IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:99-HC-436-BO

ELTON OZELL MCLAUGHLIN,
Petitioner,

v.

MARVIN L. POLK, Warden,
Central Prison, Raleigh, North Carolina,
Respondent.

ORDER

This matter is before the Court on a petition for writ of habeas corpus filed on July 2, 1999, pursuant to 28 U.S.C. § 2254. Petitioner Elton Ozell McLaughlin ("Petitioner") is a state inmate convicted of first-degree murder and sentenced to death. Respondent has filed an answer to the petition and a motion for summary judgment. Petitioner has replied and filed a motion for summary judgment granting his petition. These matters are ripe for ruling.

STATEMENT OF THE CASE

McLaughlin was tried and convicted of three counts of first-degree murder at the September 10, 1984, special session of Bladen County Superior Court. Following a sentencing hearing, Petitioner was sentenced to one sentence of death and two consecutive life sentences. The following facts are summarized from the North Carolina Supreme Court's opinions on direct appeal. *See State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (1988) ("*McLaughlin I*"); *State v. McLaughlin*, 341 N.C. 426, 462 S.E.2d 1 (1995) ("*McLaughlin II*").

A. Facts

Sometime before March 26, 1984, Sheila Denise Worley approached Petitioner, Elton Ozell McLaughlin, and asked him to kill Worley's husband, James Elwell Worley. Petitioner

agreed to do so for $3,000 and recruited Eddie Carson Robinson to help him. On the evening of March 25, 1984, Petitioner and Robinson, with the assistance of Denise Worley, entered the Worley home and shot and killed James Worley as he slept. With Denise Worley's help, the two men dressed Worley's corpse, placed it in his car, and drove it to a remote location where they set the car and corpse on fire.

Petitioner and Robinson later decided to kill Denise Worley because she failed to pay them the $3,000 and because she had been talking to the police. When Denise Worley and her two children were visiting Petitioner at his mobile home approximately one month later, on April 29, 1984, Petitioner lured Ms. Worley to a hallway. Robinson snuck out of a nearby bathroom where he had been hiding and struck Denise Worley over the head two times with an iron pipe. The two men dragged her to the bathroom, placed her in the tub and held her under water until she drowned. They then placed her body in the trunk of her car and went back and got her two sleeping children, four-year-old Psoma Wine Baggett, and eighteen-month-old Alecia Baggett.

Psoma Baggett awoke as the two men were disposing of Denise Worley's body. They decided they would have to kill Psoma because she could identify them. As Psoma walked to the back of the car asking for her mother, she too was struck and killed with the iron pipe. Robinson drove Denise Worley's car with the two bodies in it to a bridge over White Creek, and Petitioner followed in his own car. As they got to the bridge, the two men put Denise Worley's car in drive and rolled it into the creek. They then pulled the bodies of Denise Worley and Psoma Baggett into the water, leaving the infant asleep in the car. As they left, they could hear a child crying.

B. Procedural History

Defendant was tried and convicted of three counts of first-degree murder for the deaths of James Worley, Denise Worley and Psoma Baggett. Following a capital sentencing hearing, the

trial court imposed a sentence of death for the murder of James Worley and two consecutive life sentences for the deaths of Denise Worley and Psoma Baggett.

The North Carolina Supreme Court found no error on Petitioner's direct appeal and affirmed the convictions and sentences. *McLaughlin I*, 323 N.C. 68, 372 S.E.2d 49. On March 19, 1990, the United States Supreme Court granted certiorari, vacated the death sentence imposed and remanded the case to the North Carolina Supreme Court for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433 (1990). *McLaughlin v. North Carolina*, 494 U.S. 1021 (1990). On remand, the North Carolina Supreme Court vacated Petitioner's death sentence and remanded the case for a new sentencing hearing. *State v. McLaughlin*, 330 N.C. 66, 408 S.E.2d 732 (1991).

Petitioner was resentenced at the February 8, 1993, Session of Bladen County Superior Court. The jury found two aggravating circumstances – that Petitioner had previously been convicted of a felony involving the use of violence to a person and that Petitioner committed the murder of James Worley for pecuniary gain. In mitigation, the jury found the following circumstances: that Petitioner had aided in the apprehension of another capital felon; that Petitioner had cooperated with law enforcement officers at an early stage of their investigation; that Petitioner was of good character and reputation in the community in which he lived and worked; that Petitioner had made substantial efforts to improve himself by participating in religious studies and voluntary training relative to his work in prison; that Petitioner had achieved a desirable position as a cook in prison; that Petitioner had made significant efforts to be of assistance to other inmates; that Petitioner had a desirable prison record of only two infractions; and that Petitioner consistently supported his child financially. The jury again recommended a sentence of death, and sentence was imposed on the jury's recommendation. On

appeal, the North Carolina Supreme Court, in a three-two decision, affirmed Petitioner's death sentence. *McLaughlin II*, 341 N.C. 426, 462 S.E.2d 1. On February 20, 1996, the United States Supreme Court denied certiorari. *McLaughlin v. North Carolina*, 516 U.S. 1133 (1996).

McLaughlin filed a motion for appropriate relief ("MAR") in the murder case in Bladen County Superior Court on September 29, 1997. On October 20, 1997, McLaughlin filed a MAR attacking his prior involuntary manslaughter conviction, which formed the basis of one of the two aggravating circumstances found by the jury. Petitioner filed an amended MAR in the murder case on February 19, 1998. An evidentiary hearing was held on Petitioner's MARs on March 23 and March 26, 1998, in Bladen County Superior Court. On September 3, 1998, the superior court denied McLaughlin's MARs. The North Carolina Supreme Court denied McLaughlin's petition for a writ of certiorari on June 24, 1999. *State v. McLaughlin*, 537 S.E.2d 489 (1999). Certiorari review was denied by the United States Supreme Court on November 29, 1999. *McLaughlin v. North Carolina*, 528 U.S. 1025 (1999).

On July 2, 1999, McLaughlin filed his Petition for Writ of Habeas Corpus. Petitioner also filed motions for appointment of counsel and for leave to proceed *in forma pauperis*, both of which have been allowed. On July 16, 1999, Respondent filed a motion to dismiss McLaughlin's habeas petition on the grounds that it was not timely filed. Respondent's motion to dismiss was denied on October 17, 2000.

On December 19, 2000, Petitioner filed a state habeas petition challenging North Carolina's short-form murder indictment. This petition was denied by the North Carolina Supreme Court on December 20, 2000. *State v. McLaughlin*, 353 N.C. 274, 546 S.E.2d 384 (2000).

On January 5, 2001, Petitioner amended his habeas petition before this Court to add the

short-form indictment claim. Respondent filed his answer and motion for summary judgment on April 23, 2001. Petitioner filed a reply and a cross-motion for summary judgment on May14, 2001.

On January 31, 2002, Petitioner filed a motion in state court requesting relief from his death sentence on the grounds that he was mentally retarded at the time of the offense. On February 11, 2002, Petitioner filed a motion requesting this Court to hold the habeas proceedings in abeyance pending the state court's determination of Petitioner's mental retardation claim. Over Respondent's objection, an order was entered on March 19, 2002, allowing Petitioner's motion to hold the case in abeyance. On June 17, 2003, the state court entered an order denying Petitioner's mental retardation claim, and the North Carolina Supreme Court denied certiorari on August 12, 2004. *State v. McLaughlin*, 358 N.C. 737, 602 S.E.2d 368 (2004).

This case was returned to active status on October 1, 2004, and on November 3, 2004, this Court entered an order allowing Petitioner to amend his habeas petition to add a mental retardation claim ("Petitioner's second amendment"). Respondent answered Petitioner's second amendment and moved for summary judgment as to that claim. Petitioner replied and requested an evidentiary hearing. On January 4, 2005, this Court denied Respondent's motion for summary judgment as to Petitioner's second amendment and ordered an evidentiary hearing on the mental retardation claim. A hearing was held on that claim on July 20 and 21, 2005.

DISCUSSION

A. AEDPA's Standard of Review

The Court's review of McLaughlin's claims is governed by 28 U.S.C. § 2254(d), as modified by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104, 132, 110 Stat. 1214 (1996). Section 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The phrase "'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decisions." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A state-court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Id.* at 413. A state-court decision "involve[s] an unreasonable application of" clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

Only after a petitioner establishes that the state court's adjudication of his claims was "contrary to" or an "unreasonable application of" clearly established federal law or was based on

an unreasonable determination of the facts in light of the evidence may a federal court proceed to review a state-court judgment independently to determine whether habeas relief is warranted. *Rose v. Lee*, 252 F.3d 676 (4th Cir. 2001). The statute "does not require that a state court cite to federal law in order for a federal court to determine whether the state court decision is an objectively reasonable one." *Bell v. Jarvis*, 236 F.3d 149, 160 (4th Cir. 2000) (en banc). If the state court did not articulate the rationale underlying its adjudication, a federal habeas court must examine the record and the clearly established Supreme Court precedent to determine whether the state court's adjudication was contrary to, or involved an unreasonable application of, clearly established federal law. *Id.* at 158. The factual findings of the state court are presumed to be correct. 28 U.S.C. § 2254 (e)(1). The petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *Fisher v. Lee*, 215 F.3d 438, 445 (4th Cir. 2000).

B. Petitioner's Claims

McLaughlin maintains that his conviction and sentence are in violation of his constitutional rights in the following respects:

> Claim I – Petitioner was deprived of his Fifth, Sixth, Eighth and Fourteenth Amendment rights when the State breached its agreement to not present evidence of his prior involuntary manslaughter conviction beyond that contained in the stipulation entered into by Petitioner and the State.
>
> Claim II – Petitioner was deprived of his constitutional right of confrontation by the admission of prior testimony of Petitioner's alleged accomplice.
>
> Claim III – Trial counsel rendered ineffective assistance of counsel by conceding Petitioner's guilt of second-degree murder.
>
> Claim IV – Petitioner's prior conviction for involuntary manslaughter is invalid and, therefore, could not be used to support the prior crime of violence aggravating circumstance.
>
> Claim V – Petitioner's invalid involuntary manslaughter conviction was unconstitutionally used to impeach Petitioner.

Claim VI – The State unconstitutionally presented in a false light the facts of Petitioner's prior involuntary manslaughter conviction.

Claim VII – The State violated Petitioner's constitutional rights by presenting testimony of his alleged accomplice that was known to be false at the time presented.

Claim VIII – The trial court erred by failing to submit the statutory mitigating circumstance of no significant history of prior criminal activity.

Claim IX – The trial court erred by failing to instruct the jury that it must find the statutory mitigating circumstance that Petitioner had aided in the apprehension of another capital defendant.

Claim X – Petitioner was deprived of his right to be free from double jeopardy when the jury was allowed to reconsider its sentencing decision.

Claim XI – Petitioner's mental health expert had an actual conflict of interest that deprived Petitioner of his Fourteenth Amendment rights.

Claim XII – Trial counsel were ineffective for failing to investigate and defend against Petitioner's invalid manslaughter conviction.

Claim XIII – Trial counsel were ineffective for stipulating that Petitioner's prior involuntary manslaughter conviction involved an intentional killing.

Claim XIV – Trial counsel were ineffective for failing to bring to the trial court's attention the State's prior agreement to not present additional evidence of Petitioner's involuntary manslaughter conviction.

Claim XV – Trial counsel were ineffective for failing to move *in limine* to exclude evidence that Petitioner's alleged accomplice had been released from custody after receiving a life sentence for another offense.

Claim XVI – Trial counsel were ineffective for failing to request an instruction that the jury must find the statutory mitigating circumstance that Petitioner had aided in the apprehension of another capital defendant.

Claim XVII – Trial counsel were ineffective for failing to challenge the use of Petitioner's involuntary manslaughter conviction in impeaching Petitioner during the guilt-innocence phase.

Claim XVIII – Trial counsel were ineffective for calling to testify an expert who had an actual conflict of interest.

Claim XIX – Trial counsel were ineffective for failing to use Petitioner's expert witness to impeach the testimony of Petitioner's alleged accomplice.

Claim XX – Appellate counsel was ineffective for failing to argue that the trial court erred in not submitting the statutory mitigating circumstance of no significant history of prior criminal activity.

Claim XXI – Appellate counsel was ineffective for failing to argue that the trial court erred in failing to instruct the jury that it must find the statutory mitigating circumstance that Petitioner had aided in the apprehension of another capital defendant.

Claim XXII – The State withheld exculpatory evidence concerning Petitioner's conviction for involuntary manslaughter.

Claim XXIII – The trial court erred in excusing two qualified jurors due to reservations about the death penalty.

Claim XXIV – The trial court erred in excluding evidence that Petitioner's alleged accomplice received a life sentence for the murder of James Worley.

Claim XXV – The prosecutor made grossly improper and unconstitutional arguments to the jury.

Claim XXVI – The trial court improperly instructed the jurors concerning their consideration of mitigating circumstances.

Claim XXVII – The trial court erred by excluding parole eligibility information.

Claim XXVIII – The trial court improperly coerced the jury's sentencing verdict.

Claim XXIX – The State unconstitutionally excluded jurors who had expressed reservations about capital punishment.

Claim XXX – Petitioner's speedy trial rights were violated.

Claim XXXI – The trial court erred in instructing the jury concerning the pecuniary gain aggravating circumstance.

Claim XXXII – The trial court erred in instructing the jury that mitigating circumstances extenuate or reduce a defendant's moral culpability for the offense.

Claim XXXIII – The trial court erred in instructing the jury that before finding the existence of a nonstatutory mitigating circumstance it must first find the circumstance to have mitigating value.

Claim XXXIV – The trial court's instructions improperly emphasized aggravating circumstances over mitigating circumstances and implied that Petitioner had the burden of showing that life imprisonment was justified.

Claim XXXV (Petitioner's First Amendment) – The short-form indictment used to charge Petitioner with first-degree murder was unconstitutional.

Claim XXXVI (Petitioner's Second Amendment) – The death sentence was unconstitutionally imposed and must be vacated because of Petitioner's mental retardation.

As a result of these alleged constitutional violations, McLaughlin contends that he is entitled to release from his confinement or his sentence of death.

Respondent concedes that Petitioner has exhausted his state-court remedies as to each of the claims raised, as required by 28 U.S.C. § 2254(b). However, Respondent contends that Claims I, III, VII, VIII, IX, XI and one of the arguments in Claim VI are procedurally defaulted. Because the Court is precluded from reviewing procedurally defaulted claims, the Court will address the issue of procedural default before reviewing the merits of Petitioner's claims.

C. Procedural Default

Under the doctrine of procedural default, a federal court is precluded from reviewing the merits of any claim that was found to be procedurally barred by the state court on adequate and independent state grounds. *Coleman v. Thompson*, 501 U.S. 722, 731-32, 750 (1991). A state rule is "adequate" if it is firmly established and regularly and consistently applied by the state court to cases that are procedurally analogous. *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *McCarver v. Lee*, 221 F.3d 583, 588-89 (4th Cir. 2000). A state rule is "independent" if it does not depend upon a federal constitutional ruling. *Fisher*, 215 F.3d at 445 (citing *Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985)).

However, procedurally defaulted claims can be reviewed by a federal habeas court if the petitioner demonstrates cause and prejudice or that the failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750. To show cause, a petitioner must show that something external to the petitioner prevented him from complying with the state procedural rule. *Id.* at 753. To show prejudice, a petitioner must show that he was actually prejudiced as a result of the alleged violation of federal law. *United States v. Fray*, 456 U.S. 152, 167-69 (1982). To establish a "fundamental miscarriage of justice," a petitioner must show "that he is actually innocent of the charges against him." *Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001) (citing *Coleman*, 501 U.S. at 750).

In the context of an alleged default at sentencing, a fundamental miscarriage of justice requires the petitioner to show that he is "actually innocent" of the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). To be "actually innocent" of the death penalty, the petitioner must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found him eligible for the death penalty. *Id.*

With these standards in mind, the Court will consider whether Claims I, III, VII, VIII, IX, XI and one of the arguments in Claim VI are procedurally defaulted.

1. Claim I – Petitioner was deprived of his Fifth, Sixth, Eighth and Fourteenth Amendment rights when the State breached its agreement to not present evidence of his prior involuntary manslaughter conviction beyond that contained in the stipulation entered into by Petitioner and the State.

