

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Paul M. Burch, Circuit Court Judge

Appellate Case No. 2012-206087

RECEIVED

APR 17 2013

S.C. Supreme Court

MARION ALEXANDER LINDSEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

RETURN TO PETITION FOR WRIT OF CERTIORARI

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II. The PCR court reasonably found that trial counsel was not ineffective in failing to retain a social worker to testify. Counsel retained a mitigation investigator and other experts who developed an understanding of the social history. Although the particular themes presented at the PCR proceeding were not presented in the same manner at trial, the Petitioner failed to show that the result would have been different. Certiorari is not warranted.	51
III. Certiorari is not warranted where there is probative evidence to support the PCR court’s rejection of the claim that counsel failed to adequately prepare and present Dr. Melikian, a forensic psychiatrist to testify. Although this was her first capital case as a defense expert, she had been qualified as an expert on 10 prior occasions and was the director of the forensic psychiatry unit. Although she received additional information in preparation for the PCR hearing, her assessment of the Petitioner’s mental status was the same, although she opined his depression in 2004 which she had diagnosed was more severe. The Petitioner did not meet his burden of proof in showing prejudice where with the additional evidence and time, he had failed to show a reasonable probability the result of the proceeding would have been different.	71
IV. The PCR court properly concluded on the basis of competent evidence that counsel’s failure to employ and present a prison adaptability expert in mitigation was not a Sixth Amendment violation.	
A. The PCR Court reasonably applied the mandates of <u>Strickland</u> in concluding there was no Sixth Amendment violation when counsel failed to employ or opine to present a prison adaptability expert to opine “the	

Department of Corrections can manage this type of offender for the remainder of his life without causing an unreasonable risk of harm to staff, inmates, as well as the general community” where counsel was aware of recent prison incidents of violence in addition to his separate violent incidents against the victim and other that resulted in a conviction assault and battery with intent to kill.

- B. The PCR court further found 6th Amendment prejudice had not been shown where cross-examination of the expert revealed additional evidence of a character for violence including evidence that Lindsey had to be gassed in a jail incident, and other prison assaults and a recommendation for “anger management” not presented in the state’s penalty phase case and the thorough evidence presented in the state’s case at trial revealing his character for violence.
- C. Further, the reliability of the expert’s opinion at the PCR was impeached where he admitted that since his death sentence, Petitioner had additional incidents of violence with other death row inmates. 93

- V. The wholesale challenge to request and signing of a proposed order is not properly before this Court where no objection was made to the request. Further, the fact that a PCR Court did not correct clerical errors in the Order prior to signing the order does not show bias against the Petitioner nor divest the Order of its appropriate deference in this Court. Judge Burch spent an adequate amount of time - over two months - prior to signing and filing the Order. (Issue 5, Petition for Writ of Certiorari, p. 105-110). 108

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PETITIONER'S ISSUES PRESENTED

1.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to conduct an adequate mitigation investigation and failing to prepare and present an adequate mitigation case at trial?

2.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a social work expert who could testify regarding Marion Lindsey's miserable upbringing, his awful family history, and the effect this had on his mental state at the time of the shooting?

3.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by hiring an inexperienced forensic psychiatrist one month before trial and failing to prepare her to testify?

4.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a prison adaptability expert who could dispute the State's aggravation evidence?

5.

Whether Marion Lindsey's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under state law were violated because the trial judge failed to properly consider his application as evidenced by the court's wholesale adoption of the State's proposed order?

INTRODUCTION

Respondent submits that the claims of ineffective assistance of counsel are insufficient to show entitlement to relief under Strickland v. Washington, 466 U.S. 668 (1985) based upon the entire record before the court. As Strickland and its progeny make clear, assessment of the entire record, including the trial record as well as the record from the collateral proceeding, is necessary. As Harrington v. Richter, 562 U.S. ___, 131 S.Ct. 770, 178 L.Ed.2d 624 (Jan. 19, 2011), makes clear, counsel is presumed to be competent in making strategic decisions. Here, the assessment and the burden of proof are important because lead counsel Michael Bartosh died April 5, 2006 prior to this proceeding. It is evident from each of the attorneys involved in the Lindsey case - Doug Brannon and Karen Quimby Hatcher - that Mr. Bartosh was the primary counsel in the case and that Bartosh focused his efforts and strategy on the penalty phase of the trial. Each of the specifications of ineffective assistance of counsel concern the penalty phase of the trial. In fact, the only relief sought in this action concerns sentencing. As stated in Harrington, "[A]lthough courts may not indulge " post hoc rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526-527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam)."

Throughout the Petitioner's Petition, he refers to the A.B.A. Guidelines as his standard. However, the United States Supreme Court recently clarified what *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) requires in the context of investigation and preparation of penalty phase mitigating evidence:

The Sixth Amendment entitles criminal defendants to the " 'effective assistance of counsel' "--that is, representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." That standard is necessarily a general one.... Restatements of professional standards, we have recognized, can be

useful as "guides" to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place.

Bobby v. Van Hook, --- U.S. ----, ----, 130 S.Ct. 13, 16, 175 L.Ed.2d 255 (2009) (citations omitted). Accord, *Cox v. McNeil*, 638 F.3d 1356 (11th Cir. 2011) (habeas relief not warranted even if counsel's performance fell short of standards for reasonableness as articulated by American Bar Association guidelines for capital defense work, absent showing that there was reasonable probability that outcome of either his guilt or penalty phase would have been different had his counsel discussed mitigation at greater length with potential jury members).

The Court reiterated in *Bobby* that *Strickland*'s emphasis that such bar standards are " 'only guides' to what reasonableness means, *not its definition*." *Id.*, at 17 (quoting *Strickland*, at 688).

WHAT THE JURY HEARD

Any proper Strickland assessment must begin with the trial record and what defense counsel actually presented:

In the penalty phase, the defense called a series of mitigation witnesses. **Ann Howard**, Special Services Coordinator with the Spartanburg County Mental Health Center testified that she had seen the Petitioner on September 8, 2002 and he presented himself as suicidal, crying and very depressed. She opined under a deferred diagnosis and referred him to a psychiatrist, Dr. Freeman Smith. App.p. 1984-85. According to his notes, Dr. Freeman put Lindsey on an anti-psychotic drug - Zyprexa, and was currently on Celexa - and anti-psychotic, a drug for depression - and a mood stabilizer - Abilify. App.p. 1988-89. She testified that he is still receiving medication of Celexa, Depakote, and Abilify. App.p. 1989.

On cross-examination, she testified that on his intake interview that the Petitioner told her that he did not remember anything about shooting and killing his wife. App.p. 1992.

Dr. Margaret Melikian, a forensic psychiatrist retained by the defense [Program Director of Forensic Psychiatry at M.U.S.C.] testified that she saw Petitioner on May 4. She stated that she had

reviewed:

1. His medical records.
2. The records from a psychiatric hospitalization when he was a teenager.
3. The records from a head injury when he was an infant.
4. His neurological records.
5. His school records.

App.p. 2003. Dr. Melikian testified that she also reviewed the reports and records from the Hall Institute [DMH] evaluation. App.p. 2003.

Dr. Melikian opined that Lindsey had problems in school and had a learning disability and attended special classes for speech therapy. App.p. 2004. She also reported that Lindsey was in an accident when he was run over by a car when he was 18/19 months old and suffered a head injury. Id. She further had information that he had inhaled kerosene at one point. Id. She reported that he had several head injuries. Id.

Dr. Melikian stated that Lindsey had completed the ninth grade and then dropped out of school in the tenth grade. App.p. 2004. She reported that he “had trouble with school.” Id.

In reviewing his neuropsychological records, Dr. Melikian opined he had some abnormalities having to do with naming and being able to copy designs, dexterity and motor skills and that he had some cognitive deficits. Id.

She also opined that Lindsey had a “family history of depression.” She reported that he was treated by a psychiatrist after he had an overdose when he was 15 years old. She opined that at the time of the incident, Lindsey appeared to satisfy the diagnostic criteria for depression. App.p. 2004, l. 23-25. She opined that he suffers from “major depressive disorder.” App.p. 2005.

Concerning malingering, she asserted that the records suggested that while he had been diagnosed with malingering because of his report of hearing voices and his friend Jimmy, by their

objective testing, it suggested that he was putting forth good effort.

She reported that Lindsey was then seen by Dr. Tora Brawley, a forensic psychologist. Based upon this testing, Dr. Melikian opined that he was not malingering. App.p. 2005-06. She stated that the issue of malingering came up because Lindsey reports that when he was in the hospital at age 15 after an overdose, that an imaginary friend named Jimmy came to visit him and he heard voices that were comforting to him. She stated that he never discussed this with anyone but that his roommate noticed him talking to unseen others. Lindsey stated that when he is stressed that his friend Jimmy is with him and tells him good things and supports him. She stated that after the incident, Lindsey was nervous and reported that his friend Jimmy was with him. App.p. 2006-07. He told her that Jimmy first appeared after his overdose when he was in the hospital and felt he had no friends. App.p. 2007. She felt that he describes hearing a voice like an auditory hallucination. She asserted that it was atypical and would be misdiagnosed as malingering.

She also reported that the roommate that Lindsey had at the time looked like Charles Manson and that Lindsey was afraid of him and that was when Jimmy showed up. However, he reported that the roommate only looked scary and turned out to be a nice man. App.p. 2007.

As to whether Lindsey would have been operating under the influence of mental or emotional disturbance at the time of the incident, she opined that Lindsey had reported that he had been suicidal for several weeks prior to the incident. He reported that he had weight loss with decreased appetite, feelings of hopelessness and helplessness and a sad mood. She felt that he would meet the criteria for depression at that time. App.p. 2008. His depression was recurrent. She opined that the depression was acute as opposed to chronic. App.p. 2008.

She opined that he had cognitive deficits. App.p. 2009. She reported that the testing at Hall Institute determined that he had well below average IQ and "borderline intellectual functioning" close to mildly retarded range with an IQ of 76. App.p. 2009. However, she noted that when Dr. Brawley

tested him, the scores were in the 80's although it is still below average.¹ She stated that “ I would not have made a diagnosis of borderline intellectual functioning” because he does function better than what his test scores look like. She stated that his intelligence is low, he had trouble in school, but he does have some functioning abilities that she would not say was the basis of worrying or seeing him clinically for decreased intelligence. App.p. 2009. She noted that he had problems with verbal fluency, naming words and processing memory. App.p. 2009. She opined that in her professional judgement Lindsey had some kind of brain abnormality that causes his low test scores and sudden neurological findings. She concluded that a source of the abnormality could have been from the head trauma or the incident when he injected kerosene when he was 18/19 months old. App.p. 2010. She referred him to a behavioral neurologist after receiving the results from the neuro-psychologist. She also stated that the suicide attempt at age 15 was the result of an overdose of tylenol and other medications.

Dr. Melikian stated that his neurological problems were chronic. She stated that he had a limited ability to cope with things due to his limited intelligence and by his continuing to have an imaginary friend. She stated his stress with his wife and the separation added to the stress which decreased his coping skills. App.p. 2012. She stated that he described the killing of his wife. He told Dr. Melikian that his wife was leaving and taking the kids and that he would never see them again. App.p. 2012-13. He told her that he had moved into his cousin's house and planned to commit suicide by driving off the cliff, but he was worried that he might not die. Id. He stated that he begged his wife to return and had written suicide notes, but did not recall what he said. He also told her that he planned to shoot himself and that his cousin had taken his keys and that his mother, brother and uncle and talked to him. He told her that he had been unable to reach his wife because she was blocking his numbers on the telephone. He said that he had been crying which was unusual for him. App.p. 2013. He stated that he was able

¹ Dr. Tora Brawley, a clinical psychologist with a specialty in neuropsychology made a written report to Dr. Melikian on May 20, 2004. Applicant's PCR Exhibit 11. This is discussed within this pleading in the section related to preparation of Dr. Melikian.

to get in touch with his wife at work where the numbers were not blocked.

Lindsey described his weight loss from 225 pounds to 160 pounds to Dr. Melikian. App.p. 2013.

On the day of the incident, according to Lindsey, he talked with Latresse for a couple of hours and drove the car home. He stated to Dr. Melikian that he was tired and wanted to drive to his mother-in-laws and “blow his brains out” in front of the house. While there he was driving and talking to his wife’s cousin and saw an image in the back and then saw his cousin drive off. App.p. 2013. He then stated that he just snapped. App.p. 2013, l. 25. Lindsey told her that he followed them, but did not remember that he shot his wife until the EMS people told him App.p. 2014. He said he shot four times and shot himself one time and that the police also shot him. Id. He stated that he had asked the EMS people at the scene to let him die. App.p. 2014.

She stated that he had a gunshot wound to the head. The wound exited, but did not penetrate the brain. He was shot multiple times by the police. App.p. 2014.

On cross-examination, Dr. Melikian admitted that she had not prepared a written report, although she admitted that she had prepared reports when she worked at Hall Institute. App.p. 2015. She stated that the first mention of Jimmy was on October 10, 2002 which was the same date that he was served with the notice to seek the death penalty. App.p. 2018. She denied that this was evidence of malingering. App.p. 2019. She saw this as a coping mechanism for Lindsey. Id. She admitted that he tried to say it was Jimmy’s fault and to avoid responsibility. Id.

She also stated that Dr. Narayan reported in July 2003 that Lindsey was claiming that Jimmy was in the room and pulled a chair up for him and started a conversation with him, but she denied he was malingering. She also referred to Dr. Lauri Barwick’s November 13, 2003 report. App.p. 2021.

Dr. Melikian confirmed that Lindsey was competent to stand trial, knew the difference between right and wrong and could conform his conduct. App.p. 2022.

She admitted that the neurologist, Dr. Absher concluded that he had a normal neurological examination. App.p. 2024.

She stated that she did not have his earlier Department of Corrections records when he was serving time for the earlier assault and battery with intent to kill in 1996. App.p. 2026-27. She stated that Lindsey had acute periods of depression that he recovered from in between. The State inquired whether he was suffering under depression in 1996 when he shot through the windshield of Stafford Wilkins² and was convicted of assault and battery with intent to kill. App.p. 2027-28. She stated that she did not have a chronology of his moods for his entire life. App.p. 2028. She stated that she relied upon records of his 1988 suicide attempt. App.p. 2029-30. She stated that she had reviewed various school records and admitted that they were incorrect in that some showed he had quit in the 10th grade according to him yet others showed he had either repeated 8th grade three times or seventh grade twice instead. App.p. 2032. The state pointed out that Lindsey had lied on his application for employment at BMW that he had graduated from Chapman High School. App.p. 2032-33.

She stated that it might have been helpful if she had been given a copy of the BMW application and could not state that it would have been helpful to review the entire case file, or to speak with either Dr. Crawford or Dr. Narayan (who had diagnosed Lindsey with malingering) (because she had his report) or Officer Benny Godfrey, or Latresse Smith. App.p. 2037-38. She confirmed that much of what she testified to was based upon her discussion with Lindsey who she denied was malingering. Id.

She denied that depression or his low IQ or his neurological impairment caused him to gun down his wife. App.p. 2041-42. She asserted that these should be considered mitigating factors. App.p. 2042. She opined that on September 2002 he was suffering from acute depression. App.p. 2043.

Virginia Lindsey, the Petitioner's mother, testified that Marion was 30 years old at that time. App.p. 2044. She stated that she had four sons, but one died in a drowning. Id. She also had a daughter

²In the transcript of the trial, he is referred to as Stanford Wilkins. App.p. 1940.

that had been killed in a car accident in 1969 when she was seven months old. App.p. 2045. She stated that she was never married to Lindsey's father, Leon McDowell, Sr. and raised him by herself. His only male influence was his uncle Steve Pilgrim.

She described living in a two-bedroom home with the boys all in one room sharing beds and herself in another room. App.p. 2046. She stated that she worked at the Howard Johnson Motel from 8 a.m. to 4 P.M.. She stated that Uncle Steve was with them when she went to work. App.p. 2046.

She described Lindsey as a very loving and sweet child. Id. However, she stated that Lindsey inhaled kerosene when he was 18 months old. She described that she was doing dishes and was crawling around the wood heater. She described hearing him scream and saw he had poured kerosene all over his face and down his clothes. She stated that she grabbed him and tried to give him milk and carried him to the rescue squad and he was treated at the hospital for it. App.p. 2047. She stated that one month later, Lindsey was run over by a car driven by her brother - Paul Pilgrim - who accidentally backed up over his head which resulted in scars. She stated that he was treated at the hospital that night and returned home that date. App.p. 2048.

She described that her son as slow in school. She stated that he had one fight in junior high school. She stated that her son did not study and did not like to study, but would go to school. App.p. 2048-49. She stated that he had problems with his speech and had to go to speech class. App.p. 2049. She said he repeated the eighth grade, but did not recall if he repeated first grade. Id.

Ms. Lindsey stated that her sons each had different fathers. She said that while the fathers would pick them up, Marion did not have his father visit him which caused him to get upset because he could not go with his brothers.

She said that he moved out when he was 20 and quit school when he was 17. App.p. 2050. She said that he went to work and gave her money to help pay the bills. App.p. 2051. Id.

According to Ms. Lindsey, the Petitioner first met Nell Lindsey around 1995. He had been

living with a different girlfriend - Stephanie - at that time. She said that Lindsey eventually moved in with Nell and that they had a child July 1995 and a second child in 2002. She described his relationship with Nell as a little arguing, but never saw violence and around her it was good. She described Nell as being like a daughter to her. She said that they would separate and then go back together several times. She stated that Nell would go to her mother's house during the separations. App.p. 2053-54. She said that Lindsey would stay with friends then. Id.

She stated that Marion loved her sons and saw that they wore the best. He told her that he wanted to give them a father and did not want them to grow up without a father. They were the most important thing in his life. App.p. 2055. She said that he did not want anything to do with his own father.

Ms. Lindsey stated that she had four brothers (one of whom is dead) and three sisters. App.p. 2056. She stated that her sister Bessie Smith had attempted suicide. App.p. 2056. She stated that she had been treated. Id.

She said that Marion was 15 and was hospitalized for attempted suicide. She said he stayed in the hospital for four days and was afraid of the man in his room because he looked like Charles Manson. App.p. 2057.

She said that while he was in school she never had any teacher call and tell her that he was failing.

At the time of the incident, she thought that they had been separated for a few months. She said that she had attempted to see her grandchildren, but neither her nor Marion was allowed to see them. App.p. 2057. She said this was for two months before the incident. She said that this made Lindsey upset because his kids had always been with him. She said that she tried calling Nell and learned the phone was blocked four days before the incident. App.p. 2058. She said that this had an effect on him because all he wanted was to see his kids. Id. He told her that if he could not get his family back that

he could not live any longer. She said that last time she saw Lindsey was three days before the incident. She noted that he had lost weight and appeared to be worried and upset. She described him as very depressed. App.p. 2059.

She stated that she heard about the incident at 8:15 on September 18, 2002. She stated that “Marion is my son. I love him very much. And I ask mercy for my son not to be sentenced to death. I know that somebody else’s child’s life was took. But I don’t want my child sentenced to death.” App.p. 2060.

On cross-examination, Solicitor Gowdy pointed out that Rod Tullis, a lawyer, represented her son. Solicitor Gowdy further inquired whether her son had contacted legal aid. She stated that she did not know whether or not her son had taken efforts to talk to a lawyer about getting a court order to be able to see the children he wanted to see. App.p. 2061.

Bill Burton testified that he knew Lindsey and ran a chemical company for a German firm. App.p. 2061. He said he met Lindsey while he was a lifeguard. Lindsey was 6-7 at the time. He said the kids would come to the pool. He said he taught Lindsey how to swim.

Burton described the fact that Lindsey lived in a pretty rough situation. He stated that he would take them to Spartanburg Braves/Phillies baseball games and then to Burger King. On occasion, he would take them to his house to go fishing. He said that he visited Lindsey’s home and described it as “desperate poverty.” App.p. 2063, l. 21. He said that house was about 1000 square feet with eight people living in it. Id. He said all the children slept in a single bed. He said that house had since been condemned and was torn down. App.p. 2064.

Burton described Lindsey as a kid looking for attention and an adult to look up to. He said he never saw violence in Lindsey from either him or his brothers. He said he knew him for 13 years. He said they came over to his house to fish more than 20 times and would always call his mother and seek permission. App.p. 2065. He described Lindsey as “the picture of politeness” toward Burton’s parents.

App.p. 2065.

Burton stated that after he graduated from college, he became in the position to offer Lindsey a job. Lindsey then went to work for his company. App.p. 2064. He stated that Lindsey worked for his company for about a year. App.p. 2066.

He stated that Lindsey: "grew up in abject poverty without the benefits of parents like normal families. I knew him until he was 20 years old approximately. I never saw the kind of behavior or violent behavior of any sort during that period." App.p. 2067.

On cross-examination by Solicitor Gowdy, Burton stated that he had not learned of the incident when Lindsey at age 20 had shot Stafford Wilkins through the windshield with a hand gun until he came to trial. App.p. 2069.

Leon McDowell, Marion's father, declared he was not a father to Marion. App.p. 2070-71. He stated that he was married to someone else when Marion was born. He said he was never there with him to go to a baseball game or go to a movie. However, he said he gave them money for clothes and declared if not executed "maybe he can benefit his kids somehow". App.p. 2072

Chris Wilkins, a friend like a brother to Marion, hung out together since 13 and lived together sometimes with Marion and Nell, never saw Marion hit Nell, but saw them argue and believed that Marion loved her and asked for mercy. App.p. 2073-74. He stated that he saw Lindsey with his sons and that he was a loving father and proud of his boys. He said he was aware that the Lindseys would separate during their marriage. However, he never saw Lindsey hit Nell. He believed that he loved her.

Wilkins stated that he would hear Lindsey mumble to himself and appear to be chewing his tongue. App.p. 2075. He stated that Lindsey tried hard to provide for his family. He never saw Lindsey hurt anyone on purpose. He asked the jury to take into consideration the kind of father he was and have mercy on him. He felt what happened was a big tragedy for everyone, but that Lindsey was a good person. App.p. 2076.

On cross-examination by Deputy Solicitor Willingham, he confirmed that he would have helped him if he wanted to have custody of his kids and get a lawyer. App.p. 2076-77. He admitted that he was aware of the incident when Lindsey shot through the windshield at Stafford Wilkins. App.p. 2077. However, he was not aware of the 2001 incident at Applebee's when he cold-cocked Nell in the parking lot, but he has since heard of it. App.p. 2077.

Steven Pilgrim, Lindsey's nephew testified that he lived with him for seven years. App.p. 2078-79. He stated that he was present at a car accident with Lindsey as a child and personally took him to Inman Emergency. App.p. 2079. He said that they took him to a hospital and stayed with him. Id. He said that he was also knew about when Marion inhaled kerosene. App.p. 2080-81. He stated that he suffered from high blood pressure and has a daughter that suffers from panic attacks. App.p. 2080.

Bessie Smith, Marion's aunt, testified that she lived at one time in a house with Marion. App.p. 2081. She described a kitten being thrown by her brother into the heater. She said that Marion was hurt by this action. App.p. 2081. She also testified that she had attempted suicide. App.p. 2082.

The Petitioner waived his right to testify in the penalty phase of the trial. App.p. 2084-2089.³

3

The Defense Proposed Witness List

Prior to trial, the defense, through appointed counsel Michael Bartosh made written notice of potential witnesses in the case. Particularly, counsel identified the following in his written notice:

LAY WITNESSES
Bill Burton*
Pat Burton
Beth Gregg
Alex Lindsey
Trey Lindsey
Virginia Lindsey*
Amy Osbey
Sharon Pilgrim
Steven Pilgrim*
Timothy Sims
Bessie Smith*
Kennia Wilkins
Kristopher Wilkins*

The State's Case Against Lindsey

Any understanding of the facts of the case and the propriety of the harshest punishment must begin with a review of State Exhibit 21, the 911 tape, made on September 18, 2002. Within that tape, it reveals that this act was more than a single victim incident, although only one victim died. The tape reveals unique violence and blatant disregard of societal laws where Lindsey, ordered to avoid contact with the victim due to his prior criminal actions, tracks down the victim and kills the victim in cold blood while she is seeking respite at the Inman S.C. Police Station, in front of law enforcement.

State Exhibit 21, the tape of the 911 telephone call from Ruby Nell Lindsey to the Dispatcher revealed the following:

Dispatch: Spartanburg 911, what is your emergency?

Lindsey: Yes, I just got off work and my sister was going to drop me off and my husband, they signed a warrant on him last night and told him to stay away from me, now he's calling us, and I'm in Inman City. I'm on my way to the police station because he's behind us following us. He's coming down Main Street.

Dispatch: Okay, so you're ma'am! Wait a minute, don't hang up on me!

Lindsey: I'm not gonna hang up on you.

Dispatch: And he's "wanted" you said?

Lindsey: They already picked him up and the judge told him to stay away from

EXPERT WITNESSES

John Absher, Neurologist

Tora L. Brawley, M.D, USC School of Medicine

Margaret Melikian, D.O. , MUSC Institute of Psychiatry*

Lenora Topp, Mitigation

Rod Tullis, Attorney at Law

J. Benjamin Stevens, Attorney at Law

Counsel Bartosh also indicated at that time that additional witnesses may be called in his written notice. [Those marked with * testified].

me and here he is behind us and now following us.

Dispatch: What's your name?

Lindsey: Uh, Ruby Lindsey.

Dispatch: What's your phone number?

Lindsey: What's my phone number?

Dispatch: Yes ma'am, your cell phone number.

Lindsey: 978-xxxx. He's coming down right beside us.

Dispatch: What's his name?

Lindsey: Marion Lindsey.

Dispatch: Marion Lindsey?

Lindsey: Yep.

Dispatch: What kind of car are you in?

Lindsey: I'm in a gray car; I'm pulling into Inman City Police Station right now.

Dispatch: What kind of car is the male in?

Lindsey: He's in a Nissan Sentra.

Dispatch: What color?

Lindsey: Uh, gold.

Dispatch: Did he pull in behind you?

Lindsey: Yeah he pulled in behind us.

Lindsey: I'm not getting out!

(Children screaming in the background, conversation inaudible)

Dispatch: Hello?

(Child/Children crying in the background)

Dispatch: Hello? Hello? Hello?

State Exhibit 21, 21(a) (tape, enhanced CD).

The evidence of this horrific scene at the sanctuary of the police station parking lot further revealed that the driver, Celeste Nesbitt, after driving them into the parking lot exited the vehicle and tried to get the decedent to leave but she was talking on the telephone to 911. Unsuccessful, Nesbitt saw the Appellant pull into the lot, jump from his car, and run toward the back of the car. [Earlier, he had stopped them and Celeste told him, when he was unable to see through the tinted windows, that her daughters were in the back seat, but denied that there was anyone else there when he declared that somebody else is back there. App. p. 1526.] Celeste saw Lindsey pulls out a gun and stick it to the rear passengers' window and fire into the car. Celeste then crawled into the nearby police car for her own safety. After the shooting she was advised that they (the police) had got him and she was confronted with her oldest daughter screaming that Nell was dead. App. p. 1536.

Inman officer Godfrey described hearing about a "rolling domestic dispute" from the dispatcher. He stated that he saw the cars pull into the parking lot and saw Nesbitt jump out of the car and come running toward him and state that "he's going to get her . . ." He then saw the Appellant with a handgun point at the back glass. When Godfrey reached for his gun and hollered "don't," Lindsey ignored the demand and fired two shots into the back glass. App. p. 1567.

At that point, Godfrey took cover. He then saw two more flashes from Lindsey's weapon. Seconds later, Officer Godfrey came out and Lindsey pointed the firearm at him. Godfrey reacted and fired four times at Lindsey. App.p. 1567, ll. 19-24, p. 1575, l.19 -p. 1576, l. 8. Lindsey was hit by him according to Godfrey and went down.⁴

Ruby Nell Lindsey suffered four separate gunshot wounds. Three bullets entered and remained in her head. The first was to the back of the head, three 1/4 inches from the top and 3/4 of an inch to

⁴Lindsey stated to the paramedics that he had shot himself in the head. App.p. 1674. Lindsey sustained wounds to his hip and legs. App.p. 1669.

the left of the midline. The second was to the left temporal region. The third was near the nape of the neck. The fourth wound grazed the lower postural neck midline. App.p. 1654-1657.

In processing the scene, evidence revealed that shots went through the backside of the back window from the rear driver's side' and also from the driver's side rear window where Mrs. Lindsey was seated. App.p. 1588-1590. As throughly set out in the prior arguments, it was by fortuity that the children seated in the back seat were not killed or injured beyond the cuts and emotional trauma they received.

As Petitioner recognizes the events evolved out of a domestic situation. The evidence presented revealed that Marion Lindsey had beaten his wife previously. App.p. 1775-1781, 1823. [Penalty Phase Testimony of Celeste Nesbitt, Sharon Smith]. The victim had made calls contacting lawyers concerning a divorce. App.p. 1782. The Petitioner referred to his wife as "bitch" and threatened to kill her if "I catch you doing anything." App.p. 1782. Testimony was received about an assault by Petitioner on his wife at Applebee's Restaurant in December 2001 which resulted in a criminal domestic violence warrant. App.p. 1918-1921, 1924-1926. Evidence also revealed that the Appellant was involved in the sale and distribution of crack cocaine. App.p. 1830-1834, 1855-56, 1863-64, 1875 (11.41 grams of crack cocaine in the September 14, 2000 incident).

