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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Spartanburg County Court of Common Pleas
The Honorable J. Derham Cole, Circuit Court Judge

CAPITAL CASE

ANDRES ANTONIO TORRES, # 06028,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2020-000842

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PETITIONER'S QUESTIONS PRESENTED

I. Whether the PCR judge's construction of section 16-3-20(C) of the South Carolina Code rendered the statute unconstitutional as applied where the PCR judge determined the statute allowed the trial judge to instruct the jury no fewer than sixty times that it would be recommending a sentencing verdict in violation [of] petitioner's rights pursuant to the Eighth, Fifth, and Fourteenth Amendments, which prohibit any instruction that impermissibly conveys to the jury that the responsibility for determining whether petitioner would die rested elsewhere, as this instruction did? In the alternative, whether trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to object to the unconstitutional jury instruction?

II. Whether trial counsel violated petitioner's right to the effective assistance of counsel by (1) ignoring red flags in petitioner's records signifying genetic defects and organic brain damage, (2) failing to acquire petitioner's mother's medical records, which would have suggested the etiology of petitioner's mental and emotional health as congenital, and (3) failing to obtain petitioner's records associated with his first psychiatric hospitalization, when he was three years old, which prevented the presentation of mitigating evidence that petitioner suffered from genetic defects and organic brain damage rendering his conduct not a matter of choice?

III. Whether defense counsel was ineffective, in derogation of petitioner's Sixth, Eighth, and Fourteenth Amendment rights, for repeatedly telling the jury in dramatic fashion during the guilt phase opening argument that petitioner was "not guilty" where the defense knew it was not calling any guilt phase witnesses, evidence of guilt was overwhelming, and the failure of the defense team to have a theory that connected the guilt and penalty stages caused the defense to have no credibility with the jury during the critical penalty stage presentation?

IV. Whether petitioner should be ineligible for the death penalty by reason of his severe mental illnesses, including his bipolar disorder, brain damage, and genetic disorders, where these disorders significantly impaired petitioner's ability to exercise rational judgment since executing an individual suffering from these disorders would constitute cruel and unusual punishment in violation of the Eighth Amendment in the same manner as executing an individual with an intellectual disability would violate the reasoning and holding of Atkins v. Virginia, 536 U.S. 304 (2002), and defense counsel was ineffective for failing to raise this issue to the trial court?

(Petition, p. 1).

STATEMENT OF THE CASE

On October 13-23, 2008, Petitioner, Andres Antonio Torres, was tried by jury in capital proceedings on the following charges: (1) #07-GS-42-2773 (Armed Robbery); (2) #07-GS-42-2775 (Armed Robbery); (3) #07-GS-42-2776 (Burglary); (4) #07-GS-42-2777 (Murder); (5) #07-GS-42-2778 (Murder); (6) #08-GS-42-0880 (Criminal Sexual Conduct, First Degree); (7) #08-GS-42-4677 (Attempt to Burn). (App. 5365-5378). The Honorable Roger L. Couch presided. The case was prosecuted by Circuit Solicitor Trey Gowdy, with Deputy Solicitor Barry Barnette and Assistant Solicitor Cindy Crick. Petitioner was represented by Public Defender Clay Allen, Assistant Public Defender Kathryn Hodges, and John G. Reckenbeil, Esq., of the Spartaburg County Bar. (App. 114).

On October 19, 2008, the jury convicted as charged. (App. 2307). At the conclusion of the separate sentencing process, the jury found the following statutory aggravating circumstances:

> (1) murder committed while in the commission of criminal sexual conduct;
>
> (2) murder committed during commission of burglary;
>
> (3) murder committed during commission of robbery while armed with a deadly weapon;
>
> (4) murder committed during commission of larceny with use of a deadly weapon;
>
> (5) murder committed for the purpose of receiving money or a thing of value;
>
> (6) murder of two or more persons pursuant to one scheme or course of conduct.

(App. 2886-2890). The jury recommended death. (App. 2887). Judge Couch sentenced Petitioner to death for each murder; thirty (30) years, consecutive to other sentences thereafter imposed, for each armed robbery; the same for criminal sexual conduct; a life sentence, also consecutive, for

burglary first degree, and five (5) years, also consecutive, for the arson attempt conviction. (App. 2892-2894). Petitioner appealed.

Appellate defender Joseph L. Savitz, III, represented Applicant on appeal. Counsel argued (1) the trial court abused its discretion in admitting autopsy photographs during sentencing; and (2) the trial court abused its discretion in allowing the State to introduce a video recording of Applicant being pepper-sprayed while he was imprisoned at the Spartanburg County Detention Center. (App. 2900). This Court affirmed the conviction and sentence on December 13, 2010. *State v. Torres*, 390 S.C. 618, 703 S.E.2d 226 (2010). (*See also* App. 2938-2941).

Petitioner filed his first post-conviction relief ("PCR") application on April 22, 2011 and then filed subsequent amended applications on July 6, 2012, February 14, 2014, and April 7, 2014. (App. 2942-50; 2977-3009). The State filed its return on May 19, 2011. (App. 2951-2976). An evidentiary hearing was held on April 14-16, April 21-25, April 30, and June 30, 2015 before the Honorable J. Derham Cole. After receiving post-hearing briefs from both parties, Judge Cole issued his Order Denying Post-Conviction Relief on December 9, 2019. (App. 5294-5342). Petitioner filed a Rule 59 motion to reconsider on December 18, 2019. (App. 5343-5351). The State filed its return to the motion on January 2, 2020. (App. 5353-5362). Judge Cole denied the motion on May 8, 2020. (App. 5364). Petitioner appealed.

Petitioner filed a petition for writ of certiorari in this Court on April 5, 2021. This return follows.

STATEMENT OF FACTS

For purposes of this Return, Respondent relies on the summary of the facts of the crime and investigation as this Court set out in the direct appeal opinion:

> In May of 2007, Union County Emergency Services received a call reporting a one-car accident involving a van. Subsequently, Torres was identified by witnesses in a police photo line-up as the driver of the van.
>
> Officers arrived on the scene of the accident shortly after Torres fled the area and discovered that the van was registered in the name of Ann Emery. Officers found Ann and her husband Charles Ray Emery's (collectively "the Emerys") belongings in the van, and based on that discovery, requested a welfare check on their residence.
>
> Upon arriving at the Emerys' residence and getting no response at the front door, officers walked around the house to check for signs of forced entry. Finding none, officers entered the residence through an unsecured door, immediately smelled the odor of gasoline, and noticed the house felt hot. Officers discovered the body of Charles Ray Emery lying face down on the mattress in the bedroom. The body of Ann Emery was discovered on the floor beside the bed after EMS arrived on scene. Due to the extent of their injuries, neither body could be identified at the scene, and identification was accomplished at the hospital during an autopsy. Due to the compromising position of Ann Emery's body at the scene, a sexual assault kit was administered. Semen taken from Ann Emery's body by way of the kit matched DNA of Torres. Torres was indicted on: two counts of armed robbery; two counts of murder; one count of burglary of a dwelling, first degree; one count of attempt to burn; and one count of criminal sexual conduct, first degree. . . .

State v. Torres, 390 S.C. 618, 621, 703 S.E.2d 226, 227 (2010). (*See also* App. 2938-2939).

As noted in the procedural history, Petitioner was convicted of all charges and, after an individualized sentencing proceeding, a jury of his peers assessed the appropriate sentence for this individual for his crimes was death.

STANDARD OF REVIEW

Appellate courts "review questions of law de novo, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018). Appellate courts will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Id*. at 180, 810 at 839.

"Questions of statutory interpretation are questions of law, which are subject to *de novo* review" and which the appellate court is "free to decide without any deference to the court below."

Rutland v. State, 415 S.C. 570, 576, 785 S.E.2d 350, 353 (2016) (*citing State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012)).

ARGUMENTS

I. The PCR judge did not err in rejecting Petitioner's claims of arbitrariness, structural error, or alleged ineffective assistance of counsel for failing to object all based upon the trial court's instructions regarding the jury's role in sentencing when the record shows the jury was appropriately instructed with the language of the statute, and also firmly and clearly instructed that their recommendation would be followed as a binding determination.

Petitioner alleges that Judge Cole erred by finding the trial court's use of the word "recommendation" when explaining the jury's responsibilities to them during the penalty phase of Petitioner's trial was not error. (Petition, pp. 18-23). Petitioner also claims that trial counsel was ineffective for failing to object to the "unconstitutional" instruction. (Petition, pp. 23-26). Respondent submits Judge Cole's decision to deny PCR relief was reasonable and comports with this Court's precedent as to how the issue should be treated. Petitioner has failed to present an issue that merits certiorari review.

Relevant facts from the trial record

Before Petitioner's trial began, the trial court led each individual member of the venire through a substantially similar set of voir dire statements and questions. Of note are these portions:

> The same jury that hears that part of the case *then will come back and decide the question of the most appropriate punishment.*
>
> . . . . you must come back to the courtroom and make a decision concerning the appropriate punishment and that's unusual because, in our state, usually the judge makes the decision on punishment. *In this case the jury would do that* . . . .
>
> The jury generally does not decide penalties in a criminal case, but in one particular kind of case, that is a case where murder has been alleged and the State has sought the death penalty, *then the jury has to decide the penalty that's going to be imposed in that type of case* . . . .
>
> You're now going to come back and *decide the penalty to be imposed* . . . .

> …would you then be willing to listen to the facts and the evidence, and if the evidence justified it, *would you be willing to sentence someone to death* in that situation? . . . .
>
> So, you would sentence someone to life or you could sentence someone to death depending on the facts and circumstances shown during that phase of the trial, is that correct? . . . .

(*See* App. 326-364 [Juror # 209 Richard Pack]; 496-507 [Juror # 132 Ricky Hardy]; 546-60 [Juror # 135 Bradson Harrision]; 568-81 [Juror # 124 Kyra Gregory]; 663-79 [Juror # 3 Kenneth Akins]; 749-61 [Juror # 18 Melissa Ballard]; 869-89 [Juror # 101 Benjamin Fricks]; 1032-50 [Juror # 46 Shoshannah Burnett]; 1124-37 [Juror # 289 Troy Williams]; 1253-67 [Juror # 105 Andrew Gilpin]; 1389-1403 [Juror # 139 Lee Hembree]; 1515-28 [Juror # 167 Annette Ledford]). (emphasis added).

