APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Opinion En Banc in the United States Court of Appeals for the Fourth Circuit (November 15, 2021) . . . . App. 1

Appendix B Order in the United States Court of Appeals for the Fourth Circuit (July 15, 2021) . . . . App. 3

Appendix C Order Granting Petition for Rehearing in the United States Court of Appeals for the Fourth Circuit (June 30, 2021) . . . . App. 5

Appendix D Opinion in the United States Court of Appeals for the Fourth Circuit (May 24, 2021) . . . . App. 7

Appendix E Opinion and Order in the United States District Court for the District of South Carolina Aiken Division (February 12, 2020) . . . . App. 94

Appendix F Opinion and Order in the United States District Court for the District of South Carolina Aiken Division (March 19, 2019) . . . . App. 103

Appendix G Order of Dismissal with prejudice in the Court of Common Pleas Fifteenth Judicial District State of South Carolina County of Horry (November 15, 2010) . . . . App. 207

Appendix H *State v. Bryant* Transcript Excerpt (December 20, 2017) . . . . App. 224

Appendix I *State v. Bryant* Transcript Excerpt: Juror 342 Questioned (December 20, 2017) . . . . App. 227

APPENDIX A

ON REHEARING EN BANC

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 20-4

[Filed November 15, 2021]

JAMES NATHANIEL BRYANT, III,

Petitioner - Appellee,

v.

WARDEN MICHAEL STEPHAN, Broad River Correctional Institution; BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections,

Respondents - Appellants.

Appeal from the United States District Court for the District of South Carolina, at Aiken. Bruce H. Hendricks, District Judge. (1:13-cv-02665-BHH)

Argued: October 26, 2021 Decided: November 15, 2021

Before GREGORY, Chief Judge, WILKINSON, NIEMEYER, MOTZ, KING, AGEE, WYNN, DIAZ, FLOYD, THACKER, HARRIS, RICHARDSON, QUATTLEBAUM, and RUSHING, Circuit Judges.

Affirmed by published per curiam opinion.

ARGUED: Michael Douglas Ross, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellants. Lindsey S. Vann, JUSTICE 360, Columbia, South Carolina, for Appellee. **ON BRIEF:** Alan Wilson, Attorney General, Donald J. Zelenka, Deputy Attorney General, Melody J. Brown, Senior Assistant Deputy Attorney General, Caroline Scrantom, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellants. Elizabeth Franklin-Best, ELIZABETH FRANKLIN-BEST, P.C., Columbia, South Carolina, for Appellee.

PER CURIAM:

On rehearing en banc, the panel opinions in *Bryant v. Stephan,* 998 F.3d 128 (4th Cir. 2021), are vacated, and the judgment of the district court is affirmed by an equally divided court.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 20-4
(1:13-cv-02665-BHH)

[Filed July 15, 2021]

JAMES NATHANIEL BRYANT, III)
)
Petitioner - Appellee)
)
v.)
)
WARDEN MICHAEL STEPHAN,)
Broad River Correctional Institution;)
BRYAN P. STIRLING, Commissioner,)
South Carolina Department of Corrections)
)
Respondents - Appellants)
)

O R D E R

The parties are directed to file supplemental briefs addressing the following issues:

1) Whether Bryant's counsel invited any error by requesting that the trial court keep Juror 342 on the panel.

2) Whether the purported error, as it pertains to Bryant's death sentence, is amenable to harmless error review.

By separate order, the Clerk shall establish a briefing schedule.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4
(1: 13-cv-02665-BHH)

[Filed June 30, 2021]

JAMES NATHANIEL BRYANT, III,)
)
Petitioner - Appellee,)
)
v.)
)
WARDEN MICHAEL STEPHAN,)
Broad River Correctional Institution;)
BRYAN P. STIRLING, Commissioner,)
South Carolina Department of Corrections,)
)
Respondents - Appellants.)
)

ORDER

A majority of judges in regular active service and not disqualified having voted in a requested poll of the court to grant the petition for rehearing en banc,

IT IS ORDERED that rehearing en banc is granted.

The parties shall file 16 additional paper copies of their briefs and appendices previously filed in this case within 10 days.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4

[Filed May 24, 2021]

JAMES NATHANIEL BRYANT, III,

Petitioner - Appellee,

v.

WARDEN MICHAEL STEPHAN,
Broad River Correctional Institution;
BRYAN P. STIRLING, Commissioner,
South Carolina Department of Corrections,

Respondents - Appellants.

Appeal from the United States District Court for the District of South Carolina, at Aiken. Bruce H. Hendricks, District Judge. (1:13-cv-02665-BHH)

Argued: January 25, 2021 Decided: May 24, 2021

Before NIEMEYER, WYNN, and THACKER, Circuit Judges.

Affirmed in part, reversed in part, and remanded with instructions by published opinion. Judge Niemeyer wrote the opinion, in which Judge Wynn joined. Judge Thacker wrote a dissenting opinion.

ARGUED: Michael D. Ross, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellants. Lindsey Vann, JUSTICE 360, Columbia, South Carolina, for Appellee. **ON BRIEF:** Alan Wilson, Attorney General, Donald J. Zelenka, Deputy Attorney General, Melody J. Brown, Senior Assistant Deputy General, Caroline Scrantom, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellants. Elizabeth Franklin-Best, ELIZABETH FRANKLIN-BEST, P.C., Columbia, South Carolina, for Appellee.

NIEMEYER, Circuit Judge:

During a traffic stop in Horry County, South Carolina, James Bryant turned to the police officer, wrestled him to the ground, beat him unconscious with the officer's flashlight, and then, using the officer's pistol, shot the officer in the head. After a manhunt, Bryant was arrested the next day and charged with first-degree murder and armed robbery. The jury found him guilty on both counts, and he was sentenced to death for the murder and 20 years' imprisonment for the robbery.

After exhausting his state remedies, Bryant applied to the district court under 28 U.S.C. § 2254 for habeas relief, and the court vacated his death sentence. The court concluded that the state postconviction court

(1) unreasonably determined that a juror who was hearing impaired was competent to sit on the jury and unreasonably applied clearly established federal law in so concluding; and (2) unreasonably concluded that Bryant's state trial counsel was not ineffective in allowing the hearing -impaired juror to sit on the jury. But the district court rejected a claim by Bryant that his trial counsel was ineffective for failing to press a *Batson* challenge.

Because we conclude that the district court did not give effect to the proper standard in overruling the state postconviction court, we vacate the district court's rulings on the issues pertaining to the hearing-impaired juror. On Bryant's *Batson*-based claim of ineffective assistance, we affirm. We remand with instructions to deny with prejudice Bryant's federal application for habeas relief.

I

Bryant was first convicted and sentenced to death in a South Carolina state court in 2001, but the South Carolina Supreme Court reversed, based on a procedural error, and Bryant was retried. At his retrial in 2004, a jury again found Bryant guilty on both counts, and again he was sentenced to death for the murder and to 20 years' imprisonment for the robbery. This time the South Carolina Supreme Court affirmed. *See State v. Bryant*, 642 S.E.2d 582, 589 (S.C. 2007).

Bryant thereafter sought postconviction relief in state court, alleging, among other things, that one of the jurors in his second trial — Juror 342 — suffered from a hearing impairment that caused her to miss

portions of the testimony. He claimed (1) that the inclusion of this juror on the jury violated his due process right to an impartial and competent jury and (2) that his trial counsel was constitutionally ineffective in failing to seek the juror's removal. Following an evidentiary hearing, the state postconviction court denied Bryant relief, holding (1) that Juror 342's hearing impairment was not so severe that she missed material testimony, and (2) that defense counsel, knowing of the juror's impairment, made a strategic decision to keep her on the jury. The Supreme Court of South Carolina denied Bryant's petition for a writ of certiorari.

Bryant then filed a federal application for a writ of habeas corpus in the district court under 28 U.S.C. § 2254. In addition to his two claims involving Juror 342, he also made eight other claims, including, for the first time, that his trial counsel ineffectively argued that the state solicitor struck four Black jurors at trial on account of their race, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Bryant's habeas application was referred to a magistrate judge, who issued a report and recommendation that the district court deny Bryant's application and grant the State's motion for summary judgment. After Bryant filed objections to the report and recommendation, the district court sustained some of them, finding that the state postconviction court had unreasonably found facts and unreasonably applied clearly established federal law with respect to Juror 342's participation on the jury. *Bryant v. Stirling*, No. CV 1:13-2665-BHH, 2019 WL 1253235 (D.S.C. Mar. 19, 2019). According to the district court, "Juror 342 was not competent and should

have been excused" because of her "disability," *id.* at *18; her presence on the jury violated Bryant's "bedrock constitutional right to a competent jury," *id.* at *20; and "there was no valid strategy" in keeping her on the jury, *id.* at *24 (emphasis omitted). Accordingly, the court vacated Bryant's sentence of death, but found that the errors were harmless as to his guilty verdicts because "the State's proof of Petitioner's guilt was ironclad." *Id.* at *16, *22. As for the *Batson*-based ineffective assistance claim, the district court adopted the magistrate's report and recommendation and held that Bryant did not show cause to overcome his procedural default of that claim. *Id.* at *35–36.

The State appealed the district court's ruling on the two claims involving Juror 342, and Bryant argues in response that the relief the district court granted is also supported by his *Batson*-based ineffective assistance claim.

II

On Bryant's due process claim, the State contends that the district court "starkly departed from the state [postconviction] court," which should have been "afforded deference [on the issues] because the record supports the state [postconviction] court's denial of relief." It maintains, moreover, that there is no Supreme Court decision that controls the outcome of whether Juror 342's continued service on the jury violated Bryant's due process rights.

Section 2254 authorizes federal courts to "entertain" an application for a writ of habeas corpus from a person in state custody "in violation of the Constitution

or laws or treaties of the United States." 28 U.S.C. § 2254(a). But § 2254 "is not to be used as a second criminal trial, and federal courts are not to run roughshod over the considered findings and judgments of the state courts that conducted the original trial and heard the initial appeals." *Williams v. Taylor*, 529 U.S. 362, 383 (2000). In this vein, § 2254 provides that a habeas writ may not be granted "with respect to any claim that was adjudicated on the merits in State court proceedings," unless one of three exceptions is shown: (1) that the state-court decision "was contrary to" federal law; (2) that the state -court decision "involved an *unreasonable* application" of federal law; or (3) that the state-court decision "was based on an *unreasonable* determination of the facts" in light of the record before the state court. 28 U.S.C. § 2254(d) (emphasis added); *Harrington v. Richter*, 562 U.S. 86, 100 (2011); *Vandross v. Stirling*, 986 F.3d 442, 449 (4th Cir. 2021).

To say that an application or a determination is "unreasonable" is not to say simply that it is *wrong*. *See,e.g.*, *Williams v. Stirling*, 914 F.3d at 302 (4th Cir. 2019); *Harrington*, 562 U.S. at 102 ("[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable"). An "unreasonable application of federal law" refers to applications that are "objectively unreasonable," *Owens v. Stirling*, 967 F.3d 396, 411 (4th Cir. 2020) (cleaned up), that is, applications that are "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," *Harrington*, 562 U.S. at 103; *see also White v. Woodall*, 572 U.S. 415, 419–20 (2014). And "unreasonable determinations of the facts" are made

when they are "sufficiently against the weight of the evidence that [they are] objectively unreasonable." *Williams*, 914 F.3d at 312 (quoting *Winston v. Kelly*, 592 F.3d 535, 554 (4th Cir. 2010)). Moreover, "[s]tate court factual determinations are presumed correct and may be rebutted only by clear and convincing evidence." *Id.* (citing 28 U.S.C. § 2254(e)(1)).

As apparent from the text, these § 2254(d) standards are "meant to be" "difficult to meet," *Harrington*, 562 U.S. at 102; they are a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt," *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (cleaned up). Thus, to conduct the analysis prescribed by § 2254, "federal habeas courts must make as the starting point of their analysis the state courts' determinations of fact, including that aspect of a 'mixed question' that rests on a finding of fact." *Williams*, 529 U.S. at 386.

Accordingly, we turn first to the state postconviction proceedings in this case. On the Juror 342 issue, the postconviction court found, following an evidentiary hearing, that:

> [Juror 342] did have some hearing deficiencies. She had a problem with hearing in the right ear, however, she could hear. Both the State and the Defendant qualified her without objection after having reviewed the returns. There is no question but that she had some problem with hearing, however, she was able to compensate for that by reading the lips of the particular witness. She specifically testified at the —

> during one of the inquiries conducted by the trial judge that she had, indeed, heard all the testimony thus far in the sentenc[ing] phase.

The court then explained how the state trial judge accommodated Juror 342 by instructing witnesses to look at the jury panel and speak loudly and how the judge also instructed everyone in the courtroom to notify her if there was a problem. The court also noted that counsel for both parties expressly stated that they wanted Juror 342 to remain on the jury and that the state trial court found her qualified. The postconviction court observed further that "it was never determined that [Juror 342] missed any material testimony or that she was not qualified." In its formal order following the postconviction hearing, the postconviction court stated:

> This Court finds there was not a sufficient showing that [Juror 342] missed material testimony at trial or that her hearing difficulty was of such degree as to indicate she missed material [testimony]. Therefore, this due process claim is denied.

Challenging the state postconviction court's findings of fact and application of federal law, Bryant contended in his § 2254 application that his Sixth, Eighth, and Fourteenth Amendment rights were violated when he was convicted and sentenced to death by a jury that included a "hearing impaired juror who did not hear portions of the trial testimony." He argued that because Juror 342 "did not hear all of the testimony presented at either phase of the trial" — a "fact not disputed" — he was denied "[a] fair trial in a fair tribunal" and therefore was denied due process. Bryant did not,

however, cite any federal decision, much less a Supreme Court decision, where a hearing impairment disqualified a juror from participating in a trial. He argued instead that because due process, as a general matter, requires "a panel of impartial, indifferent jurors" and "a fair tribunal," he was denied due process by having a juror "who did not hear portions of the trial testimony."

The district court agreed with Bryant, concluding that:

> It was unreasonable for the PCR court to find that Juror 342 was qualified to serve on the jury, that she heard all testimony during the guilt phase, and that there had not been a sufficient showing that her hearing difficulty was of such degree as to cause her to miss material testimony.

Bryant, 2019 WL 1253235, at *16. But in reaching that conclusion, the district court made its own extensive findings of fact, stating that it was unreasonable for the state postconviction court "*to credit* Juror 342's statements." *Id.* at *19 (emphasis added). Indeed, throughout its lengthy opinion, the district court made findings in disagreement with the findings made by the state postconviction court. For instance, the district court found that after the state trial judge instructed the jury to alert the court "if they were having trouble hearing," the fact that "Juror 342 [n]ever once" did so showed that "Juror 342 was either unwilling or incapable of volunteering the undisputed truth that she was having difficulty hearing," *id.* at *17 (emphasis omitted), although it was Juror 342 who mentioned her

hearing problem in the first place. This was but one reason the district court found that it was "unreasonable for the [state] PCR Court . . . to credit Juror 342's statements that she 'heard all testimony.'" *Id.* at *19. The district court ultimately expressed agreement with Bryant's assertion that Juror 342 was "functionally deaf," *id.* at *21, and that "no reasonable factfinder could conclude that Juror 342's hearing deficit was inconsequential," *id.* at *20. Based on this and other factfinding, the district court concluded that Juror 342 was "not competent" to sit on a jury and "should have been excused." *Id.* at *18.

The district court clearly disagreed with the findings of fact made by the state postconviction court, and it did so by collecting *some* of the evidence to support its position. But it failed to take account of much of the evidence relied on by both the state trial judge and the state postconviction court — especially the numerous conversations that took place between the trial judge and Juror 342, during which Juror 342 clearly heard and understood what the judge was saying and responded to it. To demonstrate this, we describe in some detail the record that reflects the interactions between Juror 342 and the court, which, to be sure, does include some troubling exchanges.

The record shows that Juror 342 suffered from a hearing impairment that first came to light during voir dire. After the judge questioned Juror 342 — when Juror 342 sometimes appears to have misheard the judge or was confused about the questions but ultimately engaged in a discussion with the judge and answered every question — the state solicitor asked

Juror 342 about her juror form, on which she had indicated that she "had a hearing problem" with her right ear. J.A. 108. Juror 342 affirmed as much but said that she could hear the attorney fine. J.A. 108. And while a few seconds later she asked the solicitor to repeat a question, she ultimately engaged in a discussion that illustrated that she could hear his questions. J.A. 109. Bryant's lead defense counsel did not question Juror 342 on anything, and both the solicitor and defense counsel then told the court that they found Juror 342 qualified to serve. J.A. 112–13. The judge agreed, called Juror 342 back into the courtroom, and told her to "pack [her] bags for ten days" in case she was selected from among the 40 qualified to serve. J.A. 113.

Final jury selection took place the following Monday, and Juror 342 was ultimately selected to serve on the jury. J.A. 143. The guilt phase began later that same day. After opening statements and after six witnesses had testified, the judge asked Juror 342 if she could hear. J.A. 179. Juror 342 indicated that she was having trouble hearing but said, "Long as I'm looking, you know, facing you I can read your lips and understand what you're saying." J.A. 179. The judge asked if she "really ha[d] to read lips to understand . . . [b]ecause there's been plenty of times that they have turned away. Have you heard all of the evidence and testimony in this trial?" J.A. 180. Juror 342 responded that she did have to read lips to understand others, but that she had "heard" everything so far. J.A. 180. The judge was satisfied with that answer, and told the parties, "All right, we need to be very mindful that she is actually reading lips. That's assisting her. So, we'll

have to . . . have our witnesses actually looking that direction and facing" the jury. J.A. 180. The judge then instructed Juror 342 that "[i]f at any time you don't understand or can't hear you need to let us know." J.A. 180. Juror 342 said that she understood and would do so. J.A. 180.

At the end of the first day of trial, the judge once again instructed Juror 342 that "if you have any problems you know to let us know." J.A. 183. The judge said that she was "focusing on" Juror 342 "because I know you're lip reading." J.A. 183. Juror 342 said that she understood. J.A. 183.

After the jury was dismissed, the judge conferenced with the solicitor and defense counsel and told them:

> I've got some concerns about the one juror who is lip reading. . . . I have concerns that it was not brought to light that she really needed to lip read when we were doing the individual voir dire. . . . Now, that would not preclude her from serving. My concern is that it hasn't come to our attention until recently and I've asked her about whether she has missed anything, but I'm going to be very mindful of that and ask that you all be very mindful of that as well. In other words, when you're asking questions sometimes you're going to have to be looking over at that jury.
>
> I'm going to periodically make sure that all are able to hear and watch that situation as best I can. I'm also going to hear from the SLED agents [the South Carolina Law Enforcement Division agents monitoring the trial and the

> jury] . . . to see . . . if they get any indication that she's really having difficulty even lip reading, and then if that is the case then we will address that. . . .
>
> I just wanted to raise that issue because . . . there was a couple of things. She didn't hear me say that she was to pack her bags for ten days. So, she did not pack her bags for ten days. So, she missed that, although she did hear to be here today and to be here at ten o'clock . . . . So, we've got to watch this situation pretty closely. Be aware that I'm aware of it. . . . We're going to try to adapt as much as we can to be sure that she's able to.

J.A. 185–87. The solicitor and defense counsel made no objection to what the judge said. J.A. 187.

The next day, after a few witnesses had testified, the judge asked the jurors if "everybody [was] able to hear, and specifically are you able to hear with them turning this way?" J.A. 190. Juror 342 indicated that she could hear. The judge again told Juror 342 to raise her hand if she had any problems. J.A. 190.

Before the court recessed for lunch that day, the judge conducted an impromptu hearing test, asking the jurors to raise their hands if they were *not* having difficulty hearing the testimony. J.A. 192–93. Juror 342 was slow to respond. The judge noticed this delay and asked Juror 342, "Can you hear, are you able to hear?" J.A. 193. Juror 342 said, "Yeah." J.A. 193. The judge asked if Juror 342 had "been able to hear all of the

testimony." J.A. 193. Juror 342 said that she had "heard them all." J.A. 193.

The State rested its case later that day. Bryant presented no case in defense and the jury began deliberations at 4:53 p.m. It reached a verdict on guilt at 5:40 p.m.

The penalty phase began two days later. On the second day of the penalty phase, the trial judge conducted another impromptu hearing test by instructing the jurors to stand based on the color of their clothing. J.A. 640–41. Juror 342 stood at the right time, but the solicitor thought he saw that she needed a nudge from another juror to do so. J.A. 791. The solicitor accordingly asked the judge to excuse Juror 342 because he did not "think she [was] following part of the trial testimony." J.A. 791. The judge agreed that she "had . . . concerns" about Juror 342's ability to hear, although the SLED agents had "indicated that they thought" Juror 342 was able to hear. J.A. 792. The judge decided to conduct another test the next day. J.A. 792.

The next day, after the State had finished presenting its case in aggravation, the solicitor noted that he "still continue[s] to be concerned about [Juror 342's] apparent deafness and inability to follow all the testimony." J.A. 853. The judge again agreed to hold another hearing test, explaining that "there have been some things that have brought or caused the Court some concern, times when it looks like maybe . . . she's not watching back and forth [to lip read] and she's not able to hear." J.A. 853.

The judge's third hearing test involved having the jurors stand based on the color of their clothes. Juror 342 was wearing a navy-blue dress. When the judge asked everyone in a green shirt to stand, Juror 342 rightly remained seated. J.A. 855. When the judge then asked everyone in a skirt or dress to stand, Juror 342 rightly stood up. J.A. 856, 857. But when the judge asked "everyone in blue" to stand, Juror 342 remained seated. J.A. 856, 857. The judge then dismissed the jury and conferenced with the parties.

After the solicitor, defense counsel, and the judge decided that Juror 342 might have been confused about whether she was wearing navy blue or black, the judge called Juror 342 back in for more questioning. Juror 342 admitted that she considered her dress to be blue. J.A. 862. The judge asked if she had ever "turn[ed] away and miss[ed] part of a question or an answer." J.A. 861. Juror 342 responded that she had. J.A. 861.

Judge: So, you have missed some of the evidence and testimony?

Juror 342: No, ma'am, I heard it, but it's more like when I — after I heard the testimony I turned my head, you know, [to] concentrate on it.

Judge: Okay, now, listen carefully to this question. Have you found yourself turning away and looking and missing part of a question or part of an answer because you didn't, you didn't turn your head fast enough?

Juror 342:	Yes, ma'am.

* * *

Judge:	[Y]ou have been through one phase of this trial and that is the guilt phase of this trial. Now, did you hear all of the evidence and testimony in that phase?
Juror 342:	Yes, ma'am.
Judge:	Did you ever catch yourself missing part of a question or an answer in that phase of the trial?
Juror 342:	Just at one point I thought I missed a little of it but I didn't. I thought about it and I haven't missed it.
Judge:	So, you didn't miss anything?
Juror 342:	No, ma'am.
Judge:	[I]s this the phase where you've found yourself turned away and have missed some when we started this part?
Juror 342:	No, ma'am.
Judge:	Okay, have you, in fact, turned away and missed some evidence and testimony . . . at this point?
Juror 342:	I may have missed a little of it but I didn't miss everything.

Judge:	Okay, all right, so . . . you did miss some at this phase?
Juror 342:	Yes, ma'am.
Judge:	Do you believe that you missed any at the guilt phase?
Juror 342:	No, ma'am.
Judge:	Did you find yourself in that same situation where you had turned away and then you've missed some of the question being asked or some of the answer?
Juror 342:	Yes, ma'am, I may have missed concentrating, you know, just steady, may have missed some of it, yes, ma'am.
Judge:	You may have missed some testimony at the guilt phase? Is that what you're saying?
Juror 342:	Yes, ma'am.

J.A. 861–63.

After Juror 342 was dismissed from the courtroom, the solicitor immediately renewed his request that Juror 342 be excused because "[s]he's admitted that she may have missed evidence at the guilt and penalty phase." J.A. 863. Defense counsel responded that he "[thought] if you brought every juror out they would say at one point in time they've missed something."

J.A. 864. The judge decided to call Juror 342 back in for more questioning. J.A. 865.

Judge:	[W]hen I was asking you all to stand up if you had on a green shirt or to stand up if you had a dress on and you stood when I asked . . . to stand up if you had a dress on. I also asked everyone who had on blue to stand. Did you hear that question?
Juror 342:	Yes, ma'am.
Judge:	You heard it? Why didn't you stand?
Juror 342:	You said — asking me did I hear it? Oh, no, ma'am.
Judge:	You didn't hear when I asked if you have on . . . blue stand?
Juror 342:	No, ma'am.
Judge:	Okay, and you were looking directly at me and I was talking —
Juror 342:	That's what I was trying. I was trying to read your lips when you was like talking.
Judge:	Okay, who's your doctor that deals with your hearing problem?
Juror 342:	This one, my right ear.

Judge:	It's your right ear? Who's your doctor?
Juror 342:	Excuse me?
Judge:	Who's your doctor?

J.A. 866.

After Juror 342 left the courtroom to find her doctor's contact information, the judge told the parties that

> there's no question. She has indicated she just flat did not hear and I was looking directly at her and talking and even now she's having difficulty hearing me and I'm raising my voice and there's been a lot quieter voices than mine during the trial of this matter.

J.A. 867. The judge then held an off-the-record meeting, during which she unsuccessfully attempted to contact Juror 342's doctor. J.A. 868. After the meeting and back on the record, the judge noted that the parties agreed

> that all jurors can be somewhat distracted at some time and [there has been] no indication that she has not been able to hear the testimony. The indication has been, in fact, that she has been hearing most and has turned away and only missed bits, but she has admitted to missing some.

J.A. 868. The solicitor then withdrew his motion to excuse Juror 342, explaining that he thought that Juror 342 "is qualified," that she "heard most of what

was going on," and that "she is able to follow the testimony" and "was able to properly deliberate." J.A. 869. Defense counsel "agree[d] one hundred percent with" the solicitor, stating that he thought "she heard" and "that if you brought all 11 of them out they probably would miss something somewhere along the line, too." J.A. 869–70.

Bryant presented additional evidence regarding Juror 342's hearing impairment at the postconviction evidentiary hearing. Juror 342's husband testified that Juror 342 had had hearing problems since the 1980s. J.A. 1040. He offered a few anecdotes of her impairment, like being unable to hear at church or when she was standing just a few feet from her husband at home. J.A. 1040–41. Notably, however, he did not specify whether Juror 342's hearing difficulties had gotten worse over time; how bad they were at the time of trial in 2004; or whether any of the examples he provided to demonstrate Juror 342's hearing difficulties were from around the time of trial, or were more recent. The husband also testified that Juror 342 is "sensitive about her hearing problem" and that she "get[s] furious" when told she needs a hearing aid. J.A. 1040, 1042.

Bryant did not call Juror 342's ear, nose, and throat doctor or an audiologist at the postconviction hearing to testify as to the extent of Juror 342's hearing problem. He did, however, submit an affidavit by Dr. Desmond McGann, a family-practice doctor who saw Juror 342 for foot pain two years after the trial and who found Juror 342 at the time to be "partially deaf." J.A. 962. The doctor did not, however, "conduct a

hearing test using medical equipment designed to measure deafness." J.A. 962.

Based on this record, the state postconviction court rejected Bryant's fair-trial claim, explaining:

> This Court finds that [Juror 342] was qualified to serve on the jury without objection. [Juror 342] testified she heard all testimony during the guilty phase and was able to compensate for her hearing deficiencies. The trial court also took specific measures to ensure that [Juror 342] was able to hear the testimony. Additionally, South Carolina Courts have held that a person who has difficulty hearing is not per se disqualified from serving as a juror. *Safran v. Meyer*, 103 S.C. 356, 364, 88 S.E. 3, 4 (1916).
>
> This Court finds there was not a sufficient showing that [Juror 342] missed material testimony at trial or that her hearing difficulty was of such degree as to indicate she missed material [testimony]. Therefore, this due process claim is denied.

J.A. 1275.

This record makes plain that the trial judge was aware of Juror 342's hearing impairment. Indeed, the judge was actively involved in ensuring that Juror 342 could understand the proceedings and questioned Juror 342 several times as to her ability to hear. While the judge did express concerns that Juror 342 was having trouble hearing, the judge ultimately concluded that "[t]he indication has been . . . that she has been hearing most and has turned away and only missed bits." J.A.

868. Indeed, Juror 342 participated effectively in several extensive dialogues with the judge. Accordingly, the judge — with the full backing of the solicitor and defense counsel, both of whom agreed that "all . . . jurors can be somewhat distracted at some time" and thereby miss some testimony — decided that Juror 342 remained fit to serve. J.A. 868.

Given the trial judge's superior position in assessing Juror 342's competency, we owe that decision considerable deference. *See, e.g.*, *United States v. Dempsey*, 830 F.2d 1084, 1088 (10th Cir. 1987) (in case about hearing-impaired juror, explaining that a juror's "ability to perceive and weigh the evidence is best evaluated by the trial judge"); *United States v. Tegzes*, 715 F.2d 505, 509 (11th Cir. 1983) (same); *United States v. Sears*, 663 F.2d 896, 900 (9th Cir. 1981) (same); *see also United States v. Fulks*, 454 F.3d 410, 430 (4th Cir. 2006) (explaining that the trial court's finding that a juror was credible and could "carefully weigh all the evidence" is "entitled to deference"). To be sure, the evidence relating to the severity of Juror 342's hearing impairment and what Juror 342 might have missed was sometimes equivocal. On the one hand, Juror 342 missed the judge's instruction to pack for ten days; failed one of the judge's impromptu hearing tests; told the judge that she had missed "some" testimony; and evinced a difficulty hearing the judge once during a one-on-one exchange. Her husband also presented anecdotal evidence of her hearing issues. Finally, Dr. McGann's affidavit noted that she suffered from partial deafness. But on the other hand, Juror 342 did show up for trial on time (an instruction that was given in tandem with the packing instruction); passed at least

two hearing tests; and was able to communicate, for the most part, during one-on-one questioning. Moreover, everyone at trial — the judge, the solicitor, the defense team, and the SLED agents — concluded that Juror 342's hearing impairment was not severe.

Based on this record and in light of the deference owed the trial judge, who was on the scene, and the postconviction court under § 2254(d), the federal habeas court should not have concluded that the postconviction court's factual findings regarding Juror 342's ability to hear were "sufficiently against the weight of the evidence" so as to be "objectively unreasonable" under § 2254(d). *Williams*, 914 F.3d at 312 (cleaned up). Instead, there is evidence in the record supporting the postconviction court's findings. The record shows that Juror 342 was found qualified by the trial judge, who had the opportunity to consider Juror 342's hearing impairment in person and in real time. The record further shows that Juror 342 testified that she missed only "some" testimony, and there is no indication that that included any *material* testimony. And finally, the record shows that Juror 342 affirmed to the judge multiple times that she could hear, that she passed several hearing tests, and that she could generally converse with the judge during one-on-one questioning. This supports the postconviction court's factual finding that Juror 342's lip-reading accommodation generally worked and that her hearing impairment was not so severe that she *must* have missed material testimony.

While the district court's own findings on the record clearly differed from the postconviction court's, such

findings are not what matters in a § 2254 proceeding. "A state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (cleaned up). Section 2254 instead allows federal courts to reconsider the underlying facts only in the narrowest of circumstances, as we described, and the state postconviction court's findings are "presumed to be correct." 28 U.S.C. § 2254(e)(1). They may be rebutted only by "clear and convincing evidence." *Id*. Such a showing was not made here.

The remaining question — whether, in ruling on the issue, the postconviction court unreasonably applied federal law "as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d) — is more fluid because Bryant has identified no Supreme Court decision that has applied due process principles to the circumstance where a juror is hearing impaired. During the state postconviction proceedings, Bryant correctly recognized that due process requires that a defendant be given "a fair trial in a fair tribunal," meaning that the defendant have "a panel of impartial, indifferent jurors." He argued that "[t]his right to an impartial jury necessarily implies that juries are free from physical infirmities that would interfere with their competency" and thus "[d]ue process implies a tribunal both impartial and mentally competent to afford a hearing," quoting *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912). He concluded that "[a] juror who is unable to hear testimony does not satisfy a defendant's right to a fair and impartial jury."

The state postconviction court, in turn, did not disagree with Bryant on the law, stating that in "any trial . . . a litigant is entitled to an impartial[] and mentally competent jury." The court added that jurors "don't have to be perfect and there can be deficiencies, and the fact that [a] person has some hearing deficiencies does not make [the person] disqualified to serve." The court's formal order is similar. It recognized that the relevant law imposes the "impartial and competent jury" standard but denied relief after finding Juror 342 qualified and competent to sit.

In his federal application for habeas relief, Bryant did not take issue with the state postconviction court's articulation of the law. He made the same due process argument to the district court, using the same language and citing the same cases, that he had made to the state postconviction court. And the district court agreed to that articulation of law, summarizing that "[e]very criminal defendant is entitled to a jury that is both impartial and competent to adjudicate his case. The right to a competent jury necessarily implies that jurors are free from physical infirmities that would interfere with, or prevent, their ability to properly receive and consider evidence." (Citation omitted).

