarded after he left the crime scene; evidence that Moore's blood (established through DNA testing was found on the victim's clothing, the money (\$1,408.00) that was recovered from Moore's truck, a meat cleaver that was found at the scene (at the victim's feet) but which did not belong to the business and a trail of his blood leading out of the business (R. pp. 1271-93; 1305-10; 1352-53; 1364-65; 1368; 1421-32); and evidence of Moore's admission of "I did it, I did it, I give up, I give up," when Spartanburg County Deputy Sheriff Bobby Rollins came across Moore after the truck had hit the pole. R. pp. 1238-40; 1311-18. Given the present record, any error in the admission of Gibson's testimony must be viewed as harmless and non-prejudicial beyond any reasonable doubt. *See Sherard and Bailey, supra*.

Finally, the Court notes that Moore has not asserted ineffective assistance of appellate counsel based on the failure to challenge the admissibility of Gibson's testimony under Rule 404(b), SCRE, and *Lyle, supra*. Therefore, he cannot show any prejudice from counsel's failure to challenge the ruling that Gibson's testimony formed part of the *res gestae* because "[w]here the ruling of a trial judge is based on more than one ground, an appellate court must affirm unless the appellant appeals all grounds upon which the ruling was based." *State v. Hicks*, 387 S.C. 378, 379, 692 S.E.2d 919, 920 (2010); *Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993) (where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case). Thus, Moore still cannot "overcome the presumption of effective assistance of counsel,

PSL
P 75

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2008 AUG -1 AM 10:10
MOORE BLECKNEY

since the ignored issue was not “clearly stronger than those presented.” *Robbins*, 528 U.S. at 288 (quoting *Gray*, 800 F.2d at 646). He also cannot prove “a reasonable probability that but for this counsel’s unreasonable failure...he would have prevailed on his appeal.” *Id.* At 285.

2. Smith’s testimony.

The Court finds that Moore did not argue this portion of **Ground 10(j)** in his proposed Order. Therefore, he has abandoned his claim that appellate counsel was ineffective for not arguing on appeal that Ms. Smith’s testimony was inadmissible as part of the *res gestae* of the charged crimes. Alternatively, the Court finds that Moore has failed to prove deficiency or resulting prejudice under *Robbins* because the issue he now asserts should have been raised was not preserved for appellate review because there was no objection to Ms. Smith’s testimony. R. pp. 1377-78.

Even if the *in camera* ruling did cover her testimony, however, counsel did not interpose an objection at the time of her testimony and the issue of whether her testimony was admissible was not preserved for appellate review because an *in limine* ruling is not final and does not preserve the issue for appeal. *Schumpert, supra*.

Also, her testimony was admissible for the reasons discussed in **Ground 10(k)** and the State could introduce it without establishing that it constituted part of the *res gestae* of the armed robbery and murder. Because the issue was not preserved for appellate review and was admissible on other grounds than as part of the *res gestae* of the charged offenses, Moore cannot meet his burden of proving ineffectiveness of appellate counsel.

GROUND 10(k)

In his remaining guilt phase claim, Moore asserts that trial counsel were ineffective for not raising a hearsay objection to Ms. Smith’s testimony. The Court disagrees and finds that

PSL
p 76

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 2 10 10
MSHOPE BLAUNCE

counsel strategically decided not to object because he correctly recognized that her testimony was admissible.

The credible evidence before this Court is that Mr. Kelly did not object to the introduction of Ms. Smith's testimony because he thought that it was admissible. Also, even if he successfully raised a hearsay objection, he believed the State could call the emergency personnel and present the same evidence. The Court finds that his performance was not deficient under *Strickland* because he correctly viewed her testimony as admissible.

The Court finds that Ms. Smith's personal observations of Moore, such as noting "the odor of alcohol" and "that he was disoriented" did not constitute hearsay. Also, any information that he provided to her was admissible as admissions by him under Rule 801(d)(2)(A), SCRE, or as statements as to his then existing mental, emotional, or physical condition under Rule 803(3), SCRE. The Court finds that Moore has failed to prove that Ms. Smith did not personally acquire this information from him because he did not call her as a witness at the PCR hearing and she testified at trial that "[m]ore than likely," she would have obtained this information from him. R. p. 1378, ll. 6-9. See *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1999) ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice").

More importantly, even if the information in her notes was provided to her by EMS personnel, who had acquired it from Moore, she was properly permitted to testify thereto because the information introduced through her testimony was not barred by the hearsay rule. Rather, it is admissible under Rule 803(4), SCRE, as statements made for purposes of medical diagnosis or treatment. See *Todd v. Joyner*, 385 S.C. 421, 425-426, 685 S.E.2d 595, 597-98 (2009) (affirming trial court's rejection of appellant's hearsay objection to testimony by respondent's doctor about

Asl
77

FILED
CLERK OF COURT
HARTSBURG COUNTY
2011 AUG - 11 AM 10:10
M. HOPE BACHLEY

complaints or statements appellant made to her physicians because medical history was properly admissible under Rule 803(4), SCRE). *See also Gentry v. Watkins-Carolina Trucking Co.*, 249 S.C. 316, 154 S.E.2d 112 (1967) (a patient statements as to his or her present condition made to a physician consulted for treatment are generally admitted as evidence of facts stated); *State v. Ruiz*, 94 NM 771, 774-76, 617 P.2d 160, 163-65 (Ct. App. 1980), *superseded by statute on other grounds as stated in State v. McCormack*, 101 N.M. 349, 682 P.2d 742 (Ct.App.1984).

While Rule 803(4) provides that "the admissibility of statements made after commencement of the litigation is left to the court's discretion," Moore cannot show an abuse of discretion based upon this record because Ms. Smith's testimony was very probative of Moore's state of mind and circumstantially corroborated his motive. This Court further finds that the probative value of her testimony was not substantially outweighed by the tendency of the evidence to show propensity, or by some other form of unfair prejudice. Rule 403, SCRE.