At sentencing, the trial judge instructed: "There are two verdicts you are to consider in this case. One is the death penalty . . . . [t]he other is life imprisonment without the possibility of parole. ***Your sentence, sentencing recommendation will be followed by this Court."*** (App. 2865). (emphasis added). Further, the judge, near the closing of the instructions, again plainly stated:

> … Whatever your recommendation is, it must be a unanimous one if you make a recommendation. That must, means each and every juror must agree to the sentencing recommendation, ***and the recommendation will be followed by the Court.***

(App. 2881). (emphasis added).

The PCR Court's Treatment of the Issue

Petitioner moved for summary judgment on this issue before the hearing began and Judge Cole denied the motion, finding, ". . . based on my review of the record, which includes the judge's jury instructions, I find that no reasonable juror would not understand the fact that they were fully responsible for the sentencing decision in this case . . ." (App. 3046). The issue was renewed in post-hearing briefing. In the Order Denying Post-Conviction Relief, affirming again that the record shows a direct instruction that the jury's recommendation will be followed, Judge Cole found Petitioner's reliance on *Caldwell v. Mississippi*, 472 U.S. 320 (1985) and *State v. Davis*, 306 S.C. 246, 411 S.E.2d 220 (1991) was misplaced because those cases involved opposite situations

where the jury was not clearly told they were to make the final decision regarding the sentence. (App. 5321). Further, Judge Cole rejected Petitioner's argument that the charge "created arbitrariness in the sentencing phase" resulting in "structural error" such that he was entitled to relief under S.C. Code § 16-3-25 (C)(1). (App. 5321-5322). Judge Cole reasoned that this Court had already conducted its review under S.C. Code § 16-3-25 (C)(1). (App. 5321-5322). Judge Cole further observed that "[t]he framework of the trial in this case was established in compliance with the relevant statutory requirements pertaining to capital trials." *Id*. Additionally, he found "that no reasonable juror would have failed to understand the decision returned by the jury as to its 'recommendation' would be the sentence imposed by the Court on the defendant." (App. 5322). Consequently, Judge Cole resolved "the trial judge's instruction was not defective or erroneous and was appropriate and compliant with the law applicable at the time of the trial and therefore f[ound] no 'structural' or 'arbitrariness' by its application." (App. 5322).

Finally, Judge Cole also rejected Petitioner's ineffective assistance of counsel claim. He resolved Petitioner failed to show either deficient performance "in comparison to that which was expected of reasonably competent counsel under prevailing professional norms at the time of trial," and, even if Petitioner could show deficiency, he failed to show *Strickland* prejudice. (App. 5322).

Analysis:

The PCR judge did not err in denying relief as he precisely followed this Court's precedent in rejecting Petitioner's argument that the statute was unconstitutional as applied.

"A jury instruction must be viewed in the context of the overall charge." *Sigmon v. State*, 403 S.C. 120, 133, 742 S.E.2d 394, 401 (2013). "The test to determine the propriety of the trial judge's charge is what a reasonable juror would have understood the charge to mean." *State v. Bell*, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991).

It is true that "[t]he idea should be conveyed to the jury that its sentencing recommendation will be followed." *State v. Bellamy*, 293 S.C. 103, 107, 359 S.E.2d 63, 65 (1987) (*overruled on other grounds* by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)); *see also State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981). The jury was so advised here. Petitioner's continued reliance on *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633 (1985), and *State v. Davis*, 306 S.C. 246, 411 S.E.2d 220 (1991), to show the statutory language is facially invalid and constitutionally wrong is still misplaced. (*See* Petition, p. 16). These cases cannot afford relief primarily because the trial court here clearly and firmly instructed the jury that it was the jury's decision on the sentence that controlled. Indeed, the very reasons supporting reversal in *Caldwell* and *Davis* well-demonstrate the flaw in Petitioner's allegation of error.

In *Caldwell*, the Supreme Court found "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29. There, the prosecution had pointedly told the jury its sentencing decision was "not the final decision," that its "job is reviewable" and "the decision you render is automatically reviewable by the Supreme Court." *Id.* at 325-26. Additionally, the trial judge endorsed and supported those comments in stating, "I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands." *Id.* at 325. Concluding that "the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death," the Supreme Court vacated the death penalty as "the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death" which offended "the standard of reliability that the Eighth Amendment requires." *Id.* 472 U.S. at 341. *See also California v. Ramos,* 463 U.S. 992, 1011 (1983) ("advising jurors that a death verdict is theoretically modifiable, and thus not 'final,' may

incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers").

This Court applied the *Caldwell* rule in *Davis* to find reversal necessary based upon: (1) the trial court's *refusal* to tell the jury "its sentencing recommendation would be accepted by the judge and the sentence imposed accordingly;" and (2) the observance that "nowhere in the record does the trial judge refer to the jury's sentencing decision as anything more than just a recommendation." 306 S.C. at 250, 41 S.E.2d at 222.

Unlike the trial court in *Davis*, the trial judge here actually twice charged the jury that it would follow the jury's recommendation, firmly underscoring their responsibility. (App. 2865, 2881).[1] The charge is also completely consistent with established case law on this issue. *See State v. Sims*, 304 S.C. 409, 421-22, 405 S.E.2d 377, 384 (1991) (holding the instruction "whatever you recommend, will be the sentence that will be given to a defendant" informed the jury "that it was to make the ultimate decision as to [the defendant's] fate."); *State v. Cain*, 297 S.C. 497, 509-10, 377 S.E.2d 556, 562–63 (1988) (acknowledging the "death penalty statute in fact terms the jury's penalty phase verdict a 'recommendation'" and resolving no reversible error because the "judge's statement to the jury at the outset of the penalty phase . . . clearly conveyed the idea that the ultimate decision on punishment was the jury's")[2]; *State v. Middleton*, 295 S.C. 318, 325-26, 368 S.E.2d 457, 461 (1988) (concluding the instruction, "the ultimate punishment of the defendant will be in your hands if you as a member of the trial jury have found the defendant guilty" told the jury

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[1] "Jurors are presumed to follow the law as instructed to them." *See, e.g.,State v. Reyes*, 432 S.C. 394, 409, 853 S.E.2d 334, 342 (2020).

[2] Even Petitioner in his recitation of the procedure gives a nod to the wording of the statute and the controlling aspect of the "recommendation": "Based upon the jury's recommendation, Judge Couch sentenced petitioner to death on each count of murder." (Petition, p. 6).

it was vested with making a decision as to the defendant's fate); *State v. Bellamy*, 293 S.C. 103, 107, 359 S.E.2d 63, 65 (1987) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) ("The idea should be conveyed to the jury that its sentencing recommendation will be followed."); *State v. Linder*, 276 S.C. 304, 310-11, 278 S.E.2d 335, 338-39 (1981) ("To instruct the jury that it will recommend what sentence the convicted murderer will be given is not improper and does not mask the true nature of the jurors' responsibility at this phase of trial"). Notably, other jurisdictions where a statute similarly sets out the jury recommends and the judge imposes the sentence follow this same pattern. *See, for example, Brockman v. State*, 739 S.E.2d 332, 358 (Ga. 2013) *cert. denied* 134 S.Ct. 521 (2013) (finding, in the alternative, the procedurally barred claim was without merit where "it was clear from the charge that the recommendation would be binding on the trial court"); *Treadway v. State*, 924 N.E.2d 621, 639 (Ind. 2010) ("merely referring to the jury's determination as a 'recommendation'—the term used in the statute—did not run afoul of *Caldwell* because there was no intimation to the jury that its recommendation was 'only a preliminary step' and no suggestion that the jury was 'not responsible' for the ultimate sentence.").[3]

Further, Petitioner does not challenge the finding that this Court conducted the required S.C. Code § 16-3-25 (C) (1), as the direct appeal opinion reflects this Court plainly did. *Torres*,

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[3] There is a reason for the "recommendation" language to be used – the jury determines what the sentence should be, but only a court of appropriate jurisdiction may impose sentence. *See generally State v. Archie*, 322 S.C. 135, 138, 470 S.E.2d 380, 382 (Ct. App. 1996) (citing *State v. De La Cruz*, 302 S.C. 13, 393 S.E.2d 184 (1990)) ("the imposition of sentences is a judicial function"). *Cf. Salt Lake City v. Ohms*, 881 P.2d 844, 848 (Utah 1994) (act necessary to "enter final judgments and orders or impose sentence" considered "nondelegable core judicial function"). The limitation on that "core function" is found in the statute and was shared with the jury, *i.e.* if the jury found a statutory aggravating circumstance and "a recommendation of death is made, the trial judge shall sentence the defendant to death" or "a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment . . . ." S.C. Code Ann. § 16-3-20 (C).

390 S.C. at 626, 703 S.E.2d at 230. (*See also* App. 2941). The statutory provision is, by its terms, a review on appeal after sentencing. S.C. Code § 16-3-25. Petitioner has made no argument as to how this Court should construe the statute to allow unending review – none is apparent, nor should it be. *Accord State v. Motts*, 391 S.C. 635, 654, 707 S.E.2d 804, 813-14 (2011) (rejecting argument "a defendant's competency must continue to be evaluated up to the moment of execution" to ensure compliance with the Eighth Amendment); *see also Williams v. Ozmint*, 380 S.C. 473, 480, 671 S.E.2d 600, 603 (2008) ("Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice."). As to Petitioner's assertion the error should be deemed a "structural error" in such review, this Court has "flatly reject[ed] the suggestion that a violation of section 16-3-25(C)(1) precludes a harmless error analysis in all circumstances." *Bowman v. State*, 422 S.C. 19, 43, 809 S.E.2d 232, 245 (2018). At bottom, though, there must be error before there can be structural error. Here, the facts do not support error. *Ergo*, there could be no structural error.