Importantly, Magistrate Sarah Simmons of Spartanburg County testified about the September 17, 2002 arraignment of the Petitioner on a criminal domestic violence charge the night before the victim's murder. App.p. p. 1931. She stated that she directed Lindsey that "there was to be no contact with the victim who is Nell Lindsey. App.p. 1933 - 1936.

Concerning other violent incidents in Lindsey's past, there was evidence presented that on February 20, 1994, Lindsey blocked the vehicle being driven by Stanford Wilkins with Jessica Cannon as a passenger in the middle of the road. Lindsey then got out of his car and shot twice through his windshield, striking Wilkins in the arm. App.p. 1943, 1950-51. Lindsey was convicted of assault and

battery with intent to kill after a no contest plea on December 14, 1996 and received a two-year sentence, suspended to one year and one year probation with restitution. App.p. 1953.

At the sentencing proceeding for this case, victim impact evidence, in addition to the testimony concerning the effect of the trauma on Kiera, includes testimony from Stanley Staggs, the victim's father. App.p. 1954-1965. This testimony concerned the impact on his life and her children's lives. App.p. 1961-1965.

The State also presented in the penalty phase the testimony of James Sligh, Division Director of Classification and Records at the Department of Corrections. App.p. 1908. In his testimony, he stated that a person sentenced to life imprisonment would initially be housed at a Level 3 high security institution. Id. He stated the cell would be 75 by 100 with two inmates in the cell. He stated that they would have access to the yard and have contact with other individuals. He stated that there could be job assignments or educational classes in a classroom setting. App.p. 1909-1910. There could also have contact visitation up to eight visits a month. App.p. 1912.

On cross-examination from counsel Bartosh, Sligh indicated that there were 23, 500 inmates. He guessed that about 1000 were serving life sentences. He described "patrol controlled movement" from cafeteria to the various assignments. He clarified that there was no milling around on the yard. App.p. 1914. He stated that it was based upon how the particular inmate is classified to determine his prison setting. App.p. 1916. This will initially be done at the Reception and Evaluation Center. App.p. 1916. There will be testing then for academic level, mental health issues and security level. App.p. 1917.

The picture the prosecution and evidence revealed was harsh. It showed that he was a violent tempered criminal involved in the drug trade. It also revealed a person who flaunted his responsibility to obey authority. It also revealed a person with a past history for using a handgun and shooting through windshields. It painted a picture of the type of person for whom the death penalty was intended - a

violent person with a prior criminal history where correctional rehabilitation had not changed his either his violence or his disrespect for the law.

ARGUMENTS WHY CERTIORARI SHOULD NOT BE GRANTED

- I. Certiorari is not warranted where the PCR court reasonably applied Strickland v. Washington in concluding that trial counsel was not ineffective in the mitigation investigation and penalty phase presentation. There is probative evidence to support the conclusions by Judge Burch. [Petition, p. 2-63. Grounds 1,2,3,5,7,8,9. Order p. 35-65, 88-89, 102-181, App.p. 3570-3601, 3623-24, 3637-3713].**

In his initial argument on certiorari, Lindsey contends that trial counsel Michael Bartosh⁵ waited too long before the trial to begin preparations on the penalty phase of the case. He claims that he has shown that there was a mountain of mitigating evidence that could have been presented and claims the evidence presented at the PCR hearing could have made a difference. Petition, p. 4. He claims that there was a failure to promptly investigate and assemble a defense team, that counsel failed to attend Lindsey's interviews with the state mental health examiner, that counsel failed to call Rod Tullis about Petitioner's mental state around the time of the crime and failed to preserve an alleged tape of a message Lindsey left on his office answering machine around the time of the crime; failed to prepare family members to ask for mercy in their mitigation testimony; and failed to retain and present witnesses including Dr. Tora Brawley, a retained neuro-psychologist who could have testified concerning Lindsey's cognitive deficits; failed to retain and call a social worker; failed to adequately prepare Dr. Melikian, a forensic psychiatrist for her testimony and failed to call a prison adaptability expert.

Respondent submits that the PCR court, throughout its extensive order appropriately addressed

⁵Bartosh died prior to the PCR hearing. Other involved counsel asserted - despite some evidence to the contrary by their actual work on the case - that Bartosh was solely responsible for the penalty phase, even though one lawyer (Karen Quimby Hatcher) did extensive review of materials and charts concerning penalty phase issues and co-counsel Doug Brannon examined one of the family members in the penalty phase. App.p. 2072.

the individual issues, recognizing the mandates of Strickland v. Washington. Constrained by the fact that primary counsel Michael Bartosh had died and was unavailable to testify about his actions and strategies in the case, the lower court applied the standards set forth in Strickland and properly applied the burden of proof in concluding that each of the specifications did not require a new sentencing proceeding.

Preparation Time Issues

At the outset, Lindsey contends that certiorari is appropriate because he claims that he contends that counsel spent insufficient time in preparation for the trial and sentencing proceedings. Within his argument, he asserts that the defense team failed to devote adequate time for preparation for the mitigation phase of the trial. Without designating any necessary item of evidence that the “insufficient time” would have caused to surface, Petitioner claims it the result of the proceeding would have been different. In the lower court, Lindsey stated that studies reported that the average time spent by defense lawyers in capital cases was 1889 hours per case and normally 12 times more time spent in a capital case than a normal case. The Petitioner emphasizes that 2003 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases and the comments concerning investigation and preparation. He also relies upon Wiggins v. Smith, *supra*, as citing to the ABA Guidelines as appropriate guides on whether counsel provided effective assistance of counsel. Petition, p. 21-27.

The PCR Court found that counsel performed a reasonable investigation into mitigation in this case. Respondent incorporates by reference the summaries of witness testimony from both the trial and PCR hearing set out in Respondent’s Post-Hearing Memorandum, p.16 - 33, p. 36- 55, 102-167, 172 (App.p. 3360-3377, 3380-3399, 3446-3511, 3516).

Under the Petitioner’s assertion the ABA guidelines are not guides, but requirements for capital defense counsel. Petitioner points to the ABA Guidelines to suggest it is *per se* ineffective assistance of counsel to fail to do as it commands. But ABA Guidelines are not “inexorable commands”; rather,

they are “ ‘only guides’ to what reasonableness means, not its definition.” Bobby v. Van Hook, --- U.S. ----, ----, 130 S.Ct. 13, 17, 175 L.Ed.2d 255 (2009) (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052) (internal quotations omitted). As the Strickland Court explained, “[n]o 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.” *Id.* at 688-89, 104 S.Ct. 2052. Lindsey’s counsel were between a rock and a hard place in determining the best way to spare him a death sentence, given the overwhelming evidence of his guilt. See, Post v. Bradshaw 621 F.3d 406, 418 (6th Cir. 2010)

The PCR court properly found that this assertion, if accepted sets an almost impossible high bar for defense counsel in capital cases. The PCR court’s reliance on Bobby v. Van Hook, *supra.*, was well founded. As the U.S. Supreme Court recognized in vacating the lower court’s adoption of the guidelines as the unalterable standard rather than the Sixth Amendment, if the Petitioner’s position is accepted, defense counsel would now be required “to locate and interview the client’s family members . . . and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others,” Van Hook v. Anderson, 535 F.3d 458, 463 (6th Cir.2008) (quoting the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, ¶10.7, at 83); he must interview them long enough so that those interviews can be characterized as “extensive” and “in-depth,” *op.* at 776; every conceivable family member must be contacted, no matter that defense counsel has spoken with the defendant, his wife, mother, father, brother, sister, aunt, and cousin (along with several non-family members), *op.* at 778-81; and he must do all this even if he reasonably believes (based on the trial court’s rulings and his own reasonable interpretation of state law) that the introduction of any evidence

regarding the defendant's family background could open the door to truly disastrous rebuttal evidence by the prosecution. Nothing in Strickland or its progeny requires defense counsel to go to such extreme lengths in order to meet the (relatively low) threshold of “reasonably effective assistance.” This assertion by the circuit court was reversed in Bobby v. Van Hook, *supra.*, by the U.S. Supreme Court.

6

The Petitioner has ignored what the 2004 defense team actually did in making his assertion and strict reliance upon the ABA Guidelines. What the defense team did during the period of representation:

1. Received medical history including Lindsey’s ER records from 1973-1992 involving his birth records (1973), kerosene ingestion (1975), fractured elbow(1981), tylenol overdose (including Psychiatric Ward) (1988), car wreck (1989), motorcycle wreck (1989), football injury (1990), and car wreck. (1992). App.p.3077, 3084.
2. Received Spartanburg Regional Medical Center Records from 2002 -2004 concerning the incident and other matters. App.p. 3077, 3084.
3. Family and Social History: Interviewed Mother and other family members prior to and during trial. Received information concerning poverty, domestic violence and neighborhood from Petitioner and family. Interviewed Lindsey who gave an extensive family history about the family and his own history. Respondent’s Exhibits 2, 3, 4. App.p. 3056-3070.
4. Educational History - received school records and provided school records to Dr. Brawley and Dr. Melikian for their review. App.p. 2003, 2366, 2556.

⁶The United States Supreme Court has referred to the ABA standards as “guides to determining what is reasonable.” Wiggins v. Smith, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). However, Strickland explains:

In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) (“The Defense Function”), are guides to determining what is reasonable, but they are only guides. 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.

Id. at 688–89, 104 S.Ct. 2052.

5. Job History - Learned from defendant of his employment history through interviews with mitigation investigator and mental health expert, as well as family members. Mitigation investigator prepared an extensive written report from her interviews with Lindsey and mother. State Exhibit 2 (Lindsey Summary of His Life); State Exhibit 3 (Lindsey's Summary of His Mother's Life); State Exhibit 4 (Summary of Virginia Lindsey's Background Interview). App.p. 3056-3069.
6. Prior Adult Prison and Jail Records - Acquired SCDC records, including disciplinary records from 1994 incident after 1996 plea and received jail records from current incident in 2004 until trial. App.p. 3072-3082, 2555, 2566-67.
7. Prior Criminal Incidents and Records - Acquired and summarized prior criminal incidents by the Petitioner as against Nell, against females and against others. App.p. 3075-3076, 3078-81, 3082

In addition,

1. Retained an experienced criminal investigator to assist in the mitigation investigation which she began on April 21, 2004. App.p. 2393, 2406.
2. Retained a forensic psychiatrist, head of the MUSC forensic psychiatry unit who was able to render an opinion of mental illness, particularly a "major depressive disorder," "cognitive deficits" as well as suicidal tendencies prior to and at the time of the incident which used in mitigation. App.p. 2003, 2005, 2008-2010.
3. Received opinion from retained mental health experts (Dr. Brawley and Dr. Melikian) to challenge the 2003 state examiner opinion of malingering. App.p. 2005-2006.
4. Met with Petitioner on numerous occasions at jail.
5. Had assistance of third lawyer (Karen Quimby Hatcher) who prepared extensive summaries of crime scene reports, prior prison history, prior criminal history, and summarized state discovery reviewed. App.p. 2513-2587, 3071-3089.

Further, counsel received the discovery from the state concerning the particular crime and other crimes involving Lindsey. See State Exhibits 9, 10, 11 (PCR 279, 288). App.p. 2563, 2572, 3073-3085.

As Petitioner concedes by his claim, this is not a case where no investigation was done. Rather, absent Mr. Bartosh's testimony, it appears that the bulk of the preparation was done within two months prior to the trial with the retention of the psychologist, psychiatrist and mitigation investigator in that period.

Trial counsel have a duty to make reasonable investigations or to make a reasonable decision

that makes investigations unnecessary.” *Strickland*, at 691, 104 S.Ct. 2052. “In assessing counsel’s investigation, [a court] must conduct an objective review of their performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel’s perspective at the time.” *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). “In assessing counsel’s performance in this context, we look to how counsel prepared for sentencing, what mitigating evidence counsel accumulated, what additional leads counsel had, and what results counsel could have reasonably expected from those leads.” *Blanton v. Quarterman*, 543 F.3d 230, 236 (5th Cir.2008).

A court must consider “not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.” *Wiggins*, 539 U.S. at 527, 123 S.Ct. 2527. The Supreme Court has held that “investigation into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence.” *Id.* at 524, 123 S.Ct. 2527. However, “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*, ---U.S. ---, 130 S.Ct. 13, 19, 175 L.Ed.2d 255 (2009). “[C]ounsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052 (emphasis added).

The amount of time trial counsel spent preparing for trial is not dispositive to claims of ineffective assistance of counsel. See, e.g., *Hopkinson v. Shillinger*, 866 F.2d 1185, 1217 (10th Cir.1989) (defendant must show specific errors, and cannot prevail because of limited time attorney spent on case) (citing *United States v. Cronin*, 466 U.S. 648, 666, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)), overruled on other grounds by *Sawyer v. Smith*, 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990); *Owens v. Guida* 549 F.3d 399, 408 (6th Cir. 2008). Further, “[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the

level of a constitutional violation.” Nields v. Bradshaw, 482 F.3d 442, 454 (6th Cir. 2007).

Underlying this assertions is his general claim that counsel must meet the checklist that he claims the A.B.A. has established which includes the phrase immediately investigate. While it appears that counsel did not retain a mitigation investigator under months before the trial, he has not proven that no mitigation investigation was done. He has failed to show that the investigation was unreasonable. He failed to prove either deficiency or prejudice based on his pure “time spent” argument.

Rod Tullis Issue.

In his second specification, he claims that counsel failed to preserve and present testimony from Rod Tullis. He claims that Tullis could have testified at trial about the relationship with Lindsey and his wife that he learned as counsel, about his caring for his sons, about suicide notes he had received, and about a message he had received on his answering machine around the time of the incident. He complains that counsel Bartosh failed to preserve the tape and did not provide it to his co-counsel or the experts.⁷

The PCR court did not make specific findings concerning the potential testimony of Tullis or the tape. However, there was no dispute that the Petitioner’s mental state from lay witnesses and his relationship with his children was presented at the trial. Ann Howard had testified about seeing Petitioner around September 8 and seeing him as suicidal. App.p. 1984-85. Dr. Melikian had testified that on the day of the incident, she reported that his intent was suicidal and reported a history of suicide attempts. App.p. 2013-14. His mother, Virginia Lindsey had testified that Lindsey loved his sons and was upset about the separation from the children. App.p. 2055, 2057-58. However, she had not seen him three days prior to the incident, but described him as depressed. App.p. 2059. Therefore, similar evidence about his relationship and mental state was presented to the jury.

⁷Co-ounsel Brannon stated that he never saw the tape or the alleged suicide notes. App.p. 2307, 2350.

The Petitioner makes a point that there was an answering machine tape from Tullis and provided to Bartosh that was not used at trial and was not disclosed to other counsel or the experts. He claims that this call from Lindsey to Tullis was made shortly before the incident and reflected his mental state at the time. Neither Brannon nor Quimby Hatcher had ever listened to the tape and had no recollection of its existence. App.p. 2478, 2323. The tape was never recorded in Quimby's summary as having been received by the defense team, although receiving a suicide note from Tullis was noted in her summary in Defense Exhibit 22. App.p. 2578 - 79, 3029. However, counsel Brannon testified that he was aware that Tullis had received a message on his telephone and recalled that the message was that he was going to commit suicide and also recalled that Tullis received a suicide note subsequent to the phone call. However, Brannon stated that he had not spoken with Tullis about it and was not sure of Tullis's availability at the time of trial, although he was on their witness list. App.p. 2306-07, 2323-24. The summaries by Quimby Hatcher noted that Tullis was a possible witness about Lindsey's mental state and noted in handwriting "Rod Tullis - mental state." App.p. 3044, 3074.

During the PCR hearing, former attorney Rod Tullis testified. He stated that he had started representing Lindsey in the 1990's until the incident in 2004. App.p. 2447; PCR Tr. 163. These included criminal, family court, and traffic concerns for Lindsey and family members. Id.

He stated the weeks before the incident he was representing Lindsey concerning some drug cases and traffic cases in Greenville and Spartanburg. "There may have been something in Family Court near the end that he had spoken to me about." App.p. 2448; PCR Tr. 164. At some point he interviewed Lindsey about ways to resolve issues concerning his children. He felt surprised that Lindsey and his wife would have issues about his children and their discussion involved offering a payment of child support in order to secure some visitation. App.p. 2450; PCR Tr. 166, ll. 11-18. He did not know if Lindsey ever offered to do that and Tullis never filed any papers in Family Court for him. Tullis stated that he had not been retained. App.p. 2451-52; PCR Tr. 166-67. Tullis felt that at

the time of that meeting, Lindsey did not want to be separated from his wife and children nor end his marriage. App.p. 2451; PCR Tr. 167. He stated that they discussed that he had some evidence his wife may have had an extramarital affair and he was concerned because he did not want someone else to come in “and become daddy to his sons.” App.p. 2451; PCR Tr. 167. Further, he feared if he began family court proceedings that there would be ramifications on the criminal side. App.p. 2452; PCR Tr. 168. Tullis said Lindsey’s fear was that his wife would become a witness for the State, which would also end his relationship with his children because of a prison sentence.⁸ App.p. 2452; PCR Tr. 168.

Tullis claimed that shortly before the shooting took place in September 2002, Lindsey attempted to contact the office. Tullis claimed he learned of this contact after he heard about the incident and went to his office to prepare a notice of representation. App.p. 2453; PCR Tr. 169. He had learned that Lindsey was in the hospital and had surgery. According to Tullis, when he later listened to his answering machine, he heard Lindsey asking for him to pick up the phone. Tullis described Lindsey as sounding distressed and distraught. App.p. 2453; PCR Tr. 169. Since he claimed he left the office at noon, he thought the tape was made within the hour before the shooting. App.p. 2453-54; PCR Tr. 169-170. Tullis stated that the tone was not angry or agitated, but emotionally down and upset. App.p. 2454; PCR Tr. 170. Tullis recalled retaining the cassette tape for a period of time. App.p. 2454; PCR Tr. 170.

Subsequently, the Public Defenders Office became counsel.⁹ Tullis recalled contacting

Mr. Bartosh and telling him that Lindsey had called his office, that a tape existed, and he was the first person to talk to him when he was released from the hospital to the detention center. He also stated to him that he could be a possible witness in the case. App.p. 2455; PCR Tr. 171. He stated that he was removed from the case. Tullis said he later provided the audiotape to the Public Defenders Office.

⁸ This motivation was not developed by the State at the trial.

⁹ Tullis described providing his notice of appearance to the Sheriff, Solicitor, and hospital and was counsel of record for a short period of time. App.p. 2455; PCR Tr. 171.

App.p. 2456; PCR Tr. 172, ll. 15-18.

Tullis said that Lindsey had been shot by officers at the incident and then tried to commit suicide by shooting himself in the head. When Tullis visited at the Center for the first time, Lindsey was bandaged and bleeding. Still drugged from the surgery, Lindsey told him he had been bashing his head against the cell concrete wall, the stitches had come loose and he was attempting to kill himself. App.p. 2457; PCR Tr. 173. After he reported it, Tullis stated they put Petitioner on suicide watch. App.p. 2457; PCR Tr. 173.

Tullis also declared he received notes from family members about an earlier incident when Lindsey threatened suicide weeks before the incident.¹⁰ App.p. 2459; PCR Tr. 175. Tullis stated that he handed the notes over to the Public Defender. App.p. 2459; PCR Tr. 175. He felt the Solicitor's Office was aware of the existence of the notes and that he had turned them over to the Public Defender. App.p. 2550; PCR 176.

Tullis indicated that he was not contacted about testifying, but inquired about it as the case was proceeding.¹¹ He felt surprised because he thought he was the best witness as to the state of mind and involvement.

On cross-examination, Tullis recalled that he had received the letters from the family immediately after the shooting. He had reported the jail incidents on October 1, 2002. App.p. 2455; PCR Tr. 181.

¹⁰ App.p. 2985-2999 (so-called Suicide notes). The notes state that they "won't have to worry anymore" about him. App.p. 2993, "Nel drove me to this by cheating on me" (App.p. 2992), "it hurt me so bad to hear you keep calling another man like you use to call me . . . you would never tell me the truth . . . I could tell that you were staring to fall in love with him when you wouldn't let me make love to you anymore . . . always know I love you and the boys tell them daddy always will be with them. Show them my picture every day you owe me that much." App.p. 2986.

¹¹ Tullis was on the witness list by the Public Defender's Office. App.p. 150.

Tullis admitted that he was subpoenaed by the Solicitor's Office on May 21, 2004.¹² App.p. 2466; PCR Tr. 182. He said he provided the records to the State. App.p. 2467; PCR Tr. 183. However, he did not know what he provided to the State then, except he felt it was everything he had in possession of his files at that time. App.p. 2468; PCR Tr. 184. As to the information provided on his worksheet (Applicant Exhibit 13) [App.p. 2991-3011], he did not recall when that was prepared. App.p. 2469; PCR Tr. 185.

Tullis asserted that some weeks before the incident, he learned that Petitioner had been denied access to his children. However, he had no notes about that meeting. App.p. 2471; PCR Tr. 187. He was aware that the court had issued an "order of protection" just days prior to the incident which ordered him not to have contact with his wife. App.p. 2471; PCR Tr. 187. Tullis stated Lindsey never contacted him about advice concerning the impact of the order of protection. App.p. 2471-72; PCR Tr. 187-88.

As to the message on the answering machine, Tullis attempted to clarify that he did not review the machine until the day after the incident. It was after he learned of the killing the night before. However, Tullis felt it was probably left the day before, doubting the call was made the next day since he was unable to see him while he was in intensive care. App.p. 2473; PCR Tr. 189. Tullis also claimed that although he had provided the tape to the Public Defender, he claimed that he also advised the prosecution of it. However, he never provided the prosecution with any copy of the audiotape because he asserted that it was not in his possession when the subpoena was made because he had already given it to the defense. App.p. 2474; PCR 190.

Tullis agreed that when he prepared the information sheet, there was no discussion that he was being deprived of visitation rights. App.p. 2475; PCR 191. To the contrary, Tullis thought at that time

¹² On redirect, Tullis indicated that he did not recall being subpoenaed. App.p. 2479-80; PCR 195-196. However, he recalled that he would not have had anything to turn over as a result of the subpoena. PCR 196.

when Lindsey and his wife came into his office that they were trying to work their marriage out, but the meeting was actually in anticipation of a divorce or separation.

Tullis, however felt that closer to the September incident things had changed in the relationship. He noted that while Lindsey was having relationships with other women, he also felt he wanted to get back with Nell. However, Lindsey was aware that she was anticipating divorce proceedings. App.p. 2475; PCR 191. Tullis stated that Lindsey's impression of what was going on was not what an accepting and rational person would do. Lindsey was to be married to his wife, but he was involved with another person also. According to Tullis, both Lindsey and Nell were involved with other people, but she did not want to be married to him any longer. App.p. 2476; PCR 192. Tullis felt the children were being used as a pawn in the adult relationship.

He agreed though that there was a series of incidents involving Nell in August 1996, October 1996, February 1999, August 2000 and December 2001. App.p. 2476. Oddly, Tullis reported that Nell would come and pay his fees in representing Lindsey in those incidents.

Tullis admitted that he was no longer practicing law and been disbarred at the time of the PCR hearing. App.p. 2477. He stated that at the time of the trial, he was still a lawyer in May 2004 with an office in Spartanburg. He stated that he did not come to court while the trial was going on, allegedly because he thought he would be a witness in the case and would have been sequestered. He was aware of the trial while it was going on. App.p. 2477-78.

Tullis stated that he spoke with Bartosh and Ms. Quimby as the case was going on. App.p. 2478-79. Although he let them know he was available and ready to testify, he did not ask them why he was not being called as a witness or what their defense was, such that his information might not have been germane to their theory of the case. App.p. 2479-80; PCR 194-195.

On re-direct, Tullis confirmed that Lindsey had an ongoing family court dispute with the grandparents at the time over the custody of the children. He stated that matters he had with respect to

that dispute were still protected by the attorney-client privilege, including letters in that action. App.p. 2480; PCR 196. As to the timing of the taped call, he recalled that Lindsey was taken into custody immediately after the shooting. He suggested that at that point of time he would not have had the ability to make phone calls given his medical care and his arrest. This suggested to him that the call had to have been made before the incident. Tullis stated that Lindsey had never been convicted of a criminal domestic violence charge against Mrs. Lindsey or anyone else. App.p. 2482; PCR 198.¹³

Respondent submits that failure to call Tullis was not ineffective where 6th Amendment prejudice cannot be shown. Similar evidence was presented through Dr. Melikian and other lay witnesses about the Petitioner's mental state surrounding the incident and the basis for it arising from the separation from his children. She further testified about his expressed intent to commit suicide that date. App.p. 2012-2013. Evidence was also presented that Petitioner was in a suicidal state due to the events around the time of the incident. During the guilt phase, it was developed through Celeste Nesbitt about the relationship between the Petitioner and the victim and her intent to divorce Lindsey. App.p. 1540, 1557-61. Further, it was developed that Nell was not allowing for Lindsey to see the children and that she had blocked his telephone calls. App.p. 1675-76. Counsel developed that there was a head injury to Lindsey at the incident and he had declared that he had shot himself in the head. App.p. 1674. Respondent submits that the jury had a reasonable understanding from expert and lay witnesses about the Petitioner's mental state at the time. Although there is a factual issue concerning the existence and receipt of an answering machine tape, evidence supports that Tullis indicated to counsel Bartosh that

¹³ Concerning her reliance upon Rod Tullis' testimony and interview, social worker Vogelsang testified that she did not recall or know that it conflicted with the defense lawyer's testimony. PCR Tr. 581. See PCR Tr. 39-40. She also confirmed that when she interviewed Lindsey in November 2009, he never told her that he called his lawyer (Tullis) on the day of the crime and threatened to kill himself. PCR Tr. 585.

Lindsey had called his office at some point and threatened to commit suicide.¹⁴ In light of the other evidence presented, including the evidence of his self-inflicted head wound on that date, the absence of Tullis's testimony does not undermine confidence in the verdict, applying the Strickland standard. Certiorari is not warranted concerning Rod Tullis.

Vincent Bell

In his petition, he also asserts that he claims counsel failed to present evidence from Vincent Bell. This issue was expressly raised and rejected by Judge Burch. App.p. 3708-3711. Respondent submits that the PCR court reasonably applied Strickland in denying relief on the failure to call Bell. Lindsey contends that defense counsel failed to present the testimony of Vincent Bell, an EMS worker who treated Marion Lindsey to give the jury a better idea as to Lindsey's state of mind at the time of the crime. He contends that it would have resulted in a different outcome of the verdict. Respondent submits that he has failed to show either deficient performance or prejudice. Respondent submits that the 2004 jury was given similar information. Deficiency and prejudice under Strickland have not been shown.

It is undisputed that the defense was aware of Vincent Bell, as well as Susan Horton and Joseph Stewart as the paramedics who arrived at the crime scene. The defense team had included them on their listing and summary of state witnesses. App.p. 3080; State Exhibit 9. App.p. 2561-63. Counsel had also presented evidence through Dr. Melikian that Lindsey had planned to commit suicide that day shot himself after the incident and told the EMS to let him die. App.p. 2013. The hospital records confirmed that he had a head wound. App.p. 2013-2014. In the guilt phase of the trial, Officer Godfrey denied that he had shot Lindsey in the head. App.p. 1577. Defense counsel Doug Brennan called Jason Stewart in

¹⁴Respondent notes that Lindsey did not testify about his call to Tullis and there is no indication in the notes of interviews or reports by Lindsey to Topp or Dr. Melikian that he made a call on that date or the substance of the call. See App.p. 3056-61.

the guilt phase of the trial as a defense witness.¹⁵ Stewart, an EMS worker, testified at trial, that he arrived on the scene on September 18, 2002 and saw the Petitioner with a head wound. Stewart was asked whether Lindsey had said anything to him. App.p. 1660-1670. At that point, the state objected that it was a self-serving statement by the defendant and inadmissible. However, the defense was able to present the testimony that Lindsey told him that he shot himself in the head. App.p. 1674.

At the PCR hearing, Vincent Bell testified that he was a paramedic at Spartanburg EMS on September 18, 2002 and responded to the Inman Police Department after the shooting. App.p. 2381-82. While he responded to the female, his partner went to Lindsey. When Bell went to Lindsey he was conscious and he was asked questions about what happened. Lindsey initially stated he shot himself and in a follow up question stated that he shot himself, let me die, and then said “I shot myself and then I shot my wife.”¹⁶ App.p. 2383; PCR Tr. 99. Bell described Lindsey as not cooperative while they worked on his injuries. Id. While in route, Bell again asked him what happened and he said “I shot myself and then I shot my wife.” When Bell asked why, Lindsey then responded “his wife was fooling around with somebody.” App.p. 2383-84; PCR Tr. 99-100.

On cross-examination, Bell confirmed that he had given a written statement to the police. (State Exhibit 1). App.p. 2386, 3055-56. In reviewing the statement Bell confirmed and corrected that Lindsey said “I shot my wife and I shot myself in the head,” reversing the order of the shots. Bell confirmed that Lindsey did not indicate that he made any reference to his children as a reason for the shooting, but only that he shot her because she was fooling around with another man. App.p. 2387; PCR Tr. 103.