In his first claim for relief, Petitioner argues that he was deprived of his constitutional rights because the State was allowed at Petitioner's resentencing to present testimony concerning Petitioner's prior involuntary manslaughter conviction and a stipulation entered into by the parties concerning the prior conviction. When Petitioner was originally tried in 1984, the parties

entered into an agreement whereby the State agreed not to present any testimony concerning Petitioner's 1975 involuntary manslaughter conviction if Petitioner stipulated that "the act involved the use of violence in that [Petitioner] intentionally shot and killed [the victim]." When Petitioner was resentenced in 1993, the State admitted the 1984 stipulation into evidence and further presented testimony of two eyewitnesses. Petitioner argues that this constituted a breach of the 1984 agreement and a violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

Petitioner first presented this claim in his MAR filed on September 29, 1997. The MAR court concluded that Petitioner's claim was procedurally barred because it could have been raised upon direct appeal but was not. *See* N.C. Gen. Stat. § 15A-1419(a)(3). The state court further determined that McLaughlin had failed to show cause and prejudice necessary to overcome the procedural bar.

Section 15A-1419(a)(3) provides that a motion for appropriate relief must be denied where "[u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C. Gen. Stat. § 15A-1419(a)(3). The extent to which this section precludes federal review is a question to be decided by this Court. *Johnson*, 486 U.S. at 587 ("'[W]hen and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question.'") (quoting *Henry v. Mississippi*, 379 U.S. 443, 447 (1965)).

Section 15A-1419(a)(3) has been found to be an adequate and independent state-law ground to support a procedural default where the evidence necessary to support the petitioner's claim was before the appellate court. *McCarver*, 221 F.3d at 589. In *State v. Fair*, 354 N.C. 131, 557 S.E.2d 500 (2001), however, the North Carolina Supreme Court made clear that N.C. Gen.

Stat. § 15A-1419(a)(3) will not serve as a procedural bar where such evidence could not have been presented to the court on direct appeal. *Fair*, 354 N.C. at 166, 557 S.E.2d at 524-25.

Petitioner argues that he was not in a position to raise this claim on direct appeal because the parties' agreement concerning the stipulation was not part of the record before the appellate court. The state court made no finding that the agreement was part of the appellate record, and Respondent does not claim that it was. Instead, Respondent argues that Petitioner was in a position to adequately raise this claim since Petitioner did appeal the admission of the stipulation on the ground that parties cannot stipulate as to matters of law. Evidence of the parties' agreement not being part of the trial record, this claim could not have been properly presented on appeal. *Fair*, 354 N.C. at 166, 557 S.E.2d at 525; N.C.R. App. 9 (record on appeal limited to matters before the trial court). Therefore, Petitioner was not in a "position to adequately raise the ground or issue" on appeal, and this claim is not procedurally barred by N.C. Gen. Stat. § 15A-1419(a)(3).

2. Claim III – Trial counsel rendered ineffective assistance of counsel by conceding Petitioner's guilt of second-degree murder.

In Claim III, Petitioner contends that he received ineffective assistance of counsel because trial counsel conceded his guilt to second-degree murder in the death of James Worley. Petitioner raised this claim in his MAR filed on September 29, 1997. The state court concluded that the claim was procedurally defaulted because Petitioner could have raised the claim on direct appeal but did not. *See* N.C. Gen. Stat. § 15A-1419(a)(3). Petitioner asserts that the state court's decision "completely ignores precedent from the North Carolina Supreme Court and from the North Carolina Court of Appeals which clearly states that [such] claims must be raised in a Motion for Appropriate Relief if there was no evidence on the record that there was consent

given to defense counsel." Respondent offers no response to this assertion other than to state that McLaughlin raised this argument to the North Carolina Supreme Court in his petition for a writ of certiorari and that certiorari was denied.[1]

North Carolina General Statute § 15A-1419(a)(3) has not been regularly and consistently applied by the state court to bar claims such as that raised by Petitioner. If there is any consistency among the state court, it is that such claims are not procedurally defaulted for failure to raise them on direct appeal. Ineffectiveness of counsel in conceding a defendant's guilt was first recognized by the North Carolina Supreme Court in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985). This claim was raised by Harbison in a motion for appropriate relief filed after his conviction had been affirmed on direct appeal. Since *Harbison*, the state court has reiterated that such claims are most appropriately raised on post-conviction review. *See, e.g., State v. House*, 340 N.C. 187, 196-97, 456 S.E.2d 292, 297 (1995) ("appropriate remedy . . . is for a defendant to file a motion for appropriate relief in superior court based on ineffective assistance of counsel"); *State v. Ware*, 125 N.C. App. 695, 697, 482 S.E.2d 14, 16 (1997) ("To properly advance [a *Harbison* claim], defendant must move for appropriate relief. . . ."). In *State v. Matthews*, 358 N.C. 102, 591 S.E.2d 535 (2004), the North Carolina Supreme Court reversed a

---

[1]Throughout its answer, Respondent points out that certiorari has been denied by either the United States Supreme Court or the North Carolina Supreme Court, presumably to suggest that Petitioner's arguments are meritless. Counsel should be mindful of the fact that denial of certiorari is without precedential value. *Teague v. Lane*, 489 U.S. 288, 296 (1989) ("'denial of a writ of certiorari imports no expression of opinion upon the merits of the case'") (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923); *Jenkins v. Aetna Casualty & Sur. Co.*, 324 N.C. 394, 400, 378 S.E.2d 773, 777 (1989) (North Carolina Supreme Court's "denial of a petition for discretionary review or . . . of a petition for a writ of certiorari . . . has no value as precedent").

defendant's conviction for the reasons stated in *Harbison* where the claim was raised in a motion for appropriate relief filed during the pendency of the defendant's direct appeal.

Where raised on direct appeal, the state court has on a number of occasions either dismissed *Harbison* claims without prejudice or remanded the claims for an evidentiary hearing prior to the court's consideration of the claim. *See, e.g., House*, 340 N.C. 187, 456 S.E.2d 292 (dismissing claim without prejudice for defendant to file motion for appropriate relief"); *Ware*, 125 N.C. App. 695, 482 S.E.2d 14 (same); *State v. Thomas*, 327 N.C. 630, 397 S.E.2d 79 (1990) (remanding for evidentiary hearing to determine whether defendant consented to counsel's concession of guilt). Section 15A-1419(a)(3) is not an adequate ground upon which to bar McLaughlin's third claim.

3. Claim VI – The State violated Petitioner's double jeopardy rights by presenting evidence that Petitioner was guilty of murder, not simply involuntary manslaughter, for the 1975 killing of Fred McNeill, Jr.

The second portion of Claim VI involves Petitioner's 1975 involuntary manslaughter conviction for the killing of Fred McNeill, Jr. McLaughlin argues that the State violated his constitutional rights to be free of double jeopardy by presenting evidence that the offense was not involuntary manslaughter, but murder. Petitioner presented this claim in his MAR. The MAR court determined that this claim was procedurally barred because it could have been raised upon direct appeal but was not. *See* N.C. Gen. Stat. § 15A-1419(a)(3).

Section 15A-1419(a)(3) is an adequate and independent state ground to support a procedural default of this portion of Petitioner's claim VI. The trial court had before it evidence that in 1975 McLaughlin had been convicted of involuntary manslaughter for the killing of Fred McNeill, Jr. Also before the trial court was the State's evidence, which Petitioner claims violated his rights under the Double Jeopardy Clause of the Fifth Amendment. Any error

resulting from the State's presentation of this evidence was apparent from the record of the trial proceedings. *See Fair*, 354 N.C. at 166, 557 S.E.2d at 524-25 (where no further investigation required, claim procedurally barred if not raised on direct appeal). No further evidence was necessary for consideration of this claim. Accordingly, this issue is procedurally defaulted, and Respondent's motion for summary judgment as to this issue is granted.

4. Claim VII – The State violated Petitioner's constitutional rights by presenting testimony of his alleged accomplice that was known to be false at the time presented.

In Claim VII, Petitioner contends that his constitutional rights were violated when, at his 1993 resentencing, the State presented testimony of his alleged accomplice, Eddie Robinson, which had been given during Petitioner's 1984 trial. In this prior testimony, Eddie Robinson denied the existence of any agreement giving him consideration for his testimony against Petitioner. Petitioner does not dispute the accuracy of Robinson's testimony when given. Prior to Petitioner's resentencing, however, Robinson was sentenced at a hearing where the State and Robinson stipulated to the existence of the statutory mitigating circumstance that Robinson had testified truthfully against Petitioner, N.C. Gen. Stat. § 15A-2000(f)(8). Petitioner argues the State knew Robinson's testimony was false when the State presented it at Petitioner's 1993 resentencing and that the State violated Petitioner's Sixth, Eighth and Fourteenth Amendment rights as recognized by *Napue v. Illinois*, 360 U.S. 264 (1959).

Petitioner raised this claim in his MAR, and the state court procedurally defaulted the claim pursuant to N.C. Gen. Stat. § 15A-1419(a)(3) on the ground that Petitioner could have raised the claim on direct appeal but did not. *See* N.C. Gen. Stat. § 15A-1419(a)(3). Petitioner asserts this claim is not procedurally barred because evidence of the stipulation between Robinson and the State is not part of the record and could not have been presented on Petitioner's

direct appeal. In response, the State claims that Petitioner's argument is "based entirely upon [Petitioner's] 1993 resentencing transcript." However, the State has provided no reference to the stipulation between the State and Robinson, and the Court has been unable to find any such reference in the 1993 resentencing transcript.

Petitioner was not in a position to adequately raise this claim on direct appeal. *See Fair*, 354 N.C. at 166, 557 S.E.2d at 525; N.C.R. App. 9 (record on appeal limited to matters before trial court). Accordingly, this claim is not procedurally barred by N.C. Gen. Stat. § 15A-1419(a)(3).

5. Claim VIII - The trial court erred by failing to submit the statutory mitigating circumstance of no significant history of prior criminal activity.

In Claim VIII, McLaughlin argues that his constitutional rights under the Eighth and Fourteenth Amendments were violated because the trial court failed to submit as a mitigating circumstance that Petitioner had no significant history of prior criminal activity. Petitioner first raised this claim in his MAR, and the state court concluded this claim was procedurally barred because Petitioner could have raised it on direct appeal but did not. *See* N.C. Gen. Stat. § 15A-1419(a)(3). Petitioner asserts that this claim is not procedurally barred because he has shown cause and prejudice for his default. – the ineffective assistance of appellate counsel in failing to raise this claim on direct appeal.

The deficient performance of counsel violates the Sixth Amendment and is cause for a procedural default where the effectiveness of counsel's assistance was the subject of an independent claim before the state court. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Whether a procedural default was the result of ineffective assistance of counsel is governed by the well-established standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). With respect to an appeal, a petitioner must show that counsel's representation "fell below an objective standard

of reasonableness" and that a reasonable probability exists that, but for the attorney's error, he would have prevailed on appeal. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). Counsel is not required to raise every nonfrivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 752 (1983). The court must presume that counsel decided which "issues were most likely to afford relief on appeal." *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir. 1993).

The first question before the Court is whether Petitioner's appellate counsel was objectively unreasonable in failing to assign as error and argue on appeal that the trial court erred in failing to submit the statutory mitigating circumstance of no significant history of prior criminal activity. "'A defendant's criminal history is considered "significant" if it is likely to affect or have an influence upon the determination by the jury of its recommended sentence.'" *State v. Greene*, 351 N.C. 562, 569, 528 S.E.2d 575, 580 (quoting *State v. Jones*, 339 N.C. 114, 157, 451 S.E.2d 826, 849-50 (1994)). The evidence before the trial court was that Petitioner had previously been convicted of involuntary manslaughter, driving under the influence, temporary larceny of a motor vehicle, failure to yield the right of way and possession of a controlled substance. In addition, evidence was presented from which the jury could have found that Petitioner had a history of drug use. Based on his involuntary manslaughter conviction, the jury found as an aggravating circumstance that Petitioner had previously been convicted of a felony involving the use of violence to the person. Given the evidence before the jury and the jury's reliance upon the involuntary manslaughter conviction in finding the prior violent felony aggravating circumstance, it cannot be said that appellate counsel acted unreasonably by failing to argue the non-submission of the no significant history of prior criminal activity mitigator. Petitioner has failed to establish cause and prejudice to overcome the procedural default. Respondent's motion for summary judgment as to Claim VIII is granted.

6. Claim IX – The trial court erred by failing to instruct the jury that it must find the statutory mitigating circumstance that Petitioner had aided in the apprehension of another capital defendant.

In Claim IX, McLaughlin contends that the trial court erred by failing to instruct the jury it must find the statutory mitigating circumstance that Petitioner aided in the apprehension of another capital defendant. The State argues that this claim was procedurally defaulted by the state court on the ground that it could have been raised on direct appeal but was not. A review of the state court's order, however, reflects that this claim was denied on the merits and as barred pursuant to *State v. Zuniga*, 336 N.C. 508, 512, 444 S.E.2d 443, 445 (1994). In *Zuniga*, the North Carolina Supreme Court adopted the rule pronounced in *Teague v. Lane*, 489 U.S. 288 (1989), "'that new rules [of criminal procedure] should always be applied retroactively to cases on direct review, but that generally they should not be applied retroactively to cases on collateral review.'" *Zuniga*, 336 N.C. at 511, 444 S.E.2d at 445 (quoting *Teague*, 489 U.S. at 302-03). Because *Zuniga* relies upon *Teague*, it is not an independent state-law ground upon which to bar federal review. The Court will, therefore, consider the merits of this claim.

7. Claim XI – Petitioner's mental health expert had an actual conflict of interest that deprived Petitioner of his Fourteenth Amendment rights.

In his eleventh claim, Petitioner argues he was deprived of his rights to due process and a fair trial because his mental health expert had an actual conflict of interest in that he evaluated and testified for both Petitioner and his alleged accomplice, Eddie Robinson. Petitioner acknowledges this claim could have been but was not raised on direct appeal as the state court concluded. However, Petitioner asserts that he has shown cause and prejudice – ineffective assistance of appellate counsel – that excuses his failure to raise this issue on appeal.

Assuming a conflict of interest arose as a result of Dr. Lara's evaluations of both Petitioner and Robinson, Petitioner has failed to show how he was prejudiced. At Petitioner's trial, Dr. Lara testified regarding a number of matters that were helpful to Petitioner, including that Petitioner had borderline intellectual functioning with an IQ of 72; that he suffered from abnormal personality traits including components of passivity, dependency, inadequate feelings about himself, and depression; and that he had a history of drug and alcohol abuse. Relying on Dr. Lara's testimony, trial counsel argued that Petitioner was incapable of fabricating a story and telling it over and over again. Dr. Lara further testified that Robinson's IQ was higher than Petitioner's but that he did not have Robinson's report with him and could not provide any more detail concerning Robinson's evaluation.

Petitioner asserts that he was prejudiced as a result of his trial counsel's actions in "calling an expert witness who had an apparent and actual conflict" of interest and by his appellate counsel's failure to raise this issue on appeal. Aside from these conclusory statements, however, Petitioner has provided no explanation of how he was prejudiced by the alleged conflict of interest. Consequently, he fails to establish cause and prejudice to overcome the procedural default. Respondent's motion for summary judgment as to Claim XI is granted.

D. Claims Reviewed on the Merits

Having addressed Respondent's arguments of procedural default, the Court now considers the merits of those claims not procedurally barred, all of which have been adjudicated on the merits in state court. In accordance with 28 U.S.C. § 2254(d), this Court must determine whether the state court's adjudication of these claims was contrary to or involved an unreasonable application of clearly established federal law.

1. Claim I – Petitioner was deprived of his Fifth, Sixth, Eighth and Fourteenth Amendment rights when the State breached its agreement to not present evidence of his prior involuntary manslaughter conviction beyond that contained in the stipulation entered into by Petitioner and the State.

Claim I of the habeas petition alleges that Petitioner was deprived of his Fifth, Sixth, Eighth and Fourteenth Amendment rights because the State was allowed to breach an agreement entered into by the parties concerning the presentation of evidence of Petitioner's prior involuntary manslaughter conviction. Petitioner first raised this claim in his MAR. The MAR court rejected the claim on its merits and, alternatively, found the claim to be procedurally barred.

Prior to Petitioner's original trial in 1984, Petitioner and Respondent entered into an agreement whereby Petitioner stipulated that his prior involuntary manslaughter conviction "involved the use of violence in that [Petitioner] intentionally shot and killed Fred McNeil, Jr." and the State agreed not to present any evidence related to the killing other than Petitioner's stipulation. Based on evidence presented at the MAR hearing, the state court found that Petitioner agreed to the stipulation because defense counsel were of the opinion that the circumstances of the killing were such that evidence of the killing would have inflamed the passions of the jury. The state court further found that the State had agreed not to present evidence of the killing in order to avoid embarrassment to the prior District Attorney who had allowed Petitioner to plead guilty to the lesser charge of involuntary manslaughter.