Moreover, even if Moore had established that counsel's failure to object was deficient under *Strickland*, he has failed to establish that he was prejudiced by counsel's error. Ms. Smith's testimony was cumulative to that of Gibson. Also, there was overwhelming evidence of guilt, separate and apart from the testimony of Gibson or Smith. *Strickland*, 466 U.S. at 694. Given this record, Moore simply has not proven "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.³⁴

B. Sentencing Phase Allegations.

GROUND 10(a)

Moore's first claim as to counsel's performance in the sentencing phase is that trial counsel were ineffective because they did not object to the trial judge's "erroneous limitation on

³⁴ Again, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

[Moore]'s right to allocution/ right to address his jury at the end of the penalty phase and/or make a plea for mercy during his penalty phase closing statement. He asserts that their failure to object deprived him "of the fundamentally important right to seek mercy from his sentencing jury." The Court finds that Moore did not prove either deficient performance or prejudice resulting from counsel's alleged error.

FILED
CLERK OF COURT
SARASOTA COUNTY
2011 AUG - 1 AM 10:10
MOORE BLACKLEY

As he had in the guilt phase, the trial judge obtained an on-the-record waiver of Moore's right to testify in the penalty phase. R. pp. 1686-87. Following a charge conference, the trial judge obtained an on-the-record waiver of Moore's right to personally address the penalty phase jury. The waiver colloquy was as follows:

[THE COURT]: Of course, Mr. Moore, would you stand, please, sir?

(Whereupon, the defendant stood).

THE COURT: As is the case in the sentencing phase, as well as the guilt phase that we have already been through, **you certainly have the right, along with your attorney, to have a closing argument regarding the sentence imposed.**

Now, once again, this is your right, Mr. Moore, to address the jury; and once again, the statement that you would make to the jury would have to be **confined to the evidence that has been presented and to the issues concerning the sentence imposed.**

Do you understand that you have this right, sir?

THE DEFENDANT: Yes, sir, I do.

THE COURT: And what is your decision?

THE DEFENDANT: I shall not speak, Your Honor.

THE COURT: You will not speak to the jury?

THE DEFENDANT: No, sir.

THE COURT: But you understand that that is your right?

Asle
8/79

THE DEFENDANT: Yes, sir.

THE COURT: All right, sir. Thank you very much, Mr. Moore.

R. p. 1713, l. 6 - 1714, l. 1 (emphasis added).

Moore's second issue on direct appeal was that the judge erroneously limited his closing argument "to the evidence that has been presented and to the issues concerning the sentence imposed" because "S.C. Code Sections 16-3-20(C) and 16-3-28 afford a capital defendant the opportunity to ask for mercy and express feelings of remorse."³⁵ Therefore, he argued that his waiver of sentencing phase closing argument was not knowing and voluntary. *Moore*, 357 S.C. at 464, 593 S.E.2d at 611-12.

The South Carolina Supreme Court, however, found that his "argument is procedurally barred. At trial, Moore did not assert that the trial judge's comments prohibited him from asking for mercy and/or expressing feelings of remorse; he simply advised the court that he did not intend to address the sentencing phase jury. His failure to raise this contention to the trial judge precludes review of the issue on appeal." *Id* at 464-65, 593 S.E.2d at 612 (citing *State v. Perez*, 334 S.C. 563, 514 S.E.2d 754 (1999) and *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991) (issue must be raised to and ruled upon by trial judge to be preserved for appellate review)).

The Court added that:

Moreover, to the extent the trial court's comment could feasibly be viewed as limiting Moore's ability to express remorse to the sentencing phase jury, the matter is more appropriately addressed in a post conviction relief (PCR) action. As noted above, the only comment made by the trial court was that Moore could address the sentencing jury as to "the issues concerning the sentence to be imposed." This statement arguably encompasses the right to argue remorse and mercy. There is no further explanation of what this sentence means, nor any objection to it. On the present record, it is simply impossible to determine

³⁵ Section 16-3-28 provides: "Notwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument."

RL
P 80

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:30
M. HOPE BLANKLEY

precisely what the trial court meant by this statement, or what Moore understood it to mean. In the PCR context, however, a court could analyze all the facts surrounding the trial to determine if Moore knowingly and intelligently waived his rights under section 16-3-28. See *Franklin v. Catoe*, 346 S.C. 563, 552 S.E.2d 718 (2001) (noting that PCR process is specifically designed to allow for an inquiry into the relevant facts surrounding the adequacy of a defendant's information and/or waiver of rights). Accordingly, given the lack of objection and failure to raise the present issue at trial, Moore's remedy, if any, is through PCR.

Moore, 357 S.C. at 465, 593 S.E.2d at 612.

In *State v. Rocheville*, 310 S.C. 20, 425 S.E.2d 32 (1993), the Court explained that the waiver of last argument should be viewed in light of the facts surrounding the trial. "The post conviction relief process is specifically designed to allow for an inquiry into the relevant facts surrounding the adequacy of a defendant's information and/or waiver of rights." *State v. Cartrette*, 323 S.C. 15, 18, 448 S.E.2d 553, 555 (1994). See also *Franklin v. Catoe*, 346 S.C. 563, 568, 552 S.E.2d 718, 721 (2001).

This Court finds that the only evidence before it is that Moore understood both that he had the right to address the sentencing phase jury in closing argument and that he had the right to express remorse in his argument. Moore testified before this Court that he understood he had the right to make a closing statement in the sentencing phase and that he understood he could express remorse in his argument. He then testified, initially, that his recollection was that he had attempted to express remorse, but that the State objected to his argument. On the other hand, he claimed that he did not make a sentencing phase argument asking for mercy because he was intimidated by the prosecution in the guilt phase.

