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STATE OF SOUTH CAROLINA S.C. SUPREME COURT
COUNTY OF GEORGETOWN) IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Stephen C. Stanko, #6022,

Applicant,

v.

State of South Carolina,

Respondents.

C/A No. 2008-CP-22-1446

(On remand from Appellate

Case No. 2017-000211)

Order Denying Applicant's Request
for Post-Conviction Relief

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CLERK OF COURT

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GEORGETOWN COUNTY

In this installment of Applicant's collateral litigation, Applicant must establish that he was prejudiced by the representation of initial PCR counsel. The underlying claims, however, are ordinary ineffective-assistance of counsel allegations to which the average two-prong *Strickland* standard must be applied. A hearing was convened on Applicant's Second Amended (Successive) Post Conviction Relief (PCR) Application on January 28 and 29, 2019, in Georgetown County. Pursuant to this hearing, this Court finds that Applicant has failed to demonstrate deficient performance or prejudice as to any claim because the case that was presented to this Court is merely an expanded, more elaborate presentation of the mitigation evidence presented at Applicant's Georgetown County jury trial. This Court's decision is based upon the following:

I. STANDARD OF REVIEW

The present proceeding is a matter of first impression in this State.¹ This action comes before this Court by way of a limited remand proceeding ordered by the South Carolina Supreme Court to occur prior to its appellate consideration of Applicant's first post-conviction relief proceedings. *Stanko v. State*, App. Case No. 2017-000211, S.C. Sup. Ct. Order dated Dec. 14,

¹ *Robertson v. State, infra*, still awaits scheduling and completion of its own prejudice hearing and therefore fails to establish any precedential guidance in this stage of Applicant's case.

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2017. The South Carolina Supreme Court essentially granted Applicant leave to file an amended, successive, PCR application pursuant to *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016), as a result of and in accord with this Court's earlier finding that Applicant's initial PCR counsel did not meet the representation requirements of S.C. Code Ann. § 17-27-160.

Robertson declared that to succeed on any issue now before this Court, "a PCR applicant would still maintain the significant burden of proving that he was prejudiced by counsel's lack of qualification." *Id.* at 521 and nn.14-15, 795 S.E.2d 29, 37 and nn.14-15 (2016). "If prior PCR counsel are deemed unqualified and, as a result, deficient, the PCR judge must make a determination whether under *Strickland*, Petitioner was prejudiced." *Id.* at 522, 795 S.E.2d at 38 (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984)).

The overarching standard to be applied is whether Applicant can demonstrate a reasonable probability of a different result at the initial PCR hearing had he been represented by statutorily qualified counsel. *Robertson*, 418 S.C. at 521-22, 795 at 37-38; see S.C. Code Ann. § 17-27-160(B) (2014) (qualifications for capital PCR counsel). In order to succeed on the prejudice prong of *Strickland* in any PCR action, an applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 520 n.14, 795 S.E.2d at 37 n.14 (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2052). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694, 104 S.Ct. at 2068.

Functionally, Applicant must demonstrate a fact-based or record-based foundation for a PCR allegation which was not pursued at the 2015 PCR hearing. Applicant must demonstrate that had one or more of these allegations been raised in the first instance, there is a reasonable probability Applicant would have prevailed at PCR. If, however, claims raised in the successive

application could not have reasonably succeeded in garnering Applicant relief, then Applicant has failed to meet his burden. This Court finds that Applicant's successive PCR allegations do not find support in law, the record, or by counsels' investigation at any stage in this proceeding in a manner which undermines confidence in the outcome of any earlier proceeding.

II. PAST FACTS AND PROCEDURE

The entirety of Applicant's previous proceedings have bearing on the issues before this Court. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066; *Robertson*, at 522, 795 S.E.2d at 38. Any portion of the previous record may form the basis for the finding requested by Respondent: that Applicant was not prejudiced by initial PCR counsel's representation.

The instant matter initiated upon the Georgetown County Grand Jury's 2005 indictment of Applicant for murder, two counts of kidnapping, assault and battery with intent to kill, criminal sexual conduct in the first degree, and armed robbery. These charges arose from the April 8, 2005 death of Laura Ling and the rape and attempted murder of her teenage daughter on the same date. The State served a notice of intent to seek the death penalty.²

Applicant was appointed Gerald Kelly, Esquire, and William "Bill" Diggs, Esquire to represent him on the charges. Applicant's jury trial took place August 7 through August 11, 2006, before the Honorable Deadra L. Jefferson. Solicitor Greg Hembree and Deputy Solicitor Fran

² Applicant was also tried, convicted, and sentenced to death for a Horry County murder committed as part of a continuous chain of events beginning with the acts committed at the Ling home. His Horry County conviction and sentence were affirmed on appeal. *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013). He has pursued PCR in Horry County with that application having been denied and dismissed in full. The writ of certiorari Applicant seeks awaits a grant or denial by the South Carolina Supreme Court. *Stanko v. State*, Appellate Case No. 2017-002281 (Notice of Appeal Served Oct. 30, 2017). Ms. Vann also represents Applicant in the Horry County action. *Id.* (Order Appointing Counsel filed Mar. 1, 2018).

Humphries prosecuted the case. The jury found Applicant guilty of all charges. The sentencing phase took place from August 14 to August 18, 2006. The jury found the State had proven all of the statutory aggravating circumstances alleged: (1) the murder was committed while in the commission of criminal sexual conduct in any degree; (2) the murder was committed while in the commission of kidnapping; (3) the murder was committed in the commission of robbery while armed with a deadly weapon; (4) the murder was committed while in the commission of larceny with the use of a deadly weapon; and (5) the murder was committed while in the commission of physical torture. On the murder charge, the jury recommended a sentence of death.

On August 18, 2006, Judge Jefferson sentenced Applicant to death. Judge Jefferson also sentenced Applicant to twenty years' confinement for the assault and battery with intent to kill, thirty years for criminal sexual conduct in the first degree, thirty years for the kidnapping of Christina Ling, and thirty years for armed robbery. Pursuant to South Carolina law, Judge Jefferson did not sentence Applicant on the kidnapping charge for Laura Ling.

A. The State's Case and Evidence of Aggravation

On the evening of April 7, 2005, the fifteen year old daughter of Laura Ling was working on a term paper at her home in Murrells Inlet. She went to bed between 11:15 and 11:30 that night. At approximately 1:15 a.m. she was awakened by Applicant, her mother's boyfriend, trying to sexually assault her. The daughter fled to her mother's bedroom. (R. 1252-57).

There she found her mother semi-conscious between the bed and the bedroom wall with her hands tied behind her back. Applicant followed the daughter into her mother's bedroom and knocked the daughter unconscious. When the daughter regained consciousness, her arms were tied, she was gagged, and Applicant was sexually assaulting her. (R. 1257-59, 1407-08).

Applicant beat the daughter until she yielded to the sexual assault. During her rape, the

daughter could hear her mother moaning on the floor beside the bed. Applicant then turned the daughter over and tried to smother her while he choked the life out of her mother with his free hand. Applicant then slit the daughter's throat twice with a knife. The emergency room doctor who later treated the daughter testified that her ear was almost completely severed from her head. (R. 1259-64, 1311).

Applicant taunted the minor victim during the sexual assault. When the daughter told him she was going to be sick, Applicant told her ". . . well, you will just be sick on yourself." When she told him her fear of getting pregnant, Applicant told her "[w]ell then, you're going to be raising a baby by yourself" Applicant also accused the fifteen year old victim of being promiscuous. As Applicant held a sharp object to the daughter's throat, he whispered to her, ". . . scream and I'll kill you both." After killing her mother, Applicant told the daughter that what had happened to her mother was her, the daughter's fault. After cutting the daughter's throat, Applicant told the daughter to lie down on the floor next to her mother. (R. 1254, 1259-64, 1291-92).

Applicant also gagged and cut the throat of the mother. Her autopsy revealed she had been savagely beaten before her death. She died as a result of asphyxia due to strangulation. (R. 1412-18).

After the murder and rape, Applicant showered, dressed, packed a suitcase, and went through the women's purses removing belongings. While Applicant was packing the suitcase, the daughter sat up. Applicant told her ". . . no, no, no, lie back down." (R. 1265). Applicant also removed a bracelet from Ling's dead body. Applicant locked the door as he left the house and then left the crime scene driving Laura Ling's car. (R. 1265-66, 1268, 1541-42, 1575, 1801, 1887, 1236, 1246, 1249).

Applicant drove Ling's car to her local bank. He made a large withdrawal from Ling's bank

account using an ATM, used her credit card to make a purchase, and drove to a friend's residence in Conway. (R. 1369-73, 1382, 1385, 1575-76). Later that morning, Applicant called the Socastee Library where Ling worked and told them Ling would not be at work because she had suffered food poisoning and was hospitalized. At the time, Applicant did not believe the bodies of Ling and the daughter would be discovered for at least a week. (R. 1374-80, 1888).

Unbeknownst to Applicant, the daughter survived the assault and called 911. Sheriff's deputies broke the lock on Ling's front door and found the daughter inside her home covered in blood. As a result of the daughter's phone call, the operator at the Socastee Library was already aware of Ling's murder by the time Applicant called to report she was sick. The library employee notified authorities of Applicant's deceptive phone call. (R. 1237, 1269-70, 1376-80).

That same day, April 8th, Applicant shot and killed the friend he visited near Conway, Henry Turner, and fled to Columbia in Turner's truck. Applicant abandoned Ling's car at Turner's home. (R. 1381-85). That same evening, witnesses saw Applicant partying at the bar at the Blue Marlin restaurant in the Vista area of downtown Columbia. Applicant represented himself at the bar as a real estate magnate who had just closed a big deal, a graduate of The Citadel, and an employee of a company that traded on the New York Stock Exchange. Applicant was witnessed spending large amounts of money at this and another establishment. (R. 2550-54, 2543-45, 2559).

Shortly thereafter, Applicant drove from Columbia to Augusta, Georgia, where The Master's golf tournament was taking place. On April 9th, witnesses saw Applicant at a nightclub. It was at this time he met and began a new romance with Dana Putnam. He represented to Putnam and others that he was the owner of several Hooter's restaurants in South Carolina. Applicant gave Putnam the bracelet he had removed from Ling's wrist after her murder. (R. 2562-65, 2585-86, 2876).

After a few days of a whirlwind romance, Putnam recognized Applicant was wanted in relation to the coastal South Carolina murders, and she immediately notified police. United States Marshals placed a trace on her phone, and Applicant was subsequently arrested at a shopping mall in possession of Turner's truck. The key fob to Ling's car and a notebook with Ling's name on it were found in the truck. Applicant was extradited to South Carolina for Ling's murder, Turner's murder, and for the crimes against Ling's fifteen-year-old daughter. (R. 2588-90, 2609-18, 2615, 2611, 2603-06).

Applicant had previously been convicted of tying up and assaulting another female victim in February of 1996. This victim was also gagged. At the time that assault occurred, Applicant was on the verge of being arrested for several scams or cons he was committing in the Charleston area, and Applicant was in danger of being exposed to police by that female victim. (R. 1795, 2312-13, 2430-33, 2870).

At the time of Ling's murder, Applicant was once again running several scams and, once again, Applicant's cons and scams were on the verge of exposure. Applicant was representing himself to be a "lawyer," "paralegal," or "investigator" for law firms in the southern part of Horry County. Applicant was able to secure retainers from various clients around Murrells Inlet. Reportedly, Applicant operated his "practice" out of the Socastee library where Ling worked. Victims of Applicant's latest schemes were demanding that he return their money and threatening to go to the police. During this timeframe, Applicant was under community supervision for the Charleston kidnapping. (R. 1394-95, 1763-64, 1799, 1855-56, 2443-79, 2815, 2838-39).

In addition to the eyewitness testimony of Ling's daughter, DNA evidence linked Applicant to the assault and murder at the Ling residence. Surveillance photos from Ling's bank captured Applicant removing cash from Ling's account after the murder and sexual assault.

Applicant's briefcase was also found in Ling's car, which Applicant abandoned at Turner's residence near Conway. (R. 1371-72, 1382-85, 1395-98).

B. Applicant's Defense and Case in Mitigation

Applicant received the benefit of examination upon examination of a number of qualified psychiatric experts during the guilt and penalty phases of his capital trial. Trial Counsel retained mental health and medical experts who informed counsel, in their professional expert opinion, Applicant had a frontal lobe brain defect which rendered him legally insane at the time of the Ling offenses. This testimony garnered jury instructions on not guilty by reason of insanity (NGRI) and guilty but mentally ill (GBMI) at the conclusion of the guilt phase. Then, in the penalty phase, trial counsel re-called select expert witnesses from the guilt phase to present visual representations of Applicant's brain defect and to address, in medical terms, his antisocial personality diagnosis. This latter presentation garnered jury instructions on certain statutory mitigating factors appropriate upon the presentation of evidence of a mental disease or defect.

The cohesive presentation began in the guilt phase with physiological psychologist Dr. Bernard Albiniak. He testified about advances in brain scanning technology and how MRI and PET scans assist medical experts in examining the brain. He described the systems controlled by the brain, including the location, contents, and function of the limbic system. He noted that Applicant's MRI showed an elevated fluid level and described how elevated fluid in the brain equates with a lack of brain tissue. Dr. Albiniak opined Applicant had a "fairly abnormal brain" with a medial right hemisphere four standard deviations below the norm and a loss of brain tissue in the medial gray area above the limbic system which involves emotional behavior. (R. p. 1459). He shared an opinion that less than 2% of the population would share a brain structure like Applicant's. (R. p. 1461). He opined Applicant suffered from sub-normal brain function, related

the diagnosis to Applicant's difficult birth, and explained how the abnormal areas of Applicant's brain caused him to have diminished control of impulsive behavior. (R. pp. 1442-87).

Applicant next presented guilt-phase testimony from Dr. James Thrasher, a local psychiatrist with a background in the Navy who was once stationed at Guantanamo Bay where Applicant was born. After personally interviewing and examining Applicant, Dr. Thrasher opined that Applicant operated under a mental, disease, defect, or disorder at the time of the Ling crimes.³ (R. pp. 1490-1604). Notably, Dr. Thrasher testified that seizures can cause the type of brain dysfunction he diagnosed Applicant with, but that his personal examination of the Applicant showed that he "does not have seizures." (R. p. 1503). He testified that the mental illness can manifest at one moment and be gone the next due to "misfiring of the brain." (R. p. 1503). He discussed how the capacity to distinguish right and wrong is located in the area of the brain where Applicant had the notable defect. (R. pp. 1506-07). Dr. Thrasher also discussed Applicant's birth records in detail, which he opined showed evidence of "serious neurological" concerns which laid the groundwork for the dysfunction of the lower parts of the frontal lobe." (R. pp. 1507-08). He noted Applicant was hit on the back of the head as a teenager which could very well have injured the front of his brain. (R. p. 1509). Overall, Dr. Thrasher testified that his review of Applicant's records showed a reduced structure and reduced function in his brain. He went on to diagnose Applicant as having "a personality structure of an antisocial personality with a socialized overlie and he is prone to sudden violence when threatened." (R. p. 1537). He also stated Applicant's memory loss during the Ling crimes, which was the period of time in which Dr. Thrasher had opined Applicant was insane, could be caused by a frontal lobe defect. (R. pp. 1598-99).

Neuropsychologist Dr. Mark Einhorn testified next. He conducted the PET scan procedure

³ A statutory mitigating circumstance. S.C. Code Ann. § 16-3-20(C)(b).

on Applicant at the Medical University of South Carolina. He explained the process and protocol for PET scan imagery, which required a continuance performance (CPT) test be done prior to the scan in order to ensure the patient's brain was engaged prior to any images being taken. Dr. Einhorn conducted an additional battery of tests upon Applicant the following day to examine for neuropsychological impairments. The results of that testing were not remarkable but were not inconsistent with Applicant being diagnosed with diminished functioning in his frontal lobes. (R. pp. 1606-20)

Applicant then presented Dr. Joseph Wu, a well-credentialed expert in PET scan imagery and neuropsychiatric disorders from Irvine, California. (R. pp. 1623-92). Dr. Wu explained the PET scan process and the science that makes it possible. He explained the significance of the CPT being administered prior to the PET scan's creation. He took care to note that a person's IQ cannot alter the results of the PET scan. He testified he was asked to review Applicant's PET scan. (R. pp. 1662-63). Dr. Wu opined Applicant has an abnormality residing in the ventral frontal lobe area of his brain which can be viewed from the PET scan. This is the base of the frontal lobe. He explained the role of the frontal lobe in regulating a person's impulse control. (R. p. 1623-92). He testified he was aware of the results of Dr. Einhorn's additional neuropsychological testing, and explained that the parts of the frontal lobe that are used to complete those tests are higher up than the parts of the frontal lobe where Applicant has a visual abnormality—that's why Dr. Einhorn got normal results. (R. p. 1666). He determined there to be a clinically significant decrease in Applicant's frontal lobe activity which is consistent with someone who had a significant developmental problem within the frontal lobe. (R. pp. 1673-74). He also examined a volumetric brain analysis conducted by Dr. Ruben Gur which showed an abnormally sized frontal lobe. He assessed that the PET scan and MRI data are two different ways to look at a brain but that their

results overlap to show Applicant has a defective frontal lobe. (R. pp. 1676-77).

Forensic psychiatrist and neuropsychiatrist Dr. Thomas Sachy testified thereafter. (R. pp. 1712-1850). He described how a trained professional could make a diagnosis of brain dysfunction or injury by visually examining a PET scan. He testified that a person's outward social and emotional behaviors are controlled by the frontal lobes of the brain and if the frontal lobes are not working, a person will have behavioral dysfunction. He described that scientists have suspected this is the case since the 1800s when Phineas Gage was struck in the frontal lobe with a railroad spike. He described a more recent case from 2003 where a person became a pedophile after developing a brain tumor in his frontal lobe. (R. pp. 1721-24). He explained the anatomy of the brain and showed the jury the location of the amygdala where emotions are generated, its connection to the limbic system, and its role in transferring emotions to the other areas of the brain. (R. pp. 1724-29, 1764). Dr. Sachy testified that the capacity to conform and the capacity to appreciate or distinguish between right and wrong is located in this limbic portion of the brain. He testified that damage to that area of the brain will cause a person to do more wrong because their ability to distinguish acts as wrong is greatly diminished or removed from injury. (R. pp. 1730-31).

Dr. Sachy testified he was hired to interview Applicant, review his birth records and other records including Applicant's early psychiatric records from the 1990s (including those from a period of prior incarceration). (R. pp. 1732-33). Dr. Sachy contacted Dr. Wu to have him generate Applicant's PET scan images. (R. p. 1734). He ordered Applicant's MRIs, which he reviewed and determined that they showed that the top part of Applicant's brain was shrinking at a rate abnormal for his age. (R. pp. 1735-43). Dr. Sachy talked about another preeminent doctor who works in this field, Dr. Raine, and explained that a new set of studies by Dr. Raine found that people with

antisocial personality disorder have shrinkage in the very front of their brain which corresponds to decreased activity depicted in a PET scan of the same brain. (R. pp. 1738-39). He specifically cited that he was influenced by Raine's studies because they pertained to and identified as having brain dysfunction a subset of individuals who were murderers and psychopaths. (R. pp. 1733-34).

Dr. Sachy diagnosed Applicant with a brain defect. (R. p. 1746). He testified that Dr. Wu's PET scan imagery and Dr. Gur's MRI-based volumetric brain analysis, both of Applicant's brain, converged and verified that the brain was not working right. (R. p. 1741). Dr. Sachy also discussed the antisocial personality disorder Dr. Einhorn diagnosed Applicant with after conducting a battery of tests. He testified that antisocial personality disorder was referred to as psychopathy until 1980, and further explained that research literature continues to use the term psychopathy. He believed that word was a better descriptor because the condition is a disease. He differentiated psychopathy, a born defect, from pseudopsychopathy, which develops later in life as a result of, for example, a brain injury. (R. pp. 1750-51).