When Petitioner was resentenced in 1993, the State refused to honor the 1984 agreement and instead introduced evidence of the killing through eyewitness testimony. In addition, the State was allowed to present as evidence Petitioner's written stipulation that the killing involved the use of violence and that Petitioner intentionally shot and killed McNeill. Petitioner contends

that the State's actions in this regard constituted a breach of the 1984 agreement and violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights. The MAR court rejected Petitioner's claim, finding that "things were different" when Petitioner was resentenced in 1993 – that Petitioner was being resentenced for only one murder, as opposed to the three murders for which he was sentenced in 1984. The MAR court concluded that "the State was under no obligation to consider itself bound by an agreement that had pertained only to defendant's 1984 sentencing proceeding."

The Court agrees with Petitioner that the State should not have been allowed to present both eyewitness testimony and evidence that Petitioner had stipulated that the McNeill killing was intentional and violent. The prosecution's interest in a criminal prosecution is "not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). It is the prosecutor's duty to prosecute with earnestness and vigor, and while the prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Id.* When the prosecution makes an agreement within its authority and the defendant relies on it in good faith, the court should not allow the defendant to be prejudiced as a result of that reliance.

The MAR court did not act unreasonably, however, in determining that the State was not bound by the 1984 agreement. Although the stipulation signed by Petitioner was an incriminating statement induced by the State's promise not to present other evidence of the McNeill killing, the record clearly reveals that neither of the parties considered the stipulation binding upon them at the time of the resentencing hearing. When the prosecutor sought to admit the stipulation at Petitioner's resentencing hearing, defense counsel objected on the grounds that

the stipulation had been withdrawn by agreement of the State and the defense. Tr. 2248-49.[2] In addition, the prosecutor testified at the MAR hearing that he did not feel he was bound by the 1984 stipulation.

Accordingly, the problem in this case was not the admission of the eyewitness testimony concerning the McNeill killing, but with the trial court's admission of the stipulation which had been rescinded by mutual agreement of the parties. While the admission of this stipulation was error, it was cumulative of the eyewitness testimony and was, therefore, not prejudicial to Petitioner.

The MAR court's rejection of this claim was not contrary to or an unreasonable application of clearly established federal law. Respondent's motion for summary judgment is, therefore, allowed as to Claim I.

2. Claim II – Petitioner was deprived of his constitutional right of confrontation by the admission of prior testimony of Petitioner's alleged accomplice.

Petitioner's second claim for relief alleges that he was deprived of his confrontation rights when Eddie Robinson's testimony from Petitioner's original trial was admitted into evidence at Petitioner's resentencing hearing. Petitioner contends that the admission of Robinson's testimony violated his Sixth and Fourteenth Amendment rights because the prosecution failed to prove that Robinson was unavailable as a witness. McLaughlin first raised this claim on direct appeal, and it was rejected on the merits by the North Carolina Supreme Court. *McLaughlin II*, 341 N.C. at 457-59, 462 S.E.2d at 18-19.

---

[2]Citations to the transcript are to Petitioner's February 8, 1993, resentencing proceeding.

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court explained that this provision prohibits the admission of testimonial statements of a witness who does not appear at trial except where the witness is "unavailable to testify and the defendant had had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 54. In *United States v. Tindle*, 808 F.2d 319 (4th Cir. 1986), the Fourth Circuit held that the prosecution sufficiently establishes a witness's unavailability to testify where the witness either invokes or indicates that he will invoke his Fifth Amendment right against self-incrimination. *Tindle*, 808 F.2d at 327.

The testimony at issue here was given by Robinson at Petitioner's original trial in 1984. Petitioner was present at the time of Robinson's testimony and, in fact, cross-examined Robinson. Consequently, there is no question that Petitioner had a prior opportunity to cross-examine Robinson concerning the statements admitted at the resentencing.

Petitioner contends, however, that Robinson's prior testimony should not have been admitted because the prosecution failed to establish that Robinson was unavailable to testify. At the time of Petitioner's resentencing, Robinson had been convicted and sentenced to two death sentences for his involvement in the Worley and Baggett murders. However, his appeal was pending in the North Carolina Supreme Court. Prior to the admission of Robinson's prior testimony, the prosecution called Robinson to testify. After Robinson stated his name, Robinson asserted his Fifth Amendment right against self-incrimination. Robinson's appellate attorney stated that Robinson would refuse to answer any further questions put to him by either the prosecution or the defense. After the court declared Robinson unavailable to the prosecution, Petitioner requested that the court also declare Robinson unavailable to the defense.

On appeal the North Carolina Supreme Court concluded that Petitioner's confrontation rights had not been violated by the admission of Robinson's testimony from Petitioner's prior trial. Petitioner fails to demonstrate that the North Carolina Supreme Court's adjudication of this claim is contrary to or an unreasonable application of clearly established Supreme Court precedent. Respondent's motion for summary judgment as to Claim II is granted.

3. Claim IV – Petitioner's prior conviction for involuntary manslaughter is invalid and, therefore, could not be used to support the prior crime of violence aggravating circumstance.

Claim V - Petitioner's invalid involuntary manslaughter conviction was unconstitutionally used to impeach Petitioner.

In Claims IV and V, Petitioner attacks the validity of his 1975 involuntary manslaughter conviction, which was relied upon to aggravate Petitioner's sentence and to impeach Petitioner's testimony. Petitioner contends that this conviction was obtained in violation of the Eighth and Fourteenth Amendments for two reasons. Petitioner first argues that he acted in self defense and there was, therefore, no adequate factual basis for Petitioner's guilty plea. Second, Petitioner argues that he was not aware of the true nature of the charges to which he pled guilty and the guilty plea was, therefore, not voluntarily and intelligently made. These claims were raised in Petitioner's MAR and were determined to be without merit by the MAR court. Because these claims constitute a collateral attack of Petitioner's manslaughter conviction, we must first determine whether these claims are subject to review under § 2254.

Under 28 U.S.C. § 2254, a Petitioner must show he is "in custody" under the conviction or sentence under attack at the time of the filing of his petition. *Maleng v. Cook*, 490 U.S. 488, 492 (1989). A person is "in custody" within the meaning of § 2254 if he is currently serving a sentence that was enhanced as a result of a prior state conviction for which he is no longer in

custody. However, principles of finality generally prohibit a petitioner from challenging an enhanced sentence on the basis that the prior conviction was unconstitutionally obtained. In *Lackawanna County Dist. Atty v. Coss*, 532 U.S. 394 (2001), the Supreme Court explained this principle of finality as follows:

> [O]nce a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid. If that conviction is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained.

Lackawanna, 532 U.S. at 403-04. An exception to this rule is that a petitioner may challenge an enhanced sentence where the conviction used to enhance the sentence was obtained in violation of his right to have counsel appointed. *Custis v. United States*, 511 U.S. 485 (1994). Other exceptions are where the petitioner has been prevented from obtaining review of the prior conviction or where the petitioner can show compelling evidence of actual innocence not available in time for state court review. *Lackawanna*, 532 U.S. at 405.

In order to obtain federal habeas review of his 1975 involuntary manslaughter conviction, McLaughlin must demonstrate that he fits within one of these exceptions. Petitioner is unable to do so. Petitioner's involuntary manslaughter plea was not obtained in violation of his right to have counsel. Petitioner was represented by counsel both prior to and at the time of the entry of his plea. Nor has Petitioner shown that he was in any way prevented or impaired from attacking the validity of his manslaughter conviction.

Petitioner also fails to meet the actual innocence exception. Although Petitioner claims that he is actually innocent of the charge of involuntary manslaughter, his claim is based on evidence that he acted in self defense in killing McNeill. This evidence has been available to

Petitioner since the offense. It is not newly discovered evidence that will support an exception based on actual innocence. Moreover, where a plea bargain is involved, actual innocence requires a petitioner to show actual innocence not only of the offense with which he was convicted, but also of all greater offenses with which the petitioner was originally charged. Petitioner was originally charged with first-degree murder for the killing of McNeill. In order to establish he is actually innocent, Petitioner would have to show he is factually innocent of first-degree murder, second-degree murder and voluntary manslaughter, as well as involuntary manslaughter. Petitioner claims he acted intentionally in killing McNeill and he cannot have been convicted of involuntary manslaughter which, by definition, is the unintentional killing of a human being. While this may be true, it does not mean that Petitioner could not have been convicted of murder or voluntary manslaughter.

With regard to the 1975 offense, the state court found that McNeill was not armed either when he threatened to kill Petitioner or after he had been shot by Petitioner and was lying helplessly on the ground. The state court further found that Petitioner continued to shoot McNeill after he had been felled and rendered helpless. Even assuming that Petitioner acted in self defense in shooting McNeill, there is no reasonable probability that Petitioner would have been convicted of less than voluntary manslaughter. *See State v. Barts*, 316 N.C. 666, 692, 343 S.E.2d 828, 845 (1986) ("[V]oluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense where excessive force is utilized or the defendant is the aggressor.").

Petitioner has failed to establish that he meets any of the exceptions permitting collateral attack of his involuntary manslaughter conviction. As a result, these claims are not subject to

review under 28 U.S.C. § 2254. Respondent's motion for summary judgment as to Claims IV and V is allowed.

4. Claim VI – The State unconstitutionally presented in a false light the facts of Petitioner's prior involuntary manslaughter conviction.

Claim VI of Petitioner's habeas petition alleges that the State, through the testimony of Queen Esther McKoy, presented evidence concerning Petitioner's prior involuntary manslaughter conviction in a false light and withheld evidence favorable to Petitioner that could have been used to impeach Mrs. McKoy. Mrs. McKoy and her husband were witnesses to the incident that led to Petitioner's 1975 manslaughter conviction. Mrs. McKoy testified both in 1974 at Petitioner's probable cause hearing for the shooting of McNeill and in 1993 at Petitioner's resentencing hearing. Petitioner claims that Mrs. McKoy's testimony at the 1993 resentencing hearing was materially different from her prior testimony in that she testified in 1993 that she saw McNeill (but not McLaughlin) at a nightclub the evening of the shooting; that she saw McLaughlin shoot McNeill; that after he had been shot, McNeill fell to the ground and said "Man you got me;" and that McLaughlin continued to shoot McNeill after he was on the ground. Petitioner further claims that this testimony falsely portrayed Petitioner killing McNeill in cold blood without justification rather than in self defense. Petitioner raised this claim in his MAR to the state court. The MAR court denied the claim on the merits.

The state court found no material inconsistencies between Queen Esther McKoy's testimony at the 1974 probable cause hearing and the 1993 resentencing hearing. Although Mrs. McKoy testified in 1974 hearing that she did not see either Petitioner or McNeill with a gun, she explained that she knew Petitioner had been the one shooting because after the first round of shots she saw Petitioner standing over McNeill. The 1974 hearing transcript further indicates

that Mrs. McKoy testified that she saw something shiny in Petitioner's hand after the shooting. At the 1974 hearing, Mrs. McKoy also testified that she saw McNeill fall to the ground, then she heard him say "Elton man he got me." In 1993, Mrs. McKoy testified that after being shot McNeill stated "Man, you got me." Finally, in 1974 Mrs. McKoy testified that she had seen Petitioner at a nightclub that evening but that she had not seen McNeill there; in 1993, Mrs. McKoy stated that she had seen McNeill but not Petitioner at the nightclub.

Petitioner fails to show that the state court's denial of this claim is contrary to or an unreasonable application of clearly established federal law. Due process is violated by the State's knowing use of perjured testimony, *Napue v. Illinois*, 360 U.S. 264 (1959), or by its suppression of material evidence favorable to the accused, *Brady v. Maryland*, 373 U.S. 83 (1963). The State's duty to disclose favorable evidence under *Brady* extends not only to exculpatory information, but also to impeachment evidence. *Giglio v. United States*, 405 U.S. 150, 154 (1972). Evidence is material for *Brady* purposes "if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Mrs. McKoy's testimony at the 1974 hearing was not materially different from her testimony at Petitioner's resentencing hearing. It does not constitute false testimony within the meaning of *Napue*. Considering the evidence as a whole, there is also no reason to believe that disclosure of Mrs. McKoy's 1974 testimony would have changed the jury's sentencing recommendation. Respondent's motion for summary judgment as to this claim is granted.

5. Claim VII – The State violated Petitioner's constitutional rights by presenting testimony of his alleged accomplice that was known to be false at the time presented.

This claim asserts that the State violated Petitioner's due process rights as recognized by *Napue*, when it knowingly presented false testimony at Petitioner's 1993 resentencing hearing. Petitioner also claims that defense counsel were ineffective in failing to discover the facts underlying the allegedly false testimony. At issue here is Eddie Robinson's testimony at Petitioner's 1984 trial in which Robinson denied the existence of an agreement giving him any consideration in exchange for his testimony against Petitioner. On this subject, Robinson testified that he had no arrangement with the State but that his attorneys told him that his testimony might serve as a mitigating circumstance when he was tried. When asked what his understanding was about his testimony, Robinson stated:

> I understand that when I came here today, that I was to tell the truth and to come about the 15th of next month I would be tried for three first degree murders and that the District Attorney, you will be seeking the death penalty in those charges.

Robinson was, in fact, capitally tried and convicted the following month, at the October 15, 1984, session of court, for the first-degree murders of James Worley, Sheila Denise Worley and Psoma Baggett. Following a capital sentencing hearing, the jury found in all three cases the mitigating circumstance that Robinson had testified truthfully on behalf of the State in Petitioner's case. The jury recommended that Robinson be sentenced to death in all three cases. On appeal, Robinson's convictions were affirmed but his case was remanded for resentencing in light of *McKoy v. North Carolina*, 494 U.S. 433 (1990).

Robinson was resentenced at the May 4, 1992, session of Bladen County Superior Court, approximately ten months prior to Petitioner's resentencing. *See State v. Robinson*, 339 N.C. 263, 451 S.E.2d 196 (1994). At Robinson's resentencing, one of the detectives testified that

Robinson had been cooperative with the investigating officers and that Robinson had not been given a deal for testifying against Petitioner. *Id.* at 269-70, 451 S.E.2d at 200. The State stipulated that Robinson had testified truthfully on behalf of the State at Petitioner's trial. *Id.* at 270, 451 S.E.2d at 200. Based on this evidence, the jury again found as a mitigating circumstance that Robinson had testified truthfully on behalf of the prosecution in another felony prosecution. *Id.* at 270-71, 451 S.E.2d at 201. Robinson was resentenced to two death sentences for the murders of Psoma Baggett and Sheila Denise Worley and to life imprisonment for the murder of James Worley. *Id.*

In support of this claim, Petitioner relies on *Napue v. Illinois*, 360 U.S. 264 (1959). In *Napue*, the prosecution's principal witness testified that he had received no promise of consideration for his testimony when, in fact, the prosecutor had promised to recommend a sentence reduction if he testified. The Supreme Court held that the prosecutor's use of the false testimony violated the Due Process Clause of the Fourteenth Amendment, entitling Napue to a new trial.

Based on *Napue*, it has become well established that the State's knowing use of perjured testimony violates the Fourteenth Amendment. It is equally well established that a conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict. This principle applies whether the prosecutor solicited the perjured testimony or merely allowed it to go uncorrected. A prosecutor's failure to correct false testimony does not rise to the level of a Fourteenth Amendment violation, however, if there is no reasonable likelihood that the testimony was material – that it affected the outcome of the trial.

Robinson's testimony does not present a typical *Napue* claim. Robinson did not perjure himself when he testified in 1984 that there was no promise of consideration for his testimony against Petitioner. Nor does it appear that the State provided Robinson with any consideration at his trial the following month. However, Robinson's testimony was not only presented at Petitioner's 1984 trial but also at his 1993 resentencing hearing. It is the State's presentation of this testimony at the 1993 resentencing hearing of which Petitioner complains.

Like Petitioner, Robinson was also resentenced due to *McKoy* error. When Robinson was resentenced ten months before Petitioner's 1993 resentencing hearing, the State stipulated that Robinson had testified truthfully on behalf of the State at Petitioner's 1984 trial. Based on this stipulation, Petitioner argues that Robinson's testimony was no longer true at the time of Petitioner's resentencing hearing and that the State was obligated to correct the false portion of Robinson's testimony.

Napue does not directly address the situation presented here, and no case presenting similar circumstances has been cited by the parties or unearthed during the Court's review of the federal case law. It is not necessary, however, for the Court to decide how far *Napue* extends. Assuming that *Napue* requires the prosecution to correct testimony such as Robinson's, the failure to do so would violate the Fourteenth Amendment only where the petitioner is able to show there is a reasonable likelihood that the testimony affected the jury's verdict. This Petitioner has failed to do.