Finally, as to the ineffective assistance claim, nothing demonstrates that counsel's failure to challenge the statutory language and/or charge was "outside the wide range of professionally competent assistance." *Strickland,* 466 U.S. at 690. (*See also* App. 4330, trial counsel's testimony that he was "accustomed to the nomenclature" and referencing "common practice" which sparked no need to challenge). Given the established state of the law, counsel had no reason the challenge the instruction. Even assuming *arguendo* that counsel's failure to challenge the "as applied constitutionality" could constitute *Strickland* deficient performance, Petitioner has not shown that had counsel challenged the recommendation language, the challenge would have been successful because, as shown above, the jury was correctly instructed the responsibility was theirs. Critically, there could be no unfairness in the sentencing proceeding because any reasonable juror would

understand that the responsibility of selecting either life imprisonment or death rested with the jury and the jury alone.

In sum, the record well-demonstrates that the jury was adequately informed it would determine the appropriate sentence, and the judge would impose their sentence. The trial court not only told the jury at the outset of the penalty phase that he would follow their recommendation and impose the sentence they chose, but he also clearly told them it would be their decision alone during pre-trial voir dire. Petitioner has shown no error – in law or fact – to support his argument that the PCR judge erroneously denied relief. Petitioner has failed to show that this issue merits certiorari review. This Court should denied the petition as to the corresponding question presented.

II. The PCR judge did not err in rejecting a claim of ineffective assistance of counsel for failure to investigate and present evidence of two genetic disorders when the evidence supporting the diagnosis was determined to be "so damaged and questionable" that it was of insufficient value to show *Strickland* prejudice.

Petitioner complains that Judge Cole erred in finding counsel was not deficient and Petitioner was not prejudiced by failing to develop mitigation evidence of two alleged genetic defects, 22q11 Deletion Syndrome and Prader-Willi Syndrome. (*See* Petition 52-53). Petitioner catalogues briefly Judge Cole's careful review of the evidence presented by both Petitioner and the State. (*See* Petition 52-53). The record, in fact, shows even more detailed testimony presented and that the presentation produced a stark division: conflicting testimony on the very heart of the issue, whether Petitioner actually has these genetic conditions. Judge Cole, after careful consideration of the basis for those opinions, and, in light of a negative test result, concluded Petitioner failed to show that he actually has the two genetic conditions alleged. With this pivotal decision made, Judge Cole resolved that Petitioner could not carry his burden of showing

prejudice. (App. 5329).[4] The record provides ample factual support for Judge Cole's findings and further shows Judge Cole appropriately applied the correct legal analysis. Consequently, Petitioner has failed to show an issue that warrants certiorari review.

Mitigation Case at Trial

To place the new evidence in context, it is helpful to first consider the mitigation case presented at trial. It was by no means cursory. The defense offered testimony from family members, social workers, a corrections expert and mental health professionals. The defense presented evidence that Petitioner – who was diagnosed as bipolar at age seven – had a troubled childhood and struggled with mental health issues and substance abuse. (*See* App. 2489, Shackelford (mental health treatment at early age); p. 2536, Lisa Lamb (Petitioner's mother on family and background); p. 2586 Pamela Gordon (Petitioner's aunt on Petitioner requesting help at early age); p. 2594, Dr. Alex Morton (psycho-pharmacology aspect on medication, symptoms and other drugs – discussing the problems associated with Petitioner's substance abuse and self-medication, particularly with respect to alcohol, methamphetamine and Clonopin[5]); p. 2663 Dr. Donna Schwartz-Watts (background, symptoms and diagnosis of bipolar disorder - also references testing by neuro-psychologist, Dr. Brawley); p. 2732 Dr. Marti Loring (psychosocial assessments and genogram). However, Petitioner's complaints rest on the allegations counsel missed evidence

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[4] Petitioner spends a hefty portion of his argument on "red flags" and alleged deficiency in investigation. (*See* Petition, pp. 27-30; 54-61). This is irrelevant to determining if the PCR judge erred as the issue was resolved on lack of prejudice. To the extent Petitioner implicitly seeks to have this Court make fact-findings on same, that exceeds and offends this Court's settled appellate standard of review.

[5] Clonopin is a form of Benzodiazepine used to treat anxiety similar to Xanex or Valium. (App. 2602).

on genetic conditions. The problem for Petitioner is that the evidence presented in support of these conditions was not credible or of any significant weight in the prejudice analysis.

Petitioner's PCR Case on Genetic Conditions

At the PCR evidentiary hearing, Petitioner presented the testimony of Jack Rary, Ph.D., who diagnosed Petitioner with Prader-Willi Syndrome (PWS) based on a conglomeration of dysmorphic features, including the following: truncal obesity, small and low set ears that are rotated posteriorly, almond-shaped eyes, a narrow forehead, short fingers/small hands, female escutcheon, and a small phallus with a very small urethral opening. (App. 3429-3448). Dr. Rary conceded that the DNA methylation test administered to Petitioner – *which detects over ninety-nine percent of the genetic defects that cause PWS* – was negative. (App. 3449-3459; 3483-3484; Petitioner's Ex. 16). Nevertheless, Dr. Rary testified that the negative methylation test did "nothing at all" to reduce his confidence in his PWS diagnosis based on dysmorphic features alone. (App. 3449-3450).

Dr. Rary also diagnosed Petitioner with 22Q11 Deletion Syndrome (22Q11 DS) based on a chromosomal microarray test that revealed a deletion of roughly 90,000 base pairs[6] from Petitioner's chromosome 22. (App. 3461-3471). Dr. Rary testified that the deleted 90,000 base pairs included both the proline dehydrogenase gene (PRODH) and "a big area of the critical DiGeorge area." (App. 3461-3462). Dr. Rary further testified that, upon seeing that Petitioner was missing the PRODH gene, he ordered a test of Petitioner's proline levels, and that test showed that Petitioner's "proline level is way high, tremendously elevated, as opposed to the normal

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[6] 1,000 base pairs equals 1 kb. Petitioner's deletion of 90,000 base pairs is equivalent to a 90 kb deletion. For the Court's reference, the most common deletion for individuals with 22Q11 DS is 3,000,000 base pairs (3,000 kb). Genetics Home Reference – 22q11.2 deletion syndrome, http://ghr.nlm.nih.gov/condition/22q112-deletion-syndrome (last visited Aug. 31, 2015, attached). By comparison, Petitioner's deletion is approximately 3% of that.

midrange . . . ." (App. 3472-3473). Accordingly, Dr. Rary diagnosed Petitioner with hyperprolinemia. (App. 3429; 3472-3473).

Further, Petitioner presented a neuropharmacologist (Dr. Lipman), to opine the strong antipsychotic drugs Petitioner received as a child could cause atrophy or damage to the frontal lobe; a neuropsychologist (Dr. Schacht) and a neuropsychologist (Dr. Wood) who testified of cognitive impairment and/or general behaviors. Notably, each was asked to opine on consistency with the new theory of genetic conditions (though Dr. Wood had not even heard of 22q11 until this action). (*See*, for example, App. 3942-47; 3703-12)

The State's Response to Petitioner's Case on Genetic Conditions

At the conclusion of the portion of the PCR evidentiary hearing held in April 2014, this Court allowed Respondent time to find its own genetics expert to counter the testimony of Dr. Rary. On June 30, 2015, Respondent presented the testimony of Ed Spence, M.D., essentially to respond to the diagnoses of PWS, 22Q11 DS, and hyperprolinemia.[7]

Dr. Spence opined that Petitioner did not have PWS. (App. 4456). He explained that, with the advent of genetic testing, a PWS diagnosis can no longer be made based on the presence of dysmorphic features alone. (App. 4456-4459; 4491). Instead, for a genetics doctor, certain

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[7] Petitioner appears to question the time allowed the State for fair response. (*See* Petition, p. 47). However, the State placed the reason for the requested additional time on the record. (*See* App. p. 4441-44). The State received notice of a purported Prader-Willi Syndrome diagnosis in Petitioner's April 7, 2015 amendment, before the April 14, 2015 hearing began. (App. p. 4441, line 23-4442, line 3). The State's attorney detailed the attempt to find an expert who could testify but found only experts who Petitioner had consulted (though these experts had not testified nor, clearly, was the State aware they had been contacted and/or consulted). Further, after locating its own witness, the State accommodated Petitioner's request for a deposition, which Petitioner then used during the hearing. Had Petitioner been able to provide the allegations and/or discovery sooner, a break between the proceedings would likely not have been necessary; however, the additional time as requested by the State was far from unreasonable based on the established facts of record. After all, not only does the need for fairness extend to both parties in the litigation, the adversarial system is protected which in turn promotes reliability.

dysmorphic features (such as those found in people with PWS) serve as an indication that genetic testing is needed. (App. 4451; 4455). Dr. Spence testified that the methylation test is "the definitive test" for the detection and diagnosis of PWS. (App. 4458). Dr. Spence also pointed to literature regularly relied upon by genetics doctors called GeneReviews, which explains the diagnosis and testing for PWS as follows:

> Consensus clinical diagnostic criteria are accurate, but the mainstay of diagnosis is DNA methylation testing to detect abnormal parent-specific imprinting within the Prader-Willi critical region (PWCR) on chromosome 15; this testing . . . detects more that 99% of affected individuals. DNA methylation-specific testing is important to confirm the diagnosis of PWS in all individuals, but especially in those who have atypical findings or are too young to manifest sufficient features to make the diagnosis on clinical grounds.

Prader-Willi Syndrome – GeneReviews p. 1, Respondent's Ex. 13.[8] According to Dr. Spence, because Petitioner's methylation test was negative, he does not have PWS. (App. 4458).

Dr. Spence further noted the absence of certain dysmorphic features or characteristics that would usually be found in someone with PWS. For example, Dr. Spence did not see any notations of hypotonia (poor muscle tone, floppiness) in Petitioner's medical records from infancy and early childhood. (App. 4457). A fact that Dr. Rary also agreed with. (App. 1447-1448). Hypotonia is found in 100% of infants with PWS. PWS – GeneReviews p. 6, Respondent's Ex. 13 ("Infantile hypotonia is a nearly universal finding . . . ."); *see also* App. 4454-4455). Additionally, Dr. Spence opined that Petitioner's hand measurements were not small. (App. 4457).