Dr. Sachy continued that the readings of Applicant's brain scan imagery and the results of his psychiatric testing were all consistent with Dr. Raine's findings. (R. p. 1751). He explained that a brain abnormality located in the part of the brain where Applicant's abnormality lies means that he is affected by the disease of psychopathy—if he was damaged in another area of the brain, Dr. Sachy said, it would be called a different disease, like Alzheimer's. (R. p. 1752). He testified the defect can come about by anything such as a blow to the head, a viral infection, or being born with low oxygen levels. He described Applicant's birth records and linked them to the defect as a potential cause. (R. pp. 1753-60, 1822-47).

Dr. Sachy went on to explain that aggressive behavior resulting from a diminished ability to control one's impulses "could last minutes to hours to even days," and "that people who have

seizures that affect these parts of the brain, they can go into a state of violent, psychotic rage that can last for days" until medicated. (R. p. 1765). Continuing to describe the limbic system, Dr. Sachy said that the system is not wired to analyze and slow reactions which is why the limbic system is called the reptilian part of the brain—that reactive portion of the brain is all the brain that a reptile has. (R. p. 1766).

Ultimately, Dr. Sachy opined at the guilt phase that based on all of the medical literature and the documentation of Applicant's lifelong medical and criminal histories, and Applicant's demonstrable frontal lobe abnormalities, that Applicant was a psychopath. (R. p. 1767). He further opined that Applicant was insane because he lacked the capacity to distinguish right from wrong (R. pp. 1767-70); Applicant was insane at the time of the Ling crimes (R. pp. 1777-80, 1782-85); and Applicant "crosses the line into insanity when his violent, aggressive impulses gain complete dominance of his brain" (R. p. 1798). He criticized the testimony of the State's experts which was contrary to his own and to that of the nationally renowned experts that also worked on Applicant's case. (R. pp. 1785-92, 1800-02). His testimony was that Applicant did not have the ability to make moral choices because that portion of this brain was dysfunctional. (R. p. 1770, 1793-94). He testified that Applicant's prior behavior met the profile of antisocial personality disorder or psychopathy (R. pp. 1782-1797); that behaviors such as pathological lying, conning, being manipulative, and having a grandiose sense of self-worth were all inherent in this diagnosis (R. p. 1799); and that Applicant's inability to remember certain things about the crimes was likely a choice, or could be a result of his being involved in an emotionally charged incident which reduces one's ability to store detail (R. pp. 1772-75). He further testified that the middle orbital frontal lobe of Applicant's brain appeared from the PET scan imagery to not function or not be in use. (R. pp. 1776-77).

He also took care to distinguish between a layperson's understanding and use of the term psycho—he testified that when people say someone is psycho they actually mean psychopathic and insane.⁴ (R. pp. 1779-80). He stated, “Mr. Stanko nor the other psychopaths that we know of have made a conscious decision to be psychopathic. They have a brain abnormality that has been forced upon them by bad luck or God or genes or exposure to chemicals, what have you.” (R. p. 1780). Again, he clarified that Applicant met the definition of antisocial personality disorder, which he continues to call psychopathy in his practice, as was done prior to 1980. (R. p. 1781). He explained that people with this diagnosis statistically do not get in trouble with the law before age fifteen, and maybe never do over the course of their lives.⁵ (R. pp. 1782). When trial counsel asked what the medical community was trying to accomplish by changing the terminology to antisocial personality disorder, Dr. Sachy expounded that “they thought the word psychopath was too dramatic. . . . Psychopaths are a specific subset of antisocials. . . .”⁶ but clarified that now science has acknowledged that their “terrifying” behavior is a result of a brain defect. (R. pp. 1797-98, 1808-09).

The State thereafter presented rebuttal testimony from Drs. Pam Crawford, Tora Brawley, William Brannon, and Kenneth Spicer. Dr. Crawford found no mental disease or defect and diagnosed Applicant with a personality disorder, not otherwise specified, with narcissistic and antisocial features, which she then categorized as a behavioral problem. Dr. Brawley testified that

⁴ “I mean, that’s why that movie was made, the Alfred Hitchcock move, *Psycho*.”

⁵ “I don’t remember Ted Bundy ever getting in trouble with the law. I don’t remember—you know, at a young age, I don’t remember John Wayne Gacy, famous psychopaths in history, they look normal. That’s why they’re called the – it’s said they have a mask of sanity, they wear a mask that looks sane. Inside they’re insane.”

⁶ “They are the kind of people we’re terrified of and yet we read books about them and we are fascinated and we watch CourtTV and A&E and Learning Channel. They’re the Hannibal Lectors from *Silence of the Lambs*. They are the murderous psychopath. They seem almost – they are terrifying. They are like evil. They are the devil.”

she reviewed the battery of neuropsychological tests conducted by Dr. Einhorn and opined Applicant showed no signs of cognitive deficit. Dr. Brannon testified that he reviewed Applicant's MRI and birth records and opined Applicant had both a normal brain and no indication of a brain defect from birth. Dr. Spicer opined that Applicant's PET scan looks normal when compared to a normal database. (R. pp. 1862-1987). Applicant countered Dr. Spicer's opinion by pointing out that Drs. Spicer and Wu utilize different protocols, software, and databases in their PET scan practice. (R. pp. 1987-2019).

The jury rejected the evidence that Applicant was insane at the time of the Ling crimes and found him guilty rather than NGRI or GBMI. Then, during the penalty phase, Applicant re-presented Drs. Wu, Sachy, and Thrasher. (R. pp. 2980-3019, 3048-3119, 3172-98). At this stage, Dr. Wu discussed his PET protocol, software, and analysis in light of Dr. Spicer's critique offered during the State's case-in-reply. (R. pp. 2980-98). Then, he again opined that Applicant showed an approximate 50% decrease in brain activity compared to a normal subject in the floor of the frontal lobe. (R. pp. 2998-3000). He testified as to potential causations: "There is a history in Mr. Stanko's case of his having suffered an incident in which – in his senior year of high school he was struck in the back of his head and was nauseous and had some alternate of conscious. So traumatic brain injury can be one factor. Other factors include developmental brain abnormalities." (R. pp. 3001-01). He testified that "the frontal lobe is not really connected to the rest of the brain until late adolescence or early adulthood" which is why the defect may not manifest itself in one's behavior until a certain age. (R. p. 3003).

Dr. Thrasher returned to the stand to testify in detail about Applicant's birth records and Applicant's mother's medical records from his birth. (R. pp. 3048-95). He opined that annotations of poor reflexes at birth and during Applicant's initial infancy was indicative of something being

wrong in the brain. (R. pp. 3071-72). The records stated Applicant had possible intracranial damage. (R. pp. 3090-91). He testified that it is important to go back to birth records to look for a possible source or cause or initiating event for more current diagnoses. (R. p. 3095).

Then, Dr. Sachy revisited the limbic system, testifying that when there is dysfunction or ill in the brain, the person is affected by not truly being able to choose to change their behavior. He reiterated that Applicant's MRI showed shrinkage in the frontal lobe, and that his PET scans and volumetric brain analysis showed abnormal size in the frontal lobe by four standard deviations. (R. pp. 3172-81). Dr. Sachy testified that Applicant's behavior was a textbook example of being consistent with brain damage in the frontal lobe, which could be seen in Applicant's PET scans showing up to 50% reduction in function. (R. pp. 3181-84). He described Applicant as necessarily lacking empathy. (R. pp. 3184-85). He testified that applicant would not be a danger to other inmates because he would be well-behaved in a structured environment. (R. pp. 3186-88, 3192-93). He went on to explain, during cross-examination, that Applicant had a "sick, broken brain" and that he explained to Applicant that his brain imagery could assist in understanding and figuring out how to treat his defect. (R. pp. 3196-97).

Additional sentencing-phase mitigation was presented by Dr. Evelyn Califf, a qualified family counselor who presented Petitioner's social history and offered opinions about there being dysfunction in Applicant's childhood home. (R. pp. 3277-3304). Trial counsel also presented numerous lay witnesses who offered testimony on Applicant's life and social history and his ability to adapt to prison, each of which will be explained in detail below as it becomes relevant to the issues raised in Applicant's successive application.

C. Direct Appeal

Applicant appealed the following two issues to the South Carolina Supreme Court:

- 1) Did the trial judge err in refusing to allow counsel, during voir dire, to ask potential jurors about their feelings and viewpoints concerning the defense of insanity when insanity was raised as an affirmative defense and the question was asked to reveal juror bias?
- 2) Did the trial judge commit reversible error at sentencing by failing to instruct the jury on the statutory mitigating circumstance provided by S.C. Code Section 16-3-20(C)(b)(7): "The age or mentality of the defendant at the time of the crime?"

The South Carolina Supreme Court affirmed Applicant's conviction and sentence. *State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008). Applicant pursued a petition for rehearing and a petition for a writ of certiorari in the United States Supreme Court which were both denied.

D. Initial PCR Action

Applicant's initial PCR hearing took place before the Honorable W. Jeffrey Young in Georgetown County on April 27 and 28, 2015. Stuart Axelrod, Esquire, and Bobby Frederick, Esquire, served as Applicant's appointed PCR counsel in advance of the initial PCR hearing. Months prior to the hearing date, Applicant had additional representation from pro bono counsel Tristan Shaffer, Esquire. Shaffer was formally added as third chair counsel in a Consent Order issued after the hearing on May 27, 2015.

Applicant's counsel filed a series of amended PCR applications prior to the hearing. The final application, titled the Third Final Amended Application, set forth the claims pursued by Applicant at the initial evidentiary hearing (issues relevant to those raised in the action before this court are bolded for emphasis):

10-11(a) Ineffective Assistance of Trial Counsel in violation of Applicant's Sixth and Fourteenth Amendment rights.

- i. Pursuant to *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039 (1984), Applicant was constructively denied assistance of counsel when Trial Counsel failed to present a meaningful challenge to the State's case at both the guilt and sentencing phases. **Trial Counsel's chosen defense prejudiced Applicant in both the guilt and sentencing phases.**
- ii. **Trial Counsel was ineffective for presenting a defense of not guilty by reason of insanity. Trial Counsel's defense strategy failed to meet the standard of insanity**

- provided for under S.C. Code § 17-24-10. Trial Counsel's only evidence to support the defense of not guilty by reason of insanity was "[e]vidence of a mental disease or defect that [was] manifested only by repeated criminal or other antisocial conduct." Under South Carolina law the evidence was "not sufficient to establish the defense of insanity." *See* S.C. Code § 17-24-10(c). Therefore, Trial Counsel was ineffective in presenting the defense of not guilty by reason of insanity. Applicant was prejudiced by this defense both in the guilt and sentencing phases.
- iii. Trial Counsel was ineffective for failing to object to the characterization of Applicant as an evil person. Throughout the trial, Trial Counsel allowed witnesses and the opposing counsel to refer to Applicant in a negative light including calling him a psychopath and great white shark.
 - iv. Trial Counsel was ineffective for allowing the introduction of evidence concerning Applicant's prior bad acts at the guilt phase. Trial Counsel was ineffective for failing to object to the admission of the facts surrounding the assault on Elizabeth McLendon; evidence of his prior frauds; and other such evidence that will be presented at an evidentiary hearing.
 - v. Trial Counsel was ineffective in failing to request a jury charge on the lesser included offense of Voluntary Manslaughter. Trial Counsel failed to request a jury charge despite the fact that the record contained evidence that would have supported such a charge.
 - vi. Trial Counsel was ineffective in failing to request copies of the images and data analyzed by Dr. Spicer. Trial Counsel was ineffective in failing to investigate by failing to obtain copies of the images and data analyzed by Dr. Spicer. This inhibited Trial Counsel's ability to impeach this evidence.
 - vii. Counsel was ineffective for abandoning the argument and issue as to whether jurors could be questioned concerning their views surrounding the insanity defense. Subsequent to the Court's ruling on the State's objection, counsel indicated he was "abandoning" this line of questioning. Not only did counsel's abandonment fail to preserve the issue for appellate review, but this failure and gross ineffectiveness also denied defense's ability to address and question later jurors on the same and/or similar matters. Applicant will also prove this allegation through other such evidence that will be presented at an evidentiary hearing.
 - viii. Trial counsel failed entirely to properly Motion for a Change of Venue in Applicant's trial. Applicant was prejudiced by the inability to have a fair and unbiased jury. Applicant will show this through demonstrating that of the 116 potential jurors questioned, 72 were excused with 50 people claiming "fixed opinions" in Voir Dire. Applicant will also prove this allegation through other such evidence that will be presented at an evidentiary hearing.
 - ix. Defense counsel failed to investigate, research and challenge State expert[] Pamela Crawford, and her role not only as an expert examining for competency and insanity

but also as the investigative official she played prior to being legally assigned to the case. Prior to being assigned to the case, Pamela Crawford had literally traveled to Columbia, SC and Augusta, GA and had interviewed multiple witnesses, viewed multiple scenes which would later be discussed at trial[], approaching said individuals as a representative of SLED. She approached individuals identifying herself representative of SLED. Having acted in an investigative process of this case, Pamela Crawford could not possibly take an unbiased and/or fair approach to this case. The Applicant will show that Pamela Crawford routinely acts for the State in multiple positions with multiple departments. Pamela Crawford is a prosecutorial tool of the State whose hats, business cards, and lettered wind-breakers change entirely depending on what she is needed for at any given point in a case.

- x. Trial Counsel abandoned the Applicant minutes into Pamela Crawford's multiple interviews. Had counsel stayed for even ten (10) minutes at any of the numerous examinations, he could have and would have seen that Pamela Crawford had in her possession the Applicant's "journals" and other miscellaneous documents that had been provided to her by the prosecution but were not provided in Discovery to the Defense [Counsel. Defense Co]unsel, however, abandoned the Applicant which later allowed Pamela Crawford to make numerous false and highly prejudicial statements during her Court testimony that could not be rebutted.
- xi. Trial Counsel was ineffective in failing to investigate and present mitigating evidence at the sentencing phase. This mitigating evidence includes but is not limited to: information concerning Applicant's past; the possible murder of his brother; and favorable information contained in the DPPPS records; favorable information concerning Applicant's adaptability to prison life; and other such evidence that will be presented at the evidentiary hearing.
- xii. Trial Counsel was ineffective in failing to properly investigate matters concerning his past mental health history. Defense counsel failed to give investigators the additional time and resources to continue in investigating and researching specific relevant matters such as birth records, health/medical records, Dr. Randy Waid (MUSC) and mental health sessions with the Applicant. [sic] health/medical/mental records from the Berkeley County Mental Health Department involving the Applicant, facts and information surrounding a 1986 incident, and other relevant issues.
- xiii. Trial counsel was ineffective in failing to object to the court's decision not to charge S.C. Code § 16-3-20(C)(b)(8). Trial counsel did not object to the trial court's decision not to charge S.C. Code § 16-3-20(C)(b)(8).
- xiv. Trial counsel was ineffective for failing to argue that the evidence in the record supported a charge on the statutory mitigating circumstance of provocation. Trial counsel failed to remind the trial court that the evidence in the record supported a charge on the statutory mitigating circumstance of provocation.

10-11(b) Prosecutorial Misconduct that Violated Applicant's Right to Due Process.

- i. The prosecution knowingly and willingly initiated, presented and allowed false and inaccurate testimony. The prosecution knowingly allowed false testimony concerning the following: Applicant's DPPPS records; Applicant's sanity; Defense witness qualification; and such other evidence that will be demonstrated at trial.
- ii. The prosecution knowingly withheld evidence in violation of Brady and Rule 5, SCRCrimP. The prosecution failed to provide Discovery materials, in their possession, to the Defense including, but not limited to, items taken from the victim's residence (both documentary and electronic file), documents surrounding an incident in which the Applicant was struck in the head by an unopened bottle of beer while he was stopping a fight between two individuals (these documents being extremely relevant as related to the Applicant's defense and because investigators were unable to obtain copies from the small [sic] court that addressed the case and public officials), and other documents to be presented at the evidentiary hearing.

10-11(c) Ineffective Assistance of Appellate Counsel.

- i. Pursuant to *Cronic*, Applicant was denied effective assistance of appellate counsel due to the unreasonable time restraints placed on Appellate Counsel. The South Carolina Supreme Court expedited the appeal of this case and in doing so denied Applicant effective assistance of appellate Counsel under *Cronic*.
- ii. Appellate Counsel was ineffective for failing to brief the improper suppression of the testimony of Dr. Wu concerning the validity of Dr. Spicer's methodology in the sentencing phase.
- iii. As an alternative ground listed in issue 10(a)(xiii) and 10(a)(xiv), appellate counsel was ineffective in failing to argue that the trial court erred in failing to instruct the jury on the statutory mitigating circumstance of provocation contained in S.C. Code § 16-3-20(C)(b)(8).

10-11(e) Other Violations of Constitutional Rights

- i. The Chief Justice of the S.C. Supreme Court violated the Applicant's rights concerning due process and fundamental fairness by ordering an expedited appeal in the Applicant's direct appeal.
- ii. Applicant was denied his right to Due Process in the ways addressed in this Application and such other ways as will be raised at an evidentiary hearing.
- iii. Applicant was denied due process by the failure of the court to instruct the jury on the statutory mitigating circumstance of provocation contained in S.C. Code § 16-3-20(C)(b)(8).
- iv. The cumulative effect of all issues listed above as well as those that will be shown at an evidentiary hearing had the cumulative effect of denying Applicant his right to

counsel, his right to a fair trial, and his right to due process under the State and Federal Constitutions.

Applicant presented testimony from trial counsel Gerald Kelly, appellate counsel Joseph Savitz, and from the mitigation investigator employed by trial counsel prior to trial, Dale Davis. (Apr. 2015 PCR Tr. pp. 20-200). Applicant also presented testimony from Dr. James Thrasher who opined at Applicant's initial trial that Applicant did not have the capacity to conform at the time of the Georgetown County crimes and diagnosed Applicant with antisocial personality disorder, psychopathic type. (Apr. 2015 PCR Tr. p. 252). The State presented testimony from trial counsel Bill Diggs, who was then extensively cross-examined by Applicant's initial PCR counsel. (Apr. 2015 PCR Tr. pp. 293-410).

Judge Young denied relief as to each claim on June 27, 2016. Applicant's counsel filed a Motion to Alter or Amend and for Recusal to which the State Responded. On January 19, 2017, Judge Young denied the post-hearing motions. Notice of appeal followed and that notice remains pending due to the proceedings now before this Court.

III. THE SUCCESSIVE SENTENCING-PHASE ALLEGATIONS

The prejudice prong is not the only portion of the *Strickland* test that has bearing on the outcome of this action. Applicant has chiefly raised sentencing-phase ineffective assistance claims. Applicant's burden as to each of these underlying claims of error is the full two-prong test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). A PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Simpson v. Moore*, 367 S.C. 587, 595-96, 627 S.E.2d 701, 706 (2006) (*abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836). "A reasonable probability is a probability sufficient to undermine confidence in

the outcome” of the trial. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2072. The determination as to deficient performance hinges upon “whether, in light of all the circumstances, the identified acts or omission were outside the wide range of professionally competent assistance.” *Id.* at 690, 104 S.Ct. at 2065.

Relief will not be granted on a showing of mere error—prejudice must also be shown. *Id.* at 687, 104 S.Ct. at 2064. *Strickland*’s standard for “prejudice” differs depending upon whether the underlying claim flows from the guilt phase or the penalty phase. To establish prejudice on these sentencing-phase allegations, Applicant must 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, 104 S.Ct. at 2069; *Wong v. Belmontes*, 558 U.S. 15, 20, 130 S.Ct. 383, 386 (2009) (Applicant “must show a reasonable probability that the jury would have rejected a capital sentence after it weighed the entire body of mitigating evidence [including that presented at PCR] against the entire body of aggravating evidence.”).