The reason for questioning a witness about an agreement for his testimony is that the existence of such an agreement may be viewed by the jury as an incentive to "fabricate[] testimony in order to curry the favor of' the prosecution. *Napue*, 360 U.S. at 270. Although Robinson denied the existence of any agreement for his testimony, he admitted that he

was testifying against Petitioner because he thought it would help his case and that his testimony might be a mitigating factor in his case. Given Robinson's testimony, there is no reasonable likelihood that Robinson's credibility would have been viewed any differently had the jury known the State stipulated that Robinson had testified truthfully against Petitioner nine years earlier.

Because he is unable to show any reasonable likelihood of a different outcome in the verdict, Petitioner is also unable to establish that trial counsel's failure to discover the stipulation prejudiced him. Accordingly, Petitioner's ineffective assistance of counsel claim also fails. Respondent's motion for summary judgment is allowed as to Claim VII.

6. Claim IX – The trial court erred by failing to instruct the jury that it must find the statutory mitigating circumstance that Petitioner had aided in the apprehension of another capital defendant.

In this claim, Petitioner argues that the trial court erred by failing to give a "mandatory peremptory instruction" on the mitigating circumstance that Petitioner had aided in the apprehension of another capital defendant, N.C. Gen. Stat. § 15A-2000(f)(8). At the resentencing hearing, Petitioner requested a peremptory instruction as to this mitigating circumstance, and the trial court instructed the jury as follows:

> [A]s to this mitigating circumstance, I charge you that if one or more of you find the facts to be as all the evidence tends to show, you will answer, "yes," as to this mitigating circumstance on the "Issues and Recommendation" form.

Petitioner contends this instruction was insufficient and that the trial court should have instructed the jurors that they must find the existence of this mitigating circumstance. Petitioner first presented this claim in his MAR. The state court denied the claim on the merits and as *Teague*-barred.

In support of his argument, Petitioner cites the North Carolina Supreme Court's decision in *State v. Flippen*, 344 N.C. 689, 477 S.E.2d 158 (1996), and the United States Supreme Court's decisions in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and *Lockett v. Ohio*, 438 U.S. 586 (1978). In *Flippen,* the court held that it was error to not give a mandatory peremptory instruction where the mitigating circumstance had been established by stipulation of the parties. However, *Flippen* was based on state, not federal, law. Neither *Eddings*, *Hitchcock*, nor *Lockett* support Petitioner's claim. Based on these cases, it is well established that a sentencing jury may not be precluded from considering any evidence in mitigation of a defendant's sentence. However, these cases do not require that the jury be instructed that they *must* find the existence of a mitigating factor. To extend these cases to require a mandatory peremptory instruction would constitute a new rule, the application of which would be *Teague*-barred. Absent controlling federal precedent, this Court cannot say that the state court's adjudication of this claim is contrary to or an unreasonable application of clearly established federal law. Respondent's motion for summary judgment as to Claim IX is granted.

7. Claim X – Petitioner was deprived of his right to be free from double jeopardy when the jury was allowed to reconsider its sentencing decision.

   Claim XXVIII – The trial court improperly coerced the jury's sentencing verdict.

In Claims X and XXVIII, Petitioner complains of instructions given by the trial court after it received a note in which the jury inquired about perceived inconsistencies in the sentencing phase verdict form. Petitioner first asserts that he was deprived of his right to be free from double jeopardy because the jury was permitted to reconsider its sentencing decision. Second, Petitioner maintains that the instruction given improperly coerced a unanimous verdict. These claims were raised on direct appeal and rejected on the merits by the North Carolina

Supreme Court. That court held that the instructions correctly advised the jury that a recommendation as to punishment must be unanimous. The court further concluded that the instructions did not imply that a recommendation must be reached and, therefore, did not coerce a sentencing decision.

At sentencing, the jury was instructed that it must answer the following question:

> Issue Four: Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances you found is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?

As to this issue, the jury was instructed that it should return a sentence of death if it answered this issue "yes" or a sentence of life imprisonment if it answered this issue "no." However, the sentencing form further suggested that the jury's sentencing decision must be unanimous. During its deliberations, the jury sent the court a note that contained the following: "Issue 4 contradicts recommendation as to punishment (eg.) Issue 4 is no (11 to 1) yet recommendation states 'we the jury "unanimously" recommend.['] We are not unanimous (11 to 1)." In response to the jury's note, the trial court instructed the jury as follows:

> As to Issue Number Four, I instruct you that your answer to Issue Number Four – that your answer to Issue Number Four, whether you answer "yes" or "no" must be unanimous.
>
> Members of the jury, I am going to ask that you resume your deliberations in an attempt to return a recommendation. I have already instructed you that your recommendation must be unanimous. That is, each of you must agree on the recommendation. I shall give you these additional instructions.
>
> First, it is your duty to consult with one another and deliberate with a view towards reaching a recommendation, if it can be done without violence to individual judgment.
>
> And second, each of you must decide the case for yourself, and your recommendation for yourself, but only after an impartial consideration of the evidence with your fellow jurors.

Third, in the course of your deliberations you should not hesitate to re-examine your own views, and to change your opinion, if you become convinced it is erroneous. On the other hand, you should not hesitate to hold to your views and opinions if you remain convinced that they are correct.

Fourth, no juror should surrender his or her honest conviction as to the weight or the effect of the evidence solely because of the opinion of their fellow jurors, or for the mere purpose of reaching a recommendation.

Fifth, your inability to reach a unanimous recommendation as to punishment should not be your concern, but should simply be reported to the Court.

Please be mindful that I am in no way trying to force you or coerce you to reach a recommendation. I recognize the fact that there are sometimes reasons why jurors cannot agree. . . . I merely want to emphasize the fact that it is your duty to do whatever you can do . . . to reason the matter together as reasonable people, to reconcile your differences, if you can without the surrender of honest convictions to reach a recommendation.

If and when you have reached a unanimous decision as to the issues and recommendation and are ready to pronounce them, and your foreperson has marked or written the answers on the form, have your foreperson sign and date the form and notify the bailiff by knocking on the door to the jury room, or summonsing [sic] the bailiff and you'll be returned to the courtroom to pronounce your answers to the issues and your recommendation.

And, members of the jury, I want to make it clear that as you answer Issue Number Four "yes" or "no" unanimously, then that will of consequence determine your answer to the recommendation. So please understand if you answer Issue Number Four "yes," your recommendation will be the death penalty. And if you answer Issue Number Four "no," your recommendation will be life imprisonment.

Tr. 2722-24.

To support his double jeopardy claim, Petitioner relies on *Bullington v. Missouri*, 451 U.S. 430 (1981), and *Ashe v. Swenson*, 397 U.S. 436 (1970). In essence, Petitioner argues that the jury's failure to reach a unanimous verdict required the trial court to impose a life sentence pursuant to N.C. Gen. Stat. § 15A-2000(b) and triggered double jeopardy protections that prevented the subsequently imposed death sentence. Unfortunately for Petitioner, this argument

is foreclosed by the Supreme Court's decision in *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003). *Sattazahan* involved a petitioner who was sentenced to life imprisonment when the jury was unable to reach a unanimous sentencing decision. On appeal, the state court reversed the petitioner's conviction and remanded for a new trial. On remand, the petitioner was again convicted but this time was sentenced to death upon a unanimous jury verdict. The Supreme Court rejected Sattazahan's claim that imposing a sentence of death violated principles of double jeopardy. The Court held that double jeopardy is invoked only where there has been an "acquittal on the merits" and that "'a retrial following a "hung jury" does not violate the Double Jeopardy Clause.'" *Sattazahan*, 537 U.S. at 108-09 (quoting *Richardson v. United States*, 468 U.S. 317, 324 (1984)).

North Carolina law requires that a jury's sentencing decision be unanimous. Unanimity is required whether the decision is one sentencing the defendant to death or one acquitting him of the death penalty by recommending a life sentence. *State v. McCarver*, 341 N.C. 364, 393, 462 S.E.2d 25, 41 (Issues Three and Four are "ultimately dispositive" of the jury's sentencing recommendation and, therefore, may be answered only by unanimous decision) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 463 (1990)); *see also* N.C. Gen. Stat. § 15A-2000(b) ("If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment . . . .").

In Petitioner's case, there had been no unanimity and, therefore, no "acquittal on the merits." At most, the jury's note suggests that the jurors had been unable to reach a unanimous verdict at the time of their inquiry.[3] Because there was no unanimous verdict acquitting

---

[3]Respondent argues that the jury's use of "e[.]g." indicates that the numerical division described in the note is merely an example used to show the jurors' perceived inconsistencies

Petitioner of the death penalty, double jeopardy principles were not violated by the jury's continued deliberations and subsequent decision unanimously recommending the death penalty. The North Carolina Supreme Court's decision denying Petitioner's double jeopardy claim was not contrary to or an unreasonable application of clearly established federal law.

Nor did the state court act unreasonably or contrary to *Lowenfeld v. Phelps*, 484 U.S. 231 (1988), and *Allen v. United States*, 164 U.S. 492 (1896), in determining that the trial court's instructions did not improperly coerce the jury's sentencing decision. In response to the jury's note indicating an 11 to 1 numerical split, the trial judge instructed the jurors that both their answer to Issue Number Four and their sentencing recommendation must be unanimous. While urging the jurors to "reason the matter over together as reasonable people, to reconcile your differences, if you can," the trial judge further told the jurors to resume their deliberations "in an attempt to return a recommendation," and to "consult with one another and deliberate with a view towards reaching a recommendation, if it can be done without violence to individual judgment." The judge stated that "no juror should surrender his or her honest conviction as to the weight or the effect of the evidence solely because of the opinion of their fellow jurors, or for the mere purpose of reaching a recommendation," and that they "should not hesitate to hold to [their] views and opinions if [they] remain convinced that they are correct." The trial court's instructions, viewed in their entirety as they must be, did not single out the minority juror or imply that the jurors would be held indefinitely until they reached a unanimous verdict. In fact,

---

between the trial court's instructions and the sentencing phase verdict form and does not indicate that the jury was split 11 to 1. The Court notes, however, that earlier in the day, the jury had reported a 9 to 3 split on the issue of sentencing. Given the jury's note and the report of its prior vote, the Court is unable to say that the jury was not reporting a split vote.

the jurors were instructed that an "inability to reach a unanimous recommendation as to punishment should not be [their] concern, but should simply be reported to the Court." The state court did not act unreasonably in concluding that the instructions given did not have the effect of improperly coercing a unanimous verdict. *See Tucker v. Catoe*, 221 F.3d 600 (4th Cir.) (whether jury instruction is unduly coercive should be determined after consideration of a number of factors, including: "the charge in its entirety and in context;" whether the instruction includes language requiring unanimity or suggesting that the jury will be kept until a unanimous verdict is reached; the trial court's knowledge of the jury's division; any singling-out of the minority jurors; the length of jury deliberations; jury requests for instructions; and other indicia of coercion); *Green v. French*, 143 F.3d 865 (4th Cir. 1998) (jury not improperly coerced by similar instruction), *overruled on other grounds by Williams v. Taylor*, 529 U.S. 362 (2000). Respondent is entitled to judgment as a matter of law as to Claims X and XXVIII, and his summary judgment motion is, therefore, allowed as to these claims.

8. Ineffective Assistance of Counsel Claims.

McLaughlin raises numerous claims of ineffective assistance of his trial counsel, Michael Willis and Craig Wright, and of his appellate counsel. These claims were all presented to and rejected by the state court on the merits. All factual findings made by the state court are presumed correct. 28 U.S.C. § 2254(e)(1).

The Sixth Amendment right to counsel guarantees the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). An accused pleads not guilty has the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). Where the adversarial nature of trial is eliminated because of counsel's performance, the right to counsel has been violated. *Id.*

In order to prove ineffective assistance of counsel, a petitioner must ordinarily make two showings. First, he must show that counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. at 687. Counsel's performance is deficient when it falls below an "objective standard of reasonableness" under the circumstances. *Id.* at 688-90. On this issue, there is a strong presumption that trial counsel acted reasonably. *Id.* at 689. Second, a petitioner must show that counsel's deficient performance prejudiced him. *Id.* at 687. Counsel's performance is prejudicial when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In the context of a capital sentencing proceeding, the question with respect to prejudice is "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695.

There are some circumstances where prejudice will be presumed, such as where counsel was absent or prevented from assisting the accused during a critical stage of the proceeding. *United States v. Cronic*, 466 U.S. 648, 658-60 & n.25 (1984). "Circumstances of that magnitude may also be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer . . . could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conflict of the trial." *Id.* at 659-60.

a. Claim III – Trial counsel rendered ineffective assistance of counsel by conceding Petitioner's guilt of second-degree murder.

In the closing argument at Petitioner's trial, defense counsel stated: "There is no way that you can find Mr. McLaughlin not guilty of at least one count of second degree murder." Petitioner alleges that he was deprived of his Sixth Amendment right to effective assistance of

counsel because this concession of guilt was made without his consent. Citing *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), Petitioner argues that it was a *per se* violation of the Sixth Amendment for trial counsel to admit Petitioner's guilt of second-degree murder without obtaining his consent. Petitioner's argument and the *Harbison* decision are premised on the Supreme Court's decision in *Cronic*. Basically, the argument is that an admission of guilt made without the client's consent is tantamount to "an actual breakdown of the adversarial system," *Strickland*, 466 U.S. at 696, and is *per se* ineffective assistance of counsel. *Cronic*, 466 U.S. at 659 ("[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.").

The United States Supreme Court rejected such a rule of presumptive prejudice in *Florida v. Nixon*,125 S. Ct. 551 (2004). *Nixon* involved a defendant who was convicted and sentenced to death after his defense attorney conceded his guilt to a brutal killing. The Florida Supreme Court held that defense counsel's concession was the "functional equivalent of a guilty plea" and constituted presumptively inadequate counsel because Nixon had not "affirmatively and explicitly agreed to counsel's strategy." *Nixon*, 125 S. Ct. at 559. The Supreme Court reversed and held that a claim of ineffective assistance of counsel based on an admission of guilt made without the client's consent is not entitled to a presumption of prejudice but is subject to the ineffective assistance standard prescribed in *Strickland* where counsel has informed the client of the strategy and the client does not object. *Id.* at 562-63. "Defense counsel undoubtedly has a duty to discuss potential strategies with the defendant. But when a defendant, informed by counsel, neither consents nor objects to the course counsel describes as the most promising means to avert a sentence of death, counsel is not automatically barred from pursuing that

course." *Id.* at 555 (citation omitted). "[I]f counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain." *Id.* at 563.

Pursuant to *Nixon*, a review of Petitioner's claim requires the Court to first determine whether counsel fulfilled their duty of consultation by informing Petitioner of their proposed strategy and its potential benefits. An evidentiary hearing was held before the state court at which both of Petitioner's attorneys, Michael Willis and Craig Wright, testified. Neither was able to recall the specifics of their conversations with Petitioner; however, they testified that they met with Petitioner many times to talk with him about his case.

Both Willis and Wright testified that conceding guilt is an important aspect of the case and it was their policy to discuss with their clients what is important. Willis stated that he and Wright talked to Petitioner about their concerns, theories and ideas. He stated that he and Wright had worked together on other cases and always tried to inform their clients of their strategy and the reasons why they thought things should be done a certain way. Wright did not specifically recall speaking with Petitioner about conceding guilt to second-degree murder but felt that during the preparation and rather large amount of time he and Willis spent with Petitioner, they would have discussed the matter and how the attorneys were going to approach it. Wright further testified that he has always made it a practice to let his clients know the approach he is going to take in opening and closing statements and what he is going to argue to the jury. He felt strongly that they would have discussed with Petitioner their intent to concede guilt to some lesser crime.

In contrast, Petitioner testified that Willis and Wright never talked to him about anything substantive – that they merely told him what time to be in court and to be ready. He stated that Willis and Wright did not talk with him about the evidence in his case and that they did not tell

him what they were going to say in their opening and closing statements to the jury. Petitioner testified that he did not give either attorney permission to concede his guilt.