Although the Court has elsewhere found that Moore's testimony is generally not credible as to the various matters to which he testified, the Court finds that his testimony that he understood that he had the right to express remorse in closing is credible because his testimony is consistent with the PCR testimony of trial counsel. Mr. Morin testified that he advised Moore of

Asl
281

FILED
CLERK OF COURT
CHARLESTON COUNTY
2011 AUG - 1 AM 10:10
JAMES E. MCNEELY

Moore's right to address the jury in sentencing phase closing argument prior to the trial judge's colloquy with Moore, that he advised Moore of Moore's right to ask his jury for mercy and that he informed Moore that he thought that Moore should address the jury at that point. Moore apparently understood their conversation.³⁶

Mr. Morin did not object to the trial judge's colloquy with Moore during the on-the-record waiver proceeding or request a recess to further discuss this issue with Moore. After the trial judge conducted the on-the-record waiver because his understanding was that the trial judge's explanation of the law was correct. Mr. Kelly agreed that the trial judge's explanation to Moore correctly stated the law relating to a closing sentencing phase argument. Also, Mr. Kelly corroborated that counsel had advised Moore of his right to make a closing argument in the sentencing phase before the on-the-record inquiry by the trial judge. This advice included the right to ask the jury for mercy.

Based upon counsel's credible testimony, the Court finds that Moore has failed to prove deficient performance resulting from counsel's failure to object to the trial judge's remarks during the on-the-record waiver hearing. Indeed, he does not dispute that counsel had advised him of his right to address the jury by way of argument in the sentencing phase; including his right to allocate and that he understood his rights. The Court further finds that counsel had advised Moore of his rights in this regard before the on-the-record inquiry by the trial judge.

Moore further asserts that counsel's failure to object "prevented review of this issue on direct appeal." However, there is nothing in the trial judge's colloquy that incorrectly stated the law governing closing statements or contravened counsel's advice that he could ask the jury for mercy. To the contrary, the trial judge's explanation is consistent with counsel's advice.

³⁶ Mr. Morin had advised Moore of the right to address the guilt phase jury, a right that counsel had advised Moore not to assert and which Moore had indicated that he would not assert. However, Moore ultimately addressed the jury in the guilt phase and both attorneys felt that his argument did not make a favorable impression on the jury.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG -1 AM 10:40
MOORE BLANKLEY

Clearly, the admonition that a closing argument would have to be confined to the evidence presented at trial and to issues concerning the appropriate sentence was proper.³⁷ First, he could not discuss matters not in evidence, apart from his right to allocate. Second, the purpose of the sentencing phase in a capital trial pursuant to § 16-3-20(B) is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender. *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001); *State v. Shaw*, 273 S.C. 194, 200, 255 S.E.2d 799, 802 (1979). Additionally, the trial judge specifically informed Moore that he had the right to discuss "the issues concerning the sentence imposed." This Court finds that a request for mercy falls within such issues. Because the trial judge's statements did not incorrectly state the law governing closing statements or contravened counsel's earlier advice that properly explained Moore's right to allocution and which he understood, the Court finds that that counsel were not deficient in failing to object and that Moore knowingly, voluntarily and intelligently waived his rights under section 16-3-28.

The Court further finds that Moore has failed to prove any prejudice resulting from counsel's failure to object to the trial judge's remarks. To establish prejudice, he 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. In a capital sentencing proceeding, he must prove that "there is a reasonable probability that ... the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. *See also Wiggins v. Smith*, 539 U.S. 510, 537 (2003). The Court finds that he did not meet his burden of proof under *Strickland*.

³⁷ Any contention that the trial judge improperly limited his argument by stating that any argument "would have to be confined to the evidence that has been presented" (*see* R. p. 1713, ll. 14-15), ignores the remaining portion of the trial judge's explanation "and to the issues concerning the sentence imposed." R. p. 1713, ll. 15-16.

There was overwhelming evidence that established Moore's guilt of murder and the statutory aggravating circumstances, as discussed above. *See Strickland*, 466 U.S. at 694. Also and as noted, counsel had already properly advised Moore of his rights under § 16B-28, and Moore understood counsel's advice. Further, while the jury did not hear from Moore, personally, counsel ably argued the defense's case in mitigation. **R. pp. 1726-30.** Counsel's argument was succinct. However, Moore has not raised any allegation as to it and it was more than constitutionally adequate under *Strickland*.

Moreover, he did not allocate to the crime in the PCR hearing and the Court finds that he would not have done so at trial, even if counsel had objected to the trial judge's remarks to Moore or further advised him regarding this right. Although he did testify at PCR that he was sorry that the shooting occurred and that the victim was dead, he did not admit that he had gone into Nickki's with the intent to commit a robbery or that the killing was murder, which the jury had already found in the guilt phase. In spite of a history of strong armed robberies and theft related convictions, he claimed that the trouble only began after the victim ordered him out of the store in a racially insulting manner and thereafter pulled a .45 caliber weapon on him. Even after he got that weapon away from the victim, the victim produced a second gun and shot at him. This does not constitute allocution. Thus, the Court finds that he has failed to prove prejudice because, based upon this record, the Court is unable to conclude that "the balance of aggravating and mitigating circumstances did not warrant death" if he had exercised his right to address the jury. *Strickland*, 466 U.S. at 695.

GROUND 10(b)

Moore also alleges trial counsel was ineffective in failing to investigate, develop, and present mitigation evidence from family members of Moore. There is no merit to this ground.

Asl
p 84

FILED
CLERK OF COURT
SPARTANBURG COUNTY
201 AUG - 1 AM 9:10
J. HOPE BRADLEY

This Court viewed and heard the testimony of trial counsel on this issue and finds trial counsel's testimony is credible on this issue. This Court also viewed the video-taped depositions of Moore's family from Michigan. This Court finds their testimony on the issue of their willingness to come to trial and testify to be not credible given this entire record.