Applicant’s specific claims of sentencing-phase error as included in his amended (successive) application dated June 27, 2018 are as follows:

- (1) Counsel elicited expert testimony that Applicant is a psychopath who could not help killing the victim and other testimony tending to dehumanize Applicant in the eyes of the jury, instead of evidence that tended to lessen Applicant’s culpability and humanize Applicant in the eyes of the jury.
- (2) Counsel failed to investigate and present all available mitigating evidence of applicant’s life history and background, including testimony from an appropriate social history expert and/or other appropriate witnesses about how applicant’s history and background affected his behavior, mental state, and functioning over the course of his life
- (3) Counsel failed to investigate and present all available mitigating evidence of

applicant's mental health, including testimony from an appropriate mental health expert and/or other appropriate witnesses about how applicant's mental health/illness affected his behavior, mental state, and functioning over the course of his life.

- (4) Counsel failed to investigate and prepare available mitigating evidence of Applicant's prior good behavior in prison and the likelihood that he would not be a future danger while incarcerated; and
- (5) Counsel failed to object to a legally improper comment made during the State's penalty phase closing, which informed jurors they must impose the death penalty based on the evidence. Tr. 3389 ("And you made a promise to the court that given sufficient evidence, facts and circumstances, you would not only consider the death penalty, but you would impose the death penalty. You have reached that point in the process.")

Second Amended App. for PCR at 2-3 (citations omitted).

This Court believes that the State's case as previously summarized leaves no room to conclude that Applicant's presentation met both of *Strickland's* prongs. This Court believes that Applicant's most recent mitigation presentation is cumulative to that which was already submitted. The balance of aggravating circumstances presented at trial and the mitigating circumstances presented at the evidentiary hearing held by this Court do not undermine confidence in the jury's sentencing recommendation. This is a case like that of *Strickland* where the evidence Applicant "says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented[.]" *Id.* at 699-700, 104 S.Ct. at 2071; *contra Porter v. McCollum*, 558 U.S. 30, 41, 130 S.Ct. 447, 454 (2009) (per curiam) ("The judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability."). None of the claims presented in this action create a reasonable probability that Applicant's sentencer would have "struck a different balance." *See Wiggins v. Smith*, 539 U.S. 510, 513, 123 S.Ct. 2527, 2531 (2003).

A. The Benchmark Legal Principle Controlling Claims (1) – (4)

Regardless of the length and type of information presented to this Court, if "[t]he 'new'

evidence is the same as the 'old' evidence," Applicant cannot succeed in establishing he was prejudiced by initial PCR counsel's representation. *Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998). "At best, it is a fancier mitigation case. If the evidence was not persuasive in the first case, the defendant does not get a second chance. Otherwise, there would never be an end to litigation." *Id.*

Jones lays a persuasive framework for Applicant's present sentencing-phase claims. *Jones* argued his "resentencing counsel were ineffective because they failed to adequately investigate his social history, obtain his mental records, and provide this information to his one expert witness[,] and "because they did not obtain the neurological testing specifically recommended" by that one expert. *Id.* at 332, 504 S.E.2d at 823. "Jones maintain[ed] a complete picture of his mental condition would have established he was . . . entitled [] to a charge on the additional statutory mitigating circumstance." *Id.* But the South Carolina Supreme Court rejected this argument upon application of *Strickland's* prejudice prong to the totality of the evidence placed before the jury and the PCR court. Our court concluded it was not "reasonably likely that the jury's death sentence would have been different if counsel had presented additional information about Jones's mental condition." *Id.* at 833, 504 S.E.2d at 824. It based its decision in part upon the overwhelming evidence of guilt and aggravating circumstances surrounding the murder committed by Jones. *Id.* at 334-35, 504 S.E.2d at 824-25.

But the *Jones* court equally focused on the mitigation presented prior to the PCR. The court found that "extensive evidence was presented at the resentencing hearing about Jones's family and social background through his teacher, mother, two aunts, and uncle. They highlighted the changes that occurred in him after the death of his sister and pointed out his unusual behavior." *Id.* at 335, 504 S.E.2d at 825. The court highlighted the testimony of a clinical psychologist, Jones's lone

expert, who testified in mitigation that Jones “had ‘some mental deficiency,’” scoring low enough on the I.Q. test that only 1.5% of the population would have scored lower than him. *Id.* at 336, 504 S.E.2d at 825. The psychologist testified that when she screened Jones for organic brain damage he scored “‘within a brain damaged range,’ which suggested ‘he does have some problem with the actual functioning of his brain’” including impulsivity and poor judgment. *Id.* Jones also testified during the resentencing hearing. *Id.* at 336-37, 504 S.E.2d at 825-26.

Then, at PCR, Jones presented four additional experts in furtherance of his ineffective assistance claims. He presented (1) a clinical social worker who “testified about the importance of conducting a family and social history” and who also testified “at length about Jones’s upbringing and poor physical and social environment” and his personal impediments. *Id.* at 337-38, 504 S.E.2d at 826. He presented (2) a different clinical psychologist who testified that Jones’s IQ was within the range of mental retardation, he had poor memory, and exhibited signs of both neuropsychological and organic brain dysfunction. *Id.* He presented (3) a neurologist who testified Jones exhibited signs of brain dysfunction and mental retardation, and that Jones did not have normal speech and “had difficulty thinking in abstractions.” *Id.* He finally presented (4) a psychiatrist whose diagnostic impressions “were that Jones suffered from mild mental retardation, organic mental syndrome, and psychotic disorder,” and who further opined that a neuropsychological test, had one been conducted earlier in time, may have been necessary to detect organic brain damage. *Id.*

The court found the PCR presentation was merely “a more elaborate version” of the mitigation evidence of mental incapacity presented to the jury and found “that additional evidence about Jones’s mental impairment would not have revealed anything significantly different than that which the jury was presented.” *Id.* at 339, 504 S.E.2d at 826. Critically, the court decided that

just because trial counsel's initial strategy "was unsuccessful does not mean that Jones can now recharacterize the evidence and claim that counsel did not adequately present mitigation evidence."

Id. at 339, 504 S.E.2d at 827. The *Jones* court concluded:

From the testimony presented, the jurors were aware that Jones was mentally retarded, that he had brain damage, and that he often behaved in a bizarre manner. They were given several mitigating factors through which to consider the mental condition of Jones. They were also presented with overwhelming evidence of Jones's guilt and the callous and heinous way in which Jones calculated and executed the murder. They also considered the other aggravating factors surrounding the murder. Under these circumstances, there is no reasonable probability the sentencer would have concluded the balance of aggravating and mitigating circumstances did not warrant death, even if it had knowledge that, at the time of the murder, Jones was under the influence of a mental disturbance. Accordingly, Jones fails to establish ineffective assistance of counsel under *Strickland*.

Id. at 332 S.C. 329, 339–40, 504 S.E.2d 822, 827.

Applicant's case presents squarely in the same manner as that of *Jones*. And *Jones's* basis for declining to find prejudice from counsel's failure to present additional expert testimony at trial is not confined to one case in one court. When new mitigating evidence is mostly cumulative to the evidence actually heard by the jury, the new evidence necessarily undercuts any claim of deficient performance and prejudice. *Cullen v. Pinholster*, 563 U.S. 170, 200-01, 131 S. Ct. 1388, 1409-10 (2011) ("The 'new' evidence largely duplicated the mitigation evidence at trial" and left "no reasonable probability that the additional evidence Pinholster presented in the state habeas proceeding would have changed the jury's verdict."); *Morva v. Zook*, 821 F.3d 517, 530 (4th Cir. 2016) (same). There should be no finding of a reasonable probability of a different outcome unless a failure to investigate "kept the jury completely in the dark" about some type of mitigating evidence. *Byram v. Ozmint*, 339 F.3d 203, 211 (4th Cir. 2003) ("In light of the wealth of information presented by trial counsel, additional information about Byram's childhood would have added little. There was no 'reasonable probability' that the outcome would have been

different had trial counsel conducted an even more exhaustive investigation into Byram's background. Indeed, the evidence presented before the PCR court was largely cumulative."). The United States Supreme Court has rejected the view that counsel should have presented additional "humanizing evidence" about a defendant, stating that "[a]dditional evidence on these points would have offered an insignificant benefit, if any at all" to the remaining record. *Wong v. Belmontes*, 558 U.S. 15, 22-23, 130 S.Ct. 383, 387-88 (2009); *contra Council v. State*, 380 S.C. 159, 177-79, 670 S.E.2d 356, 365-66 (2008) (citing *Jones*, collecting similar cases, and finding prejudice in counsel's representation when "[t]he only evidence presented in mitigation was Respondent's mother's brief testimony"); *cf. VonDohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004) (finding a reasonable probability of different outcome at trial had counsel broadened their investigation and thereafter presented evidence of an alternative diagnosis and explanation of defendant's mental health condition at the time of the murder).

Speaking to the predicate consideration of whether trial counsel rendered deficient performance, a capital defendant does not enjoy a right to effective assistance of expert witnesses, which is distinguishable from the right to the effective assistance of counsel. *See Poyner v. Murray*, 964 F.2d 1404, 1418-19 (4th Cir. 1992) ("The mere fact that his counsel did not shop around for a psychiatrist willing to testify to the presence of more elaborate psychological disorders simply does not constitute ineffective assistance."); *Campbell v. Polk*, 447 F.3d 270, 285 (4th Cir. 2006) (rejecting malpractice standard for the assistance of appointed experts). It bears noting that capital trial counsel is not obligated to locate an expert willing to offer a more favorable opinion. *Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir. 1998) (finding that attorneys are not required to second-guess the contents of expert reports); *Jones v. Murray*, 947 F.2d 1106, 1114 (4th Cir. 1991) (failure to obtain available records does not show counsel's investigation was inadequate). This means that

neither deficient performance nor prejudice should be presumed merely because counsel did not second-guess the evaluation of a qualified expert. *Byram v. Ozmint*, 339 F.3d at 210 (4th Cir. 2003) (holding that counsel's alleged "failure to 'shop around' for a favorable expert opinion after an evaluation yields little in mitigating evidence does not constitute ineffective assistance"); *McWee v. Weldon*, 283 F.3d 179, 188 (4th Cir. 2002) (stating that investigation-based ineffective assistance claims "must be considered in light of the scarcity of counsel's time and resources in preparing for a sentencing hearing and the reality that counsel must concentrate his efforts on the strongest arguments in favor of mitigation").

Instead, to effect a fair review of counsel's performance, a reviewing court must "eliminate the distorting effects of hindsight" and attempt "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Butler v. State*, 286 S.C. 441, 444-45, 334 S.E.2d 813, 815 (1985). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotations omitted). "When the claim is that counsel failed to present a sufficient mitigating case during sentencing, the inquiry [at PCR] 'is not whether counsel should have presented a mitigation case' but 'whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable.'" *Powell v. Kelly*, 562 F.3d 656, 670 (4th Cir. 2009) (quoting *Wiggins v. Smith*, 539 U.S. 510, 523 (2003)); see *Buckner v. Polk*, 453 F.3d 195, 206-07 (4th Cir. 2006) (concluding the omission of cumulative details was insufficient to show ineffective assistance of counsel); *Moody v. Polk*, 408 F.3d 141, 154 (4th Cir. 2005) (finding no prejudice

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where counsel did not present more evidence concerning petitioner's childhood abuse), *cert. denied*, 546 U.S. 1108 (2006).

B. The Psychopathy Claim (1)

Applicant alleges that the diagnoses introduced by counsel's experts was "inherently aggravating" and thus damaging to his defense. Applicant also alleges that the not guilty by reason of insanity defense presented by trial counsel was "legally unsupportable." (Br. of App. at 12). It bears noting that this allegation is an iteration of claim (ii) pursued by initial PCR counsel. Initial PCR counsel alleged and presented that "trial counsel's defense strategy failed to meet the standard of insanity provided for under S.C. Code Ann. § 17-24-10." (*Ibid* at p. 10 (claim 10/11(a)(ii))). Initial PCR counsel also alleged and presented in allegation (iii) that "trial counsel was ineffective for failing to object to the characterization of Applicant as an evil person . . . including calling him a psychopath and a great white shark." (*Ibid* at p. 11 (claim 10/11(a)(iii))).

Having heard testimony by trial counsel and their mitigation investigator in furtherance of these allegations, the initial PCR court denied this allegation in first instance. *Stanko v. State*, 2008-CP-22-1446 (Or. of Dismissal filed July 15, 2016, at pp. 16-18, 21-37) (this case); *see also Stanko v. State*, 2014-CP-26-00035 (Or. of Dismissal filed May 18, 2016, at pp. 7-8) (Horry County PCR) (finding "references to psychopathy, including testimony from Stanko's expert witness that Stanko is a psychopath, was an attempt to corroborate Stanko's defense of insanity and mitigate his culpability by showing that he could not control his actions" and thus a valid trial strategy articulated by counsel at PCR). This Court thus has before it these claims' prior treatment, as well as the basis for these claims' dismissal, which includes the court's consideration of the balance of aggravating and mitigating circumstances presented at trial.

Applicant presented no different testimony on these claims at this stage in the proceedings.⁷ Since the purpose of this action is to determine whether initial PCR counsel's selection and presentation of PCR allegation prejudiced Applicant, this Court believes that Applicant's copycat presentation of trial counsels' and their mitigation investigator's testimony on this same issue cannot form a basis for relief in this action. See *Robertson, supra* at 521 and nn.14-15, 795 S.E.2d 29, 37 and nn.14-15 (2016).

In any event, *Strickland* instructs deference to the decisions by trial counsel. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense

⁷Also in furtherance of this allegation, Applicant has incorporated the Horry County PCR testimony of Russell Stetler and has presented an affidavit of the same information which was prepared for use in this case. While Mr. Stetler's knowledge of and experience with death penalty cases is quite extensive, this Court finds the his testimony and affidavit are irrelevant, unpersuasive, and of inappropriate construct in the context of the instant case, pursuant to *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008) and *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002).

As to Stetler's heavy recitation of ABA guidelines for capital defense teams, this Court finds that, while the guidelines may be useful in some cases, they do not present a persuasive basis for finding trial counsel's performance deficient in this case. As the *Strickland* Court said,

No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Strickland, 466 U.S. at 688-89, 104 S.Ct. at 2065; *Bobby v. Van Hook*, 558 U.S. 4, 8, 130 S.Ct. 13, 17 (2009) (reaffirming position that ABA Guidelines are "only guides to what reasonableness means, not its definition").

The ABA Guidelines have not been officially adopted by the Supreme Court of South Carolina. "[T]he *Strickland* court makes it clear that the ABA standards, although helpful, are 'only guides' for assessing reasonableness. . . . [Our] Court has never adopted the ABA guidelines as the standard for prevailing professional norms in South Carolina." *Ard v. Catoe*, 372 S.C. 318, 338 n.19, 642 S.E.2d 590, 600 n.19 (2007) (Toal, C.J., dissenting) (citing *Strickland, supra*).

attorneys would not defend a particular client in the same way.” *Strickland v. Washington*, 466 U.S. at 689, 104 S. Ct. at 2065. “[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Watson v. State*, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) (abrogated on other grounds by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018)). The court reviews the strategic decision pursuant to “an objective standard of reasonableness.” *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). “[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.” *Wiggins v. Smith*, 539 U.S. at 521, 123 S. Ct. at 2535 (quoting *Strickland v. Washington*, *supra* at 690-691, 104 S.Ct. at 2052). The court is to “focus on whether the investigation supporting counsel’s decision” on the introduction or non-introduction of mitigating evidence “*was itself reasonable*.” *Id.* at 523, 123 S.Ct. at 2537 (emphasis in original). “In assessing counsel’s investigation, we must conduct an objective review of their performance . . . which includes a context-dependent consideration of the challenged conduct as seen ‘from counsel’s perspective at the time.’” *Id.* (quoting *Strickland v. Washington*, *supra* at 689, 104 S.Ct. at 2052).

Trial counsel Bill Diggs did not come into Applicant’s legal representation as a novice criminal defense attorney. Diggs previously worked at the helm of the Division of Appellate Defense at the South Carolina Commission on Indigent Defense. (PCR Tr. p. 138). He had argued a capital case before the United States Supreme Court and briefed numerous others. (PCR Tr. p. 91). There he worked with David Bruck, a nationally-renowned capital defense attorney. (PCR Tr. p. 139); e.g., David I. Bruck, *A Rarefied Kind of Dread*, 5 J. App. Prac. & Process 75, 80 n.1

(2003); Norman L. Greene et. al., *Capital Punishment in the Age of Terrorism*, 41 Cath. Law. 187, 191 (2002) (published panel discussion). Diggs had tried capital cases as a solo practitioner. (PCR Tr. p. 92). He had also experienced some success as a capital trial attorney, garnering an acquittal in one case and hanging a jury during another sentencing proceeding such that a life sentence resulted. (PCR Tr. p. 137). He believed he and Gerald Kelly acquired two of only a few capital acquittals in what he described as "the modern era of the death penalty" in South Carolina. (PCR Tr. pp. 137-38).

Prior to Applicant's trial, Diggs had tried two death penalty cases with "brain issues" as the defense, and he had a desire to explore this angle in Applicant's case as well. (PCR Tr. pp. 95-97). But Diggs' testimony demonstrates this was not a rash or uninformed decision. "It's just the way that it happened." (PCR Tr. p. 96). Applicant reported to Diggs "that he had blacked out" during an argument with Ling and responded with "the murder or the conduct that followed." (PCR Tr. p. 98-99). Diggs could not imagine that Applicant, who was "a gentle, genuine, nice man" when they spoke, would do "what was done in this case without there being some reason." (PCR Tr. p. 95). Applicant was obviously very intelligent and it caused Diggs to "want to look at that case and figure out what exactly was going on in Stephen's brain at that time that was different from what would be going on in a healthy brain." (PCR Tr. pp. 99, 143). Diggs also assessed that with the "crime scene" in this case, he was "not going to win that case based on his life history" and he needed a different angle for his defense. (PCR Tr. p. 132).

Diggs initiated his investigation, ultimately retaining Drs. Albinia, Thrasher, Gur, Einhorn, Wu, Sachy, and Califf. (PCR Tr. pp. 100-02). Diggs first consulted with two local psychiatrists with whom he had a prior relationship and trusted for advice in legal cases: Drs. Albinia and Thrasher. (PCR Tr. pp. 140-41). In addition to a prior relationship with them, Diggs

perceived a strategic benefit from utilizing local doctors versus only bringing physicians from out-of-state. He believed that the jury may know them or "be in a position to be more accepting of that testimony." (PCR Tr. p. 141). For example, Dr. Thrasher was stationed at Guantanamo Bay at the time of Applicant's birth, so he had a familiarity with the base and the medical facilities there even though he was a psychiatrist and did not deliver Applicant. (PCR Tr. p. 107). Dr. Thrasher's role did not end there, however. Dr. Thrasher also rendered an opinion that Applicant was insane during the time of the Georgetown County crimes. (PCR Tr. p. 107).

Dr. Thrasher referred Diggs to Dr. Sachy, another psychiatrist, who could show brain function, which was Diggs's goal. (PCR Tr. p. 143). Not only could he "explain the condition of Stephen's brain," but he could "demonstrate it with visual evidence." (PCR Tr. p. 105). So Diggs consulted with and hired Dr. Sachy because he came recommended by a local doctor that he trusted and frequently went to for advice and because he could provide a visual representation of an insanity defense. (PCR Tr. pp. 104, 107, 109, 119-20). Consultation with Dr. Sachy connected Diggs to Drs. Wu and Einhorn, who were brought into the case by Dr. Sachy's recommendation to conduct the PET scan which informed their medical opinions. Dr. Wu would create and utilize graphics to assist the experts' explanation of the diagnoses. (PCR Tr. pp. 106, 147-50). Given the possibility, Diggs felt that a visual representation "would be an effective way to present the evidence" from these doctors. He discussed that years and years ago when the law on insanity was discussed or examined "there was no technology available to look at how the brain functioned at the time," but there is now, and he saw no reason why he could not "use brain scans in criminal cases." (PCR Tr. p. 143).