Based on the evidence presented at the MAR hearing, the state court found that Willis and Wright had discussed their intention to concede Petitioner's guilt and obtained his consent to do so. The court made the following additional findings:

> The decision to concede [Petitioner's] guilt in this case, unlike *Harbison*, was made prior to trial. Willis and Wright spent a great deal of time with this defendant; they both discussed all important aspects of the trial with him; he had input in all. While neither attorney could remember the specifics of any discussions after fourteen years, Wright was certain, as is and has been the practice of both these experienced criminal defense attorneys, that he and Wright had discussed conceding [Petitioner's] guilt with him. Willis testified that [Petitioner] had a sufficient grasp on things [and] that he would disagree with the attorneys on some matters, necessitating further discussion and perhaps even a change in tactics in accord with [Petitioner's] directions to them. Willis testified that conceding [Petitioner's] guilt was a fairly important aspect of the case and that all important aspects of the case were discussed with [Petitioner]. Neither attorney testified that [Petitioner] told them not to concede his guilt or disagreed with their strategy in doing so.

The evidence presented at the MAR hearing supports the state court's findings that counsel informed Petitioner of their intention to concede his guilt to second-degree murder and that Petitioner did not object. McLaughlin fails to offer any clear and convincing evidence to rebut the state court's findings, and these findings are, therefore, presumed correct. *See* 28 U.S.C. § 2254(e)(1).

Having determined that counsel consulted with Petitioner and that Petitioner offered no objection, the Court must now determine whether Petitioner has established that counsel's performance in conceding Petitioner's guilt to second-degree murder was objectively unreasonable as is required to prove the first prong of the *Strickland* standard of ineffective assistance of counsel. *Nixon*, as well as Fourth Circuit precedent predating *Nixon*, establish that

there are legitimate and reasonable strategic reasons for conceding a defendant's guilt, especially in capital cases. As the *Nixon* court noted:

> [T]he gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. In such cases, avoiding execution may be the best and only realistic result possible.

Nixon, 125 S. Ct. at 562 (citation and footnote omitted) (quoting American Bar Ass'n Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.9.1, Commentary (rev. ed. 2003), *reprinted in* 31 Hofstra L. Rev. 913, 1040 (2003)).

In *Young v. Catoe*, 205 F.3d 750 (4th Cir. 2000), the Fourth Circuit held that "counsel's concession of a client's guilt does not automatically constitute deficient performance." *Young*, 205 F.3d at 759. While a complete concession of guilt may constitute ineffective assistance in some cases, "a distinction . . . must be drawn between a statement or remark which amounts to a tactical retreat and one which has been called a complete surrender." *Clozza v. Murray*, 913 F.2d 1092, 1099 (4th Cir. 1990).

The evidence before the MAR court established that trial counsel's concession in this case was a tactical retreat made in an effort to spare Petitioner from a first-degree murder conviction. Had the jury accepted counsel's argument, Petitioner would not have faced the death penalty. Trial counsel's strategy was "a reasonable attempt 'to risk losing the battle in the hope of winning the war.'" *Baker v. Corcoran*, 220 F.3d 276 (4th Cir. 2000) (quoting *Young*, 205 F.3d at 760). Counsel's performance did not fall below an objective standard of reasonableness, and Petitioner has, therefore, failed to prove ineffective assistance of counsel within the meaning of *Strickland*.

Petitioner fails to show that the MAR court's adjudication of this claim is contrary to or an unreasonable application of clearly established federal law. Respondent's motion for summary judgment as to this claim is allowed.

b. Claim XII – Trial counsel were ineffective for failing to investigate and defend against Petitioner's invalid manslaughter conviction.

Claim XVII – Trial counsel were ineffective for failing to challenge the use of Petitioner's involuntary manslaughter conviction in impeaching Petitioner during the guilt-innocence phase.

Petitioner's twelfth and seventeenth claims raise similar arguments concerning the 1975 manslaughter conviction that was used to enhance Petitioner's sentence and to impeach Petitioner's testimony. Petitioner asserts that the conviction was invalid and that trial counsel's failure to investigate and challenge the validity of this conviction deprived him of his constitutional right to the effective assistance of counsel. As in Claims IV and V, Petitioner's claims here are premised on the argument that Petitioner could not have been convicted of involuntary manslaughter because he intentionally shot McNeill in self defense. These claims were presented to the MAR court and denied on the merits.

Assuming, *arguendo*, that trial counsel were ineffective in failing to conduct further investigation and in failing to challenge the manslaughter conviction, Petitioner has failed to establish that trial counsel's actions were prejudicial. Following an evidentiary hearing on these claims, the state court determined that had Petitioner gone to trial on the original charges instead of pleading guilty to involuntary manslaughter, there is no reasonable probability that Petitioner would have been acquitted. Based on evidence that Petitioner intentionally shot McNeill after he had been felled and rendered helpless, the state court further determined that any error resulting

from the acceptance of Petitioner's guilty plea was error benefitting Petitioner and, therefore, harmless. Had trial counsel conducted a more thorough investigation and sought to challenge the conviction by filing a motion for appropriate relief, there is no reason to believe that the trial court's determination of that motion would have been any different from the MAR court's determination. Petitioner has failed to present clear and convincing evidence to rebut the state court's findings or to demonstrate that the state court's determination of these claims was contrary to or an unreasonable application of clearly established federal law. Respondent is, therefore, entitled to judgment as a matter of law as to Claims XII and XVII.

c. Claim XIII – Trial counsel were ineffective for stipulating that Petitioner's prior involuntary manslaughter conviction involved an intentional killing.

Claim XIII of Petitioner's habeas petition alleges that trial counsel rendered ineffective assistance of counsel by stipulating that Petitioner's prior involuntary manslaughter conviction involved an intentional killing when involuntary manslaughter, by definition, is an unintentional killing. Petitioner further asserts that trial counsel were ineffective because they failed to present evidence that the killing was justified by self defense. This claim was first presented in McLaughlin's MAR and rejected on the merits. The MAR court found that counsel entered into the stipulation in an effort to keep all details of the killing from the jury and that Petitioner failed to show that counsel's performance was deficient.

At the state-court hearing on Petitioner's MAR, both of McLaughlin's trial counsel testified that they believed the facts surrounding Petitioner's killing of McNeill were extremely detrimental to Petitioner. They indicated that their investigation revealed that McNeill was unarmed at the time of the shooting, that Petitioner shot McNeill once and McNeill fell to the ground, that Petitioner shot McNeill again and again as McNeill lay helplessly on the ground and

that Petitioner then left the scene in McNeill's vehicle. The state court found that trial counsel had a reasonable trial strategy to keep all details of the killing from the jury and that the stipulation was made to promote this reasonable trial strategy. McLaughlin fails to offer clear and convincing evidence to rebut the MAR court's findings or to show that the MAR court's ruling is contrary to or an unreasonable application of *Strickland*. Respondent's motion for summary judgment as to Claim XIII is granted.

d. Claim XIV – Trial counsel were ineffective for failing to bring to the trial court's attention the State's prior agreement to not present additional evidence of the involuntary manslaughter conviction.

In Claim XIV, McLaughlin alleges that trial counsel were ineffective in failing to inform the trial court of the State's agreement to present no evidence of the involuntary manslaughter conviction beyond that contained in the parties' stipulation. Petitioner contends that the trial court would have excluded either the stipulation or the eyewitness testimony concerning the conviction had the trial court been aware of the agreement underlying the stipulation. This claim was raised in Petitioner's MAR and rejected on the merits.

In its review of Claim I, the Court determined that the admission of the parties' stipulation was error but that it was not prejudicial to Petitioner since the stipulation was merely cumulative of the eyewitness testimony. As such, Petitioner is unable to demonstrate that he was prejudiced by trial counsel's failure to inform the court of the State's agreement. Respondent's motion for summary judgment as to this claim is, therefore, allowed.

e. Claim XV – Trial counsel were ineffective for failing to move *in limine* to exclude evidence that Petitioner's alleged accomplice had been released from custody after receiving a life sentence for another offense.

In his fifteenth claim for relief, McLaughlin alleges that trial counsel were ineffective in failing to challenge evidence that Eddie Robinson had been convicted of murder, sentenced to

life imprisonment and released from custody prior to age thirty-six. Petitioner contends this evidence may have misled the jury into believing that he would be eligible for parole at an early age if sentenced to life imprisonment when, in fact, he would not have been eligible for parole until he was ninety-three. McLaughlin presented this claim in his MAR, and the MAR court rejected the claim on its merits. The state court found that Petitioner failed to demonstrate either the performance component or the prejudice component of the *Strickland* test for ineffective assistance of counsel.

Petitioner fails to show that the state court's ruling is contrary to or an unreasonable application of *Strickland*. Trial counsel requested permission to object during the reading of Robinson's testimony. The trial court denied this request, as well as defense counsel's request to present parole eligibility evidence to rebut the implication that a life sentence would not prohibit Petitioner from being released at an early age. Given all of the circumstances, trial counsel's performance can hardly be characterized as deficient. Petitioner's proof as to Claim XV fails, and Respondent's motion for summary judgment is granted.

f. Claim XVI – Trial counsel were ineffective for failing to request an instruction that the jury must find the statutory mitigating circumstance that Petitioner had aided in the apprehension of another capital defendant.

Claim XXI – Appellate counsel was ineffective for failing to argue that the trial court erred in failing to instruct the jury that it must find the statutory mitigating circumstance that Petitioner had aided in the apprehension of another capital defendant.

In Claims XVI and XXI, Petitioner contends that his trial counsel were ineffective for failing to request a mandatory peremptory instruction and his appellate counsel was ineffective for failing to challenge the lack of a mandatory peremptory instruction as to the mitigating circumstance that he aided in the apprehension of another capital defendant, N.C. Gen. Stat. §

15A-2000(f)(8). These claims were raised in Petitioner's MAR and were rejected on the merits. The state court determined that Petitioner had failed to demonstrate either the performance component or the prejudice component of the *Strickland* ineffective assistance of counsel test.

The Court has rejected Petitioner's claim that he was entitled to a mandatory peremptory instruction on the (f)(8) mitigator under federal law. *See* Claim IX *supra*. Petitioner's entitlement to such an instruction under state law was not recognized until *State v. Flippen*, 344 N.C. 689, 477 S.E.2d 158 (1996). *Flippen* was not decided until three years after Petitioner's resentencing and the year after Petitioner's direct appeal. As a consequence, Petitioner is unable to demonstrate that counsel's performance fell below the objective standard of reasonableness set forth in *Strickland*. Summary judgment for Respondent is allowed as to these claims.

g. Claim XVIII – Trial counsel were ineffective for calling to testify an expert who had an actual conflict of interest.

In Claim XVIII, Petitioner contends that his trial counsel provided ineffective assistance of counsel by calling Dr. Lara to testify as a mental health expert because Dr. Lara had an actual conflict of interest in that he evaluated both Petitioner and his alleged accomplice, Eddie Robinson. This claim was first raised in Petitioner's MAR. The state court concluded that Petitioner failed to show either prong of the *Strickland* test of ineffective assistance of counsel.

As set forth above in the Court's treatment of Claim XI, Petitioner has failed to meet his burden under *Strickland*. Assuming that a conflict of interest existed due to Dr. Lara's dual evaluations, Petitioner has not shown that he was prejudiced as a result of the evaluations or Dr. Lara's testimony. In fact, trial counsel relied heavily on Dr. Lara's testimony at Petitioner's trial, and a number of mitigating circumstances found by the jury were based on Dr. Lara's testimony.

Petitioner has failed to establish that the state court's determination of this claim was contrary to or an unreasonable application of clearly established federal law. Respondent's motion for summary judgment of Claim XVIII is granted.

h. Claim XIX – Trial counsel were ineffective for failing to use Petitioner's expert witness to impeach the testimony of Petitioner's alleged accomplice.

Claim XIX of the habeas petition alleges that Petitioner's trial counsel were ineffective for failing to use Dr. Lara's testimony to impeach Petitioner's accomplice, Eddie Robinson. Specifically, Petitioner argues that trial counsel should have elicited from Dr. Lara testimony establishing that Robinson's IQ was significantly higher than Petitioner's, that Robinson drank and abused drugs, and that Robinson knew the difference between a mistake and a lie. Petitioner asserts that this testimony was important because Robinson claimed that Petitioner played the primary role in the killings. Respondent argues this claim should be rejected because Petitioner was resentenced in 1993 only for the murder of James Worley, and Petitioner himself testified that he was the one who shot Mr. Worley.

This claim was raised in Petitioner's MAR and rejected on the merits. The state court found that defense counsel brought out the fact that Robinson had a higher IQ than defendant. The state court further determined that trial counsel's failure to question Dr. Lara concerning Robinson's alcohol use and ability to distinguish between a mistake and a lie did not amount to ineffective assistance of counsel. The court noted that one of Petitioner's trial attorneys testified that the attorneys believed it would be helpful if Robinson were shown to be the ringleader; and that he believed that emphasizing Robinson's alcohol and drug use would have weakened that strategy. Petitioner fails to present clear and convincing evidence to rebut the state court's findings or to show that the state court's ruling is contrary to or an unreasonable application of

clearly established federal law. Respondent's motion for summary judgment is granted as to this claim.

i. Claim XX – Appellate counsel was ineffective for failing to argue that the trial court erred in not submitting the statutory mitigating circumstance of no significant history of prior criminal activity.

Here Petitioner claims that his appellate counsel was ineffective for failing to raise on appeal the trial court's failure to submit the statutory mitigating circumstance of no significant history of prior criminal activity. This claim was presented in Petitioner's MAR and denied on the merits by the state court.

In reviewing Claim VIII, *supra*, the Court concluded that Petitioner has not shown that appellate counsel performed ineffectively by failing to appeal the non-submission of the "no significant history of prior criminal activity" mitigating circumstance. Because Petitioner fails to demonstrate that appellate counsel's performance was deficient, Respondent's motion for summary judgment is granted as to this claim.

9. Claim XXII – The State withheld exculpatory evidence concerning Petitioner's conviction for involuntary manslaughter.

In Claim XXII, Petitioner alleges that the State withheld material, exculpatory evidence related to his prior involuntary manslaughter conviction. Specifically, Petitioner asserts that the State withheld evidence of a conversation between the prosecutor and eyewitness Wilbert McKoy, which revealed the following: that Fred McNeill had a prior conviction of second-degree murder and had recently been released from prison; that Fred McNeill exited his vehicle threatening to kill Petitioner; and that Fred McNeill exited his car with a knife. This claim was raised by Petitioner in his MAR and denied on the merits. The state court noted that Petitioner failed to produce any evidence to support this claim at the evidentiary hearing. The court further

found that the prosecutor talked with defense counsel about the shooting of McNeill, that statements taken from McKoy and his wife indicated that the only weapon in McNeill's possession was a pocket knife that fell out of his pants pocket after Petitioner shot McNeill, and that Petitioner's trial attorneys were aware of the facts surrounding the shooting.

In his petition to this Court, McLaughlin merely reasserts his MAR claim. Petitioner presents no evidence to support his claim or to rebut the state court's findings. Nor does Petitioner show that the state court's ruling is contrary to or an unreasonable application of clearly established federal law. Accordingly, Respondent's motion for summary judgment as to this claim is allowed.

10. Claim XXIII – The trial court erred in excusing two qualified jurors due to reservations about the death penalty.

In Claim XXIII, Petitioner contends that his rights under the Sixth, Eighth and Fourteenth Amendments were violated when prospective jurors Otto Lovette and Rebecca Dixon were excused for cause. Petitioner maintains that although these two jurors expressed reservations about the death penalty, their views would not have prevented or substantially impaired the performance of their duties as jurors and that their excusal was prohibited by *Witherspoon v. Illinois*, 391 U.S. 510 (1968), *Adams v. Texas*, 448 U.S. 38 (1980), and *Wainwright v. Witt*, 469 U.S. 412 (1985). Petitioner further argues that the trial court erred by cutting off defense counsel's attempts to rehabilitate these jurors. Petitioner presented these arguments on direct appeal, and they were denied on the merits. The North Carolina Supreme Court held that the trial judge was within his discretion in excusing the jurors for cause. *McLaughlin*, 341 N.C. at 437-39, 462 S.E.2d at 6-7. The state court further determined that the trial court had not erred in terminating defense counsel's rehabilitation attempts. *Id.* at 439, 462 S.E.2d at 7.

A capital defendant's federal constitutional rights to an impartial jury prohibit the exclusion of prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon*, 391 U.S. at 522. A prospective juror is properly excluded for cause if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright*, 469 U.S. at 424. This standard does not require a party to prove the juror's bias with "unmistakable clarity," however; the court cannot reduce bias determinations "to question-and-answer sessions which obtain results in the manner of a catechism." *Id.* at 424-26.