Bell stated he was subpoenaed for the trial but did not testify. However, he did not recall

¹⁵Counsel Brannon testified that he interviewed paramedic Jason Stewart prior to trial. PCR 61. He stated that he interviewed him because he wanted to develop that Lindsey had tried to kill himself by shooting himself. App.p. 2351; PCR 67.

¹⁶ This version of the incident is inconsistent with the trial evidence.

speaking with anyone at the trial. App.p. 2388; PCR Tr. 104.

The PCR court reasonably found that the petitioner failed to show deficient performance where the 2004 jury was told that Lindsey had shot himself in the head, that the police had not shot Lindsey in the head, that an EMS worker (Stewart) who arrived at the scene was told by Lindsey that he shot himself in the head and that Dr. Melikian stated that Lindsey told her that he shot himself in the head and told an EMS worker to let him die. The only difference in including Bell's testimony is that he was the worker that Lindsey said to let him die. It is evident that the defense (as well as the jury) knew the existence of the paramedics, knew that Lindsey had shot himself and knew that he had told the paramedics that he had shot himself and knew that he had told the paramedics initially to let him die. The only omission was the failure to put up the paramedic who heard him say the let him die comment. This was clearly a strategic decision on counsel's part as to how to present the witnesses and which witness to present. Although the Petitioner may claim that they did not interview Vincent Bell, it is uncontested that they were aware of the information and that he had been subpoenaed.

Even if the Court would conclude it was deficient, 6th amendment prejudice cannot be shown. Similar information was given to the jury within both the guilt and sentencing phase. Further, the comment was used by Dr. Melikian in her assessment of depression that she gave the jury. The "let me die" after a person had shot himself in the head fails to suggest how the failure of the additional witness would have the effect to have undermined confidence in the death verdict under the standards of prejudice set out in Strickland. They had heard similar evidence. He has failed in his burden of proof. Accord, Wong v. Belmontes, supra. Furthermore, "in order to establish prejudice, the new evidence that a habeas petitioner presents must differ in a substantial way-in strength and subject matter-from the evidence actually presented at sentencing." Hill v. Mitchell, 400 F.3d 308, 319 (6th Cir.2005). The witness of the "let me die" comment he now offers does not meet this test, but is cumulative, albeit somewhat more detailed. The new evidence does not differ in subject matter-much less "in a substantial

way”-from the evidence already presented at sentencing. It covers the exact same subject. Certainly this new evidence cannot be described as “shocking, disheartening, and utterly disturbing,” the kind of evidence that courts have held would generally support a finding of prejudice warranting habeas relief. See Beuke v. Houk, 537 F.3d 618, 646 (6th Cir.2008). The Petitioner fails to explain how such evidence, had it been presented, would have done anything to change the jury's perception of Lindsey's moral culpability or mental state for such a brutal and horrific crime. See Jells v. Mitchell, 538 F.3d 478, 498 (6th Cir.2008) (“Prejudice is established where, taken as a whole, the available mitigating evidence might well have influenced [the sentencer's] appraisal of [the petitioner's] moral culpability.”). Certiorari is not warranted.

Friends and Family Members .

Lindsey further asserts that counsel was deficient in failing to call friends and family members to testify about his family background and character. Judge Burch addressed this issue in denying relief on Ground VII. App.p. 3853-3923.

The Burtons

He initially asserts that the preparation and presentation concerning his family friend Bill Burton and the failure to Burton's mother, Pat Burton was deficient. This evidence from the PCR hearing was summarized within the order at App.p. 3891-3895.¹⁷ However, the record reveals

¹⁷ Bill Burton testified similar to his trial testimony. App.p. 2588-2600; PCR Tr. 304-05. He stated prior to his trial testimony, when he learned he would be a character witness, tried to contact Mr. Bartosh because it was his first court experience. He said that he wanted some background on the kinds of questions and information he should provide and how to prepare for trial. He found it difficult to contact Bartosh, an extremely busy man. He stated they met either the day before or the day of trial with many other witnesses and did not have any one-on-one discussions with him. App.p. 2589; PCR Tr. 305.

Burton stated that he sat in the trial for several days. App.p. PCR Tr. 306. He said he was aware that guilt was not as much an issue as sentencing. PCR Tr. 306. He said he was told to “say what you know about Marion.” However, Burton felt the case was disorganized and he was concerned about it and did not have a good feeling about preparation. “I wanted to understand the strategy” and how the facts could be used to defend Lindsey and avoid a death sentence. PCR Tr. 307. App.p. 2589-2591.

Burton stated that he wanted to tell the jury that he got involved as a teenager with Lindsey when he was 6 years old when Burton was giving swimming lessons at a public pool. He found then that Lindsey wanted approval and a parent figure to look up to, anxious to show someone his achievements with swimming, jumping, and fishing. Burton said he later went to Lindsey's house, met his mother and rest of family and began a 13 year relationship. PCR Tr. 309. App.p. 2591.

Burton reiterated that Lindsey was desperate for approval, attention, and involvement with adults. Burton saw that Lindsey had no supervision at home and they did not have any help or encouragement with their studies which led to Lindsey having a difficult time at school. Id; PCR Tr. 309. He described Lindsey's house, though clean, was falling apart.

Burton felt Lindsey wanted a (normal) family, but his environment made it difficult for him to prepare for that later in life. Lindsey lived on the street, did not do well in school and his education was very limited. App.p. 2592; PCR Tr. 310.

Burton stated Lindsey did not see much of his father. He saw his role with Marion as a male figure he could look up to and Burton declared he was happy to provide it. PCR Tr. 311. His last contact with Lindsey was in 1990. PCR Tr. 311, ll. 11-12. App.p. 2593.

Burton said his company was able to offer Lindsey a job in what he hoped would lead to a good future. However, Burton was transferred and lost touch with Lindsey and learned Lindsey left "for reasons I don't recall." PCR Tr. 311, ll. 17-20. App.p. 2595.

On cross-examination, Burton did not recall his earlier testimony that when Lindsey left that he had tried to get him his job back. App.p. 2597; PCR Tr. 313. Although he lost touch in 1990's, Burton said he was aware that Lindsey was continuing to visit his farm and fish through his mother. PCR Tr. 313. He confirmed that he had no contact with Lindsey after he began his relationship with Nell or the actions of Lindsey after he moved. He admitted that he did not know until the trial of the shooting incident of Wilkens, the number of different incidents with his wife, the fact that he was involved in selling drugs, or the reasons why he was let go from the company or if it was due to a conflict with his supervisors. PCR Tr. 314. App.p. 2598.

Concerning "Jimmy", Burton claimed he was not aware of the imaginary friend during his relationship and became aware of it "later on." App.p. 2598-99; PCR Tr. 314-15.

Burton confirmed that in his discussions, he talked with Lindsey about his desires for family and children and having the "ideal family" was a major subject. Burton stated that when asked at trial whether he would have provided financial assistance to get an attorney to help see his children, that he was not aware Lindsey had seen Tullis to get help or Piedmont Legal Services. App.p. 2599; PCR Tr. 315.

Mrs. Pat Burton's PCR Testimony

Mrs. Burton said she was present at this hearing "because I love Marion." App.p. 2600-01; PCR Tr. 316-17. She recounted a letter she had written in 2008 to Judge Burch expressing that her son did not think he was properly prepared to testify. She also said she was not aware that she was on a witness list in 2004. She only knew about the case through her son when they called him. App.p. 2601; PCR Tr. 317.

She proffered what her potential testimony in 2004 would have been. She declared that she met the Petitioner when he was 6 or 7 years of age, when after the pool closed where her son was a lifeguard, he would bring a bunch of kids in a pick-up and they would fish and play in the lake. PCR Tr. 318. She thought that Lindsey was special to her son because they talked about him all the time, but not about the other kids he brought. She recalled Marion was happy with a smile. She knew that her son was proud of Lindsey when he learned to swim, but felt Marion was sorry he learned because her son would then spend more time teaching others. App.p. 2602; PCR Tr. 318.

that Burton gave strikingly similar testimony at trial. App.p. 2061-2069. Although he was not asked his opinion on mercy, his general testimony at trial was consistent about Lindsey's character and the fact that he had grown up in poverty without the benefits of parents like a normal family. App.p. 2067.

Further, although Pat Burton did not testify, her testimony was similar to the testimony presented by Bill Burton. In the petition, he claims she could have stated that Petitioner was a polite child and made a request for mercy. Arising from her son's relationship, Ms. Burton had a similar affection for the Petitioner. However, counsel is not required to call every witness who has had favorable contact with a capital defendant. Although her testimony was generally admissible, the failure to call her does not undermine confidence in the outcome under the Strickland standard.

She recalled that he came out to fish and play after her son went to the Air Force Academy and would always thank her. She stated Lindsey's brothers would bring him and Lindsey would always ask her if it was OK to use the pond - the only one who did this. App.p. 2603; PCR Tr. 319.

She felt that Lindsey became special to her also, even though she did not see him very much. She knew her son would go to Lindsey's house and describe how poor it was and how Lindsey did not have much. Her son would stop and see Lindsey when he occasionally came home from the Academy. App.p. 2603.

Mrs. Burton described her visits to Lindsey after he was sentenced to death. She has visited him "many times" and had written letters for three years once a week. App.p. 2604; PCR Tr. 320. At one time, she said she talked Lindsey out of dropping his appeals, telling him they might outlaw the death penalty and maybe he would see his sons after they grew up. App.p. 2605; PCR Tr. 321. She also described a poem he had written her after his experience and trying to teach others not to follow in his footsteps, that she gave it to a minister who used it in his church.

She stated that when she visits death row, she sees the interaction he has with other inmates and guards, and asserted there was not a feeling that they were afraid, but one of comradery of a closely knit group. App.p. 2605-06; PCR Tr. 321-22.

Mrs. Burton regretted that she had not known him more when he was younger and that she could have been able to help him reach his potential. She said she would have asked for mercy "because I don't think one action on a part of the person defines that person's life." App.p. 2607; PCR Tr. 323, ll. 4-6.

On cross-examination, she admitted that when he visited in his youth, she did not have any in depth conversations with Lindsey nor any discussions with him about his family. She admitted that she was not aware of his relationship with his wife, of his involvement with selling drugs, of his prior shooting incident, or of any of the incidents of criminal domestic violence. App.p. 2609; PCR Tr. 325. To the contrary, she only knew him as "a happy little kid" and I did not know him intimately. Id.; PCR Tr. 325. Like her son, there was no discussion about Jimmy, the imaginary friend. She said she did not come to Lindsey's trial and did not offer to testify because she did not think she would be any good and was against the death penalty anyway. App.p. 2610; PCR Tr. 326.

Timothy Sims

The Petitioner did not call Timothy Sims, the Petitioner's younger brother, at the trial. His PCR testimony is summarized in the Order of Dismissal at App.p. 3886-3891. In his Petition, he claims that Sims testimony would have shown that he saw his older brother as a father figure that helped raise him. He would have further contended that the reasons that Petitioner got involved in drugs were to take care of the family because his father was not there. App.p. 2738-39. He stated that Sims would have provided additional information about Petitioner's suicide attempt several weeks before the shooting and that he had received suicide notes. App.p. 2743-44. He claimed that he would also be able to testify about a telephone conversation that the Petitioner had with the victim the day before the shooting where he requested to be allowed to see his children, and heard his child ask for him. App.p. 2750. He stated also that on the day of the incident that he spoke with Petitioner on the telephone and he was upset about what someone had told him about Nell and that later he called back quite upset and that he tried to calm him down. App.p. 2752-53.

Respondent submits that counsel was not deficient in failing to call Sims where his mother was available and testified about the general background and other testimony was presented about Petitioner's demeanor on that day and prior suicide attempts. Prejudice cannot be shown where Sims "favorable" testimony would have been eviscerated by cross-examination by the prosecution. App.p. 2758-2763. Therein, Sims stated in reference to whether he had seen Lindsey violent toward Nell, he denied being aware of the August 1996 incident where he allegedly threatened to harm her and the October 1996 incident when Petitioner pushed and shoved her. He confirmed that he was present at the December 2001 incident at Applebee's but denied seeing him slap or tear her clothes, claiming to be on the other side of the car. App.p. 2759; PCR Tr. 475, ll. 12-24. He also confirmed that after he had received the telephone call from Lindsey a month before the incident that he did not attempt suicide at that time, just had talked about it, had no weapons and he felt comfortable enough to leave. App.p.

2760; PCR Tr. 476. Further, on the day of the shooting, Sims was under the impression that Lindsey was going to come to his house and they were going to play games and talk it over. App.p. 2760; PCR Tr. 476. He confirmed that there was no discussion on that date that Lindsey was looking for Nell, looking for a gun or having a gun with him. App.p. 2760-61; PCR Tr. 476, l. 23 - p. 477, l. 3.

Further, Sims confirmed that when Lindsey asked him to investigate Nell's house, he was looking to see if she was involved with someone else - not to check up on his children. App.p. 2761; PCR Tr. 477, ll. 7-16. Sims confirmed that Lindsey was also involved with someone else and had girlfriends while he was married. App.p. 2761-62. PCR Tr. 477.

Concerning his own drug charge, Sims confirmed that in August 2003, he pled guilty and was sentenced to 6 years, suspended to 11 months probation and was on probation at the time of the May 2004 trial. App.p. 2761-62. However, Sims admitted that he had violated probation at the time of the trial and was waiting to go to court. App.p. 2762-63; PCR Tr. 478. Concerning Lindsey's violence, Sims confirmed he had been a witness to Lindsey being violent in the past. App.p. 2762; PCR Tr. 478, ll. 19-21.

There is no reasonable probability that the result of the proceeding would have been different if Sims had been called. To the contrary, his testimony revealed that the Petitioner was violent and manipulative, and there was evidence that his concern was to check on his wife - not his children in a very negative situation. App.p. 2751. In addition, it revealed that although he had contact with Petitioner on the day of the shooting, his impression was that Petitioner was not intending to kill either himself or Nell on that date, but instead was coming over to play games with Sims. This evidence contrasted greatly with the image the Petitioner was seeking to suggest by his testimony on direct. Certiorari is not warranted concerning the failure to call Mr. Sims.

Virginia Lindsey

In his petition, he also contends that Virginia Lindsey, the Petitioner's mother, should have

testified more fully about the Petitioner's background and his mental state at the time of the shooting. He contends that further evidence that she did not testify about would have more fully explained the Petitioner's family background and violent and sad household that Lindsey was raised. Petition, p. 46-54. Respondent's incorporate by reference the summary of Virginia Lindsey's testimony at the guilt phase and trial set forth above and in the Respondent's post-hearing memorandum and the Court's Order of Dismissal. 3455-3466, 3648-3659. However, contrasted with the information that counsel had in 2004 and what was used at trial; Respondent submits that it reflects a reasonable decision not to use the additional testimony in the unpersuasive and inconsistent detail it was presented at the PCR hearing. Additionally, the failure to present it in the fuller manner did not show a reasonable probability that the result of the proceeding would have been different under the Strickland test. See, e.g., Johnson v. Bell, 344 F.3d 567, 573-74 (6th Cir.2003) (although testimony from family members would have helped to humanize the defendant, the jury could have concluded that he was even more culpable because he had enjoyed a loving family and yet had murdered his wife); Martin v. Mitchell, 280 F.3d 594, 613-14 (6th Cir.2002) (defendant did not show prejudice at the mitigation phase where family members testified about his background and a psychological report was given to the jury); Scott v. Mitchell, 209 F.3d 854, 880-81 (6th Cir.2000) (finding that potential mitigating circumstances were overwhelmingly negated by other evidence about the defendant's background).

The Petitioner describes PCR testimony of Virginia Lindsey, the Petitioner's mother, as "vastly different" than her trial testimony. The PCR Court agreed that there was more detail in the post-conviction testimony. However, he contends that in lieu of the brevity of her trial testimony (App.p. 1674-77, 2044-2061), ¹⁸ the alleged details within her PCR testimony are necessary to humanize Lindsey for the jury and to support the potential testimony of the mitigation social work expert.

¹⁸A summary of Virginia Lindsey's trial testimony is set out above in the trial summary. See App.p. 2044-2061, 3366-3369.

Respondent submits that neither deficient performance nor prejudice has been shown by this reconstructed PCR testimony of Virginia Lindsey.

The Petitioner notes that her trial testimony comprised of 16 pages whereas her PCR testimony consisted of 44 pages. Petition, p. 48. However, the issue is whether counsel considered and was aware of information in their trial preparation and presentation. Mrs. Lindsey admitted in her meetings with Doug Brannon and Lenora Topp that they may have also talked about family history. App.p. 2656; PCR Tr. 372. She corrected herself and admitted at some point that she told them about

- having two miscarriages
- her first son was Claude
- her daughter Vanessa was killed in car crash
- her second son Frederick died in the lake and body was not found in 1998
- Marion's father was Leon McDowell who did not pay child support
- fourth son was Tim Sims
- Tim Sims, Sr. helped out with kids for 17 years
- Tim Sims was on disability from Milliken where he worked until he got sick with a series of strokes

App.p. 2657-58; PCR Tr. 373-74.

Virginia also told Brannon and Topp:

- all three of her sons have children
- Marion was the only one who married the mother of his children
- none of her son's finished high school
- she worked shifts in factories, particularly the second shift
- that she had spoiled Marion "a little bit," because he did not have interaction with his father
- that her mother was deceased
- that she and her family were very poor
- that she had 8 siblings and each had 2 or 3 children
- that they grew up together

App.p. 2659-60; PCR 375-76.

Virginia Lindsey also testified that she told them Marion was run over as a child by her brother, but that she was at work when this happened and sister Bessie picked her up. She told them that this

resulted in the bad cut to his ear and head. In addition, she told them about Marion falling and hurting his head on the concrete porch. App.p. 2661; PCR Tr. 377.

Concerning the pill incident, she confirmed that she talked with Brannon and Topp about it and that

- Fred and Marion always argued
- Marion took it hard

App.p. 2661-62; PCR Tr. 377-78. She told them about efforts to get the death certificates.

She also spoke with them about his relationship with Stephanie Petty and liking Petty's grandmother. App.p. 2662; PCR Tr. 378. Concerning Nell, she told them that she thought she was a nice girl and like her and that Nell and Lindsey had problems over money. She stated to them:

- she knew Lindsey was selling drugs, but did not see it
- she knew he spent money on her and household from selling drugs

App.p. 2663; PCR Tr. 379.

Concerning the pill overdose incident, she did not recall telling the doctors that he was a stable kid and did not cause any major problems. App.p. 2664; PCR Tr. 380.

Mrs. Lindsey stated she had talked with them about how his family was important to him, but that she was aware he had other girlfriends while he was married, including at the time of the shooting. App.p. 2664-65; PCR Tr. 380-81.

Concerning the car incident, she spoke to them about it, but admitted she did nothing to stop it. App.p. 2665; PCR Tr. 381.

While she admitted that she thought about calling to get help at the September 2004 incident to talk Lindsey out of committing suicide, she did not do so. She admitted the only time she sought help was when he took the pills. App.p. 2665; PCR Tr. 381. She recalled meeting with a doctor because of his release, but did not recall what they talked about other than that Mrs. Lindsey did not want him to go to a mental hospital because he was not crazy. PCR Tr. 382.

On re-direct, she stated that in discussions with Doug Brannon and Topp, she was confirming some information that they already knew. App.p. 2668-70; PCR Tr. 384. In addition, she admitted that there was a pattern of behavior in the family to have multiple girlfriends that Marion saw. In addition, she admitted that she saw the older uncles toss the cat into the fire, shoot guns through the house, get into fights in the neighborhood. PCR Tr. 385. She stated Lindsey experienced emotion in these events.

Mrs. Lindsey said she was afraid when the shots were fired through the house and was on the floor with Lindsey. App.p. 2669-70; PCR Tr. 385-86. Concerning the cat incident, she said she was surprised when they threw the cat into the heater while she was sitting there and it created an awful smell. She said she did not try to stop it because she was afraid of her brothers: "I didn't know what they might do cause they already done grabbed the cat up and thrown him in the heater. He might have thrown me in there, too." App.p. 2670-71; PCR Tr. 386-87.

This information was additionally presented within Lorena Topp's written summary of her interview with Virginia Lindsey. App.p. 3062-65. Further much of the same information was developed with her interview with Marion Lindsey. App.p. 3056-3061.

Respondent submits that trial counsel has the right to decide the extent certain material is presented at a trial. Here counsel was aware of the same essential information from the defense investigation in the case. It can be presumed that counsel acted within his strategic discretion in choosing not to present the detail that he now proffers. The jury was aware of the fatherless upbringing through the family testimony at trial. Although many of the details were not presented in 2004 to the jury, Respondent submits that the decision was not constitutionally deficient. Further, the failure to present the details did not undermine confidence in the verdict or present a reasonable probability that the verdict would have been a life sentence rather than death. This assertion must be denied.

Bessie Smith

Like Virginia Lindsey, Bessie Smith, the Petitioner's aunt and Virginia Lindsey's sister, testified

at the PCR hearing, as well as at trial. App.p. 2672-2708; PCR Tr. 388-424.¹⁹ Her trial

¹⁹ Smith testified in significantly more detail at the PCR hearing. App.p. 2672-2709. Smith testified initially about the family history. She testified that she grew up in Inman, S.C. with 9 brothers and sisters. PCR Tr. 389. Her father was Smiley Pilgrim, who left the family when she was in the 4th grade. She went to school until the 7th grade when she left to work to help by picking peaches. She said two years after Smiley left, stepfather Willie Farr came into the picture. Smith described Farr as a godsend and took care of them. She described her mother becoming depressed after Smiley left staying in the bed with the children having to bathe and feed her. PCR Tr. 392. App.p. 2673-2676.

They relied upon her grandmother to bring them food and clothes. Her step-dad did outside work and tried to keep food in the house. PCR Tr. 392. App.p. 2676.

Smith stated that her brothers and sisters got married and moved out, but Virginia returned home. PCR Tr. 392. Mrs. Smith got married and moved about 3 miles away. She stated she got a GED and studied at Spartanburg Technical College. She had 5 children. PCR Tr. 393. App.p. 2677.

She tried to emphasize that her children had a different life than Virginia and Marion. PCR Tr. 393. She described that although Paul was quiet, shy, and timid, yet after he caught his first girlfriend with another boy he was not the same. PCR Tr. 394. She described him as getting into fights and drinking. He then went into the service. PCR Tr. 394. She said Paul gave her mother lots of trouble because he got into fights. She asserted that others were jealous of him and would pick at him, although he did not initiate the fights. She stated that Paul was usually protecting himself “because he grew up without a daddy”, or older brother to run to, not because he was mean. PCR Tr. 394-95. She described a man who would come around the house and teach Paul how to open a hawk bill knife. She said Paul would use this technique with his knife to scare them “because Paul was a timid scary kind of person growing up.” PCR Tr. 395, ll. 16-17. App.p. 2677-79.

Bessie Smith described after Fred returned from the service, he came to live with their mother, got married, and had two girls. She acknowledged worse behavior came along after.

Bessie Smith stated that her sister Robin did not display the same drinking behaviors growing up, but she started having problems (“you know how teenagers are”) with liking boys early. PCR Tr. 396-97. She was described as being smart in school and worked her senior year to pay for graduation by babysitting Marion. However, she stated using drugs resulted in being incarcerated, but claimed she was not violent or robbing people. App.p. 2680-82.

Smith stated she was not living with Virginia when her daughter Vanessa died. PCR Tr. 398. She stated that Virginia was devastated and depressed along with her mother. She stated Virginia’s mother felt blame for it. After the death, Virginia’s husband began to drink more and then started dating Virginia’s cousin that was raised with them. That relationship tore Virginia up and she separated from her husband. App.p. 2682.

After the separation, Virginia and her mother moved closer to Inman. At that time, Virginia started drinking and staying out late, but kept working. PCR Tr. 399. Smith described Virginia’s drinking as not daily, but a weekend thing. To clarify, they would work all week and then go out Friday night when they got off work. App.p. 2683.

Because Virginia worked second shift (3 p.m. to 11/12 p.m.), Smith felt she did not see her children much and they cared for themselves. Virginia’s mother would watch them while Marion was small playing outside. She said Steve Pilgrim (her brother) would be working on cars and motorcycles. She said Marion loved to hang around Steve “all the time.” PCR Tr. 400. App.p.

2684.

She said her mother and Virginia also liked to play bingo, but she did not know how much time they spent playing it. PCR Tr. 401, ll. 1-10. She said when they went to play, the children were left with Steve or another uncle. She said they played "pretty good much" and "sometimes every night." PCR Tr. 401, ll. 17-20. App.p. 2685.

Bessie Smith described a period that Marion lived with her when he was around 12 to 13. PCR Tr. 401. She observed that Marion was always smiling, crazy about her husband who he teased about the way her husband talked. PCR Tr. 402. She said Petitioner did not like to be around his step-father, but loved being with her family. She said he might have stayed there a few months. PCR Tr. 403. App.p. 2687.

She described her home as different than Virginia's. She claimed that her sons were in sports and not allowed to run around. She said they knew that they had to finish homework and chores. She said Marion "fell right in there." She said he was a sweet child who she cared about and that he wanted attention. PCR Tr. 403. She said she tried to listen to him, tease him. Id.

Bessie Smith stated that she also worked like Virginia. She saw a difference - in addition to having both parents there - that she was more active in doing things with the children in their sports, activities and schoolwork. She felt Virginia did not push them, did not go to PTA meetings. She said that because she worked second shift, Virginia would be off to work. She said Lindsey's older brother, Bubba, sometimes had to wash the clothes and shoes by hand, claiming Virginia did not have the money to go to the Laundromat. PCR Tr. 405. She also claimed that sometimes the children did not go to school because they did not have clean clothes.

Smith admitted there were problems in her own family, but claimed she had structure with rules, Marion's family "had freedom." She asserted that Virginia loved and cared for her children, and gave them everything she could and that he would have more "bill money" in his pocket than Smith had. PCR Tr. 406. She said her mother took care of everything, so Virginia never learned about responsibility. PCR Tr. 406-07. Smith said she never gave her own children "bill money." She said though that Virginia was a good mother, but we all had a struggle growing up. PCR Tr. 407, ll. 10-15. she described her own life, growing up rough suggesting at a time she had nothing to eat, nothing to keep warm when her step-father left. PCR Tr. 407. App.p. 2688-90.

Bessie Smith described an event a couple of weeks before the shooting at Lindsey's house. She stated she had heard from Virginia that the Petitioner was going to kill himself and she went to his house with her sister and brother Steve Pilgrim. She described Lindsey as being depressed, saying he did not have anything to live for and was tired of what was going on. She said they sat down and talked to Lindsey to try to find out why and that he had his whole life. She stayed with Lindsey about an hour or more. PCR Tr. 408-09. App.p. 2692-93.

She stated that she told Lindsey that he needed to pray. She left with her brother Steve. She recalled that no ambulance was called although Virginia mentioned that Bessie should call the rescue squad. She said Virginia told her he had tried to kill himself one time before when he took some pills and he stayed and got treatment. PCR Tr. 410. App.p. 2694.

Bessie Smith stated she talked to Marion later but did not see him. Bessie said she called Lindsey on cell phone days later and he said Nell was trying to take his children from him and he would not see them anymore. PCR Tr. 411-12. He told Bessie that he loved his children, and Bessie said she knew that and don't worry about the woman, and that he'll get to see the children again. PCR Tr. 412. She said he was crying. PCR Tr. 412. App.p. 2695.

Bessie Smith described receiving a telephone call from him the next day when he stated that he was still upset. He claimed that he got a job at BMW and was supposed to start work that

testimony was brief. She testified that she lived at one time in the house with Marion. ROA 2081. She

Monday, but that Nell and her mother had taken out warrants against him. He inquired how could he see his children if he did not have a job. He feared the police would arrest him at BMW and that he would have nothing and would lose the job. PCR Tr. 413. He denied to her what the warrants were for. PCR Tr. 414. She said while they were talking someone clicked in. PCR Tr. 415-16. She tried to call back, but never could reach him. PCR Tr. 415-16. She said the incident happened about 3 hours later. PCR Tr. 416. App.p. 2695-2700.

Smith said she told Marion that she had seen him with his boys at the duck pond, that Marion loved his children, that he bought shoes and clothes for them and their mother. She also said that he would give Nell money and she shopped all the time and take them to eat.

She described a time one month before the shooting when Lindsey carried Nell, his mother, and the boys to Greenville to eat and shop. PCR Tr. 414-15. App.p. 2698-2700

Preparation for Trial

Bessie Smith testified that prior to the trial, Mr. Bartosh, Mr. Brannon and a lady came out to her house a week or a few days before the trial. she said they asked questions and stayed 30 to 40 minutes. PCR Tr. 416. Smith said that she had already divorced her husband by trial time. She claimed this was the only meeting. PCR Tr. 417. She initially claimed they asked "what kind of child he was growing up", and asking "a lot of stuff about me" (Bessie) that she did not want to answer because she was not on trial. She said that they learned about Marion growing up and what type of house he grew up in. PCR Tr. 417. App.p. 2701.