Diggs consulted with still more medical experts, Drs. Gur, Brawley, and Crawford. Dr. Gur was not available to testify because he was deployed at the time of Applicant's Georgetown trial,

but he conducted a volumetric brain analysis from Applicant's MRI and made his report available for other experts to address at trial. (PCR Tr. pp. 134-35, 150-53). Diggs recalled that Drs. Crawford and Brawley were not familiar with the technology he thought was beneficial to his jury presentation, or were not "comfortable in going into that area," and so he did not utilize them for testimony. (PCR Tr. p. 144).

Diggs' testimony demonstrates that while it was his decision to pursue this mental health defense and retain these experts, he was not closeminded about it. He indicated it "could've been changed at any time if it appeared to [him] that it didn't work out or wasn't working out." (PCR Tr. p. 105). His use of Dr. Sachy's expert opinion "was dependent upon whatever developed after" he hired him. He "was always in a position to change that because there were other experts that we had discussed this case with." (PCR Tr. p. 108). But his investigation remained consistent at each and every turn, as exemplified by the testimony and diagnoses of his expert witnesses. (PCR Tr. p. 109; *ibid.* at pp. 8-17). Crucial to his continued investigation and preparation for trial, Diggs found that "each step of the way, as the evidence developed, it fell more in line with what the theory was"—Applicant's brain was not "functioning properly nor in healthy fashion at the time he committed these acts," and "substantiating physical evidence" existed in the form of brain scans to support it. (PCR Tr. p. 145).

The experts all agreed that Applicant had antisocial personality disorder. (PCR Tr. p. 145). Diggs understood that this diagnosis "could be considered as a mitigating factor" depending "on the way it's presented and how it's pursued." (PCR Tr. p. 142). His insanity defense "wasn't solely based on Dr. Sachy's opinion." (PCR Tr. p. 114). He "felt it was appropriate in Stephen's case because he didn't remember what happened. He blacked out. You have multiple medical doctors' expert opinions that he was insane, and we could demonstrate it with visual evidence." (PCR Tr.

p. 124). Comparing the earlier Berkeley County incident for which Applicant was imprisoned, Diggs pointed out that Applicant was “not in his right mind even then” based on the evidence of that offense: he drug his live-in girlfriend by the hair down the hallway as he sang. The facts “fit squarely” with the circumstances of the Ling crimes. (PCR Tr. p. 146). Diggs testified, “guilt implies that there was conscious awareness of what he was doing. I don’t think he was.” (PCR Tr. p. 146).

And although he was chiefly responsible for fact-related mitigation rather than medical or mental-health related mitigation, trial counsel Gerald Kelly likewise recognized that Applicant “was clearly mentally ill.” (PCR Tr. p. 58). Kelly did not answer whether he agreed with the presentation of the insanity defense. He instead testified that he did not think Applicant “was insane at the time of the crime” because Applicant had told him “as much.” (PCR Tr. pp. 56, 59). He recognized, however, that Diggs’s experts examined Applicant and “determined that he had a brain injury,” which fit with Diggs’s theory. (PCR Tr. p. 56). He recalled that Applicant’s diagnosis included a personality disorder, but that the testimony at trial provided reasons for the diagnosis, and it overlapped with the medical diagnoses presented in Applicant’s defense at the guilt phase. (PCR Tr. p. 85).

All of the doctors’ opinions dovetailed. (PCR Tr. pp. 121, 149-50). As Diggs put it, his experts testified that Applicant had an abnormal brain which led to impaired judgment in the area of impulse control. And they did more in the way to offer a medical reason for Applicant’s antisocial personality disorder diagnosis. “They explained why. They explained what that abnormal – abnormality was and how it contributed to this particular incident.” (PCR Tr. pp. 153-54). Diggs’ experts linked Applicant’s frontal lobe abnormality to his birth records and additionally to Applicant being hit in the head with a bottle of beer as a teenager. (PCR Tr. pp 154-

55). As a result, Diggs was successful in getting the jury instructed that they may find Applicant NGRI or GBMI. (PCR Tr. p. 153).

Given the favorable diagnoses and the visual representations in support of them, Diggs assessed that, to him, it did not matter “if it’s as high as 99% of the time that the defense is rejected” because the defense was plainly justified by “the facts here, accompanied by the scans and the video evidence that was put together” to explain why the behavior occurred. (PCR Tr. p. 147). To Diggs, neither the wording of the insanity statute nor the success rate of the insanity defense was “outcome determinative” as to “whether or not insanity needs to be used or pursued in a particular case.” (PCR Tr. p. 124). And his theory was consistent from the guilt phase into sentencing because, as Diggs put it, this case did not present “a situation where it was either/or.” (PCR Tr. p. 122). Counsel would present his insanity defense “at the guilt phase. If the jury didn’t feel like he was insane at that time, certainly that was not reason to eject Dr. Wu or Dr. Gur or Dr. Sachy or Dr. Thrasher. It wasn’t a reason to eject them in terms of mitigating evidence.” (PCR Tr. p. 122). Just because the jury did not find Applicant insane at the guilt phase, it did not make it “inconsistent to accept that evidence as mitigating evidence at the sentencing phase.” (PCR Tr. p. 123).

Diggs understood and wished to show the jury that the images put together by the doctors showed that Applicant’s fully-engaged brain had a level of activity “well below what it should have been in terms of a normal scale.” (PCR Tr. p. 149; *id.* at p. 117). Diggs understood that the affected area “is the same area that would have regulated the limbic system” but because the “brain didn’t operate or didn’t function properly there, that – that impulse drove his conduct.” (PCR Tr. p. 149). “It wasn’t an analysis in his frontal lobes that would have occurred in a normal, healthy brain, and that’s why he committed the offense that that’s why he blacked out and doesn’t remember it.” (PCR Tr. p. 149). Diggs also articulated that to compare the brain to a reptile was

to explain an inability to regulate impulse. It was a reference to or explanation of the limbic system where Applicant's brain defect was located. (PCR Tr. p. 127). Diggs plainly failed to agree that the terminology was offensive and inappropriate in the context of Applicant's case because the limbic system was "where that killer instinct or impulse came from in Stephen." (PCR Tr. p. 127). Applicant could not regulate his impulses. (PCR Tr. pp. 129-30).

As for Dr. Sachy's psychopath testimony, Diggs testified that characterization was not the defense that he had planned to portray. (PCR Tr. p. 106). He testified he "cringed about it" when Dr. Sachy began testifying that he diagnosed Applicant as a psychopath. (PCR Tr. pp. 105-06). He "didn't know he was going to use that word in that circumstance." (PCR Tr. p. 112). However, Diggs recognized Dr. Sachy "was an expert. He made a decision to use that word, but, you know, I don't think a psychopath chooses to be a psychopath." (PCR Tr. p. 106). He also testified that it did not occur to him "to say don't use the word psychopath because that might be taken in a[n] adverse way by the jury" because the condition is "something other than a conscious decision." (PCR Tr. pp. 112-13). Diggs testified: "So I think to be honest about what the circumstances are is not a bad thing in a case like that." (PCR Tr. p. 113). He believed the testimony was consistent with the theory of the case and "consistent with his opinion of the case with respect to what the physical evidence showed and what the scans showed." (PCR Tr. pp. 129-32).

Further, Diggs testified that he understood his job as counsel was "to kind of select who" the experts "were going to be," *not* "to tell them what to do." (PCR Tr. p. 111). You assist your witnesses to prepare to testify at trial, but "you don't tell a doctor how to testify about his area of expertise." (PCR Tr. p. 111). He felt "it would have been malpractice" and a "mistake not to present" the evidence of a brain defect despite the statistics he understood to be against it, because

the evidence he had was “strong” and the State’s expert even confirmed it. (PCR Tr. pp. 121, 155-56). Therefore, Diggs’s assessment is correct as a matter of law.

Trial counsel’s testimony demonstrates an ample investigation seeking to rationalize Applicant’s behavior to the jury. “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” *Strickland v. Washington*, 466 U.S. at 688-689. “Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” *Id.* at 691. Accordingly, “when counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel.” *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis in original).

Counsel demonstrated a reasonable belief that Applicant had a valid mental health defense. His belief was reasonably spawned by a consultation with his client, who informed him he blacked out during the events at the Ling home. So counsel retained a battery of well-credentialed medical experts who informed him, in their professional expert opinions, that Applicant had a frontal lobe brain defect that was not his fault *and* that Applicant was legally insane at the time of the Ling offenses. Applicant’s evidentiary presentation included testimony from psychiatrists who personally interviewed and conducted a battery of tests upon Applicant, as well as brain-scan imagery from both MRI and a PET scans, and additional well-credentialed expert testimony explaining how the medical diagnoses were visually manifested within the images themselves. Counsel also demonstrated before the jury a connection between the insanity defense and Applicant’s past medical records which indicated probable or possible intracranial damage and other ill conditions at birth, along with Applicant’s sustaining head injury from a beer bottle as a

teenager. The record shows counsel consistently presented all of this evidence to the jury in the guilt and sentencing phases of the capital trial, both as a complete defense in the guilt phase and as mitigation in the penalty phase. (*Ibid.* at pp. 8-17).

Given the remainder of Applicant's rather ordinary social history, his past criminal acts which would be introduced in aggravation, and the brutality of the crime scene, there was no remaining defense to the crimes, and no other real mitigation to the overwhelming evidence in aggravation set forth above. To the extent Applicant alleges the presentation of multiple diagnoses of antisocial personality disorder was dehumanizing and prejudicial, trial counsel's testimony demonstrates a reasonable and professionally sound tactical decision to assign a medically diagnosed reason to Applicant's wayward behavior. It was not ineffective assistance of counsel to offer this defense nor has applicant offered any alternative to this defense under the totality of the facts of this case.

Foremost, antisocial personality disorder is recognized under South Carolina law as a diagnosis warranting jury instruction on certain mitigating factors. *State v. Caldwell*, 300 S.C. 494, 506, 388 S.E.2d 816, 823 (1990) (decided *in favorem vitae*). Diggs knew and understood this. (PCR Tr. p. 142). In *Caldwell*, the defense's psychiatrist testified that he examined the defendant and opined that the defendant "had an antisocial personality which is synonymous with a psychopathic personality. [The psychiatrist] described the condition as one in which an individual is not constrained by societal norms for behavior and therefore is unlikely to obey rules on his own." *Id.* The court held that "because this evidence raised the inference that Caldwell was suffering from a mental disorder *at the time* the murder was committed, the trial judge erred in failing to instruct the statutory mitigating circumstances pursuant to Sections 16-3-20(C)(b)(2), (6), and (7)." *Id.* at 506-07, 388 S.E.2d at 823 (emphasis in original). These mitigating factors are

(2) the murder was committed while the defendant was under the influence of mental or emotional disturbance; (6) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (7) the age or mentality of the defendant at the time of the crime. S.C. Code Ann. § 160-3-20(C)(b).

It is important to distinguish that the chosen defense of insanity did not apply in the same manner at the guilt and penalty phases. In the penalty phase the insanity defense obtained favorable instruction on the aforementioned statutory mitigating factors. In the guilt phase, the standard differed. The goal at the guilt phase was to obtain a jury instruction that Applicant could be found not guilty by reason of insanity which is an affirmative defense defined within S.C. Code Ann. § 17-24-20. Applicant succeeded here as well. Given the totality of the evidence and the mitigation he had to work with, Diggs did not feel bound to the confines of the statute. As trial counsel testified, he was aware of the statutory provision but did not feel it was outcome dispositive “as to whether or not insanity needs to be used or pursued in a particular case.” (PCR Tr. p. 124). Counsel was instead “trying to say he was insane in the guilt phase because he wasn’t aware of what was . . . happening.” (PCR Tr. p. 123). And at this point, the State’s aggravating evidence of Applicant’s prior, repeated criminal conduct had not in fact been introduced.⁸ (*Ibid.* at 81-82).

At the root of this sentencing-phase ineffective assistance claim is the reasonable tactical decision trial counsel made to put forth consistent evidence of Applicant’s insanity diagnoses in both phases, and to have doctors explain what it was that made him that way, so that the jury had

⁸ More, Dr. Wu’s 2019 PCR testimony opined that Applicant had undiagnosed temporal lobe epilepsy, but the only manifestation to which Dr. Wu could testify came in the form of the same criminal or antisocial conduct relied upon by Applicant at trial in 2006 and complained of as deficient by both present and initial PCR counsel. (PCR Tr. pp. 310, 334-35, 338). Simply put, there is no other manifested evidence of any diagnosis rendered in the past thirteen years of capital litigation in Applicant’s case.

a reason to choose life imprisonment over death. Evidence of his personality disorder may not have made defendant any more likable, but it might have helped the jury understand him and his horrendous acts. *Sears v. Upton*, 561 U.S. 945, 951, 130 S.Ct. 3259, 3264 (2010). To this end, Applicant's "claim that counsel failed to perceive what was mitigating and what was aggravating ignores counsel's testimony, which revealed that counsel was well aware of the complexity and attempted to blunt the effect of the diagnosis." *Commonwealth v. Robinson*, 623 Pa. 345, 379 n.11, 82 A.3d 998, 1018 n.11 (2013). The fact that the experts consistently diagnosed Applicant with antisocial personality disorder does not bear on counsel's effectiveness in his investigation and preparation of Applicant's defense. *Id.* at 377-81, 82 A.3d at 1017-19 (holding counsel was not ineffective for introducing diagnosis of anti-social personality disorder as mitigating evidence in the penalty phase of capital trial given the record in the case, for it humanized the defendant and explained why he was the way he was); *Ward v. State*, 969 N.E.2d 46, 57-59 (Ind. 2012) (holding counsel's decision to pursue diagnosis of psychopathy as mitigating evidence not deficient performance; while evidence of psychopathy might not have made defendant any more likable, it at least attempted to assist the jury in understanding the defendant and it explained his horrendous acts and his documented lack of emotion on the day of the offenses; and defendant suffered no prejudice as the totality of the mitigating evidence produced at trial and at the PCR hearing were outweighed by the aggravating circumstances).

"The fact that [his experts] also provided some damaging testimony does not mean that the decision to use him as a witness fell below an objective standard of reasonableness. Rather, it presented a strategic decision." *Beardslee v. Woodford*, 358 F.3d 560, 583 (9th Cir.), *supplemented sub nom. Beardslee v. Brown*, 393 F.3d 1032 (9th Cir. 2004) (holding counsel not ineffective for calling expert who presented extensive evidence that defendant was a sociopath where that

testimony provided useful mitigating evidence including an explanation for defendant's failure to show remorse, testimony of his good behavior in prison, and physical and psychological explanations for his antisocial behavior); *Carter v. Bradshaw*, 2015 W.L. 5752139 at *35-36 (N.D. Ohio 2015) (Slip Opinion) (holding counsel was not ineffective in offering mitigation evidence of psychopathy diagnosis as expert related diagnosis to developmental and medical issues in capital defendant's life and those factors were beyond capital defendant's control). Still "other courts have specifically recognized that evidence of antisocial personality disorder can be considered mitigating evidence" because it serves as a response to the prosecution's claims of malice and intent.⁹ *Ford v. Schofield*, 488 F. Supp. 2d 1258, 1349 (N.D. Ga. 2007), *aff'd sub nom. Ford v. Hall*, 546 F.3d 1326 (11th Cir. 2008) (collecting cases: *Mobley v. Head*, 306 F.3d 1096, 1098 n.1 (11th Cir. 2002) (Tjoflat, J., dissenting) (evidence of antisocial personality disorder introduced as mitigating evidence); *Brownlee v. Haley*, 306 F.3d 1043, 1072-73 (11th Cir. 2002) ("[The] jury could have found a mitigating circumstance based on Brownlee's borderline intellectual functioning and psychiatric disorders, which, again, included . . . antisocial personality disorder.") (citing *Clisby v. State*, 456 So.2d 99, 102 (Ala.Crim.App. 1983) (stating that evidence of psychiatric disorders such as antisocial personality "must be considered as relevant mitigating evidence")); *Smith v. Stewart*, 140 F.3d 1263, 1270 (9th Cir. 1998) (recognizing that antisocial personality disorder is a mitigating factor under Arizona death penalty sentencing law)).

⁹ Other jurisdictions do acknowledge that "evidence of an antisocial personality disorder may be highly damaging," but they also note that competent counsel can regularly evaluate the potential impact of psychiatric testimony. *Atwood v. Ryan*, 870 F.3d 1033, 1063 (9th Cir. 2017); *e.g.*, *Crittenden v. Ayers*, 624 F.3d 943, 968 n.15 (9th Cir. 2010) (holding that counsel made a reasonable decision to keep evidence of a defendant's antisocial personality disorder away from sentencing jury). *Ford v. Schofield*, *infra* at 1349 ("Testimony such as this is a double-edged sword."). Each court's determination must be case-by-case and must afford deference to trial counsel's articulable decision-making as *Strickland* demands that hindsight not govern the outcome of deficient performance allegations. 466 U.S. at 689, 104 S.Ct. at 2065.

Applicant also assigns error by essentially alleging trial counsel failed to object to his own witness testimony which Applicant labels as dehumanizing. But the characterizations of Applicant's diagnosis, whether by his own experts or by the State, were legitimately related to his mental illness and personality disorder and formed a legitimate case in mitigation. It is clear that Dr. Sachy made these references to support his diagnosis in light of the facts of Applicant's case and his demonstrable history of engaging in antisocial behavior. The record and testimony established that counsel did not intentionally elicit these responses or comparisons. Moreover, Applicant enjoys no constitutional right to the effective assistance of an expert witness. *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998) ("The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness.") (citing *Harris v. Vasquez*, 949 F.2d 1497, 1518 (9th Cir. 1990) and *Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir. 1990)); see *Poyner v. Murray*, *supra*; see *Campbell v. Polk*, 447 F.3d 270, 285 (4th Cir. 2006) (refusing to read a malpractice standard for the assistance of appointed experts into existing United States Supreme Court case law). The Fourth Circuit has observed that

It will nearly always be possible in cases involving the basic human emotions to find one expert witness who disagrees with another and to procure an affidavit to that effect from the second prospective witness. To inaugurate a constitutional or procedural rule of an ineffective expert witness in lieu of the constitutional standard of an ineffective attorney, we think, is going further than the federal procedural demands of a fair trial and the constitution require.

Waye v. Murray, 884 F.2d 765, 766-67 (4th Cir. 1989) (*per curiam*).

Thus, counsel is also not incompetent for relying on the experts he retained and consulted. "To be reasonably effective, counsel was not required to second-guess the contents of" his expert's report(s). *Wilson v. Greene*, *supra* at 403; *Williams v. Allen*, 598 F.3d 778, 790 (11th Cir. 2010) (holding counsel was not ineffective in arguing for insanity where the defense was supported by two experts); *Forsyth v. Ault*, 537 F.3d 887, 892 (9th Cir. 2008) (holding trial counsel not required

to expert shop).

Applicant takes an academic approach to advocate for relief. (E.g., Br. of App. at 17). However, Applicant offers no practical alternative to the defense theory thoroughly and purposefully presented at trial. It is logical to conclude at this juncture that there exists no other option for Applicant's defense. Given the information investigated and made available to counsel by a litany of medical experts prior to trial, counsel made an objectively reasonable strategic trial decision to present as mitigation evidence of Applicant's mental diagnoses and defects, which necessarily includes a diagnosis of antisocial personality disorder. This disorder is also medically recognized as psychopathy. Without this testimony, "appellant's case in mitigation would have been paltry, especially in the face of the mountain of aggravating circumstances. Had counsel acted as appellant now says he should have, counsel no doubt would be faulted for failing to present" these expert opinions and diagnoses. *Commonwealth v. Robinson*, *supra* at 380, 82 A.3d at 1019; *Magill v. Dugger*, 824 F.2d 879, 889 (11th Cir. 1987) (finding impulsivity was the most compelling evidence that the defendant could have offered in mitigation and that trial counsel was ineffective for failing to present expert testimony that the defendant was "explosive" and "a time bomb").