It is trial counsel's responsibility to adequately investigate and present evidence in mitigation of guilt. *Williams v. Taylor*, 529 U.S. 362, 395 (2000); *Byram v. Ozmin*, 339 F.3d 203, 209 (4th Cir.2003). However, counsel is only required to make a reasonable investigation for possible mitigating evidence. *Matthews v. Evatt*, 105 F.3d 907, 919 (4th Cir.1997). As the Court emphasized in *Wiggins*,

we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*, 466 U.S., at 689. *We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation."* *Id.*, at 690-691. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id.*, at 691.

Wiggins, 539 U.S. at 533 (emphasis added). *See also Lovitt v. True*, 403 F.3d 171, 179 (4th Cir. 2005); *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005); *Id* at 157 (Traxler, J., concurring) (citing *Wiggins* and *Strickland*).

The Court finds that counsel's investigation for and presentation of mitigating evidence in the present case was objectively reasonable under the "prevailing professional norms." *Strickland*, 466 U.S. at 686. The record shows that trial counsel investigated and attempted to locate mitigation witnesses for Moore from his family in Michigan. However, Moore was largely uncooperative in their endeavor and initially did not want these members to assist. Additionally,

psl
885

FILED
CLERK OF COURT
STANTON COUNTY
2011 AUG 1 AM 10:40
M. HOPES
CLERK

counsel attempted to develop potential mitigation witnesses in South Carolina through the investigator, Mr. Skidmore; to whom Mr. Morin provided a list of persons to contact. These results were apparently unsuccessful. Ultimately, counsel presented Moore's wife and stepson. Their testimony is discussed elsewhere in the Order.³⁸

To assist in obtaining the cooperation of Moore's family members in Michigan, counsel retained Drucy Glass as their mitigation investigator. Ms. Glass is the wife of attorney John Blume, and she has acted as a mitigation investigator in numerous capital cases. Ms. Glass prepared and filed a report with trial counsel regarding her attempts to locate possible family members from Michigan in this case. **Respondent's Ex. 25, Report of Drucy Glass.**

The report indicates that Ms. Glass left numerous messages for Moore's father on his answering machine at Moore's father's residence in Mt. Clemens, Michigan, but that Moore's father did not return Ms. Glass' phone calls. The report also indicates that she sent a certified letter to Moore's father on September 17, 2001. The credible testimony at PCR was that Moore's father did not respond. The Court finds that Ms. Glass' report indicates the reason Moore's father did not respond to either telephone calls or a certified letter: Moore related to Ms. Glass that he had been "cut off" by his family in Michigan. Moore also told trial counsel that he had asked his family for help and he was told "there would be no help coming, and to get myself out of this mess." **Respondent's Ex. 19.**

³⁸ Although no issue in PCR has been raised concerning counsel's failure to present a mental health defense, or the failure to present expert testimony regarding his crack addiction, the Court notes that the defense had Moore examined by Dr. James Evans, a neuropsychologist, and counsel had contacted a Dr. Alexander Morton, a pharmacologist. Neither expert provided counsel with any information that would assist in mitigating Moore's punishment. Instead, both provided information that would hurt any reasonable efforts to mitigate the sentence for murder. Mr. Morin testified that Dr. Evans felt that Moore had an anti-social personality disorder. The State introduced Dr. Evans' June 22, 2001 report as **Respondent's Ex. 20**. Based upon the findings in the report (such as Moore's denial to Dr. Evans that he had used illegal drugs or alcohol "to any significant degree;" his average score on intelligence testing; and evidence that Moore "showed some evidence of difficulty dealing with emotional responsibility," which he explained to Mr. Morin) and counsel's credible testimony, the Court finds that counsel wisely chose not to present either expert.

PJL
8/26

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:10
M. HORN BLACKBERRY

Ms. Glass' report indicates why Moore's family would have cut him off. Her report details Moore's life of crime beginning in 1984 with an arrest for receiving stolen goods. In that incident, Moore actually admitted to the victim that he broke into her apartment with another individual. Moore was then arrested in 1985 for possession of a firearm. Moore was placed on two years probation during that year. In 1986, Moore was arrested for armed robbery. Again in 1986, he was arrested for breaking and entering where several guns were stolen. In 1987, he was sentenced to one year probation and three months in jail.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG -1 AM 10:10
RE MOORE BLACKLEY

In 1987, Moore was sentenced to one year and six months to five years for attempted breaking and entering. In January of 1988, he was arrested for a probation violation. In September 1988, he was released from prison on parole. He was subsequently arrested in October of that same year for driving with a suspended license. Moore was recommitted to the Michigan Department of Corrections as a "parole violator" in July 1989. He was paroled six months later in December of 1989. In January 1990, Moore absconded from parole. He was returned to the Michigan Department of Corrections on February 20, 1990. Moore maxed out his prison sentence and was released from the Michigan Department of Corrections on August 3, 1991. He then moved to South Carolina one week after his release from the Michigan Department of Corrections. **Respondent's Ex. 25.**

Ms. Glass' report reveals Moore's life of crime did not end once he moved to South Carolina. He was arrested on September 13, 1991 for driving under suspension (DUS) and habitual traffic offender. He was arrested on October 10, 1991 for two counts of assault and battery and two counts of attempted purse snatching. On November 22, 1991, he was charged with common law robbery and strong armed robbery. He was eventually convicted of these charges and received a suspended sentence and probation. In 1992, he was arrested for DUS and

Bl
887

possession of marijuana, for which he received sixty days in jail. In 1993, he was arrested for speeding, DUS, and habitual traffic offender. He eventually received ninety days in jail to be served on weekends.