Smith said she was told and agreed to testify. Id.; PCR Tr. 417. She claimed this was the only contact she had with counsel since the incident. She pointed out that she had more preparation in this hearing, meeting about 3 or 4 times. PCR Tr. 418. App.p. 2701-02.

On cross-examination, Bessie Smith stated concerning Petitioner's potential job at BMW and Nell's warrants, that she had heard about it from someone other than Petitioner. PCR Tr. 419. App.p. 2703.

Concerning her alleged telephone call with Petitioner on the day of the incident, Smith said that Petitioner did not say anything about tracking down his wife or looking for her because she had a boyfriend. PCR Tr. 420. She denied that Lindsey ever told her then that Nell and a boyfriend was helping take the kids away. She said Lindsey just kept saying that Nell did not want him to see the kids and was talking about taking the kids away from him. PCR Tr. 420.

Smith denied any knowledge on whether Petitioner had a girlfriend during the course of his marriage. PCR Tr. 421. She described that Lindsey had various jobs working on motorcycles and working at the Zeman Plant. App.p. 2705.

She returned to when he was younger and lived with Smith. She confirmed that he was a "child who like attention." PCR Tr. 422. During alleged suicide threat earlier in September, she stated that she and her brother talked to them. She confirmed that she left after 1½ hours because they thought he would not do it and her brother and sister stated he would be all right. She confirmed that there was a discussion about calling the rescue squad by Virginia and they deferred that decision to Virginia. The rescue squad was not called. PCR Tr. 422-23. She stated while "she loved Marion to death", she would "pretty much" have done something if she thought he was in danger, she also felt this was his mother's call. PCR Tr. 423. App.p. 2705-07.

Returning to the phone calls on the date of the incident, Lindsey did not tell her where he was calling from, did not tell her he was going anywhere that day, or about having a gun. Bessie Smith confirmed that when she spoke with Doug Brannon and Lenora Topp, that she told them she had a phone conversation with Lindsey that day. PCR Tr. 424. App.p. 2708.

described a tragic event in Petitioner's life when a kitten belonging to Petitioner was thrown by her brother into the heater. She said that Marion was hurt by this action. App.p. 2081. She also testified that she had attempted suicide. App.p. 2082.

Petitioner complains that the defense team failed to present or develop the information about the family background from Ms. Smith. However, she conceded that while they were asking her a lot of questions, she did not want to answer them because she felt that she was not the one on trial. App.p. 2701. However, the extreme details that she gave at the PCR hearing about the family, her conversations with Petitioner the day before the shooting concerning his problems with his wife, and the knowledge that he knew warrants were taken out on him by his wife do not undermine confidence in the verdict, even if deficient performance were found, in light of what the jury actually heard about the events leading up to the incident. Here, defense counsel used Ms. Smith to bring out the tragic event in Petitioner's childhood that she observed. Information about the family background was presented, although absent her details. The state PCR court correctly concluded that there was no 6th Amendment violation requiring a new sentencing proceeding. Certiorari is not warranted.

Steve Pilgrim

Like Virginia Lindsey and Bessie Smith, the Petitioner's uncle, Steve Pilgrim testified at the PCR proceeding in greater detail than presented at trial. App.p. 2078-2080, 2711-2736. ²⁰

²⁰ Steve Pilgrim, the Petitioner's uncle, had testified at the original sentencing proceeding. R. 2078-2080. During the PCR proceeding he testified that he was a lifetime resident of Spartanburg, growing up in Inman. PCR Tr. 427. He stated Smiley and Ruth Pilgrim were his parents. He was 6 when Smiley left. PCR Tr. 428.

Pilgrim stated that he spent a good deal of time growing up with Virginia, Bessie, Robin (Keith), Paul, and Willie. PCR Tr. 430-31.

Pilgrim denied that Virginia had a problem with drinking and drugs. PCR Tr. 431, ll. 2-4. However, he stated at one time Virginia displayed suicidal behavior. Pilgrim then described that Marion was not taken care of by Virginia or Marion's father. Virginia allegedly got upset with the father and decided she did not want to live. PCR Tr. 431, ll. 13-17. However, he did not recall if she was hospitalized for it. PCR Tr. 431.

Pilgrim also described when he was around Mrs. Smith and she attempted suicide. He stated it was between her husband and it was rough taking care of them and they broke up 3 or 4

times and Bessie just did not want to live anymore and was hospitalized. PCR Tr. 432.

As to Robin Keith, he thought she had tried to take her life 3 times. PCR Tr. 433. He described her being "kind of depressed for a long time." She also spent time in a hospital more than once.

Contrary to other testimony, Pilgrim stated that Robin had exhibited violent behavior around Marion, but Pilgrim could not remember any circumstances. He confirmed that she was presently incarcerated for violent behavior. PCR Tr. 434.

Pilgrim also stated that brothers Paul and Willie also went to prison for violent behavior. PCR Tr. 434.

Pilgrim testified about the house they lived in on Brock Street in Inman. (Exhibit 27). He stated 10 people lived in the 4 bedroom house, including Marion. PCR Tr. 434-35. He said the Petitioner was born there and the family stayed in the house for 10 years. He stated the house lacked indoor plumbing, air conditioning, and was heated with a stove using either wood or coal. PCR Tr. 435.

Pilgrim stated Lindsey experienced violence while living in their house with the actions of Paul and Willie. He described them as being violent toward Pilgrim, other family members, people in the community, and women in their lives. PCR Tr. 436.

Pilgrim described accidents in Lindsey's life. He recalled Lindsey being run over by a car driven by Paul who backed up over him. PCR Tr. 437. When Steve realized it was baby Marion, he grabbed Lindsey and carried him to the Inman Police Department who took him to Spartanburg Regional Hospital. He said Lindsey never cried or moved. PCR Tr. 437. He responded while at the hospital. He was checked and received stitches on his head where the car ran over him. He was released the same evening. PCR TR 437. Pilgrim blamed the fact that Marion would always try to follow him as the reasoning for the accident. He also stated, in general terms, that Lindsey would fall and hit his head other times. PCR Tr. 437-39.

Concerning Lindsey's suicide threat, he recalled about 3 weeks before the shooting, that he went over to Marion's with his sisters after they called stating Marion had said he was going to kill himself. He said they stayed with Marion 2 to 3 hours. Pilgrim found him real depresses - which was unusual for Lindsey - and talking about wanting to see his kids and that he was having problems with his wife. Pilgrim stated Lindsey was crying that night, which was the first time he had seen him cry. PCR Tr. 439. Pilgrim said that Lindsey had calmed down that evening. PCR Tr. 439.

The next week, Pilgrim stated he received a telephone call from Lindsey telling him that he wanted a gun. PCR Tr. 439-440. Steve Pilgrim thought he was the only one in the family with a gun because his older brothers are not allowed to possess guns (although they had them in the past). PCR Tr. 440. Pilgrim states he no longer has the gun that Petitioner asked for. PCR Tr. 440. Pilgrim stated Marion did not get his gun. However, shortly after the phone call, someone broke into his house and trashed the house, but they did not find his gun. PCR Tr. 440.

Pilgrim denied getting another phone call from Lindsey after that. PCR Tr. 1-10.

Pilgrim stated that he would loan Lindsey money to take his wife out to eat because he was trying to get back with her. He stated she went out with him 3 to 4 times before this happened. PCR Tr. 441.

As to his trial preparation, he stated he met with the defense counsel one time the day before the trial started. PCR Tr. 442. He thought that it was on a Saturday for 30 to 40 minutes. He recalled Mrs. Topp, Mr. Bartosh, Mr. Brannon, his sister Virginia, and sister Bessie - the people that were going to be testifying. PCR Tr. 442. He stated they discussed his condition and what he was

Counsel contends that had counsel spent more time with Pilgrim, the same information about Lindsey's background could have been developed and presented. Petitioner's counsel had similar information that he chose to limit in the presentation of Virginia and Bessie concerning the family background, including the extent of information concerning his suicide attempts. The Petitioner has failed to show that the failure to more fully present family background through Pilgrim was prejudicial under Strickland.

Attendance at the Mental Health Evaluations.

suffering from that resulted in his disability. He stated that he was depressed, had anxiety [and uncontrolled hypertension]. He stated that they did not request that any of them sign releases of medical or psychological records that he would have done. PCR Tr. 443.

He said he had lived in Spartanburg from the time of the incident to the trial and was available. In hindsight, he felt he was not adequately prepared to take the witness stand and testify. He said that he had never testified before and was nervous and they did not ask him anything, just about his health. PCR Tr. 444. He said they did not ask about the events leading up to the trial or Marion's personal history. In contrast, for the PCR hearing, Pilgrim described only talking about his health. PCR Tr. 445.

Pilgrim stated that they prepared him and asked him if he wanted to ask for mercy. PCR Tr. 445. In describing it though, Pilgrim stated "they told me not to ask for mercy." PCR Tr. 445, ll. 1-8. Pilgrim stated that he would have asked for mercy, declaring that "we all make mistakes", "I care for my nephew", "he's my favorite nephew and he made a mistake", "and I wouldn't want him ... get the death penalty." PCR Tr. 445, ll. 11-17.

On cross-examination, Pilgrim clarified that he took the picture of the house (Exhibit 27) last Sunday. PCR Tr. 446. Pilgrim further did not recall that at the 2004 trial he testified about being a witness to the car accident (ROA 2079-2080), that he testified about the incident when Lindsey ingested kerosene (ROA 2080), about how long he stayed with the family (ROA 2080) and his own health conditions of high blood pressure and panic attacks. PCR Tr. 448. Pilgrim admitted he would have provided this information to counsel. PCR Tr. 448.

Pilgrim testified that he had been followed by Lindsey and he taught him how to fix things and remained involved in his life after he moved out. PCR Tr. 449. He was consistently in contact with the Petitioner throughout his life. PCR Tr. 449.

In explaining his earlier reference to violence in the home, he described it as going out and getting into fights, getting guns and shooting people. He further described drinking and cussing in the home and turmoil. PCR Tr. 450.

In explaining the discussion on mercy, he said it occurred in the 20 to 30 minute meeting with Mr. Bartosh and the others at the office. PCR Tr. 451.

Pilgrim stated that he was not present when either Virginia or Bessie attempted suicide. PCR Tr. 451. He said he was the contact person in the family and would be called whenever anything happened, but he did not see what they did. PCR Tr. 452.

As to Exhibit 27, he stated the house looked the same, except they would mow the grass. PCR Tr. 452.

Petitioner takes issue with counsel's failure to personally attend the mental health evaluations. Although the record supports the conclusion that he did not attend the evaluations with Dr. Narayan, (App.p. 129), this failure does not undermine confidence in the outcome of the case. This is particularly true when Petitioner admitted to Dr. Melikian prior to the PCR hearing that he was attempting to feign mental illness during the evaluations.

Mercy Issue.

Petitioner makes a claim that the defense counsel failed to adequately present requests for "mercy" to the jury during the penalty phase. He contends that counsel failed to prepare witnesses who testified to show mercy and failed to call certain witnesses who could have testified about mercy including friends and family. These assertions were addressed in the Order of Dismissal, p. 62-66. App.p. 3597-3601. Respondent submits that the issue was appropriately addressed under Strickland.

In the lower court, he asserted that counsel "failed to adequately argue the trial court's refusal to allow the witnesses to request mercy and to preserve the record concerning that issue. The PCR Court relied upon the presumption of competency to address the deficiency prong due to counsel Bartosh's death. App.p. 3600-01; Order, p. 65-66. Further, the Court soundly determined that the second prong of Strickland v. Washington, 466 U.S. 668 (1984), a point the Petitioner makes no attempt to challenge when the Court concluded that he had claimed that had counsel objected it is likely the matter would have been reversed on appeal. However, he ignores the proper test that it is his burden to prove by a preponderance of the evidence that there is a reasonable probability that the result of the proceeding would have been different. To the contrary, four of his six witnesses had made specific mercy requests to the jury as family member and friend. He presented as noted above in the trial

summary, a series of family witnesses: mother Virginia Lindsey²¹, father Leon McDowell²², cousin Chris Wilkens²³, uncle Steve Pilgrim²⁴ and aunt Bessie Smith. He also called friend mentor Bill Burton who requested : “**please have mercy on him.**” ROA 2076. Second, counsel Bartosh made a plea for mercy and a just punishment of life. ROA 2137, 2146. To that extent, the situation is similar to the situation in State v. Sapp where the Court concluded that reversible error could not be shown even though the trial court erred in excluding a question concerning mercy. As in Sapp, there is cumulative evidence of family and friends requesting mercy. He has failed to establish Sixth Amendment prejudice. See State v. Sapp, 366 S.C. 283, 294, 621 S.E.2d 883, 888 (S.C. 2005); State v. Myers, 359 S.C. 40, 596 S.E.2d 488, cert. denied, 543 U.S. 980, 125 S.Ct. 485, 160 L.Ed.2d 359 (2004) (exclusion of testimony is harmless where it is cumulative to other testimony in the record). Certiorari is not warranted.

Dr. Tora Brawley

In his petition, the Petitioner contends that counsel erred in failing to call the retained psychologist, Dr. Tora Brawley. Petition, p. 30-31. He stated that she could have explained Lindsey’s cognitive skills. Respondent incorporates by reference its argument in argument 3. It is clear that counsel Bartosh made a decision after reviewing the information and testing results with Dr. Brawley

²¹Mother Virginia Lindsey testified to the 2004 jury that: “Marion was her son I love him very much. **And I ask mercy for my son not to be sentenced to death.** I know that somebody else’s child’s life was took. But I don’t want my child sentenced to death” ROA 2060.

²²Father Leon McDowell asked the jury: “ **if they can see fit not to execute Marion maybe he can benefit to his kids.**” ROA 2072.

²³Cousin Chris Wilkins stated to the jury: “just please take into consideration the kind of father he was. **Please have mercy on him.** I know what happened was a big tragedy for everybody. But I mean he is a good person.” ROA 2076.

²⁴Before the witness testified, a bench conference was held and Judge Few declared that: “that was the last closing argument from the witness that I’m going to allow. I’m not going to allow any other witnesses to answer the question is there anything you want to tell the jury?” ROA 2078, l. 15-19.

that he would have the information presented as part of Dr. Melikian's testimony. App.p. 2360-61, 2365, 2375, 2885-2886, 2959-60 (report to Dr. Melikian). The record reveals that Dr. Melikian presented the test results within her testimony after consulting with Dr. Brawley. App.p. 2004, 2009-2012. 2005-06, 2885-86, 2360-61. The Petitioner has failed to show either deficient performance or prejudice concerning the limited use of Dr. Brawley.

II. Ineffective Assistance of Counsel - FAILURE TO RETAIN SOCIAL HISTORIAN/SOCIAL WORKER

The PCR court reasonably found that trial counsel was not ineffective in failing to retain a social worker to testify. Counsel retained a mitigation investigator and other experts who developed an understanding of the social history. Although the particular themes presented at the PCR proceeding were not presented in the same manner at trial, the Petitioner failed to show that the result would have been different. Certiorari is not warranted.

In second argument, Lindsey contends that counsel failed to present a "family historian" and social worker. The PCR court addressed this issue in denying relief. App.p. 3637-3716. In his petition, he asserts that a qualified social worker could have presented to the jury his miserable upbringing, his awful family history, and the effect it had on his mental state at the time of the shooting. The initial problem with the Petitioner's approach is that the 2004 jury was presented with sufficient facts to accept that he had an unfortunate family background set out through the lay testimony of family members and Bill Burton. See, Argument 1, Summary of trial testimony, *infra.*, at pages 2-14. Although the record reveals that a social worker was not called as a witness by the defense, it revealed that friends and family members, as well as an expert witness, Dr. Melikian, a forensic psychiatrist, testified at trial. In addition, a mitigation investigator, Lenora Topp, a licensed investigator based in Asheville, N.C., was retained and used by the defense team in this matter. At the hearing, counsel presented family members (Virginia Lindsey, Bessie Smith, Steve Pilgrim, and Tim Sims), Lindsey's friends (Bill Burton and Pat Burton) as well defense counsel (Doug Brannon and Karen Quimby Hatcher) and retained mitigation investigator Lenora Topp.

When a defendant challenges a death sentence, prejudice is established when "there is a

reasonable probability that, absent [counsel's] 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. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Rhodes v. State, 349 S.C. 25, 31, 561 S.E.2d 606, 609 (2002). The applicant in a PCR hearing bears the burden of establishing his entitlement to relief. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). The Court will uphold the PCR court's findings if supported by evidence of probative value within the record and will only reverse where there is an error of law. Sigmon v. State, 2013 WL 1137371, 3 (S.C. 2013).

In his Petition, the Petitioner cites to Eddings v. Oklahoma, 455 U.S. 104 (1982) to suggest that a defense counsel has an obligation to present **all** available mitigating evidence. However, he then asserts that the ABA guidelines state that counsel “should consider presenting “expert and lay witnesses along with supporting documentation . . . to provide medical, psychological, sociological, cultural or other insights into the client’s mental and/or emotional state and life history that may explain or lessen that client’s culpability for the underlying offense.” ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), § 10.11 - The Defense Case Concerning Penalty. He asserts that the defense team failed to retain and present a social worker. However, other than that fact, he fails to point to any particular evidence that should have been presented or how it would have uniquely impacted upon the jury.

Respondent submits that the Petitioner has failed to prove either deficient performance or prejudice concerning this matter. As revealed within the evidence, counsel retained a mitigation investigator Lenora Topp who acquired background data concerning the defendant, acquired an understanding of the family from Marion Lindsey and his mother and provided her summaries to the defense team for their use in deciding what information to present. The family background was

investigated and not ignored. In addition, evidence was presented through lay witnesses at trial concerning the background in the guilt and penalty phases. The Petitioner has failed to show how this evidence from the social worker - or its absence undermined the confidence in the verdict under the standards of Strickland.

The PCR Testimony of Social Worker Vogelsang Presented The Particular Dangers of Presenting Family Background Testimony concerning Marion Lindsey.

Jan Vogelsang, a clinical social worker with expertise in bio-psychological assessments, testified that she conducted such an assessment of Marion Lindsey. She testified that as a part of the assessment she interviewed the Petitioner, Virginia Lindsey, Bessie Smith, Steve Pilgrim, Timothy Sims, Patsy Burton, Robin Pilgrim (Keith), Lenora Topp, Rod Tullis, Dr. Melikian and Dr. Brawley. She also declared she had sat in court and heard testimony of the same. PCR Tr. 495. She described records she reviewed from Ms. Topp and Virginia Lindsey, including medical and criminal domestic violence records, of Bessie Smith (mental health and CDV offense), of Steve Pilgrim (mental health, prior crimes, and medical), of Tim Sims (birth, school, and SCDC records), and of Robin Pilgrim (medical, prison, and mental health and prison visit). PCR Tr. 496. She also reviewed Paul Lindsey's court order declaring death [from drowning disappearance at Jocassee]. PCR Tr. 496. App.p. 2770-2781.

Concerning the Petitioner, Ms. Vogelsang stated she reviewed his request for legal aid, his medical records, his school records, SCDC records regarding Stanford Wilkens incident, Lindsey's recent letter to the victim's mother, William S. Hall - DMH records, reports of Dr. Narayan and Dr. Musick, and his mental health records. App.p. 2780-81; PCR Tr. 496-97. She also read the testimony of family members, Mr. Burton and Dr. Melikian. PCR Tr. 497. Vogelsang testified that she also visited the community and created a family tree. PCR Tr. 497. App.p. 2781.

Concerning the family tree, Ms. Vogelsang testified generally about the existence of various members. She identified the existence in some members of "substance abuse, possession or

distribution,” “any mental, emotional, or behavioral impairments,” “sexually inappropriate behavior,” and “charges of criminal domestic violence, assault, or having served time in prison.” PCR Tr. 502. She noted that the members of the home had very difficult childhoods with issues of family poverty, particularly after Smiley left. PCR Tr. 502-03. Vogelsang opined that this was abject poverty. App.p. 2787, l. 7-22.²⁵

Vogelsang related that his mother Virginia was abandoned by her father - a theme within the family - and raised by an ill parent. Vogelsang questioned her parenting skills. App.p. 2789; PCR Tr. 505. As to Lindsey’s father, Leon McDowell, she opined he had abandoned Petitioner and never acted as a father and had his own family.

She stated Lindsey was raised by his grandmother with mostly an absent mother and absent father. PCR Tr. 506. She opined no one was present to help him through the developmental stages. However, Steve Pilgrim was identified as the hardest working and cared deeply about Petitioner, but claimed he was not there a lot. PCR Tr. 507. Virginia was working 2nd or 3rd shift in the mill. PCR Tr. 507. App.p. 2791.

As to the home living conditions, Vogelsang described that, at times, there were 10 people living in the home, sometimes a 4 bedroom home in rough neighborhoods where conditions were not good, sometimes without indoor plumbing and lacked heating. PCR Tr. 507-08. App.p. 2791-92.

Vogelsang identified photographs that she would have used at a trial. She suggested the early photos of Lindsey would have helped to humanize him. PCR Tr. 509. App.p. 2793.

²⁵She also asserted that their grandfather, Porter Pilgrim, was sexually inappropriate with some boys in the family. App.p. 2787; PCR Tr. 503. She opined that some of the experiences that had been described in the testimony of the aunts and uncles with whom Lindsey lived played a significant role in the things Lindsey experienced growing up in the household. PCR Tr. 504, ll. 20-24. App.p. 2783-2788. She stated that Mrs. Lindsey had been married to Claude with 3 children and had two miscarriages. Petitioner was born in 1973 two years after she lost her seven month old daughter. Mrs. Lindsey had no intervention on the death or counseling. She stated Virginia changed after the death, working and would go out and party and was not involved in parenting. PCR Tr. 506.

She opined that Lindsey had traditional medical care, though she did not see his medical records. PCR Tr. 509. She stated that he saw Dr. Henderson and early critical care would be by anecdote, involve being carried to the police then to the hospital. She described his injuries as the car accident, the ingestion of kerosene, and falling off the porch. PCR Tr. 510. App.p. 2794.

She testified generally about child development. PCR Tr. 510-12. She opined that there was no one at home to help Marion through his developmental stages. PCR Tr. 512. She opined that young boys need a strong male adult. She suggested the lack of a positive role model creates a higher risk to end up in trouble. PCR Tr. 513. This resilience to bad things happening in their lives is learned through child development. PCR Tr. 514. App.p. 2794-2798.

She opined that Lindsey did not have any strong male figures in his life. PCR Tr. 514. While his family in the home loved and cared for each other, she opined Lindsey was not prepared to face adverse and violent situations and to resolve problems other than through violent options. PCR Tr. 515. She opined there was a lack of guidance and mental health intervention where recommendations were not followed. There were also within the family situation the existence of divorce, separation, and abandonment, as well as emotional abuse and neglect. PCR Tr. 516. She found that the care of children was not the primary concern. PCR Tr. 516. She found a lack of role models and consistent care giving, as well as an inability of trust in relationships. PCR Tr. 517. She also opined there was “worry about violence in the home,” “impaired cognitive functioning,” “inability to deal with aggressive feelings” (shown through use of guns, knives, and fists), repression of feelings (family representation to mental health stuff that everything is O.K.), and a “sense of helplessness” (poor problem solving skills). PCR Tr. 517-18. App.p. 2798-2802.

She opined that outside of home, Mr. Burton was a strong male influence on Lindsey. She opined Burton and his mother’s influence on Lindsey may have made a difference in his life and suggest the reason why his school records between 2nd and 6th grade reflect courtesy, respect for

authority. PCR Tr. 518. App.p. 2802.

She opined that Petitioner lived everyday with “a threat of harm,” which makes children anxious. She asserted that the relationship with Burton gave him his strengths and gave him hope that he could provide. However, she felt his wanting a different type of family resulting in his guessing how to do that by giving material things. PCR Tr. 519-20. App.p. 2803-04.

Vogelsang opined that the community Petitioner lived in became exposed to cocaine and crack. She asserts that when he was around 11 that he sees his family dealing and using drugs. PCR Tr. 520. Although there were programs in the community, such as Scouts to help his learning and mental health issues, they did not use them. PCR Tr. 521. App.p. 2804-05.

Concerning his schooling, she did not see the disciplinary or conduct problems in his records that the DMH evaluators had the impression of concerning misbehavior, although he did fail the first grade and had speech problems. PCR Tr. 521. She did find that Petitioner had slapped a girl, got into a “wrestling match” with a boy when he was thrown and had to get medical treatment for an elbow, and had a fight with another over a racial remark. PCR Tr. 522. App.p. 2805-07.

However, Vogelsang asserted in the eighth grade, Lindsey “succumbed to the streets” when Burton left, his mother started 3rd shift, he became absent from school and his brothers got involved with drugs, driving cars, buying jewelry and having girlfriends. PCR Tr. 522. After repeating 8th grade then placed in ninth grade, he quits school after becoming “a street person.” PCR Tr. 522. App.p. 2806.

Vogelsang stated Aunt Robin was the only member to graduate from high school but was not at home traveling and eventually getting addicted to crack cocaine. PCR Tr. 523. The others in the house included Willie who went to prison for 15 years for killing, Paul who got in trouble with drugs. It also included Bessie, Robin, and Steve who received mental health treatment. PCR Tr. 524. App.p. 2806-07.

She felt Lindsey would retreat to neighbors homes to avoid the chaos and found him lonely and

scared. PCR Tr. 524. She also asserted that when his mother got off work she frequently would go to play bingo with her mother. PCR Tr. 524. His uncles were described as either beating on him, threw his cat into a heater, hit their girlfriends, revealing a powerful threat of harm. Further, he was claimed to have seen his mother shoot at Mr. Sims. Vogelsang stated that Lindsey had no oasis for peace unless he went to his neighbors or Mr. Burton. PCR Tr. 526.²⁶ App.p. 2807-10.

Vogelsang stated that Virginia had a volatile relationship with Mr. Sims - evidenced by fighting and arguing all the time. She stated that one time she shot at him several times and missed which Petitioner witnessed. PCR Tr. 527. She also recalled the family all had guns. PCR Tr. 527. App.p. 2811.

Concerning his suicide attempts, Vogelsang described the event which led to his hospitalization. She stated that Fred returned to the home demanding attention and Petitioner needed attention from their mother. The brothers got into a fight and Lindsey went into the bathroom took between 50-60 over-the-counter medicine (Tylenol, Nuprin). PCR Tr. 527-28. At the hospital, Petitioner told them initially that his mother told him that she did not love him and that they were going to send him to a boys home which caused him to get upset and want - at that moment - to take his life. PCR Tr. 528. However, Vogelsang reported that his mother told the staff he was stable, but they were looking at his recent fighting conduct school. His mother told them about his temper outbursts. Petitioner reported to them that he was seeking attention of his mother and "he wanted to leave that place." PCR Tr. 528. Vogelsang stated his mother resisted the recommendations for further assessment and outpatient treatment. PCR Tr. 528-29. Vogelsang described the "red flag" that suicide gestures of a child and the need to stay in treatment. PCR Tr. 529. App.p. 2811-13.

²⁶ Vogelsang asserted that Paul shot at 3 cousins, had CDV charges, was involved in drugs and went to prison. She stated Willie served 15 years for ABHAN and was convicted of CDV. As to Robin, she was convicted of crack and serving a sentence from charges reduced involving an assault, kidnapping and robbery. App.p. 2810; PCR Tr. 526.

Vogelsang then reviewed the history of suicide “attempts” of Bessie, Robin, and Virginia and declared that the mental health center was not aware of their history when they saw Petitioner or that the family members get depressed and take things ending up in mental health facilities. PCR Tr. 530. She felt the center, unaware of the family history, had little to work with, but they requested further evaluation. App.p. 2815; PCR Tr. 531.

Vogelsang next described the cultural practice of “roots.” PCR Tr. 532. She distinguished its use between some families where it is taught and explained as part of their heritage and other families where there be mental illness and violence and this practice further confuses. Vogelsang found a note in the doctor’s records treating Steven Pilgrim on July 15, 2002 who was taking Xanax asserting that he was anxious and feared his wife was “putting a root” on him and putting something in his drink or food claiming it caused his penis to draw up inside him. PCR Tr. 533, ll. 14-25. Vogelsang noted that Steve was the person Lindsey looked up to. She reported Steve had previously shot a woman in an earlier relationship and the mental health records reported his conflicts with his wife. PCR Tr. 534. App.p. 2815-2818.

Vogelsang reported on direct that Lindsey was confused by the practice of roots.²⁷ She reported that the use of “magical solutions” in a confusing and chaotic family environment only confuses things. PCR Tr. 534-35. App.p. 2818-19.

Vogelsang summarized Dr. James Garbarino’s theory on psychological battering of children and asserted she would have used his model if she would have testified in 2004 with visual aids. PCR Tr. 535. She stated that there was rejection as revealed by his father’s abandonment and his mother’s alleged lack of involvement in his life. She points to claims that his brothers would leave with their fathers and Petitioner would be left behind. She said that suggested his entry into “adulthood” with a

²⁷ On cross-examination, Vogelsang admitted she had no reference to discussing “roots” with Lindsey in her interview notes from November 2009. App.p. 2859-60, 2869. PCR Tr. 575-76, 585.

fear of rejection and over-reactivity to rejection. PCR Tr. 536. App.p. 2820.