Attorney errors "cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid." *Strickland v. Washington*, 466 U.S. at 693, 104 S. Ct. at 2067. The record demonstrates that at all stages, trial counsel reasonably bolstered his pursuit of this defense through a network of able expert witnesses who at all times worked to explain the reason why Applicant committed the criminal acts. This defense explained much of Applicant's past and current behaviors in such a manner as would diffuse some of the aggravating effect the State hoped to gain from such

evidence in the penalty phase. Applicant was described by these experts as not choosing to be medically and mentally ill, but rather that he had the condition thrust upon him. The fact that the defense was unsuccessful does not mean counsel was ineffective, and Applicant has failed to meet *Strickland's* burden of demonstrating deficient performance and prejudice from the defense presented. *Stitt v. United States*, 369 F.Supp.2d 679, 686 (E.D. Va. 2005) *aff'd*, 441 F.3d 297 (4th Cir. 2006) *opinion recalled*, 459 F.2d 483 (4th Cir. 2006) *and aff'd*, 552 F.2d 345 (4th Cir. 2008) (Defendant was not entitled to relief on claim of a deficient mitigation investigation where aggravating factors in the case were overwhelming, mitigating factors were unremarkable, and there was no indication that change in psychopathy evidence would have outweighed aggravating factors); *Bullock v. Whitley*, 53 F.3d 697, 701-02 (5th Cir. 1995) (finding that even if the defense had virtually no chance of success, petitioner failed to overcome presumption of effective assistance, and the insanity plea permitted introduction of evidence of troubled past to curry sympathy in a strong capital case).

C. The Life History Mitigation Claim (2)

Applicant most concisely posits that the life history mitigation presented during the trial's penalty phase presented "the jury with only general testimony that Stanko had a dysfunctional family with a strict father." (Br. of App. at 28). Because he has this time presented the bulk of his life history through a licensed social worker, Applicant reasons that he has met his burden of demonstrating deficient performance and prejudice from the life history presentation forged by trial counsel. Applicant has not met his burden by simply recharacterizing the evidence previously presented.

"Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a

disadvantaged background may be less culpable than defendants who have no such excuse.” *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 2947 (1989). “Important sentencing phase considerations include 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.’” *Weik v. State*, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014) (emphasis in original) (quoting *Wiggins v. Smith*, 539 U.S. at 524, 123 S.Ct. at 2537). In *Weik*, the South Carolina Supreme Court assigned prejudicial error to counsel’s failure “to present even a skeletal version of Petitioner’s social history even though there was abundant social history evidence available to them.” *Id.* at 235, 761 S.E.2d at 768.

“Any competent counsel knows the importance of thoroughly investigating and presenting mitigating evidence.” *Id.* at 234, 761 S.E.2d at 767 (quoting *Romano v. Gibson*, 239 F.3d 1156 (10th Cir. 2001)). “But there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties.” *Bobby v. Van Hook*, 558 U.S. 4, 11, 130 S. Ct. 13, 19 (2009).

Applicant’s trial counsel struck a balance between these two penalty-phase maxims. Before this Court, trial counsel Gerald Kelly explained he hired a mitigation investigator and a fact investigator who each reported to him. (PCR Tr. p. 55). Kelly clearly delineated his and his investigators’ role in the mitigation phase of trial: “If it had to do with the facts of the crime, anything that took place in Georgetown County, I had to do with it. If it had to do with anything medical or anything of that type that you could call medical, we just passed anything on [to Diggs].” (PCR Tr. p. 76). Kelly was therefore responsible for Applicant’s social history and personal background.

Kelly explained to this Court separate mitigating factors about Applicant’s life history and

explained how they were relevant to Applicant's penalty-phase defense. He testified that Applicant suffered no reported abuse or other remarkable hardship during his youth, but he had a strict father. (PCR Tr. p. 76). Describing the father as alienating, Kelly testified: "His father was dominating, and his father drove a wedge between the women of the family and Stanko. He didn't want him around. He wanted him out. He didn't support him. He didn't help him when he got out of prison. He didn't try to help him through." (PCR Tr. p. 74).

Kelly testified Applicant had earlier served a prison sentence for a situation similar to the history in Georgetown County in the sense that he was unable to cope on an economic level. He couldn't hold a job. He had to rely on others for a place to live, and he relied on her [the first female victim]. And that the — he became, in her case, demanding, and that was a quality that he exhibited as the stress mounted on him. . . . And instead of pulling back, it ignited.

(PCR Tr. p. 77).

So Kelly developed a purposeful theory of mitigation to show the jury "exactly what happened, the history of it," meaning what happened after Applicant's release from his first prison sentence that led to his recidivism and the ignition in the Ling home. Kelly wished to attribute this ignition in part to law enforcement's non-responsiveness to citizen complaints. (PCR Tr. pp. 78-80). Counsel "felt like it was small, but it was something that might turn a juror because he wasn't receiving any help, and the police, the Sheriff's Department, whoever it happened to be, they weren't reacting to it. If they'd have stepped in, they'd have stopped him." (PCR Tr. p. 80).

Lead counsel Bill Diggs echoed Kelly's assessment and preparation, testifying that Applicant's intelligence and popularity during high school was "kind of like a double-edged sword"—"if you rely solely on his life history, it creates a problem" because it does not explain what caused the Ling crimes. (PCR Tr. p. 157).

Furthermore, Applicant and his family did not always help with any investigation. According to Kelly, "Stanko concealed his activities from us" and was not forthcoming with

counsel. (PCR Tr. p. 79). Testimony showed that Applicant's family also would not attend. Applicant's trial team contacted and met with Applicant's family to prepare. (PCR Tr. pp. 74-75). But as trial counsel Gerald Kelly testified: "They would not make themselves available." (PCR Tr. p. 74). Davis recollected that she herself asked the family to attend the trial, "but only as a formality because [she] knew they wouldn't" attend. (PCR Tr. p. 201). Specifically as to Jeff Stanko, Davis testified she met him in Atlanta and assessed that "he just didn't want anything to do with it," or "anything more to do with Stephen." (PCR Tr. p. 203). She testified that she was responsible for contacting the family and believed he was asked to attend and declined. (PCR Tr. pp. 203-04).

Kelly assessed Davis' work with high esteem, noting he'd previously worked with her and trusted her to be thorough in her practice. (PCR Tr. pp. 60, 81). Davis testified before this Court that she would have created the following mitigation presentation for the jury as it pertains to her records collection in Applicant's case:

Well, it would be quite in-depth based on the records, but I think I would – you would begin with his childhood and the situation. His father was in the military. We'd talk about that. His father was kind of a stern person and that when he would have qualified for college, his father wouldn't allow tax returns to be used so that he could get financial aid. We'd talk about how successful he was in high school.

Then about you're not sure if the brain injury could have been at birth or the brain injury could have been from licks. You're really not sure where the brain injury came from, but it was certainly there and it affected his behavior, one being that the first incident with the girlfriend and the way she described it even at trial was very similar to the situation that happened in Georgetown County.

To me, it seemed I just couldn't get my head around it. He left and went to Augusta, knowing that his face was all over the news, in a stolen truck, and made no attempt whatever to hide. Instead of taking off for Canada or Mexico or somewhere, he just went to Augusta and was just like he just moved there and was taking up residence.

I mean none of those things signify to me a brain that's functioning properly. And so you can – you can frame things in a way. You're never going to get away from those. I don't think we would've ever used the psychopath, but he certainly had the antisocial personality disorder. I mean you acknowledge those

things, but you can – you know, you can frame things different ways and make – make somebody know about him. About his whole life, instead of just all these separate things.

(PCR Tr. pp. 196-97).

Trial counsel presented the fruits of mitigation investigator Dale Davis' research into Applicant's life history at trial. Counsel hired Dr. Evelyn Califf, a licensed family counselor whose practice included family court mediations, teaching, counseling, and assessments and evaluations of family dynamics in dysfunctional families. (R. pp. 3278-83). She had testified in the Fifteenth Judicial Circuit several times prior to Applicant's trial. (R. p. 3295). As for trial preparation, Dr. Califf made known during cross-examination that she "could not get Mr. Jeffrey [Stanko, Applicant's brother,] on the phone" in the weeks prior to trial. (R. p. 3296). Nor could she succeed in getting in touch with his parents or sisters. But she did meet with Applicant and Dale Davis, read all of the reports and records provided, as well as emails from Applicant's one sister. (R. pp. 3296-99).

Dr. Califf opined before the jury that Applicant's family absolutely showed signs of dysfunction, which she defined as anything, including a rigid (dogmatic) family system, which causes a family "not to be a family or to be able to operate or to live and to do a good job with their children." (R. pp. 3281-83). To put her opinion into context, Dr. Califf presented Applicant's family genogram. (R. p. 3283). Dr. Califf identified Applicant's father's "rigidity" as the main issue causing family dysfunction. She stated his "more military" way of being with the family "was the hardest for the children." (R. p. 3284). "He seemed to in many cases reject some of his children and their ways. If – if the child did not do something that he wanted the child to do, he would withdraw. And it was almost like -- we call it abuse when someone gets very silent and does not speak to you." (R. pp. 3284-85). Dr. Califf "found that was one of the overriding issues with"

Applicant, as he could never get enough approval or kindness or attention from his father. (R. pp. 3284-85).

Dr. Califf testified Applicant had not spoken to his father for ten years because "he displeased his father even though he was good in school and did really well up until he did not get into the military academy." (R. p. 3286). She plainly testified that Applicant had vision problems, "so when he did not get into the military academy, he became rather depressed," and his father stopped supporting him. (R. pp. 3286-87). At that point, Dr. Califf assessed, Applicant "went downward." (R. p. 3287). Dr. Califf expounded:

If you begin to not be approved of and you still are trying so hard to get approval from someone and you begin to look at those things, you start building yourself up. And I thought it was really interesting on those who have assessed Mr. Stanko that most all of the time they came in with narcissistic personality disorder, and I can understand that because it's truly . . . it means that you really think you're great and you're always grandioso, and -- but actually what that means is not that. What it means is many different things, but most of the time you have low self-esteem, when you do not feel that you have -- inside that you have any real good things about you.

. . . And another contributing thing there was when his -- when his brother was killed because he was very close to him. And I believe that both of those things, but particularly himself, when I interviewed him, it was the only time I saw some real feelings from him is when we talked about that. And that goes into, when you see a person exaggerate, when you see them be a pathological liar because they're holding themselves up, and they are also telling everybody else what they do and they can do this and they can do that, . . . it is understandable. And what we try to do is to get people to see what the truth is, and you then know who you are and your real self, you get in there and you don't have to depend on another person for your identity, but somebody has to lead you that way when you come up in a very rigid home, and that's all the person you wanted to please.

(R. pp. 3290-94).

This family counselor recognized that throughout Applicant's young life at home, he was getting good grades, so he was getting support outside of the home in some respects. (R. pp. 3293-94). But she opined that Applicant never really got much support from his family because while

he was getting some from his mother at home, "she could not intercede between the father who was her charge and the enabler for him." (R. p. 3293). Dr. Califf testified that there "are down to earth things" she sees "every week" that may have a damaging effect on a person's development, such as Applicant's jaundice at birth, or the mental defects presented earlier at trial. (R. pp. 3291-95). She ultimately opined during cross-examination that

[H]e failed to develop because he was in a dysfunction situation, and his particular personality and the location in the family for whatever reason – because I was not there – but the functioning of that family caused him to – to – to do things that he had – lacking of the attention that he needed, and therefore he did not develop on forward.

But when he received it out of other people, he did thrive because you can look at those records and you can find that out. [] And you also know that when he thrived, the only time – every record shows that he had any problems was when he failed there or when he was hit in the head with a bottle.

(R. pp. 3301-02 (omitting interjection by counsel)).

With the beer bottle incident, Dr. Califf testified she asked the mitigation specialist for follow-up records because before he got out of high school, "it appeared that when he was hit in the head with a bottle that that had some problems," but there were no records to assist in assessing the damage. (R. pp. 3302-03). In fact, at this stage, trial counsel re-called Dale Davis to testify that she made at least seven attempts to garner the beer bottle records but they could not be obtained from the Charleston Naval Hospital where he sought emergency treatment.¹⁰ (R. p. 3305). She had eyewitness sources regarding the incident, which occurred during the end of his junior year or during his senior year of high school. (R. p. 3306). Davis had earlier been called to give testimony demonstrating that she collected the totality of Applicant's in-patient birth records from the

¹⁰ Applicant's expert at this hearing, Dr. Arlene Andrews, could not uncover these medical records nor those pertaining to a prior mental health treatment at the Medical University of South Carolina. (PCR Tr. p. 352).

Guantanamo Bay military base in Cuba. Despite seven different attempts, Applicant's other outpatient records could not be located due to his family's movements with the military. (R. pp. 3126-27).

As to the rest of the family, Dr. Califf noted they were a middle class family in relatively good health, but that they could each benefit from some counseling. (R. p. 3288). She assessed that Applicant's siblings each dealt with their father's personality differently. One or two rebelled at times, and another sibling was fearful to stand up on her own and risk losing her father's approval. (R. p. 3285).

Trial counsel complemented Califf's testimony with additional firsthand accounts of Applicant's behavior as a child and adolescent who grew up with his family in suburban Goose Creek, South Carolina. (R. pp. 2882-2923). The assistant principal at Applicant's high school testified about his good academic performance and multitude of extracurricular involvements. (R. pp. 2883-93). Applicant's high school physics and AP chemistry teacher testified that he was a leader, involved in activities, excelled academically, had potential and excellent manners, and demonstrated respect to teachers and peers. (R. pp. 2898-99, *id.* at 2906-07).

Applicant's neighbor Wanda Brooks testified that Applicant lived with his parents, his brother Jeff, and his sister Cindy in a suburban single-family home in a subdivision alongside other military personnel. (R. pp. 2913-14). Applicant was about twelve at this time, and remained as Brooks' neighbor through high school. (R. p. 2915). Brooks testified that Applicant and his brother Jeff would visit her home to play games and sports with her children and family and to swim in her pool. (R. pp. 2914-16). She testified Applicant was well-behaved and she felt comfortable having him around her home. (R. pp. 2915-16). Brooks was aware that Applicant did not get into the Air Force Academy because he personally talked to her about it. (R. p. 2920). Applicant

expressed that he was very upset because it was a major life goal of his and he did not accomplish it. (R. p. 2920).

She testified she was aware that the other brother, Billy, had some troubles and did not live with the rest of the family. (R. p. 2914). Brooks stated that when Billy "died in a fire," Applicant and Jeff "showed very little emotion about anything. It was just like everything was suppressed, you know. I mean, it was like they had gone into a depression . . ." (R. p. 2919).

She testified that Applicant never talked about his parents around her, but she noticed that the Stanko home did not get many visitors compared to her own. (R. p. 2917). Specifically as to Applicant's father, Brooks testified that he was a disciplinarian, smart, intimidating, and acted unusual "several times." (R. pp. 2921-22). Brooks recounted he would go "berserk and yelled at the kids" when a firecracker would go off near his house on the Fourth of July or New Year's Eve. (R. p. 2922). She did not recall seeing Applicant's father getting involved with any of Applicant's sports. (R. p. 2922).

Trial counsel additionally coupled Califf's testimony with accounts by individuals who experienced or had received reports of Applicant's cons and schemes. Others testified about Applicant's gaining insurance coverage and calling a psychotherapist prior to the Ling incident. (R. pp. 2797-81, 2924-49, 3020-38, 3044-47, 3130-69, 3199-3276). This testimony demonstrated Applicant's functioning and behavior during the critical time period prior to the Ling crimes, as trial counsel testified at PCR that he aimed to do. (PCR Tr. pp. 78-81).

Connie Price, one victim of Applicant's frauds, testified that she began calling authorities because she was concerned with Applicant's "pretty bizarre" behavior which came to affect her on a near daily basis, including one time when Applicant claimed he had visited a doctor but obviously had just self-applied Band-Aids. (R. pp. 2813-14). Price's friend Gary Owens echoed

this testimony, speaking about Applicant's erratic behavior a few days prior to the Ling crimes, about Applicant's lies of a grandiose lifestyle, and about Applicant's collection of retainers to pursue legal actions that never panned out. The witness recalled meeting with law enforcement the morning before the Ling crimes to ask for Applicant's activity to be investigated. (R. pp. 3262-73). One former assistant solicitor testified Applicant's name was well known to his office prior to the Ling events. (R. p. 2946).

Probation agents testified about Applicant's stint in community supervision leading up to the Ling crimes. Applicant failed to report in December and January of 2005 and was in arrears on his supervision fees. (R. pp. 3144-45, 3209-11). Prior to those dates, in October 2004, Applicant reported he wanted to move to North Carolina with his brother.¹¹ (R. p. 3233). At least one agent had warned him of the consequences of the failure to report *and* of the consequences of the complaints, if true, about his unauthorized practice of law. (3211-21). One probation agent testified that Applicant did not present himself as being in need of mental health counseling, but that a January 2005 entry from a meeting with Applicant showed that he intended to begin counseling at a specific location, and probation had in February 2005 given Applicant the names of three separate mental health counselors as references to assist with his re-integration. (R. pp. 3226-28). On April 5, 2009, Applicant reported he had begun counseling—the Ling crimes occurred on April 8. (R. p. 3229). In March 2005, one month before the crimes, Applicant reported to his agent he had voluntarily enrolled in counseling. (R. pp. 3238).

Thresla Dewitt testified Ling added Applicant to her health insurance as her common-law

¹¹ This information was elicited by the Solicitor's cross-examination but nonetheless was presented during Applicant's sentencing-phase mitigation presentation and was before the jury's consideration. The cross-examination of this witness otherwise continually pointed out that Applicant presented no disciplinary problems, was current on all fees by February 2005 and had a good attitude with the exception of one "cocky" occasion. (R. pp. 3231-3229).

husband so that he was eligible to receive mental health benefits. (R. pp. 2877-78). And a psychotherapist in private practice testified that Applicant made a call to her office in April just prior to the Ling crimes. (R. pp. 3045-47). Elsewhere during the sentencing phase, trial counsel put forth extensive testimony about Applicant's and his mother's health at birth and during his immediate infancy. (R. pp. 3049-95).

Yet Applicant now contends the mitigation presentation was prejudicial and deficient, that it was cursory regarding the father, and that it omitted familial accounts from Applicant's brother Jeff and the seven pages of Horry County testimony from Bryan Wilson, a high school teammate who was there when Applicant got hit in the head with a beer bottle.¹² An examination of the life history and background presented and argued before this Court, however, provides little, if any, new information. (Br. of App. at 18-29; PCR Tr. pp. 211-399).

As outlined above, we know from the trial record that Applicant excelled in sports and academics during his youth despite having a strict and unsupportive father. We know from the trial record that his troubled brother Billy died in a fire and that Applicant appeared to suppress emotion assigned to the loss. We know from the trial record Applicant's birth was accompanied by a number of annotations regarding jaundice and other initial concerns. We know from the trial record Applicant was affected by his failure to gain admission to the Air Force Academy, that his vision was a contributing factor to his rejection, and that this rejection from the Academy also temporally coincided with getting hit in the head with a full bottle of beer during his senior year of high school. We know from the trial record that Applicant, a braggart, started engaging in fraudulent activity when he entered the work force after high school graduation and continued with such behavior after his release from prison. We know from the trial record that close in time to the Ling crimes,

¹² This Court fails to see how the omission of Mr. Wilson's testimony could be prejudicial, considering his testimony did not make a difference in the Horry County trial.

Applicant was in arrears on his supervision fees and had reported to a probation agent an interest in moving to his brother's in North Carolina. We also know from the trial record that Applicant failed to fully engage in therapy prior to the Ling crimes, was beginning to act erratically, and was in danger of being found out. Otherwise, many, if not all, of the facts presented by Dr. Andrews that appear to be outside the scope of Dr. Califf's testimony derive from facts presented by the State *in aggravation*. (R. pp. 2277-2482).