As to the 22Q11 DS diagnosis, Dr. Spence conceded that the microarray showed a small deletion on Petitioner's chromosome 22, but he distinguished that small deletion from the typical

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[8] GeneReviews further states that "[c]onsensus diagnostic criteria for Prader-Willi syndrome (PWS) developed in 1993 have proven to be accurate and continue to be useful for the clinician. However, **confirmation of the diagnosis requires molecular genetic testing**, which was not widely available when the criteria were developed." PWS – GeneReviews p. 2, Respondent's Ex. 13 (emphasis added) (internal citations omitted).

deletion associated with 22Q11.2 Deletion Syndrome. (App. 4463-4464). Dr. Spence explained that the typical deletion seen in 22Q11 DS is approximately 2,500 kb while Petitioner's deletion is only 91 kb. (App. 4464). Furthermore, Petitioner's deletion is on a "fringe region" of chromosome 22, not the typical region. (App. 4464). Dr. Spence confirmed that Petitioner is missing his PRODH gene and a portion of the DiGeorge area, but he would not diagnose Petitioner with 22Q11 DS—rather, he would characterize Petitioner's deletion as a variant deletion "on the edge or fringe of the critical region." (App. 4463-4468).

Though the features of 22Q11 DS are widely variable, a large percentage of individuals diagnosed with 22Q11 DS have the following: heart defects (approximately 75%), intellectual disability (70–90%), and palatal abnormalities (69%). (App. 4460-4461); 22q11.2 Deletion Syndrome – GeneReviews p. 1, Respondent's Ex. 14. Though no evidence appeared to support identification of heart defects or cleft palate in Petitioner's records, Dr. Spence admitted on cross-examination that he did not have all the medical records. (App. 4469-4470). Even so, no such record was produced for review, the question was simply asked. Dr. Spence testified that he would expect the absence of Petitioner's PRODH gene to result in elevated proline levels, but the testing of Petitioner's proline levels showed only a minor elevation. (App. 4465). Accordingly, he characterized Petitioner's hyperprolinemia as "minor." (App. 4465).

Prader-Willi Syndrome

Dr. Spence's testimony that Petitioner does not have PWS, as Judge Cole found, was credible. Moreover, the negative methylation test supports Dr. Spence's opinion, particularly since both experts agree that this test detects over ninety-nine percent of the occurrences of PWS.[9]

[9] In his deposition, Dr. Spence described the individuals in the remaining less than one percent:

Petitioner's Ex. 16. And Dr. Spence provided the synopsis of PWS from GeneReviews, a source regularly relied upon by doctors who practice in the field of genetics, which supports his testimony that because the methylation test was negative, Petitioner does not have PWS.[10] Furthermore, Dr. Spence opined that Petitioner does not even have the dysmorphic features that are characteristic of PWS. There was no indication that Petitioner had hypotonia as an infant or young child, a feature found in one hundred percent of individuals with PWS. And though Petitioner is short, his other features were fairly normal when compared with the average measurements set forth in Smith's Recognizable Patterns of Human Malformation:

> His intercanthal distance was three centimeters, the distance between the eyes. And that was 50th percentile. And this is using those photographs where they use that metal tape measure, and I did the best I could with what I had. The intercanthal distance between the outside corners of the eye was 8.4 centimeters, which was 25th percentile. The ear length was 5.9 centimeters, which is 25 to 50th percentile, but very normal. Total hand measurement was 17.3 centimeters, which was 25th to 50th percentile. The palm length was 10.5, which was 75th percentile, and the middle finger length was 6.8, which was 10th percent percentile for an adult.

App. 4983-5024. Thus, Dr. Spence was able to show that even the purportedly dysmorphic features on which Dr. Rary bases his PWS diagnosis are not that abnormal at all.

Dr. Rary's testimony stands in stark contrast to Dr. Spence's—not only because of the different conclusion reached, but also because of the absence of any supporting sources to confirm his conclusion. Indeed, Dr. Rary's diagnosis of PWS based solely on Petitioner's clinical

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> I would assume that they are individuals who have typical features of Prader-Willi Syndrome and the physician is convinced that they have the diagnosis, but they can't find the test that's positive. Given that the number is so small, it makes we [sic] wonder if it's really some other diagnosis and not truly Prader-Willi Syndrome . . . .

App. 5006-5007.

[10] *See also* App. 3714-15 (Dr. Schacht confirming physical examination diagnosis was prior to development of test).

presentation despite a negative methylation test is incongruous with the literature that has been provided to this Court regarding the diagnosis of PWS. While clinical diagnostic criteria were once all that was available to clinicians to diagnose PWS, GeneReviews makes it clear that the DNA methylation test is the touchstone for the diagnosis of PWS today.[11] PWS – GeneReviews pp. 1-3, Respondent's Ex. 13. Though Dr. Rary testified that he most often used OMIM (Online Mendelian Inheritance in Man) in his practice,[12] he did not point to anything in particular—from

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[11] During his deposition, Dr. Spence described the transition that the field of medical genetics has undergone with the advent of genetic testing:

> Q. Would it be fair to say that genetic—the field of genetics has a lot of art and not just science involved in it in terms of how you try to come to a conclusion of what a person actually suffers from?
>
> A. I think the art of genetics in recognizing features and determining which tests to order has been more formalized with the improvement in our testing in the last 25 years. People jump to conclusions about diagnoses based on physical features in the past that were found to be incorrect when laboratory testing was available to provide a more definitive answer. In many cases, if someone has a laboratory result that gives you the answer, then that can clarify the physical features that you see. But I think doing diagnostic evaluations without the genetic testing or ignoring the genetic testing results is not the way to practice and that there's more science now than just the art of genetics.

(App. 4994).

[12] When asked on cross-examination what sources Dr. Rary regularly relied on, he responded:

> The one I go by most often is on the—what we call OMIM, and it's an N.I.H. sponsored site that gives a full description and history of every known genetic syndrome. And if you look at the 22q DiGeorge it will have a complete description of all the clinical anomalies, all the dysmorphic features. Same thing for Prader-Willi and all of the clinical tests that are available.

(App. 3488-3489). In his deposition, Dr. Spence described OMIM differently:

> OMIM started out as a—just a listing of publications related to a specific genetic condition or a gene. And they are simply listed in summary of occurrence. They often are—can be broken down into clinical aspects, psyo genetic [sic] aspects,

the OMIM entry for PWS or from any other source—to support his diagnosis of PWS in the face of a negative methylation test.

22Q11.2 Deletion Syndrome/Hyperprolinemia

Dr. Spence's testimony that Petitioner has a deletion on his chromosome 22 but that the deletion is too small for Petitioner to have 22Q11.2 Deletion Syndrome is similarly credible. Clearly, the microarray supports the testimony by both experts that Petitioner has a deletion of 91 kb from his chromosome 22. Petitioner's Ex. 17. However, whereas Dr. Spence noted that Petitioner's deletion was only a small fraction of the standard deletion for 22Q11 DS, and he characterized the deletion as "on the fringe," Dr. Rary admitted that he did not know how significant the deletion of Petitioner's DiGeorge region was:

> I honestly did not look at this to see how much. I would guess quite a significant amount because the PRODH gene probably is only three or four thousand base pairs in length. So most of this 90,000 deletion would be in the DiGeorge area. So a large portion of the DiGeorge gene is deleted in this case.

(App. 3465). Nevertheless, Dr. Rary testified it was "absolutely" fair to characterize the deletion as 22Q11 DS. (App. 3465).

> molecular aspects. They may list particular mutations or cases and how the literature summarizes those. But it's a very cursory, very limited cataloging of articles related to a topic and how they might be relevant. It is not as robust and organized like gene reviews in that it doesn't always give the—a very detailed clinical synopsis. It doesn't give a way to evaluate, treat and manage patients, and it doesn't provide as much—nearly as much detail. But it's a good source for looking up genetic conditions, looking up some highlights . . . especially for uncommon conditions that may not have a gene review.

(App. 5004). Though Petitioner did not submit the OMIM entries for PWS and 22Q11 DS to this Court, they are readily available online. *See* Attached OMIM Entries. From Respondent's review of the OMIM entries for these genetic conditions, it appears that OMIM provides (as Dr. Spence testified) more of a review of the research that has been done on a particular genetic condition than a comprehensive summary of the features and diagnostic criteria for the condition (as Dr. Rary testified).

Dr. Spence, on the other hand, explained that Petitioner's deletion is "vastly smaller than the classic" deletions seen in 22Q11 DS. (App. 4999). He also testified in his deposition that Petitioner's "deletion [is] on the very end of that whole critical region. And it does not include the genes that are most typically involved in the classic deletion syndrome." (App. 4999). Dr. Spence further noted that, while the physical features of 22Q11 DS are widely variable, he did not see those features in Petitioner. (App. 4999). Again, the literature provided by Dr. Spence supports his opinion. (App. 5123-5151).

Both experts agreed that Petitioner's proline dehydrogenase gene is included in the deletion region on chromosome 22. However, they disagree on the import of that deletion. Dr. Spence testified that Petitioner only had mild hyperprolinemia. (App. 5000). He explained that the standard level for proline is around "the low 30s." (App. 4465). He further explained that Petitioner's level was "in the 40s," but those with severe hyperprolinemia have proline levels "in the 60s and above." (App. 4465). In contrast, Dr. Rary categorized Petitioner's hyperprolinemia as "tremendously elevated" though he did not provide any numbers to compare Petitioner's proline level to. (App. 3472).

The PCR Court's Treatment of the Issue

In light of the above summarized testimony, Judge Cole considered whether Petitioner had shown that he "suffers the genetic condition(s) upon which he bases his request for relief." (App. p. 5324). Judge Cole noted the variety of conflict and that current medical literature and standards supported Dr. Spence's opinions. (*See* App. 5329). In particular, Judge Cole noted the PCR testimony that supported:

- "with the advent of genetic testing, a diagnosis can no longer be made based on the presence of dysmorphic features alone,"

- "the methylation tests is the 'definitive test' and both Petitioner's expert and the State's expert agree Petitioner's test was negative;"

- "the absence of certain dysmorphic features or characteristics that would usually be found in someone with PWS" such as "hypotonia (poor muscle tone, floppiness) in [Petitioner's] medical records from infancy and early childhood" and Petitioner's expert agree there was not such indicators;

- measurements relied upon simply did not fall outstand the standards;

- the small deletion that was present that could be connected to 22Q11, was not only marginal but in a "fringe region," significantly under the typical deletion for diagnosis ;

- Petitioner neither presented not could point to any record showing other conditions that could be seen in individuals with 22Q11 DS – such as heart defects, intellectual disability, and palatal abnormalities.