Another Garbarino factor was “isolation” which she opined there was evidence of minimal exposure to church and scouts, although she claimed he tried to play football, but quit when no one would come to his games. She also saw “exposure to negative behaviors within the home” and other than Mr. Burton, his mother and Steve. App.p. 2820; PCR Tr. 536

As to “terrorism”, she opined he witnessed his uncles fighting, beating up wives and girlfriends, and his uncle throw his cat into the fire. As to the “ignoring” factor, she opined the parents failed to notice his needs for school, mental health, protection and supervision. App.p. 2821; PCR Tr. 537.

As to the “corruption” factor, she opined it was shown by his uncles’ violence, his mother shooting at her boyfriends tires and boyfriend, and his uncle’s profit from drugs. App.p. 2821; PCR Tr. 537. She suggested that these factors mis-socialized the child. App.p. 2822; PCR Tr. 538.

Vogelsang reported that Lindsey became involved in the drug trade around age 12 as a courier for his uncles. App.p. 2822; PCR Tr. 538. This initially provided him some money, and Vogelsang claimed he used the money to help pay for his grandmother’s medicine, gave money to his mother, yet also used it to buy clothes and shoes for himself. App.p. 2823; PCR Tr. 539.

Concerning his school performance, she opined he had potential with extra help and tutoring. App.p. 2823; PCR Tr. 539. But opportunities were not present. Id.

Vogelsang described Petitioner’s relationships with women as erratic and chaotic. PCR Tr. 540. An early relationship with an unbeknownst cousin and breakup demanded by his mother caused Petitioner to become very sad and upset. She further equates his mother’s alleged rejection prior to the pill injection at age 15. App.p. 2824.

Vogelsang describes that Lindsey began dating and when rejected becomes upset and over-reactive. She describes the shooting of Stafford Wilkins after he was in a “long-term” relationship with Stephanie, causing him to be sent to jail. App.p. 2824; PCR 540.

Concerning the victim Nell, Vogelsang reported that the relationship began at age 22. She found “incredible instability” in the relationship. She said the relationship with Nell began while living with Stephanie. He has a child with Nell. Although Vogelsang opines that Petitioner loves being a father App.p. 2825; (PCR Tr. 541, ll. 14-15), she describes breakup where each returns to their mother, arguments and violence resulting in at least one conviction and multiple arrests. App.p. 2825; PCR Tr. 541. They were married in 1997 after he was released from jail after the Wilkins incident. A conflicted relationship, they have a second child in 1999. She reports that while Lindsey gets jobs for a period, then reverts back to drug dealing “where he can get the money he needs to provide” for things he thinks he wants his family to have. App.p. 2826; PCR Tr. 542.

Vogelsang found that he wanted to be a father, but lacked knowing about fatherhood. She denied any knowledge that he ever abused or hit his children. PCR Tr. 543. he only found that his role was to give them things. PCR Tr. 543. App.p. 2827.

Vogelsang reported that there was, however, violence in his relationship with Nell. Though one CDV conviction, she had made other reports of violence or aggressiveness toward her. App.p. 2827; PCR Tr. 543.

Vogelsang stated the drowning of brother Fred in 1998 was a major loss, even though this was the brother he fought with. PCR Tr. 544. They had gotten closer and worked in Virginia together. After his death, she opined he got sad and depressed in a “normal grieving process.” PCR Tr. 544. App.p. 2828.

She opined that Lindsey lacked an understanding of fidelity and being committed in a relationship. Vogelsang described a family pattern of marriage and additional involvement in other relationships. PCR Tr. 545. Vogelsang, however, stated this did not apply to Nell though. However, Vogelsang opined that “he became extremely depressed over the loss of his boys” and Nell. Vogelsang pointed out that is when he threaten to take his life - no one called EMS or took him to the E.R. and

“just left him there.” PCR Tr. 545. App.p. 2829.

Vogelsang re-stated the major factor in his life was the family system and behaviors he had witnessed through his development years. She declared this affected his judgment, impulsivity, insight, “and placed him at a higher risk to end up committing a serious act.” App.p. 2881; PCR Tr. 547. she opined that had she been a witness in 2004, she would have testified whether Bessie Smith had attempted suicide or suffered mental illness based upon her knowledge of its foundation, although the Respondents objected to it under hearsay. App.p. 2883-84; PCR Tr. 549-550.²⁸

²⁸ On cross-examination, the dangers inherent in presenting social history testimony was revealed. First, Vogelsang admitted that she misstated on direct that Uncle Willie has killed someone, when in fact it was only an assault. PCR Tr. 556-57. Further, she admitted that Lindsey was not identified in the pill incident as attempting suicide by the hospital, but that it was a gesture, that he had no suicidal ideation, did not realize the medicine was toxic and that he did it to get attention - implicitly not to kill himself. PCR Tr. 557-58. App.p. 2840-42.

Vogelsang again corrected herself concerning the incident three weeks before was not an attempted suicide, but was only a “threat.” PCR Tr. 559. She argued there was no attempt or overt act on his part and suggested conflicted evidence that he had a gun, contrary to the family’s earlier testimony. PCR Tr. 559. (See App.p. 2708, 2724, 2760-61; PCR Tr. 424, 440, 476-77). App.p. 2843.

Concerning her lack of a written report, Vogelsang declared she is not required to do a report unless requested. she denied that had she made a report that she would not have made factual mistakes. PCR Tr. 561. She admitted that as a member and past president of the National Association of Social Workers of S.C., that they have a national policy in opposition to the death penalty, but declared she did not vote on the policy. PCR Tr. 562. App.p. 2845-46.

Vogelsang then described what matters she reviews as an expert witness in child custody cases. She did not recall trial testimony that Lindsey had given his child alcohol at trial although she had admitted that she read the trial testimony. App.p. 2847; PCR Tr. 563. See App.p. 1820 (Lindsey gave son a beer in a baby bottle). She suggested it would have stood out and it would have been a concern for her in a family court recommendation situation. Similarly, whether an individual carried a weapon, had shot at someone, sold drugs, and had multiple incidents of violence toward his wife would affect her recommendation. Vogelsang declared she would not have recommended visitation for that person, although she had earlier declared “from all sources he was a good father.” She confirmed in a child custody situation - with her information - she would have been hesitant and would have recommended that there be no visitation without supervision from someone from the Court present. App.p. 2849; PCR Tr. 565, ll. 7-20.

Ms. Vogelsang admitted that she did not speak to victim’s family members who had long-term relationship with the Petitioner and his family or the mother of Lindsey other child. App.p. 2851-52; PCR Tr. 567-69.

Vogelsang admitted that his mother and grandmother - as care givers - had taken Lindsey to doctors for regular checkups. Vogelsang admitted that Steve Pilgrim was a person who was not threatening and a workaholic and supporter of the family. PCR Tr. 573. She stated though that he

ANALYSIS

The Investigation Concerning the Social History of Lindsey and the Family Members Was Reasonable.

was not there for “child development”, pointing out that he “believed in practice of roots” and “shot a girl”, though Lindsey did not witness it. PCR Tr. 574. App.p. 2857-58.

When asked about what Marion had told her about the practice of roots in the home (during her November 2009 interview), she asserted various matters including it was confusing to him, made him mixed-up between a difference between roots and home remedies, confused him about family members putting a root on people in their relationships to make them feel sick or die. However, when asked to point out in any of her notes of the interview, she declared - prior to reviewing the notes - that she “may not have written it down.” PCR Tr. 575. when she reviewed her multiple page notes, she declared nothing was in there, although she remembered the conversation. PCR Tr. 576. App.p. 2859-60.

Vogelsang declared Lindsey “succumbed to the streets” at the eighth grade, as a runner for his uncles, but then could not clarify which uncle nor resolve that Willie was in jail at that period of time. PCR Tr. 578. she then switched it to drug dealing cousins rather than the uncles. PCR Tr. 578-79. App.p. 2862-63.

She confirmed that she failed to interview Stafford Wilkins, who Lindsey had shot. She stated she was unaware that Wilkins stated he thought Lindsey was his friend and did not know why he shot him, admitting that she had not read his trial testimony. App.p. 2863; PCR Tr. 579.

Concerning her reliance upon Rod Tullis’ testimony and interview, she did not recall or know that it conflicted with the defense lawyer’s testimony. App.p. 2865; PCR Tr. 581. See PCR Tr. 39-40. She also confirmed that when she interviewed Lindsey in November 2009, he never told her that he called his lawyer (Tullis) on the day of the crime and threatened to kill himself. App.p. 2869; PCR Tr. 585.

In suggesting a reason for the crime, she confirmed that he had declared to the EMS that he had shot her because she had a boyfriend - not because she would not let him see his children. PCR Tr. 586. She confirmed at the time that he was under an order of protection and not to see his wife, though she could recall how long before the incident it had been in place. PCR Tr. 587. she confirmed that after the order was entered, Lindsey would not have supposed to have seen his children or have contact with them. PCR Tr. 587. App.p. 2870-72.

While she had stated he had provided support for his children, she confirmed that he did not always provide them clothes, food, or try to have visitation. PCR Tr. 588. To the contrary, he had asserted in records that he was not providing any support 4 to 5 months prior to the incident. PCR Tr. 588. App.p. 2872.

Vogelsang also confirmed that Lindsey had a record of violence, not only toward Nell, but toward other females, including those he claimed to love. PCR Tr. 589. He also had indications of violence toward males. App.p. 2873.

Vogelsang stated she had talked with Lindsey about violent acts while dealing drugs, including fights and shootings. PCR Tr. 590. She described Lindsey as “controlling”, but also scared half to death concerning the drug sales. PCR Tr. 590. She stated he had an “extremely overactive behavior involving violence.” App.p. 2875; PCR Tr. 591, ll. 1-2.

Vogelsang also confirmed that his risk factors made it a high risk that he would end up committing the very act he committed. PCR Tr. 593. She also admitted that the risk factors she found are not treated in the prison system. PCR Tr. 594. App.p. 2878.

Initially, the underlying issue concerns whether the investigation of the social history of Lindsey and his family was reasonable. Petitioner contends that counsel should have retained a social worker to explain to the jury the effect of Lindsey's family history on his mental state. . He relies upon the ABA guidelines, but recognizes that even under the guidelines there is no requirement that a social worker be retained in every case, but instead asserts that expert witnesses may be useful for the purpose of understanding a client's extended, multi-generational history for an understanding of his functioning. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), 10.11. App.p. 3250-51. However, the particular risk factors that Ms. Vogelsang presented were not complex and would be understood by the jury. More particularly, they were essentially testified to by the lay witnesses. These Vogelsang factors included abject poverty, lack of a father figure, mental health issues and suicide attempts by Petitioner and members of the family, substance abuse, and criminal activity and violence within the family unit. App.p. 2785-2882. The entry and exit of Bill Burton as a positive influence was evident from his testimony before the jury, as was his father Leon McDowell's admission that he was never there for his son. App.p. 2071. Dr. Melikian spoke of the family history of depression and suicide attempts. App.p. 2004 - 2001.

Petitioner does not point to any particular piece of evidence that critical to the defense and mitigation, but merely suggests that it was not done in the depth that he thinks counsel should have done. Although the investigations may not have included Ms. Topp's suggested preference of three years (or the claims 1000 hours of the ABA average), it uncovered the matters necessary for the defense.

A review of the trial testimony of Virginia Lindsey (guilt and penalty), cousin Chris Wilkens (guilt and penalty) and the penalty phase testimony of friend Bill Burton, Leon McDowell and Steve Pilgrim reveal that the essential family background was revealed to the jury. Importantly, concerning the depth of the investigation, the summaries of the interviews that Ms. Topp had with Marion Lindsey

and Marion Lindsey's mother in 2004, buttressed by Ms. Topp's own PCR testimony about what she learned in 2004 are virtually in the same detail that the post-conviction evidence from the family members and Jan Vogelsang's testimony in the PCR hearings. Simply put defense counsel Bartosh through his investigation had an understanding of the potential evidence he could have presented in greater depth. It was not the lack of a social worker that prevented it. It was Mr. Bartosh's decision not to present the greater detail.

Trial "counsel have a duty to make reasonable investigations or to make a reasonable decision that makes investigations unnecessary." Strickland, at 691, 104 S.Ct. 2052. "In assessing counsel's investigation, we must conduct an objective review of their performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (internal quotation marks and citations omitted). "In assessing counsel's performance in this context, we look to how counsel prepared for sentencing, what mitigating evidence counsel accumulated, what additional leads counsel had, and what results counsel could have reasonably expected from those leads." Blanton v. Quarterman, 543 F.3d 230, 236 (5th Cir.2008) (citing *Neal*, 286 F.3d at 237). Courts must consider "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527, 123 S.Ct. 2527.

Respondent submits that the investigation concerning the social history of the family was constitutionally adequate. In addition to this information, the 2004 defense team was aware that there had been mental health concerns for Bessie Smith who had tried to commit suicide, and Steve Pilgrim who at least had nerve and anxiety problems.

"[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying heavy measure of deference to counsel's judgments." Wiggins, 539 U.S.

at 521-22. “A defense attorney is not required to investigate all leads” Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir.1994).²⁹ “A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance.” Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir.1992). “The attorney's decision not to investigate must not be evaluated with the benefit of hindsight, but accorded a strong presumption of reasonableness.” Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir.1985).

“The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.” Strickland v. Washington, 466 U.S. at 691. “The reasonableness of the investigation involves ‘not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.’” St. Aubin v. Quarterman, 470 F.3d 1096, 1101 (5th Cir.2006), quoting in part Wiggins, 539 U.S. at 527.

Petitioner has failed to show what material counsel was unaware of that was critical to the defense, just that in depth evidence was not presented. However, he has failed to show that counsel's investigation of the family background was unreasonable. With the further information about the family background, the psychiatric diagnosis is similar, the information provided by and to the social expert is similar to what the 2004 defense team was aware either by their own or Ms. Topp's interviews. The

²⁹Rejecting a per se rule of ineffective assistance where counsel does not consult family members, the 11th Circuit held in Williams v. Head, 185 F.3d 1223, 1237 (11th Cir.1999), that counsel's investigation was reasonable when he did not interview the defendant's sister or father, the latter because the defendant had not lived with him for very long. ‘[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary.’ Strickland [v. Washington], 466 U.S. [668] at 690-91, 104 S.Ct. [2052] at 2066 [(1984)]. Accord, Davis v. State, 9 So. 3d 539 (Ala.Crim.App.,2008).

assertions otherwise must be denied.

More clearly, 6th Amendment prejudice has not been shown. Petitioner has not pointed to any new information or a gamechanging revelation that creates a reasonably probability of a different outcome. Bean v. Calderon, 163 F.3d 1073, 1081-82 (9th Cir.1998). To the contrary, it is virtually the same information. The Petitioner has failed to show that further investigation of the family history undermines confidence in the outcome of the case and creates a reasonable probability that the result of the proceeding would be a life sentence.

The Failure to Employ A Clinical Social Worker Does Not Require A New Trial.

It is undisputed that defense counsel in 2004 did not retain a clinical social worker such as Jan Vogelsang in 2002-2004. Although the decision not to retain a social worker is not reflected in the record due to counsel's death, Respondent submits that the failure does not amount to deficient performance or prejudice under Petitioner's argument.

As to deficient performance, Petitioner appears to assert that the retention of a social worker is required in all capital cases. His reliance upon the ABA Standards notwithstanding, the 6th Amendment does not require the retention of any particular expert in every case. See Durr v. Mitchell, 487 F.2d 423 (6th Cir. 2007) (no requirement to employ social worker and no prejudice for failure to do so. Similarly in Wiggins, the Court did not hold that there was an error in retaining a social worker, but the it was not a reasonable investigation to follow up on leads that would have lead to a mental health issue. Cf, Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2007) (counsel ineffective based upon a failure to investigate and present, including retaining a social worker where funds were made available).³⁰ However, the Court need not address deficient performance where the Petitioner has failed

³⁰ This case is decidedly different than the facts in *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004), in which the Court, relying on *Wiggins*, found counsel's investigation was unreasonable. In *Von Dohlen*, the defense psychiatrist at trial opined that the defendant suffered from adjustment reaction disorder. However, upon learning additional records existed, and after having reviewed the additional record in the subsequent PCR action, the psychiatrist testified that

to satisfy the prejudice prong.

A review of social worker Vogelsang testimony reveals that it was almost a direct reading of the reports completed by Ms. Topp in 2004.³¹ App.p. 3056-3071. The Petitioner has

his diagnosis would have been “major depressive episodes with severe symptoms of anxiety and possible prepsychotic features.” *Von Dohlen*, 360 S.C. at 605, 602 S.E.2d at 741. Von Dohlen contended in his PCR action that trial counsel “fail[ed] to adequately prepare and present evidence in the penalty phase of the trial that he suffered from severe, chronic depression, a major mental illness, at the time of the murder.” 360 S.C. at 606, 602 S.E.2d at 742. This Court agreed finding that the medical records that affected the defense expert’s opinion were available at the time of trial but not provided to him.

³¹ Lenora Topp made detailed summaries of her interviews with Lindsey and Virginia Lindsey and these written interviews reveals virtually identical data to a significant portion of Social Worker Jan Vogelsang’s PCR testimony. Respondent’s Exhibit 2, 3, 4. The Petitioner has failed to point out any new and critical data revealed post-trial. A review of the data received in 2004 by the defense team reveal that they were aware of Virginia Lindsey background in detail as revealed first from Lindsey and then from Virginia, including her limited education, children and their different fathers, involvement of her mother in raising the children, her employment as a shift worker and not at home in evenings to help with food and homework, Lindsey’s lack of an active father to interact with, and Lindsey’s opinion that the family was poor. Respondent’s Exhibit 2, 3, 4. Topp and the defense team also were aware of Virginia’s 8 siblings. They were aware that all five of Bessie Smith’s children - in contrast - had completed college. Respondent’s Exhibit 2 -4. From Virginia, she revealed that injuries that Marion has sustained while growing up - being run over by a car driven by her brother Paul when Lindsey was 19 months old, Lindsey falling and hitting his head frequently, Virginia also reported to Topp that Lindsey had tried to commit suicide by swallowing pills from the medicine cabinet and the reason that he was upset with her after a fight with the brother and she told him that she would not do anything for him again and had stayed in the hospital one week. Respondent Exhibit 4. Virginia had also reported to Topp that Lindsey had raised his younger brother Tim and that her son Fred died while canoeing and was never found. *Id.* She also reported to Topp about the incident when her brother threw Lindsey’s cat into the furnace. She also described to Topp about Lindsey’s earlier relationship with Stephanie Petty who they liked and got along. *Id.* Concerning the relationship between Nell and Lindsey, Virginia had reported that she like and loved Nell, thought Nell’s mother had too much influence on her and when there was an issue with money, there were problems in the relationship. Virginia stated to Topp that she knew that Lindsey sold drugs and that he spent money on Virginia and her family during those times.

In Lindsey’s interviews with Topp on April 16 and 25, 2004, he reported similar details about the family background. Respondent Exhibit 2, 3. Particularly he noted his knowledge of his father Leon McDowell and referred to him as a “sperm donor” who did not want to get involved with him and Lindsey was bitter toward him. He noted to Topp that his other brothers would go on activities with their fathers and he was left out. *Id.* He noted that his mother struggled while he was growing up and that they did not have new clothes and had a wringing washer machine and ruined a new one through overuse. Lindsey reported to Topp that his brother Fred died in a canoeing accident when he was with a friend who survived, but Fred’s body was never found. He reported that Fred’s death affected him for at least three years. *Id.* He stated that he and Fred used to fight,

but they became friends and worked together in West Virginia until Lindsey became homesick and moved back. Lindsey felt that he raised his brother Tim Sims who would follow him everywhere and that Tim's father was the only father figure in Lindsey's life. Respondent's Exhibit 2,3.

Lindsey also reported to Topp that he did not know his sister Vanessa who was killed in a car accident. In describing growing up, he felt his family was very poor and that they could not afford to eat anything except bologna and that he currently cannot eat it.

Lindsey also reported to Topp that when he was 25, his father's children started to hang round him, although he claimed he was not selling drugs at the time. He noted that half-brother Leon McDowell also took out an assault warrant against him and that family considered him an outsider. Lindsey reported that he did get along with Claude, Marshall Martha Sammy and Kathy Lindsey. Respondent Exhibit 2, 3.

Lindsey also provided Topp a summary of his educational history through 10th grade when he quit school to work and help his mother. Id. He also described his recollection of disciplinary actions taken against him at school, including slapping a girl, being hit in the eye in junior high after a racial epithet but having nothing done to the perpetrator after he reported it to the baseball coach though he was suspended for a week.

Lindsey reported to Topp that none of his family finished school. He stated to her that he played football in junior high , but quit when no one would come to watch. Respondent Exhibit 2, 3.

Lindsey advised Topp that he had two traumatic times in his life, pointing out the incident when his cat was thrown into the heater alive and when he tried to commit suicide when he was 12 years old. Id. He also described running away from home when he was 7 because his mother would not let him go somewhere , but returned home when he got hungry.

Lindsey described that after he quit school, he started working with his brothers at Beecher's Plastic Co.. He described having a bad car accident when the tire blew and the car flipped and he was out of work for a year due to injuries,. He claimed that he lost his memory, broke his hip and had facial surgery. As a result of the totaling of the car, he stated his brother also lost their jobs. He then went to work at Burger King where his brothers worked until he had words about 1 ½ years later with a female manager. After being out of work a month he then worked at Union Cloth in Spartanburg, but found it boring and had to work with a lot of gossiping women and left there after 6-7 months. Id .

Lindsey told Topp that he then stayed at home and took care of Claude's children by cooking and cleaning so that Claude and his sister could work.

Lindsey described his relationship with Stephanie Petty, working with his brother Fred in West Virginia and returning home.

Lindsey claimed that he partied, drank beer but never did drugs.

Concerning Bill Burton, Lindsey said he was his mentor while growing up and Burton got him a job at his plant when he was plant manager. He stated in his youth he would go fishing with Bill and met his mother . At the plant for 2 years, Lindsey said it was the best job he ever had. He stated that one evening he agreed to work overtime and described that he did all the work while others fooled around with girls. The next day, he stated that he was confronted by the supervisor as to why the work was not completed and when he advised the supervisor that he was the one who did it all, he felt he would not listen to him and Lindsey "jerked Mr. Green up by his shirt" and he was fired. He stated Burton tried to get his job back, but there was a no-rehire policy.

Unable to get a similar job, Lindsey stated that he started being a drug courier again for cocaine and crack - though he claimed he never used it. Id.

failed to point to the differences other than she could have presented hearsay testimony to support that Bessie Smith was hospitalized with a alleged attempted suicide and explained that Steve Pilgrim had allegedly had mental health issues as well as a criminal record. The remainder of the focused testimony was known by counsel and reasonably understood by the jury after the testimony of the family and Dr. Melikian. Lindsey was raised by his mother and an absent father in a poor family. The Petitioner has failed to pinpoint what difference any of the information Ms. Vogelsang laboriously testified about would have impact upon a jury in a manner that would undermine confidence in the verdict under Strickland.

Respondent submits the Petitioner failed to prove that there is a reasonable probability that the jury would have concluded that “the balance of aggravating and mitigating circumstances did not warrant death.” See Strickland, 466 U.S. at 695, 104 S.Ct. 2052. See, e.g., Johnson v. Bell, 344 F.3d 567, 573-74 (6th Cir.2003) (although testimony from family members would have helped to humanize the defendant, the jury could have concluded that he was even more culpable because he had enjoyed

He described to Topp his various jobs after that with Thomas and Betts in Inman, Hudson International.

He also described his life with Stephanie who had moved in with them and her father threatening to kill him, but then would come over on weekends.

Lindsey described his other job at Budweiser as a fork lift operator until he was arrested for a traffic ticket and lost his job after he stayed in jail . He next worked at a body shop until it was shut down.

Lindsey also described shooting Stafford Wilkins in 1994.

Lindsey, during the interview on April 16, 2004 also went into detail about his relationship with Nell Lindsey. Within that part of the interview he described breaking up with Stephanie after Nell became pregnant, he stated that he would also take care of the children. He went into detail about their relationship leading up to the shooting. He told Topp that hee had written suicide notes after Nell had moved back with her mother and told him that he could not see his children after a domestic violence order was taken out Respondent’s Exhibit 2, 3. He claimed to have lost weight from 225 to 160 in four weeks and was depressed all the time. He described his version of the day of the shooting including going to his brother hoping he would stop him , seeing Nell’s cousin’s car seeing Nell and then chasing them, not recalling the shooting , but recalling putting his gun to his temple and hearing a voice tell him to put the gun down, then being shot. Respondent Exhibit 2, 3. App.p. 3056-70.

a loving family and yet had murdered his wife); Martin v. Mitchell, 280 F.3d 594, 613-14 (6th Cir.2002) (defendant did not show prejudice at the mitigation phase where family members testified about his background and a psychological report was given to the jury); Scott v. Mitchell, 209 F.3d 854, 880-81 (6th Cir.2000) (finding that potential mitigating circumstances were overwhelmingly negated by other evidence about the defendant's background).

Further, as pointed out in the cross-examination, the danger of using a social worker who relies frequently on anecdotal hearsay risks making a difficult case even worse. It would have presented an additional opportunity to focus upon certain errors in her presentation and re-emphasize negative factors related to Lindsey that would make a death sentence even more likely. In the questioning concerning her expertise in child custody matters, Vogelsang admitted that a person with the characteristics of Lindsey should not have been allowed to have visitation without court supervision, if at all, even though she had to be reminded that there was evidence that Lindsey had feed beer to his baby son in a baby bottle. App.p. 2847; PCR Tr. 563. See App.p. 1820 (Lindsey gave son a beer in a baby bottle). App.p. 2849; PCR Tr. 565, ll. 7-20. Vogelsang was inconsistent on what family members - uncles or cousins - that Petitioner was running drugs. App.p. 2862; PCR Tr. 578. Vogelsang also reiterated Lindsey had a record of violence, not only toward Nell, but toward other females, including those he claimed to love. App.p. 2873; PCR Tr. 589. In confirming that his risk factors made it a high risk that he would end up committing the very act he committed, the social worker also admitted that the risk factors she found are not treated in the prison system. App.p. 2877-78; PCR Tr. 593-94.

“To assess the probability [of a different outcome under Strickland], we consider the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding-and reweigh it against the evidence in aggravation.” Sears v. Upton, --- U.S. ----, 130 S.Ct. 3259, 3266, 177 L.Ed.2d 1025 (2010). (finding that a proper prejudice analysis must take into account the newly uncovered mitigating evidence, along with the mitigation evidence introduced during the

defendant's penalty phase trial, to assess whether there is a reasonable probability that the defendant "would have received a different sentence after a constitutionally sufficient mitigation investigation"). The United States Supreme Court has stated that there "is no prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker" Id. at 3266.

Here, the sentencing profile was not altered by the additional testimony of Ms. Vogelsang. Although she presented a social history of known poverty and lack of a father-figure - known to the sentencing jury, she also confirmed that he had become a controlling and violent person. Against the trial backdrop including the evidence in aggravation, as well as the family mitigation the jury actually heard, the burden of proof has not been met by Petitioner. The PCR court reasonably applied Strickland in denying relief. Certiorari is not warranted.

III. Ineffective Assistance of Counsel - FAILURE TO ADEQUATELY PREPARE PRESENT DR. MELIKIAN, A FORENSIC PSYCHIATRIST.

Certiorari is not warranted where there is probative evidence to support the PCR court's rejection of the claim that counsel failed to adequately prepare and present Dr. Melikian, a forensic psychiatrist to testify. Although this was her first capital case as a defense expert, she had been qualified as an expert on 10 prior occasions and was the director of the forensic psychiatry unit. Although she received additional information in preparation for the PCR hearing, her assessment of the Petitioner's mental status was the same, although she opined his depression in 2004 which she had diagnosed was more severe. The Petitioner did not meet his burden of proof in showing prejudice where with the additional evidence and time, he had failed to show a reasonable probability the result of the proceeding would have been different.

Petition, p. 76- 92. PCR Order, App.p. 3601-3623, 3751.

In his third argument, Lindsey contends that counsel failed to adequately prepare and provide defense forensic psychiatrist Dr. Margaret Melikian with sufficient information for her evaluation and testimony. He asserts that Dr. Melikian was not timely retained, lacked experience as a defense expert,³²

³² At the time of the 2004 trial, Dr. Melikian was the program director of Forensic Forensic Psychiatry at the Medical University of South Carolina. App.p. 2001. Prior to her 2004 testimony, she admitted that she had been previously qualified as an expert in forensic psychiatry ten times.

and needed additional information related to Lindsey's family history to properly evaluate him. The PCR court rejected this assertion. App.p. 3601-23. In particular, there is competent evidence to support the court's findings and conclusions. As previously set forth, the summary of the evidence of the trial and the state PCR hearing shows that Dr. Melikian has the same opinion of the particular mental illnesses that she found Petitioner possessed at the time of the trial. As revealed in the cross-examination during both the 2004 trial and the state PCR proceeding, her expert opinion and the supplemented material that she additionally would have been required to reveal were a two-edge sword. The PCR court reasonably concluded the Petitioner failed in his burden of proof to show the Strickland prejudice prong. While more time and additional information may have made Dr. Melikian more comfortable with her assessment about Lindsey's mental health, it would not have changed her resulting opinion. Strickland prejudice has not been shown where they failed to show a reasonable probability that the result of the proceeding would have been different and undermine confidence in the result.