Whether a prospective juror's view on capital punishment would prevent or substantially impair his performance as a juror is a factual question committed to the sound discretion of the trial court. *Wainwright*, 469 U.S. at 428. Because a determination of bias is based in large part on the prospective juror's demeanor and credibility, the finding of the trial judge is entitled to great deference. Where the prospective juror's responses are ambiguous or even contradictory, "the determination made by the trial court, based on its eyeing the juror, is presumed to be consistent with the applicable standard." *Maynard v. Dixon*, 943 F.2d 407, 415 (4th Cir. 1991).

a. Juror Otto Lovette

On voir dire, prospective juror Lovette testified that he did not have any moral, religious or personal objections to the death penalty but that his religious training was such that he did not know whether he could put aside his religious views and follow the court's instructions in the penalty phase. When questioned further, Lovette stated as follows:

> [PROSECUTOR]: . . . . And are you saying that – are you saying part of those teachings . . . are such that you don't feel like you should be sitting on a jury, making a decision as to whether they should be sentenced in a criminal case?

JUROR LOVETTE: Yes, sir.

. . . .

[PROSECUTOR]: Is that belief such that you feel like it would prevent you from being able to follow the Court's instructions and consider punishment in this case?

JUROR LOVETTE: Well, again, I'd – I'd try to do what I was supposed to do, but still that teaching's there.

. . . .

JUROR LOVETTE: I – I don't want to – I don't want to lead you to believe that I could honestly and with clear mind say that the man should not get what he's asking for. Because, like I say, I – it's hard – hard to get out of my teachings.

[PROSECUTOR]: . . . .

Do you think that your heartfelt beliefs concerning your ability to judge others would substantially impair your ability to consider the punishment in this case?

. . . .

JUROR LOVETTE: I – I can't honestly answer you. That –

. . . .

[PROSECUTOR]: . . . .

Do you feel that these beliefs that you have would substantially impair your ability to be able to sit on the jury and make a decision one way or the other in this case?

. . . .

JUROR LOVETTE: No, sir. I'd – I honestly – well, it's down in there and it won't come out. I – I just don't feel like I should be a judge in saying whether a man should get what he wants or not. I meant, I just – I just can't get it in my mind to say yes, I could – could come [to a] conclusion. And I could hear it. But could I give a just and honest answer. I can't say that I could.

. . . .

[PROSECUTOR]: Okay. Are you telling me that you just feel like you would not be able to make that decision?

JUROR LOVETTE: Yes, sir.

. . . .

[PROSECUTOR]: So I believe what you're telling us, sir, is that your deep, heartfelt beliefs about judging others would prevent you from being able to make the decision as to whether another man should live or die for the punishment of first degree murder, as a juror; is that correct, sir?

. . . .

JUROR LOVETTE: Yes, sir.

On rehabilitation, Lovette stated that he would follow the judge's orders if told to sit on the jury but again expressed doubts whether he could set aside his religious beliefs:

[DEFENSE COUNSEL]: . . . . But am – am I hearing you to say that despite the fact that obviously you don't want to do it, as I assume anybody else wouldn't want to do it, that if you're called to sit, you'll abide by the law the judge gives you, and do your duty. Consider both sides fairly, and render a decision that you're convinced of under the law?

JUROR LOVETTE: Well, that what – you hit a word there that I was trying to hit a while ago. Could I with my teachings surrender what I really felt, under my – going by my teachings? I would try to do as I was told to do. But could I honestly?

Following this response, the trial court terminated the questioning and excused Lovette on the grounds that he "has such deeply held religious views that the adherence to these views would substantially impair the performance of his duty as a juror in this case, in accordance with his instructions and oath." The North Carolina Supreme Court concluded that the trial court did not abuse its discretion in excusing Lovette and that "[n]othing in the transcript . . . indicate[s] that further questioning would have shown that prospective juror Lovette could have set aside his

strong religious beliefs in order to apply the law according to the trial court's instructions." *McLaughlin*, 341 N.C. at 438, 462 S.E.2d at 7.

The trial court's findings as to prospective juror Lovette are fairly supported by the record in this case. Consequently, Petitioner fails to show that the North Carolina Supreme Court's decision upholding the excusal of Lovette was contrary to or an unreasonable application of clearly established federal law.

b. Juror Rebecca Dixon

At the very outset of voir dire, prospective juror Rebecca Dixon unequivocally stated that she was opposed to the death penalty:

> [PROSECUTOR]: . . . .
>
> Are you against the death penalty?
>
> JUROR DIXON: Sir, I don't believe in capital punishment.
>
> [PROSECUTOR]: Okay. And is this a religious belief?
>
> JUROR DIXON: Religious.
>
> [PROSECUTOR]: All right. Have you held this belief for some long time?
>
> JUROR DIXON: Yes, sir.

When questioned further, Dixon stated that her opposition to the death penalty was such that if she had to make "a decision between capital punishment and life imprisonment [she] would automatically vote for life imprisonment regardless of the circumstances and regardless of the instructions of the Court" and that she "would never be able to personally vote for the death penalty in any case, regardless of what the facts were and regardless of the circumstances." When asked by defense counsel whether she could set aside her feelings about the death penalty

and follow the court's instructions, Ms. Dixon stated: "I – I don't really go against my relig – religious belief." Following this response, the trial court terminated Petitioner's attempts to rehabilitate Ms. Dixon and excused her for cause.

In light of Ms. Dixon's repeated statements that she did not believe in the death penalty and could not vote for the death penalty regardless of the circumstances, the trial court's decision to strike her for cause is supported by the record. Petitioner having failed to show that the state court's adjudication of this claim was contrary to or an unreasonable application of clearly established federal law, Respondent's motion for summary judgment is allowed as to this claim.

11. Claim XXIV – The trial court erred in excluding evidence that Petitioner's alleged accomplice received a life sentence for the murder of James Worley.

Petitioner here claims that the trial court deprived him of his rights under the Eighth and Fourteenth Amendments and *Parker v. Dugger*, 498 U.S. 308 (1991), by excluding evidence that Petitioner's accomplice, Eddie Robinson, received a life sentence for the murder of James Worley. Petitioner asserts that Robinson's life sentence was competent mitigating evidence and that the trial court's exclusion of this evidence had a substantial and injurious effect on the jury's verdict. Petitioner raised this claim on direct appeal. The North Carolina Supreme Court denied the claim on its merits, concluding that evidence of Robinson's sentence was properly excluded because it had "'no bearing upon defendant's character, record or the nature of his participation in the offense.'" *McLaughlin*, 341 N.C. at 441, 462 S.E.2d at 9 (quoting *State v. Irwin*, 304 N.C. 93, 104, 282 S.E.2d 439, 447 (1981)).

In capital cases, the sentencer must "'not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings v. Oklahoma*, 455

U.S. 104, 110 (1982) (quoting *Lockett*, 438 U.S. at 604). However, a defendant is not constitutionally entitled to present evidence of an accomplice's sentence since the accomplice's sentence is neither an aspect of the defendant's character or record nor a circumstance of the offense. *Ward v. French*, 1998 WL 743664 (4th Cir. 1998) (unpublished); *Brogdon v. Blackburn*, 790 F.2d 1164, 1169 (5th Cir. 1986).

Parker does not suggest otherwise. In *Parker*, the Supreme Court reviewed the Florida Supreme Court's affirmance of a death sentence after the Florida court struck two aggravating factors found by the trial court. Under Florida law, the sentence of an accomplice is deemed to have mitigating value. Thus, in reviewing the Florida court's decision, the *Parker* Court discussed the mitigating evidence, including evidence of the accomplices' sentences. The Court did not in any way suggest that the admission of an accomplice's sentence is required as a matter of federal constitutional law.

The North Carolina Supreme Court's rejection of this claim is neither contrary to nor an unreasonable application of clearly established federal law. Respondent's motion for summary judgment as to this claim is, accordingly, granted.

12. Claim XXV – The prosecutor made grossly improper and unconstitutional arguments to the jury.

In his next claim, Petitioner maintains that there were a number of improper arguments made at his resentencing and that these arguments deprived him of his constitutional right to due process. He argues that the prosecutors sought to diminish the jury's sense of responsibility for the sentencing decision, misstated the law, and made comments that were personally abusive of Petitioner. Petitioner first raised this claim on direct appeal. The North Carolina Supreme Court

reviewed each asserted instance of improper argument and found no basis to conclude that the trial court erred in failing to intervene *ex mero motu*.

"Misconduct by a prosecutor in closing argument may be grounds for reversing a conviction." *Arnold v. Evatt*, 113 F.3d 1352, 1358 (4th Cir. 1997). However, "it 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Darden v. Wainwright*, 699 F.2d 1031, 1036 (11th Cir. 1983)). A new trial is required only where the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

Petitioner first challenges the prosecutors' statements that Petitioner is responsible for the murders, that he started the chain of events which led the jurors to be called upon to decide whether Petitioner should be sentenced to death or to life imprisonment, that Petitioner "wrote out his own death warrant" when he committed the murders, and that by sentencing Petitioner to death the jurors would be doing nothing more than "making him responsible for the effect of his own actions." Petitioner contends these arguments violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985), wherein the Supreme Court held that "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." *Caldwell*, 472 U.S. at 328-29. *Caldwell* is "'relevant only to certain types of comment – those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.'" *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (quoting *Darden v. Wainwright*, 477 U.S. at 184 n.15). An argument improperly diminishes the jury's responsibility if it implies either that a reviewing court can substitute its

judgment for the jury's verdict or that the sentencing decision is not entirely the jury's responsibility.

The arguments challenged here did not improperly diminish the jury's role. At no point did the prosecutor suggest that the jury was not the ultimate or final decision-maker. Rather, the thrust of the prosecution's argument was that Petitioner was responsible for his actions and should be held accountable by the jury.[4] Throughout its summation, the prosecution emphasized that whether Petitioner was sentenced to life or death was a decision to be made by the jury. The "chain of events" argument challenged by Petitioner, for example, was that Petitioner started the chain of events that led *to the jury being called upon to determine* whether he should be sentenced to death or life imprisonment.

The prosecutors' arguments neither trivialized the importance of the jury's decision nor misled the jury as to their role in sentencing Petitioner. Considering the arguments of counsel in their entirety, as well as the trial court's instructions, the jury could not have understood the prosecutors' arguments to mean that the jury was relieved of the responsibility of determining

---

[4]This is most evident from the final passage of the prosecution's first closing argument:

> [Petitioner] gave up his right to live during those months in 1984. He wrote out his death warrant. He wrote it out and he used the blood of other people. He wrote it out in fire. He wrote it out in death. And he wrote it out in destruction. He's responsible for his acts. He's responsible for what he did. And *when you're making the decision, I ask you to sentence him to death. You are not doing anything but making him responsible for the effect of his own actions.* As we go through this world, we do things. We know what the – what's going to happen. We know what the effect of our actions are going to be in most cases. And we take responsibility for that. *And the only way in this case to give [Petitioner] that responsibility is to sentence him to death. . . .* [Petitioner] has signed – has brought his death warrant, and he's left it up here for you to sign. I ask you to sign it, and render a verdict sentencing him to death.

Tr. 2599-60 (emphasis added).

Petitioner's sentence, as Petitioner contends. The North Carolina Supreme Court's decision rejecting this part of Petitioner's claim is not contrary to or an unreasonable application of *Caldwell*.

Petitioner also claims that the prosecutors misstated capital sentencing law by describing mitigating circumstances as things that reduce a capital defendant's culpability, by arguing that the jury should render a death sentence unless specific mitigating circumstances outweighed specific aggravating circumstances or the State's aggravating evidence as a whole, and by suggesting that the death penalty is appropriate for all murders. This claim is without merit. In their arguments, the prosecutors described mitigating circumstances as things that make the offense "less deserving of the death penalty" or that "lessen[] the seriousness of the offense." While the prosecutors argued strenuously that certain evidence proffered by Petitioner should be considered to have no or little mitigating value, at no point did either of the prosecutors attempt to limit the jury's consideration of evidence concerning Petitioner's age, character, education, environment, habits, mentality or prior record, as Petitioner asserts. Instead, the prosecutor argued that the jury must consider all aspects of Petitioner's character and record:

> We're asking you to sentence him, and looking at any aspect of his character or record, and any circumstances of the offense that would substantially support the imposition of the death penalty. Because when you're looking at him, you're not just looking at what he did that night when he walked into James Worley's house. You're looking at everything he's done in his life. You're looking at things he did in 1974. You're looking at things that Essic Williams says he did in 1966. . . . And part of what his character is, is what he did.

Tr. 2597.[5]

---

[5]The jury did find a number of mitigating circumstances related to Petitioner's character and background, further evidencing that the prosecutor's description of mitigating circumstances did not infect the trial with unfairness.

Nor did the prosecutors misstate the method to be used in evaluating the mitigating evidence or suggest that all murderers should receive the death penalty. Rather, the prosecutor told the jury that the weight to be given the aggravating and mitigating circumstances "is entirely up to you [the jury]. When you're weighing these things you don't have to say that one aggravating circumstance equals one mitigating circumstance. But you – you have to consider them, giving them proper weight and proper perspective in looking at the defendant's character." Tr. 2575. Moreover, the trial court instructed the jurors that they were "the sole judges of the weight to be given to any individual circumstance," that they "should not merely add up the number of aggravating circumstances and mitigating circumstances" but "must decide from all of the evidence what value to give to each circumstance," weigh the aggravating and mitigating circumstances, and "finally determine whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances." Tr. 2672.

Finally, Petitioner asserts that the prosecutor "personally abused Petitioner without adequate evidentiary support" by referring to Petitioner as a "mass murderer," by suggesting that Petitioner is a contract killer, by suggesting that Petitioner is free to do whatever he chooses in prison, and by intimating that Petitioner should have helped his sister out more when there was no evidence to suggest that Petitioner was financially able to do so. The North Carolina Supreme Court rejected Petitioner's claim finding "nothing so 'grossly improper' . . . as to require the trial court to intervene *ex mero motu*." *McLaughlin*, 341 N.C. at 445, 462 S.E.2d at 11. Having considered the record as a whole, the Court concludes that Petitioner has not shown that the prosecutors' remarks deprived him of his right to due process.

Petitioner fails to demonstrate that the state court's ruling is contrary to or an unreasonable application of Supreme Court precedent. Accordingly, Respondent's motion for summary judgment as to this claim is granted.

13. Claim XXVI – The trial court improperly instructed the jurors concerning their consideration of mitigating circumstances.

Claim XXVI alleges that the trial court erred in instructing the jury concerning mitigating circumstances in response to jury questions asking "how mitigating circumstances are to be deemed of value," whether the jurors should just use common sense or whether the court had specific instructions and whether the jury should consider evidence of Petitioner's character since the murder. Petitioner argues that the supplemental instruction given did not comply with *Skipper v. South Carolina*, 476 U.S. 1 (1986), because it failed to instruct the jury to consider "any other circumstances arising from the evidence which you deem to have mitigating value." Petitioner raised this claim on direct appeal and it was denied on the merits.

In response to the jury's questions and after conferring with counsel, the trial court instructed the jury as follows:

> A mitigating circumstance is a fact or a group of facts which do not constitute a justification or excuse for a killing, or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders.
>
> A juror may find that any mitigating circumstance exists by a preponderance of the evidence, whether or not that circumstance was found to exist by all of the jurors.
>
> And then finally, members of the jury, we're going to instruct you that you are to consider all aspects of the defendant's character as presented by the evidence, including the evidence relating to the defendant's character since the murder of the victim.

Tr. 2696-97. Following the supplemental instruction, defense counsel questioned whether the

court should specifically instruct on the jury's use of common sense. However, defense counsel did not request an instruction on "any other circumstance deemed to have mitigating value" and did not lodge any objection to the supplemental instruction given.

The North Carolina Supreme Court concluded that the instructions given, when considered in their entirety, did not restrict the jury from considering any relevant mitigating evidence. The Court reasoned:

> It is important to point out that this assignment of error concerns a reinstruction of the jury. The jurors posed their question presumably to clarify any confusion they had concerning the meaning of mitigating circumstances. The jury already had been instructed to consider any other evidence having mitigating value before the jury began its deliberations. Further, the written form given the jury directed it to consider and weigh "any other circumstance or circumstances arising from the evidence which . . . [has] mitigating value." When reviewed in their entirety, the original instructions and the additional instructions did not restrict the jury from considering all evidence which may have mitigating value.

McLaughlin, 341 N.C. at 453-54, 462 S.E.2d at 16 (alteration in original). These findings are presumed correct. *See* 28 U.S.C. § 2254(e)(1).

Petitioner fails to present clear and convincing evidence to rebut the state court's findings or to demonstrate that the state court's adjudication of this claim is contrary to or an unreasonable application of clearly established federal law. Respondent's motion for summary judgment as to this claim is, therefore, allowed.