(App. 5325-5326).

Judge Cole then made the specific and supported credibility determinations necessary to apply the *Strickland* test:

> Dr. Spence's testimony that Applicant does not have PWS was credible. Moreover, the negative methylation test supports Dr. Spence's opinion, particularly since both experts agree that this test detects over ninety-nine percent of the occurrences of PWS. Applicant's Ex. 16. And Dr. Spence provided the synopsis of PWS from GeneReviews, a source regularly relied upon by doctors who practice in the field of genetics, which supports his testimony that because of methylation test was negative, Applicant does not have PWS. Furthermore, Dr. Spence opined that Applicant does not even had the dysmorphic features that are characteristics of PWS. There was no indication that Applicant had hypotonia as an infant or young child, a feature found in one hundred percent of individuals with PWS. And though Applicant is short, his other features were fairly normal when compared with the average measurements set forth in Smith's Recognizable Patterns of Human Malformation….
> …
> Dr. Rary's testimony stands in stark contrast to Dr. Spence's - not only because of the different conclusion reached, but also because of the absence of any supporting sources to confirm his conclusion. Indeed, Dr. Rary's diagnosis of PWS based solely on Applicant's clinical presentation despite a negative methylation test is incongruous with the literature that has been provided to this Court regarding the diagnosis of PWS. While clinical diagnostic criteria were once all that was available to clinicians to diagnose PWS, GeneReviews makes it clear that the DNA methylation test is the touchstone for the diagnosis of PWS today. PWS - GeneReviews pp. 1-3, Respondent's Ex. 13. Though Dr. Rary testified that he most

> often used OMIM (Online Mendelian Inheritance in Man) in his practice, he did not point to anything in particular - from the OMIM entry for PWS or from any other source - to support his diagnosis *of* PWS in the face of a negative methylation test.

(App. 5327-5328).

Judge Cole likewise expressly detailed his credibility analysis on the remaining conditions, 22q11 and Hyperprolinemia. (App. 5328). He noted both experts relied on a "microarray" showing merely "a deletion of 91 kb" at the relevant site. (App. 5328). Again, Judge Cole considered the opinions in light of the relevant and current medical standards. He resolved that the literature supported Dr. Spence's position that not only was the deletion "vastly smaller" than normally seen in the syndrome, but also that it was in area near the edge of the "critical region" and did not affect "the genes that are most typically involved" and also the absence of notable "features" connected to the condition. (App. p. 5328).

Further, Judge Cole fairly noted that both experts observed a deletion demonstrating hyperprolinemia. (App. 5328-5329). However, he also noted Dr. Rary's vague testimony indicating a "tremendous elevation," while Dr. Spence presented the actual numbers of results and rating scale to demonstrate the condition was "mild." (App. 5329). Judge Cole concluded:

> Dr. Spence's opinion that Applicant does not have 22Qll DS is more credible than Dr. Rary's opinion that he has that syndrome,. particularly since Dr. Spence explained his position and pointed to literature in support thereof, and Dr. Rary failed to consult or provide such literature and could only guess as to the significance of the deletion on Applicant's chromosome 22. Likewise, Dr. Spence's opinion that Applicant's hyperprolinemia is "mild" stands in stark contrast to Dr. Rary's opinion that Applicant's proline levels were "way high" and again, Dr. Spence is more credible on this point as he provided outside support for his opinion.

(App. 5329).

Judge Cole resolved Petitioner failed to show "prejudice in [counsel] failing to discover and present this additional evidence would could show very little relevant evidence…." (App. 5329). He expressed the weak link to a genetic factor to character:

> …the value of the evidence as to character of the defendant or circumstances of the crime would rest on misleading the fact finder under the label of science. That would be improper. Not all evidence offered by a capital defendant need be accepted, nor should it be if the goal is a fair and reliable process for all. see *Lockett v. Ohio,* 438 U.S. 586, 604 n. 12 98 S.Ct. 2954 (1978) (acknowledging the continuing "traditional authority" of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.") …

(App. 5330).

He concluded "[t]he evidence here certainly could be offered at a trial, but again its worth is so damaged and questionable that [Petitioner] cannot carry his burden of showing *Strickland* prejudice." (App. 5330).

Analysis:

The record well-supports the PCR court's critical finding of facts and shows no error in the application of the Strickland prejudice test.

Even though *Strickland* establishes a two-part test, *Strickland* also sets out that "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697. Since "[t]he object of an ineffectiveness claim is not to grade counsel's performance," no specific ruling on deficiency is required. *Id.* Rather, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*

In the petition to this Court, Petitioner presents a lengthy discussion of unrelated cases, (*see* Petition, pp. 54-60), which stands for a single principle: an attorney must make a reasonable

investigation. *Owens v. Stirling*, 967 F.3d 396, 413 (4th Cir. 2020) ("the Court's cases indicate that the investigation need only be *reasonably* thorough"). While that principle holds true, the variety of facts and circumstances offer only general aid as each case turns on its own facts and circumstances as to whether failing to investigate and present certain evidence is sufficiently prejudicial to warrant resentencing relief. *See Shinn v. Kayer,* 141 S. Ct. 517, 526 (2020) ("because the facts in each capital sentencing case are unique, the weighing of aggravating and mitigating evidence in a prior published decision is unlikely to provide clear guidance about how a state court would weigh the evidence in a later case"). Consequently, the details of unrelated cases are not particular helpful,[13] and even less so where the only issue resolved below is the lack of *Strickland* prejudice. Here, unlike some of the stark examples in the petition, the record shows that counsel investigated and presented a robust case in mitigation.[14] The record also shows that among the various expert testimony presented at sentencing, there was not a presentation on genetics. Judge Cole did not consider or decide on whether there was *Strickland* deficiency in not obtaining genetic

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[13] The cases do, however, lay a groundwork useful in this way: the cases Petitioner cites (and others) present a series of guideposts in determining deficient performance, if that should be a question to be reviewed. If counsel fails to conduct any investigation, that is most likely going to be deficient, *see Williams v. Taylor*, 529 U.S. 362, 395 (2000) and *Porter v. McCollum*, 558 U.S. 30, 40 (2009) as well as decisions based on inattention rather than strategy, *see Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). If counsel fails to investigate further, ignoring clear leads, that may very well be deficient, *see, Wiggins v. Smith*, 539 U.S. 510, 525 (2003) and *Rompilla v. Beard*, 545 U.S. 374, 375 (2005), as well as decisions made on legal misunderstandings on admissible, *Rosemond v. Catoe*, 383 S.C. 320, 329, 680 S.E.2d 5, 10 (2009). However, if counsel conducts reasonable investigation, even if more could have been discovered, the possibility of deficiency is remote, *see Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) and *Stone v. State*, 419 S.C. 370, 798 S.E.2d 561 (2017). Those guideposts are simply not necessary here where the lack of prejudice controlled the denial of relief.

[14] *See generally Dunn v. Reeves*, 141 S. Ct. at 2411 (2021) ("Counsel's initial enthusiasm to collect [the defendant's] records and obtain funding hardly indicates professional neglect and disinterest.").

testing. Judge Cole resolved this issue on lack of prejudice based upon the presentation Petitioner made in PCR.

Based on that presentation, Petitioner was obliged to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, at 694. "When determining if want of mitigation evidence resulted in prejudice," this Court will consider "whether the 'mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [the defendant's] culpability.'" *Rosemond,* at 326-27, 680 S.E.2d at 9. "[T]he likelihood of a different result if the [mitigation] evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing." *Rompilla, at* 393 (quoting *Strickland,* at 694) (alteration in original). Thus, "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.' " *Sigmon v. State*, 403 S.C. 120, 127-28, 742 S.E.2d 394, 398 (2013) (quoting *Strickland,* at 695). *See also Jones v. State*, 332 S.C. 329, 341, 504 S.E.2d 822, 828 (1998) (same).

While a petitioner need not show that he would not have been sentenced to death, the Supreme Court has resisted all attempts to lessen the *Strickland* burden to a "nothing to lose" catchall. *See Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). "The *Strickland* standard is 'highly demanding.' " *Shinn v. Kayer*, 141 S. Ct. 517, 522–23 (2020) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). A petitioner must show "a reasonable probability" *i.e.,* one that is "substantial" one, not just a possibility of an effect on the proceeding. *Id*. (quoting *Cullen v. Pinholster*, 563 U.S. 170 (2011)). "The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the

standards that govern the decision." *Strickland,* at 695. Essentially, to show *Strickland* prejudice, it was Petitioner's burden to show not just that some avenue of information was not taken in investigation or presentation, but that it was unreasonable not to investigate a certain line or fact of mitigation.

As Judge Cole found, the evidence as presented in PCR could have been presented in mitigation, (App. 5330), but, as clearly established law dictates, he then looked beyond the fact that something else could have been presented to critically review and assess the worth and weight of that information. That is the juncture where Petitioner's case failed: "its worth is so damaged and questionable that [Petitioner] cannot carry his burden of showing *Strickland* prejudice." (App. 5330). *See generally Dunn v. Reeves*, 141 S. Ct. 2405, 2411-12 (2021) (noting counsel could consider "debatable methodologies would undermine credibility with a local jury").[15] Even so, Petitioner argues the evidence would "assist the jury in understanding the 'why' of petitioner's behavior," craving reference to the *Williams v. Stirling* case from the Fourth Circuit. (Petition, p. 64). Petitioner's reference to *Williams* shows the distinction of his case, not a similarity.

In *Williams*, the Fourth Circuit resolved that fetal alcohol syndrome evidence as presented during the PCR case, "could have provided to the jury evidence of an overarching neurological defect that *caused* Williams' criminal behavior." *Williams*, 914 F.3d at 315 (4th Cir.). Not so here, at least according to the science upon which the genetic theory is based. *See* Deborah W. Denno, *Revisiting the Legal Link Between Genetics and Crime, Law & Contemp. Probs.*, Winter/Spring

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[15] Petitioner appears to suggest in note 8, Petition p. 53, that the "sources" relied upon by a proffered expert are irrelevant in the *Strickland* analysis. He cites to *Sears v. Upton*, 561 U.S. 945, 949-50 (2010). However, the reference in *Sears* goes to questioned sources of *facts* within or supporting an opinion, not sources of *current and accepted scientific principles. See* 561 U.S. at 960-62. His reliance on *Sears* is misplaced. Taken to the extreme, Petitioner suggests that if an expert says it, there is a reasonable probability of a different result. That is not correct. *Strickland* still controls.