The Petitioner takes issue with the PCR court's finding that much of the Petitioner's proffered mitigation testimony during the PCR proceeding was a double-edged sword and even potentially aggravating. See, e.g., Suggs v. McNeil, 609 F.3d 1218, 1231 (11th Cir.2010) (noting that "evidence of drug and alcohol use is often a 'two-edged sword' that provides an independent basis for moral judgment by the jury," and that evidence that the defendant spent time at military school because of behavioral issues "was potentially damaging" (quotation marks and citation omitted)); Reed v. Secretary, Fla. Dept. Of Corrections, 593 F.3d 1217 at 1246 (11th Cir. 2010) ("[I]t would have been all too easy for the State to use Reed's own mitigation witnesses to paint him as a violent, manipulative person with long-standing drug abuse issues and brushes with the law . . . Here, it was not just a reasonable probability, but a virtual certainty that Reed's 'good' mitigation evidence would have led to the introduction of 'bad' evidence."). As Dr. Melikian admitted, her conclusions about the existence

App.p. 2002.

of the particularly mental illness of depression did not change. App.p. 2905-06. As the PCR court found, the Petitioner had not shown the existence of any new medical information that “radically buttress the experts' testimony, causing it to shift from mere “artifice” to gamechanging revelation that creates a reasonable probability of a different outcome. Bean v. Calderon, 163 F.3d 1073, 1081-82 (9th Cir.1998).” App.p. 3602-03. Certiorari on the claims should be denied.

The Petitioner contends in this petition that because Bartosh retained Dr. Melikian around one month before trial that he fell short of the 2003 A.B.A. Guidelines which suggests that retention of a mental health expert shall begin immediately. He further complains that Bartosh only spent 30 minutes in actual preparation with Dr. Melikian for her testimony which similarly fell short of the guidelines. He complains that the PCR court’s decision rejecting that deficient performance based on a failure to provide documentation of Petitioner’s history was in error. He contends he proved this because Dr. Melikian stated that she did not review the suicide notes nor learn about the alleged call that Lindsey made to Rod Tullis and found that various records she received in 2004 were incomplete compared to what she received and reviewed prior to this hearing. Petition, p. 88. He further claims that counsel was deficient in failing to prepare Dr. Melikian for the issue concerning “Jimmy” and the claims of malingering. The Petitioner relies upon Von Dohlen v. State, 360 S.C. 598, 613, 602 S.E.2d 738, 746 (2004) and claims that counsel’s failure to prepare Melikian and the destruction of her credibility at trial removed any benefit of her testimony during sentencing. Petition, p. 89. He further claims the PCR court’s double edged sword conclusion was deficient because the defense was not to show that Lindsey was a good person, but that he suffered from depression. He claims that any withholding of information from his expert would have been available regardless of the defense witness’s knowledge.

ANALYSIS

Respondent submits that the state PCR judge reasonably applied Strickland in determining that the alleged failings were not deficient performance. Certiorari is not warranted. This Court will uphold

the findings of the PCR judge when there is any evidence of probative value to support them, and will reverse the decision of the PCR judge when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

DEFICIENT PERFORMANCE HAS NOT BEEN SHOWN

The Petitioner has failed to show deficient performance or prejudice under Strickland. As the PCR court found, it is apparent that there was a difference in the quantity of material that Dr. Melikian reviewed in 2004 compared with what she received prior to the hearing. App.p. 2887; PCR 603. However, she was unable to state with any clarity what particular information she lacked in 2004 that was critical to a revision in her assessment at the PCR hearing. In 2004, she had his medical records, the records from a psychiatric hospitalization when he was a teenager, the records from a head injury when he was an infant, his neurological records, and his school records. App.p. 2003. She also had the forensic psychiatric reports from Hall Institute concerning their evaluation. App.p. 2885; PCR 601. She also had personally consulted with Dr. Brawley, the defense neuro-psychologist, who did a series of neuropsychological testing on Lindsey and received and reviewed her written report prior to the 2004 testimony. App.p. 2886; PCR 602. Dr. Brawley's report to Dr. Melikian on May 20, 2004 revealed information about prior suicide attempts and his present suicidal ideations. App.p. 2958-59.

Although Dr. Melikian complained in hindsight that she had not been provided all the information that the 2004 defense team acquired (App.p. 2887; PCR 603), Dr. Melikian was unable to cogently state at the PCR hearing what particular material made a difference to her conclusions, other than it would be corroborative evidence concerning information that she had learned and relied upon in 2004. A significant portion of her renewed analysis did not concern the rendering of a mental health opinion, but was directed toward the characterization that was being made of the Petitioner's character by the state's evidence. App.p. 2891; PCR 607 (information about arrests that she was not aware in 2004).

The problem with Dr. Melikian's retrospective analysis of her own 2004 testimony is that it ignored the inherent danger that her review of the additional material presented. These factors would have weighed against the presentation of the testimony in 2004. This additional information allowed the Respondent in this PCR proceeding to develop the negative evidence - as the prosecution would have been developed at trial, and as it was similarly done with the proffered social work testimony of Jan Vogelsang, as noted in argument two herein.

For example, in cross-examination, based upon her review and reliance upon information both developed by the original trial team and then enhanced by the collateral team, Dr. Melikian had to address the bad as well as the beneficial because of her reliance of the extensive, but limited data.

The Court found that Dr. Melikian's 2010 PCR diagnosis of Lindsey's mental illness under Axis I, II, III, IV would be the same as her earlier conclusions, only that the degree of the severity of the depression was greater than she earlier thought. App.p. 2905; PCR Tr. 621. Similarly, although she was not aware of the alleged telephone call to Rod Tullis by Lindsey, Dr. Melikian was not aware that there was no additional evidence from Lindsey himself that he ever made the particular call and no evidence that anyone - other than allegedly Tullis - had actually heard the alleged call, including her own discussions with Lindsey concerning the events. See also App.p. 3090-3108.³³

Although she now wished Lindsey had seen a behavioral neurologist rather than a clinical general neurologist, there is no evidence of what such an expert would have revealed that could have transformed her opinion. Although Dr. Melikian claimed she had limited school records, she admitted she received 18 pages of school records faxed to her on May 4, 2004. App.p. 2908; PCR Tr. 624. She

³³ Dr. Melikian's 2004 notes reveal information about prior suicide attempts (App.p. 3090), that he wrote suicide letters (App.p. 3091), that she spoke to Latrice the day of the incident and that he planned to "blow brains out" (App.p. 3091), that he had shot himself, that he was on suicide watch in jail. The notes also revealed that he was tired of talking about "Jimmy." He stated that he had been depressed since the incident. App.p. 3092. In the interview described his family history, his education, and his criminal history among other matters, including Jimmy. App.p. 3092-3108.

pointed to the fact she now had better evidence of his weight loss but that it was consistent with her 2004 testimony. App.p. 2917; PCR Tr. 633.

Similarly, Respondent submits that the PCR court correctly concluded that had she relied upon the material presented through Jan Vogelsang, the likelihood of a death verdict became even more enhanced.³⁴ Although she met with investigator Lenora Topp, who prepared extensive summaries of the family history from her interviews with Lindsey, his mother and aunt, Dr. Melikian could not recall the specifics of the information she was provided about Lindsey's family and Topp's interview with Lindsey prior to her trial testimony. App.p. 2919; PCR Tr. 635. Her ultimate conclusion in 2004 and now is the same. Lindsey met the diagnostic criteria for "major depression" - whether or not she looked at those earlier records and she still believes that he does after reviewing more records given to her since the trial. App.p. 2919-20; PCR Tr. 635-37.

SIXTH AMENDMENT PREJUDICE WAS NOT SHOWN

Even if we assume that counsel was deficient in failing to provide certain identified material in the Petition to Dr. Melikian, the Petitioner has failed to show prejudice or even a different presentation would have been made to the jury concerning the mental health of Lindsey where her reported illnesses remained that same. See Wong v. Belmontes, --- U.S. ----, 130 S.Ct. 383, 386, 175 L.Ed.2d 328 (2009) (per curiam) (assuming, for purposes of analysis, that counsel's performance was deficient when prejudice inquiry was dispositive).

The Petitioner further claims that counsel erred in failing to request a continuance for Dr. Melikian to have more time to prepare. The Petitioner has only shown that she wanted more time, but not that counsel was deficient in failing to make the request nor any likelihood that it would have been granted. In fact, there was evidence presented through Dr. Melikian that counsel Bartosh had contact made by her directly in a conference call to Judge Few concerning her request for more time on or about

³⁴See summary of PCR testimony of Jan Vogelsang, *infra.*, in argument 2.

May 12, 2004. App.p. 2891-95. Where the defendant claims ineffective assistance for failure to file a particular motion, he must “not only demonstrate a likelihood of prevailing on the motion, but also a reasonable probability that the granting of the motion would have resulted in a more favorable outcome.” Styers v. Schriro, 547 F.3d 1026, 1030 n. 5 (9th Cir.2008).³⁵ Because he failed to prove that a continuance motion would have been successful if made because it was unlikely that Judge Few would have granted the further motion for delay had it been formally made by counsel when it had been informally rejected, it must be denied.

Further, he failed to show that the results of any such further testing by Dr. Melikian would have changed the outcome of the sentencing. Respondent submit that this Court cannot say the alleged deficiency was prejudicial. Dr. Melikian was able to render an opinion to a reasonable degree of medical certainty in her area of expertise. Counsel’s failure to request a continuance to make her more comfortable has not been shown to be deficient. As shown above, even with the period of time since the trial her opinion of the particular diagnoses has not changed. Instead, Dr. Melikian asserted an emphasis in her opinion - driven in part by a revelation that Lindsey was intentionally feigning mental illness in 2003 and 2004 by the false claims about “Jimmy”- which now suggested to her that the severity of his depression was more severe in 2002. Respondent submits that there was cogent evidence at the PCR hearing to support the Court’s rejection of the claim and conclusion that the Petitioner has made no probative showing that there was a reasonable probability that the result of the proceeding would have been a life sentence . In addition, he failed to show that Judge Few would have granted a continuance. To the contrary, the evidence was that he would have likely denied it - through her own testimony - and that she was directed by Mr. Bartosh to get the job done. See Gardner v. Galetka, 568

³⁵Harrington v. Richter, 562 U.S. —, 131 S.Ct. 770, 178 L.Ed.2d 624, _ U.S. _ (Jan. 19, 2011). Stated another way, Petitioner has the burden of showing a reasonable possibility that, but for counsel's deficient performance, the death sentence would not have been imposed. Wong v. Belmontes, —U.S. —, 130 S.Ct. 383, 386, 175 L.Ed.2d 328 (2009).

F.3d 862 (10th Cir 2009) (Capital murder defendant was not prejudiced by his counsel's failure to provide mental health expert with more time to prepare for penalty phase testimony; despite the limitations under which expert was operating, expert did an effective job of conveying mitigating evidence regarding defendant's family history, possible organic brain damage, and social circumstances, and there was a risk of opening the door to damaging evidence by introducing further potential mitigating circumstances).

Finally, Lindsey asserts, but does not argue as a specific claim, that Dr. Melikian should have been asked if there was evidence related to specific statutory mitigating factors. While Respondent admits that some expert witnesses in capital cases are asked that question by some defense counsel, the Petitioner has failed to show that counsel was deficient in failing to make any particular inquiry. In fact, the counsel specifically asked Dr. Melikian whether she could give an opinion as to “whether Mr. Lindsey would have been operating under the influence of mental or emotional disturbance when the incident occurred,” a statutory mitigating circumstance. App.p. 2007, l. 21-24. Nevertheless, Strickland prejudice has not been shown.

Judge Few was responsible for reviewing the evidence and instructing on all statutory mitigating factors shown by the evidence. He specifically instructed on the two applicable:

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

App.p. 2155-56, 2188. The alleged omission of this legal interpretation of her evidence by Dr. Melikian does not create that any omission of the question by counsel Bartosh created a reasonable probability that the result of the proceeding would have been different. It must be dismissed.

The Post-Conviction Testimony of Dr. Melikian

Dr. Margaret Melikian, the forensic psychiatrist retained by the defense prior to trial in 2004, testified that she spent 7 hours and 45 minutes in preparation for her earlier testimony. App.p. 2882;

PCR Tr. 598, ll. 17-19. Of that time, 2½ hours were actually spent with Lindsey on May 4, 2004. Dr. Melikian stated that she was concerned when she was retained whether she would be ready for trial due to her own lack of experience at the time.³⁶ App.p. 2884; PCR Tr. 600. She stated that she accepted the case thinking that if all the mitigation investigation was done, she could be prepared. However, in hindsight, she now declared due to her own lack of experience, she did not understand how much was involved in gathering information, and that the mitigation had barely begun and she now felt that there was no way they could be prepared for trial.³⁷

Dr. Melikian indicated that she had received records from defense counsel on April 28, 2004 and made a call on April 28 to get the mental health records from William S. Hall. App.p. 2885; PCR Tr. 601. Dr. Melikian confirmed that she had requested an opinion letter from Dr. Tora Brawley, a forensic psychologist, who had seen Lindsey. Dr. Melikian stated that she discussed Dr. Brawley's findings with her on April 29. App.p. 2885; PCR Tr. 601. She later requested a written report from Dr. Brawley on May 18. App.p. 2885; PCR Tr. 601.

Dr. Melikian stated she requested the written report from Dr. Brawley after she was advised that she would be the only one testifying and would put in Dr. Brawley's findings. Dr. Melikian received the written report on May 20 after the trial had already started on May 17. App.p. 2886; PCR Tr. 602.

Dr. Melikian stated that "in her limited evaluation," Lindsey did not seem to have a "mental illness defense." App.p. 2886; PCR Tr. 602, ll. 17-20. She said she went right to mitigation, since he

³⁶ Dr. Melikian stated this was either her first or second trial as a defense expert. App.p. 2883; PCR Tr. 599, ll. 14-16. She stated that she was subsequently involved in 15 to 20 cases. App.p. 2884; PCR Tr. 600, l. 22.

³⁷ Counsel for Petitioner questioned her about an April 30, 2004 (Friday) note in counsel's records that an amount of documents had been sent to the witness on Monday and Tuesday and more was being sent that date. The note revealed that Dr. Melikian had stated "too much" and that she can't be ready. App.p. 2883; PCR Tr. 599. Notation included a written remark by Michael Bartosh that Dr. Melikian knew the time constraints before she got involved and said she would be OK. App.p. 2883-84; PCR Tr. 599-600.

appeared to be competent. App.p. 2886; PCR Tr. 602, ll. 17-23.

She stated that there was a difference between what she received in 2004 and the material she received in preparation for the PCR hearing which was 6 or 7 times as much. App.p. 2887; PCR Tr. 603. She stated she had suicide notes, in bits and pieces, and did not have a “complete” file, mental health records, medical records, Department of Corrections’ records, or the complete incident reports. App.p. 2887; PCR Tr. 603, ll. 12-23. She stated that she was not given all the information that the 2004 defense team had acquired. App.p. 2887; PCR Tr. 603, ll. 21-23. [Her original file was 3 to 4 inches thick]. App.p. 2887; PCR Tr. 603.

Dr. Melikian stated the additional material she reviewed would have changed her diagnosis because she did not understand the level of depression he was showing at the time of the evaluation and that way she looked at his cognition in his low testing results. App.p. 2888; Tr. 604. However, it did not change her diagnosis concerning depression. She stated this was due to her lack of a family history and did not spend enough time with Lindsey to realize that he was not functioning at his best level.

Dr. Melikian opined that Lindsey does not show much emotion or depression. She declared again that in her one meeting with him, Lindsey was functioning pretty well. App.p. 2889; PCR Tr. 605. However, in her more recent meetings, she felt that she had misjudged him in 2004 and would have changed her testimony.

Particularly, Dr. Melikian stated that she would have explained the severity of his depression. She had already given that diagnosis in 2004, but saw rather than being depressed and upset, but rarely suicidal to genuinely suicidal. She said he had lost a significant amount of weight with decreased energy. She felt he was not functioning well at all. App.p. 2889; PCR Tr. 605.

Dr. Melikian found his test scores at Hall Institute and with Dr. Brawley showed his level of cognitive ability decreases quite a bit with his depression. She said that in 2004, Lindsey fit the overall picture because she was aware of his problems in school, his speech impediment and low scores.

However, in 2004, with the other things he was able to do, she felt the “borderline intellectual functioning” diagnosis that others had given was probably not correct. In hindsight, she now thinks based upon further record review and I.Q. scores, that it was likely due to his depression. App.p. 2890; PCR Tr. 606.

Dr. Melikian stated she had general information in 2004 about the CDV charges and the assault and battery with intent to kill charges. However, she claimed she did not know that he had not been convicted of most of the CDV and the family dynamics of how often the police were called and the severity of the incidents. In addition, she asserted that the assault and battery charge “appeared to have a large element of self-defense in that” which resulted only in a one year sentence “which would be unusual for a crime that severe.” App.p. 2891; PCR Tr. 607. In addition, she claimed that she had not been aware that he had tried to turn himself in 4 times by going to the police. App.p. 2891; PCR Tr. 607, ll. 1-6.

Dr. Melikian claimed this paints a different picture of Lindsey of rather than just showing that he had been charged and convicted of assault and battery with multiple CDV charges to “a more accurate picture of who this person is as opposed to just a list of he did bad in school, his IQ is low, and he’s had these charges in the past.” App.p. 2891; PCR Tr. 607, ll. 7-13.

In hindsight, Dr. Melikian stated that she did not feel that she was prepared to testify in 2004. She stated she was not aware of a particular suicide note until the PCR action, that she had called Bartosh’s office and told them she was not prepared, and that she had set up a conference call with Judge Few on May 12 where she told him about not being ready to testify. App.p. 2891-92; PCR Tr. 607-08. Dr. Melikian testified that she had originally expected to testify on Monday, May 24, with preparation the day before, but was contacted Saturday night and told to be ready Sunday morning. App.p. 2892; PCR Tr. 608. She stated she spent 30 minutes on the phone with Bartosh Saturday night to prepare.

She described contacting Judge Few in a conference call on May 12 to tell him that she could not be ready for trial. App.p. 2892-94; PCR Tr. 608-10.

Dr. Melikian stated that she did not agree with the 2003 report from the State Hospital on Lindsey's competency. She stated they had diagnosed Lindsey with malingering and borderline intellectual functioning. Their reason for malingering was based on atypical symptoms, but by the objective testing, she felt he did not meet the criteria for malingering. She also noted that Dr. Brawley tested for malingering and that Lindsey did not malingering on those tests. App.p. 2894; PCR Tr. 610.

Dr. Melikian asserted her disagreement with the DMH diagnosis for borderline intellectual functioning. She found that he had higher IQ scores with Dr. Brawley and felt those scores were not accurate because he appeared to be functioning at a higher level, but now knows that he was functioning at a lower level due to his likely depression. App.p. 2895; PCR Tr. 611.³⁸ She thought he functioned at a higher level than borderline intellectual functioning [70-80 I.Q.] because he appeared a little better than that and his history revealed he had been able to hold some jobs and do some things at a higher level. App.p. 2895; PCR Tr. 611, ll. 8-17.

³⁸ Dr. Brawley stated that she recommended that medical and school records be obtained because she had not been provided with them and it would help indicate whether the deficits existed earlier. App.p. 2366; PCR Tr. 81-82. Dr. Brawley stated that she received school records after she had made her written report in 2004, but did not look at them because she had already been advised she was not testifying. App.p. 2366; PCR Tr. 82. In hindsight, she noted the records showed he had been in the 8th grad for 3 years, whereas he had reported repeating the 7th grade. App.p. 2366; PCR Tr. 82.

In addition to the school records, she received the report from Hall Institute [Petitioner's Exhibit 12 - App.p. 2969-2967] and the raw test data. App.p. 2367; PCR Tr. 83. She noted his Hall IQ test was 76, whereas her own IQ test in 2004 was much higher score of 85, with the discrepancy in performance IQ. She opined that the difference could have been due to earlier depression in 2003. PCR Tr. 83-84. She opined that the subtests that reflected the difference in the IQ scores were "attention and concentration" and "abstract reasoning" which is a frontal lobe function. She also opined that Hall testing of the "repeatable battery for the assessment of neuropsychological status" also had subtest that showed scattered deficits consistent with her findings. App.p. 2369; PCR Tr. 85. Dr. Brawley also confirmed that the State Hospital had also done malingering tests - the TOMM and SIRS - which did not indicate malingering. App.p. 2369; PCR Tr. 85.

Dr. Melikian's PCR Testimony About Jimmy - Direct Examination.

Dr. Melikian stated that Hall Report that he was malingering was based upon atypical symptoms and his discussions of his friend "Jimmy." App.p. 2896; PCR Tr. 612, ll.16-20. Given that and his test scores that showed he was not malingering, Dr. Melikian stated she disagreed with the diagnosis. Id. [This was consistent with her original trial testimony. App.p. 2005-2008].

Since the trial, Dr. Melikian said she had learned more information about what Lindsey did at the William S. Hall evaluation, that counsel Brannon described Lindsey talking to a hallucinatory person, Jimmy, who was in the room and pulling out chairs.³⁹ Dr. Melikian stated when she saw Lindsey in 2004 (and Dr. Brawley), Lindsey described Jimmy as an imaginary friend that he knew was not psychotic experience. App.p. 2897; PCR Tr. 613, ll. 3-8. She felt that given his level of intelligence it was not far out to not believe that and make a malingering diagnosis with the objective testimony that he was not.

Although Brannon had described his knowledge of Jimmy with Lindsey, Dr. Melikian testified that neither Brannon nor Bartosh told her about the particular experiences they had with Lindsey and Jimmy.⁴⁰ Dr. Melikian stated she would have wanted to know this before she

³⁹ See *Testimony of Doug Brannon*, App.p. 2318-19; PCR Tr. 34-36 where Brannon describes meeting at Detention Center, Lindsey not letting him sit in Jimmy's chair and the continued presence of the empty chair at their meetings. See also, App.p. 2897; PCR Tr. 613, ll. 13-25. See also *Testimony of Mitigation Investigator Lenora Topp* concerning April 2004 interview with Lindsey concerning "Jimmy". App.p. 2424; PCR 140 (Lindsey tell Topp that Jimmy can to him from God in his early teens). Also, Trial Evidence that "Jimmy" first discussed by Petitioner on date notice to seek death penalty served. App.p. 136-137, 2017-2019 (no mention of Jimmy in reports until October 10, 2002, the same date that the notice of intent to seek the death penalty).

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Counsel Brannon's Interaction with Petitioner About Jimmy

Counsel Doug Brannon testified that after he was appointed as second counsel on March 5, 2004, he met with Lindsey on March 12, 2004 at the detention center. App.p. App.p.2297; PCR Tr. 13. He described his initial interview and how it impacted on how the defense handled the case:

I went over to the Public Defender's Office, and then I, I rode over to the detention center in, in Mr. Bartosh's car, and Mike said something along the lines of Marion is a unique character, and we got over to the detention center and Pod 5 is the, is the, is the lock down pod. And when we got in there, they brought

Marion in and there were four chairs around the table. Actually, actually there weren't four chairs around the table. There were four chairs in the room and three chairs around the table, and Marion sat down and I went to sit in the chair next to him and he said no, no, no, no, don't sit there. And, and I said okay, why not and he said cause Jimmy sits in that chair, and I looked at Bartosh and he just kind of pointed at the other chair that was away from the table and I went and drug the chair up to the table and I sat there.

So, every time I met with Marion Lindsey there was an empty chair sitting at the table. Now, sometimes when I met with Marion it was with me and Mr. Bartosh and sometimes it was with me and Ms. Quimby. But there were two or three occasions where it was just he and I, but there was always an empty chair sitting at the table.

App.p. 2298; PCR Tr. 34, l. 14 - p. 35, l. 11. Brannon testified that after the meeting Bartosh told him that he should have told him about "Jimmy" before their meeting. Brannon stated that in reviewing the reports, it was claimed that it dated back to when Lindsey was previously in the State Hospital and had a roommate who looked like Charles Manson. App.p. 2319; PCR Tr. 35. Importantly, Brannon stressed that Marion was friendly and that if you asked a question, Lindsey would answer and he never felt threatened by him. App.p. 2319-20; PCR Tr. 35-36.

Counsel Brannon stated that he was aware there were mental health issues, but they had Dr. Narayan's report. App.p. 2321; PCR Tr. 37. Although aware that Lindsey's IQ was lower, Brannon stated that other than the "Jimmy" issue, when asked a question Lindsey would give a clear and lucid answer. Id.

Mr. Lindsey indicated to Brannon that the reason for the crime was that he snapped and that he had contemplated his own demise, but not the murder of his wife. App.p. 2321; PCR Tr. 37. He said when Lindsey came upon Nell and others in the car and the other people were not his children, he did not know who had the kids and snapped. App.p. 2321; PCR Tr. 37.

Brannon, in addition to his awareness of Dr. Narayan's report, admitted that he had discussions with Bartosh about Dr. Melikian and Dr. Tora Brawley and the substance of their potential testimony. App.p. 2329; PCR Tr. 45. He recalled listening to a telephone conversation with Dr. Melikian. App.p. 2328; PCR Tr. 44. He stated that he talked at length with Bartosh about whether the information from Dr. Melikian and Dr. Brawley created any potential defense of either guilty but mentally ill or a lack of criminal responsibility and resolved it did not. App.p. 2330; PCR Tr. 46. Brannon stated the basis for everything was Dr. Narayan's report that Lindsey was malingering, but competent to stand trial. App.p. 2330; PCR Tr. 46. Instead, they desired to focus on the miserable life Lindsey had, but also that he was the life of any crowd he was in, however recognizing that he was involved in drug sales for years. App.p. 2331; PCR Tr. 47. They decided to play that he was just intelligent enough to pass the tests. Brannon felt it was believable to have "snapped", that based upon his miserable life and minimal intelligence level. App.p. 2331; PCR Tr. 47.

Counsel Brannon stated that he spoke with Dr. Narayan with Bartosh concerning his potential testimony in the case. App.p. 2344; PCR Tr. 60. Based upon their interview and his

reviewed the Hall report. She admitted she questioned Lindsey about it on May 4 and that Lindsey described him as an imaginary friend, but not in a psychotic way, but as a way for someone with a low intelligence to cope. App.p. 2898; PCR Tr. 614. He had told Dr. Brawley the same thing. "He did tell me that he had done that with Dr. Narayan and pulled a chair out and behaved in that manner" which she asserted because it was a hostile interview with Dr. Narayan. App.p. 2898-99; PCR Tr. 614-15.⁴¹ She recalled during the 2004 trial, he had behaved in the trial in that manner. App.p. 2899; PCR Tr. 615.

Dr. Melikian felt if she had known what he had done with his lawyers it would have been helpful. She stated in records she had reviewed since the trial, Lindsey was discussing Jimmy while he was incarcerated and made statements that Jimmy had taken over his body or been responsible for

report, Brannon did not see any basis to call him as a witness in the guilt phase. Particularly, he summarized that Dr. Narayan would call Lindsey "a faker" and he did not want him anywhere near a witness stand. App.p. 2345; PCR Tr. 61. [Dr. Narayan did not testify in front of the 2004 jury for the State or the defense].

Counsel Brannon confirmed that he was in a factual box in the guilt phase defense. App.p. 2348; PCR Tr. 64. He was aware that he was not going to get a not guilty on manslaughter charge based upon facts he was presented. App.p. 2348; PCR Tr. 64. He was aware that the information was looked at to see if it had meaning in the penalty phase. App.p. 2348; PCR Tr. 64.

Brannon conceded that Lindsey did not gain anything by telling him that Jimmy was there. App.p. 2349; PCR Tr. 65. Similarly, counsel Brannon testified that they did not have the tape from Rod Tullis when he was handling the case. App.p. 2350; PCR Tr. 66, ll. 10-16. Counsel did not know if Tullis was subpoenaed from trial (although he was on the witness list).

Brannon recalled when he began his visits with Lindsey that he was on lock down and also wearing a "suicide gown." App.p. 2351; PCR Tr. 67.

Counsel stated that the reason why he interviewed the paramedic was to show that Lindsey had tried to shoot himself and kill himself. App.p. 2351; PCR Tr. 67.

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Dr. Brawley on "Jimmy"

On cross-examination, Dr. Brawley indicated that she spent three (3) hours with Lindsey in 2004. She stated that Lindsey did not bring up "Jimmy", so she asked Lindsey about it and he told her "he's like an older role model", that Jimmy came to him at age 12 when he was in mental health for the first time and tried to kill himself. He told her he was in a room with an older man at the time and was scared. He told her that he doesn't tell him to do things but God sent him to Lindsey to help him out. App.p. 2371; PCR Tr. 87. He told her that he talked to him when he is in trouble and suicidal. App.p. 2371; PCR Tr. 87. However, Dr. Brawley said - unlike Doug Brannon's experience - that Lindsey did not say Jimmy was in the room with him at the time she met with him. App.p. 2371; PCR Tr. 87.

the shooting. If she had that information, she felt that “Jimmy” would have been more of a focus of her May 4 evaluation in the limited time that she had as a “mental health defense.” App.p. 2899; PCR Tr. 615, ll. 6-16.