The question before us thus requires us to focus on the *application* of these accepted legal principles. Bryant asserts that Juror 342 was so hearing impaired that she could not fulfill her role to serve as a "competent" juror. That argument, however, actually reduces to a fact question, first answered by the postconviction court's finding that Juror 342 *was* competent to serve but then reversed by the district

court when it concluded that she was not. The line between juror competency and incompetency is indeed murky, but we can safely conclude that the postconviction court did not *unreasonably* apply federal law in denying Bryant's due process claim. Rather, after it found that Juror 342 "heard all testimony during the guilty phase and was able to compensate for her hearing deficiencies" and that "there was not a sufficient showing that [Juror 342] missed material testimony at trial or that her hearing difficulty was of such degree as to indicate she missed material [testimony]," it was justified in concluding that her presence on the jury did not violate Bryant's right to a competent jury.

We agree with Bryant, as well as the district court, that due process does include a requirement that a defendant be tried by a "competent jury, which means a jury capable of 'rendering an impartial verdict, based on the evidence and the law.'" (Quoting *Peters v. Kiff*, 407 U.S. 493, 501 (1972)); *see also Tanner v. United States*, 483 U.S. 107, 126 (1987) ("This Court has recognized that a defendant has a right to 'a tribunal both impartial and mentally competent to afford a hearing'" (quoting *Jordan*, 225 U.S. at 176)); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (explaining that the right to a fair trial requires that the jury base its verdict "upon the evidence developed at the trial"). But competency has an open texture, and what that means in terms of a juror with a hearing impairment like Juror 342's has never been addressed. Thus, in light of the more general due process standards that are applicable, we must give the state courts "more leeway" in "reaching outcomes in case-by-case determinations."

Owens, 967 F.3d at 415 (ultimately quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

We thus conclude that the postconviction court did not unreasonably apply federal law in determining that Juror 342's presence on the jury did not violate Bryant's right to a competent jury. In reaching this conclusion, we note that the situation can, in some respects, be likened to when a juror is found to be sleeping. In such cases, we have explained that a juror should be removed if the juror's slumber "makes it impossible for that juror to perform his or her duties or would otherwise deny the defendant a fair trial." *United States v. Johnson*, 409 F. App'x 688, 692 (4th Cir. 2011) (quoting *United States v. Freitag*, 230 F.3d 1019, 1023 (7th Cir. 2000)). But "a court is not invariably required to remove sleeping jurors, and a court has considerable discretion in deciding how to handle a sleeping juror." *Id.* (cleaned up). In *Johnson*, for example, we found no error because "[a]t worst, the record reflect[ed] that the juror was tired and perhaps inattentive for an undefined period of time during the Defense's opening argument and the informant's direct testimony." *Id.* Here too, we know only that Juror 342's hearing impairment caused her to miss "a little" testimony. At the least, *Johnson* shows that it is not "so obvious that" Juror 342's presence on the jury violated Bryant's right to a competent jury "that there could be no 'fairminded disagreement' on the question." *White*, 572 U.S. at 427 (quoting *Harrington*, 562 U.S. at 103).

In sum, with respect to Bryant's due process claim, we conclude that the state postconviction court did not unreasonably apply federal law as determined by the

Supreme Court of the United States and did not unreasonably determine the facts in light of the record. *See* 28 U.S.C. § 2254(d). We thus reverse the district court's ruling on the issue.

III

The State also challenges the district court's ruling that Bryant's trial counsel was ineffective in failing to insist on the removal of Juror 342 in light of her hearing impairment, arguing that the court similarly violated the standards imposed by § 2254(d) by not giving sufficient deference to the state postconviction court.

The state postconviction court found, based on the record, that:

> Counsel's decision not to request [Juror 342] excused was a strategic decision. Counsel explained that he did not excuse [Juror 342] because he did not like the alternate jurors who would replace [Juror 342]. Counsel also stated he did not approve of the selection process because it was conducted as a paper strike. Overall, [Bryant] failed to show Counsel's reasons for keeping [Juror 342] was not a valid strategic decision.

The court cited to and applied *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Under *Strickland*, Bryant was required to show that his trial counsel's decision not to exclude Juror 342 was "outside the wide range of professionally competent assistance" and that it was not a "strategic choice[]." *Id.* at 690.

"Strategic choices," the Court held, are "virtually unchallengeable." *Id*. at 690–91.

But the district court again reversed the postconviction court's conclusion, disagreeing with the postconviction court's findings of fact. The court rejected the multiple reasons given by Bryant's trial counsel for making his strategic decision as "mak[ing] no sense as justifications to ignore the presence of an incompetent juror." *Bryant*, 2019 WL 1253235, at *22. In this manner, the court chose to focus on counsel's explanation that his decision to keep Juror 342 on the jury was motivated in part on her race, which matched Bryant's. The court found that that did not constitute a valid strategy. Indeed, the court ultimately concluded that "*there was no valid strategy* to retain a juror whose hearing was substantially impaired." *Id*. at *24. These findings are not only beyond the district court's role in a § 2254 proceeding, but they also rest on its own credibility determinations.

What the record does show and what the district court essentially discarded is that while Bryant's defense counsel knew that Juror 342 was having difficulty hearing and had missed "some" testimony, he nonetheless pushed to keep her on the jury, offering various explanations for this decision. He said during the postconviction hearing that Juror 342's ability to pass one of the hearing tests "was one of the considerations to keep her," which is consistent with the position he took during trial when he argued that Juror 342 "heard everything" "in the guilt phase" and that while "she missed a little something in the penalty phase, . . . maybe 11 other jurors missed a little

something, too." Bryant's defense counsel also testified that the defense team was "a little angry about the way the jury was picked" — which involved using a "paper strike" method, the details of which are not relevant, and which, according to counsel, resulted in Juror 342 being the only Black juror. Defense counsel explained that he took that into account, given that Bryant was also Black. In fact, however, the makeup of the jury included two Black jurors. Finally, Bryant's defense counsel testified at the postconviction hearing that the defense team did not "particularly care[] for the alternate," although he added that his understanding was that dismissing Juror 342 at the penalty phase would result in a mistrial. In short, the record shows that after being made aware of Juror 342's hearing issues and after observing her in person and in real time, Bryant's trial counsel concluded that the benefits of having Juror 342 on the jury outweighed the risk that she had missed some testimony.

It is apparent from the record that defense counsel's decision to keep Juror 342 on the jury was not so beyond the pale that every fairminded jurist would conclude that it was unsound trial strategy. *See, e.g.*, *Valentino v. Clarke*, 972 F.3d 560, 581 (4th Cir. 2020). The composition of a jury is a delicate matter, one that trial lawyers are particularly attuned to and that courts of review are particularly ill-suited to second-guess (or in this case, third-guess). *See generally* Ellen Kreitzberg, *Jury Selection: The Law, Art and Science of Selecting a Jury* (Nov. 2020 Update). Here, defense counsel made the on-the-ground decision that his client's chances of avoiding death were better with Juror 342 on the jury than off. And given the

postconviction court's determination that Juror 342's hearing was not so severely impaired that she was incompetent to serve as a juror, that court's conclusion that defense counsel's decision satisfied *Strickland* is well within the bounds of reasonableness, as required under § 2254(d).

In sum, we conclude that the state postconviction court's denial of Bryant's ineffectiveness claim was not unreasonable, either as a matter of fact or as a matter of law. *See* 28 U.S.C. § 2254(d). Therefore, we also reverse the district court's ruling on this issue.

IV

Bryant advances, as an additional ground for affirmance of the relief granted by the district court, a claim that his trial counsel was ineffective in properly arguing a *Batson* claim. *See Jennings v. Stephens*, 574 U.S. 271, 276–801, 802 (2015) (permitting habeas petitioner to raise additional grounds for affirmance of the relief sought despite not having filed a cross-appeal or obtained a certificate of appealability).

Because Bryant did not make this argument to the state postconviction court, it is, as he recognizes, procedurally defaulted. *See Fowler v. Joyner*, 753 F.3d 446, 460 (4th Cir. 2014). He seeks, however, to excuse this procedural default by relying on *Martinez v. Ryan*, 566 U.S. 1, 17 (2012). *Martinez* requires Bryant to establish "(1) that his [*Batson*-based] claim [of ineffective assistance] is substantial and (2) that [his postconviction counsel's] failure to raise it was deficient" under *Strickland*. *Owens*, 967 F.3d at 423.

On this issue, the district court adopted the magistrate's report and recommendation, which concluded that Bryant had presented no evidence showing that postconviction counsel was ineffective and that Bryant had failed to show that the underlying ineffective-assistance claim was substantial.

During jury selection, the state solicitor used four of his five peremptory strikes to remove four Black potential jurors, and Bryant's trial counsel challenged these strikes under *Batson*. The trial judge determined that defense counsel had demonstrated a prima facie case of discrimination and accordingly ordered the solicitor to give race-neutral reasons for his strikes. After the solicitor stated that he struck two of the Black potential jurors because of their criminal records and the other two because they equivocated on the death penalty, the judge accepted the reasons as race neutral and offered Bryant's counsel the opportunity to expose them as pretextual. While Bryant's counsel repeated that the solicitor had struck four of the seven Black potential jurors, he did not offer any further evidence of pretext. The court accordingly denied defense counsel's motion.

Bryant contended for the first time in his federal habeas application that his counsel's failure to argue pretext constituted ineffective assistance under *Strickland*, reasoning that "it is apparent from the record that counsel did not understand the three-step process of a *Batson* challenge and believed his work to be done when he made a *prima facie* case." He maintained that had his counsel been competent, "he would have been able to expose the strike of" one of the

Black jurors —Juror 247 — "as pretextual" on the basis, as he argues, that while the solicitor stated that he had struck Juror 247 because she vacillated on the death penalty, he did not strike a White potential juror — Juror 123 — who had expressed similar, if not greater, hesitation. According to Bryant, a competent lawyer would have made this argument, "and the *Batson* challenge would have been successful."

Strickland requires that we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689. Bryant argues that his counsel failed to satisfy this standard by not arguing pretext. But he says nothing further about what the record showed on that issue or about his counsel's motive or strategy. Indeed, a cold review of the record suggests at the least that Juror 247's reticence to impose the death penalty was greater than Juror 123's, meaning that this potential pretext argument likely had no basis. *See Keel v. French*, 162 F.3d 263, 272 (4th Cir. 1998) (explaining that if "there is ample evidence in the record to suggest racially neutral reasons for excusing" the struck jurors, then counsel's failure to object is not objectively unreasonable under *Strickland*). In a similar vein, his defense counsel may also have wanted Juror 247 off the jury for another reason. There is simply no evidence in the record, one way or the other, and "it should go without saying that the absence of evidence cannot overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Burt*, 571 U.S. at 23 (cleaned up).

In short, we conclude that Bryant has failed to satisfy the requirement of *Martinez* that his underlying *Batson*-based claim of ineffective assistance was sufficiently substantial to allow us to excuse his procedural default of that claim. So, on this issue, we affirm the district court.

*   *   *

For the reasons given, we reverse the district court's rulings on Bryant's claims relating to Juror 342, and otherwise affirm. Accordingly, we remand this case to the district court with the instruction to deny Bryant's application for habeas relief under § 2254 with prejudice.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

THACKER, Circuit Judge, dissenting:

James Nathaniel Bryant ("Petitioner") was sentenced to death by a hearing-impaired juror ("Juror 342") who consistently failed to hear the proceedings during each stage of Petitioner's trial. In considering whether his death sentence should stand, the state postconviction relief court ("PCR Court") relied on factual findings that were "sufficiently against the weight of the evidence" and "objectively unreasonable." *Williams v. Stirling*, 914 F.3d 302, 312 (4th Cir. 2019) (internal quotation marks omitted). The district court recognized as much, and I cannot join the majority in reversing its reasoned conclusion.

Specifically, pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), I would affirm the district court's conclusion that the PCR Court's decision regarding Juror 342's competency was based on "an unreasonable determination of the facts in light of the evidence presented" and factual findings that were incorrect "by clear and convincing evidence."[1] 28 U.S.C. §§ 2254(d)(2), 2254(e)(1).

The PCR Court based its decision on the following findings: (1) Juror 342 "testified she heard *all testimony* during the guilty phase"; (2) she "was able to compensate for her hearing deficiencies"; (3) the trial court "took specific measures to ensure that Juror [342] was able to hear the testimony"; and (4) there "was not a sufficient showing that [she] missed material

---

[1] Because I would affirm the district court's grant of habeas relief on this ground, I do not address the ineffective assistance of counsel claims Petitioner raised in his habeas petition.

testimony or that her hearing difficulty was of such degree as to indicate she missed material [testimony]." J.A. 1275 (emphasis supplied). But to the contrary, Juror 342 testified she missed testimony during both the guilt and penalty phases, the evidence demonstrates she was not able to compensate for her hearing deficiencies, and there was no logical way to ascertain what type or how much "material" testimony she missed.

Therefore, I respectfully dissent.

I.

Section 2254(d) provides that habeas relief "shall not be granted" unless the state court adjudication "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," 28 U.S.C. § 2254(d)(1); or "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," *id.* § 2254(d)(2). It is elementary that, pursuant to AEDPA, the state court's decision is not deserving of deference if it is based on unreasonable factual findings. *See Lopez v. Smith*, 574 U.S. 1, 7 (2014) (per curiam). This makes sense because if the state court reached a legal conclusion based on erroneous facts, that legal conclusion is wholly misinformed. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2276 (2015) (vacating and remanding court of appeals denial of habeas relief, explaining, "[b]ecause we agree that the state court's [adjudication] was premised on an 'unreasonable determination of the facts' within the meaning of

§ 2254(d)(2), we need not address" the petitioner's argument on § 2254(d)(1)). As explained below, the factual determinations on which the PCR Court relied in rendering its decision are objectively unreasonable, and the PCR Court's legal decision based thereon should not stand.[2]

A.

Trial Proceedings

In determining whether the PCR Court's adjudication was based on an unreasonable determination of the facts, "we train our attention on the . . . underlying factual determinations on which the [state] court's decision was premised," *Brumfield*, 135 S. Ct. at 2276: that is, Juror 342 testified she heard *all testimony* during the guilty phase; she was able to compensate for her hearing deficiencies; the trial court took measures to ensure that she was able to hear the testimony; and she did not miss material testimony. But the evidence of a hearing impairment that affected Juror 342's ability to hear the trial proceedings -- despite the trial court's assistance -- is pervasive. As the majority itself recognizes, there were unquestionably "troubling exchanges." *Ante* at 9. Indeed, as detailed below, Juror 342 failed to hear the proceedings at every stage of Petitioner's trial.

---

[2] I agree with the district court that any errors as to Petitioner's guilty verdict were harmless, as "the State's proof of Petitioner's guilt was ironclad." *Bryant v. Stirling*, No. CV 1:13-2665-BHH, 2019 WL 1253235, at *16 (D.S.C. Mar. 19, 2019). Therefore, like the district court, I would vacate the death sentence only and remand for resentencing.

1.

Voir Dire

Jury selection[3] in the state court trial began on September 29, 2004. "[T]roubling exchanges" occurred right off the bat. *Ante* at 9. During the voir dire proceedings, Juror 342's answers to various questions by the trial court were the first indicators of a hearing problem:

> [THE COURT]: [Y]ou were handed a witness list. . . . Did you recognize any of these potential witnesses as being related to you by blood or marriage or being personal or business acquaintances of yours?
>
> [JUROR 342]: Yes, ma'am.
>
> Q: Who? Who is related to you by blood or marriage or who is a personal or a business acquaintance?
>
> A: Oh, I'm sorry, no ma'am.

J.A. 98.

> [THE COURT]: . . . If you're under oath and you're told that you must apply the law as I instruct it whether you agree with it or not . . . could you do that?

---

[3] The same jury sat for the guilt and sentencing phases of Petitioner's trial. Under South Carolina law, a jury must be unanimous in delivering a death sentence. *See* S.C. Code Ann. § 16-3-20(C).

[JUROR 342]: No, ma'am.

Q: Okay, you would not apply the law as instructed? Is that what you're saying?

A: Ma'am?

Q: You would not apply the law as instructed?

A: Oh, no, I wouldn't -- answer to the best of my ability, you know. I wouldn't tell nothing that's not true.

Q: Okay, now, I'm not asking you about telling anything that's not true. Listen to my question very carefully. I will instruct you as to the law at the close of both phases of this case.

A: Uh-huh[].

Q: You have to apply the law as I instructed it.

A: Oh.

Q: And you'd indicated that you would listen to the law and you would apply that law. . . .

A: Yes.

J.A. 98–99.

[THE COURT]: [A] Defendant is presumed innocent until his guilt has been proven beyond a reasonable doubt. The Defendant doesn't have to prove himself innocent. Do you understand that?

[JUROR 342]: No ma'am.

Q: You don't understand that? Let me explain it to you. You listen carefully.

A: Okay ---

Q: A Defendant is presumed innocent.

A: Uh-huh[].

Q: He's sitting there an innocent man. He's presumed innocent until his guilt is proven beyond a reasonable doubt. Do you understand that?

A: Yes, ma'am. He's innocent until he's proven guilty.

J.A. 101.

[THE COURT]: [C]ould you, based on the facts and circumstances and the law instructed, could you find the Defendant either guilty or not guilty?

[JUROR 342]: Guilty.

Q: Okay, you're saying guilty. I'm not asking you to guess which one because you don't know the facts of the case.

A: No.

Q: I'm just saying could you find them either guilty or not guilty depending on the facts, one or the other, could you find that?

A: What you saying regardless if I hear the facts or not?

Q: No, I'm saying, I'm asking you after you've heard the facts, but you don't know what they are now, can you then make a determination that he's either guilty or not guilty? That's after you've heard the facts.

A: No, ma'am.

Q: Could you do that?

A: No, ma'am.

Q: You couldn't say that he was guilty or not guilty?

A: I could say not guilty until I hear it, yes.

Q: Right, you're right. They're presumed innocent, they're presumed not guilty till you hear, but what I'm asking you is at the guilt phase you and your fellow jurors have to decide if the State met their burden of proof. If the State did not meet its burden of proof you would have to find the Defendant not guilty. Could you do that?

A: Yes, ma'am.

J.A. 102–04.

[THE COURT]: Okay, if you are chosen to serve as a juror in this case you will be housed in a motel during the course of the trial. It may be up to ten days. I don't anticipate it'll be that long, but I'll have you pack for ten days. Except for the personal inconvenience that this would pose[,] would this pose any serious danger to the

health or well-being of yourself or those dependent upon you?

[JUROR 342]: Yes, ma'am.

Q: It would? Would it pose a serious danger to the health or well-being of you or someone who is dependent on you if you were in a motel?

A: No, ma'am.

Q: It won't?

A: No.

Q: Okay, now, you've answered me both ways and I need to clarify this like I've done on some of these others.

A: I understand what you're saying.

. . .

Q: Okay, will it? Will it cause any undue hardship for you to be housed in a motel during this trial?

A: No, ma'am.

J.A. 106–07.

Next, the Solicitor asked Juror 342 about her responses to the juror questionnaire, specifically, the fact that Juror 342 indicated she had a hearing problem:

[SOLICITOR]: Okay, all right, and I notice that in the last question there about whether you had a mental or physical condition that might make

> you unable to serve you said that you had a hearing problem with your right ear.
>
> [JUROR 342]: Yes, sir; yes.
>
> Q: And I notice a couple of times when the Judge was talking to you[,] you kind of put your hand up there.
>
> A: Yeah, so I can focus.
>
> Q: All right, and can you tell us -- can you hear at all out of that ear?
>
> A: Yeah, I can hear.
>
> Q: Okay, can you hear me okay when I'm talking?
>
> A: Yes, sir.

J.A. 108. At the conclusion of voir dire, both the Solicitor and defense counsel deemed Juror 342 to be qualified. The trial court told Juror 342 that she needed to return on Monday at 10:00 and told her, "I need for you to pack your bags for ten days. . . . [C]ome Monday at ten o'clock with your bags packed assuming you'll be chosen." *Id.* at 113. The trial court then told Juror 342, "[Y]ou can leave your baggage and all out in the car if . . . you want to do that. . . . You don't have to drag it all in." *Id.* at 114.

Juror 342 was selected as a member of the jury on Monday, October 4, 2004, and the guilt phase began. She did not have her bags packed.

2.

<u>Guilt Phase</u>

Following the jury being sworn, the trial judge provided a number of general instructions, including the following:

> Another important hand signal, because you are the judge of the facts of the case, is this [raising hand or finger] and this means 'Judge, I cannot hear or I cannot see.' I'll figure out which one it is and I'll make sure that that witness speaks up or that attorney speaks up or I speak up or that that document or photograph or exhibit is better displayed to you, the jury.

J.A. 177–78. The parties made opening statements, and seven of the State's witnesses testified. At that point, the trial judge sua sponte questioned the jury, and specifically Juror 342, about whether they could hear properly:

> THE COURT: While we wait on [the next witness] to come, let me ask you is every member of the jury able to hear? If you are able to hear just raise your hand for me. I need to be sure that everybody is able to hear. All right, let me ask you once again, is every member of the jury panel able to hear? Is every member of the jury able to hear? All right, I'm getting an indication that one juror is unable to hear; is that correct? Are you having difficulty hearing? You are?
>
> [Juror 342]: Yes.

THE COURT: Have you been having difficulty hearing throughout this trial?

[Juror 342]: Long as I'm looking, you know, facing you I can read your lips and understand what you're saying.

THE COURT: All right, so, you really have to read lips to understand?

[Juror 342]: Yes, ma'am.

THE COURT: Because there's been plenty of times that the[] [witnesses] have turned away. Have you heard all of the evidence and testimony in this trial?

[Juror 342]: I heard.

THE COURT: Okay, I don't mean to put you on the spot because we will work with you. I just want to make sure you haven't missed anything thus far. Have you heard?

[Juror 342]: Yes, ma'am.

THE COURT: You can, okay. All right, we need to be very mindful then that she is actually reading lips. That's assisting her. So, we'll have to be -- have our witnesses actually looking that direction and facing. If at any time you don't understand or can't hear you need to let us know. Do you understand that?

[Juror 342]: Yes, ma'am.

J.A. 179–80 (emphases supplied). Of note, the trial court made this announcement that witnesses should

face the jury while testifying *after seven witnesses had already testified.*

At the end of the first day of trial, the trial judge gave additional instructions to the jury, and specifically told Juror 342:

> [M]a'am, you're going to have to get clothes. You're going to have to pack and be ready as well. You've got to get your clothes packed. So, they'll probably take you to get your clothes packed sometime this evening for ten days. You need to pack for ten days. You understand? I don't anticipate it'll be that long but I need for you to be packed that long. Everybody else is packed for ten days.

J.A. 183.

Upon dismissing the jury for the evening, the trial judge openly expressed her concerns about Juror 342 to the Solicitor and defense counsel:

> THE COURT: All right, I want you to know that I've got some concerns about the one juror who is lip reading. I want to be sure -- I have concerns that it was not brought to light that she really needed to lip read when we were doing the individual voir dire. ***She indicated she had a hearing problem but said it was taken care of, that she, in fact, could hear, but now I'm understanding that she, in fact, lip reads***. Now, that would not preclude her from serving. My concern is it hasn't come to our attention until recently and I've asked her about whether she has missed anything, but I'm going

to be very mindful of that and ask that you all be very mindful of that as well. In other words, when you're asking questions sometimes you're going to have to be looking over at that jury.

I'm going to periodically make sure that all are able to hear and watch that situation as best I can. I'm also going to hear from the SLED[[4]] agents . . . to see if there is -- if they get any indication that she's really having difficulty even lip reading, and then if that is the case then we will address that. Hopefully that will not be the case and simply being aware of it and looking towards her and making sure that she's able to hear everything will work and that will be sufficient. I just wanted to raise that issue because I want to let you know that when they went to pick her up there was a couple of things. ***She didn't hear me say that she was to pack her bags for ten days***. So, she did not pack her bags for ten days. So, she missed that, although she did hear to be here today and to be here at ten o'clock, and she did come, but she came with, I think, an aunt and a niece and without bags packed. So, she is going to have to be taken to get her bags packed. So, we've got to watch this situation pretty closely. Be aware that I'm aware of it. Anything that I hear that is reported through this court you will become, you will be made aware of it immediately if I think it's a concern about her ability to serve. We're going to

---

[4] South Carolina Law Enforcement Division ("SLED") agents were helping with the jury at the trial.

> try to adapt as much as we can to be sure that she's able to.

J.A. 185–87 (emphases supplied).

During the next day of trial, October 5, 2004, the continuation of the guilt phase, the trial judge again questioned the jurors about their ability to hear:

> THE COURT: . . . . I have been told that lunch has arrived and ladies and gentlemen of the jury, I will allow you to go back to the jury room at this time with a reminder please do not discuss the case. Before I send you back I'm going to ask you one more time is everybody having -- are there any problems seeing or hearing anything? Are you having any problems? If you're having any problems -- let me put it this way, if you're not having any problems seeing or hearing raise your hand.
>
> All right, all right, now, ma'am, you delayed. Can you hear, are you able to hear?
>
> [Juror 342]: (Indicates affirmatively.) Yeah.
>
> THE COURT: Have you been able to hear all of the testimony?
>
> [Juror 342]: I heard them all.

J.A. 192–93. The State concluded its guilt-phase evidence later that day. Petitioner did not present any guilt-phase evidence. The jury began deliberating at 4:53 p.m., and returned a guilty verdict at 5:40 p.m.

3.

Penalty Phase

After a 24 hour statutory waiting period, *see* S.C. Code Ann. § 16-3-20(B), the penalty phase began Thursday, October 7, 2004. During this phase, the State argued the following aggravating factors to support the sentence of death: (1) Petitioner committed the murder while in the commission of a robbery and while armed with a deadly weapon; (2) the murder was committed while in the commission of larceny with use of a deadly weapon; (3) the murder was committed while in the commission of physical torture; and (4) the murder of a local law enforcement officer during or because of the performance of his official duties.

In response, defense counsel presented mitigation evidence, including: (1) the crime was out of character for Petitioner; (2) Petitioner was "extremely remorseful for his crime"; (3) Petitioner was a good, caring person whom others trusted; (4) Petitioner suffered extreme beatings from his father as a child; (5) Petitioner had a remarkably positive history in prison, including that Petitioner intervened to disarm another prisoner who had a shank; (6) expert testimony that Petitioner could live safely and successfully in prison for life; and (7) Petitioner came from a large and dedicated family that would incur needless suffering if Petitioner were executed. J.A. 1597–98.

On Friday, October 8, 2004, the trial judge briefly interrupted the sentencing-phase proceedings and interjected the following exercise to test whether the jurors were hearing properly:

> THE COURT: While [the next witness] is coming forward let me ask is everybody able to hear? Everybody able to hear me? All right, if you're able to hear me raise your hand. All right.
>
> . . .
>
> THE COURT: [Witness is seated.] Please be seated. If you have, if you're in the jury box and you have on a yellow shirt would you stand up. You might need to look at your shirt to decide. Would you stand up if you have on a yellow shirt. I'm not picking on you, just whoever has on a yellow shirt stand up.
>
> All right, if you . . . happen to have on a green shirt or you have green in it would you stand up. I know this seems unusual, but bear with me. Thank you. [Y]ou can be seated. If you have on a blue shirt would you stand up? If you have on a blue shirt. You might want to look at your shirt, but if you have on a blue shirt would you stand up? All right, thank you. We'll continue.

J.A. 640–41. Juror 342, who had on a blue shirt, stood at the proper time, although it appeared the juror beside her might have nudged her. *See id.* at 791 (Solicitor: ***"I think the juror beside her to her left . . . was trying to help her, nudged her."*** (emphasis supplied)).

Near the end of the penalty phase, and after more than 30 witnesses had testified in that phase, the Solicitor moved to excuse Juror 342.

[Solicitor]: . . . . Your Honor, the final thing I would like to bring up is that I would move at this time to excuse Juror 342[.] I don't think -- ***I think she's following part of the trial testimony. I don't think she's catching all of it.*** Your Honor had gone through an exercise to test her hearing ability at one point and she did not stand up when you asked about the blue blouse until . . . I think the juror beside her to her left ---

THE COURT: I, I don't know. I watched that carefully.

[Solicitor]: --- was trying to help her, nudged her.

THE COURT: It looked like she was starting to stand up when the juror was nudging. So, it was really hard to gauge. I'll tell you what I will do. I will do another similar test and I know that seemed real odd and I'm glad that you've mentioned it. I did do a test. I have been watching her and I just want to be assured that she's able to hear. I will do it again tomorrow, and hopefully we'll have nobody, hopefully she'll be sitting by someone else and nobody nudging and I'll try that once again. I have been asking about it. I have asked the SLED agents who have been watching, who have been seeing them in the evenings, too, whether she's able to hear and they've indicated that they thought she could, ***but I have had my concerns*** and that's the reason that I had that unusual request of the jurors that if you have on a yellow shirt stand or a blue shirt and it was exactly that

> reason, to test her, and I am unsure whether she was beginning to stand when she was nudged or whether she was nudged to stand. I think the appropriate thing to do is try it again, and I certainly note your motion and we'll take it up, remind me tomorrow and we'll take it up again tomorrow depending on the results that we get.

J.A. 791–92 (emphasis supplied). The trial court tested the juror's hearing in a similar way the following day, Saturday, October 9, after prompting by the State. With only one mitigation witness remaining, the Solicitor said:

> SOLICITOR: Your Honor, the only other item the State would wish to bring up at this time would pertain to the juror since we're running towards the end of this trial, Juror 342, [] ***I still continue to be concerned about her apparent deafness and inability to follow all the testimony.***
>
> THE COURT: All right, and what I said I would do in that regard is that I would call them out and I'm going to have to go through a type of a test as I did yesterday either with the color of their shirt or pants or the color of their hair, something creative to try to see whether she's able to hear because ***there have been some things that have brought or caused the Court some concern, times when it looks like maybe she's . . . not watching back and forth and she's not able to hear***.

J.A. 853 (emphases supplied). The Solicitor noted, "[I]t's again kind of late in the process to be doing that, [I could suggest] maybe make some inquiry whether or not she has a physician that attends her with her hearing problem and maybe have some court personnel contact that physician to find out just how bad her problem is." *Id.* at 854. And the court said, "I'll be glad to do that." *Id.* In any event, the court proceeded to conduct another hearing test:

> THE COURT: . . . . We're going to do an exercise once again today. So listen very carefully as I ask you these questions[.] If there are any gentlemen with green shirts on would you stand?
>
> . . .
>
> THE COURT: Very good, you may be seated.
>
> . . .
>
> THE COURT: If we have any ladies who are wearing skirts or dresses would you please stand[?]
>
> . . .
>
> THE COURT: And we do have several and you look very nice I might add. Please be seated.
>
> . . .
>
> THE COURT: . . . . All right, now, I think I see some -- everyone in blue please stand.
>
> . . .
>
> THE COURT: All right, you may be seated.
>
> . . .

> THE COURT: All right, ladies and gentlemen, I'm going to send you back to the jury room for just a moment. We will have you out in the very near future. You may go back at this time. Do not discuss the case.
>
> (Whereupon, the following takes place outside the presence of the jury.)
>
> THE COURT: Juror Number 342, . . . first of all let me note on the record that she responded . . . when I asked about the ladies who were wearing skirts or dresses. She got up for that and she responded to that and it looked like without any nudging or coaxing at all. I was watching for that very carefully. ***What she didn't respond to was my next question about blue. She's in a navy blue [sic]. It's dark. She may consider it black, but it's blue. I don't know whether she didn't answer because, and unfortunately she wasn't in a bright blue color, but she didn't answer because she believe[s] she's in black or she didn't answer because she didn't hear me.***

J.A. 855–57 (emphases supplied). After further discussion with counsel, it was decided the trial court would speak with Juror 342's doctor. Defense counsel suggested that Juror 342 had failed to respond to the trial court's direction to "stand if wearing blue" because she was confused by the fact that, although her garment was blue, it had polka dots on it. *Id.* at 858. The trial court again suggested that it could be because she considered it black, and many people have difficulty differentiating between navy blue and black.

Defense counsel stated, "I'm satisfied with what you did. I just think she was a little confused with the blue and the polka dots." *Id.* at 859.

The trial court then stated:

> THE COURT: It's so important. ***It's so important for both the State and the Defendant that she's heard everything***.
>
> [Defense Counsel]: I understand.
>
> THE COURT: We'll simply inquire who her doctor is and then I'm going to ask her, too, has she heard all of the evidence and testimony. ***It's kind of hard to know if you've missed something. She's heard what she's heard.***
>
> [Defense Counsel]: Right.
>
> THE COURT: But I'll just ask her if there is [sic] any times that maybe she's turned away and she's missed some of the evidence and testimony. That's all I know to do.
>
> [Solicitor]: Your Honor, ***I don't think there's any way to establish with absolute certainty how much she's hearing,*** and I would suggest just ---
>
> THE COURT: We'll do both.
>
> [Solicitor]: --- that all that's gone on, that just out of an abundance of caution we've got two alternates that are here. Nobody's indicated any sickness or injury or any reason we would need

> to use those alternates for somebody else. That's why they're here, and ---
>
> THE COURT: If she has heard everything and she doesn't have a hearing problem I just -- I don't want to take her off.