2006, at 209, 213 (belief that genes determine violence, "however entrenched in the public's mind, has no scientific support. Rather, an overwhelming amount of evidence shows that 'environments influence gene expression.'"). Further, the Fourth Circuit in *Williams* was critically wrong in the prejudice analysis, having misconstrued how South Carolina conducts sentencing. The Fourth Circuit noted "the State only presented one aggravating *factor*" that the panel considered to be the "*solitary aggravating evidence*" to be "weighed against the totality of the mitigating evidence…." *Id*. at 318-19 (emphasis added). This Court is aware that we are not a weighing state, and once eligibility is determined, selection allows the jury to consider any and all circumstances presented by the evidence. *See, e.g., Jones*, 332 S.C. at 333 n. 1, 504 S.E.2d 822, 824 n. 1 (1998) ("the type of 'weighing' we have disapproved of is that which requires a jury to determine life or death on the basis of the numerical weight of the aggravating and mitigating circumstances. The 'weighing' that is permissible is the *considering* of any mitigating and aggravating circumstances."). That is a critical limitation to following *Williams* in a prejudice analysis.

Further still, the *Williams* opinion has apparently sparked limited persuasion in other jurisdictions. The Ninth Circuit, asked to follow *Williams*, declined to do so. Its logic shows not only the tenuous support *Williams* could afford here, but also that should the link be attempted, there is a dangerous double-edged sword the evidence creates that should be considered:

> … the petitioner in *Williams* was prejudiced because his lawyers presented a much weaker-than-available mitigation argument that was insufficient to overcome an also weak aggravating argument that clearly troubled some jurors. That was not the situation here. We also note that our conclusion is consistent with the Fifth Circuit's in *Trevino v. Davis*, 861 F.3d 545 (5th Cir. 2017), *cert. denied*, —— U.S. ——, 138 S. Ct. 1793, 201 L.Ed.2d 1014 (2018), in which that court rejected an ineffective assistance of counsel claim relating to the failure to present mitigating evidence of an FASD diagnosis because the evidence would have been outweighed by what the court viewed as very substantial aggravating evidence. *Id.* at 549-51.

Floyd v. Filson, 949 F.3d 1128, 1141 (9th Cir.), *cert. denied sub nom. Floyd v. Gittere*, 141 S. Ct. 660, 208 L. Ed. 2d 271 (2020).[16]

Moreover, trial counsel did not leave the jury without an explanation or context for the actions. Counsel presented medical and social experts to explain background and mental health diagnosis and function. In sentencing, the experts noted that with proper medication Petitioner's dangerous aspects could be controlled. (*See* App. 2705-2706, testimony confirming that "Tony's bipolar and his other psychiatric problems" treatable within prison and noting "many inmates with bipolar disorders … are managed"; (App. 2639) (testimony that Petitioner had "nor really received any psychiatric medicine since he was" 16 years old, and "prognosis is quite good that he would respond"). Further, the defense expert testified at sentencing, after neuropsychological testing, that "there as no evidence of brain damage" and Petitioner's "IQ is still stable. He's of average intelligence" even with his history of significant drug use. (App. 2690). And there is no doubt that Petitioner seeks to use the testimony to show Petitioner could not control his actions. (*See* Petition, p. 27, sentenced to death after jury heard Petitioner was a "violently dangerous man who possessed the ability to alter his behavior, but he simply refused to do so." and App. 67, show "a 'why' ").[17]

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[16] Even the *Williams* panel noted if counsel may wish not to present such evidence specifically because the evidence may show the individual more dangerous and uncontrollable: "…as the State correctly notes, a FAS diagnosis can be a double-edged sword, given that it may also indicate future dangerousness to the jury. Consequently, we also cannot presuppose FAS evidence must be presented or will prevail in any further proceedings. We conclude only that *if* counsel had chosen to present this evidence, the jury *may have* returned a different verdict. Nothing in this opinion should be taken to conclude that counsel, after a proper investigation, is compelled to present FAS evidence in another sentencing proceeding." 914 F.3d at 318 n. 8.

[17] Interestingly enough, defense counsel used that same phrasing to explain to the jury that in sentencing they would show "why Tony Torres did this" arguing very similarly that Petitioner "essentially could not or did not control himself." (App. 2331-32). The goal was met in presentation by the testimony of the defense witnesses. That the strategy was not successful does not mean it was unreasonable. *See, e.g., Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995) ("Standing

Of course, that is neither a correct nor fair assessment of the presentation – the defense presented evidence that Petitioner had been denied the psychiatric tools and proper medication needed, but when correctly assessed and treated, without the abuse of street drugs included, he would be manageable, *i.e.,* he would be a lesser threat for dangerousness in the future. [18] Even so, and of no little significance, unlike the PCR evidence presented in *Williams*, the PCR court heard testimony two diametrically opposed opinions – but only one was consistent with medical standards and a controlling test result.

"In [PCR] proceedings, the burden of proof is on the applicant to prove the allegations in his application." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). Credibility determinations are critical to fact-finding which is part and parcel of the consideration of whether the applicant has shown *Strickland* prejudice. *See, for example, Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521–22 (1993) (relying on PCR judge's assessment of witness testimony in PCR). The PCR judge is the fact-finder in these collateral proceedings, and credibility determinations are inherent in the factual determinations necessary to properly assess the offered evidence. *See, e.g., Wilson v. Ozmint*, 352 F.3d 847, 858 (4th Cir. 2003), *opinion amended on denial of reh'g,* 357 F.3d 461 (4th Cir. 2004) ("Credibility determinations, such as those the state PCR court made regarding

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alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel.")

[18] Recall that the prosecution presented in sentencing a corrections facility video "suggesting future dangerousness" – a video that was contested in the direct appeal and in the PCR. (*See* App. 2907-2909; 2940-41; and 3003). As Petitioner argued on appeal, "[a] capital defendant's future dangerousness and his adaptability to life in prison are always critical issues at capital sentencing," citing *Skipper v. South Carolina*, 476 U.S. 1 (1986) and *State v. Burkhart,* 371 S.C. 482, 640 S.E.2d 450 (2007). (*See* App. 2908). (*See also* 2940-41, where this Court resolved the video was correctly admitted as relevant to "adaptability to prison life, … a legitimate concern in the sentencing phase of a capital case…."). The fact that this evidence showing Petitioner's violence in a "routine prison situation" is a part of this particular record logically enhances the need to explain that with proper treatment and care, he can be safely controlled.

Morgan, are factual determinations."). In practice, such findings may be critical in the issue presented in PCR, and, like other fact determinations, will rarely be disturbed on appeal. *See, e.g., Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (appellate courts afford "great deference to a PCR judge's findings where matters of credibility are involved").

To the extent Petitioner suggests that there is some suspension of the need to assess credibility because a juror may have weighed the evidence differently, that is contrary to *Strickland.* Again, a petitioner is not entitled to relief simply because he presents different evidence in his collateral proceedings, nor is it sufficient "for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Not only is the credibility finding necessary to resolve competing evidence generally, but it was also necessary to the required prejudice analysis. *Strickland* requires the fact-finding to reweight the totality of the evidence in context of the case. Here, the evidence in aggravation was not slim. Respondent notes though only one statutory aggravating circumstances is necessary to allow the jury to consider death, six[19] were returned: (1) murder committed while in the commission of criminal sexual conduct; (2) murder committed during commission of burglary; (3) murder committed during commission of robbery while armed with a deadly weapon; (4) murder committed during commission of larceny with use of a deadly weapon; (5) murder committed for the purpose of receiving money or a thing of value; and (6) murder of two or more persons pursuant to one scheme or course of conduct. (App. 2886-2887; 2825). Apart from this eligibility determination, the jury had a wealth of information to make its sentencing determination.

[19] If one applies the flawed weighing analysis in *Williams* to this case, the great number of statutory aggravating circumstances, found beyond a reasonable doubt, is instantly distinguishing and would undoubtedly tip the scales in the other direction rather than in Petitioner's favor.

The record shows these facts: the van Petitioner was driving after the murders was filled with a variety of personal items including purses, wallets, clothing, jewelry and a computer, and Mrs. Emery's identification. (App. 1724). When officer's responded to the Emery home, the deputies immediately noticed the home was hot and smelled of "either kerosene or gasoline." (App. 1726). The deputies observed an overturned gas can and a clear pool on the hardwood floor. (App. 1726). In the kitchen, the broiler was turned on and the oven door was open. (App. 1744, 1750 and 1760). The burners on the stove were left on high, with a trail of gasoline leading from the bedroom to the kitchen. (App. 1743-1744). In the living room, a bloody hammer was resting atop the television. (App. 2002). Continuing down the hall, the deputies saw a body face-down in the bed. (App. 1726). The bedroom was a blood covered, ransacked crime scene. (App. 1723-1728; 3051). Mr. Emery, who slept with the aid of a breathing device, was found face-down with the apparatus still attached to his face, the back of his skull crushed. (App. 1890-1891). His wife, Mrs. Emery, was found in the floor with her legs to her chest, half-naked; her facial area crushed and her dental bridge sticking out, loosely in the jaw area where her mouth should have been. (App. 1746-1747; and 1911). Her face was completely unrecognizable and her eye was missing. (App. 1746-1747). They were badly beaten and bludgeoned with a hammer. (App. 1765-1766). Both bodies were covered in gasoline. (App. 1897).

The evidence led directly to Petitioner, though he attempted to deflect his involvement and flee from the crashed van. Petitioner made up a story about his wife having a baby, and offered one hundred dollars in cash to have someone take him to Spartanburg Regional Hospital. (App. 1777; 1802-1803). Later that same day, investigators contacted Petitioner at his grandmother's home. Petitioner indicated they probably needed to question him and answered that the clothes he wore earlier that day were in the washer. Those yet unwashed clothes were surrendered to officers.