In 1994, he was arrested for four counts of passing fraudulent checks. In 1994, he was arrested, again, for DUS. In 1995, he was arrested for ABHAN. Also in 1995, he was convicted of DUS 3rd and sentenced to six months, suspended, with ninety days house arrest and probation. Also in 1995, he was arrested again for DUS and for driving under the influence. On March 7, 1996 he was arrested and charged with first degree burglary, criminal sexual conduct, and assault and battery. On August 7, 1997, Moore's probation was revoked on a charge of common law robbery. He was ordered to serve six years in prison. His probation was also revoked on a habitual traffic offender charge. On the same date, Moore pled guilty to ABHAN, arising from the 1995 arrest and was sentenced on that charge as well. Moore was released from SCDC on "Supervised Furlough" on December 9, 1998. Approximately nine months later, he was arrested on September 16, 1999 and charged with the murder of James Mahoney, the armed robbery of Nikki's convenience store, and AWIK for the attempted shooting of Terry Hadden.

Respondent's Ex. 25, Report of Drucy Glass.

Ms. Glass' report also indicates that Moore's mother died in 1997 and that Moore could not attend his mother's funeral because he was incarcerated at the time. **Respondent's Ex. 25.** It is no small wonder that Moore's family had cut him off. His life of crime set forth in detail in Ms. Glass' report explains why his sister, Vanessa, stated to Moore's wife: "Richard is dead to us." **Respondent's Ex. 25.** It also explains why applicant's family told him: "there would be no help coming [from Michigan], and to get myself out of this mess." **Respondent's Ex. 19.**

The record shows both trial counsel and Ms. Glass unsuccessfully attempted to locate family members of Moore in Michigan, who would come to South Carolina and testify favorably for him. The attempts of trial counsel's and Ms. Glass' to locate and obtain the cooperation of Moore's family members in Michigan were rebuffed. His family members would not answer telephone calls or answer letters sent by counsel or their mitigation investigator. Moore told Ms. Glass that if his mother had not died in 1997, he would not have been "cut-off" by his family like he was in this case.

This Court viewed the testimony of the witnesses in this case, including trial counsel, and finds that trial counsel's testimony on this issue is credible. Counsel's testimony is corroborated by the letter written to trial counsel by Moore and Ms. Glass' report. The Court finds that Moore's family members did not want to assist in his case and that they avoided all efforts to gain their assistance and cooperation. Counsel's investigation was reasonable. *O'Brien v. Dretke*, 156 Fed.Appx. 724, 2005 WL 3529255 (5th Cir. 2005) (counsel's failure to discover particular family friends and relatives and call them to testify in mitigation during penalty phase of capital murder prosecution, did not amount to deficient performance, where counsel's investigation into defendant's background was reasonable; counsel asked defendant to identify potential mitigation witnesses, interviewed several of defendant's family members and friends, and retained mental health experts, and determined that none of those potential witnesses would be favorable to defense).

Nor has Moore established prejudice from counsel's alleged errors. This Court has reviewed the deposition testimony of Moore's family from Michigan and it finds that their testimony as to their willingness to come and testify is not credible. In particular, the testimony of one of Moore's brothers typifies the credibility of Moore's family members on this issue.

Ppl
P89

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG -1 AM 10:10
A. HOPE LAMLEY

James Moore testified he would have come and testified if he had been notified of the trial. James Moore claimed he was living at home with his and Moore's, father during the time from Moore's arrest until trial.

However, on cross-examination by Respondent, James was forced to admit that he was incarcerated in a prison during part of the time leading up to Moore's trial and at the time of Moore's trial on drug charges. James also admitted that he was kept in the dark by Moore's Michigan family regarding the fact that Moore had been charged with murder and was facing the death penalty. This further corroborates the fact that Moore's Michigan family was embarrassed and angered by Moore's commission of a murder and armed robbery in South Carolina, and that they had washed their hands of him.

Another of Moore's brothers, Maurice Moore, admitted that he too had a criminal record, for conspiracy and grand larceny. He also was angry with Moore after Moore's arrest for murder and armed robbery. Maurice Moore admitted that when Moore called him from jail after his arrest for these crimes, he did not talk to Moore initially. So, Moore talked to Maurice's girlfriend. Maurice further admitted that Moore's father basically disowned him after he was charged with murder and armed robbery in South Carolina.

Maurice Moore later admitted that he talked with Moore several times on the telephone prior to the trial. Maurice testified that they talked about him coming to South Carolina and testifying, however, he then reversed himself and said he was just imagining that Moore wanted him to come and testify. Maurice also testified he did not come and testify at the trial because he could not afford to. He then admitted that his girlfriend could have driven him to South Carolina, and that he could have stayed with Moore's wife during the trial.

This Court simply does not find Maurice Moore credible because of his conflicting testimony about his discussions with Moore regarding coming and testifying at his capital trial, and his later testimony that he could not afford to come at the time. Additionally, Maurice Moore's testimony is contradicted by Ms. Glass' mitigation report. Maurice denied that he was contacted by any person acting on behalf of his brother prior to or at the time of his brother's capital trial, but Ms. Glass mitigation report specifically states that she sent a certified letter to Maurice Moore on September 17, 2001.

This Court finds it was an objectively reasonable trial strategy decision not to seek out two of Moore's brothers. Ms. Glass' report indicates Moore related to either his counsel or Ms. Glass that two of his brothers were incarcerated for drugs. Moore related that his brother James and his brother Phillip were both incarcerated in state prison outside South Carolina. **Respondent's Ex. 25.** Trial counsel Kelly testified that he would not want to present a family member who was, himself, incarcerated.

This Court has also carefully reviewed the testimony of Moore's other family members from Michigan, and the Court finds that he was not prejudiced by the failure of trial counsel to call any of them in his capital case. First, counsel called Moore's wife and his stepson, to testify in mitigation and to make a plea for applicant's life.