Importantly, we learned from Dr. Califf that Applicant grew up with dysfunction in the home which stunted his development, but that he thrived when given structure. Her opinion plainly parallels Dr. Andrews's ultimate conclusion that "he just was poorly equipped to deal with all of these stressors, the barriers he had." (PCR Tr. p. 384). Dr. Califf just did not harmonize her presentation by calling it a "social history assessment" or by using terminology such as "social ecology" in front of the jury as was done by Dr. Andrews. (*E.g.*, PCR Tr. p. 347).

And, though Jeff Stanko testified before this Court that he would have attended the trial had the attorneys asked him, (PCR Tr. pp. 225-26), this testimony is not credible. The remainder of the record bears a different story. Not only is Jeff's statement not echoed by Applicant's trial team, but Jeff Stanko himself later testified that he attended a preliminary hearing in the Georgetown case but did not attend trial "[b]ecause [he] really didn't want [his] face and [his] family all over the media. . . . It's a very hostile time because no one cares about you or your family." (PCR Tr. pp. 243-44). He testified he was contacted by Dale Davis multiple times, that he did not recall speaking to anyone other than Davis, and that Applicant himself did not request him to be there. (PCR Tr. pp. 243-46). Also, Jeff Stanko's testimony could be viewed to undermine part of the mitigation theory. Jeff testified at PCR that he felt they experienced "[r]elatively what

[he] would call a normal childhood.”¹³ (PCR Tr. p. 213). Jeff did not consider his father to be strict, and did not agree with “that terminology being used.” (PCR Tr. pp. 226-28). In fact, Dr. Arlene Andrews who testified before this Court said that she could not get in touch with Applicant’s one sister and that she was disappointed to find there were no prior interviews with his parents before their deaths. (PCR Tr. p. 352).

Given expansive trial testimony regarding Applicant’s upbringing and the stressors causing him to “ignite” in the commission of the crimes at the Ling home, trial counsel cannot be found to have rendered deficient performance or to have prejudiced Applicant. Applicant’s family life and upbringing presented no significant problems which required any more detailed testimony than that presented at trial. *Contra Wiggins v. Smith*, 539 U.S. at 123 S.Ct. at 2536-38 (finding it unreasonable for counsel to “put on a halfhearted mitigation case” making no mention of defendant’s tumultuous family background); *contra Council v. State*, 380 S.C. 159, 172-74, 670 S.E.2d 356, 363-64 (2008) (finding it unreasonable for counsel not to obtain defendant’s family record, to limit its social history investigation, to forego hiring a social worker, and to present only “extremely limited testimony” by defendant’s mother in furtherance of life history mitigation).

But even speaking solely to trial counsel’s performance, the presentation at trial does not warrant a finding of deficient performance because counsel employed an objectively reasonable strategy. *Lounds v. State*, 380 S.C. at 462, 670 S.E.2d at 650 (“when counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective

¹³ Contrary to the representation in Applicant’s brief, Jeff Stanko stated Applicant experienced strikes with a wild pitch or a collision because he was the catcher, but that he was only “probably” forced out of a baseball game “two times that [he] would recall.” (PCR Tr. pp. 213, 238). This testimony is cumulative insofar as it pertains to Applicant’s playing sports, and does not help to prove prejudice in relation to any mental health diagnosis. Both Dr. Andrews and Dr. Wu testified that the beer bottle was the precipitator of the changes in Applicant’s behavior. (PCR Tr. pp. 312, 367).

assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'"). Trial counsel presented a case in mitigation which focused on Applicant's youth and adolescence, and on Applicant's actions and stressors during the crucial last weeks before the Ling crimes. (PCR Tr. pp. 78-80, 157). They hired Dr. Califf a local, credentialed counselor with hands on experience counseling dysfunctional families.¹⁴ Trial counsel and his mitigation investigator both recognized family dysfunction as a mitigating feature of Applicant's youth, and it was therefore reasonable to hire Dr. Califf to present this family history. They strengthened the context of her testimony with other firsthand accounts. And as to the "stressors" presentation, it countered the aggravation put forward by the State and dovetailed with the medical mitigation that is the topic of the previous issue—these mitigation witnesses' testimonies about Applicant's increasingly erratic behavior and reported pursuit of mental health treatment helped the jury assign reason to the crimes' commission.

Applicant's trial-time mitigation investigator's PCR testimony is also telling on the point of deficient performance. Dale Davis has significant experience in capital trial mitigation investigations. At PCR, Davis testified before this Court that her role in these capital cases includes interviewing the client and then seeking out an exhaustive list of contacts, interviews, and records, which she then provides to trial counsel for their use and evaluation.¹⁵ (PCR Tr. pp. 168-71, 179-85). Davis testified that a social worker would ordinarily be hired to review, verify, and testify about the records she collected and summarized. According to Davis: "They just – they weave – they weave things into a story, which always makes information more interesting and relevant.

¹⁴ In contrast, Dr. Andrews indicated she completed social histories to guide others in deciding what a child's course of treatment might be in any given scenario. (PCR Tr. p. 349).

¹⁵ Davis elsewhere noted both that she is not an attorney, and that her role was to collect and relay records and background information rather than to hire and prepare expert or social worker testimony. (PCR Tr. pp. 193-203).

While it's accurate, it's still cohesive in telling a story." (PCR Tr. p. 181). Dr. Califf's testimony cannot be said to deviate from this role or to differ from that employed by Dr. Andrews at this PCR hearing. Further, Davis testified that the social worker she recommended from Greenville was not available for Applicant's trial. (PCR Tr. pp. 187-89).

In sum, it cannot be said that trial counsel only put on a skeletal presentation of Applicant's life history. *Contra Weik v. State*, 409 S.C. at 235, 761 S.E.2d at 768. Applicant has not presented anything newly enlightening in 2019 that was not presented over a decade ago. "This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, or would have been apparent from documents any reasonable attorney would have obtained." *Bobby v. Van Hook*, 558 U.S. at 11, 130 S.Ct. at 19 (*citing for comparison Wiggins v. Smith, supra; Rompilla v. Beard*, 545 U.S. 374, 389-93, 125 S.Ct. 2456 (2005)). Rather, the presentation before this Court was just a "fancier" supplement to that presented to the Georgetown County jury. (PCR Tr. pp. 355-99). The new evidence is either cumulative to the old or was unavailable at the time of trial. Accordingly, the factual basis for relief Applicant presented to this Court is not enough to warrant a finding that one juror would have struck a different balance. *Cullen v. Pinholster, supra; Morva v. Zook, supra; Byram v. Ozmint, supra; Jones v. State, supra*. As a result, Applicant can point to no specific indicator warranting a finding that initial PCR counsel was functionally deficient or caused prejudice in representing Applicant at the first PCR hearing.

D. The Mental Health Mitigation Claim (3)

Petitioner endeavors to represent that trial counsel prejudiced Applicant by failing to retain Dr. Joseph Wu to conduct an expanded investigation into the evidence otherwise presented through the aforementioned battery of guilt- and sentencing- phase medical and mental health experts.

Applicant argues “Dr. Wu could have testified that there was a biological explanation for Stanko’s inability to handle stresses, his failure to anticipate and learn from consequences, and his aggressive reaction to the stresses converging at the time of the offense and that those biological issues were treatable.” (Br. of App. at 29). Yet Dr. Wu and the remainder of the experts from trial testified to each of these alleged omissions. Therefore, to the extent Applicant argues that Dr. Wu’s 2019 testimony materially alters the outcome of that presented in 2006, Applicant has wholly failed to meet his burden of demonstrating *Strickland* deficient performance and prejudice. *Jones v. State*, *supra*.

At trial, Dr. Wu explained the contributing science and process for conducting a PET scan, including the pre-scan administration of the continuance performance test (CPT) to ensure engagement of the brain at the time of the scan. (R. pp. 1623-63, 2951-54, 2980-87). Dr. Wu testified that he was retained to review Applicant’s PET scan. His review led him to opine that Applicant has a brain abnormality residing in the frontal lobe, specifically the ventral frontal lobe, which he described was near the bottom of the frontal lobe. (R. pp. 1662-75, 2987-3000; PCR Tr. p. 287). He pointed out that the decrease in the brain activity occurred on both sides of Applicant’s frontal lobe. (R. pp. 1667). He stated the decrease in activity was 50% or greater in some areas. (R. pp. 1668-69, 1675, 2999). He also examined Dr. Gur’s quantitative volumetric brain analysis in preparation for trial, which he then testified showed a statistically significant decrease in volume by a measure of four standard deviations from the norm. (R. pp. 1676-77, 1693).

Dr. Wu described that the abnormality affects Applicant’s ability to regulate or control his impulses. (R. pp. 1671-72, 3011). He explained that, like the famous case of Phineas Gage, Applicant would have difficulty controlling aggressive behavior. (R. pp. 2999-3000). He determined Applicant’s decrease of activity in the frontal lobe to be clinically significant, and he

found it could “be consistent with someone who had a significant developmental problem” in the frontal lobe. (R. pp. 1674). He specifically testified that one potential contributing factor to the abnormality could be Applicant’s having suffered a blow to the back of the head with a beer bottle when he was a senior in high school, which Dr. Wu categorized as a traumatic brain injury. (R. p. 3001). He also testified that medical records from Applicant’s birth indicate developmental brain abnormalities—that there existed poor wiring in Applicant’s brain function from the time of birth. (R. pp. 3001-02). He testified that developmental abnormalities sometimes do not manifest until early adulthood because “the frontal lobe is not fully connected throughout their brain until late adolescence.” (R. pp. 3002-03).

At PCR, Dr. Wu simply offered a repetitive explanation and diagnosis. (PCR Tr. pp. 268-296, 318-27). He testified that Applicant’s frontal lobe damage was likely caused by traumatic brain injury (PCR Tr. pp. 311-12). Dr. Wu testified that the area where Applicant’s brain abnormality resided was the area of the brain responsible for impulse control, and that, as in the famous case of Phineas Gage, an abnormality there meant Applicant would have difficulty controlling aggressive behavior. (R. pp. 291-92, 301-02, 308-09). He testified that Dr. Gur’s quantitative volumetric brain analysis showed a decrease in volume by a measure of four standard deviations. (PCR Tr. pp. 295-96). Dr. Wu only minimally expanded his prior diagnosis by testifying that he reviewed additional records not provided to him as part of his pre-trial preparation in this case. (PCR Tr. pp. 296-310).

For purposes of this hearing, Dr. Wu concluded that Applicant’s records support a “working diagnosis, based on what [he had] learned so far,” that Applicant “had an imaging that’s consistent with a traumatic brain injury and consistent with temporal lobe epilepsy.” (PCR Tr. p. 320). Yet crucially, Dr. Wu’s testimony showed that there was a great deal of medical testimony

from Applicant's 2006 trial which he did not read, review, or compare to his own diagnosis prior to this PCR hearing. (PCR Tr. pp. 325-33). Additionally, Dr. Wu in no way retracted his testimony and diagnosis provided in 2006. (PCR Tr. p. 337).

Trial counsel Bill Diggs also provided this Court with testimony relevant to this claim. He stated that his job as counsel was "to kind of select who" the experts "were going to be." (PCR Tr. p. 111). Diggs indeed hired a number of medical experts who each had a slightly different role in Applicant's defense. (*Ibid.* at pp. 8-16). Trial counsel testified that not one doctor he worked with in Applicant's case returned to him and asked for additional information to complete the task they were hired to do. (PCR Tr. p. 154).

Importantly, Diggs did not recall hiring Dr. Wu to diagnose Applicant upon a review of records extraneous to the PET scan—he hired him "to put together the video" of the PET scan imagery and to testify about it. (PCR Tr. pp. 148-150). It was Dr. Sachy who directed trial counsel to Dr. Wu for purposes of conducting the PET scan and creating and analyzing the PET scan imagery. (PCR Tr. pp. 106, 147-50). "Dr. Wu was in that area of expertise explaining what the scans revealed. Dr. Wu was the one that put together the visual video" used at trial. (PCR Tr. p. 114). Along with Dr. Wu's review of the PET scan and creation of the PET scan graphics came an opinion that Applicant had a frontal lobe abnormality. (PCR Tr. p. 148). This planned testimony served to enhance the opinions of the other medical professionals. (PCR Tr. p. 150). Dr. Wu's visual examination and diagnoses fit squarely with that of the other doctors who viewed Applicant's PET and MRI scans and testified about them at trial. (*Ibid.* at pp. 8-16).

Diggs was of the opinion that Dr. Wu's testimony enhanced the medical opinions of his other experts because "it demonstrated visually what their opinions were based on." (PCR Tr. p. 150). Diggs also appraised the defense prepared and presented by trial counsel and their team of

experts and investigators as one which provided a medical explanation for Applicant's abnormal brain and explained how that abnormality "contributed to this particular incident." (PCR Tr. p. 153). Mitigation investigator Dale Davis likewise assessed before this Court that defense counsel "found the answer" to explaining Applicant's behavior: brain damage. (PCR Tr. p. 197). She disagreed with the presentation, but that was also not her role, as she was not licensed trial counsel. (PCR Tr. p. 197).

Applicant challenges trial counsel's curtailment of Dr. Wu's role at trial, but Applicant cannot prevail on *Strickland's* deficient performance prong. Trial counsel's investigation and presentation of Dr. Wu more than passes muster. "The mere fact counsel did not shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders simply does not constitute ineffective assistance." *Poyner v. Murray*, 964 F.2d at 1419. "When the claim is that counsel failed to present a sufficient mitigating case during sentencing, the inquiry 'is not whether counsel should have presented a mitigation case' but 'whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable.'" *Powell v. Kelly*, 562 F.3d 656, 670 (4th Cir. 2009) (quoting *Wiggins v. Smith*, 539 U.S. at 523, 123 S.Ct. at 2536). "The 'prevailing norms' that guide our judgment as to whether counsel's performance was reasonable do not require counsel to pursue a second expert after a qualified expert has given an adverse opinion"—or a promising one. *Stone v. State*, 419 S.C. 370, 406-07, 798 S.E.2d 561, 581, cert. denied, 138 S. Ct. 392 (2017); *Pruett v. Thompson*, 996 F.2d 1560, 1574 (4th Cir. 1993) (holding counsel was not ineffective for failing to further investigate a theory after counsel had good cause to believe the theory was incredible).

The record reflects that trial counsel duly investigated Applicant's brain function and made a reasonable strategic decision to employ Dr. Wu to review and provide testimony regarding the

completion and visual presentation of Applicant's PET scan. (*Ibid.* at pp. 29-46). To this end, Dr. Wu admitted at PCR that his "primary modality of interpretation is a visual analysis of the scan." (PCR Tr. pp. 283-84). Dr. Wu later criticized trial counsel for asking him "more general questions" about PET scans rather than more specific questions about the functioning of Applicant's brain. (PCR Tr. p. 302). Yet these statements support the fact that trial counsel made an objectively reasonable professional decision to hire Dr. Wu to visually examine the scan and prepare testimony on that topic for the jury, knowing that Dr. Wu's testimony would supplement the remainder of the expert testimony he prepared to present. Trial counsel acted exactly in the manner recommended by Dr. Wu at the PCR hearing when he testified that that "clinical correlation is recommended."—he just did it through another credentialed expert. (PCR Tr. p. 339).

This strategic decision, which is based on proper investigation and supported by the testimony of the remainder of the experts who testified at Applicant's trial, should not be subject to second guessing in favor of a new strategy. *Gardner v. Ozmint*, 511 F.3d 420, 427 (4th Cir. 2007) (acknowledging more detail in evidence submitted may be found, but no *Strickland* error where counsel investigated the case, relied on experts, presented a sound defense, and evidence of aggravation was overwhelming and compelling). Counsel is not required to independently seek out additional experts when they have already hired experts who they believe are well-qualified. *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998) ("[C]ounsel did retain medical experts whom he thought well-qualified. The experts he had retained did not state that they required the services of . . . additional experts. There was no need for counsel to seek them out independently."); *Walls v. Bowersox*, 151 F.3d 827, 835 (8th Cir. 1998) (holding counsel has no duty to pursue additional testimony from alternative neurological experts when the experts with whom he consulted indicated no additional testing was required). The fact that Applicant could later secure

an alternative expert diagnosis “does not mean that trial counsel’s failure to obtain that expert testimony constituted deficient performance.” *McClain v. Hall*, 552 F.3d 1245, 1253 (11th Cir. 2008) (“McClain blames Dr. Maish’s failure to diagnose the frontal lobe disorder on his counsel’s failure to inform Dr. Maish of McClain’s history of childhood abuse and substance abuse, but that argument fails. As McClain acknowledges, Dr. Maish was aware of both McClain’s substance abuse and childhood abuse.”).

This concept ties into the maxim that there exists no constitutional right to the effective assistance of an expert witness. *Wilson v. Greene, supra*. It matters whether counsel put forward a reasonable and reasonably thorough investigation into a particular defense, not whether a certain expert he hired missed something fairly duplicative and otherwise discredited from the remainder of the testimony given at trial. Trial counsel has no duty to present all psychiatric evidence and a decision not to present additional psychiatric evidence may be reasonable. *Philmore v. McNeil*, 575 F.3d 1251, 1263 (11th Cir. 2009). Trial counsel is also not required to order each expert to conduct an entire battery of neuropsychological tests when counsel does not reasonably believe that necessary to the completion of his defense. *Stokley v. Ryan*, 659 F.3d 802, 813 (9th Cir. 2011). And even a failure to obtain available records “does not show that counsel’s investigation was inadequate.” *Jones v. Murray*, 947 F.2d 1106, 1114 (4th Cir. 1991); *Byram v. Ozmint*, 339 F.3d at 209-10 (4th Cir. 2003) (largely cumulative presentation in collateral action not enough to warrant finding of deficient performance for counsel’s failure to expert-shop); *see also Bobby v. Van Hook*, 558 U.S. at 11, 130 S.Ct. at 19 (2009) (“[G]iven all the evidence they unearthed from those closest to Van Hook’s upbringing and the experts who reviewed his history, it was not unreasonable for his counsel not to identify and interview every other living family member or every therapist who once treated his parents”).

Moving to the prejudice prong, the South Carolina Supreme Court has found deficient performance and prejudice where capital trial counsel failed to provide medical records and relevant information to their testifying psychiatrist. See *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004). That case assigned prejudice to counsel's failure because the capital defendant demonstrated his counsel only "exerted some effort," which was determined insufficient to "adequately investigate and prepare expert testimony about his mental condition as it existed at the time of the murder." *Id.* at 608, 602 S.E.2d at 743. However, *Von Dohlen* is not analogous to Applicant's case because of the depth of the battery of experts Applicant's counsel strategically employed to present compelling mitigating evidence throughout both phases of trial. *Von Dohlen* did not present a battery of experts until his PCR hearing. *Id.* at 604-06, 602 S.E.2d at 741-42. But at Applicant's trial, each expert's testimony built upon that of the previous expert to paint one full picture of the causes and implications of Applicant's brain abnormality. Applicant's experts provided a medical reason—a visually discernable frontal lobe impairment—for Applicant's antisocial diagnosis and criminal behavior. With the exception of Drs. Einhorn and Wu who were hired to conduct and create the PET scan, Applicant's remaining experts were provided with the gamut of Applicant's relevant records for assistance in diagnosis. Drs. Thrasher and Sachy also personally interviewed Applicant prior to reaching any conclusion. (*Ibid.* at pp. 8-17 and 29-46).

In fact, Applicant cannot establish prejudice because, in addition to being largely cumulative of his 2006 testimony, (*Ibid.* at pp. 60-62), the content of Dr. Wu's 2019 testimony was also cumulative to that of the remaining trial experts. From the outset, Dr. Albiniak opined that less than 2% of the population would share a brain structure like Applicant's, which he identified as lacking brain tissue in the area of the brain which regulates emotional behavior. (R. pp. 1459461). Dr. Sachy testified that Applicant's behavior was a textbook example of being

consistent with brain damage in the frontal lobe, which could be seen in Applicant's PET scans showing up to 50% reduction in function. (R. pp. 3181-84). Dr. Thrasher testified Applicant was hit on the back of the head as a teenager which could very well have injured the front of his brain. (R. p. 1509). Drs. Thrasher and Sachy also testified that they reviewed Applicant's prior medical records and that the brain abnormality may have resulted from his health at the time he was born. (R. pp. 1507-08, 1732-33).