Concerning the jail incident where Lindsey hit his head and former counsel Tullis told them to keep an eye on his client, Dr. Melikian said she never saw pictures in the records she reviewed, although Lindsey told her about it. App.p. 2899; Tr. 615. Since there was no corroboration provided to her, she did not give it much weight.

She stated that the history she received came from Lindsey, although she met with investigator Lenora Topp on the day of the trial and 30 minutes on the telephone with Bartosh the night before. App.p. 2900; PCR Tr. 616.

Dr. Melikian stated that Dr. Pamela Crawford was present and Melikian knew she was at court to critique her for the State. However, Dr. Melikian stated she already felt unprepared and did not want to speak with Dr. Crawford that day. She said she needed to continue to review records and reports, although she was not aware that Dr. Crawford had seen Lindsey briefly with Karen Quimby. App.p. 2901; PCR Tr. 617.

Dr. Melikian said since the trial she has met with Lindsey 3 times. She felt that she had previously misjudged his cognitive ability in the past. Particularly, she found that he was not depressed, got along with guards and she had contact visits. In reaction to questions about his adaptability in prison, Dr. Melikian described a visit when Lindsey was left unshackled in violation of SCDC policy and the resulting confusion over his shackling. However, she asserted that no one seemed concerned about her safety and that he seemed to be cordial to the guards. App.p. 2902-03; PCR Tr. 618-19.

Dr. Melikian, in a proffer after the objection, opined this was the least prepared with the least amount of time, since she had been a death penalty case. She stated since then she had calls under similar time constraints and refused to participate. She said she had been bothered by the case since

that date and wondered if she should have refused to testify since she was so unprepared. App.p. 2904; PCR Tr. 620.

Cross-Examination

Dr. Melikian testified that her clinical diagnosis in 2004 had changed since because she did not understand the severity of his depression. App.p. 2905; PCR Tr. 621. However, she admitted her conclusions of mental illness under Axis I, II, III, IV would be the same thing. Id. She admitted that she testified he was depressed in 2004, but she could not elaborate in full the degree. She pointed out that she was aware of suicide notes, but had not seen them. Similarly, she was not aware of the telephone call to Rod Tullis, which would have been useful to understand his mental state close to the time of the offense. App.p. 2905-06; PCR Tr. 621-22.

Dr. Melikian confirmed that she had prior to her trial testimony his medical records, his teenage psychiatric hospitalization records, and his infant head injury records, although she now claimed they may have been incomplete. She admitted that as to neurological records in 2004, she had Dr. Brawley's letter and had spoken with the neurologist, Dr. Abshur. App.p. 2907; PCR Tr. 623.⁴² She stated she

⁴²Dr. Brawley stated she shared this information verbally with Dr. Melikian two days later on April 29. App.p. 2371-72. She stated she gave her the diagnostic impression that he was not a malingerer and that he had scattered neurological deficits. App.p. 2372; PCR Tr. 87.

More specifically, Dr. Brawley confirmed that Lindsey told her about the suicide attempts. As to the incident at age 12, he had taken pills after he had a fight with his brother and his mother told him that he did not love her anymore resulting in his hospitalization for 1½ months. App.p. 2372; PCR Tr. 88. As to the 2001 attempt, Lindsey told her he was having troubles with his wife and took a gun, but his cousin took it away. As to the third one in August 2002, his wife had told him she was leaving with the kids and he planned to drive the truck off a cliff, but then decided not to do it. App.p. 2372; PCR Tr. 88, ll. 12-15. She described another incident in September 2002 when his family talked him out of suicide. App.p. 2372; PCR Tr. 88, ll. 15-17. The final attempt was the gunshot wound to the head in September 2002 (during the arrest) and resulted in mental health at the jail. App.p. 2372; PCR Tr. 88.

Dr. Brawley testified about the series of neuropsychological tests she gave in 2004. App.p. 2373; PCR Tr. 89. She testified that Lindsey did not show deficits below normal on a number of the tests she gave including:

- immediate visual memory.
- delayed verbal learning for stories
- manual speed on his left hand.

wanted Lindsey to see a behavioral neurologist, but he was seen by a clinical general neurologist who would not be specialized in behavior. *Id.* Also, she said in 2004 she had the school records, but claimed she did not have all of them. However, Dr. Melikian admitted she received 18 pages of school records faxed to her on May 4, 2004. App.p. 2908; PCR Tr. 624.

On cross, she admitted that during the trial, she claimed the only additional records she wanted were SCDC records. App.p. 2908-09; PCR Tr. 624-25. (See App.p. 2031).

Further, in addition to Dr. Brawley's report, Dr. Melikian confirmed that her conversation with Dr. Brawley included actual results of the other testing she did, that Lindsey had problems with attention and concentration. App.p. 2910-11; PCR Tr. 626-27.⁴³ She felt that he had been tested on

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- right handed manual dexterity.
 - trail making - Part B.
 - non-verbal abstract reasoning.
 - sequencing ability.

App.p. 2374; PCR Tr. 90, ll. 9-23.

Dr. Brawley stated she shared this information about all the results with Dr. Melikian in the verbal consult. As to her written report, she put in the areas of deficits that she found, but not the test results. App.p. 2375; PCR Tr. 91.

Dr. Brawley confirmed that she consulted with Mr. Bartosh for ½ hour on May 2, 2004. App.p. 2375; PCR Tr. 91, ll. 10-22. She stated she went over the test results with him and the other information that she had gathered in the interview. App.p. 2375; PCR Tr. 91. She recalled that she made a specific request for school records to Dr. Melikian and felt she asked Bartosh for medical records. She stated she received the particular records on May 20 after she had written her report on May 20, 2004. PCR Tr. 92.

Dr. Brawley stated she consulted with Dr. Abshur, the neurologist, and shared her findings with him. App.p. 2376-77; PCR Tr. 92-93.

Dr. Brawley stated her information about suicidal ideation came from Lindsey. App.p. 2378; PCR Tr. 94. Similarly, the history represented in her report came from Lindsey that other family members suffered from depression, that he had a chaotic childhood, that his stepfather was a heavy drinker, that his mother worked most of the time, that Lindsey was responsible for his younger sibling and taking care of the home and meals, living with a cousin at the time of the incident, and separated from his wife. App.p. 2379-80; PCR Tr. 95-96.

⁴³ During the PCR proceeding, Dr. Tora Brawley, a clinical psychologist with a specialty in neuropsychology, testified that she became involved in Petitioner's defense on April 12, 2002 and advised of a May 17, 2002 trial date by Mike Bartosh. App.p. 2356 ; PCR Tr. 72. She

the RAY Complex Figure Test and tested borderline, rather than the RAY malingering test. App.p. 2911; PCR Tr. 627. She said Lindsey had been tested for malingering on the SIRS tests and the Test

became involved after a cancellation and met with Lindsey on April 27. Prior to the interview, she was not provided any records but learned certain information from counsel Bartosh. App.p. 2356; PCR Tr. 72. Particularly, she learned that it was a death penalty trial and Lindsey had a history of a head trauma, a gunshot wound, and a car accident. Bartosh also advised her that there was an issue of malingering. App.p. 2356; PCR Tr. 72.

Dr. Brawley stated she conducted an extended clinical interview and battery of neuropsychological tests. She also consulted with a neurologist, Dr. Abshur, after her testing. She summarized her findings as scattered neurological deficits and a recommendation that they obtain medical and school records and speak with collateral sources to investigate it. App.p. 2357; PCR Tr. 73.

Dr. Brawley stated Lindsey reported to her that he had fallen on steps, hit his head 4 to 5 times, and had stitches. He further told her he had been run over by a car at age two, blacked out, and was in a hospital for 2 weeks. App.p. 2358; PCR Tr. 74. He reported to her he had surgery on his face. According to Lindsey, he had two motorcycle accidents: in 1993 when he was not wearing a helmet and 1998 when he was thrown off and became dazed. App.p. 2358; PCR Tr. 74. She was also told about the 2002 self-inflicted gunshot wound and a history of migraine headaches. App.p. 2359.

As to his educational history, he reported to her that he quit school in the 10th grade and had to repeat the 1st and 7th grades. In addition, he reported to having speech therapy and learning classes with a problem in spelling. App.p. 2358.

As to psychiatric history, she stated that Lindsey reported to her that he had suicide attempts: age 12 with an overdose, a 2001 attempt, another in September 2002, and the September gunshot to his head. App.p. 2359; PCR Tr. 75.

Dr. Brawley noted that a history of depression could impact on test performance by slowing and a general decrease in test performance. In an April 27, 2002 I.Q. test, Lindsey had a Full Scale IQ of 85, verbal of 80 and performance of 92. App.p. 2359; PCR Tr. 75. [Applicant's Exhibit 11] [App.p. 2959 (Dr. Brawley's written report to Dr. Melikian)].

Dr. Brawley, in her 2004 written report to Dr. Melikian, listed a number of impairments, including severely impaired speed of mental tracking, below average accuracy of mental tracking, severely impaired verbal fluency, severely impaired confrontation at naming (ability to name objects), below average manual dexterity and speed, below average immediate verbal memory, delayed visual memory, severely impaired verbal learning ability, impaired ability to copy and recall a complex figure. App.p. 2360-61, 2959; PCR Tr. 76-78. She opined that he fell below the average range of scoring. App.p. 2361; PCR Tr. 75.

Dr. Brawley could not give an opinion on what caused the brain dysfunction. She noted there were multiple possibilities from the damage to the brain. App.p. 2362; PCR Tr. 78. She pointed out that she lacked enough information to determine whether it was consistent with where it should be or was due to head injuries. App.p. 2362; PCR Tr. 78. She pointed out that she did not have medical or school records in 2004. App.p. 2362; PCR Tr. 78.

Dr. Brawley stated there was nothing inconsistent in her interview with Dr. Melikian's diagnosis of major depressive disorder. App.p. 2362; PCR Tr. 78.

of Malingered Memory (TOMM). App.p. 2911; PCR Tr. 627.

The Revelation of Feigning Jimmy During the Cross-examination.

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

“One of the reasons that that information would of been so important to me to have is that issue of Jimmy I could have dealt with before trial. As a matter of fact, the first time I met with Mr. Lindsey in preparation, in preparation for this hearing, one of the first things he did was apologize for Jimmy. **When I look back and, you know, now with hindsight, I can see that Mr. Lindsey started out malingering Jimmy. He was told to do this by some other inmates is the information he’s given me since, and he was feigning these symptoms because they told him to act crazy.**”

App.p. 2913; PCR Tr. 629, ll. 11-22 (emphasis added). She stated that when she saw him 2 years later, he did not want to continue this and minimizing it which made it more believable. Dr. Melikian speculated that if she had spent more time with him in 2004 as opposed to meeting him once, “I probably would have gotten that information before trial and would have been able to give much more effective testimony.” App.p. 2914; PCR Tr. 630, ll. 4-7, 12-16.

Dr. Melikian noted that she wished that she had the information in 2004 that he malingered mental illness at the State Hospital evaluation and with his lawyers because he thought it was in his best interest. App.p. 2914; PCR Tr. 630.⁴⁴ She felt she could have explained it with his level of depression

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Dr. Brawley on Malingering

Concerning the question of malingering, she stated she considered the issue in 2004. App.p. 2363; PCR Tr. 79. She had learned from counsel Bartosh that Lindsey had an imaginary friend and the State doctors had determined he was malingering. She stated she did malingering tests for cognitive, for memory, and for psychiatric symptoms. She said she gave the Test for Memory Malingering (TOMM) and concluded he was within normal limits. She also gave the Structured Interview of Reported Symptoms (SIRS) test for malingering os psychiatric symptoms. App.p. 2364; PCR Tr. 80. He again tested within normal limits then. App.p. 2365; PCR Tr. 81. She determined during her April 2004 interview that there was no evidence of malingering in the testing and reported it to Dr. Melikian and counsel Bartosh. App.p. 2365; App.p. 2365; PCR Tr. 81. Dr. Brawley stated she spoke with Bartosh and gave him a verbal report of her conclusions. Id. She provided the written report to Dr. Melikian pursuant to her request. However, she does not know why she was not called to testify. Id.

and cognitive ability. Dr. Melikian stated in 2004 that Lindsey had a passive suicidal ideation based upon his expressions that he wanted the death penalty. She stated that was suicidal regardless of why he wanted to die. App.p. 2915; PCR Tr. 631, ll. 9-17.

Dr. Melikian admitted that in 2004 she testified that she would not have made a diagnosis of borderline intellectual functioning, that he did have chronic neurological problems, and that she was aware of the existence of the suicide notes from Lindsey. She confirmed that she had learned in 2004 that in 2001 at 15 years old, Lindsey had a gun and planned suicide, but his cousin talked him out of it. App.p. 2916; PCR Tr. 632. She also recalled that he stated that he wanted to drive off a cliff, but was worried he wouldn't die. She stated that she learned from Lindsey about his weight loss prior to trial.

Although this was consistent with the information she testified about in 2004, Dr. Melikian opined it was less effective to state that Lindsey told her about his weight loss than records to show he weighed 200 at one point and then was down to 180 or 160. However, she admitted the State never challenged the statement concerning weight loss. App.p. 2917; PCR Tr. 633.

She stated that the fact it was on T.V. did not concern her because she had forgotten about the cameras when she testified, but felt she was sleep deprived and was more worried about her ethical duty to Mr. Lindsey due to her lack of preparation. App.p. 2918; PCR 634. Although she was not confident about her opinion when she was cross-examined at trial, she did not feel it was destroyed. App.p. 2918; PCR Tr. 634.

Dr. Melikian admitted that she met with investigator Lenora Topp, but could not recall the specifics of the information she was provided about Lindsey's family and Topp's interview with

Lindsey. App.p. 2919; PCR Tr. 635. ⁴⁵ She stated that prior to the trial date she had only spent 2½ hours on record review, and then looked at records on that date, but could not recall whether she looked at the St. Luke records provided to her on April 30. However, she admitted she felt he met the diagnostic criteria for “major depression” whether she looked at those earlier records and still feel he does after reviewing more records given to her since the trial. App.p. 2919-20; PCR Tr. 635-36.

On re-direct, Dr. Melikian felt that she was not made privy to information from Brannon, Quimby and Topp concerning their interviews prior to the trial. She also claimed that she did not know much about Lindsey’s family history. App.p. 2920; PCR Tr. 636. She felt this affected her credibility, although her diagnosis has not changed. App.p. 2921; PCR Tr. 637.

Dr. Melikian admitted that she had some family history, information about his earlier crime and a N.C.I.C. report. She stated her notes reflected that they had discussed his education and schools, the first time he thought about suicide and what was in his mind, and his problems in his interview with Dr. Narayan. App.p. 2922; PCR Tr. 638. She admitted that he had told her about trying to turn himself in four times concerning Standford Wilkins. She admitted that none of this was new information, but she asserted that she did not have another opportunity to see him again, go through his history, review the record again, and corroborate what he told her even though most of it turned out to be true. App.p. 2923; PCR Tr. 639.

She stated that she would not - in the future - only see a death penalty inmate one time again. She felt repeated evaluations would build a support. She admitted that from May 4 (her meeting with Lindsey) until she testified on May 23, she was not denied access to Lindsey. App.p. 2924; PCR Tr. 640. She admitted she made no written report in 2004 and the only records were her notes, which were

⁴⁵ Mitigation investigator Lenora Topp also testified at the hearing that she discussed “Jimmy” with Lindsey during her interview on April 16, 2004. She stated that he told her that he had a friend named Jimmy who told him that God sent him. App.p. 2388; PCR 140. In addition, he stated to her that he had arrived during his early teens. Id.

introduced as Respondent's Exhibit 14 [App.p. 3090-3108]. App.p. 2924; PCR Tr. 640.

IV. Ineffective Assistance of Counsel - Failure to Retain Prison Adaptability Expert.

The PCR court properly concluded on the basis of competent evidence that counsel's failure to employ and present a prison adaptability expert in mitigation was not a Sixth Amendment violation.

- A. The PCR Court reasonably applied the mandates of Strickland in concluding there was no Sixth Amendment violation when counsel failed to employ or present a prison adaptability expert to opine "the Department of Corrections can manage this type of offender for the remainder of his life without causing an unreasonable risk of harm to staff, inmates, as well as the general community" where counsel was aware of recent prison incidents of violence in addition to his separate violent incidents against the victim and other that resulted in a conviction assault and battery with intent to kill.**
- B. The PCR court further found 6th Amendment prejudice had not been shown where cross-examination of the expert revealed additional evidence of a character for violence including evidence that Lindsey had to be gassed in a jail incident, and other prison assaults and a recommendation for "anger management" not presented in the state's penalty phase case and the thorough evidence presented in the state's case at trial revealing his character for violence.**
- C. Further, the reliability of the expert's opinion at the PCR was impeached where he admitted that since his death sentence, Petitioner had additional incidents of violence with other death row inmates.**
[Issue 4 - Certiorari Petition, p. 93-105. PCR Orders, p. 89-102; App.p. 3624 - 3637, 3751].

In his fourth argument for certiorari, Lindsey asserts that the PCR Court erred in finding no Sixth Amendment violation when trial counsel failed to retain or present a prison adaptability expert to rebut the state's case in aggravation suggesting that he was a violent person. In addition, Lindsey takes issue with the state PCR court's parsed finding that there was "no showing" that Lindsey would be adaptable to prison. Petition, p. 99. However, the PCR court's finding in context was: "there has been no showing that the Petitioner would have been "adaptable to prison in the future or was adaptable in the past." App.p. 3625. Instead, as the PCR court acknowledged, the Petitioner had presented

testimony through prison expert James Aiken that “that the Department of Corrections can manage this type of offender for the remainder of his life without causing an unreasonable risk of harm to staff, inmates, as well as the general community.” App.p. 3625, citing App. 2491, l. 16-21, PCR 207-208. This ability of SCDC to manage inmates with a history of violent crimes without unreasonable risks opinion by Mr. Aiken was addressed by the PCR court and not ignored as Petitioner suggests. Expert witness Aiken’s qualified reference was not limited to Lindsey, but to inmates who had been guilty of crimes of violence within the community. Id. App.p. 2491, l. 16-17. The failure to present this information does not undermine confidence in the outcome of this case. Certiorari should be denied.

This issue was raised by the Petitioner in his original post-hearing memorandum at pages 51-52. The Court denied relief on the claim within its Order at pages 89-102. App.p. 3624-3637. Concluding that the defense team *considered* presenting evidence of prison adaptability (Order, p. 96-98), the PCR Court opined that deficient performance had not been shown where the decision fell within the wide range of professional assistance. Order, p. 98-100. Importantly, the Court independently concluded that Sixth Amendment prejudice had not been shown strength and weakness of the proffered testimony of James Aiken against the trial record. Order, p. 100-102. App.p. 3635-3637. A motion to alter was specifically made on this issue. App.p. 3732. The motion was denied. App.p. 3751.

The Petitioner relies upon Skipper v. S.C., 476 U.S. 1 (1986) which concludes the evidence of prison adaptability which suggests the defendant would not pose a danger if his life was spared and he was incarcerated must be considered mitigating and admissible. He further seeks support from the ABA Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases, Section 10.11 (2003) which states that defense counsel *should consider* presenting “expert and lay witnesses along with supporting documentation . . . to . . . give a favorable opinion as to his client’s capacity for rehabilitation, or adaptation to prison . . .” He asserts that the defense team failed to retain and present a prison adaptability expert. He further contends that the failure to do so created a reasonable

probability of a different verdict.

The PCR court's conclusions are supported by the record. The Petitioner complains about the so-called "no showing" conclusion. However, the PCR court found that "there has been no showing that the Petitioner would have been "adaptable to prison in the future or was adaptable in the past." This was a correct conclusion. In fact, witness Aiken clarified that it was not his opinion that Lindsey "would be managed without risk of harm or violence to guards, inmates or the general public." App.p. 2508, l. 9-19. It was prison consultant James Aiken's testimony that the Department of Corrections can manage this type of offender for the remainder of his life *without causing an unreasonable risk of harm* to staff, inmates, as well as the general community." App.p. 2491; PCR 207-208. Second, the trial record reveals a series of violent assaults and threats by the Petitioner toward loved ones and others, despite the fact he was under orders to avoid them. Finally, it reveals he was involved in a drug dealing outfit. Further, the Petitioner's trial counsel had presented a thorough case in mitigation about the Petitioner's background and family, albeit without any specific evidence concerning Lindsey's prison adaptability.⁴⁶

⁴⁶ There may have been a strategic reason for the decision not to pursue this line of mitigation. Recently, the U.S. Supreme Court addressed strategic claims on deciding not to present mental health evidence. In addressing the decision, the Court stated :

Without expressing a view on the ultimate reasonableness of the decision not to pursue this evidence further, we note that the Eleventh Circuit majority observed that the state court could reasonably have determined that counsel had strategic grounds for their decision. In particular, evidence about Wood's mental deficiencies may have led to rebuttal testimony about the capabilities he demonstrated through his extensive criminal history, an extraordinarily limited amount of which was actually admitted at the penalty phase of the trial. Counsel's decision successfully thwarted the prosecutor's efforts to admit evidence that Wood murdered his ex-girlfriend while on parole for an attempted murder of a different ex-girlfriend that was strikingly similar in execution to the subsequent successful murder. App. 23-24. Moreover, as the Eleventh Circuit majority noted, evidence of Wood's mental deficiencies also could have undercut the defense's argument that he left school to support his family, suggesting instead that he left school because of educational difficulties. 542 F.3d, at 1305-1306. **Counsel's decision about which avenues to investigate can therefore plausibly be described as strategic rather than necessarily being the product of "happenstance, inattention, or neglect,"** *post*, at

In his Petition, Lindsey claims that the prison management evidence should have been presented to mitigate evidence presented to the jury concerning Lindsey's acts of violence toward others. Particularly, he points to Celeste Nesbitt's testimony concerning several incidents of violence between Lindsey and his wife at the beach, at Nesbitt's house and at Applebee's restaurant parking lot. App.p. 1775-1779, 1787. Deputy Brian White testified about the Applebee's incident and the warrant for domestic violence concerning the incident. App.p. 1919-22. In addition, Petitioner points to testimony from another incident by Sharon Smith where Nell Lindsey got hit at Smith's house. Smith also states she saw bruises and black eyes on the victim. App.p. 1821-23.

Magistrate Sarah Simmons testified concerning the night before Nell Lindsey's murder when she presided on a bond hearing concerning a CDV charge showing the existence of the pending charge and the directive that he was ordered to not have contact with the victim. App.p. 1930-1936.

There was also trial evidence presented that Lindsey had been arrested for trafficking in crack cocaine. App.p. 1829-1834, 1862. Further, evidence of Petitioner's violence - unrelated to prison - was presented from Stanford Wilkins which led to Petitioner's earlier 1996 conviction for assault and battery with intent to kill. This evidence revealed that Lindsey used his vehicle and blocked Wilkins car and then shot Wilkins twice through the car window, with Wilkins suffering a bullet injury in his arm. App.p. 1942-1943. Evidence was presented concerning the conviction, the fact that he pled guilty and received a two-year sentence, suspended to one year and one year probation. App.p. 1952-1953.

The Limited Prison Life Evidence at Trial

The State presented in the penalty phase the testimony of James Sligh, Division Director of Classification and Records at the Department of Corrections. App.p. 1908. In his testimony, he stated that a person sentenced to life imprisonment would initially be housed at a Level 3 high security

Wood v. Allen, 558 U. S. ___, 130 S.Ct. 841 (U.S. 2010) (emphasis added).

institution. Id. He stated the cell would be 75 by 100 with two inmates in the cell. He stated that they would have access to the yard and have contact with other individuals. He stated that there could be job assignments or educational classes in a classroom setting. App. 1909-1910. There could also have contact visitation up to 8 visits a month. App. 1912.

On cross-examination from counsel Bartosh, Sligh indicated that there were 23, 500 inmates. He guessed that about 1000 were serving life sentences. He described "patrol controlled movement" from cafeteria to the various assignments. He clarified that there was no milling around on the yard. App. 1914. He stated that it was based upon how the particular inmate is classified to determine his prison setting. App. 1916. This will initially be done at the Reception and Evaluation Center. App. 1916. There will be testing then for academic level, mental health issues and security level. App. 1917: [No questions were asked concerning Lindsey adaptability to prison by either side at trial].

The picture the prosecution and evidence revealed was harsh. It showed a violent tempered criminal involved in the drug trade. It also revealed a person who flaunted his responsibility to obey authority. It also revealed a person with a past history for using a handgun and shooting through windshields. It painted a picture of the type of person for whom the death penalty was intended - a violent person with a prior criminal history where correctional rehabilitation had not changed his either his violence or his disrespect for the law.

The Petitioner may be relying upon *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), and *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). It is unclear below whether Lindsey suggests that his proffered evidence was in rebuttal to any specific evidence concerning prison life or otherwise. In this Petition, he equates it to evidence of Lindsey's violence presented in the penalty phase. In *Gardner*, 430 U.S. at 358, 97 S.Ct. 1197, the United States Supreme Court held that a defendant is entitled to due process during the sentencing phase of a criminal trial. The

Court concluded that the defendant was “denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.” *Id.* at 362, 97 S.Ct. 1197.

In *Skipper*, 476 U.S. at 3, 8, 106 S.Ct. 1669, the United States Supreme Court held that the trial court erred in excluding evidence that the defendant was well-behaved in jail between the time of his arrest and trial and that such behavior was probative of his future adaptability in prison. The Court stated, “a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination.” *Id.* at 7, 106 S.Ct. 1669.

Critical to the assessment of counsel Bartosh's and the defense team's performance in not presenting such an expert is the particular information the defense team had about Lindsey's character and prior incarceration and their awareness of prison adaptability as mitigating evidence. As the PCR court reasonably found, the Petitioner failed to satisfy his burden of proof. Although counsel Bartosh is deceased, the assessment by the Court must lead to the conclusion that he was not deficient in presenting this generalized testimony and the evident risk that it had with limited probative value and a higher risk of negatively revealing Lindsey's additional dangerousness and potential for violence in a prison setting due to his prior involvement in incidents in his earlier incarcerations - a point any seasonal prosecutor would seek to establish. The evidence conclusively reveals that the defense team was aware - through the notations of counsel Quimby Hatcher of the fact that prison adaptability evidence could be presented through lay and expert witnesses. In addition, the record is replete with the facts of his involvement in violent prison incidents with inmates and guards before his death sentence (and after). A review of the testimony presented leads to the conclusion that there was neither deficient performance nor prejudice under Strickland.

Counsel Brannon and Quimby Hatcher's Testimony on Prison Adaptability Issue.

Counsel Brannon testified that he had heard of prison adaptability before, but that was not his guilt phase issue to present. Since Bartosh was concerned about sentencing, the prison issue was Bartosh's issue. App.p. 2334; PCR Tr. 51. He knew prison adaptability evidence was potentially admissible mitigation evidence from the seminars he had attended. Id.; PCR Tr. 51. Brannon's experience with Lindsey at the detention center was in the conference room and very cordial. However, Brannon was aware that Lindsey had been in a fight in the jail and received a disciplinary that resulted in him being locked down at least for the first 3 to 4 weeks Brannon was involved in the case. App.p. 2335; PCR Tr. 52. Brannon stated that they would bring Lindsey into the room for their interview "completely shackled." App.p. 2335.

Counsel Brannon confirmed that with the awareness of the admissibility of prison adaptability evidence and the conduct in jail (and the fact Brannon called a witness in the penalty phase), he knew what witnesses Bartosh intended to call in the penalty phase. Brannon was aware that there were no jail guards on the witness list. App.p. 2336-39; PCR Tr. 53. Brannon admitted, however, that he did not personally review the records of the 1996 incarceration at SCDC. App.p. 2336-39; PCR Tr. 55.

Counsel Karen Quimby Hatcher also testified about her records she made in the case. Particularly, she had noted that as a mitigating circumstance to be considered was future adaptability to prison life. App.p. 2533. PCR Tr. 249. (Applicant's Exhibit 18) (App.p. 3019). However, she did not know the particular reason Bartosh did not present evidence in the area. App.p. 2533-34; PCR Tr. 249-50. See also App.p. 2545-46; PCR Tr. 261-62. *See also Respondent's Exhibit 6. App.p. 3071. (Note where prison adaptability is crossed-out).* Her records also reflected summaries of the SCDC records and records from the Spartanburg County Detention Facility documenting his disciplinary history which jail and prison assaults and the potential witnesses from the incidents. App.p. 2566-67; PCR Tr. 282-83. See also App.p. 3075-3082. (Respondent's Exhibit 9) (documenting series of listed incidents involving crimes against persons and witnesses).