Second, most of the Michigan family members testified that they had little contact with Moore after he reached the age of 18 or after he moved to South Carolina. These witnesses would have been thoroughly impeached with their lack of knowledge of Moore. Even though they lived in the same small community in Michigan and lived in close proximity to him, they testified that they were unaware of his convictions in Michigan for possession of a weapon, and

attempted burglary. . Additionally, they had no knowledge and were unaware of his criminal convictions for common law robbery, habitual traffic offender, and ABHAN.

Moreover, one witness contradicted Moore's PCR testimony. She testified that he moved to Detroit around the age 18. **Deposition testimony of Arma Hadley, p. 15.** However, Moore denied at PCR that he had ever lived in Detroit. This Court finds the family's testimony that they were not aware of Moore's extensive criminal history is not credible. Even if credible, they would be thoroughly impeached at trial, by any claim that they were unaware of it. *See Belmontes*. It would have appeared to the sentencing jury that either his Michigan family members were lying about not knowing about his criminal record, or that they really did not know about Moore as a person.

Finally, while the witnesses said some good things about Moore, they offered no evidence that he suffered from any mental illness, mental retardation, personality disorder, physical or sexual abuse, or deprivation or poverty. Nor was there any testimony from any of these family members that Moore witnessed any physical or sexual abuse during his formative years. In fact, they each testified that Moore came from a good family, had good parents, had positive role models, and was made to attend church growing up and taught the difference between right and wrong. Given the totality of their testimony, this Court finds Moore has failed to show prejudice from the alleged deficient performance in not calling these witnesses in the penalty phase. This Court finds that even if they had been called, there is no reasonable probability the result of the sentencing proceeding would have been different. *See Belmontes*. He simply did not meet his burden of proving that "there is a reasonable probability . . . that the balance of aggravating and mitigating circumstances did not warrant death" if his Michigan

FILED
CLERK OF COURT
STANLEY COUNTY
2011 AUG - AUG 10:11
M. HOPE LAMLEY

PSL
p92

family members had testified at sentencing. *See Strickland*, 466 U.S. at 695. *See also Wiggins*, 539 U.S. at 537.

GROUND 10(g)

Next, Moore alleges that counsel were ineffective because they failed to present evidence of his adaptability to prison through their retained "expert in the field of penal institution safety and management," James Aiken. He asserts that their failure to present Aiken's testimony "opened the door for the state's damning closing argument that [Moore] had shown escalating violence." He claims that he was prejudiced by counsel's decision because the State injected the issue of Moore's future dangerousness by its argument, and that Aiken's opinion that Moore could be safely incarcerated if he received a life sentence would have rebutted the State's argument. The Court finds that counsel made a reasonable strategic decision not to present Aiken's testimony. The Court further finds that Moore has not proven any prejudice resulting from counsel's decision.

Mr. Aiken, an expert in correctional institution management, was presented by Moore at the PCR hearing. Mr. Aiken testified that he is President of James E. Aiken & Associates, and he gave a summary of his work experience, both of working for various departments of corrections and as a consultant. He explained prison classification systems, his own assessment of Moore's classification and his opinion that Moore would be of low risk of presenting a future danger in the prison system. Mr. Aiken opined that Moore can be controlled and managed in a prison environment for the remainder of his life without causing an undue risk of harm to staff, inmates or the general community. In part, the basis for Aiken's favorable opinion is that Moore does not have a history of escape attempts, use of weapons against other inmates or officers and there was no indication that he participates in gang or other predatory activity.

FILED
CLERK OF COURT
STANTON COUNTY
2011 AUG - AMO:11
M. H. P. L. A. C. L. E. Y.

Based upon Mr. Kelly's credible testimony, the Court finds that Mr. Aiken was present at trial and prepared to testify that Moore could be safely housed and controlled by SCDC. While Mr. Kelly did not have all of the prison records that had been gathered by the time of his PCR testimony, he had given copies of all of those records to Mr. Aiken in preparing for Moore's trial. Mr. Kelly felt that Aiken would have given favorable testimony.

However, the prosecution had brought a records custodian down from Michigan to testify about misconduct while incarcerated in that State. The State had provided Mr. Kelly a copy of the records that it intended to introduce through this witness and he provided the records to Aiken. Although Mr. Kelly was unable to recall the precise nature of these records,³⁹ he recalled that the State's evidence was damaging enough that he thought the defense would be "hammered" if Aiken testified. Therefore, he decided not to present Mr. Aiken as a witness.

"In light of 'the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant,' the performance inquiry necessarily turns on 'whether counsel's assistance was reasonable considering all the circumstances.'" *Belmontes*, 130 S.Ct. at 384-85 (citing *Strickland*, 466 U.S. at 688-689). Considering the circumstances of discussed above, this Court finds counsel's decision not to offer this evidence was reasonable under *Strickland*, since the presentation of Aiken's testimony would have resulted in the State being allowed to present damaging testimony in reply. See *Gaskin v. Secretary, Dept. of Corrections*, 494 F.3d 997, 1002-03 (11th Cir. 2007) (petitioner did not present clear and convincing evidence to rebut presumption that defense counsel's decisions

³⁹ The Court finds that, in 2011, Mr. Kelly had telephoned Mr. Aiken in an effort to obtain a copy of the records from Mr. Aiken and refresh his recollection. Mr. Aiken did not return his call, but he was informed that Aiken did not have the records. Therefore, Mr. Kelly could not recall whether Mr. Moore was involved in gangs, assaults or escape or some other misconduct. Although he did not have a specific recollection, the report sent to him by Ms. Glass (Respondent's Ex. 25) shows a detailed account of his criminal history in both Michigan and South Carolina, including several offenses that the State did not introduce at trial. See **Ground 10(b)**. Included in the information provided to counsel was that Moore absconded from parole in Michigan on January 10, 1990. Respondent's Ex. 25, p. 8.