J.A. 859–60 (emphases supplied).

At that point, Juror 342 was called back into the courtroom. The trial court inquired as follows:

> THE COURT: Ma'am, first of all let me tell you you have done nothing wrong. I simply want to ask you some questions and it is about your hearing because we had addressed that somewhat in your individual voir dire and you said that you had some hearing problems. Have you had any difficulty in hearing what has happened -- let me ask it this way[:] ***have you turned away and then found yourself just catching the end of some testimony or not hearing all of it?***
>
> [Juror 342]: ***Yes, ma'am.***
>
> THE COURT: You have?
>
> [Juror 342]: Yes, ma'am.
>
> THE COURT: So, you have missed some of the evidence and testimony?
>
> [Juror 342]: No, ma'am, I heard it, but it's more like when I -- after I heard the testimony I turned my head, you know, concentrate on it.

> THE COURT: Okay, now, listen carefully to this question. ***Have you found yourself maybe turning away and looking and missing part of a question or part of an answer because . . . you didn't turn your head fast enough?***
>
> [Juror 342]: ***Yes, ma'am.***

J.A. 860–61. ***The trial court then asked Juror 342 if she considered her dress to be blue, and she said, "Yes, ma'am."*** *Id.* at 862. The trial court then further questioned Juror 342:

> THE COURT: [L]et me, let me ask you, you have been through one phase of this trial and that is the guilt phase of this trial. Now, did you hear all of the evidence and testimony in that phase?
>
> [Juror 342]: Yes, ma'am.
>
> THE COURT: Did you ever catch yourself missing part of a question or an answer in that phase of the trial?
>
> [Juror 342]: Just at one point I thought I missed a little of it but I didn't. I thought about it and I haven't missed it.
>
> THE COURT: So, you didn't miss anything?
>
> [Juror 342]: No, ma'am.
>
> THE COURT: All right, all right, now, at this point is this, is this the phase where you've found yourself turned away and have missed some when we started this part?
>
> [Juror 342]: No, ma'am.

> THE COURT: Okay, have you, in fact, turned away and missed some evidence and testimony . . . at this point?
>
> [Juror 342]: ***I may have missed a little of it but I didn't miss everything.***
>
> THE COURT: ***Okay, all right, so, so, you did miss some at this phase?***
>
> [Juror 342]: ***Yes, ma'am.***
>
> THE COURT: Do you believe that you missed any at the guilt phase?
>
> [Juror 342]: No, ma'am.
>
> THE COURT: ***Did you find yourself in that same situation where you had turned away and then you've missed some of the question being asked or some of the answer?***
>
> [Juror 342]: ***Yes, ma'am, I may have missed concentrating, you know, just steady, may have missed some of it, yes, ma'am.***
>
> THE COURT: ***You may have missed some testimony at the guilt phase? Is that what you're saying?***
>
> [Juror 342]: ***Yes, ma'am.***

J.A. 862–63. At that point, the State renewed its request to excuse Juror 342.

> [SOLICITOR]: ***She's admitted that she may have missed evidence at the guilt and the penalty phase and she knows she's got a***

> ***blue dress on, didn't stand up when Your Honor asked her that, and I think clearly she's, she's not catching everything and should be removed***.
>
> THE COURT: All right, yes.
>
> [DEFENSE COUNSEL]: Your Honor, I think if you brought every juror out they would say at one point in time they've missed something. . . . I bet you almost every juror would say, "Yeah, at one point I did miss a little something." We're sitting in this courtroom all day long[.]

J.A. 863–64 (emphasis supplied). The trial court again discussed the matter with counsel, and again they came back to the hearing test based on the blue dress. Defense counsel maintained that Juror 342 was "confused" about the blue dress question and maybe she thought she was "only entitled to stand once." *Id.* at 864–65. Defense counsel also said, "She missed a little something in th[e sentencing] phase, but maybe 11 other jurors missed a little something too." *Id.* at 864. So, the judge proceeded to question Juror 342 yet again:

> THE COURT: Ma'am, when I was asking the jurors, when I was asking you all to stand up if you had on a green shirt or stand up if you had a dress on and you stood when I asked you if you had – to stand up if you had a dress on. I also asked for everyone who had on blue to stand. Did you hear that question?
>
> [Juror 342]: Yes, ma'am.

> THE COURT: You heard it? Why didn't you stand?
>
> ***[Juror 342]: You said – asking me did I hear it? Oh, no ma'am.***
>
> ***THE COURT: You didn't hear when I asked if you have on ---***
>
> ***[Juror 342]: No, ma'am.***
>
> ***THE COURT: --- blue []?***
>
> ***[Juror 342]: No, ma'am.***
>
> ***THE COURT: Okay, and you were looking directly at me and I was talking ---***
>
> ***[Juror 342]: That's why I was trying, I was trying to read your lips when you was like talking.***

J.A. 865–66 (emphasis supplied). The trial court then asked Juror 342 to retrieve contact information for her doctor. While she was out of the courtroom, the trial court said:

> THE COURT: ***Okay, I'm going to note there's no question. She has indicated she just flat did not hear and I was looking directly at her and talking and even now she's having difficulty hearing me and I'm raising my voice and there's been a lot quieter voices than mine during the trial of this matter.***

J.A. 867 (emphasis supplied).

The trial court retreated to chambers and attempted to reach the juror's doctor, to no avail. The court then went on the record to say:

> THE COURT: There has been some conversation in chambers . . . about [Juror 342] and her ability to hear. There's been some indication from both the State and from the Defendant that a belief that all of the jurors can be somewhat distracted at some time and no indication that she has not been able to hear the testimony. The indication has been, in fact, that she has been hearing most and has turned away and only missed bits, but ***she has admitted to missing some [testimony]***.

J.A. 868 (emphasis supplied). The State then began to backtrack on its original concern.[5]

> [SOLICITOR]: Your Honor, although I did on behalf of the State express some concern about [Juror 342's] hearing problems, the potential problems, in reflecting on this, you know, I started thinking about it and I don't think any, any juror is going to have the capability of getting a hundred percent of the testimony. You're going to have a mix of people that are

[5]As explained below, the Solicitor testified at the evidentiary hearing that Juror 342 was black, and he was concerned about a potential *Batson* challenge if Juror 342 was removed, as Petitioner was also black. *See Batson v. Kentucky*, 476 U.S. 79 (1986) (State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded).

> young and old, some more intelligent than others. Some might have attention deficit problems, and I would note that even a blind juror is qualified to serve in this state, and they obviously are not going to be able to get the same read from a . . . witness that the other jurors could. So, I don't think a hundred percent ability to be, you know, healthy and a hundred percent alert is a qualification per se to serve as a juror. I think [Juror 342] is qualified. She's heard most of what was going on. It would be better if she could hear more, but again, I mean, I think she meets the statutory qualifications as a juror in your discretion. Your Honor, you have qualified her as a juror, and I'm satisfied at this point that she is able to follow the testimony, was able to properly deliberate and would withdraw my motion to have her excused . . . .
>
> THE COURT: All right, anything from the Defense?
>
> [DEFENSE COUNSEL]: Yes, Your Honor, I agree one hundred percent with [the Solicitor] and I also went over all of the ramifications one way or the other with my client and he is perfectly satisfied that she stays on the jury.

J.A. 869–70.

The trial court then confirmed, through a series of questions, that defense counsel and Petitioner were both satisfied with Juror 342 having served in the guilt phase and continuing to serve in the penalty phase. Then, defense counsel called its last mitigation witness,

and the sentencing phase proceeded to its conclusion. Jury deliberations began at 3:54 p.m., and a verdict was reached at 5:17 p.m. Petitioner was sentenced to death.

B.

Post-Conviction Proceedings

1.

PCR Court Evidentiary Hearing

During the evidentiary hearing in the PCR Court on January 25, 2010, Petitioner called four witnesses: Juror 342's husband, Jimmie Jones; defense trial counsel, Robert Johnston; defense trial counsel Paul Archer; and Solicitor, Walter Bailey. Juror 342 did not testify.

a.

Juror 342's husband

Jones testified that he had been married to Juror 342 for 30 years and that she had been experiencing hearing problems since 1984. In other words, for 20 years at the time of trial. He stated that when he and his wife go to church she likes to sit in the back, but the preacher tells her that she cannot hear and directs her to come to the front. Jones further stated, "***And then he would ask her to read and she still couldn't hear what he was saying. Till I say, he asking you to read. Then she would stand up and read.***" J.A. 1040 (emphasis supplied).

Jones provided several examples of Juror 342's difficulty hearing. He said, "Well, we'll be out in the yard and I'll say, hand me that rake right over there and she'll be about as far as you to me and she don't hear a thing I say. She keep walking." J.A. 1041. When asked whether she would keep walking because she does not want to hear what Jones is saying, he responded:

> A: Well, she trying to hear what I say but she don't understand it. She just keep walking. And then I guess we're in the kitchen and . . . she said, I need so and so. I said you need this frying pan or something or this skillet, she ***keep walking just like she ain't hear me. We're right in the kitchen together.***
>
> ***Q: You can be just a few feet apart?***
>
> ***A: That's right.***
>
> Q: Okay. Now also you talked about sometimes that she'll be leaving to go somewhere and she'll . . . say like, honey, I'm going, or something like that. Tell the judge about that.
>
> A: Well, a lot of times she get ready to go somewhere and she'll come back and say, I'm fixing to go. I said, well, I heard you, I told you okay. Then she'll come back again and say the same thing again. ***She didn't hear what I said to start with.***
>
> Q: She didn't hear you acknowledge her?
>
> A: That's right.

Id. at 1041–42 (emphases supplied). Jones admitted Juror 342 had "***[b]ad trouble with the hearing problem***." *Id.* at 1042.

But Jones testified that Juror 342 was sensitive about her hearing problem, and that "[s]he get[s] furious" when she is told she needs a hearing aid. J.A. 1042. He explained that "she gets mad" because "she don't want to be deaf, she don't want no hearing aid neither." *Id.* at 1042–43.

b.

Defense Counsel Archer

Petitioner then called one of his trial attorneys, Paul Archer. Archer testified that ***"we all noticed" Juror 342's problem with hearing***. J.A. 1051. He agreed that, at some point, Juror 342 "indicated that she used lip reading," and at that time, Archer's opinion was that the trial court "should have removed [her]." *Id.* He testified that after the trial, he thought more about Juror 342's hearing impairment and wondered how she could have effectively participated in deliberations, given the context of group discussion around a table. Based on Archer's conversations with the trial court, and in light of the trial court's persistent questioning of Juror 342, Archer was "under the impression" the trial court was going to order a mistrial, and he was "very surprised" when it did not, despite the fact that neither his team nor the State requested a mistrial. *Id.* at 1052–53.

On cross examination, Archer admitted "in retrospect when I read the transcript ***there's no doubt that [Juror 342] did not belong on that jury***." J.A.

1074 (emphasis supplied). When asked whether this was something he decided in hindsight, he answered, "Not necessarily. I was busy with other things [in the trial], but I did weigh into the fact that she was a person of color." *Id.* He continued, "I don't think we particularly cared for the alternate, but I don't think the alternate came into [it because] in the penalty phase [Juror 342] already voted," but he said, "I should have made a motion . . . for a mistrial, definitely," and "if I made a motion for a mistrial [the trial court] would have granted it." *Id.* at 1074–75.

Then, the PCR Court asked counsel, "[W]hy did y'all argue so strenuously on the record to keep her on the jury . . . if you had been offered a mistrial?" J.A. 1077. Archer responded, "[W]e were a little angry about the way the jury was picked . . . And it just so happened that the people we wanted -- and also []race played a factor -- they were all in the end [jury] pools, and [the Solicitor] picked up on it real quick. . . . [O]n the last pools were . . . some black people that we wanted [and the trial court] wouldn't let the [jurors] come in front of us." *Id.* at 1077–78. But Archer concluded, "At least we got something from that the way the jury was picked[.] [W]e got some black person there," even though "[i]t's not exactly who we wanted." *Id.* at 1078–79. "[B]ut I don't think [Juror 342 being black] outweighs the fact that she was deaf." *Id.* at 1079. He said, "[I]f [Juror 342] were a white woman there's no doubt . . . I would have done it differently, but at least we got one black on the jury." *Id.* at 1081. Nonetheless, ***Archer reiterated Juror 342 "should have never been on that jury."*** *Id.* at 1083.

c.

Defense Counsel Johnston

Robert Johnston, who also served as defense counsel in the state court trial but in more of an assistant role, testified that Archer "was handling" the juror issue. J.A. 1026. When asked whether he discussed the trial court's concerns and the prospect of asking for a mistrial with Archer, Johnston replied that he did not "specifically recall any conversations with [Archer]." *Id.* at 1001. Johnston had "a recollection that there was an offer [from the trial court] to the extent that if somebody will ask me for [a mistrial] I'll grant it." *Id.* at 1027. He testified that when Juror 342's hearing problems were being discussed, he "felt that a mistrial might be a good idea." *Id.* at 994.

d.

Solicitor Bailey

Finally, Solicitor Walter Bailey testified about his involvement in the state court trial. When asked whether there was discussion of a mistrial, Bailey said:

> A: Well, it was an ongoing thing that led up to that with the -- this person's hearing loss and the judge and the attorneys tried to ascertain the extent of the hearing loss and what impact that might have had on ability [sic] to be a juror. And at some -- at some point the issue did come [sic] if she did decide -- by then we were in the penalty phase.
>
> Q: Right.

> A: The issue came up if the judge decided that juror was not qualified at that point in time[,] the penalty phase, then what will that do to the verdict.
>
> Q: Right.
>
> A: Yeah, that did come up.
>
> Q: And did you ever hear [the trial court] just flatly say to the defense or to you that if you requested mistrial I'll give it?
>
> A: I don't recall that at all.

J.A. 1087–88. Bailey explained he changed course from moving to excuse the juror because she could not hear to keeping her on the jury because he was "trying to protect the record" and was "concerned about the fact that . . . the defendant was a black male [and] [t]he juror was a black female. There are mostly white jurors on there, and that if [Juror 342] was removed and replaced with a white alternate it could create . . . a *Batson*-type situation." *Id.* at 1088–89.

Bailey testified that, although Juror 342 had disclosed her hearing issue on her questionnaire, and "***everyone knew that she did have the hearing loss***," it was "hard to get a grasp on how bad it was or how large one [sic] it may have been. It was difficult to determine because she kept insisting she was able to hear and follow the testimony, but then she would admit that she did miss out on certain things." J.A. 1089 (emphasis supplied). Regarding his abandoned request to excuse Juror 342, the Solicitor stated, "I think everybody recognized that you don't have to be a

perfect specimen to be on a jury. You can be blind. You can have other impediments. And we never crossed to that point where anybody decided that she was not qualified[.]" *Id.* at 1090.

On cross-examination, Bailey testified that he "went back and forth" with his concerns about Juror 342, explaining that his concerns were alleviated when she told the trial court she could hear everything, "then there would be maybe another test or another indication that she wasn't hearing well and I would begin to wonder." J.A. 1093–94.

e.

Affidavit

Petitioner also filed an affidavit from Juror 342's physician, stating that in July of 2006 (21 months after trial), Juror 342 "informed [him], in the course of [his] medical examination of [Juror 342], that she suffered from deafness." J.A. 962. By his "medical experience," he determined she "suffered from deafness", was "partially deaf, and "should never have served on a jury without an appropriate accommodation for her hearing impairment." *Id.*

2.

PCR Court Decision

In denying relief to Petitioner in a formal order, the PCR Court made the following findings:

> This Court finds that Juror [342] was qualified to serve on the jury without objection. Juror [342] ***testified she heard all testimony***

> ***during the guilty phase and was able to compensate for her hearing deficiencies***. The trial court also took specific measures to ensure that Juror [342] was able to hear the testimony. Additionally, South Carolina Courts have held that a person who has difficulty hearing is not per se disqualified from serving as a juror. *Safran v. Meyer*, 103 S.C. 356, 364, 88 S.E. 3, 4 (1916).
>
> This Court finds there was ***not a sufficient showing that [Juror 342] missed material testimony at trial or that her hearing difficulty was of such degree as to indicate she missed material*** [sic]. Therefore, this due process claim is denied.

J.A. 1275 (emphases supplied).[6]

C.

District Court Decision

Although the magistrate judge recommended granting summary judgment for the State on all claims, the district court disagreed as to Ground One

---

[6] The majority also quotes from the PCR Court's oral findings, which are substantially similar. *See ante* at 6–7. There, the PCR Court found that Juror 342 "did have some hearing deficiencies[.] She had a problem with hearing in the right ear," but "she could hear." J.A. 1183. It also found, "There is no question but that she had some problem with hearing, however, she was able to compensate for that by reading the lips of the particular witness[.] She specifically testified . . . during one of the inquiries conducted by the trial judge that she had, indeed, heard all of the testimony thus far in the sentenc[ing] phase." *Id.*

(due process violation based on the presence of Juror 342 on the jury) and Ground Two (ineffective assistance of counsel based on the juror issue).

As to Ground One, the district court found the PCR Court's factual findings to be unreasonable pursuant to § 2254(d)(2), explaining, "[E]ven affording the trial judge and the PCR Court all the appropriate deference, the undersigned concludes that their finding Juror 342 competent for continued jury service in light of her incapacitating hearing impairment was 'sufficiently against the weight of the evidence that it [was] objectively unreasonable.'" *Bryant v. Stirling*, No. CV 1:13-2665-BHH, 2019 WL 1253235, at *16 (D.S.C. Mar. 19, 2019) (quoting *Williams v. Stirling*, 914 F.3d 302, 312 (4th Cir. 2019)). The district court continued,

> It is perfectly clear from the record that the trial judge had concerns about Juror 342's ability to hear *throughout the trial*. This is demonstrated by the fact that [the trial judge] spontaneously began questioning the jury, and specifically Juror 342, about hearing difficulties after seven of the State's twenty-eight fact witnesses had testified. It is also clear that Juror 342 failed to advise the trial court, the solicitor, or Petitioner's trial counsel that she needed to read lips in order to assist her with understanding testimony. This was material information regarding her capacity as a juror, which was only haphazardly discovered as a result of the trial judge's *sua sponte* questioning, *well after the parties and the trial court deemed her a qualified juror*, and after—by the trial judge's

> description—"plenty of times" when witnesses on the stand and/or examining counsel turned away from the jury box.

Id. at *17 (citation omitted) (emphases in original). It also noted, "Whatever demeanor and body language the trial judge and solicitor observed that led them to initiate such an inquiry surely went beyond the typical distraction or temporary lack of focus that every juror suffers from time to time." *Id.*

II.

Ground One of Petitioner's habeas petition alleges that Petitioner was denied his right to a fair trial before an impartial jury in violation of the Sixth, Eighth, and Fourteenth Amendments because he was convicted and sentenced to death by a hearing impaired juror who did not hear portions of the trial testimony. For the following reasons, I would affirm habeas relief on this count.

A.

Section 2254(d)(2)

1.

Legal Background

Section 2254(d)(2) provides that habeas relief may not be granted unless the adjudication of the state law claim at issue "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."

"For a state court's factual determination to be unreasonable under § 2254(d)(2), it must be more than merely incorrect or erroneous. It must be sufficiently against the weight of the evidence that it is objectively unreasonable." *Winston v. Kelly*, 592 F.3d 535, 554 (4th Cir. 2010) (citing *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007)). However, 28 U.S.C. § 2254(e)(1) provides that "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." The Supreme Court has held that § 2254(d)(2) and (e)(1) are "independent requirements" in federal habeas review. *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003). Therefore, "[t]o secure habeas relief, [a] petitioner must demonstrate that a state court's factual finding was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), *and* that it was objectively unreasonable in light of the record before the court." *Winston*, 592 F.3d at 555 (alterations and internal quotation marks omitted) (emphasis in original).

In analyzing the factual determinations made by the PCR Court, we must "train our attention on the . . . underlying factual determinations on which the [state] court's decision was premised." *Brumfield v. Cain*, 135 S. Ct. 2269, 2276 (2015). On federal habeas review, we must uphold a state court factual determination when, "[r]eviewing all of the evidence," the state court's decision, "even if it is debatable, . . . is not unreasonable." *Wood v. Allen*, 558 U.S. 290, 303 (2010). Although "the term 'unreasonable' is no doubt difficult to define . . . [i]t suffices to say . . . that a state-court

factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Id.* at 301 (alteration and internal quotation marks omitted). Finally, "federal habeas courts have no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them. Rather, for a federal habeas court to overturn a state court's credibility judgments, the state court's error must be stark and clear." *Merzbacher v. Shearin*, 706 F.3d 356, 364 (4th Cir. 2013) (citations and internal quotation marks omitted).

2.

Application

The PCR Court's analysis on the relevant point -- that is, Petitioner was denied his right to a fair trial by the presence of a hearing impaired juror -- is two short paragraphs. Without much analysis, the PCR Court determined Juror 342 "was qualified" to serve on the jury; that she "testified she heard all testimony during the guilty phase"; that with the help of the trial court, she "was able to compensate for her hearing deficiencies"; that she "was able to hear the testimony"; and that there "was not a sufficient showing that [she] missed material testimony" or that her "hearing difficulty was of such degree as to indicate she missed material [testimony]." J.A. 1275. The district court concluded the "PCR Court's factual findings were unreasonable, and [Petitioner] has shown as much by clear and convincing evidence." *Bryant*, 2019 WL 1253235, at *16.

a.

District Court's Purported Missteps

The majority concludes that the district court did not give proper deference to the PCR Court's decision and improperly made its own factual findings. *See ante* at 8–9 (citing *Bryant*, 2019 WL 1253235, at *17 (district court observing "Juror 342 was either unwilling or incapable of volunteering the undisputed truth that she was having difficulty hearing"); *id.* at *21 (district court "ultimately express[ing] agreement" with Appellee's assertion that Juror 342 was 'functionally deaf'")). In deeming the PCR Court's analysis reasonable, the majority cites examples in the record of times when Juror 342 could hear and responded appropriately, suggesting that the district court ignored or failed to give weight to these instances where Juror 342 was hearing clearly.

I disagree. The district court did not violate AEDPA principles in its decision. Rather, the district court's analysis was grounded firmly in the record evidence. First, looking at the full context of the district court's "unwilling or incapable" passage, the district court actually stated:

> [E]ven though the trial judge gave the jury specific instructions, including a particular hand signal, about what to do if they were having trouble hearing, there is no indication that Juror 342 ever once availed herself of this hand signal, even though she admitted trouble hearing numerous times in response to *judge-initiated* questioning.

Bryant, 2019 WL 1253235, at *17 (emphasis in original). Based on this correct reading of the record, the district court inferred that "it seems Juror 342 was either unwilling or incapable" of telling the trial court that she had difficulty hearing. *Id.* This inference is also supported by Jones's testimony that Juror 342 was sensitive about her hearing problem; "[s]he get[s] furious" when she is told she needs a hearing aid; and "she gets mad" because "[s]he don't want to be deaf, she don't want no hearing aid neither." J.A. 1042–43. Thus, the district court was not finding its own facts. It was doing its job -- that is, looking at "the weight of the evidence" to determine if the PCR Court's factual findings were "objectively unreasonable." *Winston*, 592 F.3d at 554.

Moreover, the district court did not make a finding that Juror 342 was "functionally deaf"; rather, the district court noted fleetingly that Appellee had suggested as much in his objections to the magistrate judge's recommendation, and it "agree[d]" generally with the objections Appellee made. *Bryant*, 2019 WL 1253235, at *21.

But even if the district court should not have surmised that "it seem[ed]" Juror 342 was "unwilling or incapable" of admitting she could not hear at certain points, or should not have suggested Juror 342 was "functionally deaf," on de novo review of the district court's decision, I would nonetheless conclude the PCR Court's findings were "sufficiently against the weight of the evidence" such that they were "objectively unreasonable." *Williams*, 914 F.3d at 312.

b.

PCR Court's Findings Sufficiently Against the Weight of the Evidence

The PCR Court ignores the fact that the trial court had concerns about Juror 342's hearing from the inception of the trial,[7] and that throughout the entirety of the trial, these concerns continued. The trial court conducted several hearing tests, some of which Juror 342 failed, and *after* the trial court deemed her qualified to serve at voir dire, Juror 342 herself admitted that she had to read lips. Finally, after several attempts to discern how well Juror 342 could hear, the trial court concluded, "[T]here's no question. She has indicated she just flat did not hear" at a time when the trial court was "looking directly at her and talking [and] raising [its] voice," and even the trial court admitted there had been "a lot quieter voices than mine during the trial of this matter." J.A. 867. This is a crucial admission. And Juror 342 herself admitted several times that she may have missed "some testimony" at trial. J.A. 863; *see, e.g.*, *id.* at 861 (Juror 342 admitting she "found [her]self maybe turning away and looking and missing part of a question or part of an answer because [she] didn't turn [her] head fast enough"); *id.* at 862 (Juror 342 admitting she "may have missed a little of [the

[7] The trial court granted the State's motion to incorporate the guilt phase testimony into the penalty phase. *See* J.A. 219 ("[A]ll of you may consider[,] as well as the additional testimony and evidence that you will hear in this [penalty] phase[,] all of the evidence and testimony that was presented in the first [guilt] phase of this trial.").

evidence and testimony]"); *id.* at 863 (Juror 342 admitting she "may have missed some of [the questions being asked]"); *see also id.* (Solicitor explaining that Juror 342 "admitted that she may have missed evidence at the guilt and the penalty phase"). This is directly contradictory to the PCR Court's finding that Juror 342 "testified she heard all testimony." J.A. 1275.

And it was not only the trial court who noticed the issue. Until nearly the end of the penalty phase, the Solicitor urged the court to reassess Juror 342's hearing. He referred to her "apparent deafness"; noted she was unable to "follow all the testimony"; and moved for Juror 342 to be excused due to her inability to hear. *Id.* at 853. Further, the testimony in the PCR Court by defense counsel was that Juror 342 "should have never been on that jury." *Id*. at 1083. Even Juror 342's own husband admitted "she has had hearing problems . . . [s]ince" around 1984 (which necessarily means up to and including the time of trial), and that she sometimes did not hear things he said when he was in the same room with her just a few feet away. He also testified that she "get[s] furious" when she is told she needs a hearing aid because "[s]he don't want to be deaf, she don't want no hearing aid neither." *Id.* at 1042–43. Corroborating this testimony was an affidavit by Juror 342's physician, stating that in July of 2006 (21 months after trial), Juror 342 "informed [him], in the course of [his] medical examination of [Juror 342], that she suffered from deafness." *Id.* at 962. By his "medical experience," he determined she "suffered from deafness," was "partially deaf," and "should never have served on a jury without an appropriate accommodation." *Id.*

In my view, the weight of the evidence demonstrates that Juror 342's deafness interfered with her hearing the evidence at trial, in direct conflict with the PCR Court's findings. This evidence is plentiful and includes:

- At voir dire, Juror 342 was told twice to bring clothes for 10 days, but she did not do so. The trial court was concerned "[s]he didn't hear me say that she was to pack her bags for ten days."
- At the guilt phase, after hearing for the first time that Juror 342 had to read lips and after seven witnesses had already testified, the trial court recognized there had been "plenty of times [witnesses] ha[d] turned away."
- In the middle of the guilt phase, the trial court had "some concerns about the one juror who is lip reading," and the issue did not "come to our attention until recently."
- Although during one hearing test in the penalty phase, Juror 342 stood at the proper time, the Solicitor was concerned another juror nudged her.
- During the penalty phase, the Solicitor "d[id]n't think [Juror 342 was] catching all [the testimony]."
- During the penalty phase, the trial court admitted it "had [its] concerns" about Juror 342's hearing. The Solicitor also "continue[d] to be concerned about her apparent deafness and inability to follow all the testimony."

- During the penalty phase, the trial court noticed "some things that have . . . caused the Court some concern," including that at times, "it looks like maybe she's . . . not watching back and forth and she's not able to hear."

- During another hearing test, although Juror 342 stood at the appropriate time when the trial court asked for those wearing skirts or dresses to stand, she then ***did not*** stand at the appropriate time when the court asked for those wearing blue to stand. When the trial court later asked Juror 342 if she considered her dress to be blue, she said "Yes ma'am," and explained she could not hear the trial court's direction because she "was trying to read [the judge's] lips."

- The trial court acknowledged, "It's kind of hard to know if you've missed something," and the Solicitor believed there was no way "to establish with absolute certainty how much she's hearing."

- Juror 342 admitted she "turned away and then found [her]self just catching the end of some testimony or not hearing all of it."

- Juror 342 admitted she "found herself . . . turning away and looking and missing part of a question or part of an answer because [she] didn't turn [her] head fast enough."

- Juror 342 admitted she "may have missed a little of" the testimony at the penalty phase.

- Juror 342 admitted she "may have missed some testimony at the guilt phase."
- At the penalty phase, the Solicitor stated, "[C]learly she's . . . not catching everything and should be removed." The trial court said, "[T]here's no question. . . . [S]he just flat did not hear [when] I was looking directly at her and talking," when the court was "raising [its] voice" and when "there [had] been a lot quieter voices . . . during the trial."
- The trial court stated, "[S]he has admitted to missing some [testimony]."
- Juror 342's husband testified Juror 342 had had a hearing problem since 1984. He testified she could sometimes not hear him when they were "just a few feet apart" in the kitchen together.
- Her husband testified that she "still couldn't hear" their preacher, even when she moved to the front of the church.
- Her husband testified Juror 342 had "bad trouble" with hearing and did not want to wear a hearing aid. He further testified that she "get[s] furious" when the accommodation is suggested because she does not want to be deaf.
- Petitioner's trial counsel admitted "there's no doubt that [Juror 342] did not belong on that jury."

- The Solicitor testified that "everyone knew" Juror 342 had hearing loss.
- Petitioner's physician submitted an affidavit in 2006 saying Juror 342 "suffered from deafness" and was "partially deaf."

Yet, the PCR Court ignored and/or disregarded all of this evidence, with no explanation. Instead, it made a finding that Juror 342 testified she "heard all the testimony" in the guilt phase, J.A. 1275, and the penalty phase, *see id.* at 1183. This finding is directly contrary to the evidence.

Moreover, the PCR Court determined Juror 342 "was able to compensate for her hearing deficiencies," and the trial court "took specific measures to ensure that Juror [342] was able to hear the testimony," but does not explain how this was so. If the PCR Court was talking about lip reading, the weight of the evidence reveals that her lip reading ***did not***, in fact, compensate for the hearing deficiencies. First of all, the trial court did not discover Juror 342 was lip reading until well into the guilt phase, after seven witnesses had already testified. And in any event, the trial court discovered that even if someone was looking directly at Juror 342 and speaking, she still could sometimes not read the lips or hear what was being said. *See id.* at 867 ("She has indicated she just flat did not hear and I was looking directly at her and talking . . . ."). The trial court's attempted use of hand signals to communicate trouble hearing is even less supportive of the PCR court's compensation conclusion because Juror 342 never used them. She only volunteered that she missed testimony in response to the trial court's

questioning, at which point it was too late to remedy the problem. Thus, the weight of the record evidence entirely fails to demonstrate successful compensation of hearing deficiencies.

The majority credits the PCR Court's finding that Petitioner did not sufficiently demonstrate that Juror 342 missed "material" testimony. *Ante* at 19 ("The record further shows that Juror 342 testified that she missed only 'some' testimony, and there is no indication that that included any *material* testimony." (emphasis in original)). But there is no basis in the law to require such a showing. With good reason. How could a juror who did not hear material testimony assure the trial court that she did not hear material testimony? It makes no sense to expect her to be able to relate what she ***did not hear***. The trial court said it best when it said: "It's kind of hard to know if you've missed something. She's heard what she's heard." J.A. 859.

In addition, the majority reasons that because Juror 342 passed some hearing tests and could "generally" converse with the trial court, "the postconviction court's factual finding that Juror 342's lip-reading accommodation generally worked and that her hearing impairment was not so severe that she *must* have missed material testimony" is sound. *Ante* at 19. To begin with, the majority's assertion that Juror 342 could "generally" converse with the trial court fails to support any of the PCR Court's findings. Throughout the record, Juror 342's interactions with the trial court demonstrate that she required significant follow up and clarification to reach a common understanding. *See, e.g.*, J.A. 106 (THE COURT: "Okay, now, you've

answered me both ways and *I need to clarify this like I've done on some of these others.*" (emphasis supplied)). Because no such clarification took place during witness testimony, Juror 342's ability to "generally" converse with the trial court is of little to no relevance when evaluating how much testimony she must have heard.