(App. 1608-1609; 1634-1638 ; 1651-1652). Petitioner then voluntarily accompanied the detectives to the Sheriff's Office to be questioned. (App. 1636; 1639-1641). He received his *Miranda* warnings twice - once on the way to the sheriffs department and then at the sheriffs department. (App. 1609-1610; 1640; 1642). He stated he learned by phone call that day that Mr. and Mr. Emery had been killed, beaten to death, and that Mr. Emery's son was blaming him for the deaths. (App. 1613). He "stated that he was not responsible for the beating death of the Emery[]s...." However, the fact they had been beaten to death had not yet been released to the public. (App. 1643-1644). Detective Lindsey actually accused Petitioner of murder, and Petitioner responded, "prove it," and then asserted his right to an attorney at which time questioning ceased. (App. 1613-1614).

Later investigation revealed the DNA profile developed from semen found in a sample taken from Mrs. Emery's body matched Petitioner's DNA profile at the tested sites. (App. 2185; 2216). Further, DNA evidence from samples taken from Petitioner's clothing and shoes indicated blood from Petitioner and the victims; (App. 2187-2188; 2192-2194); and, Mrs. Emery was a major contributor of the DNA found on the hammer recovered from the crime scene with minor contributor's profile being consistent with the DNA of both Mr. Ray Emery and Petitioner, (App. 2180-2183). Further, blood found on a jewelry box discovered in the van wrecked by Petitioner matched the DNA profile of Mr. Ray Emery to a probability of one in four-hundred twenty quadrillion. (App. 2190). Fingerprint evidence confirmed the connections as well, with Petitioner's fingerprints found both on and inside the van, and Petitioner's fingerprint on a flowerpot that was stained with the blood of both Mr. and Mrs. Emery. (App. 1933-1936; 2184-2185). [20]

[20] In the PCR hearing, trial counsel testified their defense team DNA expert essentially confirmed the testing procedure and reported results were correct. (App. 4411-4415).

As noted above, the case in mitigation was robust, though it did not include the questionable evidence on genetic conditions. Petitioner's new evidence, again, of questionable value based on the concurrent and controlling scientific principles, could barely alter the sentencing profile, if at all. Moreover, the facts in aggravation – including the character of the defendant in that he could commit not only a double murder, but did so in the heinous and brutal circumstances noted – weigh heavily. The jury recommended death after an individualized sentencing proceeding, finding, after thoughtful consideration of Petitioner's character and background, that Petitioner's heinous crime warranted the imposition of the law's most severe sentence. A sentencing profile that would increase the expectation of future dangerousness is unlikely to have aided Petitioner. Petitioner failed in his burden of showing a reasonable probability that a different balance would be struck.

For all of these reasons, Petitioner has shown no error – in law or fact – to support his argument that the PCR judge erroneously denied relief. Petitioner has failed to show that this issue merits certiorari review. This Court should denied the petition as to the corresponding question presented.

III. The PCR judge did not err in rejecting a claim of ineffective assistance of counsel when counsel posited defendant was not guilty when petitioner expressly instructed trial counsel to so argue, and the decision to plead not guilty is solely reserved to the defendant.

Petitioner alleged at PCR that trial counsel was ineffective by telling the jury Petitioner was "not guilty" of the offenses for which he was on trial during the guilt phase opening argument, though there would be overwhelming evidence of guilt presented. Petitioner's issue to this Court appears to allege an overall ineffective presentation, but the issue before Judge Cole was more narrowly framed. (*See* App. 5337; *see also* App. 2994, alleging, in part, "Trial counsel were ineffective for failing to recognize and respect the strength of the State's evidence and severely

prejudiced Applicant by" asserted in opening "that Applicant was not 'not guilty'" while "not planning to present any evidence"). Respondent notes Petitioner did not challenge the resolution of the issue in his Rule 59 motion, or ask for broader treatment. (*See* App. 5343-5351). The petition argument, to the extent that it exceeds the question presented and the question resolved by Judge Cole. is procedurally barred from review. *See e.g., Pruitt v. State*, 310 S.C. 254, 255 n.2, 423 S.E.2d 127, 128 n. 2 (1992) (affirming "general rule that issues must be raised to, and ruled on by, the post-conviction judge to be preserved for appellate review"). Further, the key complaint – that counsel did not concede guilt – is resolved by the fact that Petitioner expressly instructed trial counsel to argue he was not guilty during the guilt phase. Simply, trial counsel was required to follow his client's decision. This Court should deny the petition for writ of certiorari.

Relevant Facts Developed at the PCR Hearing

Trial counsel Kathleen J. Hodges, Esquire, who handled the opening statement of the guilt phase, testified at the PCR hearing that Petitioner expressly instructed his defense team to argue he was not guilty during the guilt phase of the trial. (App. 3799-3804, 3809, 3814-3817). She explained: "It was pretty important to the client to put up a fight even though in our professional opinion we felt like the evidence was going to be . . . the fight in this case was going to be in the penalty phase . . . ." (App. 3799). She said she and the other members of the defense team consulted ABA guidelines about hostile clients and not overriding professional judgments in making their decision to argue lack of guilt. (App. 3800). Co-counsel Reckenbeil testified similarly, and highlighted that Petitioner's resolve grew stronger to contest guilt as his trial date approached. (App. 4081-4083, 4150-52). He testified trial counsel were obligated to contest guilt and go to trial. (App. 4174-4175). Counsel testified, in understanding of the potential danger to credibility, that the team devised a strategy to switch counsel, dividing up the face of the

representation between phases. (PCR 1382 and 1397-98). Counsel also noted that though the evidence was weighty against them, they could still hold the State to its burden of proof. (PCR p. 1156).

The PCR Court's Treatment of the Issue

In his December 9, 2019 Order Denying PCR Relief, Judge Cole raised, briefly discussed, and then dismissed Petitioner's claim as being without merit. (App. 5336-5337). He listed it out as the first of nine alleged errors committed by trial counsel, as PCR counsel alleged that the cumulative errors committed by trial counsel afforded Petitioner post-conviction relief. (App. 5318-5319). Judge Cole concluded the claim lacked merit as trial counsel testified at the PCR hearing, "Applicant did not want a concession of guilt and wished to contest his guilt at the trial, Counsel was under an ethical obligation in their representation to follow the instructions of their client." (App. 5337). He also noted counsel's testimony of how they "devised a strategy based upon that decision to divide the representation in the guilt phase and penalty phase" in order to avoid, as best as possible, compromising counsel's respective credibility with the jury. *Id*. Because of this, Judge Cole found that Petitioner failed to carry his burden of proving either deficient performance or prejudice resulting therefrom and denied relief. *Id*.

Analysis:

The record well-supports the PCR court's critical finding that Petitioner insisting on contesting guilt; consequently, there was not ineffective assistance in honoring the client's wishes on this decision that the Supreme Court finds reserved specifically to the client.

The United States Supreme Court has squarely held that trial counsel cannot strategically concede guilt without their client's express consent. *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (finding that a defendant has ultimate control over whether he chooses to plead guilty, waive a jury, testify on his behalf, or take an appeal.) "[C]ertain decisions regarding the exercise or waiver

of basic trial rights are of such moment that they *cannot* be made for the defendant by a surrogate." *Id*.; *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (emphasis added). The Petitioner in *McCoy v. Louisiana* was granted a new trial by the United States Supreme Court after the trial court violated his Sixth Amendment rights by allowing his trial counsel to concede the fact that he had committed three murders over his express objection during the guilt phase of his capital trial. *McCoy v. Louisiana*, 138 S.Ct. 1500, 1505 (2018). Trial counsel reasonably believed, from their experience, that admitting guilt was the Petitioner's best chance of avoiding a death sentence. *Id.* at 1507. Nevertheless, the Court still concluded it was and is the defendant's prerogative, not trial counsel's, to decide on the objective of his defense in a capital murder trial, as individual liberty and life were and are at stake. *Id.* at 1505.

Petitioner has shown no error – in law or fact – to support his argument that the PCR judge erroneously denied relief. Any error is attributed to Petitioner's own choice, not ineffective assistance. Petitioner has failed to show that this issue merits certiorari review. This Court should denied the petition as to the corresponding question presented.

IV. The PCR judge did not err in rejecting a claim of ineffective assistance of counsel for failure to argue Petitioner was exempt from execution under *Atkins v. Virginia* when Petitioner did not claim the one condition recognized as an exemption, intellectual disability, and neither the Supreme Court nor this Court has recognized an expansion of the exemption to other claims of intellectual functioning.

Judge Cole reasonably denied Petitioner post-conviction relief on this issue. Petitioner alleges he is ineligible for the death penalty under the Eighth Amendment and *Atkins v. Virginia*, 536 U.S. 304 (2002), because he possibly suffers from bipolar disorder, brain damage, and genetic disorders (specifically 22Q11 deletion syndrome and Prader-Willi syndrome). Petitioner also claims that trial counsel was ineffective for failing to object. Respondent disagree with these allegations and submits they are without merit. First, Petitioner never explicitly claimed at trial

that he possessed an Intellectual Disability pursuant to *Atkins v. Virginia*. Second, the medical background evidence presented both at trial and at PCR was heavily damaged and weak under prevailing medical norms as multiple expert witnesses disagreed with the defense expert's conclusion that Petitioner had 22Q11 deletion syndrome or Prader-Willi Syndrome. (A full discussion of Petitioner's alleged conditions is set forth in Section II, *supra*.) Third, there is no evidence in the record that Petitioner had a qualifying Intellectual Disability, and he, therefore, failed to meet the threshold determination required under *Atkins v. Virginia* and S.C. Code § 44-20-30 that would make him ineligible for the death penalty. The PCR court's ruling was reasonable – whether Petitioner met the threshold of proving he had an Intellectual Disability is a factual determination, and there is substantial evidence in the record to support the PCR judge's ruling that Petitioner does not have an Intellectual Disability under legal and clinical definitions. This Court should affirm the PCR court.