On the issue of whether Applicant's condition was treatable, Dr. Sachy testified at trial that aggressive behavior resulting from a diminished ability to control one's impulses can be curtailed with medication. (R. pp. 1765, 3188). On the issue of prison adaptability, Dr. Sachy testified that Applicant was likely to be well-behaved in a structured prison environment and why. (PCR Tr. pp. 3186-88, 3192-93). As to memory loss, Dr. Thrasher testified at trial that Applicant's stated memory loss during the Ling crimes could be caused by a frontal lobe defect. (R. pp. 1598-99). Dr. Sachy also addressed Applicant's stated inability to remember certain things about the crimes. Dr. Sachy offered an opinion that Applicant likely chose not to remember some things, but that the memory loss could also result from entanglement in an emotionally charged incident which reduces one's ability to store detail. (R. pp. 1772-75). At PCR, Dr. Wu expressly stated that he did not disagree with Dr. Sachy on this point. (PCR Tr. p. 332).

Perhaps the most telling indicator relevant to the prejudice analysis in this case is the lack of credible weight Dr. Wu's new "working diagnosis" carries. The contention that Applicant suffers from "undiagnosed temporal lobe epilepsy," (PCR Tr. p. 296), is contradictory to the testimony of trial experts who actually examined Applicant. Notably, Dr. Thrasher testified at trial that seizures can cause the type of brain dysfunction he diagnosed Applicant with, but that his

personal examination of the Applicant showed that he “does not have seizures.”¹⁶ (R. p. 1503). Dr. Wu’s new “working diagnosis” should further be viewed with caution due to Dr. Wu’s acknowledgement that “you kind of have to ask for” information regarding the manifestation of symptoms. (PCR Tr. p. 338).

However, Dr. Wu’s testimony shows that, unlike Dr. Thrasher, he has requested no additional information to support his diagnosis. Dr. Wu’s testimony further shows that Applicant does not present any symptoms of the disorder and is not undergoing treatment or being medicated for it. (PCR Tr. pp. 335, 338). As to Applicant’s purported hypergraphia, Dr. Wu’s basis for this finding lacks evidentiary support, as it is known that Applicant endeavored to write and publish a book while in prison, and as Dr. Wu never personally examined Applicant or asked for additional records to enhance or verify his assessment on only limited facts. (PCR Tr. pp. 333-34). Mere speculation does not satisfy Applicant’s burden of demonstrating prejudice from alleged omissions from trial. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995); *see also Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). Moreover, Dr. Wu’s suggestions that Applicant’s condition can be treated with hyperbaric oxygen therapy and cognitive rehab, (PCR Tr. pp. 313-14), are unavailing to this prejudice analysis given the aggravating evidence and the likelihood of Applicant’s receipt of that type of boutique treatment in prison.

The weight of Dr. Wu’s recent testimony is further distinguishable from the trial testimonies of Drs. Thrasher, Sachy, and Einhorn because Dr. Wu never personally examined Applicant and was provided with only circumspect materials from the 2006 trial. (PCR Tr. pp.

¹⁶ To the extent that Applicant elsewhere argues counsel was ineffective for pursuing an NGRI defense because the evidence showed that Applicant’s mental defect was manifested only in repeated criminal or antisocial behaviors, Dr. Wu’s PCR testimony does not establish prejudice. Dr. Wu admitted Applicant showed no other symptoms or signs of temporal lobe epilepsy apart from his history of criminal and antisocial acts. (PCR Tr. pp. 334-35, 338).

324-34). He was not asked to review, for this proceeding, the testimonies of all of the medical experts who testified at trial. He in fact could not recognize that the testimony he was hired to prepare for the 2019 hearing was largely cumulative to that of other doctors. Moreover, at PCR, Dr. Wu agreed that Applicant has a personality disorder, and he actually lowered the percentage of abnormal functioning he observed within Applicant's PET scan to 25%, which differs from the 50% difference he testified about at trial. (PCR Tr. pp. 293, 318; *contra* R. pp. 1668-69, 1675, 2999). And in spite of presenting a "working diagnosis" regarding another abnormality in Applicant's "right temporal insular cortical metabolism," Dr. Wu agreed that that area of the brain remains in the limbic system and thus remains responsible for impulse control. (PCR Tr. pp. 295, 320-21). Still more, his identification of this portion of the limbic system may contradict a crucial distinction he made at trial. At trial, Dr. Wu testified Dr. Einhorn administered neuropsychological tests upon Applicant and obtained normal results. He then explained that he would expect the results to be normal in Applicant's case because the parts of the frontal lobe Applicant would use to complete those neurological tests were higher up than the portion which was impaired. (R. p. 1666).

Applicant's revamped presentation of Dr. Wu is also circumspect given his similar role in other capital collateral actions. *E.g.*, *People v. Woodruff*, 5 Cal. 5th 697, 717, 421 P.3d 588, 607 (2018) (stating that physician and co-chair of Cedars-Sinai Medical Center's imaging department "concluded that Wu's method was appropriate for research but not diagnostics"); *Clemons v. State*, 55 So.3d 314, 328 n.5 (Ala. Ct. App. 2003) (holding that state court was correct to refuse admit testimony of PET scan conducted by Dr. Wu that showed defendant suffered a brain injury at or near birth because the test was conducted during adulthood and because "Wu conceded that none of the scientific journals or studies supported the use of a PET scan as a diagnostic tool to ascertain

old brain injuries”), *conviction upheld in habeas action, Clemons v. Thomas*, No. 2:10-CV-02218-LSC, 2016 WL 1180113 at *15 n.5 (N.D. Ala. Mar. 28, 2016); *United States v. Walker*, 71 M.J. 523, 530 (N-M. Ct. Crim. App. 2012), *aff’d in part, rev’d in part*, (C.A.A.F. July 16, 2012) (“[W]e conclude that the military judge did not abuse his discretion by determining that the PET scan and Dr. Wu’s assistance were unnecessary or cumulative.”). Dr. Wu’s findings “do not offer a new or more mitigating explanation of the effects of Petitioner’s neurological and mental status at the time of the crimes, and there is not a reasonable probability that placing a different emphasis on the cause of his impulsive behavior would have persuaded the jury to vote for a life sentence.” *Smith v. Ryan*, No. CV-12-00318-PHX-PGR, 2014 WL 1247828, at *46 (D. Ariz. Mar. 24, 2014), *aff’d*, 823 F.3d 1270 (9th Cir. 2016) (unpublished) (addressing testimony by Dr. Wu); *see also Berryman v. Ayers*, No. 1:05 CV 05309 AWI, 2007 WL 1991049, at *81 (E.D. Cal. July 10, 2007) (reaching same conclusion and stating “Dr. Waxman indignantly states that Dr. Wu’s method in this regard ‘is intended to mislead the reader by suggesting that normal *individual* subjects have no asymmetries of the temporal lobe’”) (unpublished).

Most fundamentally, Applicant cannot establish prejudice because Dr. Wu’s testimony is not enough to warrant a finding that at least one juror would have struck a different balance. *Cullen v. Pinholster*, *supra*; *Morva v. Zook*, *supra*; *Byram v. Ozmint*, *supra*. Dr. Wu has simply said more of the same as before. And he has supported it with the same visual presentation that original trial counsel hired him to provide. Again, the presentation before this Court was just a “fancier” supplement to that presented to the Georgetown County jury. *Jones v. State*, *supra*. To focus on any expansion of Dr. Wu’s testimony would discount the amount of testimony from a number of other well-qualified experts who testified at Applicant’s Georgetown County trial. Further, to the extent Dr. Wu’s PCR testimony may be viewed to vary from the other expert presentations at trial

in any credible manner, trial counsel does not meet the legal standard for deficient performance given the conscious and well-reasoned choice to present a battery of other medical experts. *King v. State*, 211 So.3d 866, 882 (Fl. Sup. Ct. 2017) (presenting mitigating mental health testimony from Dr. Wu at trial was not found to constitute deficient performance where family member testimony corroborated that defendant's behavior changed after a sledding accident and at least one other expert did not believe the only alternative mitigating theory). As a result, Applicant can point to no specific indicator warranting a finding that either trial counsel or initial PCR counsel were functionally deficient or caused Applicant prejudice in their initial representations.

E. The Prison Mitigation Claim (4)

Applicant posits that trial counsel's alleged sentencing-phase exclusion of jailer testimonies prejudiced Applicant because it excluded evidence of prior good behavior in prison and omitted evidence regarding the likelihood of future dangerousness if sentenced to life imprisonment rather than death. While Applicant posits that trial counsel prejudiced Applicant by choosing to present guards from the county detention center rather than from Applicant's time in prison, the record laid before this Court demonstrates that both the Georgetown County Detention Center and the South Carolina Department of Corrections employees testified in a critically similar manner. And while Applicant posits that the expert testimony presented at the prejudice hearing before this Court painted a new picture of Applicant's prison adaptability and future dangerousness, the trial record's expert testimony again refutes this contention.

The United States Supreme Court has held that a complete deprivation of sentencing-phase testimony regarding a defendant's good behavior during pre-trial incarceration deprived the defendant of his right to present relevant evidence in mitigation of punishment. *Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S.Ct. 1669, 1671 (1986). The *Skipper* Court held "evidence that the

defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating” and “may not be excluded from the sentencer’s consideration.” *Id.* at 5, 106 S.Ct. at 1671 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 (1982)); *see also McCleskey v. Kemp*, 481 U.S. 279, 305-06, 107 S.Ct. 1756, 1774 (1987) (holding that the sentencer should not be limited from considering any relevant circumstance that could cause it to impose a life sentence over death). Our State Supreme Court emphasizes that, in the way of mitigating evidence, “only the character of the defendant and circumstances of the crime are relevant in the sentencing phase of a capital trial.” *Bowman v. State*, 422 S.C. 19, 37, 809 S.E.2d 232, 242 (2018); *accord Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (1976) (holding “the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death”). Thus, any prison mitigation evidence must not speak to general prison conditions, but must rather be contained to evidence bearing on the particular “defendant’s character, prior record, or the circumstances of his offense.” *Id.* at 36, 809 S.E.2d at 241 (quoting *State v. Koon*, 278 S.C. 528, 537, 298 S.E.2d 769, 774 (1982)).

Applicant’s penalty phase was not deprived of evidence of his ability to adapt to prison life. “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.” *Strickland v. Washington*, 466 U.S. at 670, 104 S. Ct. at 2056. Here, the prejudice inquiry lacks complication.

Before this Court, Applicant presented a retired warden, a retired security sergeant, and a retired correctional facility chaplain. Each witness worked at Turbeville Correctional during Applicant’s 1996-2004 prison sentence for kidnapping, assault and battery of a high and aggravated nature (ABHAN), nine counts of breach of trust with fraudulent intent, and two counts

of obtaining property by false pretenses. Each of these witnesses testified that Applicant posed no disciplinary problem while incarcerated. They each provided testimony that Applicant was helpful to other inmates and acted in compliance with the structure and authority present within the institution. (PCR Tr. pp. 22-48, 248-65). They each recalled that Applicant served as the inmate grievance clerk, assisting other inmates in filing and resolving grievances. (PCR Tr. pp. 24, 28-30, 250-51, 260-61). The former security sergeant characterized the majority of inmates as "not very smart" and contrasted Applicant as an "aide to the inmates and always respectful of staff." (PCR Tr. pp. 249-51). The former chaplain testified Applicant assisted other inmates with their reading and writing, and acted as a coordinator. He said he was approachable by staff and inmates and periodically attended chapel. (PCR Tr. pp. 260-61). The former warden testified Applicant "assisted inmates in preparing their grievances and assisted inmates with other legal matters" and that he effectively reduced the number of institutional grievances. The former warden testified that Applicant served as the chairman¹⁷ of the inmate relations council. (PCR Tr. pp. 24-25, 28-30). He stated Applicant worked alongside "a number of other inmates" in gaining the prison's accreditation award one year when the facility was brand new. (PCR Tr. pp. 28-29). Lay witness testimony also showed Applicant spoke with youthful offenders and other at-risk youth brought into Turbeville as part of a deterrent program called Operation Behind Bars. (PCR Tr. pp. 25-27, pp. 255-56).

As for expert testimony, Applicant presented risk assessment and inmate classification expert Dr. James Austin, who merely testified that Applicant "does prison time well." (PCR Tr. p.

¹⁷ It was unclear to the former warden whether the chairman was peer-elected like the other council members or was appointed. (PCR Tr. p. 30, lines 11-13). Applicant's contextualization of the PCR prison adaptability testimony does not always match the content of the actual testimony presented. (Br. of App. pp. 30-34).

44). Austin reviewed Applicant's records from his 1996-2004 incarceration and identified that Applicant was held in the lowest prison classification possible and had no disciplinary record. (PCR Tr. pp. 43). In other words, Applicant's kidnapping conviction precluded him from being classified at any lesser security level, but he behaved "like a minimum-security inmate." (PCR Tr. p. 44). He noted that if Applicant were sentenced to life imprisonment without the possibility of parole he would indefinitely be held in the highest security classification possible due to the nature of convictions, but he could contribute to the prison and would probably share a cell with another inmate. (PCR Tr. pp. 44-48). Contrary to Applicant's written presentation, Dr. Austin did not testify that his existence serving life without parole would be especially punitive due to Applicant's intelligence. (Br. of App. at 32). Rather, Dr. Austin testified that it would be a "mundane kind of experience" because "his existence" would consist of a repetitive day. (PCR Tr. p. 46).

Doctor Wu also testified on this topic, stating

I believe it's well known that individuals with brain injuries do better in structured environments. The structured environment acts kind of like an external frontal cortex. It helps to organize their world. It helps to regularize things. There are – is a certain routine and a predictability that an external structured environment provides, which allows people with brain injuries to actually do better than when they are in an unstructured everyday setting where there is unpredictability and where there are unpredictable stresses.

(PCR Tr. p. 316).

Social historian Dr. Arlene Andrews echoed the testimony of the prison employees' and of Dr. Wu: "While he was in prison, he had no disciplinary problems. He managed very well in the structure, contributed in major ways to the prison. . . . his behavior in a social environment is that he – he manages much better in a structured environment than in an unstructured environment." (PCR Tr. p. 358; *id.* at 392). She testified Applicant was "remarkably adaptive" to the prison environment and did not conduct scams during that time. (PCR Tr. p. 371). She attributed his

behavior to "clear expectations and predictability in the environment." (PCR Tr. p. 372).

All of this testimony, however, is similarly reflected in Applicant's 2006 trial. Witnesses called at that trial also testified that Applicant does well when incarcerated. At that time, Applicant presented the second-in-command at the Georgetown Detention Center who testified that he had daily contact with Applicant and never had any difficulty with him—he was not violent, he followed the rules, he was not bad at being managed, he was respectful rather than threatening, *and that Applicant was his cell block's grievance spokesman.* (R. pp. 2741-47). Applicant next presented another county corrections officer who testified that Applicant followed instructions in the cell block and in the larger unit and that he was respectful rather than a threat or harm to others. (R. pp. 2747-51). A third corrections officer testified that Applicant was quiet and respectful during booking, and that he was respectful and caused no problems during his pre-trial confinement. Moreover, this third officer testified that Applicant was the voice of the cellblock—he brought inmate grievances to the chain of command's attention, and they were not frivolous. (R. pp. 2752-55).

Then, again in 2006, psychiatrist Dr. Thomas Sachy testified as follows during the sentencing phase of Applicant's trial:

- Q: Let me talk to you about Stephen in the event he were to be sentenced to Life imprisonment.
- A: Yes.
- Q: Would other inmates be in danger around Mr. Stanko?
- A: Not typically, no.
- Q: Why do you say that?
- A: Because in reviewing this – the literature, it had to do with behavioral disorders that he had, the behavioral disorder that he had. In prison they don't act violently or don't tend to act violently. They are manipulative. They use the system to their advantage, but they don't go around shanking other prisoners or attacking other prisoners. They actually seem to be well-behaved. . . . that structure keeps the psychopath at least in control.
- Q: Now, we have seen Mr. Stanko. We know he was in prison for eight and a half years and had a relatively clean record there as an inmate. And then

he gets out and this happens within months. Does that corroborate, do you – would you put that forward as evidence to support your conclusions that you're stating now or opinions?

A: Well, yes. And again, . . . in jail, these people, as long as they have that structure, they – they don't do horrible, terrible predatory acts of violence.

Q: Just like at the Georgetown County Detention Center. I don't think you were here, but we have had corrections – officers come in from the Detention Center who spoke favorably of Mr. Stanko. Would that be something that would be replicated, duplicated in prison, in the prison setting?

A: I – yes. I suspect the guards in prison would end up having a favorable, friendly working relationship with him, but just the same as they did here.

(R. pp. 3186-88).

He plainly agreed that he believed that Applicant "could be a contributing individual to the inmate population, to the corrections system, and to science at large . . ." if he were sentenced to prison. He plainly agreed that Applicant "could be housed in that prison – structured prison environment so as not to be an unreasonable risk to any other corrections personnel or inmate."

(R. pp. 3192-93).

Applicant's trial presentation on the topic of prison adaptability was neither sufficiently insubstantial nor so malformed as to warrant a finding in this proceeding that one juror would have struck a different balance had the jury heard the 2019 version rather than, or in addition to, the version presented in 2006. *See Wiggins v. Smith*, 539 U.S. at 537, 123 S.Ct. at 2543 (2003) (finding a reasonable probability of a different outcome had the jury heard defendant's entire history of childhood abuse rather than only one significant mitigating factor—that the defendant had no prior convictions). Applicant's brief draws a number of expansive conclusions regarding Applicant's ability to adapt to prison in a positive manner—but the jury heard the same base information from the testimony presented at trial. Each witness at each presentation discussed Applicant's (1) low risk of violence while incarcerated; (2) Applicant's adaptability to the structure of incarceration; and (3) that Applicant had an ability to contribute to the detention center/prison in a productive

way. The presentation before this Court was just lengthier and “fancier” than that presented to the Georgetown County jury. Therefore, the new evidence is cumulative to the old and is not enough to warrant a finding that one juror would have struck a different balance. *Cullen v. Pinholster*, *supra*; *Morva v. Zook*, *supra*; *Byram v. Ozmint*, *supra*; *Jones v. State*, *supra*.

Moreover, the newly offered evidence relating to Applicant’s prison adaptability is “by no means clearly mitigating, as the jury might have concluded that [Applicant] was simply beyond rehabilitation.” *Cullen v. Pinholster*, 563 U.S. at 201, 131 S.Ct. at 1410 (citing *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 2252 (2002) (recognizing that mitigating evidence can be a “two-edged sword” that juries might find to show future dangerousness)) (also citing *Wong v. Belmontes*, 558 U.S. at 24, 130 S.Ct. at 389-90 (taking into account that certain mitigating evidence would have exposed the petitioner to further aggravating evidence)). Features of Applicant’s character and criminal record actually weigh against Applicant’s contention that he was prejudiced from the failure to present *prison* guards to testify in mitigation rather than those from the Georgetown County Detention Center. Not all of the new mitigating evidence was complimentary of Applicant.¹⁸ The retired security sergeant acknowledged that Applicant spoke to at-risk youth while at Turbeville, but also reoffended with the Ling incidents a short time after release, demonstrating that he did the thing that he was trying encourage people not to do. (PCR Tr. pp. 256-57). Dr. Wu later testified to a belief that Applicant was less stressed in prison than in the outside world not only because it was structured, but because “he was not looked down upon in the prison population. . . . [H]e might not have been under a lot of stress if he was in a population

¹⁸ Thus, the newly offered mitigation has no effect on Applicant’s cited portion of State’s closing argument because the 2019 presentation was not materially different than that presented at trial and because the new testimony bolstered a permissible inference that Applicant retained or enhanced his manipulative attributes during this initial incarceration. (See R. p. 3397).

that felt he was you know, kind of helping.” (PCR Tr. p. 335-37).