Furthermore, the majority misstates what the PCR Court found. It found Juror 342 "testified she heard all testimony" in the guilt phase and the sentencing phase, *see* J.A. 1275, 1183, and was able to "compensate" for her hearing deficiency, *id.* at 1275 -- not that the lip-reading "generally worked." Plus, there is no logic in claiming that someone utilizing a hearing accommodation which only "generally" works would not miss "*any* material testimony" when such material testimony is necessarily pervasive. *Ante* at 19 (emphasis supplied). In the sentencing phase of a death penalty trial where an individual's life is at stake, I would think all the testimony is material.

For these reasons, the PCR Court's decision relied on an unreasonable determination of facts, and the presumption of correctness of the state court's findings is rebutted by clear and convincing evidence.

B.

Section 2254(d)(1)

The majority recognizes, and I agree, that Appellee's argument regarding unreasonable application of clearly established federal law pursuant to § 2254(d)(1) "actually reduces to a fact question." *Ante* at 21. I do note, however, that "[i]f we determine, considering only

the evidence before the state court, that . . . the state court's decision was based on an unreasonable determination of the facts, we evaluate the claim de novo . . . ." *Hurles v. Ryan*, 752 F.3d 768, 778 (9th Cir. 2014); *see also Dodson v. Ballard*, 800 F. App'x 171, 179 (4th Cir. 2020) (per curiam) ("Because the state supreme court's decision was based on an unreasonable determination of fact, which led to this unreasonable application of federal law, our review is not barred by AEDPA," and "we now examine [the claim] de novo."); *see Austin v. Plumley*, 565 F. App'x 175, 184–85 (4th Cir. 2014) (per curiam) ("[T]he weight of the authority establishes that we should . . . decline to apply AEDPA deference when a petitioner satisfies § 2254(d)(2)." (collecting cases)); *cf. Panetti v. Quarterman*, 551 U.S. 930, 953–54 (2007) (pursuant to § 2254, considering petitioner's claim "without deferring to the state court's finding" where "the factfinding procedures upon which the court relied were not adequate for reaching reasonably correct results" (internal quotation marks omitted)).

Reviewing Ground One without regard to AEDPA deference, I would readily affirm habeas relief because the failure of the trial court to remove a juror who clearly was hearing impaired and could not hear all of the trial testimony in a capital case violated Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

The Sixth Amendment right to a jury trial requires "a fair trial by a panel of impartial, indifferent jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (internal quotation marks omitted). The Supreme Court has

recognized that a defendant has a right to "a tribunal both impartial and mentally competent to afford a hearing." *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912); *see Tanner v. United States*, 483 U.S. 107, 127 (1987) (recognizing a defendant's Sixth Amendment interest in an "unimpaired jury"). And in capital cases, "[b]elief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' has allowed this Court to view sentencer discretion as consistent with -- and indeed as indispensable to -- the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). Further, South Carolina law requires that "no person is qualified to serve as a juror in any court in this State if . . . [h]e is incapable by reason of . . . physical infirmities to render efficient jury service." S.C. Code Ann. § 14-7-810(3).

Based on the above analysis and proper account of the facts, the trial court's refusal to remove Juror 342 violated Petitioner's right to a fair and impartial jury, and ultimately, his right to be free from the death penalty. In my view, the particulars of the testimony she missed (which is largely unascertainable) does not matter as much as the *extent* of what she missed. The evidence in the record amply demonstrates her hearing deficiency was pervasive: at voir dire, she did not even know that she was supposed to pack clothes for 10 days, despite the fact that the trial court told her twice; at the guilt phase, she admitted (after seven witnesses had already testified) that she had to read lips, and the

trial court stated that "there's been plenty of times that the[] [witnesses] have turned away," meaning Juror 342 could not read the lips of witnesses "plenty of times"; and at the penalty phase, Juror 342 failed a hearing test and admitted she missed evidence and testimony in the penalty phase, where Petitioner himself testified and presented numerous character and mitigation witnesses in an effort to save his own life.

Therefore, reviewing the record outside of the AEDPA framework, I would affirm the district court's determination that Petitioner's rights were violated, and remand to state court for a new sentencing hearing.

III.

The strictures of AEDPA are "demanding but not insatiable." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005). In this case, where the PCR Court made unreasonable determinations of fact, "[d]eference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

I would affirm.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

Civil Action No. 1:13-2665-BHH

[Filed February 12, 2020]

James N. Bryant, III,

Petitioner,

vs.

Bryan P. Stirling, Commissioner,
South Carolina Department of Corrections;
Warden, Kirkland Correctional Institution,

Respondents.

Opinion and Order

This capital case is before the Court on Commissioner of South Carolina Department of Corrections Bryan P. Stirling's ("Respondent") motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e). (ECF No. 96.) On March 19, 2019, the Court issued an Opinion and Order granting Petitioner James N. Bryant, III's ("Petitioner") amended petition for writ of habeas corpus as to

Grounds One and Two. (ECF No. 94.) Respondent filed the Rule 59(e) motion on April 16, 2019. (ECF No. 96.) Petitioner filed a response in opposition on May 6, 2019. (ECF No. 100.) The matter is ripe for adjudication and the Court now issues the following ruling.

LEGAL STANDARD

"In general, 'reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.'" *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (quoting 11 Wright et al., *Federal Practice and Procedure* § 2810.1, at 124 (2d ed. 1995)). Such a motion is not a vehicle to re-argue issues previously presented or to express mere disagreement with the Court in a pitch to change its mind. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008); *Hutchinson v. Staton*, 994 F.2d 1076, 1081–82 (4th Cir. 1993). Rather, the Fourth Circuit has directed that Rule 59(e) relief may only be granted "in very narrow circumstances: '(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.'" *Hill v. Braxton*, 277 F.3d 701, 708 (4th Cir. 2002) (quoting *Collison v. Int'l Chem. Workers Union*, 34 F.3d 233, 236 (4th Cir. 1994)).

DISCUSSION

Respondent generally argues that by granting habeas relief as to Grounds One and Two of Petitioner's amended petition, the Court misconstrued the limits of the Antiterrorism and Effective Death Penalty Act of

1996 ("AEDPA"), because habeas relief is not warranted where reasonable minds could disagree as to the legality of the underlying State court proceedings. (*See* ECF No. 96 at 2.) Respondent contends that the Court employed a set of debatable inferences to justify its grant of habeas relief, and that Rule 59(e) relief is necessary to correct the Court's clear error of law. (*Id.*)

First, Respondent asserts that the Court erred by granting relief, yet failing to identify clearly established United States Supreme Court precedent in contravention of the State court's legal conclusion regarding Juror 342. (*Id.* at 3.) Specifically, Respondent claims that the Court "extend[ed] the rationale of the 'general standard at issue' in order to grant relief." (*Id.* at 4.)

Title 28, Section 2254 states in relevant part that habeas relief may be granted where the State court's adjudication of a claim "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." 28 U.S.C. § 2254(d)(1). Respondent is right to note that the Supreme Court has declined to set aside a State court determination that merely refuses to *extend* a governing legal principle to a new context in which the petitioner claims the legal principle should apply. (*See id.* at 4 (citing *White v. Woodall*, 572 U.S. 415, 426 (2014) (stating the Supreme Court "has never adopted the unreasonable-refusal-to-extend rule" with respect to whether a State court determination violated clearly established Federal law)).) However, Respondent is

incorrect to suggest that there need be a Supreme Court ruling involving a factually identical scenario for the Federal law at issue to be deemed "clearly established." *See, e.g.*, *White*, 572 U.S. at 427 ("This is not to say that § 2254(d)(1) requires an 'identical factual pattern before a legal rule must be applied.'" (quoting *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007)))*; Lockyer v. Andrade*, 538 U.S. 63, 76 (2003) ("Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced."); *Quinn v. Haynes*, 234 F.3d 837, 844 (4th Cir. 2000) ("[T]he relevant Supreme Court precedent need not be directly on point, but must provide a 'governing legal principle' and articulate specific considerations for lower courts to follow when applying the [relevant] precedent." (citing *Williams v. Taylor*, 529 U.S. 362, 413 (2000)). The governing legal principle at issue is Petitioner's constitutional right to a competent jury, a jury composed of individuals free from physical infirmities that prevent them from hearing and considering witness testimony. (*See* ECF No. 94 at 38.) The Court did not "extend" this principle by applying it to a situation where a functionally deaf juror demonstrably and indubitably missed witness testimony in a capital case. Respondent has not shown that the Court committed a clear error of law and the motion to alter or amend the judgment on this basis is denied.

Second, Respondent asserts that the Court erred by finding that the State court's factual determination regarding Juror 342 was objectively unreasonable,

because reasonable minds could differ as to whether Juror 342 was competent. (*See* ECF No. 96 at 5–7.) Respondent argues, "When the cold record in this case is considered as a whole, Juror 342's hearing impairment is debatable in a manner undeserving of habeas corpus relief," and, "Petitioner at all stages failed to establish that Juror 342's hearing did in fact cause her to miss material testimony." (*Id.* at 5.) Moreover, Respondent states that the trial court was in the best position to adjudge Juror 342's competence and contends that this Court failed to afford appropriate deference to that tribunal's factual findings. (*Id.* 7– 8.)

To begin, this second line of argument in Respondent's Rule 59(e) motion (*see id.* at 4–8) merely rehashes arguments that the Court already considered and rejected in its March 19, 2019 Order. (*See* ECF No. 94 at 27–35.) Nonetheless, the Court will proceed with the analysis to show that Rule 59(e) relief is not warranted. Title 28, Section 2254 states in relevant part that habeas relief may be granted where the State court's adjudication of a claim "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)(2). In its March 19, 2019 Order, before explaining the reasoning behind its determination that the State court's factual findings were unreasonable, this Court conducted an extensive review of the trial and PCR record, delineating every instance in which Juror 342's hearing was observed to be deficient, called into question, asserted as a basis for excusal, and investigated by the trial judge. (*See* ECF No. 94 at 10–27.) Based on this review the Court

stated, "[E]ven affording the trial judge and the PCR Court all the appropriate deference, the undersigned concludes that their finding Juror 342 competent for continued jury service in light of her incapacitating hearing impairment was 'sufficiently against the weight of the evidence that it [was] objectively unreasonable.'" (*Id.* at 29 (quoting *Williams v. Stirling*, 914 F.3d 302, 312 (4th Cir. 2019), *as amended* (Feb. 5, 2019)).) The record evidence reveals that Juror 342 gave contradictory answers about whether she missed testimony—saying both "yes" that she missed some, and "no" she had not missed any—concerning both the guilt phase and penalty phase. (*See id.* at 32.) Juror 342 failed the trial judge's makeshift hearing test, admitted that she did not hear the trial judge's question, and revealed that her supposed lip-reading accommodation—which went undiscovered until long after she had already been qualified as "competent"—was unreliable. (*See id.* at 21, 32–33.) Moreover, it was transparently evident to counsel and the trial judge that Juror 342 was having difficulty hearing. (*See id.* at 30–31.) Accordingly, the Court held:

> [I]n light of the evidence presented in the State court proceedings, it was not just incorrect or erroneous, but unreasonable for the PCR Court (1) to find that Juror 342 was appropriately qualified by the trial court, (2) to credit Juror 342's statements that she 'heard all testimony' (ECF No. 69-15 at 47) during the guilty phase without accounting for her statements to the contrary about both the guilt and penalty phases, and (3) to find that Petitioner had not made a sufficient showing that Juror 342's

> hearing impairment was of a degree to materially impair her ability to receive and consider evidence.

(*Id.* at 35 (citing *Williams*, 914 F.3d at 312).) This holding was based on extensive review and documentation of supporting evidence in the record, and the Court continues to find that the totality of the evidence shows no reasonable observer would deem Juror 342 competent to serve on Petitioner's capital jury. Respondent has not shown that the Court committed a clear error of law and the motion to alter or amend the judgment on this basis is denied.

Third, Respondent argues that the "debatability" of Juror 342's hearing impairment precludes a finding of *Strickland* prejudice on the related ineffective assistance of counsel claim. (ECF No. 96 at 8.) Respondent seeks alteration of the judgment regarding Ground Two of the habeas petition due to the Court's supposed "failure to consider the prejudice prong of Strickland in light of the debatable inference flowing from Juror 342's hearing." (*Id.* at 9.)

The Court's analysis above and in the March 19, 2019 Order has already indicated that, based on the entirety of the record, Juror 342's substantial impairment is beyond reasonable debate and the State court's failure to acknowledge this was objectively unreasonable. (*See* ECF No. 94 at 10–27, 38–46.) With respect to *Strickland* prejudice as it pertains to Ground Two, the Court stated:

> Petitioner bears a heavy burden to demonstrate that counsel's errors deprived him of "a trial

> whose result is reliable," [*Strickland v. Washington*, 466 U.S. 668, 687 (1984)], but the Court finds that Petitioner has satisfied that burden given trial counsel's inexplicable decision to not only fail to request Juror 342's removal, but to affirmatively argue for her retention. ([*S*]*ee* ECF No. 69-9 at 69–70, 75–76, 80–81.) As explained above, trial counsel's purpose was to ensure that each juror assimilated the defense's evidence in mitigation, along with any diminution of the aggravating evidence the defense was able to achieve through cross-examination. Intentionally leaving a hearing-impaired juror on the panel undermined this purpose, and casts doubt upon the reliability of the result because it weakens confidence that Juror 342 voted in favor of the death penalty as an outworking of her own deliberative choice, rather than simply following the crowd after having understood only insufficient portions of the testimony. Put simply, a competent jury is *fundamental*; allowing an incompetent juror to remain renders the result *fundamentally* unreliable. *See* [*Harrington v. Richter*, 562 U.S. 86, 104 (2011)].

(*Id.* at 49.) Respondent has failed to show that the Court committed a clear error of law in its finding on the prejudice prong of the ineffective assistance of counsel claim regarding Juror 342. Accordingly, the motion to alter or amend the judgment on this basis is denied.

CONCLUSION

For the foregoing reasons, Respondent's motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e) (ECF No. 96) is DENIED.

IT IS SO ORDERED.

/s/ Bruce Howe Hendricks
United States District Judge

February 12, 2020
Charleston, South Carolina

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

Civil Action No. 1:13-2665-BHH

[Filed: March 19, 2019]

James N. Bryant, III,
Petitioner,
vs.
Bryan P. Stirling, Commissioner,
South Carolina Department of Corrections;
Warden, Kirkland Correctional Institution,
Respondents.

Opinion and Order

Petitioner, James N. Bryant ("Petitioner"), represented by counsel and under a sentence of death, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254. This action is before the Court on Petitioner's amended petition for writ of habeas corpus and Respondents' motion for summary judgment. (ECF Nos. 65 and 73.) In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(c),

D.S.C., this matter was referred to United States Magistrate Judge Shiva V. Hodges, for pre-trial proceedings and a Report and Recommendation ("Report"). On July 26, 2018, Judge Hodges issued a Report recommending that Respondents' motion for summary judgment be granted and the amended petition for writ of habeas corpus be denied and dismissed with prejudice. (ECF No. 86.)

Petitioner filed objections on August 29, 2018 (ECF No. 89), and Respondents replied on September 12, 2018 (ECF No. 90). The Report sets forth the relevant factual and procedural background (ECF No. 86 at 4-14), which the Court incorporates herein without recitation.[1] For the reasons set forth herein, the Court overrules Petitioner's objections with respect to Grounds Four through Nine of the amended petition, **ACCEPTS** the Magistrate Judge's Report as to Grounds Four through Nine, sustains Petitioner's objections with respect to Grounds One and Two of the amended petition, and **REJECTS** the Report as to Grounds One and Two. (ECF No. 86.) Therefore, the Court **GRANTS** Respondents' motion for summary judgment as to Grounds Four through Nine, and **DENIES** the motion as to Grounds One and Two. (ECF No. 73.) Consequently, the Court **GRANTS** Petitioner's amended petition for writ of habeas corpus as to Grounds One and Two. (ECF No. 65.)

---

[1] As always, the Court says only what is necessary to address Petitioner's objections against the already meaningful backdrop of the Magistrate Judge's thorough Report; exhaustive recitation of law and fact exist there.

I. LEGAL STANDARD

A. The Magistrate Judge's Report and Recommendation

The Magistrate Judge makes only a recommendation to the Court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with the court. *Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). The Court is charged with making a *de novo* determination of those portions of the Report to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter with instructions. 28 U.S.C. § 636(b)(1). However, the Court need not conduct a *de novo* review when a party makes only "general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). In the absence of a timely filed, specific objection, the Magistrate Judge's conclusions are reviewed only for clear error. *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005).

B. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). It is well established that summary judgment should be granted "only when it is

clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts." *Pulliam Inv. Co. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir. 1987).

The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the Court must view the evidence before it and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). When a respondent is the moving party and the petitioner has the ultimate burden of proof on an issue, the respondent must identify the parts of the record that demonstrate the petitioner lacks sufficient evidence. The nonmoving party must then go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *see* Fed. R. Civ. P. 56(c).

A party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). Therefore, "[m]ere unsupported speculation . . . is not enough to defeat a summary judgment motion." At *Ennis v. National Ass'n of Bus. & Educ. Radio*, Inc., 53 F.3d 55, 62 (4th Cir. 1995).

C. Section 2254 Standard

Because Petitioner filed the petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), his claims are governed by 28 U.S.C. § 2254(d), as amended. *Lindh v.*

Murphy, 521 U.S. 320 (1997). Section 2254 "sets several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). For instance, § 2254 authorizes review of only those applications asserting a prisoner is in custody in violation of the Constitution or federal law and only when, except in certain circumstances, the prisoner has exhausted remedies provided by the State. *Id*.

When a § 2254 petition includes a claim that has been adjudicated on the merits in a State court proceeding, § 2254 provides that the application shall not be granted with respect to that claim, unless the State court's 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). "This is a 'difficult to meet,' and 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.'" *Pinholster*, 563 U.S. at 181 (internal citations omitted) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

The Fourth Circuit Court of Appeals recently explained proper application of these standards as follows:

> Under § 2254(d)(1), such a decision is "contrary to" Supreme Court precedent "if the state court applied a rule that contradicts the governing law set forth in" Supreme Court cases, or "confronted a set of facts that are materially indistinguishable from a Supreme Court decision and nevertheless arrive[d] at a result different from [that] precedent." *Williams v. Taylor*, 529 U.S. 362, 405–06, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000). A decision is an "unreasonable application" of clearly established Supreme Court precedent if the PCR court "correctly identified the governing legal rule but applied it unreasonably to the facts of a particular prisoner's case." *Id.* at 407–08, 120 S. Ct. 1495. "In order for a federal court to find a state court's application of Supreme Court precedent unreasonable, the state court's decision must have been more than incorrect or erroneous. The state court's application must have been objectively unreasonable." *Wiggins*, 539 U.S. at 520–21, 123 S. Ct. 2527 (internal citation and quotation marks omitted); *see also Harrington v. Richter*, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L.Ed.2d 624 (2011) ("[A] state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in

> existing law beyond any possibility for fairminded disagreement.").
>
> Alternatively, a state prisoner may be granted relief pursuant to § 2254(d)(2) if the PCR court['s] decision[] was based on a factual determination "sufficiently against the weight of the evidence that it is objectively unreasonable." *Winston v. Kelly*, 592 F.3d 535, 554 (4th Cir. 2010). As with legal conclusions, "for a state court's factual determination to be unreasonable under § 2254(d)(2), it must be more than merely incorrect or erroneous." *Id.* (internal citation omitted).

Williams v. Stirling, 914 F.3d 302, 311–12 (4th Cir. 2019), *as amended* (Feb. 5, 2019) (modifications omitted).

D. Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The United States Supreme Court has held that this right is violated when counsel retained by, or appointed to, a criminal defendant fails to provide adequate or effective legal assistance. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). *Strickland* established a two-prong test for a claim of ineffective assistance of counsel in violation of the Sixth Amendment, under which the criminal defendant must show deficient performance and resulting prejudice. *Id.* at 687. "The performance prong of

Strickland requires a defendant to show 'that counsel's representation fell below an objective standard of reasonableness.'" *Lafler v. Cooper*, 566 U.S. 156, 163 (2012) (quoting *Hill v. Lockhart*, 474 U.S. 52, 57 (1985)). "[C]ounsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,'" and courts should indulge in a "'strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance.'" *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013) (modifications omitted) (quoting *Strickland*, 466 U.S. at 689–90). "To establish *Strickland* prejudice a defendant must 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Lafler*, 566 U.S. at 163 (quoting *Strickland*, 466 U.S. at 694).

The standard for an ineffective assistance claim under *Strickland* in the first instance is already "a most deferential one," and "'[s]urmounting *Strickland*'s high bar is never an easy task.'" *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult," because the "standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Id*. (internal citations omitted) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)); *Lindh*, 521 U.S. at 333 n.7; *Strickland*, 466 U.S. at 689). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. . . .

[but] whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105.

E. <u>Procedural Default</u>

A petitioner's failure to raise in State court a claim asserted in his § 2254 petition "implicates the requirements in habeas of exhaustion and procedural default." *Gray v. Netherland*, 518 U.S. 152, 161 (1996). "The habeas statute generally requires a state prisoner to exhaust state remedies before filing a habeas petition in federal court." *Woodford v. Ngo*, 548 U.S. 81, 92 (2006). Thus, "[a] state prisoner is generally barred from obtaining federal habeas relief unless the prisoner has properly presented his or her claims through one 'complete round of the State's established appellate review process.'" *Id*. (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)). In a similar vein, "a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance" and has procedurally defaulted those claims. *Coleman v. Thompson*, 501 U.S. 722, 732 (1991).

Absent an exception, a federal court will not entertain a procedurally defaulted claim, so long as the State procedural requirement barring the State court's review is adequate to support the judgment and independent of federal law. *See Martinez v. Ryan*, 566 U.S. 1, 9–10 (2012); *Walker v. Martin*, 562 U.S. 307, 315–16 (2011); *Beard v. Kindler*, 558 U.S. 53, 55 (2009). "Thus, if state-court remedies are no longer available because the prisoner failed to comply with the deadline

for seeking state-court review or for taking an appeal, those remedies are technically exhausted, but exhaustion in this sense does not automatically entitle the habeas petitioner to litigate his or her claims in federal court." *Woodford*, 548 U.S. at 93 (internal citation omitted). Rather, "if the petitioner procedurally defaulted those claims, the prisoner generally is barred from asserting those claims in a federal habeas proceeding." *Id.* (citing *Gray*, 518 U.S. at 162; *Coleman*, 501 U.S. at 744-51).

However, "[t]he doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." *Martinez*, 566 U.S. at 10 (citing *Coleman*, 501 U.S. at 750). "In *Coleman*, . . . the Supreme Court held that . . . a federal habeas 'petitioner cannot claim constitutionally ineffective assistance of counsel in [State post-conviction] proceedings to establish cause.'" *Fowler v. Joyner*, 753 F.3d 446, 460 (4th Cir. 2014) (quoting *Coleman*, 501 U.S. at 752). Subsequently, in *Martinez*, the Supreme Court recognized a "narrow exception" to the rule stated in *Coleman* and held that, in certain situations, "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 566 U.S. at 9. The Fourth Circuit has summarized the exception recognized in *Martinez*:

> [A] federal habeas petitioner who seeks to raise an otherwise procedurally defaulted claim of

> ineffective-assistance-of-trial-counsel before the federal court may do so only if: (1) the ineffective-assistance-of-trial-counsel claim is a substantial one; (2) the "cause" for default "consists of there being no counsel or only ineffective counsel during the state collateral review proceeding;" (3) "the state collateral review proceeding was the initial review proceeding in respect to the ineffective-assistance-of-trial-counsel claim;" and (4) state law "requires that an ineffective-assistance-of-trial-counsel claim be raised in an initial-review collateral proceeding."

Fowler, 753 F.3d at 461 (internal modifications omitted) (quoting *Trevino v. Thaler*, 569 U.S. 413, 423 (2013)).

In the alternative to showing cause and prejudice, a petitioner may attempt to demonstrate a miscarriage of justice, *e.g.*, actual innocence (*see Bousley v. United States*, 523 U.S. 614, 623 (1998) (stating that a petitioner's claim may be reviewable despite procedural default if he can establish that the constitutional error at issue "has probably resulted in the conviction of one who is actually innocent" (internal quotation marks and citation omitted)); *see also Schlup v. Delo*, 513 U.S. 298, 327–28 (1995)), or abandonment by counsel (*see Maples v. Thomas*, 565 U.S. 266, 283 (2012) (inquiring "whether [the petitioner] ha[d] shown that his attorneys of record abandoned him, thereby supplying the extraordinary circumstances beyond his control, necessary to lift the state procedural bar to his federal

petition" (internal quotation marks and citations omitted)).

DISCUSSION

Petitioner filed timely objections to the Magistrate Judge's Report on August 29, 2018. (ECF No. 89.) In his objections, Petitioner challenges the Magistrate Judge's reasoning and conclusions on Grounds One, Two, Four, Five, Six, Seven, Eight, and Nine from his amended petition. He has expressly abandoned his Third and Tenth Grounds for relief, and those claims are not addressed herein. (*See* Resp. to Mot. for Summ. J., ECF No. 78 at 16, 66; Obj., ECF No. 89 at 4, 21.) Petitioner concedes that the ineffective assistance of trial counsel claims he raises in Grounds Five, Seven, and Nine are subject to procedural default, as those claims were not previously raised to and ruled upon by the State court that adjudicated his initial post-conviction review petition ("PCR Court"). (ECF No. 78 at 35, 46, 65.) Accordingly, the Court will confine its analysis of the procedurally defaulted claims to the question whether Petitioner has made a sufficient showing to overcome the procedural bar pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012).

A. Ground One

In Ground One, Petitioner alleges he was denied his right to a fair trial before an impartial jury under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution when he was convicted and sentenced to death by a hearing-impaired juror who did not hear portions of the trial testimony. (ECF No. 65 at 7.) After extensive recitation of the trial record pertaining to

concerns about Juror 342's hearing deficiency and qualification to sit on the jury, the Magistrate Judge concluded that the PCR Court's denial of this claim was not based on unreasonable factual findings, nor was it contrary to, or did it reflect an unreasonable application of, federal law. (ECF No. 86 at 23–46.)

Petitioner argues that the evidence presented to the PCR Court about Juror 342's hearing impairment introduced facts that were unknown to the trial court at the time of trial and illustrated just how incapacitated Juror 342 really was. Specifically, Petitioner points to the PCR testimony of Juror 342's husband, stating that he "provided additional information about her inability to hear." (ECF No. 89 at 2 (citing ECF No. 69-12 at 38-40).) Petitioner objects to the Magistrate Judge's finding that Petitioner failed to demonstrate by clear and convincing evidence that the PCR Court's factual findings were unreasonable in light of the record. Petitioner argues that Juror 342 simply was not qualified to sit on Petitioner's jury, and, particularly in light of the "heightened reliability requirements of capital cases," that her participation violated his right to an impartial jury. (*See* ECF No. 89 at 2-3 (citing *Zant v. Stephens*, 462 U.S. 862 (1983); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) ("Under the Eighth Amendment, the death penalty has been treated differently from all other punishments").)

At the outset, the Court would note the extraordinary level of care and diligence exemplified by the Magistrate Judge throughout her exhaustive and well-reasoned Report. Nonetheless, after careful

consideration, the Court sustains Petitioner's objection and rejects the Report's conclusions and recommendation as to Ground One.

1. Concerns About Juror 342's Hearing Impairment at Trial

The concerns with Juror 342's ability to hear began in voir dire. (*See* ECF No. 69-4 at 48–66.) Juror 342 answered various questions posed by the trial judge in a manner that could indicate difficulty hearing, *inter alia*:

> THE COURT: . . . . If you'll state your name for the record, please.
> [Juror 342]: Excuse me?
>
> . . . .
>
> Q: . . . . Did you recognize any of those potential witnesses as being related to you by blood or marriage or being personal or business acquaintances of yours?
> A: Yes, ma'am.
> Q: Who? Who is related to you by blood or marriage or who is a personal or a business acquaintance?
> A: Oh, I'm sorry, no, ma'am.
>
> . . . .
>
> Q: . . . . If you're under oath and you're told that you must apply the law as I instruct it whether you agree with it or not would you, could you do that?
> A: No, ma'am.

Q: Okay, you would not apply the law as instructed? Is that what you're saying?
A: Ma'am?
Q: You would not apply the law as instructed?
A: Oh, no, I wouldn't – answer to the best of ability, you know. I wouldn't tell nothing that's not true.

. . . .

Q: Could you, based on the facts and circumstances of the case and the law that I'd instruct, at that phase of the case could you find the Defendant either not guilty or guilty depending on the facts and you can't guess which now ---
A: Yeah.
Q: --- but could, could you, based on the facts and circumstances and the law instructed, could you find the Defendant either guilty or not guilty?
A: Guilty.
Q: Okay, you're saying guilty. I'm not asking you to guess which one because you don't know the facts of the case.
A: No.
Q: I'm just saying could you find them either guilty or not guilty depending on the facts, one or the other could you find that?
A: What you [sic] saying regardless if I hear the facts or not?
Q: No, I'm saying, I'm asking you after you've heard the facts, but you don't know what they are now, can you then make a determination

that he's either guilty or not guilty? That's after you've heard the facts.
A: No, ma'am.
Q: Could you do that?
A: No, ma'am.
Q: You couldn't say that he was guilty or not guilty?
A: I could say not guilty until I hear it, yes.
Q: Right, you're right. They're presumed innocent, they're presumed not guilty till you hear, but what I'm asking you is at the guilt phase you and your fellow jurors have to decide if the State met their burden of proof. If the State did not meet its burden of proof you would have to find the Defendant not guilty. Could you do that?
A: Yes, ma'am.

. . . .

Q: Okay, if you are chosen to serve as a juror in this case you will be housed in a motel during the course of the trial. It may be up to ten days. I don't anticipate it'll be that long, but I'll have you pack for ten days. Except for the personal inconvenience that this would pose would this pose any serious danger to the health or well-being of yourself or those dependent upon you?
A: Yes, ma'am.
Q: It would? Would it pose a serious danger to the health or well-being of you or someone who is dependent on you if you were in a motel?
A: No, ma'am.
Q: It won't?

A: No.
Q: Okay, now, you've answered me both ways and I need to clarify this like I've done on some of these others.
A: I understand what you're saying.

(*Id.* at 49, 52, 53, 56–58, 60.) However, these and other lapses in communication that occurred during the trial judge's questioning of Juror 342 could have simply resulted from Juror 342's failure to understand the trial judge's meaning, from poorly worded questions, or from other sources of confusion.

Next, the solicitor questioned Juror 342 about her responses on the questionnaire:

Q: Okay, all right, and I notice that in the last question there about whether you had a mental or physical condition that might make you unable to serve you said that you had a hearing problem with your right ear.
A: Yes, sir; yes.
Q: And I notice a couple of times when the Judge was talking to you[,] you kind of put your hand up there.
A: Yeah, so I can focus.
Q: All right, and can you tell us – can you hear at all out of that ear?
A: Yeah, I can hear.
Q: Okay, can you hear me okay when I'm talking?
A: Yes, sir.

(*Id.* at 62-63.) At the conclusion of her voir dire, both the solicitor and trial counsel[2] found Juror 342 to be qualified. (*Id.* at 67.) The trial judge then informed Juror 342 that she had been qualified to serve in a death penalty case, and needed to return to the courthouse the following Monday at ten o'clock with a bag packed for ten days. (*Id.*)

The jury was selected on Monday, October 4, 2004. (*Id.* at 119, 146–53, 167, 174.) Following the jury being sworn, the trial judge provided a number of general instructions, including the following:

> Another important hand signal, because you are the judge of the facts of the case, is this, and this means 'Judge, I cannot hear or I cannot see.' I'll figure out which one it is and I'll make sure that that witness speaks up or that attorney speaks up or I speak up or that that document or photograph or exhibit is better displayed to you, the jury.

(*Id.* at 183–84.) After the parties made opening statements and seven of the State's witnesses testified, the trial judge *sua sponte* questioned the jury, and specifically Juror 342, about whether they could hear properly:

> THE COURT: While we wait on [the next witness] to come, let me ask you is every

---

[2] Except where expressly noted, the Court uses the term "trial counsel" to refer Petitioner's lead defense counsel at the underlying trial. Where the Court refers to Petitioner's assistant defense counsel, it is so noted.

member of the jury able to hear? If you are able to hear just raise your hand for me. I need to be sure that everybody is able to hear. *All right, let me ask you once again, is every member of the jury panel able to hear? Is every member of the jury able to hear? All right, I'm getting an indication that one juror is unable to hear; is that correct? Are you having difficulty hearing? You are?*

[Juror 342]: *Yes.*

THE COURT: Have you been having difficulty hearing throughout this trial?

[Juror 342]: Long as I'm looking, you know, facing you I can read your lips and understand what you're saying.

THE COURT: *All right, so, you really have to read lips to understand?*

[Juror 342]: *Yes, ma'am.*

THE COURT: *Because there's been plenty of times that they have turned away.* Have you heard all of the evidence and testimony in this trial?

[Juror 342]: I heard.

THE COURT: Okay, I don't mean to put you on the spot because we will work with you. I just want to make sure you haven't missed anything thus far. Have you heard?

[Juror 342]: Yes, ma'am.