Bl
894

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:17
M. HOPE BLANKLEY

not to present retained mental health expert's findings or further evidence regarding petitioner's educational history were tactical: counsel purposely withheld information about defendant's past, including school records, because he had reason to believe that it would lead to damaging testimony regarding defendant's past violent and criminal conduct); *Byram v. Ozmin*, 839 F.3d 203, 210 (4th Cir. 2003) (counsel's strategic decision not to present psychological evidence, where experts' findings contained suggestions of antisocial behavior that could have been harmful to client's defense "was a reasonable one because such evidence 'is a double-edged sword that might as easily have condemned [defendant] to death as excused his actions.'") (citation omitted); *Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir. 2001) ("The clearest respect in which the lawyer's representation fell below the minimum level was the decision to put the psychologist on the stand, knowing what the lawyer knew"), order directing the district court to issue a conditional writ of habeas corpus vacated and the petition for rehearing dismissed, 268 F.3d 485 (7th Cir. 2001); *Bonin v. Calderon*, 59 F.3d 815, 834 (9th Cir. 1995) ("while the Constitution requires that a criminal defendant receive effective assistance of counsel, the presentation of expert testimony is not necessarily an essential ingredient of a reasonably competent defense." Counsel's presentation of childhood mitigation evidence was reasonable since expert testimony would have been of "slight value at best" and it "would have opened the door to precisely the type of cross-examination that [counsel] sought to avoid by refusing to call psychiatric experts-another recitation of all of Bonin's atrocities for the purpose of determining whether, in the expert's opinion, such behavior is the likely product of such abuse").

The Court further finds that Moore has not proven that he was prejudiced by counsel's failure to present Mr. Aiken's testimony. This requires Moore "to establish 'a reasonable probability that a competent attorney, aware of [the available mitigating evidence], would have

[Handwritten signature]
9/95

FILED
CLERK OF COURT
HARTLAND COUNTY
2011 AUG - 11 AM 11:11
MOORE BLACKBURN

introduced it at sentencing,' and 'that had the jury been confronted with this ... mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.'" *Belmontes*, 130 S.Ct. at 386 (citing *Wiggins*, 539 U.S. at 535, 536). Further, "[i]n evaluating that question, it is necessary to consider all the relevant evidence that the jury would have had before it if [counsel] had pursued the different path-not just the mitigation evidence [counsel] could have presented" through Mr. Aiken, but also the damaging evidence from the prosecution in reply "that almost certainly would have come in with it." *Belmontes*, 130 S.Ct. at 386.

The Court finds that, on cross-examination, Respondent significantly impeached his opinion of Moore's adaptability with a contrary history of disciplinary infractions that Moore has committed while incarcerated. Specifically, Respondent elicited that Moore had committed a number of disciplinary infractions, both in the Spartanburg County Jail and on death row. The most serious offense that he has committed while housed on death row is possession of a cell phone and cell phone charger, which occurred in July 2006. This was considered a major infraction by SCDC.

Mr. Aiken was dismissive of all of the disciplinary infractions that Respondent elicited; and he opined that none of the infractions, including Moore's possession of the cell phone charger, caused him to alter his opinion that Moore was adaptable to life in prison and could be safely incarcerated. However, the Court finds that Moore's record while incarcerated demonstrates that he has refused to adapt to prison and that his various infractions demonstrate an unwillingness and refusal to comply with the rules and regulations of the institutions that have incarcerated him. Indeed, the offense of inmates possessing cell phones while incarcerated is such a grave problem for the Department that SCDC and prison officials from twenty-nine other

APL
96

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG - 1 AM 10:11
MOORE-BLACKNEY

states petitioned the Federal Communications Commission in 2010 for permission to install technology that would jam cell phone transmissions and render them useless.⁴⁰

Further, although Respondent did not impeach Mr. Aiken's opinion with the January 10, 1990 offense that Moore absconded from parole in Michigan (*see Respondent's Ex. 25, p. 8*), this offense and any other infractions that he committed during his incarceration in Michigan would almost certainly be presented by the State at trial to rebut Mr. Aiken's opinion as to Moore's adaptability. The Court finds that this offense and the numerous disciplinary infractions that Moore committed in South Carolina prior to the trial would have minimalized the effectiveness of Aiken's testimony. This is particularly true if there was further evidence of misconduct that Moore committed in the Michigan incarcerations, as there appears to be. Under these circumstances, the Court finds that Aiken's expert testimony would have been of slight value, at best, and that it would have permitted the introduction of evidence that would be damaging to the defense's case in mitigation.⁴¹

Counsel's decision not to present Mr. Aiken's opinion meant that the defense did not present expert testimony to rebut any argument by the State as to Moore's future dangerousness, but, at the same time, it avoided the introduction of much evidence that circumstantially tended to demonstrate his future dangerousness: *i.e.*, his inability or unwillingness to adjust to life in prison. Furthermore, counsel presented Moore's wife and stepson at trial and counsel argued that these witnesses suggested that Moore's actions after his arrest proved that he "is being a

⁴⁰ See <http://www.nytimes.com/2011/01/03/us/03prisoners.html>.

⁴¹ The original jury would obviously not have been presented with any of the disciplinary infractions that Moore committed after the trial, such as his misconduct while he has been incarcerated on death row. However, a resentencing jury obviously would be presented with this evidence, as well. The Court finds that this post-trial evidence of misconduct would all but conclusively demonstrate his inability or refusal to adjust to confinement.

productive member of society." R. p. 1730. Thus, the defense did present evidence to rebut the State's argument on future dangerousness.