Relevant facts from the PCR hearing

At the PCR hearing, Judge Cole heard testimony from a number of individuals who testified to Petitioner's social history and numerous expert witnesses who testified regarding Petitioner's health records and potential diagnoses. (*See* App. 3020-3025). Of note is the testimony of Dr. Jack M. Rary, (App. 3418-3498), Dr. Jonathan Joseph Lipman, (App. 3515-3613), Dr. Thomas Edward Schacht, (App. 3614-3755), Doctor Stacey Wood, (App. 3880-3961), and Dr. George Woods, (App. 3962-4063). Also of note are Petitioner's Exhibit #23 (Dr. Stacey Wood's Neuropsychological Evaluation Summary from January 18, 2013)(App. 4610-4613); Petitioner's Exhibit # 26 (The Medical Records of the Petitioner) (App. 4633-4748); Petitioner's Exhibit # 27 (Dr. Donna Schwartz-Waggs, M.D.'s Psychiatric Evaluation of Petitioner from October 16, 2008) (App. 4749-4775); Petitioner's Exhibit # 29 (October 23, 1994 Psychiatric History and Mental

Status Exam of Petitioner) (App. 4939-43); and Petitioner's Exhibit # 30 (Summary of the Mitigation Case Presented at Trial) (App. 4944). None of these witnesses opined that Petitioner was, or could be, diagnosed with Intellectual Disability. None of Petitioner's documents reflect that Petitioner was diagnosed with Intellectual Disability. After testimony concluded, the judge took the matter under advisement after both attorneys moved for time to order the transcript of the hearing and moved to submit briefs summarizing their respective arguments. (App. 4493-95).

Judge Cole did not separately rule on this issue in his December 9, 2019 Order Denying Post-Conviction Relief; rather, he combined his ruling with his conclusions on Petitioner's genetics conditions arguments. (*See* App. 5330-31). Judge Cole held that Petitioner was not entitled to relief because he did not carry his burden of proving he had a specific mental condition that qualified as an intellectual disability under S.C. Code Ann. § 44-20-30 (Supp. 2011).[21] He ruled that the freestanding claim was barred by the *Simmons* doctrine, 264 S.C. at 423, 215 S.E.2d at 885, because trial counsel did not properly preserve this issue for appeal. Judge Cole then discussed how South Carolina has declined to extend the holding in *Atkins*, giving *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013) as an example. "The Court noted the 'threshold determination' was whether [Petitioner's] alleged mental condition places him within the class of offenders that may not [be] executed.'" *Stanko*, 402 S.C. 283, 741 S.E.2d at 724. He then found that Petitioner's trial counsel "presented ample evidence of Petitioner's background and limitations . . . ." and that "Petitioner's additional evidence presented during the post-conviction relief hearing was not reliable. It was subject to significant criticism under the prevailing medical norms." He found that Petitioner failed to establish by a preponderance of the evidence that "trial counsel's

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[21] "Significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." *Franklin v. Maynard*, 356 S.C. 276, 278-79, 588 S.E.2d 604, 605 (2003).

failure to present this additional evidence was unreasonable, deficient, or ineffective assistance in comparison to that which was expected of reasonably competent counsel under prevailing professional norms at the time of trial," and failed to prove he was prejudiced by any alleged error. (App. 5330-5332).

Analysis:

The record well-supports the PCR court's critical finding that Petitioner's genetic conditions evidence was hopelessly impaired; and also his finding that to the extent Petitioner sought an exception, the issue was barred by the Simmons Doctrine.

First, it is well-settled that a direct appeal issue, standing alone, should not be heard in PCR. *See, e.g, Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993) ("Under the doctrine enunciated in *Simmons v. State,* 264 S.C. 417, 215 S.E.2d 883 (1975), errors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."). Petitioner has shown no error in the PCR court's ruling on this point. He clearly argues for an extension of Atkins, and that argument was available at trial. (*See* Petition, p. 90, arguing a "next logical step"; *see also* App. 5330-5331, noting "*Atkins* was decided in 2002 well before the 2008 trial"). Petitioner also shows no error in declining to find counsel ineffective for failing to argue for an exemption for which there was no support.

In *Atkins v. Virginia*, the United States Supreme Court held that mental retarded individuals are ineligible for the death penalty under the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 317-318 (2002). The Court in *Atkins* limited the class of individuals who were ineligible due to mental infirmity to an extremely narrow class of individuals: those who meet either the clinical or legal definition of "mentally retarded." *Atkins*, 536 U.S. at 308 n.3, 309 n.5, 317-318. The Court explained that mental retardation requires "not only subaverage intellectual functioning, but also significant limitations in adaptive skills." *Id*. at 305. An expert witness who testified during Atkins'

sentencing phase said, "Atkins' full scale IQ is 59. Compared to the population at large, that means less than one percentile . . . . **Mental retardation is a relatively rare thing. It's about one percent of the population** . . . ." (emphasis added). The expert also indicated that of the over 40 capital defendants that he had evaluated, Atkins was only the second individual who met the criteria for mental retardation. He testified that, in his opinion, Atkins' limited intellect had been a consistent feature throughout his life . . . ." *Atkins*, 536 U.S. at 308 n.3, 309 n.5, 317-318.

This Court refused to extend the *Atkins* holding in *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013). The appellant was convicted of murder, assault and battery with intent to kill, criminal sexual conduct, two counts of kidnapping, and armed robbery and was sentenced to death. *Stanko*, 402 S.C. at 259, 741 S.E.2d at 711-712. At his trial, the appellant asserted an insanity defense, arguing he suffered from a central nervous system dysfunction and did not understand right from wrong. *Id.* During the appellant's case in chief, he presented expert witnesses to bolster his insanity defense: one testified he did not have the ability to distinguish right from wrong. *State v. Stanko*, 376 S.C. 571, 574, 658 S.E.2d 94, 95 (2008). On rebuttal, the State, however, presented experts who testified that the appellant was, in fact, able to tell the difference between right and wrong. *Id*.

Appellant also presented three experts who testified that his impulse control and ability to exercise proper judgment was impaired by a frontal lobe abnormality. *Stanko*, 376 S.C. at 574, 658 S.E.2d at 95. Another expert testified, "Scans of the right hemisphere of appellant's brain exhibited damage in the medial gray matter of appellant's brain at four standard deviations below normal. The expert testified that this type of damage is not seen in "normal" people, and an individual with this type of "extreme" damage would have some type of temporal lobe epilepsy." *Stanko*, 402 S.C. at 284, 741 S.E.2d at 725. The State, on the other hand, presented "compelling counter testimony" and concluded any "evidence of mental disease or defect manifested only by repeated criminal or

other anti-social conduct [was] not sufficient to establish the defense of insanity" as it did not show "significant sub-average intellectual functioning." *Stanko*, 402 S.C. at 284-285, 741 S.E.2d at 725.

The trial court instructed the jury that the appellant had to prove by a preponderance of the evidence that he had a mental disease or defect that made him unable to distinguish between right and wrong pursuant to S.C. Code Ann. § 17-24-10 in order to be ineligible for the death penalty. *Id.* at 574, 658 S.E.2d at 95-96. The jury found appellant guilty on all counts and sentenced him to death, declining to find him guilty by reason of insanity. *Id.*

At PCR, Stanko argued, among other issues, the trial court erred by ruling his execution did not violate the Eighth Amendment. *Id*. at 260, 741 S.E.2d at 712. On PCR appeal, this Court disagreed, finding the appellant did not fit the legal definition of intellectual disability pursuant to S.C. Code § 44-20-30.

> Appellant's alleged mental abnormalities do not demonstrate an inability to communicate or care for himself adequately, or sub-average intellectual functioning. Instead, his above average intelligence, and behavior before and after the Victim's murder, demonstrate an ability to formulate and execute deliberate plans . . . . [H]is behavior in this case stands at the opposite end of the spectrum from the behavior of an intellectually disabled person . . . . There is simply no justification for finding Appellant's alleged condition similar to those individuals who may not be executed lawfully.

Stanko, 402 S.C. at 287-288, 741 S.E.2d at 726.

Petitioner's case is substantial similar to Stanko's. Petitioner is also arguing that the *Atkins* holding should be extended to cover his particular alleged infirmities, and that trial counsel was ineffective for failing to object or argue this point at trial. However, like in *State v. Stanko*, Petitioner presented evidence of his mental abilities to the trial court and to the jury but the State also presented compelling counter evidence, and the jury found both Stanko and Petitioner eligible for the death penalty after hearing all of the evidence. Yet, in this case, Petitioner never claimed he had an Intellectual Disability pursuant to *Atkins v. Virginia* or pursuant to South Carolina state

law or any legal or clinical definition at trial. Even taking into consideration the additional evidence Petitioner presented at his PCR hearing, the record demonstrates that Petitioner failed to prove by a preponderance of the evidence that he even had the two conditions he relies in asking for an extension of *Atkins v. Virginia*. There is simply no basis to find counsel deficient or to find *Strickland* prejudice.

Of note, the Fourth Circuit also very recently declined to extend the *Atkins* holding to Dylann Roof. *United States v. Roof*, Opinion No. 17-3, pp. 96-100 (4th Cir. 2021). The court declined to read either *Atkins* or *Roper v. Simmons*, 543 U.S. 551 (2005) expansively. *Id.* at 98. "*Roper*'s holding is a categorical ban on executing juveniles in the same way that *Atkins* is a categorical ban on executing the intellectually disabled." *Id.* The Court then noted:

> … He has an IQ of 125, which is higher than approximately 25% of the general population. He thus has no plausible argument that he is protected by *Atkins*, which held that the Eighth Amendment prohibits the execution of the intellectually disabled. 536 U.S. at 321.
>
> The *Atkins* Court specifically defined such disability as involving "subaverage intellectual functioning." 536 U.S. at 318. Although "significant limitations in adaptive skills such as communication" are part of the *Atkins* test, *id.*, they are not sufficient by themselves to render a defendant mentally incapacitated. *See Hall*, 572 U.S. at 711-14 (holding that mental incapacity per *Atkins* requires deficits in intellectual functioning in addition to deficits in adaptive functioning). Roof is therefore not intellectually disabled under *Atkins*.

Roof, p. 100. *Cf. United States v. Tsarnaev*, 968 F.3d 24, 97 (1st Cir. 2020) (regarding extension of *Roper* "whether a change should occur is for the Supreme Court to say – not us."). Petitioner has failed to show an error warranting certiorari review.

CONCLUSION

Respondent submits, for all the foregoing reasons, the petition should be denied.

Respectfully submitted,

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