THE COURT: You can, okay. All right, we need to be very mindful then that she is actually reading lips. That's assisting her. So, we'll have to be – have our witnesses actually looking that direction and facing. If at any time you don't understand or can't hear you need to let us

> know. Do you understand that?
> [Juror 342]: Yes, ma'am.

(ECF No. 69-5 at 86–87 (emphasis added).)

At the end of the first day of trial, the trial judge gave additional instructions to the jury, and specifically told Juror 342 that she would be escorted to get her clothes packed for ten days, because she had not packed clothes as instructed, though every other juror was packed for ten days. (*Id.* at 97–100.) Upon dismissing the jury for the evening, the trial judge openly expressed her concerns about Juror 342 to government and defense counsel:

> THE COURT: All right, I want you to know that I've got some concerns about the one juror who is lip reading. I want to be sure – *I have concerns that it was not brought to light that she really needed to lip read when we were doing the individual voir dire.* She indicated she had a hearing problem but said it was taken care of, that she, in fact, could hear, but now I'm understanding that she, in fact, lip reads. Now, that would not preclude her from serving. *My concern is it hasn't come to our attention until recently and I've asked her about whether she has missed anything, but I'm going to be very mindful of that and ask that you all be very mindful of that as well.* In other words, when you're asking questions sometimes you're going to have to be looking over at that jury.
>
> I'm going to periodically make sure that all are able to hear and watch that situation as best I can. I'm also going to hear from the SLED

> agents and those to see if there is – if they get any indication that she's really having difficulty even lip reading, and then if that is the case then we will address that. Hopefully that will not be the case and simply being aware of it and looking towards her and making sure that she's able to hear everything will work and that will be sufficient. I just wanted to raise that issue because I want to let you know that when they went to pick her up there was a couple of things. *She didn't hear me say that she was to pack her bags for ten days*. So, she did not pack her bags for ten days. So, she missed that, although she did hear to be here today and to be here at ten o'clock, and she did come, but she came with, I think, an aunt and a niece and without bags packed. So, she is going to have to be taken to get her bags packed. So, we've got to watch this situation pretty closely. Be aware that I'm aware of it. Anything that I hear that is reported through this court you will become, you will be made aware of it immediately if I think it's a concern about her ability to serve. We're going to try to adapt as much as we can to be sure that she's able to.

(*Id*. at 100–02 (emphasis added).)

During the next day of trial, October 5, 2004, the continuation of the guilt phase, the trial judge again questioned the jurors about their ability to hear:

> THE COURT: . . . . I have been told that lunch has arrived and ladies and gentlemen of the jury, I will allow you to go back to the jury room

> at this time with a reminder please do not discuss the case. Before I send you back I'm going to ask you one more time is everybody having – are there any problems seeing or hearing anything? Are you having any problems? If you're having any problems – let me put it this way, if you're not having any problems seeing or hearing raise your hand.
>
> All right, all right, *now, ma'am, you delayed.* Can you hear, are you able to hear?
>
> [Juror 342]: (Indicates affirmatively.) Yeah.
>
> THE COURT: Have you been able to hear all of the testimony?
>
> [Juror 342]: I heard them all.

(ECF No. 69-6 at 4–5 (emphasis added).) The State concluded its guilt-phase evidence later that day. (*Id.* at 74.) The Defense did not present any guilt-phase evidence. (*Id.* at 85–86.) The jury began deliberating at 4:53 p.m., and returned a guilty verdict at 5:40 p.m. (*Id.* at 123–25.)

The sentencing phase began on Thursday, October 7, 2004, following a twenty-four-hour statutory waiting period.[3] (ECF No. 69-6 at 126–31.) On Friday, October 8, 2004, the trial judge briefly interrupted the sentencing-phase proceedings and interjected the following exercise to test whether the jurors were hearing properly:

> THE COURT: While [the next witness] is coming forward let me ask is everybody able to hear?

---

[3] *See* S.C. Code Ann. § 16-3-20(B).

> Everybody able to hear me? All right, if you're able to hear me raise your hand. All right.
> [The witness is seated by the clerk of court.]
> THE COURT: All right, ma'am, thank you. Please be seated. If you have, if you're in the jury box and you have on a yellow shirt would you stand up. You might need to look at your shirt to decide. Would you stand up if you have on a yellow shirt. I'm not picking on you, just whoever has on a yellow shirt stand up.
>
> All right, if you have, happen to have on a green shirt or you have green in it would you stand up. I know this seems unusual, but bear with me. Thank you. You can, you can be seated. If you have on a blue shirt would you stand up? If you have on a blue shirt. You might want to look at your shirt, but if you have on a blue shirt would you stand up? All right, thank you. We'll continue.

(ECF No. 69-8 at 100.) The solicitor subsequently moved to have Juror 342 excused from the jury due to his belief that she was not hearing all the testimony:

> [Solicitor]: . . . . Your Honor, the final thing I would like to bring up is that I would move at this time to excuse Juror 342[.] *I don't think – I think she's following part of the trial testimony. I don't think she's catching all of it.* Your Honor had gone through an exercise to test her hearing ability at one point and she did not stand up when you asked about the blue blouse until the, I think the juror beside her to her left ---
> THE COURT: I, I don't know. I watched that carefully.

> [Solicitor]: --- was trying to help her, nudged her.
> THE COURT: It looked like she was starting to stand up when the juror was nudging. So, it was really hard to gauge. I'll tell you what I will do. I will do another similar test and I know that seemed real odd and I'm glad that you've mentioned it. I did do a test. I have been watching her and I just want to be assured that she's able to hear. I will do it again tomorrow, and hopefully we'll have nobody, hopefully she'll be sitting by someone else and nobody nudging and I'll try that once again. I have been asking about it. I have asked the SLED agents who have been watching, who have been seeing them in the evenings, too, whether she's able to hear and they've indicated that they thought she could, but I have had my concerns and that's the reason that I had that unusual request of the jurors that if you have on a yellow shirt stand or a blue shirt and it was exactly that reason, to test her, and *I am unsure whether she was beginning to stand when she was nudged or whether she was nudged to stand.* I think the appropriate thing to do is try it again, and I certainly note your motion and we'll take it up, remind me tomorrow and we'll take it up again tomorrow depending on the results that we get.

(ECF No. 69-8 at 250–51 (emphasis added).)

The trial judge, prompted by the solicitor, tested the jurors' hearing in a similar manner the following day, Saturday, October 9, 2004:

[Solicitor]: And, Your Honor, the only other item the State would wish to bring up at this time would pertain to the juror since we're running towards the end of this trial, Juror 342, [] *I still continue to be concerned about her apparent deafness and inability to follow all the testimony.*
THE COURT: All right, and what I said I would do in that regard is that I would call them out and I'm going to have to go through a type of a test as I did yesterday either with the color of their shirt or pants or the color of their hair, something creative to try to see whether she's able to hear because *there have been some things that have brought or cause the Court some concern, times when it looks like maybe she's, she's not watching back and forth and she's not able to hear.*

. . . .

THE COURT: . . . . We're going to do an exercise once again today. So listen very carefully as I ask you these questions. If there are any gentlemen with green shirts on would you stand?
(Complies with request.)
THE COURT: Very good, you may be seated.
(Complies with request.)
THE COURT: You have some green in your shirt. All right, very good.
THE COURT: If we have any ladies who are wearing skirts or dresses would you please stand.
(Complies with request.)
THE COURT: And we do have several and you look very nice I might add. Please be seated.

(Complies with request.)

THE COURT: All right, not to say that the women in the slacks don't look very nice. You do as well. Let me make that clear. All right, now, I think I see some – everyone in blue please stand.

(Complies with request.)

THE COURT: All right, you may be seated.

(Complies with request.)

THE COURT: All right, ladies and gentlemen, I'm going to send you back to the jury room for just a moment. We will have you out in the very near future. You may go back at this time. Do not discuss the case.

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: Juror Number 342, I need to see – well, first of all let me note on the record that she responded to when I asked about the ladies who were wearing skirts or dresses. She got up for that and she responded to that and it looked like without any nudging or coaxing at all. I was watching for that very carefully. *What she didn't respond to was my next question about blue. She's in a navy blue [sic]. It's dark. She may consider it black, but it's blue. I don't know whether she didn't answer because, and unfortunately she wasn't in a bright blue color, but she didn't answer because she believe[s] she's in black or she didn't answer because she didn't hear me.*

(ECF No. 69-9 at 64–65, 66–68 (emphasis added).) After further discussion with counsel, it was agreed

that the trial judge would attempt to make contact with Juror 342's doctor, or clinic, or wherever she went for medical treatment pertaining to her hearing deficit. (*Id.* at 68.) Petitioner's trial counsel suggested that Juror 342 had failed to respond to the trial judge's direction to stand if wearing blue because she was confused by the fact that, although her garment was blue, it had polka dots on it. (*Id.* at 69.) The trial judge again suggested that it could be because she considered it black, and many people have difficulty differentiating between navy blue and black. (*Id.*) Trial counsel stated, "I'm satisfied with what you did. I just think she was a little confused with the blue and the polka dots." (*Id.* at 70.)

The trial judge then indicated the way forward:

> THE COURT: It's so important. It's so important for both the State and the Defendant that she's heard everything.
> [Trial Counsel]: I understand.
> THE COURT: We'll simply inquire who her doctor is and then I'm going to ask her, too has she heard all of the evidence and testimony. *It's kind of hard to know if you've missed something. She's heard what she's heard.*
> [Trial Counsel]: Right.
> THE COURT: But I'll just ask her if there is [sic] any times that maybe she's turned away and she's missed some of the evidence and testimony. That's all I know to do.
> [Solicitor]: *Your Honor, I don't think there's any way to establish with absolute certainty how much she's hearing, and I would suggest just* ---

> THE COURT: We'll do both.
> [Solicitor]: --- *that all that's gone on, that just out of an abundance of caution we've got two alternates that are here.* Nobody's indicated any sickness or injury or any reason we would need to use those alternates for somebody else. That's why they're here, and ---
> THE COURT: If she has heard everything and she doesn't have a hearing problem I just – I don't want to take her off.

(*Id.* at 70–71 (emphasis added).) Whereupon, Juror 342 was summoned back into the courtroom on her own and the trial judge engaged in the following colloquy:

> THE COURT: Ma'am, first of all let me tell you[,] you have done nothing wrong. I simply want to ask you some questions and it is about your hearing because we had addressed that somewhat in your individual voir dire and you said that you had some hearing problems. Have you had any difficulty in hearing what has happened – let me ask it this way have you turned away and then found yourself just catching the end of some testimony or not hearing all of it?
> [Juror 342]: *Yes, ma'am.*
> THE COURT: You have?
> [Juror 342]: *Yes, ma'am.*
> THE COURT: So, you have missed some of the evidence and testimony?
> [Juror 342]: *No, ma'am, I heard it, but it's more like when I – after I heard the testimony I turned my head, you know, concentrate on it.*

> THE COURT: Okay, now, listen carefully to this question. Have you found yourself maybe turning away and looking and missing part of a question or part of an answer because you didn't, you didn't turn your head fast enough?
> [Juror 342]: *Yes, ma'am.*

(*Id.* at 72 (emphasis added).) The trial judge then asked if the parties had any further questions, and after being prompted by the defense, asked Juror 342 if she considered her dress to be blue—Juror 342 stated, "Yes, ma'am." (*Id.* at 72–73.) After a bench conference, the trial judge proceeded with the following:

> THE COURT: Here's something that I – let me, let me ask you, you have been through one phase of this trial and that is the guilt phase of this trial. Now, did you hear all of the evidence and testimony in that phase?
> [Juror 342]: Yes, ma'am.
> THE COURT: Did you ever catch yourself missing part of a question or an answer in that phase of the trial?
> [Juror 342]: Just at one point I thought I missed a little of it but I didn't. I thought about it and I haven't missed it.
> THE COURT: So, you didn't miss anything?
> [Juror 342]: No, ma'am.
> THE COURT: All right, all right, now, at this point is this, is this the phase where you've found yourself turned away and have missed some when we started this part?
> [Juror 342]: No, ma'am.
> THE COURT: *Okay, have you, in fact, turned*

> *away and missed some evidence and testimony at this, at this point?*
> [Juror 342]: *I may have missed a little of it but I didn't miss everything.*
> THE COURT: *Okay, all right, so, so, you did miss some at this phase?*
> [Juror 342]: *Yes, ma'am.*
> THE COURT: Do you believe that you missed any at the guilt phase?
> [Juror 342]: No, ma'am.
> THE COURT: Did you find yourself in that same situation where you had turned away and then you've missed some of the question being asked or some of the answer?
> [Juror 342]: *Yes, ma'am, I may have missed concentrating, you know, just steady, may have missed some of it, yes, ma'am.*
> THE COURT: You may have missed some testimony at the guilt phase? Is that what you're saying?
> [Juror 342]: *Yes, ma'am.*

(*Id.* at 73–74.)

In light of these questions and answers, the solicitor renewed his motion to excuse Juror 342, arguing:

> [Solicitor]: . . . . She's admitted to that may have missed evidence at the guilt and the penalty phase and *she knows she's got a blue dress on, didn't stand up when Your Honor asked her that, and I think clearly she's, she's not catching everything and should be removed.*
> THE COURT: All right.
> [Trial Counsel]: Your Honor, I think if you

> brought every juror out they would say that at one point in time they've missed something. I mean, that's – I bet you almost every juror would say, "Yeah, at one point I did miss a little something." We're sitting in this courtroom all day long, so.

(*Id.* at 74–75 (emphasis added).) After some argument back and forth between trial counsel and the solicitor regarding whether Juror 342 failed to stand during the test because she was confused, or because she did not hear the question, the trial judge recalled Juror 342 and the following exchange transpired:

> THE COURT: Ma'am, when I was asking the jurors, when I was asking you all to stand up if you had on a green shirt or stand up if you had a dress on and you stood when I asked you if you had – to stand up if you had a dress on. I also asked for everyone who had on blue to stand. *Did you hear that question?*
> [Juror 342]: *Yes, ma'am.*
> THE COURT: *You heard it? Why didn't you stand?*
> [Juror 342]: ***You said – asking me did I hear it? Oh, no ma'am.***
> THE COURT: *You didn't hear when I asked if you have on ---*
> [Juror 342]: ***No, ma'am.***
> THE COURT: *--- blue stand?*
> [Juror 342]: ***No, ma'am.***
> THE COURT: *Okay, and you were looking directly at me and I was talking ---*
> [Juror 342]: ***That's why I was trying, I was***

> ***trying to read your lips when you was like talking.***

(*Id.* at 76–77 (emphasis added).)

Next, the trial judge attempted to retrieve contact information from Juror 342 for her ear, nose, and throat doctor, to see if he could shed light on the extent of her hearing impairment. (*Id.* at 77–78.) The trial judge excused Juror 342 to look for the information and stated the following on the record:

> THE COURT: Okay, I'm going to note there's no question. *She has indicated she just flat did not hear and I was looking directly at her and talking and even now she's having difficulty hearing me and I'm raising my voice and there's been a lot quieter voices than mine during the trial of this matter.*

(*Id.* at 78.) After retrieving the contact information from Juror 342, the trial judge called counsel back into her chambers and made efforts to reach the doctor, which efforts were unsuccessful. (*Id.* at 79) Upon returning from the recess, the trial judge itemized these efforts for the record and then stated:

> THE COURT: . . . . There has been some conversation in chambers though about [Juror 342] and her ability to hear. There's been some indication from both the State and from the Defendant that a belief that all of the jurors can be somewhat distracted at some time and no indication that she has not been able to hear the testimony. The indication has been, in fact, that she has been hearing most and has turned away

> and only missed bits, but she has admitted to missing some.

(*Id.*) The solicitor then abruptly withdrew his motion to excuse Juror 342, stating:

> [Solicitor]: Your Honor, although I did on behalf of the State express some concern about [Juror 342's] hearing problems, the potential problems, in reflecting on this, you know, I started thinking about it and I don't think any, any juror is going to have the capability of getting a hundred percent of the testimony. You're going to have a mix of people that are young and old, some more intelligent than others. Some might have attention deficit problems, and I would note that even a blind juror is qualified to serve in this state, and they obviously are not going to be able to get the same read from a, from a witness that the other jurors could. So, I don't think a hundred percent ability to be, you know, healthy and a hundred percent alert is a qualification per se to serve as a juror. I think [Juror 342] is qualified. She's heard most of what was going on. It would be better if she could hear more, but again, I mean, I think she meets the statutory qualifications as a juror in your discretion. Your Honor, you have qualified her as a juror, and I'm satisfied at this point that she is able to follow the testimony, was able to properly deliberate and would withdraw my motion to have her excused as an alternate.
> THE COURT: All right, anything from the Defense?
> [Trial Counsel]: Yes, Your Honor, I agree one

> hundred percent with [the solicitor] and I also went over all of the ramifications one way or the other with my client and he is perfectly satisfied that she stays on the jury.

(*Id.* at 80–81.) The trial judge then confirmed, through a series of questions, that trial counsel and the defendant, himself, were both satisfied with Juror 342 having served in the guilt phase and continuing to serve in the penalty phase. (*Id.* at 81.) Whereupon, the defense called its last mitigation witness (*id.* at 85–108) and the sentencing phase proceeded to its conclusion (*id.* at 183). Jury deliberations began at 3:54 p.m., and a verdict was reached at 5:17 p.m. (*Id.* at 186, 188.) All jurors confirmed that their verdict was accurately represented and Petitioner was sentenced to death. (*Id.* at 189–92, 194–95.)

2. PCR Proceedings Regarding Juror 342

Petitioner's PCR counsel called Juror 342's husband ("Mr. Jones") as a witness during the PCR evidentiary hearing. Mr. Jones testified that he had been married to Juror 342 for thirty years and that she had been experiencing hearing problems since 1984. (ECF No. 69-12 at 37–38.) He stated that when he and his wife go to church she likes to sit in the back, but the preacher tells her that she cannot hear and directs her to come to the front. (*Id.* at 38.) Mr. Jones further stated, "And then he would ask her to read and she still

couldn't hear what he was saying. Till I say, he asking you to read. Then she would stand up and read."[4] (*Id.*)

Mr. Jones gave some examples of Juror 342's difficulty hearing in commonplace situations: "Well, we'll be out in the yard and I'll say, hand me that rake right over there and she'll be about as far as you to me and she don't hear a thing I say. She keep walking." (*Id.* at 39.) When asked whether she would keep walking because she does not want to hear what Mr. Jones is saying, he responded:

> A: Well, she trying to hear what I say but she don't understand it. She just keep walking. And then I guess we're in the kitchen and I – she said, I need so and so. I said you need this frying pan or something or this skillet, she keep walking just like she ain't hear me. We're right in the kitchen together.
> Q: You can be just a few feet apart?
> A: That's right.
> Q: Okay. Now also you talked about sometimes that she'll be leaving to go somewhere and she'll – and she say like, honey, I'm going, or something like that. Tell the judge about that.
> A: Well, a lot of times she get ready to go somewhere and she'll come back and say, I'm fixing to go. I said, well, I heard you, I told you okay. Then she'll come back again and say the same thing again. She didn't hear what I said to

[4] Mr. Jones' testimony is transcribed here as it is shown in the PCR transcript, without modification to existing grammatical errors.

> start with.
> Q: She didn't hear you acknowledge her?
> A: That's right.

(*Id.* at 39–40.)

Mr. Jones testified that Juror 342 is sensitive about her hearing problem, and that "[s]he get furious" when she is told she needs a hearing aid. (*Id.* at 38, 40.) He explained that "she gets mad" because "she don't want to be deaf, she don't want no hearing aid neither." (*Id.* at 40–41.)

Trial counsel also testified to their recollection of the questions surrounding Juror 342's hearing impairment during the trial. Assistant trial counsel, who focused his advocacy on the sentencing phase (*see* ECF No. 69-11 at 260–61), testified that when Juror 342's hearing problems were being discussed, "[he] felt a mistrial might be a good idea." (*Id.* at 250.) When asked whether the trial judged offered to grant a mistrial based on Juror 342's hearing difficulties, assistant trial counsel stated, "I think she did. I do not specifically remember her stating those words, but my recollection is that if we were to ask for it, she would grant it." (*Id.* at 254.) Assistant trial counsel also described his memory of the conversation that occurred in the trial judge's chambers:

> . . . [lead trial counsel] was teasing, was joking around with [the trial judge], and he said at some point in the future she would be on the Court of Appeals and he would be retired. I also remember since then in chambers the judge trying to telephone a doctor, and that's also

> when I recollect some language, although I don't specifically remember hearing her say it, but some language about the mistrial.

(*Id.* at 255.) When asked whether he discussed the trial judge's concerns about Juror 342's hearing and the prospect of asking for a mistrial with lead trial counsel, assistant trial counsel stated:

> A: I don't specifically recall any conversations with [lead trial counsel]. I'm sure there probably was some.
> Q: But you can't recall?
> A: No, I left – I left that up to him.
> Q: There was no doubt in your mind that this juror had hearing problems, right?
> A: She had a hearing problem, yes.

(*Id.* at 257.) Assistant trial counsel later reaffirmed that lead trial counsel was primarily handling the Juror 342 issue, and he deferred to lead trial counsel on whether or not to seek a mistrial. (*See* ECF No. 69-12 at 18–19.)

Lead trial counsel testified that the trial judge noticed Juror 342's hearing problem first and called it to the parties' attention, but that "we all noticed it." (*Id.* at 49.) He stated that once Juror 342 indicated she relied upon lip reading as a way to try to understand what somebody was saying, he thought the trial judge should have removed her from the jury. (*Id.*) Trial counsel further testified that, after the trial, he thought more about Juror 342's hearing impairment and wondered how she could have effectively participated in deliberations, given the context of group discussion

around a table. (*Id.* at 49–50.) Based on counsel's conversations with the trial judge, and in light of the judge's persistent questioning of Juror 342, trial counsel believed the judge was going to order a mistrial and he was surprised when she did not. (*Id.* at 50–51.)

On cross-examination, trial counsel testified that he should have made a motion for mistrial and that "there's no doubt [Juror 342] did not belong on that jury." (*Id.* at 90.) He asserted that the trial judge told the defense that she would grant a mistrial if they requested one. (*Id.* at 91.) When pressed to explain why he affirmatively argued to retain Juror 342 if he was offered a mistrial, trial counsel admitted that Juror 342's race, as the only black juror, played a role: "I'm saying the reason was is [sic] because if that were a white woman there's no doubt I probably would have – I would have done it differently, but at least we got one black on the jury." (*Id.* at 97.) Trial counsel further stated, "in hindsight," that no one had appropriately considered how Juror 342's hearing difficulties would impair her ability to deliberate, but had it "dawned on [him]," he would have brought it to the trial judge's attention. (*Id.*)

The solicitor also testified at the PCR evidentiary hearing regarding his recollection of Juror 342's hearing impairment at trial. When asked whether the trial judge discussed a mistrial, the solicitor stated:

> A: Well, it was an ongoing thing that led up to that with the – this person's hearing loss and the judge and the attorneys tried to ascertain the extent of the hearing loss and what impact that might have had on [sic] ability to be a juror.

> And at some – at some point the issue did come [sic] if she did decide – by then we were in the penalty phase.
> Q: Right.
> A: The issue came up if the judge decided that juror was not qualified at that point in time the penalty phase, then what will that do to the verdict.
> Q: Right.
> A: Yeah, that did come up.
> Q: And did you ever hear [the trial judge] just flatly say to the defense or to you that if you requested mistrial I'll give it?
> A: I don't recall that at all.

(*Id.* at 111–12.) The solicitor asserted that talk of a mistrial was just "something that was in the air" and "came up in the discussion," though he did not recall who brought up the topic. (*Id.*) He became concerned that if Juror 342 was excused and replaced with an alternate for the sentencing phase, it would potentially expose the guilt phase to an argument on appeal that there should have been a mistrial rather than using an alternate juror. (*Id.*) In explaining why he changed positions from repeatedly moving for Juror 342's excusal, to arguing in agreement with the defense that she should be retained, the solicitor stated:

> I was trying to protect the record. I was also concerned about the fact that . . . the defendant was a black male. The juror was a black female. There are mostly white jurors on there, and that

> if she was removed and replaced with a white alternate it could create . . . a *Batson*-type issue.

(*Id.* at 112–13.)

The solicitor testified that, although Juror 342 had disclosed her hearing issue on her questionnaire, and "everyone knew that she did have the hearing loss," it was "hard to get a grasp on how bad it was or how large one [sic] it may have been. It was difficult to determine because she kept insisting she was able to hear and follow the testimony, but then she would admit that she did miss out on certain things." (*Id.* at 113.) Regarding his abandoned request to excuse Juror 342, the solicitor stated, "I think everybody recognized that you don't have to be a perfect specimen to be on a jury. You can be blind. You can have other impediments. And we never crossed to that point where anybody decided that she was not qualified . . . ." (*Id.* at 113–14.) On cross-examination, the solicitor testified that he "went back and forth" with his concerns about Juror 342, explaining that his concerns were alleviated when she told the trial court she could hear everything, "then there would be maybe another test or another indication that she wasn't hearing well and I would begin to wonder." (*Id.* at 117–18.) Finally, the solicitor agreed that he changed his mind about seeking her removal from the jury after the meeting in the trial judge's chambers, wherein the judge was attempting to contact Juror 342's doctor. (*Id.* at 118.)

3. The Unreasonableness of the PCR Court's Factual Findings

The PCR Court made the following findings in denying Petitioner's due process claim[5] regarding Juror 342:

> This Court finds that Juror [342] was qualified to serve on the jury without objection. Juror [342] testified she heard all testimony during the guilty phase and was able to compensate for her hearing deficiencies. The trial court also took specific measures to ensure that Juror [342] was able to hear testimony. Additionally, South Carolina Courts have held that a person who has difficulty hearing is not per se disqualified from serving as a juror. *Safran v. Meyer*, 103 S.C. 356, 364, 88 S.E. 3, 4 (1916).
>
> This Court finds there was not a sufficient showing that [Juror 342] missed material testimony at trial or that her hearing difficulty was of such degree as to indicate she missed material. [sic] Therefore, this due process claim is denied.

---

[5] In his PCR action, Petitioner styled this claim as seeking relief for denial of his rights to due process under the Fifth Amendment, and to a competent jury under the Sixth Amendment. (*See* ECF No. 69-15 at 47.) The substance of the claim is the same in the instant case, even though Petitioner no longer specifically invokes the Due Process Clause of the Fifth Amendment in the way he styles the claim here. (*See* ECF No. 65 at 7.)

(ECF No. 69-15 at 47.) The Court now finds that the PCR Court's factual findings were unreasonable, and that Petitioner has shown as much by clear and convincing evidence.

First, the Court is mindful that it is not at liberty to supplant the factual findings of State tribunals merely because its subjective reading of trial transcripts would lead it to draw different conclusions than the State courts. *See Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) ("28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them."); *see also* 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). Second, the Court is well aware of the established principle that the trial judge is in the best position to evaluate whether a juror is qualified for service. *See United States v. Fulks*, 454 F.3d 410, 430 (4th Cir. 2006) ("The trial court—which unlike us was in the best position to view [the juror's] demeanor and assess her credibility—was convinced that she would carefully weigh all the evidence. That finding, given [the juror's] answers on voir dire, is entitled to deference."). Nonetheless, even affording the trial judge and the PCR Court all the appropriate deference, the undersigned concludes that their finding Juror 342 competent for continued jury service in light of her incapacitating hearing impairment was "'sufficiently against the weight of the evidence that it [was] objectively unreasonable.'" *Williams v. Stirling*, 914

F.3d 302, 312 (4th Cir. 2019), *as amended* (Feb. 5, 2019) (quoting *Winston v. Kelly*, 592 F.3d 535, 554 (4th Cir. 2010)). Specifically, it was unreasonable for the PCR Court to find that Juror 342 was qualified to serve on the jury, that she heard all testimony during the guilt phase, and that there had not been a sufficient showing that her hearing difficulty was of such degree as to cause her to miss material testimony. (*See* ECF No. 69-15 at 47.)

To begin with, the Court would note that the State's proof of Petitioner's guilt was ironclad. Trial counsel testified at the PCR hearing that there was "never a question of [Petitioner's] guilt," and that "it never entered [his] mind that [the jury] would find him not guilty." (ECF No. 69-12 at 64, 78.) Assistant trial counsel testified that he "strongly, strongly believe[d]" that the result would be the same "if you tr[ied] that guilt phase a thousand times," and "I feel as strong as I could that it would turn out the same every time." (ECF No. 69-11 at 237.) In the instant proceeding, Respondents stated in their summary judgment brief, "The guilt phase evidence was absolutely overwhelming . . . ." (ECF No. 72 at 59. *See id.* at 12–16 (summarizing the State's guilt-phase evidence).) Petitioner likewise conceded in his response brief, "the State's evidence against Mr. Bryant was virtually impenetrable. Mr. Bryant's trial counsel were aware of this, and were also aware that when they reached the sentencing phase, they would be arguing that the crime was an aberration for Mr. Bryant, and that he was remorseful." (EFC No. 78 at 17 (internal citation omitted).) Accordingly, the Court finds that the constitutional error present in the record was harmless

as to Petitioner's convictions for murder and armed robbery, and those convictions will not be displaced by the instant ruling.

It is perfectly clear from the record that the trial judge had concerns about Juror 342's ability to hear *throughout the trial*. This is demonstrated by the fact that she spontaneously began questioning the jury, and specifically Juror 342, about hearing difficulties after seven of the State's twenty-eight fact witnesses had testified. (*See* ECF No. 69-5 at 2–3, 86–87.) It is also clear that Juror 342 failed to advise the trial court, the solicitor, or Petitioner's trial counsel that she needed to read lips in order to assist her with understanding testimony. This was material information regarding her capacity as a juror, which was only haphazardly discovered as a result of the trial judge's *sua sponte* questioning, *well after the parties and the trial court deemed her a qualified juror*, and after—by the trial judge's description—"plenty of times" when witnesses on the stand and/or examining counsel turned away from the jury box. (*See id.* at 87.)

Furthermore, even though the trial judge gave the jury specific instructions, including a particular hand signal, about what to do if they were having trouble hearing, there is no indication that Juror 342 ever once availed herself of this hand signal, even though she admitted trouble hearing numerous times in response to *judge-initiated* questioning. (ECF No. 69-4 at 183–84; 69-5 at 86–87; 69-9 at 72–74.) In other words, whether due to embarrassment or oversight, it seems Juror 342 was either unwilling or incapable of *volunteering* the undisputed truth that she was having

difficulty hearing. The trial judge and solicitor relied upon their own observations—represented both implicitly and explicitly in the record—of Juror 342 to begin an inquiry into her actual ability to hear the testimony. The upshot of this is that her hearing difficulties were *externally evident*. Whatever demeanor and body language the trial judge and solicitor observed that led them to initiate such an inquiry surely went beyond the typical distraction or temporary lack of focus that every juror suffers from time to time.

In making his first motion for Juror 342 to be removed from the jury, the solicitor stated:

> I don't think – I think she's following part of the trial testimony. I don't think she's catching all of it. Your Honor had gone through an exercise to test her hearing ability at one point and she did not stand up when you asked about the blue blouse until the . . . juror beside her to her left . . . nudged her.

(ECF No. 69-8 at 250.) The trial judge noted the solicitor's oral motion, indicated that she was "unsure whether [Juror 342] was beginning to stand when she was nudged or whether she was nudged to stand," and stated that "the appropriate thing to do is try it again." (*Id.* at 251.) The following day, the solicitor prompted the trial judge to conduct another hearing test, stating, "I still continue to be concerned about her *apparent deafness and inability to follow all the testimony*;" the trial judge agreed, stating, "there have been some things that have brought or cause the Court some concern, *times when it looks like maybe she's, she's not*

watching back and forth and she's not able to hear." (ECF No. 69-9 at 64–65 (emphasis added).)

After Juror 342 failed the second hearing test, the trial judge observed the limitations of simply continuing to ask her whether she had heard all the testimony, "It's kind of hard to know if you've missed something. She's heard what she's heard;" the solicitor agreed and continued to push for Juror 342 to be removed, "I don't think there's any way to establish with absolute certainty how much she's hearing, and I would suggest just . . . that all that's gone on, that just out of an abundance of caution we've got two alternates that are here." (*Id.* at 70–71.)

When individually questioned by the trial judge as to whether she had missed testimony, Juror 342 gave contradictory answers—saying both "yes" that she missed some, and "no" she had not missed any—concerning both the guilt phase and the penalty phase. (*See* ECF No. 69-9 at 72–74.) But the final straw was when Juror 342 admitted to having failed to hear the trial judge's instruction to stand if wearing blue ***in the middle of the trial judge's second makeshift hearing test***. (*See id.* at 76–77.) And this in the context of the trial judge and the solicitor's suspicion that Juror 342's compliance with the first hearing test may have simply been the result of an assisting nudge from an adjacent juror. (*See* ECF No. 69-8 at 100, 250–51.)