14. Claim XXVII – The trial court erred by excluding parole eligibility information.

In Claim XXVII, Petitioner argues that the trial court violated his Eighth and Fourteenth Amendment rights by prohibiting Petitioner from questioning the jury about parole eligibility, by excluding evidence of Petitioner's parole eligibility and by not accurately informing the jury about Petitioner's eligibility for parole after the jury specifically asked about parole eligibility. Because Petitioner was already serving two consecutive life sentences for the murders of Sheila

Denise Worley and Psoma Wine Baggett, Petitioner asserts that a life sentence for the murder of James Worley would have meant that Petitioner would not be eligible for parole for at least sixty years, at which time Petitioner would be 93 years old. Relying on *Simmons v. South Carolina*, 512 U.S. 154 (1994), Petitioner contends that he was entitled to have the jury informed of his parole eligibility to rebut the State's future dangerousness arguments. Petitioner raised this issue on direct appeal, and the North Carolina Supreme Court denied it on the merits. *McLaughlin*, 341 N.C. at 454, 462 S.E.2d at 16.

In *Simmons*, the Supreme Court held that a capital defendant who is ineligible for parole is entitled to inform the jury of that fact if the prosecution argues future dangerousness as a basis for imposing the death penalty. *Simmons*, 512 U.S. at 171. In *Ramdass v. Angelone*, 530 U.S. 156 (2000), the Supreme Court refused to extend *Simmons* beyond those cases where parole ineligibility is conclusively established, stating:

> *Simmons* applies only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison. Petitioner's proposed rule would require courts to evaluate the probability of future events in cases where a three-strikes law is the issue. . . . If the inquiry is to include whether a defendant will, at some point, be released from prison, even the age or health of a prisoner facing a long period of incarceration would seem relevant. The possibilities are many, the certainties few.

Ramdass, 530 U.S. at 169.

Petitioner was not parole ineligible at the time of his resentencing. Even considering Petitioner's two other life sentences, Petitioner would have been eligible for parole in sixty years. Consequently, the state court's ruling is not contrary to or an unreasonable application of *Simmons*. Respondent's motion for summary judgment as to Claim XXVII is granted.

15. Claim XXIX – The State unconstitutionally excluded jurors who had expressed reservations about capital punishment.

Claim XXIX of Petitioner's habeas petition alleges that his Sixth, Eighth and Fourteenth Amendment rights were violated because the State used peremptory challenges to exclude jurors who had expressed reservations about capital punishment but who were not excusable for cause under *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Petitioner raised this claim on direct appeal, and the North Carolina Supreme Court rejected the claim on the merits.

Petitioner fails to establish that the state court's ruling is contrary to or an unreasonable application of clearly established federal law. A state may not exclude for cause jurors who have expressed opposition to the death penalty but who are nevertheless able to perform their duties as jurors. *Wainwright v. Witt*, 469 U.S. 412 (1985); *Witherspoon*, 391 U.S. 510. This rule, however, only applies to excusals for cause. The only restriction that the Supreme Court has placed on the use of peremptory challenges involves the discriminatory removal of jurors within traditionally protected classes. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (gender); *Hernandez v. New York*, 500 U.S. 352 (1991) (ethnic origin); *Batson v. Kentucky*, 476 U.S. 79 (1986) (race). The Fourth Circuit has held that the government may use peremptory challenges to strike jurors based on opposition to the death penalty. *United States v. Barnette*, 390 F.3d 775 (4th Cir. 2004), *vacated on other grounds*, 126 S. Ct. 92 (2005); *Brown v. Dixon*, 891 F.2d 490, 497-98 (4th Cir. 1989). "[W]hile the government's reason does not support a challenge for cause under *Witherspoon*, it can still be used as the basis for a peremptory strike." *Barnette*, 390 F.3d at 795; *accord Pitsonbarger v. Gramley*, 141 F.3d 728 (7th Cir. 1998); *Andrews v. Collins*, 21 F.3d 612, 628 (5th Cir. 1994); *Dobbert v. Strickland*, 718 F.2d 1518 (11th

Cir. 1983); *Bonnell v. Mitchel*, 301 F. Supp. 2d 698 (N.D. Ohio 2004). Petitioner is not entitled to relief on this claim. Respondent's motion for summary judgment is allowed as to Claim XXIX.

16. Claim XXX – Petitioner's speedy trial rights were violated.

Petitioner here claims that his Sixth, Eighth and Fourteenth Amendment rights were violated by the sixteen-month delay in scheduling his case for resentencing. Petitioner presented this claim as a preservation issue on direct appeal, and it was denied on the merits by the North Carolina Supreme Court. *McLaughlin*, 341 N.C. at 459, 462 S.E.2d at 19.

The Sixth and Fourteenth Amendments guarantee an accused the right to a speedy trial. Whether a delay violates an accused's speedy trial rights is measured by four factors: (1) the length of the delay; (2) the reason for the delay; (3) the extent to which the accused asserted his right to a speedy trial; and (4) prejudice resulting from the delay. *Barker v. Wingo*, 407 U.S. 514 (1972).

Petitioner fails to demonstrate a violation of his speedy trial rights. Petitioner has not provided on appeal or to this Court any information concerning the reasons for the delay in sentencing Petitioner nor has he shown how, if at all, the delay prejudiced him. Consequently, Petitioner is unable to show that the state court's adjudication of this claim is unreasonable. Respondent's motion for summary judgment is granted as to Claim XXX.

17. Claim XXXI – The trial court erred in instructing the jury concerning the pecuniary gain aggravating circumstance.

In Claim XXXI, Petitioner contends that the trial court's instructions on the pecuniary gain aggravating circumstance deprived him of his Eighth and Fourteenth Amendment rights as recognized by *Gregg v. Georgia*, 428 U.S. 153 (1976). Petitioner argues that the instruction

given is unconstitutionally vague and overbroad and allowed the jury to find the existence of the pecuniary gain mitigating circumstance without concluding that Petitioner killed Worley in order to obtain something of value. Petitioner raised this claim as a preservation issue on appeal, and it was denied on the merits. *McLaughlin*, 341 N.C. at 459, 462 S.E.2d at 19.

To satisfy the Eighth and Fourteenth Amendments, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). North Carolina, like most states, has accomplished this task by the use of aggravating circumstances. "An aggravating circumstance sufficiently narrows the class of death-eligible murders so long as it does 'not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder.'" *Powell v. Lee*, 282 F. Supp. 2d 355 (W.D.N.C. 2003) (quoting *Tuilaepa v. California*, 512 U.S. 967 (1994)).

Petitioner fails to establish that the trial court's pecuniary gain instruction failed to comport with the Eighth and Fourteenth Amendments. The jury was instructed that the pecuniary gain aggravating circumstance applied only if Petitioner "obtained, or intend[ed] or expect[ed] to obtain money or some other thing which can be measured – or valued in money, either as compensation for committing it, or as a result of the death of the victim." The trial court further instructed the jury that they would find this aggravating circumstance only if they found beyond a reasonable doubt that Petitioner had been hired to kill Worley. This instruction properly channeled the jury's discretion. Respondent's motion for summary judgment as to Claim XXXI is granted.

18. Claim XXXII – The trial court erred in instructing the jury that mitigating circumstances extenuate or reduce a defendant's moral culpability for the offense.

In Claim XXXII, Petitioner contends that the trial court's definition of mitigating circumstances improperly limited the jury's consideration of mitigating circumstances to evidence that "extenuates" or "reduces" his moral culpability for the killing. Petitioner argues that the trial court's instruction violated the Eighth and Fourteenth Amendments and *Skipper v. South Carolina*, 476 U.S. 1 (1986). Petitioner first raised this claim as a preservation issue on direct appeal and it was denied on the merits. *McLaughlin*, 341 N.C. at 459, 462 S.E.2d at 19.

In a capital sentencing proceeding, the jury must have an opportunity to consider as a mitigating factor "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604. Petitioner's argument that the trial court's instruction improperly restricted the consideration of mitigating circumstances is without merit. A challenged instruction must be reviewed in the context of the overall charge. *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973) (jury instructions not to be "judged in artificial isolation"); *see also Weeks v. Angelone*, 176 F.3d 249, 260 (4th Cir. 1999), *aff'd*, 528 U.S. 225 (2000). In his instruction on mitigating circumstances, the judge in Petitioner's case told the jurors to consider "any aspect of [Petitioner's] character or record" "and any other circumstances which arise from the evidence which you deem to have mitigating value."

Moreover, the jury's sentencing recommendation clearly establishes that the jury did not understand mitigating circumstances to be limited to those circumstances reducing Petitioner's culpability for the killing. In addition to circumstances surrounding the offense, the jury found a number of mitigating circumstances related to Petitioner's background, including that Petitioner

"was of good character and reputation in the community in which he lived and worked," "[t]hat since [his] incarceration, [Petitioner] has achieved a desirable and competitive position within the prison, working as a cook within the kitchen," that he "has made substantial efforts to improve himself by participation in both religious studies and voluntary training courses relative to his work within the prison," that he has "made significant efforts to be of assistance to other inmates in the prison to help them to adjust to prison life," that "he has achieved a desirable prison record of only Two (2) infractions and has had no infractions since August 31, 1987," and that Petitioner "consistently supported his child financially."

Petitioner fails to demonstrate that the North Carolina Supreme Court's adjudication of this claim is contrary to or an unreasonable application of clearly established federal law. Respondent's motion for summary judgment as to Claim XXXII is allowed.

19. Claim XXXIII – The trial court erred in instructing the jury that before finding the existence of a nonstatutory mitigating circumstance it must first find the circumstance to have mitigating value.

Claim XXXIII of the habeas petition alleges that the trial court violated Petitioner's Eighth and Fourteenth Amendment rights by instructing the jury that it could find a nonstatutory mitigating circumstance only if the facts underlying that circumstance were "deemed by [the] jury to have mitigating value." Petitioner argues that the instruction given is contrary to *McKoy*, *Hitchcock*, *Eddings*, and *Lockett*, because it "impair[ed] the jury's ability to consider relevant mitigating evidence, improperly ma[de] the jury judges of the law, and permitt[ed] the jury to arbitrarily and capriciously disregard obviously mitigating evidence." Petitioner raised this claim as a preservation issue on direct appeal, and the North Carolina Supreme Court denied it on the merits. *McLaughlin*, 341 N.C. at 459, 462 S.E.2d at 19.

Jury instructions run afoul of *Lockett* and the other cases Petitioner cites, where "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990). The instruction at issue here did not prevent the jury from considering mitigating evidence but instead gave the jury wide discretion in determining which factors had mitigating value. This is wholly consistent with *McKoy*, *Hitchcock*, *Eddings* and *Lockett*.

That the jury rejected as a mitigating circumstance that Petitioner "was regularly employed for over 12 years at Cape Craftsman and was a productive member of society" is of no moment. "There is simply no constitutional requirement that a sentencing jury must give effect or value to any evidence offered in mitigation." *Williams v. French*, 146 F.3d 203, 216 n.15 (4th Cir. 1998). As long as the mitigating evidence is within "the effective reach of the sentencer," the requirements of the Eighth Amendment are satisfied. *Graham v. Collins*, 506 U.S. 461, 475 (1993). Consequently, Petitioner fails to show that the state court acted unreasonably in denying this claim. Respondent's motion for summary judgment as to Claim XXXIII is granted.

20. Claim XXXIV – The trial court's instructions improperly emphasized aggravating circumstances over mitigating circumstances and implied that Petitioner had the burden of showing that life imprisonment was justified.

Petitioner next contends that the trial court violated his Eighth and Fourteenth Amendment rights by improperly emphasizing aggravating circumstances over mitigating circumstances. The basis of Petitioner's challenge is the following instruction concerning the fourth and final sentencing issue:

> Issue Number Four reads as follows[:] "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances you found is or are sufficiently substantial to call for the imposition of the death penalty when considered with the . . . mitigating circumstance or circumstances found by one or more of you?"

> In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by one or more of you. When making this comparison, each juror may consider any mitigating circumstance or circumstances that juror determined to exist by a preponderance of the evidence. After considering the totality of the aggravating and mitigating circumstances, each of you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue "Yes." In so doing, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. You may very properly give more weight to one circumstance than another. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination. You, the jury, must determine how compelling and how persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances. After so doing, if you are satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty when considered with mitigating circumstances found by one or more of you, it would be your duty to answer the issue "Yes." If you are not so satisfied or have a reasonable doubt, it would be your duty to answer the issue "No."

Tr. 2673-74. Petitioner asserts that the trial court's instructions "inflated the weight given to aggravating circumstances," "inappropriately expressed an opinion that multiple aggravating circumstances existed and biased the sentencing jury in favor of the imposition of the death penalty by erecting a rebuttable presumption that death was the appropriate punishment." This claim was presented as a preservation issue on appeal and was denied on the merits by the North Carolina Supreme Court. *McLaughlin*, 341 N.C. at 459, 462 S.E.2d at 19.

The only case Petitioner cites to support this claim is *Hitchcock*. In *Hitchcock*, the Supreme Court held that the state court's exclusion of nonstatutory mitigating evidence rendered the defendant's death sentence unconstitutional. *Hitchcock* reaffirmed the well-established principle that in capital cases the sentencer may not be precluded from considering any relevant mitigating evidence, including "any aspect of a defendant's character or record and any of the

circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings*, 455 U.S. at 110.

Petitioner fails to show that the instruction at issue is contrary to *Hitchcock* or any other clearly established federal law. The instruction given did not preclude the jury from considering Petitioner's character or record, the circumstances of the offense or any other relevant mitigating evidence. In fact, the jury was specifically instructed that it was their "duty to consider, as a mitigating circumstance, any aspect of the [Petitioner's] character or record and any of the circumstances of this murder that the [Petitioner] contends is a basis for a sentence less than death, and any other circumstances arising from the evidence which you deem to have mitigating value." Tr. 2661. Moreover, both the prosecutor and defense counsel argued to the jurors that they must consider all facets of Petitioner's life in addition to the circumstances of the offense. That the jury did so is evident from the Issues and Recommendations where the jury indicated that one or more jurors found the existence of six of the eight nonstatutory mitigating circumstances submitted, all of which concerned Petitioner's background or character.[6]

The Court finds no significance to the fact that the instruction given assumed the existence of one or more aggravating circumstances. The instruction challenged by Petitioner is the fourth and final sentencing issue to be addressed by the jury – "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances you found is or

---

[6]Of the statutory mitigating circumstances submitted, the jury rejected two: that the murder was committed while Petitioner was under the influence of mental or emotional disturbance and that Petitioner's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. The jury further rejected two nonstatutory mitigating circumstances submitted: that Petitioner was regularly employed for over twelve years at Cape Craftsman and was a productive member of society and the catchall mitigating circumstance – any other circumstance or circumstances arising from the evidence which is deemed to have mitigating value.

are sufficiently substantial to call for the imposition of the death penalty when considered with the . . . mitigating circumstance or circumstances found by one or more of you?" Both the trial court's instructions and the Issues and Recommendations sheet provided to the jury made it clear that the jury would not reach this issue unless it found the existence of one or more aggravating circumstances.[7] In no way did this instruction bias the jury in favor of the death penalty or erect a presumption that death was the appropriate punishment.

Respondent's motion for summary judgment is allowed as to this claim.

21. Claim XXXV – The short-form indictment used to charge Petitioner with first-degree murder was unconstitutional.

In the first amendment to his petition, filed January 5, 2001, McLaughlin argues that the short-form indictment used to charge him with the first-degree murder of James Worley was unconstitutional. He asserts that the short-form indictment failed to set forth all of the essential elements of first-degree murder because it did not allege the elements of specific intent to kill, premeditation and deliberation and because it did not include the aggravating circumstances relied upon by the State. Petitioner argues that because the indictment was inadequate the trial court lacked jurisdiction to enter judgment against Petitioner for first-degree murder. Petitioner first raised this claim in an application for habeas relief filed with the North Carolina Supreme Court on December 19, 2000. The application was denied by the North Carolina Supreme Court on December 20, 2000.

---

[7]The Issues and Recommendation sheet instructed the jury to "skip issues two, three, and four, and indicate life imprisonment" if the jury found the existence of no aggravating circumstances. The trial judge also instructed the jurors: "If you do not unanimously find from the evidence beyond a reasonable doubt that at least one of these aggravating factors existed, . . . you would answer Issue Number One, 'No.' If you answer Issue Number One, 'No,' you would skip Issues Two, Three and Four and you must recommend that [Petitioner] be sentenced to life imprisonment." Tr. 2660.