Furthermore, Applicant was in prison for a callous Berkeley County assault on a live-in girlfriend which mirrored, as an antecedent, the brutal and murderous assaults carried out on Ling and her daughter. As recounted by Dr. Andrews before this Court, “he tied her up, attempted to kill her with chemical cloths, and then moved her around the house several times, took the rags out, and was having a conversation with her and then – and then left.” (PCR p. 388; R. pp. 2296-2394). “[I]t was similar in that he was engaging in the scams. She knew about the scams, and she – he knew that he was going to get in trouble.” (PCR Tr. p. 389). As characterized by trial counsel Bill Diggs before this Court: “It fits squarely within what happened here.” (PCR Tr. p. 146). “He had her by the head dragging her down the hallway singing, you know, as he was about to strap her into that chair in the kitchen.” (PCR Tr. p. 146).

Instead, as evidenced by Gerald Kelly’s penalty-phase opening statement, trial counsel asked the jury to gauge Applicant’s future dangerousness and created a favorable barometer by limiting their consideration to the timeframe between Applicant’s arrest in Augusta and trial. (R. pp. 2732-33). And arguably purposefully so. Kelly testified that his mitigation investigator Dale Davis had all the past prison records and he did not consider presenting that as evidence of adaptability. (PCR Tr. p. 61). Diggs testified that he did not think about calling a prison adaptability expert and chose to rely “on the witnesses that were presented at the trial who were familiar with what his behavior was in a structured environment.” (PCR Tr. pp. 125-26). Trial counsel matched this lay testimony with expert testimony from their lead psychiatrist Dr. Sachy. (R. pp. 3186-88).

Even given the double-edge of the additional mitigation testimony, this Court cannot stop “its analysis short without reweighing the totality of all the evidence.” *Trevino v. Davis*, 138 S.Ct. 1793, 1794 (2018). When the new evidence is weighed along with the old evidence to determine

whether the omission prejudiced the outcome of Applicant's sentencing phase, it is of "questionable mitigating value" and thus is not worthy of a grant of relief. *Cullen v. Pinholster*, 563 U.S. at 201, 131 S.Ct. at 1410. The mitigating evidence that Applicant could adapt and arguably thrive as a contributor to the South Carolina Department of Corrections would be heard along with testimony of the graphic assault and numerous schemes and cons that Applicant committed in Berkeley County. When taken with the old, the new evidence makes Applicant appear more incorrigible because it draws attention to the fact that Applicant assaulted his live-in girlfriend because she found out about his conning and scheming, was sent to prison for those crimes, did well and contributed therein for his own benefit, and then reoffended in an eerily similar manner less than one year after release from Turbeville. Jurors could infer that Applicant received no benefit from a prison sentence even where he contributed positively to the prison environment because he was clearly not subject to rehabilitation, and thus decline to assign mercy in their sentencing recommendation.

The sum of these considerations weighs in favor of a refusal to assign error and prejudice to trial counsel's prison adaptability presentation. *Id.*; *Atkins v. Virginia*, *supra*; *Wiggins v. Smith*, 539 U.S. at 535, 123 S.Ct. at 2542-43 (also noting the double edge of certain mitigation evidence may justify a limited investigation by counsel in some cases) (citing *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114 (1987); *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464 (1986)). The totality of the record evidences Applicant engaged in a long pattern of behavior as a con man who preyed on the laypeople he could engage in business and on the women he could engage in romance. Applicant's assault on the Lings and escape thereafter was vicious and violent in its own nature. Therefore, the latest PCR testimony fails to unhinge confidence in the result of the jury's

verdict at sentencing.¹⁹

F. Additional Reasons Applicant Not Prejudiced

Assuming for a moment that counsel did present the mental health assessment, life history, and other prison adaptability evidence in the manner presented before this Court rather than in the manner reflected by the Record on Appeal. Even then, there exists no reasonable probability the jury, assembled in 2006, would have returned with a different verdict based solely on the facts of the case. The facts established throughout both phases of trial are too aggravating.

Laura Ling's daughter survived Applicant's assault and called 911. She identified Stanko as the perpetrator in that call and in excited utterances shortly thereafter, and she testified at trial and identified Applicant as the person who tied her, bound her, raped her, murdered her mother, and cut her throat. The evidence established Laura Ling was also bound before her murder and severely beaten and strangled to death by Stanko. Ling was bound with neckties; she was beaten from the top of her head to the bottom of her feet; she was stabbed with a sharp object; and finally murdered by strangulation while her fifteen-year-old daughter was raped. Further, Applicant attempted to murder the fifteen-year-old daughter by cutting her throat twice, almost severing her ear from her head. He left her, believing she was dead. Applicant then showered off the blood and immediately fled, but not before stealing Ling's bracelet, her car, and money from her bank account. Applicant's DNA was identified on the vaginal swabs recovered from the daughter's rape kit taken that night. Applicant was captured on surveillance video withdrawing money from Ling's account shortly after her murder. Applicant called Ling's employer the following morning and

¹⁹ Applicant asserts that Diggs recognized the benefit of this type of testimony by calling witnesses who interacted with Stanko during his initial incarceration during Stanko's second capital trial in Horry County. However, the jury in Horry County still imposed the death penalty upon Applicant. Applicant's argument that this testimony would have made a difference in the Georgetown County trial is faulty at best since it failed to make a difference in the Horry County trial.

informed them Ling would not be reporting for work because she had food poisoning, when in fact he knew she was already dead. (R. pp. 1233-1424, 2496-2512, 2643-2704).

Applicant then fled Horry and Georgetown Counties in Turner's truck.²⁰ During the penalty phase, the jury learned that Applicant traveled to Columbia after the murder and brutal assaults. There, he partied at bars and nightclubs. He then traveled to Augusta, Georgia, where he attended parties held to celebrate the ongoing Masters golf tournament. It was a couple of days later in Augusta that Applicant conned another woman into believing he was someone he was not. He gave that woman the bracelet he had taken off Ling's wrist after he murdered her. He was later captured by United States Marshals in Augusta in possession of Turner's truck which housed items belonging to Applicant and to Ling. (2541-2618).

Additionally, the State established Applicant's bad character and future dangerousness. The State presented witnesses in the penalty phase who testified about Applicant's stealing a computer and being a braggart and pathological liar as a teen and young adult. The State proved Applicant had previously been convicted of kidnapping another girlfriend, with whom he lived, in a similar manner. He attempted to kill her with a Clorox soaked cloth. There was evidence Applicant had been previously convicted of multiple counts of breach of trust, grand larceny, and obtaining goods by false pretenses stemming from his time as a used car salesman in Summerville. The State also proved Applicant had previously served approximately eight and a half years in prison for these crimes, had not been rehabilitated, and after release from prison almost immediately began illegally defrauding other victims of their money before committing the present crimes less than a year after release. (2277-2482).

²⁰ Applicant's trial counsel successfully excluded aggravating evidence of the Turner murder from the penalty-phase. (R. pp. 2518-37, 2539, 2620-43).

The evidence of aggravation introduced in this case is staggering. As a result, Applicant cannot show *Strickland* prejudice. *Ward v. Neal*, 835 F.3d 698 (7th Cir. 2016) (finding it reasonable for state court to determine that capital defendant was not prejudiced by counsel's presenting evidence of psychopathy, since trial counsel's other option was to present lay mitigation evidence that petitioner was well-behaved and thoughtful child, which was not strong enough to outweigh aggravating circumstances, including that petitioner tortured and mutilated victim while she was alive). There is no reasonable probability the result of the proceeding would have been different had counsel introduced the testimony presented to this Court. *Id.*; e.g., *Wong v. Belmontes*, *supra*.

G. Abandonment of Claim (5)

Applicant has alleged that he was prejudiced by initial PCR counsel's failure to pursue a failure-to-object allegation regarding the State's penalty-phase closing argument which reminded the jury that they had earlier represented they would consider and could impose the death penalty given sufficient evidence, facts and circumstances. Amended App. for PCR at 3 (quoting R. p. 3389). In support, Applicant cited generally to *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978 (1976). That case held that a statute which mandatorily imposes the death penalty violates the Eight and Fourteenth Amendments. *Id.* Applicant elicited limited testimony on this issue at the evidentiary hearing, but did not include this issue in its post-hearing brief. Respondent asserts that this allegation may be deemed waived and abandoned due to Applicant's failure to brief the merits of the claim. S.C. Code Ann. § 17-27-90 (grounds in the application may be found waived or inadequately raised); see S.C. Code Ann. § 17-27-80 ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.").

Applicant has additionally failed to demonstrate how this claim bears a reasonable

likelihood of success had it been pursued at the Georgetown County PCR in the first instance. Unlike the North Carolina statute considered in *Woodson, supra*, South Carolina's statutory penalty is discretionary. S.C. Code Ann. § 16-3-20. Wherein Applicant alleges that the State's sentencing-phase argument painted the imposition of the death penalty as mandatory and not discretionary, the excerpted portion was actually a correct reflection of state law.

Applicant points only to one statement in a lengthy argument. In doing so, Applicant mischaracterizes the State's argument, which at that point purposefully reflects back to the jurors' individual testimonies during voir dire. Yet any excerpt of the State's closing exists as "one moment in an extended trial." *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872 (1974); *see also* S.C. Code Ann. § 16-3-25(C)(1) (A capital sentence may not be "imposed under the influence of passion, prejudice, or any other arbitrary factor."). In determining whether defense counsel would prevail on an objection, a court must conduct an "examination of the entire proceedings." *Id.* at 643, 94 S.Ct. at 1871; *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) ("We must review the [closing] argument in the context of the entire record."); *State v. Bell*, 302 S.C. 18, 35, 393 S.E.2d 364, 374 (1990). The *Donnelly* Court admonished that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." 416 U.S. at 647, 94 S.Ct. at 1873.

On just the next page of the record, the State tells the jury that if they "find the existence of at least one statutory aggravating circumstance, then it is [their] responsibility to consider all the other evidence, all the circumstances, the mitigating circumstances, everything, and to reach a verdict regarding the penalty that is just, a verdict of life without parole or death." (R. 3390). When read in the appropriate context, the State's closing argument accurately reflects the discretionary,

constitutionally sound S.C. Code Ann. § 16-3-20. Applicant's trial counsel agreed, testifying before this Court that the excerpted portion of the State's closing argument was a correct statement of South Carolina law. (PCR Tr. p. 159). Bill Diggs testified that he believed the argument excerpted by Applicant referenced that the jury promised to return a death sentence only if the testimony and evidence presented justified it. (PCR Tr. p. 132). Gerald Kelly testified he did not believe any judge would find it objectionable on the basis posed by Applicant. (PCR Tr. pp. 67, 70-72).

Applicant further cannot meet his burden as to this claim because the trial court made it clear in its final instructions that the jury's role was to recommend either a sentence of death or life without parole only after a unanimous finding of one or more statutory aggravating circumstances. (R. 3388-3512). "Our jurisprudence unwaveringly provides that we are to presume that juries follow their instructions and that proper instruction of the jury by the court cures most errors." *State v. Northcutt*, 372 S.C. at 228, 641 S.E.2d at 884.

The allegation raised but not briefed by Applicant is without merit, if not abandoned or inadequately raised. The State's penalty-phase closing included only a correct statement of the law. No witness presented at the evidentiary hearing refuted that the trial transcript reflected an accurate statement of South Carolina law. Furthermore, the jury was otherwise properly instructed. Therefore, Applicant has failed to establish prejudice from initial PCR counsel's failure to pursue this claim in the initial PCR proceeding, and this allegation is therefore denied and dismissed.

IV. THE BIASED JUROR ALLEGATION

Applicant finally alleges he was denied an impartial jury due to one juror's purported concealment of a prior relationship with one officer who testified during the course of trial, and that the juror's daughter attends the same school as the teenage victim. While actual juror bias may

invalidate a conviction, this allegation does not merit a grant of relief because Applicant's argument in support of intentional concealment is not supported by the material testimony received at the PCR hearing.

A criminal defendant is guaranteed "a fair trial by a panel of impartial and indifferent jurors." *State v. Bryant*, 352 S.C. 390, 581 S.E.2d 157 (2003). Yet "due process does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 946 (1982). "The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Id.* If a juror fails to disclose a relationship with some party or witness during *voir dire*, impartiality may only be inferred if there is no justification for the failure to disclose—but "where the failure to disclose is innocent, no such inference may be drawn." *State v. Woods*, 345 S.C. 583, 587-88, 550 S.E.2d 282, 284 (2001).

Accordingly, a new trial or other grant of relief is only merited when a court finds a juror intentionally concealed information and "that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." *Id.* Applicant has failed to meet this burden. Intentional concealment occurs when a reasonably comprehensible question is presented to the juror "and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." *Id.* at 588, 550 S.E.2d at 284. "Unintentional concealment, on the other hand, occurs . . . where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." *Id.*

This test for unintentional concealment informs the only reasonable conclusion which can

be drawn from this juror's recollection of his trial experience. The juror at issue credibly testified at PCR that he merely recognized the officer when he took the witness stand. He knew nothing more about the officer than that he had responded to a break-in at the juror's residence an indeterminate number of years prior to trial. He did not know the officer's name and thus could not have brought officer's service at his own residence to the court's attention during jury qualification. The juror gave no indication at PCR that he had any actual relationship or lasting personal experience with that officer. The outcome of the officer's role in investigating the juror's break-in was not even important enough to the juror to mention or recall at PCR. (PCR Tr. pp. 14-18).

As to the teenage victim, the juror similarly credibly testified at PCR that she and his daughter merely went to the same school at the same time. He testified he had no knowledge of this prior to trial. He was not even sure when he found out that the teenage victim was a student at his daughter's high school. He twice stated that he could have found out "when the whole trial was over" and that to state anything more than an awareness that the teenagers attended the same school would be speculation. His testimony plainly indicated that he had never personally crossed paths with the teenage victim prior to trial, through his daughter or otherwise. (PCR Tr. pp. 15-19).

The juror's testimony as it pertains to each alleged prior relationship is not probative of a finding of intentional concealment or actual bias. Nothing about this juror's presentation at the evidentiary hearing indicates that his belated recognition of these two witnesses posed a threat to his deliberative process. (PCR Tr. p. 18). The subject of the inquiry was insignificant to the juror, and reasonably so given the limited nature of his recognition of these two witnesses' roles in his own community. *State v. Woods, supra*. The subject of the inquiry was also, at the time of trial, so far removed in time from the juror's limited personal knowledge of either subject that the lack of

disclosure must be considered reasonable. *Id.* In plain terms, it meant nothing to him. Applicant has failed to establish that the juror at issue had any intent to conceal information from the court in a manner warranting an inference of bias.

As to impartiality in a broader sense, “[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.” *Smith v. Phillips, supra*. This juror’s testimony fails to provide a basis for a finding of actual bias. The juror also credibly testified at PCR that recognizing the police officer and recognizing that the victim went to his daughter’s school had no bearing on his ability to serve in an objective manner. (PCR Tr. p. 18). He credibly recalled the questions the trial court posed to him at voir dire regarding his ability to impartially consider all of the evidence and follow the court’s instructions. (PCR Tr. p. 19). The juror testified he had no pre-formed verdict: “I agreed to what was required of me to serve, and I followed through.” (PCR Tr. p. 20). The voir dire record echoes the same, as this juror testified that he had only a general awareness about the case. He agreed that he could act as a horse with blinders if selected to serve on the jury and render a decision based only on the evidence and the law as charged. (R. pp. 377-79). The juror was also sequestered during the course of the trial. (R. p. 382). This Court also notes that the South Carolina Supreme Court has already ruled in this case on direct appeal that a “review of the entire *voir dire* process shows the qualified jurors were impartial, unbiased, and capable of following the law. . . .” *State v. Stanko*, 376 S.C. 571, 576, 658 S.E.2d 94, 97 (2008) (holding that trial court’s limiting the scope of *voir dire* did not deprive Applicant of a fair trial).

Even if the juror’s testimony could be interpreted in a manner warranting a finding of presumed bias, Applicant has failed to establish prejudice from the failure to pursue this issue at

the first PCR hearing. *See Woods, supra* at 590, 550 S.E.2d at 285. “[R]elief is required only when the court finds the concealed information would have supported a challenge for cause, or would have been a material factor in the use of the party’s peremptory challenges.” *Thompson v. O’Rourke*, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986). This inquiry requires focus on the character of the information alleged to have been concealed. *Id.* Again, the juror credibly testified at PCR that his belated recognition of the officer and the teenage victim (assuming the latter occurred during the course of Applicant’s trial and not after its conclusion) had no bearing on his deliberative process. (PCR Tr. pp. 14-20). The record does not support a finding that the juror should have been challenged for cause. *See Wilson v. Childs*, 315 S.C. 431, 437-38, 434 S.E.2d 286, 290 (Ct. App. 1993) (trial court’s refusal to exclude jurors for cause justified where jurors voluntarily disclosed their potentially disqualifying relationships, stated their ability to be impartial, and appellant identified no circumstances suggesting any juror dishonestly declared his or her impartiality).

Applicant also failed to establish that the information supplied at the PCR hearing would have altered the use of his peremptory challenges. Applicant’s framing of the testimony taken in pursuit of this allegation does not match the materiality of the actual testimony presented to this Court. Gerald Kelly testified that if he learned one of the jurors knew a police officer who was going to testify, that he “would have examined them and if [he] found out that they were friends or that they could in any way be influenced [he] would strike them.” (PCR Tr. pp. 68-69). He similarly testified that if he knew that a juror had a daughter who went to school with the teenage victim that he would have “forced the strike” only if he “felt that there was any influence there” after examining the juror. (PCR Tr. p. 69). In the exact same vein, Bill Diggs testified that if he found out a juror was familiar with an arresting officer and found out that the teenage daughter

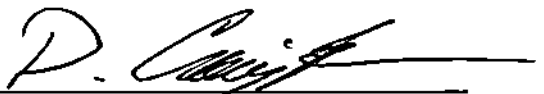
went to the same school as his own, he “would have proceeded to ask the juror to pursue it” and would strike the juror only “if [he] didn’t get any kind of satisfaction or satisfactory responses.” (PCR Tr. pp. 133-34). Trial counsels’ testimony fails to establish prejudice when considered in conjunction with that of the juror. The juror failed to demonstrate a friendship with either witness or that he was in any way influenced by his recognition of them. (PCR Tr. pp. 18-20). The record leaves no indication that trial counsel would not deem the juror to have made a satisfactory showing of impartiality.

Applicant has failed to meet the standard governing relief on this type of allegation. Jurors “need not enter the box with empty heads in order to determine the facts impartially.” *Skilling v. United States*, 561 U.S. 358, 398, 130 S. Ct. 2896, 2925 (2010). The record demonstrates the juror had no pre-formed opinion rising to the level requiring disqualification; the juror did not testify any differently at PCR than he did during voir dire as to his pre-trial exposure to the case and his ability to listen to the law charged to him and render a decision based upon the evidence presented; and, the juror did not purposefully conceal from the court any type of actual, personal relationship with any witness in a manner amenable to a finding of bias. *See id.* (finding from “the full record, rather than incomplete exchanges selectively culled from it,” the defendant was not deprived of an impartial jury even in light of extensive pretrial publicity).

CONCLUSION

“The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.” *Strickland*, 466 U.S. at 691-92, 104 S. Ct. at 2067. For the foregoing reasons, Applicant has not demonstrated that he lacked the assistance necessary to justify reliance on the outcome of his prior proceedings—including the denial of post-conviction relief following the initial merits hearing. Applicant’s trial counsel put on a thorough and well-researched defense at both phases of Applicant’s trial.

Applicant's current PCR counsel put forward a vigorous case attempting to show that Applicant was prejudiced at trial. However, the evidence Applicant presented before this Court fails to undermine confidence in the jury's verdict and sentencing recommendation. Therefore, this Court respectfully denies and dismisses Applicant's successive application for post-conviction relief.


D. Craig Brown
South Carolina Circuit Court Judge

This 11 day of March, 2021
Florence, South Carolina