It is unclear what further indication of Juror 342's hearing incapacity the trial judge was waiting for in order to find her unqualified for continued service on the jury. It is further unclear what more transparent,

albeit unwitting, admission of her hearing deficit Juror 342 could have given. If there was any moment when Juror 342 would have been focused on understanding the specific words being spoken in the courtroom, it would be when the trial judge was addressing the jury directly (eliminating the added complexity of bouncing back and forth between examining counsel and the witness stand), and plainly instructing cohorts of Juror 342's peers to stand in succession based on various criteria. Moreover, Juror 342 admitted she was "trying to read [the trial judge's] lips" at that specific moment, demonstrating that the accommodation which was supposed to have been mitigating her hearing deficiency all along *was not reliable*. (*See* ECF No. 69-9 at 76–77.)

The trial judge's repeated questioning of Juror 342 brought *no resolution* about *how much* of the testimony she had missed, as Juror 342 continued to say both that she had heard everything and that she had missed parts, causing the solicitor to renew his motion that Juror 342 be removed: "[S]he knows she's got a blue dress on, didn't stand up when Your Honor asked her that, and I think clearly she's, she's not catching everything and should be removed." (*See id.* at 72–74.) Of course, by its very nature, Juror 342's disability would make it impracticable, if not impossible, for the trial judge to determine what portions of trial Juror 342 missed without simply letting her read a transcript of the proceedings. After recalling Juror 342 to ask her directly *why* she failed to stand during the second hearing test, the trial judge transparently noted, "there's no question. . . . she just flat did not hear and I was looking directly at her and talking and even now

she's having difficulty hearing me and I'm raising my voice and there's been a lot quieter voices than mine during the trial of this matter." (*Id.* at 78.)

The undersigned is well aware of the inertia that develops around protecting the integrity of a trial record as more and more time and energy have been expended to reach the latter stages. To put it bluntly, all participants in the retrial of a capital murder case—trial judge and counsel alike—would understandably be reticent to consider the inevitable ramifications of straight-faced acknowledgment that one of the jurors had missed indeterminate portions of testimony . . . a *third* trial. Indeed, the undersigned is mindful of how that same inertia can creep into PCR and federal habeas proceedings, making the relevant standards of review, which are rightly very deferential, functionally impossible to satisfy. But, most especially where the ultimate, irreversible penalty is at stake, the burden and impracticality of beginning again must be ignored for the sake of ensuring that if such a penalty is imposed, it is done by the unanimous agreement of a fair, impartial, and *competent* jury. It only takes one unconvinced juror to preclude unanimity. Juror 342 was not competent and should have been excused.

The evidence presented at the PCR evidentiary hearing only cemented this fact. Mr. Jones testified that Juror 342's hearing problems began in 1984, twenty years prior to Petitioner's trial, and that she routinely misses things spoken directly to her in various commonplace situations, including when he addresses her from just a few feet away. (ECF No. 69-12 at 37–40.) Furthermore, Mr. Jones indicated that

Juror 342 is sensitive about her hearing impairment, to the point of getting "mad" and "furious" when told she needs a hearing aid, because "she don't want to be deaf." (Id. at 40–41.) Mr. Jones' testimony both elucidated the profound nature of Juror 342's hearing loss, and offered a coherent explanation for why Juror 342 never once volunteered that she was having trouble hearing during the trial, though her struggles were observable to the trial judge and counsel.

The solicitor's PCR testimony revealed that he withdrew his repeated motion to excuse Juror 342 not because his belief that she was missing trial evidence changed, but because he was concerned with the practical ends of insulating the record against appellate review and avoiding a "*Batson*-type issue" that could be created by removing the only black juror on the panel. (ECF No. 69-12 at 112–13.)

Finally, trial counsel's PCR testimony invoked the vital, but unanswered, question of how Juror 342 could effectively participate in deliberations if she relied on lip reading with, apparently, limited success. (*See id.* 49–50, 97.) Given the realities of a mid-sized group seated around a conference table, jurors potentially speaking over each other when debating aspects of the case, and Juror 342's timidity and sensitivity about her hearing difficulties, this was a valid concern.

Therefore, the Court holds that, in light of the evidence presented in the State court proceedings, it was not just incorrect or erroneous, but unreasonable for the PCR Court (1) to find that Juror 342 was appropriately qualified by the trial court, (2) to credit Juror 342's statements that she "heard all testimony"

(ECF No. 69-15 at 47) during the guilt phase without accounting for her statements to the contrary about both the guilt and penalty phases, and (3) to find that Petitioner had not made a sufficient showing that Juror 342's hearing impairment was of a degree to materially impair her ability to receive and consider evidence. *See Williams*, 914 F.3d at 312.

4. The PCR Court's Unreasonable Application of Federal Law

Every criminal defendant is entitled to a jury that is both impartial and competent to adjudicate his case. *Tanner v. United States*, 483 U.S. 107, 126 (1987). *See Peters v. Kiff*, 407 U.S. 493, 501 (1972) ("Long before this Court held that the Constitution imposes the requirement of jury trial on the States, it was well established that the Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law."); *Jordan v. Massachusetts*, 225 U.S. 167, 176 ("Due process implies a tribunal both impartial and mentally competent to afford a hearing."). The right to a competent jury necessarily implies that jurors are free from physical infirmities that would interfere with, or prevent, their ability to properly receive and consider evidence.

The trial judge found Juror 342 to be qualified, which, according to State law, meant that she determined that Juror 342 was not "incapable by reason of mental or physical infirmities to render efficient jury service." *See* S.C. Code Ann. § 14-7-810(3). The PCR Court ratified this finding, noting that Juror 342 was qualified to serve on the jury without objection

and that difficulty hearing is not a *per se* disqualification under South Carolina law. (ECF No. 69-15 at 47 (citing *Safran v. Meyer*, 88 S.E. 3, 4 (S.C. 1916)[6]).)

In the Report, the Magistrate Judge stated that "the attorneys on both sides likened the effect of Juror 342's hearing impairment to that of a juror who was momentarily distracted." (ECF No. 86 at 44.) Here, the Magistrate Judge was referring to the parties' arguments, transcribed above, to retain Juror 342 after returning from a conference in the trial judge's chambers. (*See* ECF No. 69-9 at 80–81.) The Magistrate Judge further stated, "Petitioner has failed to present, and the undersigned has not found, a United States Supreme Court case indicating that a due process violation occurs when a juror is seated who 'missed bits' of testimony or who had a hearing impairment to that of Juror 342." (ECF No. 86 at 44 (citing ECF No. 69-9 at 79).) The Report proceeds with an analysis of case law indicating that a defendant's due process rights are not necessarily violated when a juror misses testimony due to inattention or sleep. (ECF No. 86 at 44–46); *see, e.g.*, *United States v. Johnson*, 409 F. App'x.

---

[6] The Court notes that the relevant appellate issues in *Safran*, a 100-year-old decision, were whether the trial court erred by not granting a new trial on the ground that one of the jurors was "defective in hearing," and whether the trial court erred in not having the juror brought into open court for examination regarding his hearing. 88 S.E. 3, 4 (S.C. 1916). The South Carolina Supreme Court held that hardness of hearing does not *per se* disqualify a juror from service. *Id.* The opinion includes no details about the extent of the hearing impairment in question, and the trial judge made no specific findings in that regard. *See id.*

688, 692 (4th Cir. 2011) (declining to find error by a district court that failed to remove an allegedly sleeping juror, where the record only showed that the juror was tired and perhaps inattentive for an undefined period of time during the defense's opening statement and informant's direct testimony).[7] However, the Court finds that the circumstances invoked by Juror 342's hearing deficit are distinguishable from a sleeping juror scenario because an inattentive juror can be roused to wakefulness, whereas Juror 342's hearing impairment affected her ability to absorb and assess testimony throughout the trial and deliberations. No reasonable fact finder could conclude that Juror 342's hearing deficit was inconsequential when she plainly

---

[7] In *Johnson*, the Fourth Circuit favorably cited the Seventh Circuit's standard for addressing the issue of sleeping or dozing jurors:

> If sleep by a juror makes it impossible for that juror to perform his or her duties or would otherwise deny the defendant a fair trial, the sleeping juror should be removed from the jury. *See United States v. Kimberlin*, 805 F.2d 210, 244 (7th Cir. 1986); *United States v. Bradley*, 173 F.3d 225, 230 (3d Cir. 1999); *United States v. Springfield*, 829 F.2d 860, 864 (9th Cir. 1987). However, a court is not invariably required to remove sleeping jurors, *Springfield*, 829 F.2d at 864, and a court has considerable discretion in deciding how to handle a sleeping juror, *United States v. Wilcox*, 50 F.3d 600, 603 (8th Cir. 1995). Reversal is appropriate only if the defendant was deprived of his Fifth Amendment due process rights or his Sixth Amendment right to an impartial jury. *Springfield*, 829 F.2d at 864.

United States v. Freitag, 230 F.3d 1019, 1023 (7th Cir. 2000). In any event, it is clear that a court's responsibility to remove a juror in order to protect a defendant's due process rights and right to an impartial jury turns on the specific circumstances in question.

could not hear questions posed to her that were designed to test her hearing, when she admitted to missing testimony in both the guilt and penalty phases, and when her proposed accommodation—lip reading—proved unreliable. *But see*, *United States v. Dempsey*, 830 F.2d 1084, 1087–89 (10th Cir. 1987) (upholding the service of deaf juror, who was aided during trial and deliberations by a sign-language interpreter, and who was chosen as jury foreperson; noting, "[m]any jurors have somewhat less than perfect hearing or vision, or have other limitations on their abilities to assimilate or evaluate testimony and evidence")

The Court recognizes that there is, indeed, no Supreme Court precedent expressly dictating that a juror with substantially the same hearing deficit as Juror 342 is constitutionally disqualified from jury service, however:

> AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Carey v. Musladin*, 549 U.S. 70, 81, 127 S. Ct. 649, 656, 166 L.Ed.2d 482 (2006) (KENNEDY, J., concurring in judgment). Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. 63, 76, 123 S. Ct. 1166, 155 L.Ed.2d 144 (2003). The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable

> manner. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L.Ed.2d 389 (finding a state-court decision both contrary to and involving an unreasonable application of the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)).

Panetti v. Quarterman, 551 U.S. 930, 953 (2007). The general standard at issue in Ground One is Petitioner's bedrock constitutional right to a competent jury, a jury composed of individuals free from physical infirmities that would render them substantially incapable of assimilating and evaluating witness testimony. The Court finds that the PCR Court unreasonably applied this general standard by glossing over the full import of Juror 342's equivocation regarding her ability to hear, the elucidating PCR testimony that exposed the profundity of her hearing impairment, and the unreliability of her proposed accommodation—lip reading—which was not revealed during voir dire and only haphazardly discovered part way through the guilt-phase evidence. Accordingly, Petitioner's objections regarding Ground One are sustained, the Report is rejected as to Ground One, and the amended habeas petition is granted as to Ground One.

B. <u>Ground Two</u>

In Ground Two, Petitioner alleges he was denied the effective assistance of counsel as guaranteed by the Sixth Amendment when trial counsel failed to insist on the removal of Juror 342 in light of her hearing impairment. (ECF No. 65 at 9.) Petitioner focuses this claim on the assertion that his trial counsel improperly

and unreasonably kept Juror 342 on the jury solely because she was black. (*See* ECF No. 78 at 12–16.)

With regard to this claim, the PCR Court stated:

> Counsel's decision not to request Juror [342] excused [sic] was a strategic decision. Counsel explained that he did not excuse Juror [342] because he did not like the alternate jurors who would replace Juror [342]. Counsel also stated he did not approve of the selection process because it was conducted as a paper strike. Overall, Applicant failed to show counsel's reasons for keeping Juror [342] was [sic] not a valid strategic reason.
>
> This court finds that the Applicant has failed to establish that trial counsel was ineffective in not requesting that Juror [342] be removed during either the guilt or innocence phase of this trial.

(ECF No. 69-15 at 49.) Petitioner argues that the decision not to seek Juror 342's excusal cannot be properly categorized as a valid "strategic decision," because "[a] finding that [trial counsel's] race-based rationale was reasonable would be in direct conflict with Supreme Court jurisprudence, which has repudiated the racial stereotype that guided trial counsel's decision-making." (ECF No. 78 at 15.)

The Magistrate Judge concluded that there is support in the record for the PCR Court's factual findings on this *Strickland* claim (*see* ECF No. 86 at 50–51), and that Petitioner's arguments regarding the PCR Court's unreasonable application of federal law

rely on an overextension of Supreme Court precedent (*see id.* at 52–54).

Petitioner objects by arguing that the Magistrate Judge's conclusion regarding the PCR Court's factual findings does not square with trial counsel's PCR testimony or the record as a whole. (ECF No. 89 at 3.) Petitioner contends that a fair reading of the record shows that trial counsel kept a functionally deaf juror on Petitioner's capital jury solely because she was black. (*Id.*) The Magistrate Judge noted that some of trial counsel's statements arguably imply that Juror 342's race was his only consideration in deciding not to seek Juror 342's removal (*see* ECF No. 86 at 51 (citing ECF No. 69-12 at 97 ("[I]f that were a white woman there's no doubt I probably would have—I would have done it differently, but at least we got one black on the jury."))), but opined that trial counsel's PCR testimony, when considered as a whole, reflects that other considerations also factored into his decision (*see* ECF No. 86 at 50–51 (citing ECF No. 69-12 at 90 (stating, "I don't think we particularly cared for the alternate"), 93–95 (explaining, in response to the question why trial counsel argued to keep Juror 342 on the jury after having been offered a mistrial[8] by the trial judge, "Well,

---

[8] In his PCR testimony, trial counsel represented that the trial judge said she should would grant a mistrial on the issue of Juror 342's hearing difficulties if the defense requested it. (*See* ECF No. 69-12 at 93.) All discussion of a mistrial happened during conversations off the record (*see id.* at 90–91 (trial counsel stating, "It was just part of a conversation," and referring to counsel joking in the trial judge's chambers about not being involved in the retrial if a mistrial was declared)), as there is no explicit offer of a mistrial in the trial transcript. The solicitor disputed, in his PCR

again, we were a little angry about the way the jury was picked"[9]))). The Court agrees with Petitioner's objections on this issue and, as further explained below, finds that the PCR Court's factual findings were unreasonable in light of the record.

Petitioner further objects to the Magistrate Judge's conclusion that Petitioner failed to demonstrate an unreasonable application of federal law. Petitioner construes the Report as "find[ing] that using race in contexts other than peremptory challenges would survive constitutional scrutiny", and argues that "the

---

testimony, that the trial judge directly offered a mistrial to either party regarding Juror 342, stating that the concept of a mistrial was just "something that was in the air" and "came up in the discussion." (*Id.* at 111–12.)

[9] Here, trial counsel is referring to the trial court conducting a "paper strike," which did not allow the parties to view the jurors when deciding how to exercise their peremptory strikes. In Ground Three, now expressly abandoned, Petitioner claimed that his right to a fair jury selection process as guaranteed by the Sixth and Fourteenth Amendments was violated by the "paper strike." Trial counsel objected to the paper strike at trial, and the issue was raised on direct appeal. The South Carolina Supreme Court denied relief, stating, "the record shows that Bryant affirmatively chose to forego the physical viewing of jurors and proceed with the paper strike method as part of a strategic move to generate a strike list more beneficial to the defense." *State v. Bryant*, 642 S.E.2d 582, 586–87 (S.C. 2007). The parties had initially agreed to view jurors by calling them forward in the order they were qualified, but trial counsel later requested a redraw. *Id.* at 587. At the PCR hearing, trial counsel explained that the potential jurors the defense wanted were "all in the end pools," and that if he had not sought a redraw, the final jury would already have been selected before the defense's desired jurors were called. (ECF No. 69-12 at 93–94.)

great weight of legal authority militates against using race in this manner, in either the criminal or civil law context." (ECF No. 89 at 4 (citing *Buck v. Davis*, 137 S. Ct. 759, 775 (2017) (finding ineffective assistance of counsel where defense counsel, during the penalty phase of capital murder trial, presented expert testimony that defendant was statistically more likely to act violently in the future because he was black); *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 US. 701 (2007) (holding the use of racial classifications in school districts' student assignment plans violated the Equal Protection Clause of the Fourteenth Amendment because the school districts had not demonstrated that such classifications were narrowly tailored to achieve a compelling government interest); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (holding "that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny," and remanding for consideration whether race-based presumptions in a federal program designed to provide highway contracts to disadvantaged business enterprises could survive such scrutiny); *Johnson v. California*, 543 U.S. 499 (2005) (holding strict scrutiny applied to State department of corrections' unwritten policy of placing new inmates with cellmates of same race)).)

The Magistrate Judge found that Petitioner's reliance on *Batson v. Kentucky*, 476 U.S. 79 (1986), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994),[10] is

---

[10] Petitioner relied upon *Batson* and *J.E.B.* not in the amended habeas petition itself, but rather in his response to the

misplaced because *Batson* and *J.E.B.* both considered the use of peremptory challenges, whereas the juror question at issue here dealt with the decision to retain or excuse a juror who had already been qualified by the trial court and participated in trial proceedings through and including the guilty verdict. (*See* ECF No. 86 at 52–53.) The Court agrees with this limited portion of the Report's analysis on Ground Two, and notes that the cases cited in Petitioner's objections are not directly relevant to the reasonableness of the PCR Court's construal of federal law.

Petitioner challenges the race-based decision making of his defense counsel, not the State, which distinguishes this case from *Batson* and *J.E.B. See J.E.B.*, 511 U.S. at 128 ("We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from *state-sponsored* group stereotypes rooted in, and reflective of, historical prejudice." (emphasis added, citations omitted)). Additionally, trial counsel's efforts to *retain* a minority juror whose race matched that of his client—as distinct from *excluding* a minority juror based on race—should not be equated with the forms of invidious stereotypes and historical prejudice that *Batson* and *J.E.B.* sought to expel from the judicial process. Nevertheless, as explained *infra*, the Court finds that it was objectively unreasonable for the PCR Court to conclude that trial counsel was not ineffective for arguing that Juror 342 should be retained on the

---

Respondents' motion for summary judgment. (*See* ECF No. 78 at 14–15.)

jury, and rejects the Report's contrary recommendation.

1. The Unreasonableness of the PCR Court's Factual Findings

The Court first notes that the factual context relevant to the *Strickland* claim presented in Ground Two is inextricably intertwined with the factual context already analyzed with regard to the Sixth Amendment claim presented in Ground One. Accordingly, the Court incorporates here, without repetition, its previous transcription of excerpts from the trial record and PCR proceedings pertaining to Juror 342. (*See supra* at 11–27.) Moreover, the Court observes, once again, that the State's proof of Petitioner's guilt was unassailable, so the constitutional error that the Court finds herein is harmless with respect to Petitioner's convictions, though not with respect to his death sentence.

The PCR Court found that trial counsel made a "strategic decision" not to seek Juror 342's removal because: (1) he did not like the alternate jurors who would replace Juror [342], and (2) he did not approve of the "paper strike" jury selection process. (ECF No. 69-15 at 49.) But these putative reasons for trial counsel's course of action were cherry-picked out of trial counsel's PCR testimony, and make no sense as justifications to ignore the presence of an incompetent juror on the panel.

The State's PCR counsel cross-examined trial counsel as to why he chose not to seek a mistrial in the following manner:

> Q: Let's talk a little bit about [Juror 342] – and correct me if I'm wrong, but from my understanding your testimony is that [the trial judge] offers [sic] you a mistrial if you'd asked for it based on [Juror 342], but you decided not to, is that correct?
> A: It didn't happen that way. It was just part of a conversation. I was under the impression that she was gonna declare a mistrial, and she kept going back to it and back to it. And every minute I kept thinking I was gonna hear, ["]I don't want to hear anymore this is a mistrial[,"] but she never did. And in retrospect when I read the transcript *there's no doubt that [Juror 342] did not belong on that jury*.
> Q: So that's something you've decided in hindsight as this proceeding has come to this point, is that correct?
> A: Not necessarily. I was busy with other things, but I did weigh into the fact that she was a person of color.
> Q: Okay.
> A: And we would be getting rid of – and I don't think we particularly cared for the alternate, but *I don't think the alternate came into – in the penalty phase she's already voted so that didn't come into it.* It would have to be a mistrial, but I would say that, yes, *I should have made a motion to – for a mistrial, definitely.*

(*Id.* at 89–90 (emphasis added).) When placed in context, the only reasonable reading of trial counsel's PCR testimony reveals: (1) that trial counsel knows he should have sought a mistrial, because Juror 342 "did

not belong on that jury;" and (2) that the prospect of an undesirable alternate replacing Juror 342 "didn't come into" the decision not to seek a mistrial, because the discussion surrounding Juror 342's excusal occurred at a stage of trial when her removal for cause would have required a mistrial.

After some questions from the PCR Court about what point in the trial Juror 342's hearing problem became known, and whether alternate jurors were still available (*see* ECF No. 69-12 at 90–91), cross-examination continued and trial counsel stated:

> THE WITNESS: . . . . I was under the impression it was a mistrial on everything. [The trial judge] just threw her hands up and said this is a mistrial is the way I recall it. I don't recall her saying, well it'd be just a mistrial on the guilt part or mistrial on – it happened throughout the whole trial. She kept questioning her, can you hear, can you hear. At one point [Juror 342] said, I can't hear, and right away I thought the judge was gonna say mistrial and she never did.
> Q: Okay. And just so we're clear though, she never once said to you, you know, [trial counsel], if you request a mistrial I'll give it to you. You just thought that if ---
> A: No, she did, she did say that.
> Q: She did say that?
> A: Oh, yeah.
> Q: Okay. Well, let me ask you this then, why did y'all argue so strenuously on the record to keep her on the jury, keep [Juror 342] on the jury, if

you had been offered a mistrial?
A: Well, again, we were a little angry about the way the jury was picked. Most of the jurors that we wanted were in the last groups which she refused to put into the hopper 'cause [the solicitor] objected. And that means that somebody – let's assume you have pools of five and let's assume you have ten pools, whatever, you have 150 people, well somebody is on the end pool. They'll never get picked because you'll have a jury already. . . . And it just so happened that the people we wanted – and also []race played a factor – they were all in the end pools . . . . We picked a jury already by the time we got to that. So on the last pools were basically there were some black people that we wanted. We never saw the jurors. She wouldn't let them come in front of us. They were sitting right behind us so all they had to do was walk around us. And I mean, it was outrageous . . . .

. . . .

Q: I understand your viewpoint on [the "paper strike"] issue, but I still don't understand if you were offered a mistrial ---
A: Well, there was just some conversation. At least we got something from the way the jury was picked we got some black person there.
Q: Right.
A: It's not exactly who we wanted. But the people we wanted, there's no way we were gonna get them because if she threw everybody in the hopper, juror number 1 and juror number 100

> would have the same chance of getting picked. Juror 100 never has a chance of getting picked because the jury would have been picked already.
>
> Q: Sir, and I understand that, but I'm going back to [Juror 342]. And I just don't understand ---
>
> A: I just said that was one consideration because she was a black person, but I don't think it outweighs the fact that she was deaf.

(*Id.* at 92–95.) When pressed further by the State's PCR counsel to explain why he affirmatively argued to retain Juror 342, trial counsel stated, "I'm saying the reason was is [sic] because if that were a white woman there's no doubt I probably would have – I would have done it differently, but at least we got one black on the jury." (*Id.* at 97.)

If anything, trial counsel's transparent frustration with the jury selection process—which he challenged both on the theory that the State's use of peremptory strikes violated the rule established by the Supreme Court in *Batson* (*see* ECF No. 69-4 at 153–164), and on the basis of the "paper strike" method imposed by the trial judge (69-4 at 119–123)—would have provided an *incentive* to seek a mistrial, because a mistrial was the only viable route to selecting a new jury in a manner that comported with trial counsel's sense of fairness. In any event, it provides zero rationale for trial counsel's failure to seek Juror 342's removal from the panel, and simply does not support a finding that said failure was grounded in valid trial strategy. The PCR Court was unreasonable to make such a finding, and inexplicably

ignored trial counsel's repeated testimony that Juror 342's race motived his decision.

To clarify, it was not impermissible for trial counsel to consider the fact that Juror 342 was black when deciding whether or not to seek her removal. However, the mere fact that Juror 342's minority race matched the race of his client did not supply trial counsel with a valid strategy to retain an incompetent juror. Taking into account the reality that Petitioner's conviction at the guilt phase was assured (*see* ECF No. 69-12 at 64, 78), trial counsel knew that the "success" of the defense team's representation was dependent upon convincing at least one juror that the death penalty was not warranted. This task necessarily required jurors to assimilate and credit mitigation evidence presented at the sentencing phase, and to receive any discredit the defense was able to cast on the reliability or extremity of the aggravating facts established at the guilt phase. In this context, *there was no valid strategy* to retain a juror whose hearing was substantially impaired and trust to hope that she would vote against death simply because the defendant was black like her. Accordingly, the PCR Court's factual findings on this issue were unreasonable.

2. The PCR Court Unreasonably Applied Federal Law

The Court finds that the PCR Court unreasonably applied the well-established standard for ineffective assistance of counsel set forth in *Strickland* and its progeny. "An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency

prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland,* 466 U.S. at 687). "To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" *Id.* (quoting *Strickland*, 466 U.S. at 688). Under this standard, a reviewing court must "conduct an objective review of [counsel's] performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time,' ('Every effort must be made to eliminate the distorting effects of hindsight'). *Id.* at 523 (internal citations and alterations omitted) (quoting *Strickland*, 466 U.S. at 688, 89). When counsel's challenged conduct is purportedly attributable to "tactical judgment," the reasons supporting that judgment must also be reasonable. *See id.* at 521 (holding that the measure of the reasonableness of counsel's justification for conducting limited investigation—namely, that it resulted from a "tactical judgment" not to present mitigating evidence and pursue an alternative strategy at sentencing—was whether the professional judgment supporting a limited investigation was itself reasonable). A petitioner establishes prejudice by demonstrating a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 695. This standard is satisfied where "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The Court is clear-minded about its responsibility to apply a "strong presumption" that trial counsel's representation fell within the "wide range of reasonable professional assistance." *Richter*, 562 U.S. at 104 (citation and quotation marks omitted). Nonetheless, the Court finds that trial counsel's error in failing to seek Juror 342's excusal was of a seriousness as to show that he "was not functioning as the counsel guaranteed the [Petitioner] by the Sixth Amendment." *Id.* Accounting for the context—wherein trial counsel was already dissatisfied with the fairness of the jury selection—and counsel's contemporaneous perspective—which included real-time observation of Juror 342's faltering responses and equivocation about missing testimony—the decision to retain Juror 342 fell outside the bounds of reasonable professional judgment.

Because imposition of the death penalty is dependent upon unanimous agreement among jurors, *see* S.C. Code Ann. § 16-3-20(C), and in light of the State's rock-solid proof at the guilt phase, trial counsel's primary role in this case was to convince at least one juror that the death penalty was unwarranted, whether due to the strength of mitigating circumstances or simply as an act of mercy. (*See* ECF No. 69-9 at 170–71 (trial judge instructing the jury that they could recommend a sentence of life in prison without parole "for any reason or for no reason at all").) To properly fulfill this role, he would have to ensure, at the very least, that each juror was physically able to understand and appreciate the full weight of any mitigating evidence presented by the defense, as well as any weaknesses in the State's aggravating

evidence that counsel was able to reveal. Trial counsel abdicated this responsibility with regard to Juror 342.

In *Strickland*, the Supreme Court stated, "Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable[.]" 466 U.S. at 688. The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines") applicable at the time of Petitioner's trial indicate, with respect to voir dire and jury selection:

> Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. *Counsel should be familiar with techniques*: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) *for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence*; and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

ABA Guidelines (rev. ed. 2003) § 10.10.2(B), *reprinted in* 31 Hofstra L. Rev. 913, 1049 (2003) (emphasis added). Admittedly, concerns regarding the extent of Juror 342's hearing loss, though addressed briefly in

voir dire, came to a head outside the context of jury selection. Moreover, the quoted section of the ABA Guidelines pertains most naturally to a defense counsel's duty to ferret out unwanted juror biases and predilections respecting capital punishment itself. However, the italicized portion of the guideline certainly suggests that one duty of a defense counsel in a capital case is to make affirmative efforts to identify jurors who are "unable" to properly consider mitigating evidence, a disqualifying characteristic that applies with equal force to a juror's physical infirmity as to her potential bias. Accordingly, the Court finds that trial counsel's failure to seek Juror 342's excusal was unreasonable under prevailing professional norms and evinced deficient performance of constitutional magnitude.

With respect to prejudice, Petitioner bears a heavy burden to demonstrate that counsel's errors deprived him of "a trial whose result is reliable," *Strickland*, 466 U.S. at 687, but the Court finds that Petitioner has satisfied that burden given trial counsel's inexplicable decision to not only fail to request Juror 342's removal, but to affirmatively argue for her retention. (*see* ECF No. 69-9 at 69–70, 75–76, 80–81.) As explained above, trial counsel's purpose was to ensure that each juror assimilated the defense's evidence in mitigation, along with any diminution of the aggravating evidence the defense was able to achieve through cross-examination. Intentionally leaving a hearing-impaired juror on the panel undermined this purpose, and casts doubt upon the reliability of the result because it weakens confidence that Juror 342 voted in favor of the death penalty as an outworking of her own deliberative

choice, rather than simply following the crowd after having understood only insufficient portions of the testimony. Put simply, a competent jury is *fundamental*; allowing an incompetent juror to remain renders the result *fundamentally* unreliable. *See Richter*, 562 U.S. at 104.

In the context of a *Strickland* claim challenging the thoroughness of defense counsel's mitigation investigation, the Supreme Court has stated, "[when] assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. If this rubric is applied to the instant case (though the basis for Petitioner's *Strickland* claim differs from the claim at issue in *Wiggins*), it supports a finding of prejudice resulting from trial counsel's deficient performance. Specifically, this was *not* a case where the defense was bereft of meaningful mitigation, so the failure to ensure that *every* juror could take account of that mitigation injected prejudice into the proceedings.

Assistant trial counsel summarized the defense evidence in the sentencing phase as follows:

> Mr. Bryant had a remarkable history in prison. Mr. Bryant . . . was well liked in prison. He was very active in some programs. In school everybody I spoke with really liked the guy. He wasn't your typical prisoner. I mean, there was even testimony by somebody that he had intervened in some sort of a situation and disarmed another prisoner that had what they called a shank, which is a weapon. [The defense

> prison-adaptability expert] felt that he could successfully live for the rest of his life in prison.
>
> . . . .
>
> [T]here was more than prison adaptability. . . . There was also the family, and presenting the evidence that, I mean, this was a great family. These are wonderful people and they come across as wonderful people. It's a large family. They're all very dedicated. They're very caring. There's a tremendous amount of love. All and all I had well over 20. I sort of remember, I think, the number was 26, and the vast majority of those witnesses were family members. And my point is that [sic] show the jury—that the family would have incurred needless suffering. And then he didn't have—James Bryant did not have the perfect past, but he didn't have the worst past either. And that he had a religious commitment. There was a, I thought, some good things to say about his character.

(ECF No. 69-11 at 234–36.) Assistant trial counsel further indicated that one aspect of his penalty phase theory was to demonstrate that the crime was out of character for Petitioner, that he had lived "a relatively okay life and something went wrong for about three minutes." (*Id.* at 263–64.) To that end, Petitioner's family and friends described him as a loving, considerate person, with a big heart (*see, e.g.*, ECF No. 69-7 at 182, 196, 225–26), as a person others trusted (*see, e.g.*, *id.* at 141, 189–90, 223), and as a person with no history of violence (*see, e.g.*, *id.* at 202–03, 212, 225). The case in mitigation also included testimony

regarding repetitive beatings that Petitioner suffered at the hands of his strict disciplinarian father, beatings that "[got] out of hand" and "[were] extreme."[11] (*See, e.g.*, ECF No. 69-7 at 160–62, 177–79.) Multiple witnesses reflected that Petitioner was extremely remorseful for his crime.[12] (*See, e.g.*, ECF No. 69-7 at 203–04, 220, 226.) Though the State's case in aggravation was quite strong, the upshot of the fact that the defense possessed significant mitigating evidence is that "there is a reasonable probability" that Juror 342 may have "struck a different balance," if she heard and considered the mitigation in its entirety. *See Wiggins*, 539 U.S. at 537. Thus, the reliability of the death sentence is further undermined and the Court finds that Petitioner has satisfied the prejudice prong of the *Strickland* analysis.

When an ineffective assistance of counsel claim is plead in the context of a habeas petition, the petitioner

---

[11] *See also Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse." (quotation marks and citation omitted)).