PCR Testimony of Prison Adaptability Expert James Aiken

James Aiken, a former South Carolina Department of Corrections Warden, who has a consulting firm relating to death penalty proceedings and jail and prison security testified at the PCR hearing in support of the allegation. App.p. 2485; PCR Tr. 201-228. He testified that he had reviewed the correctional files concerning Mr. Lindsey, but had never met Lindsey. App.p. 2490; PCR Tr. 206. He opined that it was not necessary to meet Lindsey before he rendered an opinion about prison adaptability or future dangerousness. App.p. 2490; PCR Tr. 206. He stated that he relied upon the records of the Spartanburg County Detention Facility and the South Carolina Department of Corrections' records when he was incarcerated for 7½ months in formulating his opinion. App.p. 2491; PCR Tr. 207. He also admitted that he has reviewed the records since he was on death row, but claimed that it was not included in formulating his opinion. App.p. 2490-91; PCR Tr. 206-07. Aiken opined his observations were that Lindsey had been guilty of crimes of violence in the community and that the Department of Corrections "can manage this type of offender for the remainder of his life without causing unreasonable risk of harm to staff, inmates, as well as the general community." He indicated his opinion was based upon the fact that he had done time before and that SCDC had the capacity to classify him, evaluate his behavior, and had the necessary staff, equipment and expertise to manage him. App.p. 2492; PCR Tr. 208. He noted that Lindsey did not have relationships with "security threat groups" or "gangs." App.p. 2492; PCR Tr. 208. Further, Aiken opined he had not demonstrated a propensity toward random and systematic violence against others while he's in prison. App.p. 2492; PCR Tr. 208. Aiken admitted that since prisons are dangerous, things can happen. He testified that a life sentence without parole is a severe sentence and reduces a person to the lowest common denominator. App.p. 2493; PCR Tr. 209. He stated he could have rendered the same opinion during the trial. App.p. 2493; PCR Tr. 209.

Aiken opined that he was qualified to give a favorable opinion as to Lindsey's capacity for

adaptation to prison. App.p. 2494; PCR Tr. 210. He opined that lay witnesses were not so qualified. Id.

On cross-examination, the risk of this generalized adaptability testimony was presented. Particularly, he recognized that it was his opinion that inmates in the Department of Corrections can be managed to avoid injury to other inmates, the general public and prison guards. App.p. 2495; PCR Tr. 211, ll. 22-25. Aiken noted that you can never say never, but the vast majority of prisoners in SCDC can be incarcerated.

Aiken acknowledged that the best predictor of future behavior is past behavior. App.p. 2496, l. 20-22. He was aware that the prior correctional records of the crime of assault and battery with intent to kill revealed circumstances where there was an altercation on a highway where shots were fired and the victim was wounded. It was then emphasized - like the present case - that he shot into a vehicle! App.p. 2497-98; PCR Tr. 214.

Similarly, he was aware that Lindsey had also been arrested for criminal domestic violence. However, in making the assessment, Aiken stated he had no need to speak with Lindsey about his other arrests and crimes of violence he committed, because he was only basing it on adjudications and official records.⁴⁷ He stated that being accused of something and being guilty are two distinct matters. Aiken discounted the fact that he had a source in Mr. Lindsey to ask him whether he did do what he was charged with, but still found it unnecessary. App.p. 2499; PCR Tr. 215, ll. 5-11.

Aiken also admitted - though not mentioned in direct - that he saw in the prison records that he was recommended for "anger management" class. App.p. 2499-2500; PCR Tr. 215, ll. 21-22. He admitted that this reflected that "the potential for violence is certainly there" and Aiken opined the recommendation was to prepare him for his return to society. App.p. 2500; PCR Tr. 216.

⁴⁷ Witness Aiken made this comment even though original defense counsel had created a file and record of a number of violent incidents involving Lindsey against a number of individuals. See Respondent's Exhibits 8-10. App.p. 3073- 3082.

Aiken also admitted that Lindsey's prior prison record reflected that he got into fights and other indications that he acted violently toward others. App.p. 2500; PCR Tr. 216. In addition to the March 24, 1996 fight at Dutchman Correctional Institution, his jail records in Spartanburg reflected that he had a violent assault in the jail when he got into another altercation with an inmate and a detention officer. App.p. 2501; PCR Tr. 217. Aiken stated the incident was resolved with Lindsey being gassed to control his behavior at the incident and a disciplinary action resulting in 20 days segregation. Aiken noted that gassing an inmate during a fight is not automatic. App.p. 2501-02; PCR Tr. 217-18. He further opined that the use of gas against Lindsey appeared appropriate. App.p. 2502, l. 1-3.

Concerning the 1996 fight in SCDC, the incident occurred outside the dining hall where inmates are gathered. Similarly, the February 13, 2004 incident occurred after Lindsey left his cell. Aiken described how the officer who broke up the fight got caught in between and another officer gassed him. App.p. 2502-2503.

Concerning the reliability of his opinions as to prison adaptability and the ability to manage inmates without a risk of violence toward others, Aiken also admitted that Lindsey had had two subsequent violent incidents at Lieber Correctional Institution since he was sentenced to death in December 2004 with inmate William Bell and a more aggressive fight in December 2006 with inmate Angel Vasquez. App.p. 2505-2507; PCR Tr. 221-23. However, Aiken would not agree that the incidents showed on those dates that SCDC was unable to manage Lindsey to prevent violence against other inmates. App.p. 2507; PCR Tr. 223, ll. 9-15.

Aiken clarified that his opinion was only that Lindsey could be managed not to create an unreasonable risk of harm, not that he was not a risk. App.p. 2508; PCR Tr. 224.

ANALYSIS

Respondent submits that the state PCR court properly denied this 6th Amendment claim. Deficient performance has not been shown. Respondents do not disagree that evidence concerning

prison adaptability by lay or expert witnesses as a response to claims of future dangerousness and the Petitioner's character under *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) is admissible in mitigation in death penalty cases and should be considered by reasonable counsel.⁴⁸ While we agree that defense counsel did not retain an expert in this area, it is clear that the defense team *considered* the issue.

The evidence concerning that of the defense team consideration of the prison adaptability issue is shown by the fact that counsel Quimby had included in her notes and summaries that future adaptability to prison life was a statutory mitigating factor. App.p. 2583, PCR 249. (Respondent Exhibit 18). In fact, at some point, the reference to prison adaptability evidence was cross-ed out, suggesting consideration and rejection. See, App.p. 3071. Also included in the defense team material were the records of SCDC concerning the earlier incarceration and records from the Spartanburg Detention Center concerning his disciplinary history. App.p. 2566 - 67; PCR 282-283. In addition, counsel noted that evidence of prison adaptability could be introduced from a clinical psychologist. App.p. 2546; PCR 262. In addition, counsel Brannon stated that he was aware that evidence of prison adaptability was a proper matter for mitigation in a capital case from the seminars that he had attended. App.p. 2335-37; PCR 51, 53. In addition, counsel were aware of the jail disciplinaries that Lindsey had been involved in from the records and his visits in the jail where he was locked down. App.p. 2336; PCR 52.

The fact that Bartosh is not available due to his intervening death to explain his decision on why he not specifically retain a correctional expert for trial does not shift the burden. As recognized in Harrington, although courts may not indulge "post hoc rationalization" for counsel's decisionmaking

⁴⁸See generally *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (evidence of good behavior in prison admissible in mitigation as relevant to future adaptability); *State v. Shafer*, 352 S.C. 191, 573 S.E.2d 796 (2002) (evidence of violent behavior in prison relevant to future dangerousness); *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996) (defendant's future dangerousness and his adaptability to prison life are legitimate interests in the penalty phase of a capital case).

that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a “strong presumption” that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than “sheer neglect.” Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam).

What is undisputed is that the defense team was aware of the potential for the admission of evidence of prison adaptability, acquired records of his current and prior incarceration and evidence of his actions in jail, which included gassing, segregation and anger management courses. Further, the evidence is undisputed that as the defense team culled and created witness list - with the understanding prison adaptability was a potential mitigating evidence basis - they did not include any witness on the list - jail or prison guards - to testify about this area. Additionally, Brannon opined that this decision would have been left up to Mr. Bartosh.

The failure to investigate or retain a prison adaptability expert in this case is supported by reasonable professional judgment. See Strickland, 466 U.S. at 690-91, 104 S.Ct. 2052 (stating that “strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation”). Importantly, as in Harrington, the proffered evidence revealed the two-edge sword that any seasoned trial lawyer like Bartosh would have recognized as a high risk of harmless information and emphasis by a prosecutor lay in wait for this type of evidence to be presented due to inconsistent history on being adaptable.

Respondent submits that a trial counsel's not presenting this expert future dangerousness testimony “falls within the wide range of reasonable professional assistance.” Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. First, Aiken’s opinion that Lindsey would not be an unreasonable risk to harm guards or fellow inmates in prison was based in large part on the fact that prison authorities would classify him as a maximum security inmate based on his murder conviction. His opinion did not focus on any mitigating lack of propensity to violence in his character - because as shown he had propensity

for violence and anger, but rather on the fact that the structured, maximum security prison setting likely would control Lindsey and not permit him to act on any desires to escape or commit acts of violence to other inmates or guards, even though he had done so previously and while awaiting trial (as well as with two other death row inmates since his sentence).⁴⁹ They also serve to emphasize the point, not favorable to Lindsey, that the prison system would classify him as a high security inmate because it would consider him to present a potential for violence. Aiken clarified that his opinion was only that Lindsey could be managed not to create an unreasonable risk of harm.

The PCR court reasonably concluded that a reasonable defense attorney could simply conclude that the adaptability experts' core opinion - that he could be managed and not be an unreasonable risk of harm to inmates, guards and the public - in spite of his having recently violently attacked a jailer and a history of jail incidents -was weak and would not persuade Lindsey's jurors. Additionally, a reasonable lawyer would have known the evidence focused more on the prison's ability to control Lindsey and all inmates, rather than Lindsey own character, which would have been focused by the prosecution with Lindsey's violent incidents while in custody - with the underlying knowledge of his violence against others - male and female - in and out of custody. A decision to prevent or limit that comparison against the weakened evidence of prison administration would not be unreasonable. A reasonable attorney could decide that under the particular facts of this case the future dangerousness testimony concerning prison adaptability would not be helpful.⁵⁰

⁴⁹ Similar testimony may be inadmissible in some other states, including Virginia. See, Morva v. Commonwealth, 278 Va. 329, 351, 683 S.E.2d 553, 565 - 566 (Va.,2009) ("Whether offered by an expert, or anyone else, evidence of prison life and the security measures used in a prison environment are not relevant to future dangerousness unless it connects the specific characteristics of a particular defendant to his future adaptability in the prison environment").

⁵⁰We note that this is not a case in which the State introduced expert testimony about the defendant's future dangerousness and the defendant was denied an opportunity to directly rebut that testimony with his own expert. See *Clisby v. Jones*, 960 F.2d 925, 929 n. 7 (11th Cir.1992). Nor is this a case like *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), in which the State's two experts testified there was a "high probability" that Williams posed a serious

Further, the state PCR court correctly determined that Sixth Amendment prejudice was not shown by the failure to present similar testimony by James Aiken in 2004. As shown in the cross-examination before the PCR Court, the benefit in mitigation of such testimony was weakened and could have made a death sentence more likely rather than less likely. The risks of this generalized adaptability testimony was evident where:

- Aiken noted that you can never say never, but the vast majority of prisoners in SCDC can be incarcerated. App.p. 2496; PCR 212.
- The best predictor of future behavior is past behavior.
 - the prior correctional records of the crime of assault and battery with intent to kill revealed circumstances where there was an altercation on a highway where shots were fired and the victim was wounded. It was then emphasized - like the present case - that he shot into a vehicle! App.p. 2498; PCR Tr. 214.
 - Lindsey had also been arrested for criminal domestic violence.
 - Aiken never met with Lindsey about his other arrests and crimes of violence he committed and only based his opinion on paperwork. App.p. 2499; PCR Tr. 215, ll. 5-11.
 - Aiken also admitted “the potential for violence is certainly there” and had failed to mention in direct - that he saw in the prison records that he was recommended for “anger management.” App.p. 2499; PCR Tr. 215, ll. 21-22.
 - His prior prison record reflected violence with fights and indications he acted violently towards others which had not been emphasized at the 2004 trial where the adaptability testimony had not been proffered. App.p. 2500; PCR Tr. 216.
- The March 24, 1996 inmate fight at Dutchman Correctional Institution.

continuing security threat and defendant's attorneys failed to elicit: (1) evidence of Williams's “nightmarish childhood,” including criminal neglect by his parents, severe abuse by his father, and his time in an abusive foster home; (2) that correctional officers were willing to testify Williams would not pose a danger while incarcerated; (3) that Williams received prison commendations for breaking up a drug ring and returning an officer's wallet; and (4) an admission *from the State's testifying future dangerousness experts* that the defendant would not pose a threat in the future if kept in a structured environment. *Id.* at 368-71, 373 & n. 4, 395-98, 120 S.Ct. at 1500-02 & n. 4, 1514-15.

- A Spartanburg Detention Center violent assault in the jail when he got into another altercation with an inmate and an officer. App.p. 2501; PCR Tr. 217.
- Lindsey received 20 days segregation and Lindsey got GASED by the officers to control his behavior.
- Aiken clarified that his opinion was only that he could be managed not to create an *unreasonable* risk of harm, not that he would not be harmful to others. App.p. 2508; PCR Tr. 224.

Even if counsel's performance was allegedly deficient for not presenting such an expert, no prejudice resulted. There is no reasonable probability that the outcome would have been different had such an expert testified because any possible benefit from such expert testimony would pale in comparison to Lindsey's actual behavior both prior to and after his arrest. The mixed impact it could have had in this particular supports the conclusion that counsel was not ineffective. See Parker v. Sec'y for the Dep't of Corr., 331 F.3d 764, 788-89 (11th Cir.2003) ("Given the strength of the aggravating factors and the relative weakness of the mitigating evidence Parker argues should have been presented, there is no reasonable probability that, absent the deficient performance, the outcome of the proceedings would have been different. The aggravating factors in this case are substantial."). "Moreover, we have rejected prejudice arguments where mitigation evidence was a 'two-edged sword' or would have opened the door to damaging evidence." Wood v. Allen, 542 F.3d 1281, 1313 (11th Cir.2008), cert. granted, --- U.S. ---, 129 S.Ct. 2389, 173 L.Ed.2d 1291 (2009) (citing Gaskin v. Sec'y, Dep't of Corr., 494 F.3d 997, 1004 (11th Cir.2007); Grayson v. Thompson, 257 F.3d 1194, 1227 (11th Cir.2001)); see Wong v. Belmontes, 130 S.Ct. at 387-90 (finding no prejudice where proposed mitigation evidence was either cumulative of evidence already presented at penalty phase, or would have opened door to damaging testimony).

Here, Respondent submits that PCR court reasonably assessed the thorough presentation of the horrific evidence in aggravation with the omission of proffered prison adaptability evidence and determined that it would not have undermined confidence in the death sentence verdict. He has failed

to show on this unique record which included a plethora of evidence about his criminal character that there is a reasonable probability that the result of the proceeding would have been different under *Strickland*. Certiorari is not warranted in this case on this issue.

PROPOSED ORDER ISSUE

- V. **The wholesale challenge to request and signing of a proposed order is not properly before this Court where no objection was made to the request. Further, the fact that a PCR Court did not correct clerical errors in the Order prior to signing the order does not show bias against the Petitioner nor divest the Order of its appropriate deference in this Court. Judge Burch spent an adequate amount of time - over two months - prior to signing and filing the Order. (Issue 5, Petition for Writ of Certiorari, p. 105-110).**

In his fifth argument before this Court, the Petitioner - for the first time - makes an extraordinary and misplaced argument that the findings and conclusions of Judge Burch in the Order of Dismissal “should be disregarded and because Judge Burch adopted and signed the requested proposed order he is ‘entitled to a new PCR hearing before a different judge.’” Petition, p. 109. What is extraordinary is that no objection was made to the fact of a requested proposed order by the Petitioner, no objection was made to general adoption of a proposed order under Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004) at the time either of the requested proposed order, after the proposed order was submitted, or within the motion to alter or amend.

What is additionally extraordinary, is that - again - for the first time - the Petitioner makes assertions challenging the impartiality of the Honorable Paul Burch. Petition, p. 107-08. He suggests a brief reference during one witness’s testimony in overruling the State’s objection to the relevance of testimony, suggested some bias against the Petitioner in favor of the State. The parsed and isolated comment in the context of the lengthy proceeding where fifteen (15) witnesses testified, 32 exhibits submitted by the Petitioner and 14 exhibits submitted by the Respondent. Subsequent to the hearing, Judge Burch allowed counsel to wait for a transcript of the PCR hearing before post-hearing memorandum were received. App. 2933-2934. At conclusion of the hearing, the Court suggested briefing in 30 days after receipt of the transcript which was provided to Petitioner’s counsel by August

24, 2010 and the Petitioner's post-hearing brief was filed October 26, 2010. Subsequent to request and the filing of requested proposed order from the Respondents on May 2, 2011, Judge Burch allowed Petitioner until July 27, 2011 to submit his proposed order. To characterize Judge Burch's handling of the case as "impatience" flies in the face of any reasonable reading of this record.⁵¹

Petitioner asserts that his 6th, 8th and 14th Amendment rights and unidentified State law rights were violated where the PCR judge signed a proposed order submitted by the Respondent with limited corrections. He contends that the signing of a requested proposed order "violates the express commands of this Court." Petition for Writ of Certiorari, p. 105. In particular, Petitioner points to the language in Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) that: "although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency." In Hall, the Supreme Court concluded that the PCR judge "spent an adequate amount of time reviewing the order before adopting it." Id. Lindsey claims that in his case, the salient facts suggest that Judge Burch failed to spend an adequate amount of time reviewing the Order because within the 192 page order he claims it included essentially unidentified sentence fragments (8), spelling errors (36), incorrect tense agreements (9), references to pleadings (4), and punctuation errors (48) which were present in the Respondent's proposed order. Petition, p. 106-07. He claims that the failure to correct the errors reflect that the PCR judge did not review the

⁵¹ Petitioner's complain toward Judge Burch about his impatience with the case [suggesting an attitude against the Petitioner] is more extraordinary and incorrect when considered in light of what occurred prior to the case. Judge Burch appointed counsel Vieth and Collins on July 31, 2008 (after relieving prior appointments). An initial scheduling order was set on July 23, 2009 allowing for an amendment to be filed by August 1, 2009 (over one year after initial appointment) and setting January 1, 2010 for the hearing. Lindsey v. State, Scheduling Order, June 23, 2009. The Amended Application was filed August 6, 2009. App. 2210. On June 17, 2010, Respondents made a Return to the Amended Application and Second Rule 12(e) Motion for specificity. App. 2217. The hearing was convened July 19, 2010, nearly two years after counsel was appointed to represent the Petitioner. This is a far cry from impatience from Judge Burch.

proposed order. Petition, p. 107. Apparently, it is his conclusion that when a trial judge fails to correct grammatical or spelling errors (most unidentified in his pleading) that the order is entitled to no deference by the appellate court. What is additionally disturbing about his current position is his suggestion that the failure to correct clerical errors reflects a bias against the Petitioner. The Petitioner, on appeal, makes these assertions against the fact the Petitioner's counsel in the lower court made no similar assertions or objections. To the contrary, it took the same opportunity to submit a proposed order when offered and did not object or challenge the fact of the Respondent's submission of the Order, upon request. Instead, consistent with the Rules, the Petitioner sought to challenge the individual portions of the signed Order under Rule 59 that it deemed appropriate. Relief under the fifth argument is not appropriate.

A review of the critical dates reveals how the PCR court had an adequate time to review the order before adopting it. On October 26, 2010, the Petitioner made his 61 page Post-Hearing Memorandum. App. 3284-3344. On April 2, 2011, the Respondent made their 190 page Post-Hearing Memorandum. App. 3345-3535.

One month after the Respondent had submitted their Post-Hearing Memorandum, Judge Burch wrote counsel on May 2, 2011 and requested counsel for the Respondent to submit a proposed Order of Dismissal "reflecting the Respondent's Post-Hearing Memorandum" and to submit the proposed order within thirty (30) days [by June 2, 2011]. Supp. App. p. 1.

On May 12, 2011, after earlier communication with Petitioner's counsel, Judge Burch emailed counsel for Lindsey holding the matter open for a reasonable time to allow submission of a proposed order by Petitioner. Supp. App. p. 2. On the same date, counsel for Lindsey requested "about a month to submit their proposed order. Supp. App. 3. On May 26, 2011, counsel for the Petitioner advised the Clerk of the South Carolina Supreme Court that both counsel were preparing proposed orders for Judge Burch. Supp. App. 4.

On June 2, 2011, pursuant to Judge Burch's May 2, 2011 request, Respondent's counsel submitted a proposed order of dismissal, consistent with Judge Burch's directive "reflecting Respondent's Post-Hearing Memorandum" and consisting of 192 pages. Supp. App. 6 (June 2, 2011 cover letter to Judge Burch); App. 3752-3943 ("Respondent's Proposed Order of Dismissal"). A PDF version was emailed to Judge Burch and counsel for Lindsey that date.

Subsequent to the receipt of the Respondent's Proposed Order of Dismissal, Lindsey's counsel on June 7 emailed Judge Burch requesting until the end of June to complete the proposed order for Lindsey. Supp. App. 7. On July 29, 2011, counsel for Lindsey submitted a 61 page proposed "Order Granting Post-Conviction Relief." Supp App. p. 7-69.

On August 10, 2011, Judge Burch signed the "Order of Dismissal" of 192 pages. App. 3536-3727. At the time fo the signing of the Order of Dismissal on August 10, 2011, Judge Burch had the "Proposed Order of Dismissal" from Respondent since June 2, 2011 for a period of 69 days.⁵²

After the receipt of the signed and filed Order of Dismissal, the Petitioner made a Motion to Reconsider, Alter and Amend on September 19, 2011. App. 3728-3736. However, a review of the post-order Motion reflects no objection or complaint to the fact that a proposed order was requested from Respondent's counsel under Hall v. Catoe, *supra*. App. 3728-3737. The PCR Court denied the Motion to Alter and Amend on December 21, 2011 after review of the specific complaints from the Petitioner. App. 3751.⁵³

The Petitioner's reliance upon Jefferson v. Upton, 130 S.Ct. 2217 (2010) is misplaced as supporting his position to require a new judge and new PCR hearing. In Jefferson, unlike this case, the

⁵² It should be noted that Judge Burch requested a proposed order from Respondent on May 2, 2011 "reflecting the Respondent's Post-Hearing Memorandum." It could be argued that he had sought this Order upon his review of the Respondent's Post-hearing Memorandum since April 2, 2011.

⁵³ Respondents made a response to the Motion to Alter on November 18, 2011. App. 3738-3749.

collateral (PCR) judge contacted the State's counsel *ex parte* and no similar request was made of the defendant's counsel and the proposed order included statement by individuals who did not testify or participate in the case. Jefferson, 130 S.Ct. 2219-20. In the instant case, Judge Burch contacted the Respondent and Petitioner's counsel and made the request for the proposed order reflecting the Respondent's post-hearing memorandum and allowed opposing counsel an opportunity to present a proposed order also. Nevertheless, in Jefferson, the Court did not vacate the state court order, but remanded it to the district court in a federal habeas corpus proceeding to determine the nature and extent of the *ex parte* contact. Here, the Respondent's proposed order was not solicited *ex parte*, did provide Petitioner's counsel the opportunity to review the proposed order and supply its own proposed order, and did not include reference to material and evidence not submitted at the hearing.

Importantly, in Jefferson, the Supreme Court acknowledged that it had held that "verbatim adoption of findings of fact prepared by prevailing parties" should be treated as findings of the court, albeit criticized. Jefferson, 130 S.Ct. 2223, citing Anderson v. Bessemer City, 470 U.S. 564, 572 (1985). In Hall, this Court similarly criticized the practice, but did not forbid it. His reliance for the relief he requests is misplaced.

Respondents would also note that the adoption of the proposed order by a state court has been held to not deny due process of law in many similar situations. Subsequent to Jefferson, the Missouri Court upheld the practice in Prince v. State, 390 S.W.2d 225 (Mo. App. 2013). Similarly in Miller v. State, 99 So.3d 349 (Ala.Crim.App. 2011), The Alabama Court found no due process violation in the submission and adoption of the proposed order.

Contrary to the suggestion in the Petition, the proposed order was only submitted to the PCR court from the Respondent in paper form and a PDF form. No request was made for it to be submitted in any alternative word processing format. Respondent take no position on whether a new practice of requiring proposed orders to be submitted in a word processing format, such as Microsoft Word, that

can be manipulated or with metadata apparent would ever be an appropriate or necessary practice. Nevertheless, that practice would not address the concerns expressed in Hall.

As stated above, what addressed those concerns were:

1. The PCR judge's review of the post-hearing memorandum.
2. The PCR hearing judge's request for the State to submit a proposed order "reflecting of the Respondent's Post-Hearing Memorandum of Law" suggesting agreement with the Respondent's position therein.
3. The submission of the proposed order consistent with the court's directive.
4. The passage of 69 days after receipt of the proposed order prior to signing.
5. The motion to alter or amend addressing specific and limited areas of concern by Petitioner.
6. The State's Response to the Motion to Alter.
7. The PCR Court's denial of the Motion to Alter.

In conclusion, Respondent submits that this issue is not preserved for review in this Court because it was not raised by either an objection to the directive to submit a proposed order or a Rule 59 Motion concerning the adoption of the proposed order. Accord, Hall v. Catoe, *supra*. Second, the claim by Petitioner that either the objection or Rule 59 would be "futile or quixotic" would suggest that all Rule 59 motions would be futile. The issue is whether the PCR court reviewed the findings and conclusions set forth in the proposed order and adopted them as their own. The assertions that clerical errors and disagreement with grammar by Petitioner suggests that the court did not review the Order does not undermine the court's assessment, particularly where a Rule 59 was done concerning other particular findings and conclusions.

Finally, the Petitioner suggests that the state court should reach the unpreserved issue because he claims the federal court will reach the issue under Martinez v. Ryan, 132 S.Ct. 1309 (2012) is a

misreading of Martinez, as well as this Court's preservation rules. Whether state court findings are presumed correct is always at issue in 28 U.S.C. § 2254 proceedings. However, there is nothing in Martinez which suggests that state courts should be required to abandon well-founded preservation rules - particularly when the Petitioner is claiming on appeal for the first time bias by the state PCR judge absent any claim below. The request to set forth a new procedure in capital cases nullifying well-founded error preservation and waiver jurisprudence is unnecessary. To require, in this setting a new PCR hearing and new PCR judge merely because of missed clerical errors in the submission - not disagreement in the findings and conclusions as reflected in the denial of the Rule 59 motion - is without merit.⁵⁴

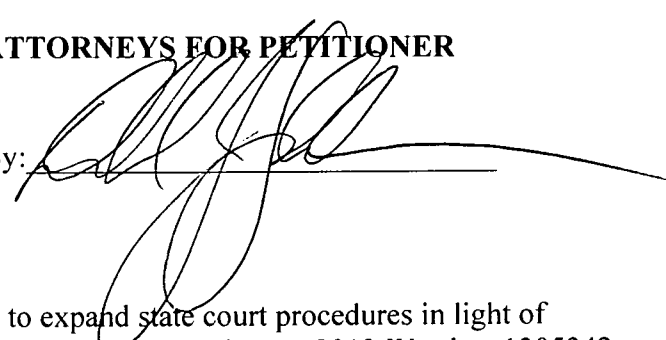
CONCLUSION

For all the foregoing reasons, the Petition must be denied.

Respectfully submitted,

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ATTORNEYS FOR PETITIONER

By: 

April 16, 2013

⁵⁴ State courts addressing attempts to expand state court procedures in light of Martinez v. Ryan have rejected such expansion. See, State v. Anderson, 2013 Westlaw 1305342 (Delaware Super. 2013) (Martinez did not establish a new constitutional right to challenge PCR counsel effectiveness and must be dismissed under statute of limitations [similar to S.C.]); Commonwealth v. Lewis, __ A.2d __, 2013 Westlaw 1182093, n.3 (Pa. Super. 2013) (Martinez claim has questionable application in a state court proceeding, but not preserved for appeal because it was not raised below); Tierney v. State, 2013 Westlaw 656765 (Hawaii 2013) (Martinez does not require state court to appoint counsel in collateral proceedings); Howell v. State, __ So.3d __, 2013 Westlaw 646550 (Fla. 2013) (Martinez has no applicability in state court proceedings citing Gore v. State, 91 So.3d 769 (Fla. 2012), cert. den. 132 S.Ct. 661 (2012)); Jensen v. State, __ S.W.3d __, 2013 Westlaw 221479 (Mo.App. W.D. 2013) (Martinez not applicable to state court to require review of ineffective PCR counsel); Logan v. State, 377 S.W3d 623 (Mo. App. W.D. 2012) (Martinez does not authorize defendant a second chance at obtaining relief in a second PCR proceeding).

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Paul M. Burch, Circuit Court Judge

Appellate Case No. 2012-206087

MARION ALEXANDER LINDSEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

CERTIFICATE OF SERVICE

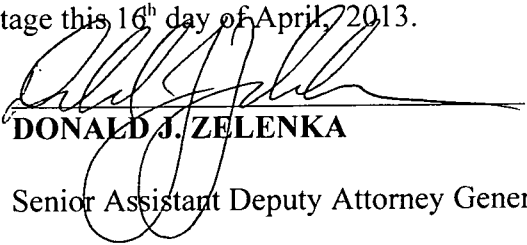
I, Donald J. Zelenka, hereby certify that I have served Respondents **Return to**

Certiorari on:

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by depositing a copy in the Mail with sufficient postage this 16th day of April, 2013.


DONALD J. ZELENKA

Senior Assistant Deputy Attorney General