Additionally, the Court finds that there was overwhelming proof that Moore was guilty of the murder of Jamie Mahoney and the aggravating circumstances. There was also overwhelming proof of Moore's future dangerousness, through the introduction of evidence concerning his prior criminal history, which included convictions for common law robbery, aggravated assault and battery, thefts of valuables the theft or possession of weapons, and parole violations. There was also a similar robbery where he went behind the counter threatened and assaulted the victim. Finally, the record shows that Moore had been incarcerated several times before and was not rehabilitated by his incarceration. Thus, the Court finds that Moore did not meet his burden of proving that "there is a reasonable probability . . . that the balance of aggravating and mitigating circumstances did not warrant death" if such an instruction had been given. *See Strickland*, 466 U.S. at 695. *See also Wiggins*, 539 U.S. at 537.

GROUND 10(h)

Moore maintains that trial counsel were ineffective because they failed to request a charge on the statutory mitigating circumstance of provocation by the victim, as set forth in S.C. Code Ann. § 16-3-20(C)(b)(8) (Supp. 2011).⁴² He asserts that there was "no conceivable professionally reasonable basis for not seeking" the charge since counsel argued to the jury that Moore was also a "victim," and that, in the absence this "instruction, the jury was left with no guidance to assist them in taking into consideration the fact that Mahoney shot [Moore], which was the whole basis of counsel's argument that [Moore] was a victim, too." The Court finds that he has not proven that counsel's performance was deficient because the credible evidence is that

⁴² Section 16-3-20(C)(b)(8) provides that it is a mitigating circumstance that "[t]he defendant was provoked by the victim into committing the murder." The Court's Westlaw search of the statutes of those states that have the death penalty revealed that South Carolina is the only one that has this mitigating circumstance.

counsel made a reasonable strategic decision not to request the charge. The Court further finds that there was no prejudice from counsel's alleged error because there was no evidence that the victim provoked him.

First, this Court finds that counsel's failure to request this statutory mitigating instruction did not amount to deficient performance under *Strickland*. The credible evidence is that Mr. Kelly correctly determined that there was no legal basis for counsel to request the charge, in the absence of testimony from Moore to support it. Also, the jury had already convicted Moore of murder and armed robbery. Therefore, the Court finds that trial counsel made a reasonable strategic decision under not to ask the trial judge to submit this statutory mitigating circumstance. The Court further finds that counsel discussed with Moore that the defense might be entitled to this statutory mitigating circumstance if there was evidence to support it, in connection with the discussion as to whether or not Moore would testify in the sentencing phase. However, Moore refused to testify in either phase of the trial. Moreover, he has not raised any allegation that counsel were ineffective in their advice as to his right to testify in either phase of the trial.

Nor has Moore established any prejudice under *Strickland* from counsel's chosen strategy. He would have been entitled to this statutory mitigating circumstance if there was any evidence presented that the victim did anything to provoke the murder. This Court does not read § 16-3-20(C)(b)(8) to require the existence of evidence that would constitute sufficient legal provocation such as would warrant a manslaughter instruction. However, as discussed in **Ground 10(f)**, there is absolutely no evidence in the trial transcript that the victim did anything, whatsoever, to provoke Moore. *Contra State v. Plemmons*, 286 S.C. 78, 84, 332 S.E.2d 765, 769 (1985). Rather, the only evidence at trial was that the victim was acting lawfully and in defense

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG 11 AM 10:11
M. HOPKINS
BLACKLEY

of himself or Mr. Hadden. Also, evidence that the victim was initially armed with both weapons or that he may have produced a weapon first did not constitute provocation by him for the reasons discussed in **Ground 10(f)**.

Even if the victim did first present the .45, it is clear that Moore had managed to take that weapon away from him and completely subdue him before any shots were fired. Further, the only evidence is that the victim did not shoot at Moore, until after Moore had fired a shot at Hadden. Thus, whether Mr. Mahoney was acting to defend himself, the store or Hadden, he was acting lawfully when he finally fired his .44 caliber weapon at Moore, and the victim did not provoke the defendant to commit the murder. Moreover, there was overwhelming evidence that proved that Moore was guilty of murder and the statutory aggravating circumstances. See *Strickland*, 466 U.S. at 694. Also, there was no evidence to support the submission of this mitigator.

Additionally and contrary to Moore's argument before this Court, counsel's sentencing phase closing argument did not assert that Moore was a victim, even though the evidence did show that Moore was shot during his confrontation with Mr. Mahoney and counsel did urge that Moore's had "suffered with an addiction problem." R. p. 1728. Rather, counsel pointed out the meaningful contributions that Moore could make within his family if given a life sentence⁴³ and counsel argued for a life sentence as an act of mercy. R. pp. 1726-30.

Therefore, the Court finds that he did not meet his burden of proving that "there is a reasonable probability . . . that the balance of aggravating and mitigating circumstances did not warrant death" if such an instruction had been given. See *Strickland*, 466 U.S. at 695. See also *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

⁴³ In obvious response to the prosecutions argument, counsel suggested that Moore's actions after his arrest demonstrated that he "is being a productive member of society." R. p. 1730.

IT IS, THEREFORE, ORDERED:

1. That the Application for Post-Conviction Relief in this matter is dismissed with prejudice; and
2. That Applicant is remanded to the custody of Respondent.

AND, IT IS SO ORDERED this 29th day of July, 2011.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG -1 AM 10:11
M. HOPE BLANCHLEY

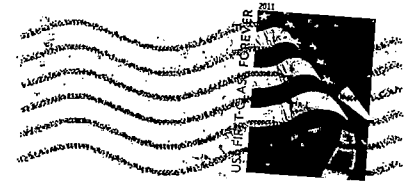
[Signature], South Carolina

[Signature]
ROGER L. COUCH
Presiding Circuit Court Judge

Melissa J. Armstrong
1830 Marion Street
Columbia, S.C. 29201

COLUMBIA SC 292

01 SEP 2011 PM 11



S.C. Supreme Court
P. O. Box 11330
Columbia, S.C. 29211

*Richard
Moore*

29211+1330