[12] This type of evidence has relevance at the penalty phase of capital cases because a juror's perception of a defendant's lack of remorse has been empirically associated with a preference for a death sentence. Dennis J. Devine & Christopher E. Kelly, Life or Death: An Examination of Jury Sentencing with the Capital Jury Project Database, 21 Psychol. Pub. Pol'y & L. 393, 395, 402 (2015) (discussing studies).

must satisfy the highly deferential standards of 28 U.S.C. § 2254(d) and *Strickland* "in tandem," making the standard "doubly" difficult to surmount. *Richter*, 562 U.S. at 105. Applied here, the question becomes whether "there is any reasonable argument that counsel satisfied *Strickland*'s deferential standards" when he sought to retain Juror 342. *See id.* The Court finds that the unreasonableness of the PCR Court's determination on this *Strickland* claim is "beyond any possibility of fairminded disagreement." *See id.* at 103. In concluding that trial counsel was not ineffective, the PCR Court credited the failure to request Juror 342 be excused as a "strategic decision." (ECF No. 69-15 at 49) But in so doing, the PCR Court conflated a consideration that trial counsel stated "didn't come into it"—disapproval of alternate jurors—and a patently illogical reason *not* to seek a mistrial—disapproval of the jury selection process—with trial counsel's putatively "valid" reasons for retaining Juror 342. (*See id.*) In actual fact, the *one* consideration that trial counsel *repeatedly* cited as his motivation for keeping Juror 342 was her race, which would, of course, have no countervailing value as against her hearing incapacity. As trial counsel openly acknowledged at the PCR hearing, "I don't think [the fact that she was a black person] outweighs the fact that she was deaf." (ECF No. 69-12 at 95.) The PCR Court was objectively unreasonable to ignore trial counsel's stated reason for failing to seek Juror 342's removal, and to substitute more palatable reasons in deeming trial counsel's decisions to be valid strategy. Therefore, Petitioner's objections regarding Ground Two are sustained, the Report is rejected as to Ground Two, and the amended habeas petition is granted as to Ground Two.

C. <u>Ground Four</u>

In Ground Four, Petitioner alleges he was denied the right to effective assistance of counsel as guaranteed by the Sixth Amendment when trial counsel offered defense theories inconsistent with each other and incompatible with their penalty phase presentation. (ECF No. 65 at 12.) The PCR Court found that Petitioner failed to establish that trial counsel offered inconsistent theories during the guilt-innocence and sentencing phases of trial, stating:

> Based on counsel's testimony and review of the trial record, it is clear that counsel's overall strategy for the guilt phase was to hold the State to its Burden [sic] of proof. The defense strategy at the sentencing phase was to show the applicant was remorseful, would adapt well to prison, had become a religious man, had a good family, and a life sentence would be sufficient to punish him. *See Glass v. State*, 227 S.W.3d 463, 473 (Mo. 2007) (finding counsel's strategy was reasonable in arguing that the state had not presented evidence beyond a reasonable doubt to establish that defendant had deliberated prior to killing during guilt phase, and in the sentencing phase argued defendant was remorseful and that this one act was out of character).
>
> Because the two strategies were not inconsistent, the Applicant also fails to show that he was prejudiced by the interaction between the two strategies. Furthermore, even if the two strategies were inconsistent, Applicant fails to show that but for counsel's error, there

> was [sic] reasonable probability that the outcome at trial would have been different.

(ECF No. 69-15 at 53–54.) After extensive explication of the PCR proceedings pertaining to this claim, the Magistrate Judge concluded that Petitioner has failed to show: (1) that the PCR Court was unreasonable in finding that trial counsel's guilt-phase strategy was to hold the State to its burden of proof; (2) that the PCR Court was unreasonable in finding that this guilt-phase theory was not inconsistent with the penalty-phase strategy of showing Petitioner was remorseful, was adaptable to prison, was a religious man, had a good family, and would be sufficiently punished by a life sentence; and (3) the PCR Court's findings in this regard were contrary to the Supreme Court's articulation of effective assistance of counsel. (*See* ECF No. 86 at 54–68.)

Petitioner raises multiple objections to the Magistrate Judge's conclusions regarding Ground Four. First, Petitioner argues that the Report's recommendation "is somewhat confusing, as it appears be [sic] based on an inaccurate reframing of the issue." (ECF No. 89 at 5.) Petitioner asserts that the Magistrate Judge artificially narrowed the parameters of the claim such that trial counsel's actions would not be found deficient so long as they can be described as "pointing out inconsistencies" in the State's case, or "holding the State to its burden." (*Id.*) Petitioner avers that this "narrow view" of the claim avoids the essential question of whether trial counsel's guilt-phase strategy allowed counsel to maintain credibility with the jury when they reached the penalty phase. (*Id.*)

This objection lacks merit. The Report's reasoning and recommendation with regard to Ground Four can hardly be deemed "confusing." The Magistrate Judge addressed the matter of trial counsel highlighting inconsistencies in the testimony of the State's witnesses because that is how trial counsel characterized his own role in the guilt phase. (*See* ECF No. 69-12 at 100–01.) Nothing about the Magistrate Judge's analysis can accurately be described as narrowing Petitioner's *Strickland* claim regarding inconsistent trial theories. The objection is overruled.

Second, Petitioner objects to the Report's "parsing and reframing of the record to support the PCR [C]ourt's conclusion that counsel had a guilt phase strategy at all." (ECF No. 89 at 5.) Petitioner juxtaposes various snippets of trial counsel's PCR testimony, and avers that the testimony includes "nakedly contradictory statements." (*Id.* at 5–6.) This objection lacks merit. The Court finds that the Magistrate Judge accurately discussed and fairly considered the relevant PCR testimony, and the objection is overruled.

Third, Petitioner objects to the Report's "implication that deficient performance by trial counsel can only be proved by trial counsel's admitting their own error." (*Id.* at 6.) In support of this assertion, Petitioner points to one sentence of the Report which states, "Petitioner does not identify any testimony by trial counsel reflecting a decision to challenge the State's case for guilt." (ECF No. 86 at 63.) The Court finds that the Report includes no implication that counsel must admit

ineffectiveness in order to substantiate a *Strickland* claim, and the objection is overruled.

Fourth, Petitioner objects to the Magistrate Judge's conclusion that trial counsel's cross-examination of Earl Deaton, an eye witness to the crime, was insufficient to show that the PCR Court was unreasonable in finding that trial counsel's guilt-phase strategy was to hold the State to its burden of proof. (*See* ECF No. 86 at 63–64.) Petitioner argues that the actual import of the cross-examination was to directly challenge James Bryant's presence at the scene of the crime, thereby implying that Petitioner was not the perpetrator, which was putatively inconsistent with trial counsel's sentencing-phase theory of remorse. (*See* ECF No. 89 at 6–7.)

At the end of the cross-examination, trial counsel asked Mr. Deaton, "did you identify the Defendant as a big man?" (ECF No. 69-4 at 231.) After receiving an affirmative response from Mr. Deaton, trial counsel next asked, "but you didn't identify him as James Nathaniel Bryant; is that correct?" (*Id.*) Mr. Deaton responded, "No, sir." (*Id.*) At the PCR hearing, trial counsel explained that he asked these questions in an attempt to show that Mr. Deaton had not actually seen as much as he claimed and had exaggerated his testimony. (*See* ECF No. 69-12 at 70.) The Court agrees with the Magistrate Judge's conclusion that this cross-examination falls short of demonstrating that the PCR Court was unreasonable in finding that the trial counsel's strategy at the guilt phase was to show inconsistencies in the State's evidence where possible,

and ultimately to hold the State to its burden of proof beyond a reasonable doubt. The objection is overruled.

Fifth, Petitioner objects to the finding that "Petitioner failed to demonstrate that the PCR [C]ourt's ruling was unreasonable, because the PCR [C]ourt did not find that counsel's guilt and innocence phase presentations were consistent, it found that they were 'not inconsistent.'" (ECF No. 89 at 7 (citing ECF No. 86 at 66).) Petitioner does not explain this one-sentence objection further. The relevant portion of the Magistrate Judge's Report highlights an important distinction and demonstrates sound reasoning with which the Court agrees. (*See* ECF No. 86 at 65–66 (stating, "Petitioner's argument is based on a mischaracterization of the PCR [C]ourt's findings—the PCR [C]ourt did not find trial counsel's strategies to be consistent; it found they were not inconsistent").) The objection is overruled.

Sixth, Petitioner objects to the Magistrate Judge's invocation of the clear and convincing evidence standard set forth in 28 U.S.C. § 2254(e)(1) in finding that Petitioner failed to show the PCR Court's factual determinations were unreasonable. (ECF No. 89 at 7–8.) Without legal support, Petitioner argues, "By its terms, that section describes the burden of proof borne by a petitioner at a hearing when he is presenting new evidence not heard by the state court on the claim." (*Id.* at 7.) Petitioner asserts that the Magistrate Judge was "bound to review the reasonableness of the district court's factual determinations 'in light of the evidence presented in the State court proceeding' per the express terms of 28 U.S.C. § 2254(d)(2)." (*Id.* at 7–8.)

Section 2254(e)(1) states:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1). It is unclear why Petitioner asserts that this provision, "by its terms," only applies in habeas proceedings where a petitioner is presenting new evidence at a hearing. However, to the extent the clear and convincing evidence standard is somehow incompatible with, or mutually exclusive with, the reasonableness analysis set forth in § 2254(d)(2)–to be clear, the Court makes no such declaration—the Court would note that its conclusions regarding the merits of Petitioner's various assertions that the PCR Court's findings of fact were unreasonable would remain the same. The objection is overruled.

Finally, Petitioner objects to the Magistrate Judge's conclusion that the PCR Court did not unreasonably apply existing Supreme Court precedent, which requires that defense counsel in a capital case must consider the guilt and penalty phases in conjunction when determining how best to proceed with trial strategy. (ECF No. 89 at 8 (citing *Florida v. Nixon*, 543 U.S. 175, 192 (2004).) This objection is general and conclusory, and fails to point the Court to any specific error in the Magistrate Judge's reasoning. The objection is overruled, the Report is adopted as to

Ground Four, and Ground Four is denied and dismissed with prejudice.

D. <u>Ground Six</u>

In Ground Six, Petitioner alleges he was denied the effective assistance of counsel when trial counsel acquiesced in the introduction of evidence relevant to an arbitrary factor during the sentencing phase of the trial. (ECF No. 65 at 15–16.) Here, Petitioner refers to the introduction of prison conditions evidence during the sentencing phase. The PCR Court found that trial counsel was not deficient for introducing evidence of prison conditions, and then failing to object when the solicitor cross-examined sentencing witnesses on this evidence after the door had been opened, stating:

> This Court finds that Applicant's counsel was not deficient in raising issues of conditions of confinement. This trial occurred after *Kelly v. South Carolina*, 534 U.S. 246 (2002), but before *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005), *State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007), and prior to its own direct appeal *State v. Bryant*, 372 S.C. 305, 642 S.E.2d 582 (2007). The *Kelly* decision caused the state General Assembly to pass a law requiring life without parole to be charged in all death penalty cases. The *Bowman* decision held that prison conditions are not relevant to the question of whether a defendant should be sentenced to death and are inappropriate in the penalty phase of a capital case. After *Bowman*, [the] South Carolina Supreme Court held in *Burkhart*

> that it was reversible error for the solicitor to introduce the conditions evidence.
>
> As noted previously, the *Bowman* and *Burkhart* decisions were not law at the time of this trial. It is clear that *Strickland* does not require counsel to anticipate changes in the [sic] developments in the law, and thus counsel is not required to have foreseen the State Supreme Court would subsequently call conditions evidence arbitrary. Therefore, this Court finds that given the time period and the then existing laws, the trial counsel was not deficient in presenting conditions evidence.
>
> Applicant further contends that trial counsel was deficient in failing to object to testimony elicited by the state that focused on [sic] the jury's attention on irrelevant information, i.e. the conditions of the prison. Given the state of the law when this trial took place, applicant's counsel was correct that they would not have had a valid objection to the solicitor's limited responsive questioning. *See State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984) (holding that once the defense entered evidence about prison conditions, the State was allowed to submit evidence that life imprisonment was not the total abyss which the defendant portrayed it to be).

(ECF No. 69-15 at 50–51.)

In her Report, the Magistrate Judge discussed at length the South Carolina Supreme Court's decision in *Bowman v. State*, 809 S.E.2d 232 (S.C. 2018) ("*Bowman*

II"), which was published after the PCR Court's decision in Petitioner's case, and which considered an ineffective assistance claim substantially similar to the claim raised in Ground Six. The Report explains:

> In *Bowman II*, the court described Bowman's claim as one "that trial counsel was deficient in failing to object to the State's cross-examination of prison-adaptability expert James Aiken[,]"[13] where "Aiken's testimony transitioned from a discussion of prison adaptability into one about general prison conditions . . . ." 809 S.E.2d at 234, 238. Bowman's trial counsel had testified that he elicited testimony from Aiken that Bowman "was not going to a 'kiddy camp' and that he would not be 'mollycoddled' [as] a strategic choice, and counsel acknowledged that he expected the solicitor to respond with questions about some of the less harsh conditions of confinement." *Id.* at 244. The solicitor did, in fact, elicit testimony from Aiken that prisoners could play basketball and exercise on their own and that they had access to libraries, movies, television, and other recreational activities. *Id.* at 238–39. The South Carolina Supreme Court discussed at length "the unique distinction South Carolina jurisprudence has drawn between evidence of

---

[13] James Aiken also testified as a prison-adaptability expert for the defense at the sentencing phase of Petitioner's trial. His testimony in Petitioner's case, along with the "prison conditions" testimony of other defense mitigation witnesses, is subject to a challenge similar to that which was raised in *Bowman II*.

> prison adaptability, which [the court has] held is relevant and admissible, and evidence of general prison conditions, which [the court has] held is not." *Id.* at 241. Bowman's trial, like Petitioner's trial, occurred after *Plath* and *Kelly v. South Carolina*, 534 U.S. 246 (2002) but before the cases declaring evidence of prison conditions to be arbitrary under state law. *Id.* at 244.

(ECF No. 86 at 80–81.) The South Carolina Supreme Court stated, in *Bowman II*, that Bowman's counsel's performance was not deficient and denied post-conviction relief, stating:

> By myopically considering our state's nuanced and unique distinction between prison adaptability and general prison condition evidence, it might appear a finding of deficient representation is warranted.[FN] While we acknowledge that a close question is presented, in light of the state of the law at the time of Petitioner's trial and the narrowly tailored scope of the prison conditions evidence elicited, we find there is evidence in the record to support the PCR court's finding. There is evidence that counsel articulated a valid reason for employing this strategy, and because the State's response was proportional and confined to the topics to which counsel had opened the door, we affirm the finding that counsel was not deficient in failing to object to the State's line of questioning.
>
> FN. We reiterate that the prison adaptability versus general prison condition distinction is a creation of state law and is not mandated by the

> Eighth Amendment or other constitutional provision.

Bowman II, 809 S.E.2d at 244 (citations omitted).

Petitioner first objects to the Magistrate Judge's conclusion that he did not offer a case in which the Supreme Court found trial counsel deficient for presenting or acquiescing to conditions of confinement evidence, nor did he offer a case that prison conditions evidence is unconstitutional in the sentencing phase of a capital case. (ECF No. 89 at 12–13.) Petitioner reiterates his citations to *California v. Brown*, 479 U.S. 538, 541 (1987), and *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), which stand for the general proposition that a "capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his character or record and any of the circumstances of the offense." *Brown*, 479 U.S. at 541 (quotation marks and citations omitted). The Court agrees with the Magistrate Judge that Petitioner has not shown any well-established federal law that holds the introduction of prison conditions evidence to be ineffective assistance, or a freestanding constitutional violation in the penalty phase of a capital case. The objection is overruled.

Petitioner next objects that, regardless of the South Carolina Supreme Court's statement in *Bowman II,* that "the prison adaptability versus general prison condition distinction is a creation of state law and is not mandated by the Eighth Amendment or other constitutional provision," 809 S.E.2d at 244, n.7, prison conditions evidence is, nonetheless, an arbitrary factor that should not have been considered by the jury, and

its introduction constituted ineffective assistance. (*See* ECF No. 89 at 13–14.) At the time of Petitioner's trial, South Carolina law had not yet called conditions of confinement evidence an arbitrary factor. The PCR Court was right to note that "*Strickland* does not require counsel to anticipate changes in . . . the law, and thus counsel is not required to have foreseen the State Supreme Court would subsequently call conditions evidence arbitrary." (ECF No. 69-15 at 50–51.) Accordingly, the objection is overruled.

Finally, Petitioner objects to "[Report]'s finding that the PCR [C]ourt's order appropriately addressed the prejudice inquiry." (ECF No. 89 at 14.) However, as already indicated, the PCR Court found that trial counsel was not deficient in introducing the prison conditions evidence and in acquiescing to limited cross-examination once the defense opened the door. There was no need for the PCR Court to reach the prejudice prong of the *Strickland* inquiry under these circumstances. In sum, the Court finds that the PCR Court's ruling with regard to Ground Six did not involve an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts. Therefore, the objection is overruled, the Report is adopted as to Ground Six, and Ground Six is denied and dismissed with prejudice.

E. Ground Eight

In Ground Eight, Petitioner alleges he was denied the effective assistance of counsel when trial counsel failed to object to the solicitor's elicitation of evidence regarding a rumored escape attempt by prisoners on

death row that did not involve Petitioner. (ECF No. 65 at 20–21.) During the sentencing phase of Petitioner's trial, the defense offered the testimony of institutional Chaplain Derward Van Bebber, in order to show that Petitioner demonstrated a sincere religious commitment during his pretrial incarceration. (ECF No. 69-8 at 47–48.) On cross-examination, the solicitor asked a question about the death row Easter service on April 18, 2003 being cancelled, to which Chaplain Van Bebber responded, "Yes, sir, it was. To my understanding it was cancelled because there was a rumor there was going to be an attempted escape; and so, the warden canceled that Easter sunrise service." (*Id.* at 52.) The solicitor then asked a few follow up questions, in response to which Chaplain Van Bebber clarified that the rumored escape attempt was from death row, but that it did not necessarily involve the inmates that were going to the worship service. (*Id.* at 52–53.) On redirect examination, Chaplain Van Bebber testified that he was never suspicious that Petitioner had an ulterior motive for attending worship services, that "when he came to worship service he was always attentive" (in contrast to inmates who had motivations other than religious conviction for attending), and that there were many rumors in prison not all of which he took seriously. (*Id.* at 63–64.)

The PCR Court denied Petitioner's claim that trial counsel was ineffective for failing to object to the testimony regarding a rumored escape attempt, stating:

> Trial counsel was not deficient in failing to object to statements made by a witness about an

> alleged planned escape that did not implicate the Applicant. Trial counsel reasoned there was no harm because the witness quickly explained the escape evidence did not implicate Applicant. Furthermore, there was no prejudice in failing to object to information about the planned escape because of the egregious nature of this offense. Therefore, this Court finds the trial counsel was not ineffective in failing to object to testimony about an alleged planned escape not implicating the Applicant.

(ECF No. 69-15 at 53.) The Magistrate Judge concluded that there is support in the record for the PCR Court's factual findings (*see* ECF Nos. 69-11 at 243–45; 69-12 at 9–12 (setting forth assistant trial counsel's PCR testimony on this matter)), and that the PCR Court's application of *Strickland*, finding neither deficiency nor prejudice with respect to trial counsel's representation as to the escape attempt evidence, was not improper. (ECF No. 86 at 89–91.) The Court agrees.

First, Petitioner objects by arguing that the Report demands more than what the law requires when it faults Petitioner for failing to point to a Supreme Court Case that addresses the improper introduction of evidence related to escape. (ECF No. 89 at 18.) Yet again, Petitioner cites the general rule from *Brown* and *Lockett*, that relevant mitigation evidence in capital sentencing proceedings is that evidence which pertains to the accused's character, his record, or the circumstances of the offense. (*See supra* at 60.) Petitioner argues that the admission of Chaplain Van Bebber's testimony regarding the escape plan

introduced an arbitrary factor into the proceeding, and was therefore constitutionally improper. (ECF No. 89 at 18.)

The Court finds that the evidence in question pertained to a very limited line of questions, in which Chaplain Van Bebber called the potential escape plan a "rumor," and stated he was "not sure who was involved in that." (*See* ECF No. 69-8 at 52–53.) There was no insinuation that Petitioner was involved, or would be involved in such an escape attempt. The solicitor did not reference the matter during his closing argument. While irrelevant to the jury's deliberations during the sentencing phase, the brief mention of a rumor that an unidentified inmate(s) had planned an escape from death row, in order to explain why the Easter sunrise service itemized on Petitioner's religious services attendance record was cancelled, is not of constitutional magnitude such that trial counsel's failure to object was deficient under *Strickland*. Therefore, the PCR Court was not unreasonable in finding that trial counsel was not deficient. The objection lacks merit and is overruled.

Second, Petitioner objects to the Magistrate Judge's conclusion that the solicitor's cross-examination regarding the rumored escape plan was "legitimately related to the Solicitor's cross-examination of Van Bebber on the motives of prisoners attending his worship services, a concept on which trial counsel had questioned Van Bebber." (ECF No. 86 at 90.) Petitioner argues that the introduction of possible escape plans of death row inmates into his capital sentencing proceeding was highly inflammatory, improper, and

arbitrary. (ECF No. 89 at 18–19 (citing *Brooks v. Francis*, 716 F.2d 780 (11th Cir. 1983); *Hance v. Zant*, 696 F.2d 950 (11th Cir. 1983)).)

The cases cited by Petitioner in support of this objection are worlds apart from the "escape plan" evidence presented at Petitioner's trial. In the pre-AEDPA case of *Brooks*, the Eleventh Circuit vacated a habeas petitioner's death sentence due to gross prosecutorial misconduct in appealing to jurors' fears that the defendant might escape, inviting jurors to use the death penalty as a solution to crime in the streets, and appealing to the patriotism of jurors by likening a vote for the death penalty to the task of young military servicemen sent overseas to kill enemy soldiers. 716 F.2d at 788–89. The prosecutor's sentencing argument in *Brooks* appeared to be modeled on the sentencing argument in *Hance*, even using the same examples and turns of phrase, and the Eleventh Circuit based its finding of prosecutorial misconduct largely upon its reasoning and analysis in *Hance*. *See id.*

In *Hance*, the Eleventh Circuit held that the prosecutor's "fervent appeals to the fears and emotions of an already aroused jury was error of constitutional dimension." 696 F.2d at 951. The court noted that the prosecutor "tried to convince the jury that no one could feel save with [the defendant] in prison, close to one's home and family." *Id.* at 952. The prosecutor even made a direct parallel between the famous escape, two years earlier, of James Earl Ray from Brushy Mountain State Penitentiary in Tennessee, and the defendant's likelihood of escape, stating that if Ray escaped from what "was thought to be the most secure

cell in the most secure prison in the United States. Why can't this man escape from the Harris County Work Camp, or from Reidsville, for that matter?" *Id.* Whether the Magistrate Judge was or was not correct to note that the solicitor's questions regarding the rumored escape attempt were legitimately related to his cross-examination of Chaplain Van Bebber is beside the point. These cases have *no bearing* on the brief mention of a rumored escape plan unconnected to Petitioner at his sentencing hearing. Accordingly, the objection is overruled, the Report is adopted as to Ground Eight, and Ground Eight is denied and dismissed with prejudice.

F. Analysis of the Procedurally-Barred Grounds: Five, Seven, and Nine

Petitioner concedes that the ineffective assistance of trial counsel claims raised in Grounds Five, Seven, and Nine were procedurally defaulted. (ECF No. 78 at 35, 46, 65.) In order to satisfy the exception set forth in *Martinez v. Ryan*, 566 U.S. 1 (2012), and obtain federal habeas review of the defaulted claims, Petitioner must establish that PCR counsel's failure to present those claims was itself ineffective assistance. Petitioner must then show that the underlying claims of ineffective assistance of trial counsel are substantial. The Magistrate Judge concluded that Petitioner has not met this burden as to Grounds Five, Seven, or Nine, that the procedural default of those grounds has not been overcome, and that summary judgment should be granted accordingly. (ECF No. 86 at 93–94.)

As an initial matter, the Magistrate Judge found that Petitioner failed to present any evidence regarding

PCR counsel's recognition of, investigation of, or decision-making regarding any of the underlying *Strickland* claims. (*Id.* at 94.) Thus, in asserting that PCR counsel were deficient and that he was prejudiced as a result, Petitioner "[e]ssentially. . . argues that there can be no strategic reason for PCR counsel's alleged errors." (*Id.*) Accounting for the strong presumption that PCR counsel's performance was reasonable, the Magistrate Judge reasoned that Petitioner has not satisfied his burden under *Martinez.* (*Id.* at 94–95 (citing *Burt v. Titlow*, 571 U.S. 12, 17 (2013) ("It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" (modification in original) (quoting *Strickland*, 466 U.S. at 689))).) The Court agrees.

Petitioner objects to the Report's "determination that the deficient performance of PCR counsel was not plain from the record," stating simply, "[t]here can be no valid strategy for failing to raise a valid claim." (ECF No. 89 at 22.) He rejects the notion of "winnowing" issues in PCR proceedings, and asserts that "eliminating what Petitioner has now demonstrated are valid claims, would be per se deficiency in a capital case." (*Id.*) With respect, this objection is unresponsive to the Magistrate Judge's cogent explanation of how Petitioner failed to meet his burden under *Martinez.* The objection is conclusory and is overruled.

1. Ground Five

In Ground Five, Petitioner alleges he was denied the right to effective assistance of counsel when trial counsel unreasonably failed to object properly to the solicitor's alleged use of peremptory challenges on the basis of race in violation of *Batson*. (ECF No. 65 at 14.) The record shows that trial counsel challenged the State's peremptory strikes of four black females (ECF No. 69-4 at 153–54); the solicitor gave explanations for his use of peremptory strikes (*id.* at 154–61); the trial judge found the solicitor's stated reasons to be racially neutral and encouraged, indeed ordered, the defense to take extra time to see if they could show the solicitor's reasons to be mere pretext (*id.* at 161–64); upon returning from a recess, trial counsel indicated that he had no argument to make as to pretext (*id.* at 165); Petitioner confirmed to the trial court that he had spoken with trial counsel and agreed with trial counsel's position (*id.* at 165–66); whereupon, the trial court denied the *Batson* motion (*id.* at 166). Petitioner contends that trial counsel, by declining to argue that the solicitor's justifications for the peremptory strikes were pretextual, unreasonably failed to *complete* a meritorious *Batson* objection. (ECF No. 89 at 9.)

After extensive analysis of the trial record and the relevant law, the Magistrate Judge concluded that Petitioner failed to show substantial deficiency or prejudice as to his Ground Five claim, and that the procedural bar should stand. (*See* ECF No. 86 at 95–108.) Petitioner raises a number of objections to this section of the Report, most of which are conclusory, or amount to simple disagreement with the Magistrate

Judge, and do not require in depth treatment here. (*See* ECF No. 89 at 9–12.)

The gravamen of Petitioner's claim in Ground Five is that trial counsel was deficient by failing to understand and make an informed decision about the third-step of a *Batson* challenge—a showing of pretext—and that Petitioner suffered prejudice when trial counsel failed to make a comparative juror analysis between Juror 247, a black female who was struck by the State, and Juror 123, a white female who was seated on the jury. (*See* ECF No. 78 at 26–34.) With respect to the prejudice prong, Petitioner objects, *inter alia*, to the Magistrate Judge's "speculat[ion] that the reason the [s]olicitor retained the white juror, despite her extensive religion-based hesitation about the death penalty and struck the black one, who expressed almost none, was the 'pause' the black juror had about signing the death verdict." (ECF No. 89 at 11.) Petitioner further objects to the Magistrate Judge's reasoning: "It could be argued that Juror 247 expressed greater hesitation since her hesitation was related to a critical part of the jury's process in recommending death, as compared to Juror 123's more general musings on the propriety of the death penalty." (*See* ECF No. 86 at 106.)

The Magistrate Judge's reasoning and conclusions in this regard were by no means "speculative." As she duly noted in the Report, after Juror 247 had been found qualified, the solicitor stated:

> [I]n regard to [Juror 247] she was qualified. I would like the record to note that when she was asked about signing the death penalty form that

> *she hesitated for what I perceived as being a fairly long period of time*. I just state that for the record in case there's some issue if she's struck.

(ECF No. 69-3 at 105 (emphasis added).) Here, the solicitor was referring to Juror 247's response to the trial judge's questions about signing the verdict form:

> Q: Okay, now once again could you, depending again on the facts and circumstances and the mitigating and aggravating circumstances and the law that I charged you, could you sign a verdict form that would sentence a Defendant to death, which in South Carolina is by lethal injection or electrocution?
> A: To death, I don't know.
> Q: Okay.
> A: That's kind of tough.

(*Id.* at 95.) Petitioner's *ex post* disagreement with the solicitor's evaluation of Juror 247's demeanor on the basis of a cold reading of the trial transcript is insufficient to undermine the Magistrate Judge's lucid analysis. After *de novo* review of the relevant portions of the record, the Court finds the Magistrate Judge's determinations to be sound, and the Report evinces no error. (*Id.*) Accordingly, the objections are overruled, the Report is adopted as to Ground Five, and the Court grants summary judgment as to Ground Five.

2. Ground Seven

In Ground Seven, Petitioner alleges he was denied the right to effective assistance of counsel when trial counsel unreasonably failed to object to improper comments in the solicitor's closing arguments. (ECF

No. 65 at 18.) Petitioner challenges two arguments made by the solicitor. First, he asserts that the solicitor advanced an argument that impaired the jury's ability to consider mitigating evidence, specifically:

> Now, I will concede that James Bryant maybe didn't have an ideal upbringing, but ladies and gentlemen, nobody is brought up by Ward and June Cleaver. They're not brought up by Bill Cosby. That's fiction. Everybody, everybody has something in their background that shouldn't have happened, something about the way they were raised, something about their parents, *but consider this, and this is important, where is the connection between whatever problem he had being raised by his father who drank too much and who tried to exert discipline on his children, what is the connection between that which occurred back up until the time he leaves home at 17 or something and his murder of a law enforcement over a decade later? Has anybody gotten up here and said because of this he did that? It's just not there. There's no connection.* What he did he did of his own free will and accord because he wanted to. You all hadn't heard about any kind of mental problem that he's got that would cause him to do this. It's not there. He chose to drive a car knowing he had no driver's license. He chose to run a stop sign while he was driving that car with no driver's license. He chose to resist arrest when Officer Lyden tried to put him under arrest for doing exactly what he had been doing wrong and he knew it. He knew he had no license. He knew

> the stop sign was there and he didn't— he didn't stop.

(ECF No. 69-9 at 127–28 (emphasis added).)[14] Second, Petitioner avers that the solicitor capitalized on inadmissible evidence regarding conditions of confinement and improperly compared the victim's death to the prospect of Petitioner's life in prison:

> First of all you've got three meals a day supervised by a dietician. You've got medical and dental care for whatever goes wrong for the rest of your life. You get your clothing given to you. You can work or not work at your discretion. If you work you get paid. If you don't feel like working there's 12 hours of television you can watch a day. You have a canteen you can go to. Your family can send you money or you can work and get that money. You can go to the canteen. You can buy cigarettes, candy, Coca-Cola, potato chips, snacks, whatever you want. You get tired of eating you can to go [sic] the library and you can read a book or two. You can get your walk-man, listen to whatever music you want to listen to, go to a movie. They've got an athletic director there, you know, maybe you're tired of reading, don't want to work, "Let's go play handball. Let's play softball." They've got intramural teams, you know, "Here's our dorm we can play your dorm, you know, let's play a

---

[14] Petitioner challenges the italicized portion of the solicitor's argument as being improper. (*See* ECF No. 65 at 18.) The remainder of the quotation is provided for context.

> game here." They've got an athletic director supervising all that, and in the meantime Corporal Dennis Lyden is in his grave and that's why life in prison is not an acceptable alternative punishment to the death penalty in this case.

(ECF No. 69-9 at 129–30.) The Magistrate Judge concluded that Petitioner had not made a substantial showing that trial counsel was deficient in failing to object to portions of the State's closing argument (ECF No. 86 at 110–12), nor had Petitioner made a substantial showing that he was prejudiced in that the result of the proceeding would have been different if trial counsel had objected (*Id.* at 112–16.) Therefore, the Magistrate Judge found that Petitioner could not overcome the procedural default of Ground Seven. (*Id.* at 116.)

With respect to the prejudice prong, the Magistrate Judge took issue with Petitioner's characterization of the solicitor's argument regarding Petitioner's personal background. Rather than interpreting the argument as an instruction to the jury to disregard mitigating evidence unless they found a nexus between that evidence and the crime, the Magistrate Judge concluded that the argument was part of the solicitor's contention that Petitioner murdered the victim of his own free well. (*Id.* at 113 (citing *United States v. Rodriguez*, 581 F.3d 775, 799 (8th Cir. 2009)).) The undersigned agrees that the argument was not improper in the first instance. The Magistrate Judge further found, "[i]t is not clear that the [s]olicitor's reference to [the victim's] future in a grave as

compared to Petitioner's future in prison was improper." (*Id.* at 114 (citing *United States v. Umaña*, 750 F.3d 320, 353 (4th Cir. 2014) ("We do not believe that it was error, much less plain error, for the prosecutor to have compared Umaña's potential prison sentence with the plight of the victims."))).) While it is not impossible for this type of argument by a prosecutor to stray into impermissible territory, the solicitor's argument at issue here was not improper and represents "'the sort of thrust and parry in which attorneys typically engage in the course of their last chance to persuade a jury.'" *Umaña*, 750 F.3d at 353 (quoting *United States v. Runyon*, 707 F.3d 475, 513 (4th Cir. 2013)).

As is the case with Petitioner's objections regarding Ground Five, most of the objections raised with respect to Ground Seven are conclusory, or amount to simple disagreement with the Magistrate Judge. (*See* ECF No. 89 at 14–17.) However, the Court will specifically address Petitioner's assertion that the Report "overlooks the fact that just a month prior to Petitioner's trial, the South Carolina Supreme Court had found counsel ineffective for failing to object to [a prosecutor's argument comparing the worthiness of the defendant's life to that of the victim]." (*See id.* at 16–17 (citing *Hall v. Catoe*, 601 S.E.2d 335 (S.C. 2004)).) *Hall* is distinguishable. In that case, the South Carolina Supreme Court held that Hall's counsel's failure to object to the following statement "allowed the solicitor to charge the jury with an arbitrary, misconceived sentencing analysis, violating Hall's right to due process":

> I am talking about values, because a jury verdict is a statement of values. And I am not talking about dollars and cents as far as what the [lives of the two girls were] worth, but nevertheless it is a question of values. What are the lives of these two girls worth? Are they worth the life of this man, the psychopath, this killer who stabs and stabs and kills, and rapes and kidnaps.

Hall, 601 S.E.2d at 339. The prosecutor's argument in *Hall* was impermissible because it encouraged the jury to make comparative judgments about the worth of a defendant's life as against the worth of the lives of his victims. *See id.* at 362–63 (declining to extend the previous decision of *Humphries v. State*, 570 S.E.2d 160, 168 (S.C. 2002), where the court held that a solicitor comparing the lives of a criminal defendant with that of the victim was permissible victim impact evidence). In the instant case, the solicitor's cursory reference to the victim lying in his grave does not invoke the same kind of direct comparison of worth that the court found problematic in *Hall*.

After *de novo* review, the Court finds Petitioner's objections insufficient to displace the sound reasoning and conclusions of the Magistrate Judge regarding Ground Seven. Petitioner has not satisfied the requirements of *Martinez* to excuse the procedural default of this claim. Accordingly, the objections are overruled, the Report is adopted as to Ground Seven, and the Court grants summary judgment as to Ground Seven.

3. Ground Nine

In Ground Nine, Petitioner alleges he was denied the right to effective assistance of counsel when trial counsel failed to object to the trial court's erroneous definition of mitigating evidence. (ECF No. 65 at 22.) Here, Petitioner challenges a portion of the trial judge's instruction to the jury regarding non-statutory mitigation evidence: "Okay, these non-statutory mitigating circumstances, as I indicated, are not by statute, but is [sic] one which the Defendant claims serves the same purpose, that is to reduce the degree of his guilt of the offense." (ECF No. 69-9 at 175–76.) Petitioner contends that this instruction was a misstatement of the law because, "There is no requirement that non-statutory mitigating circumstances demonstrate any link between mitigating evidence and the crime, much less prove that it reduces the extent of [Petitioner's] legal culpability, which has by definition already been decided in the guilt phase." (ECF No. 78 at 62.)

The Magistrate Judge concluded that, when considered in context of the entire jury charge, the particular portion that Petitioner challenges was not erroneous. (ECF No. 86 at 116–17.) Immediately prior to the challenged portion of the charge, the trial judge stated:

> Now, mitigating circumstances is [sic] neither justification nor excuse for the murder. It simply lessens the degree of one's guilt, that is it makes them less blame-worthy or less culpable. You may consider any non-statutory mitigating circumstances and you may also consider the

> statutory mitigating circumstances that has [sic] been listed for you, that is that the Defendant has no significant history of prior criminal convictions involving the use of violence against another person. Now, these non-statutory mitigating circumstances are not listed on this form. They're not required to be, just the statutory mitigating circumstances.

(ECF No. 69-9 at 175.) Moreover, the trial judge instructed the jury that they could "sentence the Defendant to life in prison without parole for any reason or for no reason at all. This is what has been traditionally referred to as a recommendation of mercy . . . ." (*Id.* at 176.) The Magistrate Judge discussed a South Carolina Supreme Court decision, wherein the court considered an almost identical jury charge regarding mitigating circumstances and held that the defense counsel was not ineffective for failing to object to the charge. (*See* ECF No. 86 at 117–19, n.24–25 (citing *Sigmon v. State*, 742 S.E.2d 394, 401–02 (S.C. 2013)).) Finally, the Magistrate Judge found that where there was no error in the trial court's jury instructions, trial counsel had no reason to object, that Petitioner failed to make a substantial showing as to either prong of *Strickland*, and that Petitioner had not overcome the procedural default of his claim in Ground Nine. (*Id.* at 119–20.)

Petitioner objects, arguing that defining mitigation as a factor that reduces "the degree of guilt" is simply incorrect, and this erroneous definition was not cured by the trial judge's other statements in context. (*See* ECF No. 89 at 19–20.) Petitioner further argues that

the Magistrate Judge's citation to *Sigmon v. State* is inapposite because the court in that case considered "whether a similar instruction improperly differentiated between statutory and non-statutory mitigating circumstances in a way that made the jury think that statutory mitigation should carry more weight." (*Id.* at 20.)

With respect, while it is true that the issue raised in *Sigmon* was phrased in slightly different fashion—namely, whether "trial counsel was ineffective for failing to object to the trial court's instructions on non-statutory mitigating circumstances *because the charge disparaged the legitimacy of this type of evidence*," 742 S.E.2d at 401 (emphasis added)—the language of the jury charge was nearly identical to the charge at issue here, and the South Carolina Supreme Court's analysis was right on point to the arguments that Petitioner has raised in support of his claim. *See id.* ("Sigmon argues the instructions *improperly narrowed the evidence the jury would consider in mitigation to factors relating specifically to the crime*, to the exclusion of other evidence presented, such as Sigmon's adaptability to prison life, acceptance of responsibility for his actions, and remorse for the crimes." (emphasis added)). Moreover, the *Sigmon* court reasoned that the language challenged by the defendant should not be analyzed in isolation, but in the context of the jury charge as a whole, which instructed the jury that they could consider:

> whether the defendant should be sentenced to life imprisonment for any reason, or for no reason at all. . . . In other words you may choose

> a sentence of life imprisonment if you find a statutory or non-statutory mitigating circumstance, or you may choose a sentence of life imprisonment as an act of mercy.

Id. at 401–02. Again, this contextual language is substantially similar to the trial judge's instruction in the instant case. The Court finds that the *Sigmon* decision is highly relevant to the viability of Petitioner's challenge to the jury charge in this case, and militates toward a finding that trial counsel was not ineffective for failing to object. Accordingly, the Court overrules Petitioner's objections, adopts the Report as to Ground Nine, and grants summary judgment as to Ground Nine.

CONCLUSION

In light of the foregoing analysis, the Court overrules Petitioner's objections with respect to Grounds Four through Nine of the amended petition, **ACCEPTS** the Magistrate Judge's Report as to Grounds Four through Nine, sustains Petitioner's objections with respect to Grounds One and Two of the amended petition, and **REJECTS** the Report as to Grounds One and Two. (ECF No. 86.) Grounds Three and Ten are **DISMISSED** as moot, having been expressly abandoned by Petitioner. Therefore, the Court **GRANTS** Respondents' motion for summary judgment as to Grounds Four through Nine, and **DENIES** the motion as to Grounds One and Two. (ECF No. 73.) Consequently, the Court **GRANTS** Petitioner's amended petition for writ of habeas corpus as to Grounds One and Two (ECF No. 65), and **VACATES** his death sentence. The Court suggests that a

resentencing trial in State court occur within sixty (60) days or as soon as practical thereafter.

IT IS SO ORDERED.

/s/ Bruce Howe Hendricks
United States District Judge

March 19, 2019
Charleston, South Carolina

APPENDIX G

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

07-CP-26-5062

[Filed: November 16, 2010]

JAMES NATHANEIL BRYANT, III	)
Applicant,	)
v.	)
STATE OF SOUTH CAROLINA	)
	)
Respondent	)
	)

ORDER OF DISMISSAL WITH PREJUDICE

This matter is before this Court on the application for post-conviction relief (APCR) filed by James Nathaniel Bryant, III (Applicant), who was convicted of murder and armed robbery. For the following reasons, this Court denies and dismisses the application with prejudice.

I

PROCEDURAL HISTORY

In December of 2000, the Hon-y County Grand Jury indicted Applicant for murder and armed robbery (00-

GS-26-3326). Applicant was initially convicted and sentenced to death in June of 2001, but the South Carolina Supreme Court reversed the guilt and sentencing phases of that trial. State v. Bryant, 354 S.C. 390, 581 S.E.2d 157 (2003).

Jury selection began before the Honorable Paula H. Thomas on September 29th, 2004. Paul Archer and Robert Johnston represented Applicant at this jury trial, and the attorney General's office appointed former First Circuit Solicitor Walter Bailey to represent the State. On October 5, 2004 the jury convicted Applicant on both charges.

The sentencing phase of his trial began on October 7th, 2004, and Judge Thomas submitted the following aggravating factors to the jury: 1) the murder was committed while in the commission of a robbery while armed with a deadly weapon; 2) the murder was committed while in the commission of larceny with use of a deadly weapon; 3) the murder was committed while in the commission of physical torture; and 4) the murder of a local law enforcement officer during or because of the performance of his official duties. On October 9th, 2004 the jury recommended the death penalty, and on that same day, Judge Thomas sentenced Applicant to death.

Applicant filed and served a timely Notice of Appeal with the South Carolina Supreme Court. Assistant Appellate Defender Robert M. Dudek represented Applicant during his direct appeal, and continues to represent him before this Court. On October 3, 2006, Dudek filed a Final Brief of Appellant with the South Carolina Supreme Court. The State, through Assistant

Attorney General S. Creighton Waters, filed its Final Brief of Respondent on October 19th, 2006.

The South Carolina Supreme Court issued an opinion affirming the convictions and death sentence on February 27th, 2007. State v. Bryant, 642 S.E. 2d 582 (S.C. 2007). The Court denied a petition for rehearing on April 4th, 2007.

Applicant was granted a stay of execution to file a petition for writ of certiorari with the United States Supreme Court. Applicant filed his certiorari petition on July 2, 2007, and on October 1, 2007 the United States Supreme Court denied the certiorari petition.

While the certiorari petition before the United States Supreme Court was pending, Applicant filed this APCR. On October 15th, 2007 Applicant filed with the South Carolina Supreme Court a Motion for Appointment of PCR Judge and Stay of Execution. On October 31, 2007 the South Carolina Supreme Court granted the stay of execution and appointed this Court to preside over the PCR action. On November 15th, 2007 this court appointed Bentz Kirby and Donna Taylor to represent Applicant. Ultimately, Robert E. Lominack and Diana Holt took over the representation from Kirby and Taylor.

Applicant filed his Second Amended Application for Post-Conviction Relief, which was the subject of the evidentiary hearing on this case that took place on January 25, 2010. This Court has heard the testimony, reviewed the record, and reviewed the post-trial briefing of counsel, and rules as follows.

II

GROUNDS FOR RELIEF

Pursuant to the familiar doctrine in Strickland v. Washington, 468 U.S. 668 (1984), Applicant must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598 (4th Cir. 1996).

In addition to deficient performance, Applicant must also establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. 668, 694 (1984); See Also Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998) (holding that the prejudice prong in a capital sentencing proceeding is established when there is a reasonable probability that, but for the counsel's errors, the sentencer would have concluded the circumstances did not warrant death.)

A PCR Applicant has the burden of proving his claims for relief by a preponderance of the evidence. Jeter v. State, 308 S.C. 230, 417 S.E. 2d 594 (1992).

A. Use of Proposed Order

As a preliminary matter, this Court must address concerns raised by Applicant as to the proposed orders. Due to the use of the term "proposed order" in an email to the parties, the State submitted a proposed order

while the Applicant submitted a post-trial brief. The Applicant objected by letter and the State responded by letter, explaining the miscommunication and pointing out that the substantive text would not change much regardless of format. This Court agrees, and reviewed the States submission as if it were a post-trial brief. The applicant objected to this Court signing a proposed order prepared by the State. This Court granted applicant's motion for reconsideration and drafted this order.

B. Grounds for Relief

a. *Applicant was denied his right to Due Process and an impartial and competent jury as guaranteed by the Fifth and Sixth Amendment to the United States Constitution and South Carolina law.*

Applicant contends that one juror, Shirley Jones, had substantial hearing impairment and the judge was required to remove the juror.

This Court finds that Juror Jones was qualified to serve on the jury without objection. Juror Jones testified she heard all testimony during the guilty phase and was able to compensate for her hearing deficiencies. The trial court also took specific measures to ensure that Juror Jones was able to hear the testimony. Additionally, South Carolina Courts have held that a person who has difficulty hearing is not per se disqualified from serving as a juror. Safran v. Meyer, 103 S.C. 356, 364, 88 S.E. 3, 4 (1916).

This Court finds there was not a sufficient showing that juror Jones missed material testimony at trial or

that her hearing difficulty was of such degree as to indicate she missed material. Therefore, this due process claim is denied.

b. ***Applicants right, as guaranteed by the Fifth, Sixth, and Eighth Amendments to the United States Constitution and South Carolina law, to Due Process and a fair trial free from arbitrary, capricious imposition of the death penalty, was violated by the introduction of irrelevant and prejudicial evidence regarding the conditions of confinement in the South Carolina Department of Corrections.***

During the sentencing phase the Defense called social worker Lorita Whitaker, who was qualified as an expert in clinical social work and human behavior in prisons. Defense counsel requested Whitaker describe prison life for an average prisoner. Whitaker described the dangers of prison life, the inability of inmates to touch loved ones, and the details of everyday life in prison. Whitaker also testified as to the psychological effects of prison, the harshness of prison guards, and the general lack of privacy. Defense later asked James Aiken, a corrections expert, to describe what prison was like for someone serving life without parole.

This Court finds that Applicant's Due Process claim is without merit. The defense clearly elected to raise the issue of confinement conditions first, and on the whole benefited from the evidence. In contrast, the State only moderately responded, which was permissible because the defense opened the door. It is difficult to find something arbitrary under the Eighth Amendment or a violation of due process where the

defense first took on the issue, had free reign, and introduced a far greater amount of evidence on the subject than the limited State response.

Furthermore, the South Carolina Supreme Court has already considered the fact that this case had evidence of prison conditions, and affirmed the sentencing anyway, stating "after reviewing the entire record, we conclude that the sentence in this case was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of similar cases illustrates that imposing the death penalty would be neither excessive nor disproportionate in light of the crime and the defendant." State v. Bryant, 372 S.C. 305, 318, 642 S.E. 2d. 582, 589 (2007).

c. *Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law at the guilt-or-innocence phase of his trial*.

The Applicant claims that trial counsel was deficient by not requesting Juror Jones be removed due to a hearing impairment that was discovered during the trial.

In Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, the United States Supreme Court stated,

> "A fair assessment of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from

> counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance: that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Counsel's decision not to request Juror Jones excused was a strategic decision. Counsel explained that he did not excuse Juror Jones because he did not like the alternate jurors who would replace Juror Jones. Counsel also stated he did not approve of the selection process because it was conducted as a paper strike. Overall, Applicant failed to show counsel's reasons for keeping Juror Jones was not a valid, strategic decision.

This Court finds that the Applicant has failed to establish that trial counsel was ineffective in not requesting that Juror Jones be removed during either the guilt or innocence phase of this trial.

d. ***Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law at the sentencing phase of his trial.***

1) Applicant again states trial counsel was ineffective in failing to request Juror Jones be removed because of her hearing disability, however this attempt is aimed at the sentencing phase.

Due to reasons stated above, this Court finds Applicant failed to establish that trial counsel was ineffective in not requesting Juror Jones be removed during the sentencing phase.

2) Applicant next contends trial counsel introduced irrelevant and prejudicial evidence regarding the conditions of confinement in the South Carolina Department of Corrections, and failed to object to certain irrelevant testimony elicited by the state.

This Court finds that Applicant's counsel was not deficient in raising issues of conditions of confinement. This trial occurred after Kelly v. South Carolina, 534 U.S. 246 (2002), but before State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005), State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007), and prior to its own direct appeal State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007). The Kelly decision caused the state General Assembly to pass a law requiring life without parole to be charged in all death penalty cases. The Bowman decision held that prison conditions are not relevant to the question of whether a defendant should be sentenced to death, and are inappropriate in the penalty phase of a capital case. After Bowman, South Carolina Supreme Court held in Burkhart that it was reversible error for the solicitor to introduce the conditions evidence.

As noted previously, the Bowman and Burkhart decisions were not law at the time of this trial. It is clear that Strickland does not require counsel to anticipate changes in the developments in the law, and thus counsel is not required to have foreseen the State Supreme Court would subsequently call conditions

evidence arbitrary. Therefore, this Court finds that given the time period and the then existing law, the trial counsel was not deficient in presenting conditions evidence.

Applicant further contends that trial counsel was deficient in falling to object to testimony elicited by the state that focused on the jury's attention on irrelevant information i.e. the conditions of the prison. Given the state of the law when this trial took place, applicant's counsel was correct that they would not have had a valid objection to the solicitor's limited responsive questioning. See State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) (holding that once the defense entered evidence about prison conditions, the State was allowed to submit evidence that "life imprisonment was not the total abyss which the defendant portrayed it to be.")

In light of the applicable law at the time of this trial, this Court finds that the trial counsel was not deficient in failing to object to the State's eliciting information about prison conditions.

3) Applicant next contends that trial counsel erroneously believed that discovery rules required defense experts to draft a report, which were then given to the prosecution.

Applicant fails to show that counsel was deficient by providing the expert reports to the State. State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007) held that the trial court could not require experts for the defense to produce reports under Rule 5 of SCRCP. But, the opinion also noted Rule 5 requires reports that were created for the defense to be provided to the State.

Here, because the defense was in possession of reports from their experts, he was obligated under Rule 5 to provide them to the State. Furthermore, Applicant fails to establish he was prejudiced as a result of counsel requesting the reports and providing them to the prosecution. Applicant has not shown the result of the trial would have been different but for counsel providing the solicitor with the expert's report. Additionally, Applicant failed to introduce the report into evidence in this proceeding, thus it is unclear what information the report contained that would have been useful to the solicitor and prejudiced the Applicant. Therefore, Applicant fails to show trial counsel was ineffective.

4) Applicant next contends the trial counsel failed to object to the use of both larceny and robbery as aggravating factors.

In State v. Elkins, 312 S.C. 541, 436 S.E.2d 178 (1993), the South Carolina Supreme Court held that it was not an error for the trial court to submit both larceny and armed robbery as aggravating circumstances during the sentencing phase of the trial. Thus, Applicant failed to establish trial counsel was deficient. Applicant has also failed to establish he was prejudiced as a result of trial counsel not objecting to the use of both larceny and robbery as aggravating. Even if it was improper for the jury to consider robbery and larceny, the jury found beyond a reasonable doubt two other aggravating circumstances: the murder was convicted while in the commission of physical torture, and the murder was of a law enforcement officer during or because of the performance of his official duties. Any

error by Applicants counsel in failing to object to the use of larceny and robbery was harmless. Therefore, this Court finds the trial counsel was not ineffective in failing to object to the use of larceny and robbery as aggravating factors.

5) Applicant next contends trial counsel failed to object when the state elicited information about allegations of a planned escape by a death row inmate.

Trial counsel was not deficient in failing to object to statements made by a witness about an alleged planned escape that did not implicate the Applicant. Trial counsel reasoned there was no harm because the witness quickly explained the escape evidence did not implicate Applicant. Furthermore, there was no prejudice in failing to object to information about the planned escape because of the egregious nature of this offense. Therefore, this Court finds the trial counsel was not ineffective in failing to object to testimony about an alleged planned escape not implicating the Applicant.

6) Applicant next contends that trial counsel presented a theory of defense in the guilt-or-innocence phase that was supported by no evidence, and which was entirely inconsistent with the theory of the sentencing phase defense.

This Court finds that Applicant has failed to establish that trial counsel presented inconsistent theories for the guilt-or-innocence phase and the sentencing phase. Based on counsel's testimony and review of the trial record, it is clear that counsel's overall strategy for the guilt phase was to hold the

State to its Burden of proof. The defense strategy at the sentencing phase was to show the applicant was remorseful, would adapt well to prison, had become a religious man, had a good family, and a life sentence would be sufficient to punish him. See Glass v. State, 227 S.W.3d 463, 473 (Mo.2007) (finding counsel's strategy was reasonable in arguing that the state had not presented evidence beyond a reasonable doubt to establish that defendant had deliberated prior to killing during guilt phase, and in the sentencing phase argued defendant was remorseful and that this one act was out of character.)

Because the two strategies were not inconsistent, the Applicant also fails to show that he was prejudiced by the interaction between the two strategies. Furthermore, even if the two strategies were inconsistent, Applicant fails to show that but for counsel's error, there was reasonable probability that the outcome at trial would have been different.

7) Applicant next contends that trial counsel failed to object to victim impact testimony that exceeded the bounds of Payne v. Tennessee, 501 U.S. 808 (1991).

Trial counsel testified that as a general rule they are hesitant to interfere with victim impact witnesses for fear of offending the jury. It cannot be said that counsel was unreasonable in deciding that any risks in offending the jury from interrupting the testimony of a brother officer outweighed anything that might be gained in limiting the officer's testimony on one small point or another. Therefore, there was no deficiency.

In Payne the United States Supreme Court held that victim impact evidence is relevant for a jury to meaningfully assess the defendant's moral culpability and blameworthiness and is only inadmissible where it is so unduly prejudicial that it renders the trial fundamentally unfair. Thus, the evidence in question was admissible as a matter of law, and any objection was ineffective.

Furthermore, the Applicant failed to show that the sentencer would change the sentence of death but for the victim impact testimony.

8) The Applicant next contends that trial counsel presented testimony of an expert social worker regarding the conditions of confinement in the South Carolina Department of Corrections.

The issue the Applicant brings to the attention at the PCR Hearing is whether counsel was ineffective in using Whitaker witness for conditions of confinement when she had never been in a South Carolina prison. This court finds that counsel was not ineffective

Ms. Whitaker earned a master's in social work and presides as the mental health coordinator at Georgia County Detention Center responsible for mental health assessment of all inmates. Furthermore, fellow defense attorneys who previously presented Ms. Whitaker's testimony in a capital trial recommended her to counsel. Therefore, trial counsel was not deficient in presenting testimony of Ms. Whitaker.

There was also no prejudice caused to Applicant in using Ms. Whitaker as an expert witness. Whitaker testified to prisons in general, and did not undermine

her testimony as to Applicant's family life and social history.

For the above stated reasons, this Court finds that Applicant was not denied effective assistance of counsel.

e. *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was denied as a result of appellate counsel's failure to raise on direct appeal the introduction of testimony regarding the conditions of confinement which injected an arbitrary factor into the trial proceeding.*

Applicant finally contends that his appellate counsel was ineffective in failing to assert on direct appeal that the State's introduction of evidence of conditions of confinement was an arbitrary factor. For the following reasons, this Court finds that appellate counsel was not ineffective in failing to assert the introduction of evidence of conditions of confinement was an arbitrary factor.

As previously noted the Plath decision was rendered in 1984 and disapproved of evidence of conditions of confinement, but did not forbid the introduction of such evidence. In 2002 the United States Supreme Court issued Kelly v. South Carolina, which essentially required life without parole to be charged in every capital case. The Applicant's trial occurred in 2004, and his appellate brief filed on November 9th 2005. It was not until January 8, 2007 that three members of the

South Carolina Supreme Court first referred to conditions of confinement as arbitrary factor in violation of S.C. Code Ann. 16-3-25(C)(1)(2003).

Appellate counsel stated the arbitrary factor language in S.C. Code Ann. 16-3-25(C)(1)(2003) is part of a mandatory review that the South Carolina Supreme Court does on its own in death penalty cases. Furthermore, as a general rule, an issue cannot be argued on appeal unless it was raised to and ruled upon by the trial court. Thus appellate counsel cannot be found deficient for failing to assert an unpreserved issue. Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991). Finally, as previously stated, counsel is not required to anticipate changes or developments in the law, and no case at the time counsel filed his brief had found conditions evidence to be an arbitrary factor under the statute.

Moreover, the fact that the South Carolina Supreme Court did not reverse Applicant's sentence shows they thought the defense as a whole received more benefit from the evidence than the State.

III

For the foregoing reasons, Applicant's APCR is **DENIED AND DISMISSED WITH PREJUDICE.** Applicant is hereby advised that if he wishes to appeal this Order, a notice of intent to appeal must be filed within thirty (30) days of the receipt of this Order. Applicant's attention is also directed to Rules 203 and 243 of the South Carolina Appellate Court Rules for appropriate procedures to follow after notice of intent to appeal has been timely filed.

Therefore it is **ORDERED** that:

1) The application for post-conviction relief is denied and dismissed with prejudice.

2) Applicant is remanded to the custody of the State of South Carolina.

This 15 day of Nov, 2010,

/s/ Michael Nettles
Michael Nettles
Presiding Judge
Twelfth Judicial Circuit

[illegible], South Carolina

APPENDIX H

State v. Bryant Transcript Excerpt

[Filed December 20, 2017]

[pp. 1063-1065]

that if you want a night cap that is available at your own cost. The rest will be paid for.

Have a very good evening. We will see you here in the morning. We're going to begin the trial of this case -- are you able to have witnesses here and be ready to go at nine o'clock in the morning?

MR. BAILEY: Yes, ma'am.

THE COURT: Okay, we will have you back here at nine o'clock in the morning. We will see you then. Have a good evening. You're free to go, and let's everybody hold tight for just a moment. I've got to talk to the attorneys about something.

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: All right, I want you to know that I've got some concerns about the one juror who is lip reading. I want to be sure -- I have concerns that it was not brought to light that she really needed to lip read when we were doing the individual voir dire. She indicated she had a hearing problem but said it was taken care of, that she, in fact, could hear, but now I'm understanding that she, in fact, lip reads. Now, that

would not preclude her from serving. My concern is it hasn't come to our attention until recently and I've asked her about whether she has missed anything, but I'm going to be very mindful of that and ask that you all be very mindful of that as well. In other words, when you're asking questions sometimes you're going to have to be looking over at that jury.

I'm going to periodically make sure that all are able to hear and watch that situation as best I can. I'm also going to hear from the SLED agents and those to see if there is -- if they get any indication that she's really having difficulty even lip reading, and then if that is the case then we will address that. Hopefully that will not be the case and simply being aware of it and looking towards her and making sure that she's able to hear everything will work and that will be sufficient. I just wanted to raise that issue because I want to let you know that when they went to pick her up there was a couple of things. She didn't hear me say that she was to pack her bags for ten days. So, she did not pack her bags for ten days. So, she missed that, although she did hear to be here today and to be here at ten o'clock, and she did come, but she came with, I think, an aunt and a niece and without bags packed. So, she is going to have to be taken to get her bags packed. So, we've got to watch this situation pretty closely. Be aware that I'm aware of it. Anything that I hear that is reported through this court you will become, you will be made aware of it immediately if I think it's a concern about her ability to serve. We're going to try to adapt as much as we can to be sure that she's able to.

Anything from the State at this time?

MR. BAILEY: No, ma'am.

THE COURT: Anything from the Defense?

MR. ARCHER: No, ma'am.

THE COURT: All right, very good. Have a good evening. We'll see you back here at nine o'clock in the morning. No later than nine. That means I really would like people in place a little sooner than that so we can start at that time. Have a good evening, according to it's Juror Number 342, Shirley Jones, 342.

***** OFF THE RECORD *****

(On the record, Tuesday, October 5, 2004.)

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: We have all our jurors in place. Is there anything from the State?

MR. BAILEY: Nothing from the State, Your Honor.

THE COURT: Anything from the Defendant?

MR. ARCHER: No, ma'am.

THE COURT: All right, we are ready for them.

(Whereupon, the following takes place in the presence of the jury.)

THE COURT: Welcome back, ladies and gentlemen of the jury. I remind you that we are in the phase of the case

---

APPENDIX I

State v. Bryant Transcript Excerpt: Juror 342 Questioned

[Filed December 20, 2017]

[pp. 2043-2047]

courtroom)

THE COURT Counsel, if I could see you back in chambers we're going to have to be at ease at this point, probably about a 10-minute break I'll try to make this call and see what we can do, but I want to do it in the presence of the -- of counsel Let's go back

***** OFF THE RECORD *****

(On the record)

(Whereupon, the following takes place outside the presence of the jury)

THE COURT All right, let's get everybody in place I'll note for the record that I had made an attempt to call Shirley Jones, the juror's doctor I was unsuccessful He is not in town Spoke with another doctor, but he is not familiar with her and nor does he have access to her chart to assist in that regard There has been some conversation in chambers though about Ms Jones and her ability to hear There's been some indication from both the State and from the Defendant that a belief that all of the jurors can be somewhat distracted at some time and no indication that she has not been able

to hear the testimony The indication has been, in fact, that she has been hearing most and has turned away and only missed bits, but she has admitted to missing some

I'll be glad to hear from both the State and the Defendant at this time

MR BAILEY Your Honor, although I did on behalf of the State express some concern about Ms Jones's hearing problems, the potential problems, in reflecting on this, you know, I started thinking about it and I don't think any, any juror is going to have the capability of getting a hundred percent of the testimony You're going to have a mix of people that are young and old, some more intelligent than others Some might have attention deficit problems, and I would note that even a blind juror is qualified to serve in this state, and they obviously are not going to be able to get the same read from a, from a witness that the other jurors could So, I don't think a hundred percent ability to be, you know, healthy and a hundred percent alert is a qualification per se to serve as a juror I think Ms Jones is qualified She's heard most of what was going on It would be better if she could hear more, but again, I mean, I think she meets the statutory qualifications as a juror in your discretion Your Honor, you have qualified her as a juror, and I'm satisfied at this point that she is able to follow the testimony, was able to properly deliberate and would withdraw my motion to have her excused as an alternate

THE COURT All right, anything from the Defense?

MR ARCHER Yes, Your Honor, I agree one hundred percent with Mr Bailey and I also went over all of the ramifications one way or the other with my client and he is perfectly satisfied that she stays on the jury

THE COURT Okay, well, let me ask you this question, are you satisfied that she was a juror in the guilt phase and one of those jurors who unanimously agreed to find him guilty? Are you satisfied that she heard sufficiently ---

MR ARCHER Yes

THE COURT --- at that phase?

MR ARCHER I think she heard and I also agreed with him, actually I happened to bring it up the fact that if you brought all 11 of them out they probably would miss something somewhere along the line, too

THE COURT Okay, and are you satisfied with her remaining in on the penalty phase as well?

MR ARCHER Yes, ma'am

THE COURT All right

MR ARCHER And have conferred with my client and he agrees with that and maybe you would like to ask him couple of questions

THE COURT Mr Bryant, is that correct what your attorney just said?

MR BRYANT Yes, Your Honor

THE COURT You're satisfied with that juror having served in the guilt phase and having been one of those who found you guilty of murder and of armed robbery in this matter?

MR BRYANT Yes, Your Honor

THE COURT All right, and you're satisfied with her continued service at the penalty phase?

MR BRYANT Yes, Your Honor, I am

THE COURT All right, very well Please, please be seated

I'm going to take this opportunity to let you know, too, Mr Bryant, that we have a statute 16-328 that basically says in any criminal trial where the maximum penalty is death and in a separate sentencing proceeding the Defendant and his counsel have the right to make the last argument Do you understand that?

MR BRYANT Yes, Your Honor

THE COURT Now, I advise you now of that right Have you discussed that right with your attorneys?

MR BRYANT Yes, I have

THE COURT All right, now, I'm going to note for the record then I do find that he has been advised of his rights and is it, is it your desire to exercise that right?

MR BRYANT Yes, it is my desire to do so

THE COURT All right, all right, and that he's made his decision knowingly and intelligently and freely and voluntarily

All right, very well Anything further from the State?

MR BAILEY Nothing, Your Honor

THE COURT Anything further from the Defense ---

MR JOHNSTON No, ma'am

THE COURT --- prior to bringing our jury back out? One thing I would like to do is bring Ms Shirley Jones out Is she okay?

OFFICER Yes, ma'am

THE COURT All right, if we can just bring her out I'm going to give her her card back and ask her to remain with us I'm scratching through the cell phone number I've received for the doctor, though

(Whereupon, Juror Number 342, Shirley Jones, enters courtroom)

THE COURT Ms Jones, if you'd come forward, please I'm going to give you your card back and I thank you for -- are you okay?

MS JONES I'm fine

THE COURT Okay, this is your card back You're going to stay with us, all right? Now, if you can't hear for any reason you remember the signal If you'll just raise one finger if you think you've missed something

and we can have it repeated, all right? Okay, very good
You may go back