The North Carolina Supreme Court's order denying Petitioner's state habeas petition does not articulate the rationale for its decision. In these circumstances, "our review is no less deferential than it is when we review a detailed state court analysis of a petitioner's claim." *Hartman v. Lee*, 283 F.3d 190, 194 (4th Cir. 2002). The procedure for our review is slightly different, however. "We must conduct an independent review of the record and the applicable law to determine whether the *result* reached by the state court 'contravenes or unreasonably applies clearly established federal law.'" *Hartman*, 283 F.3d at 194 (quoting *Bell*, 236 F.3d at 163).

McLaughlin acknowledges that the indictment charging him with the first-degree murder of James Worley satisfies North Carolina's statutory requirements for short-form indictments. *See* N.C. Gen. Stat. § 15-144. However, he argues that North Carolina's short-form indictment is unconstitutional because the Sixth and Fourteenth Amendments require all elements of an offense and any aggravating circumstances relied upon for sentencing be specifically enumerated in the charging instrument. In support of this argument, Petitioner relies upon *Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Jones*, which involved a federal indictment, the Supreme Court stated that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones*, 526 U.S. at 243 n.6. Petitioner asserts that in *Apprendi*, the Supreme Court made clear that its decision in *Jones* applies to state court proceedings.

In *Hartman*, the Fourth Circuit rejected a claim similar to Petitioner's, concluding that the North Carolina Supreme Court's denial of the short-form indictment claim was neither contrary

to, nor an unreasonable application of clearly established federal constitutional law. *See Hartman*, 283 F.3d at 199. This Court reaches the same conclusion.

Furthermore, even if *Apprendi* and *Jones* were held applicable to state-court indictments, Petitioner's claim would nevertheless fail. *Apprendi* was decided in June 2000, after Petitioner's conviction and sentence became final.[8] If *Apprendi* applied *Jones* to state-court indictments, it was by means of a new constitutional rule that does not apply retroactively to Petitioner's case. *See Basden v. Lee*, 290 F.3d 602, 619 (4th Cir. 2002); *Hartman*, 283 F.3d at 192 n.2.

Petitioner fails to show that the North Carolina Supreme Court's denial of this claim is contrary to or an unreasonable application of *Jones*, *Apprendi* or any other clearly established federal law. Respondent's motion for summary judgment as to Claim XXXV is granted.

22. Claim XXXVI – The death sentence was unconstitutionally imposed and must be vacated because of Petitioner's mental retardation.

In the second amendment to his habeas petition, Petitioner contends that he is mentally retarded and that his death sentence, therefore, violates the Eighth Amendment and *Atkins v. Virginia*, 536 U.S. 304 (2002). Petitioner first raised this claim in state post-conviction proceedings. The state court summarily denied Petitioner's claim on the merits without a hearing. This Court previously determined that Petitioner had presented a *prima facie* case of mental retardation and that the state court unreasonably applied *Atkins* in denying Petitioner's claim without an evidentiary hearing.

On July 20 and 21, 2005, an evidentiary hearing was held at which Petitioner and Respondent both presented evidence and arguments to the Court concerning Petitioner's mental

---

[8]The United States Supreme Court denied certiorari review of Petitioner's direct appeal on November 29, 1999.

retardation claim. Based on the evidence presented at the hearing, the Court concludes that Petitioner is entitled to the issuance of a writ vacating his death sentence.

In *Atkins*, the Supreme Court held that the execution of mentally retarded individuals constitutes cruel and unusual punishment in violation of the Eighth Amendment. *Atkins*, 536 U.S. at 321. The Court did not define mental retardation but "'[left] to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences.'" *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). However, the Court indicated that mental retardation generally manifests before the age of eighteen and is evidenced by subaverage intellectual functioning as well as significant limitations in at least two adaptive skill areas. *Id.* at 309 n.3, 371 & n.22. "[A]n IQ between 70 and 75 . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Id.* at 309 n.5.

North Carolina law defines mentally retarded individuals as having (i) "significantly subaverage general intellectual functioning" – "[a]n intelligence quotient of 70 or below"; and (ii) "[s]ignificant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills." N.C. Gen. Stat. § 15A-2005(a)(1). Both the intellectual deficits and the deficits in adaptive functioning must have manifested before the age of 18. N.C. Gen. Stat. § 15A-2005(a)(1). North Carolina's statute further provides that an IQ score of "70 or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning." N.C. Gen. Stat. § 15A-2005(a)(2).

The federal courts' power to grant writs of habeas corpus is limited to those instances in which the state court's adjudication on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law" or "resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). A state court's factual determinations are presumed correct absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1). However, "deference does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). "A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable . . . ." *Id.* If based upon an unreasonable determination of the facts, the state court's decision must be reviewed *de novo*. *Rompilla v. Beard*, 125 S. Ct. 2456, 2467 (2005).

The state court's denial of Petitioner's mental retardation claim was based on an unreasonable determination of the facts. In his state post-conviction motion, Petitioner presented ample evidence of a history of both "significantly subaverage general intellectual functioning" and significant limitations in at least two adaptive skill areas. This evidence included affidavits from an expert psychologist, five lay witnesses, school records and full-scale IQ scores of 70 on the Otis-Lennon Mental Abilities Test and 71 on the Weschler Adult Intelligence Scale - Revised ("WAIS-R").[9] Petitioner's expert psychologist indicated that Petitioner has been "functioning in the retarded range [since] before the age of eighteen." Without conducting a hearing, the state court rejected all of Petitioner's evidence, finding that "the credible evidence" indicated that

---

[9]A more complete discussion of the evidence presented to the state court is set forth in this Court's January 2, 2005, Order granting Petitioner an evidentiary hearing on the *Atkins* claim.

Petitioner functions in "the borderline range of intelligence, not mental retardation" and that the characteristics described in Petitioner's affidavits were indicative of a personality disorder, not mental retardation. Despite affidavits attesting that in school Petitioner had scored 70 on the Otis-Lennon Mental Abilities Test and had been placed in a special class because he was a slow learner, the state court found that Petitioner had "presented no official documentation" of any IQ testing conducted during Petitioner's school years and "no official documentation and no credible evidence" "to support a finding of any limitations in functional academics, much less significant limitations therein." Mem. Op. and Final Order at 16, 19 ("Order"). The facts alleged by Petitioner, if taken as true, would have entitled Petitioner to relief as a matter of law. The state court acted unreasonably in its determining the facts and in denying Petitioner's *Atkins* claim without an evidentiary hearing.

The state court's decision was also an unreasonable application of *Atkins*. The state court determined that a claim of mental retardation must be supported by evidence that prior to eighteen the individual had scored 70 or below on a scientifically recognized, standardized IQ test that had been individually administered by a licensed psychologist or psychiatrist. Because Petitioner was unable to show that he had taken such a test prior to the age of eighteen, the state court concluded that Petitioner had failed to show that he was mentally retarded. Order at 17-18, 24. While *Atkins* authorized the states to adopt their own procedures for adjudicating claims of mental retardation, those procedures are not immune from constitutional challenge. *Schriro v. Smith*, 126 S. Ct. 7 (2005). The requirement imposed by the state court is not consistent with either *Atkins* or N.C. Gen. Stat. § 15A-2005. Where, as in this case, the absence of such a test has been shown to be the result of illegal segregation of the public schools, imposing such a requirement is not only inconsistent with *Atkins* but unreasonably so.

Having determined that the denial of Petitioner's claim was unreasonable, this Court conducts a *de novo* review of Petitioner's claim. *See Rose*, 252 F.3d 676 (habeas court obligated to conduct *de novo* review where state-court decision unreasonable). Based on the evidence presented at the evidentiary hearing on Petitioner's claim, the Court concludes that Petitioner has shown by a preponderance of the evidence that he is mentally retarded within the meaning of *Atkins* and N.C. Gen. Stat. § 15A-2005.

As to the requirement of significantly subaverage general intellectual functioning, Petitioner presented evidence that he has been tested with a number of different intelligence tests, including the Stanford-Binet Scales-Fifth Edition ("Stanford-Binet"), the Weschler Adult Intelligence Scales-Third Edition ("WAIS-III"), the WAIS-R, and the Slosson IQ test. Most recently, Petitioner received a full-scale IQ score of 68 on the Stanford-Binet and a full-scale score of 70 on the WAIS-III. Prior testing reflected full-scale IQ scores of 72 on the Slosson IQ test in 1984, 71 on the WAIS-R in 2001 and 76 on the WAIS-R in 1993. For each of these tests there is a five-point standard error of measurement, which means that a score of 70 could represent an IQ from 65 to 75.

Dr. Timothy Hancock, Petitioner's expert psychologist, testified that the WAIS-R and the Slosson IQ test were outdated when they were administered to Petitioner. As a result, the scores Petitioner received on those tests may have been artificially inflated.[10] The Slosson IQ test had not been renormed in over twenty years, while the WAIS-R had not been renormed in ten years. If you were to adjust those scores to account for the time that had elapsed since the tests'

---

[10]It is widely accepted in the scientific community that IQ scores on any given test increase over time "and that IQ tests that are not 're-normed' to adjust for rising IQ levels will overstate" an individual's IQ. *Walker v. True*, 399 F.3d 315 (4th Cir. 2005). This phenomenon was first recognized by Dr. James R. Flynn and is known as the "Flynn effect."

standardization, Petitioner's scores would have been 65.01 on the Slosson IQ test administered in 1984, 72.67 on the 1993 WAIS-R and 65.01 on the 2001 WAIS-R.[11] According to Dr. Hancock, Petitioner is in the mild range of mental retardation, with an IQ in the range of 68 to 70.

Other evidence presented at the hearing supports Dr. Hancock's opinion that Petitioner has had an IQ of 70 or below since before the age of eighteen. When he was ten years old and in the second grade, Petitioner scored 70 or below on the Otis-Lennon Mental Abilities Test, a group administered IQ test used in the schools.[12] Petitioner had difficulties throughout his school years. Although he did not start school until he was eight years old, Petitioner was unable to perform the work without assistance from his younger brother. Early on, Petitioner was identified as having special educational needs. Although the school he attended had no officially designated special education class, the principal created a special, self-contained class for those students who were slow learners or disciplinary problems. According to Essie Williams, a former assistant principal at the school, Petitioner had been placed in this special class because he was a slow learner. At some point during his youth, Petitioner was tested using the Diagnostic Analyses of Learning Difficulties. Dr. Hancock stated that this was significant because that test was only given to students who had been recognized as special needs students.

---

[11]Based on Dr. Flynn's research, Dr. Hancock applied "a formulary adjustment of a third of a point a year from the standardization date" to each of the individually administered IQ tests. With these adjustments, only the WAIS-R administered in 1993 indicated a score above 70.

[12]According to Dr. Hancock the Otis-Lennon will not pinpoint an individual's IQ. For that reason, it is not used for diagnostic purposes, although it does provide corroborative evidence of an individual's IQ range. The test is designed so that an individual will never receive a score less than 70. In 1960, Petitioner received a raw score of 34 and a documented score of 70 on the Otis-Lennon.

Achievement tests taken during Petitioner's childhood and adult years further suggest significant cognitive deficits. Respondent's expert psychologist, Roger Moore, testified that as a "rough comparison," a mentally retarded individual functions around the sixth grade level. Evidence presented at the hearing indicates that prior to his incarceration Petitioner had never scored above the sixth grade level on achievement tests. The highest score Petitioner obtained in school was in the seventh grade. Petitioner was fourteen at the time and scored at the 5.4 grade level. At age thirty-four, Petitioner was tested with the Wide Range Achievement Test by the North Carolina Department of Correction. On that test, Petitioner scored at the sixth grade reading level and at the third grade level in arithmetic.

Without regard to any adjustment for the Flynn effect, the Court finds that Petitioner has presented sufficient evidence to demonstrate by a preponderance of the evidence that he has significantly subaverage general intellectual functioning as evidenced by an IQ of 70 or below. The Court further finds that Petitioner has had significantly subaverage general intellectual functioning prior to the age of eighteen and continuing through the date of the offense. The Court must, therefore, determine whether Petitioner satisfies the other statutory criteria for mental retardation – that he has had significant limitations in at least two adaptive skills since childhood.

As to Petitioner's adaptive skills, evidence presented at the hearing established that in addition to significant limitations in functional academics[13] Petitioner has significant

---

[13]The evidence establishing Petitioner's subaverage general intellectual functioning also demonstrates that Petitioner has been significantly limited in the area of functional academics, one of the ten adaptive skill areas listed in N.C. Gen. Stat. § 15A-2005. Accordingly, Petitioner need only demonstrate significant limitations in one additional adaptive skill area under N.C. Gen. Stat. § 15A-2005.

limitations in the areas of communication and social skills.[14] Dr. Hancock testified that he administered two adapative behavior tests – the Adaptive Behavior Assessment System and the Scales of Independent Behavior-Revised. On each of these tests Petitioner received an overall or global composite score of 65, indicating that his global adaptive functioning is at the bottom one percent of the population. Dr. Hancock testified that Petitioner has a "clear, on the face, communication deficit." Dr. Hancock indicated that he had difficulty understanding Petitioner, and Petitioner had difficulty understanding him.

Essic Williams testified that Petitioner's problems at school were not limited to academics: In addition to being a slow learner, Petitioner had difficulty interacting with other children. He was different from the other members of his family, as well as the other children at school. He lacked the skills to relate to and interact with other students. He was "not a jolly, happy child"; he was "basically solemn." He was a loner and kept to himself most of the time.

Petitioner's brother, Lester Leroy McLaughlin, testified that as a child Petitioner had problems getting along with other children. He wanted things his way; "and if it wasn't his way then he wasn't going to do it the other way." He would often lose his temper as you tried to talk to him. You could never predict how Petitioner would act – he would act one way one day and another the next day. In the eighth grade, Petitioner shot his father because his father was going to whip him. He spent two years in training school, then returned home to work with his father. Petitioner was eventually thrown out of his parents' home around the age of twenty-two, when he "thumped" one of the grandchildren on the head.

---

[14]Petitioner contends that the evidence also demonstrates significant limitations in the areas of community use and work. The Court renders no opinion as to Petitioner's adaptive skills in these areas.

Even in his adult years, Petitioner has had difficulties interacting with other people. Arthur Robbins, one of Petitioner's former bosses described Petitioner as "introverted" and a loner. Robert Jacobs, a friend of Petitioner's, stated in an affidavit:

> [I]n terms of communication, you had to go to [Petitioner] more than one time to get him. He was what you would call "spaced out." You had to speak in very direct terms.
>
> . . . He would be good one minute and then off the next. Sometimes he would talk a lot, but he always had a problem. He was always down on himself.

In 1984, Petitioner underwent a competency evaluation at Dorothea Dix Hospital. Dr. Hancock testified that they did not conduct a formal assessment of Petitioner's cognitive functioning at Dorothea Dix but that they did note a number of behaviors that are consistent with severe social skills deficits. For example, the hospital records indicate that Petitioner was withdrawn, did not converse with the staff when they tried to interview him, and often would respond only by nodding his head. Dr. Hancock testified that this behavior was similar to that exhibited by Petitioner during his childhood – where he was "off to himself" and withdrawn.

Respondent contends that such behavior exhibited by Petitioner is due to a personality disorder. Respondent's psychologist testified that he had diagnosed Petitioner with personality disorder, not otherwise specified, with avoidant and paranoid features. Evidence presented by Petitioner, however, suggests that the cause for his erratic and often inappropriate behavior is due to mental retardation. Dr. Hancock testified that where there is significant cognitive impairment, that is considered to be the primary cause of any behavioral problems. Dr. Hancock explained that personality disorders may be present, but that where cognitive impairment is involved, it is assumed that the cognitive impairment is the primary cause.

The Court finds that Petitioner has established by a preponderance of the evidence that at the time of the murders he was mentally retarded within the meaning of N.C. Gen. Stat. § 15A-2005 and *Atkins*. Evidence presented to the Court sufficiently demonstrates that since his childhood Petitioner has had significantly subaverage general intellectual functioning and significant limitations in functional academics, communication and social skills. Because of his disability, "death is not a suitable punishment." *Atkins*, 536 U.S. at 321.

CONCLUSION

For the reasons set forth above, the Court finds that McLaughlin has demonstrated that he has been sentenced to death in violation of the United States Constitution and that he is entitled to relief from that sentence pursuant to 28 U.S.C. § 2254. A writ of habeas corpus vacating Petitioner's death sentence shall issue, and the State of North Carolina shall sentence Petitioner to a term of life imprisonment.

This 11 day of January, 2006.

Terrence W. Boyle

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE