STATE OF NORTH CAROLINA
COUNTY OF MONTGOMERY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
Nos. 99 CRS 3818, 3820

STATE OF NORTH CAROLINA

v.

SCOTT DAVID ALLEN
Defendant.

ORDER GRANTING STATE'S MOTION TO DISMISS CLAIMS 7, 8, AND 9 OF DEFENDANT'S MOTION FOR APPROPRIATE RELEF AND SUPPLEMENTAL MOTION FOR APPROPRIATE RELIEF

THIS MATTER came before the undersigned Senior Resident Superior Court Judge on February 12, 2018 in the Superior Court of Montgomery County for an evidentiary hearing on Claim 7 of Defendant's Motion for Appropriate Relief ("MAR") and Claims 8 and 9 of Defendant's MAR and Supplemental Motion for Appropriate Relief ("SMAR"). Defendant Scott David Allen ("Defendant") was present and represented by his appointed counsel, Mr. Michael L. Unti and Ms. Margaret C. Lumsden, and the State was represented by Assistant Attorney General Nicholaos G. Vlahos. Upon review of the court file, transcripts, and record in this case, as well as the evidence presented at the evidentiary hearing and the arguments of counsel submitted in post-hearing briefs, the Court makes the following findings of fact and conclusions of law:

RELEVANT PROCEDURAL HISTORY

1. On January 24, 2000, Defendant was indicted for the first-degree murder of Christopher Gailey ("Gailey"), felonious larceny, and felonious possession of stolen goods. Defendant was tried capitally before a jury at the October 27, 2003 Criminal Session of Superior

Court, Montgomery County. On November 13, 2003, the jury found Defendant guilty of first-degree murder, felonious larceny, and felonious possession of stolen goods. After a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction, and the trial court entered judgment in accordance with that recommendation on November 18, 2003. Defendant's trial counsel, Mr. Carl W. Atkinson, Jr. ("Mr. Atkinson") and Mr. C. Pierre Oldham ("Mr. Oldham"), represented Defendant at the capital sentencing proceeding.

2. Defendant gave notice of appeal to the Supreme Court of North Carolina. By unanimous decision entered March 3, 2006, the Supreme Court affirmed the judgment below, finding that Defendant received a fair trial free of reversible error in both the guilt phase and the sentencing phase, and that Defendant's sentence of death was not disproportionate. State v. Allen, 360 N.C. 297, 626 S.E.2d 271, cert. denied, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

3. After his conviction and sentence became final on direct appeal, Defendant filed his pending MAR with this Court on or about July 2, 2007, raising ten claims for relief. On or about September 17, 2013, Defendant filed his pending SMAR with this Court, supplementing MAR Claims 1, 2, 3, 8, and 9 and adding two claims, for a total of twelve claims for relief.

4. On or about September 30, 2014, the State filed an answer and motion for summary denial. Defendant filed a response to the State's motion for summary denial on or about January 26, 2015. The State filed a reply to Defendant's response on or about February 24, 2015. Defendant filed a "Memorandum in Response to State's Oral Argument" at an April 4, 2016 scheduling hearing on or about May 9, 2016.

5. On August 18, 2016, after thorough review of the record and the post-conviction pleadings, this Court entered an order summarily dismissing Claims 1, 2, 4, 5, 6, 10, 11, and 12 of Defendant's MAR and SMAR. (08/18/16 Order Dismissing Certain Claims of Defendant's MAR and SMAR) In that order, this Court also summarily dismissed Claim 3 of Defendant's MAR and all subparts of Claim 3 of Defendant's SMAR except for Claims 3H, 3J, 3K, and that portion of 3I that related to the in camera examination of the sealed mental health and substance abuse records of State's trial witness Vanessa Smith ("Smith"). (08/18/16 Order Dismissing Certain Claims of Defendant's MAR and SMAR pp. 28, 45-46)

6. By separate order, this Court reserved the right to conduct a limited evidentiary hearing to determine if Defendant suffered any sufficient prejudice to warrant a full evidentiary hearing on SMAR Claims 3H, 3J, 3K, and that portion of 3I that related to the in camera examination of Smith's sealed mental health and substance abuse records. (08/22/16 Order on Four Subparts of Claim 3 of Defendant's SMAR for Which Court Has Reserved Ruling) After determining that such hearing was necessary, this Court conducted a limited evidentiary hearing on August 25, 2017 and entered an order on January 4, 2018 concluding, inter alia, that a further evidentiary hearing on SMAR Claims 3H, 3J, 3K, and that portion of 3I that relates to the in camera examination of Smith's sealed mental health and substance abuse records was unnecessary and that Defendant failed to establish any sufficient prejudice to warrant a full evidentiary hearing on those claims. (01/04/18 Order Granting State's Motion to Dismiss Claims 3H, 3J, 3K and a portion of 3I of Defendant's SMAR) Therefore, this Court dismissed those claims in its January 4, 2018 order.

7. By another separate order, this Court granted Defendant an evidentiary hearing on Claims 7, 8, and 9 of his MAR and SMAR, which are all claims alleging ineffective assistance of counsel regarding the sentencing phase of Defendant's trial. (08/18/16 Order on State's Summary Denial Motion on Claims 7, 8, and 9) That evidentiary began on February 12, 2018, concluded on February 15, 2018, and is the subject of this order.

MAR AND SMAR CLAIMS REMAINING FOR ADJUDICATION

1. Defendant contends he received ineffective assistance of counsel regarding his capital sentencing proceeding. Defendant claims his counsel was ineffective by: (1) failing to call a mental health expert to explain the significance of lay testimony and other matters placed before the jury at sentencing; (2) failing to investigate and present available mitigation evidence; and (3) failing to adequately prepare witnesses to testify or otherwise prepare for sentencing.

2. As phrased by Defendant, his claims are:

CLAIM 7: INEFFECTIVE ASSISTANCE OF COUNSEL DURING SENTENCING: FAILURE TO CALL A MENTAL HEALTH EXPERT TO EXPLAIN THE SIGINFICANCE OF LAY TESTIMONY DURING THE SENTENCING PHASE AND OTHER MATTERS PLACED BEFORE THE JURY. (MAR pp. 77-86)

CLAIM 8: INEFFECTIVE ASSISTANCE OF COUNSEL IN THE SENTENCING PHASE: FAILURE TO INVESTIGATE AND PRESENT AVAILABLE MITIGATION EVIDENCE. (MAR pp. 86-104; SMAR pp. 42-47)

CLAIM 9: INEFFECTIVE ASSISTANCE OF COUNSEL IN THE SENTENCING PHASE: FAILURE TO ADEQUATELY PREPARE WITNESSES TO TESTIFY OR OTHERWISE PERPARE FOR SENTENCING. (MAR pp. 104-118; SMAR pp. 47-51)

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAINING CLAIMS

A. Findings of Fact Regarding Claim 7

1. In this claim, Defendant contends trial counsel were ineffective for failing to call a mental health expert to explain the significance of lay witness testimony and other matters placed before the jury at sentencing.

2. In support, Defendant argues a mental health expert could have (1) explained Defendant's "unusual affect" and tattoos to the jury (2) explained the significance of testimony by Defendant's family members and how the traumatic events in Defendant's life affected his psychological makeup; (3) presented an expert opinion that Defendant was under the influence of a mental or emotional disturbance at the time of the crime; (4) presented evidence that Defendant was an emotionally disturbed and mentally impaired but normally non-violent person; and (5) presented evidence that Defendant was less culpable because of his disadvantaged background or emotional and mental problems.

3. At Defendant's capital sentencing proceeding, trial counsel called 10 witnesses to testify in support of the 1 statutory and 18 non-statutory mitigating circumstances presented to the trial court in a request for jury instructions. (Def. Ex. 14) The witnesses trial counsel called were: (1) Sherry Allen, Defendant's mother (St. Ex. 51); (2) Francis Parker, a teaching assistant at Millingport Elementary School where Defendant attended the third grade (St. Ex. 52); (3) Gladys Barclay, Defendant's maternal grandmother (St. Ex. 53); (4) Vera Coble, Defendant's maternal aunt (St. Ex. 54); (5) Robert Byrd, Defendant's maternal uncle (St. Ex. 55); (6) Alice Blaylock ("Blaylock"), Defendant's paternal aunt (St. Ex. 56); (7) Lt. Kenny Allen, Defendant's older brother who was with the Troy Police Department at the time of trial (St. Ex. 57); (8) Benny Allen,

Defendant's father (St. Ex. 58); (9) Jordan Allen, Defendant's daughter who was eight years old at the time of trial (St. Ex. 59); and (10) James Aiken, a corrections and criminal classifications expert (St. Ex. 60).

4. Through the above-listed witnesses, trial counsel presented substantial evidence in support of the mitigating circumstances presented to the trial court, including evidence of, inter alia: (1) Defendant's family history and background; (2) Defendant's relationships with his father, mother, brother, daughter, and other family members; (3) relevant traumatic events from Defendant's childhood to establish sympathy for Defendant; (4) the fact that Defendant's father had a terminal illness and might not be around to support Defendant's mother during the execution of Defendant's sentence; and (5) a corrections expert's opinion that Defendant could be housed and managed in a prison setting for the remainder of his life without causing undue risk of harm to prison staff, inmates, or the general community. Also, trial counsel introduced several photographs of Defendant as a child and pre-teenager (including one showing Defendant with his maternal grandfather), a copy of a drawing Defendant made as a child, and a Mother's Day card Defendant made as a child, to humanize Defendant without delving into his character and to show Defendant's strong connection to his family. The Court finds none of the above-listed witnesses testified Defendant was emotionally disturbed, mentally impaired, had emotional or mental problems, or came from a disadvantaged background. To the contrary, Defendant's family members testified he came from a loving family, had the support of his parents, grandparents and extended family, and, in spite of his parents' frequent separations, grew up in the same home as his brother who became a high ranking member of local law enforcement.

5. Trial counsel did not call a mental health expert to testify at sentencing, did not question Defendant's mitigation witnesses about Defendant's tattoos, and did not draw the jury's attention to Defendant's tattoos in any way.

6. Based on the mitigation evidence presented, the jury found no statutory mitigating circumstances and two non-statutory mitigating circumstances: (1) Defendant was deeply affected by the death of his grandfather; and (2) Defendant's death would have a detrimental impact on his mother, father, daughter, and other family members. (Def. Ex. 13) The jury also unanimously found the following aggravating circumstances beyond a reasonable doubt from the evidence presented at trial and sentencing: (1) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (2) the murder was committed for pecuniary gain; and (3) the murder was especially heinous, atrocious, or cruel. (Def. Ex. 13) The jury found unanimously and beyond a reasonable doubt that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to impose a sentence of death; therefore, the jury returned a binding recommendation of death. The Court finds the aggravating circumstances were strongly supported by the evidence presented at trial including, inter alia, the eyewitness account of Vanessa Smith ("Smith") and Defendant's confession to Jeffrey Lynn Page ("Page") wherein Defendant admitted (1) he shot a man in the Uwharrie forest because Defendant thought the man would "rat him off" as an escapee from prison, (2) Defendant, heard the man groaning, threw rocks on the ground near the man, and waited to hear if the man fired his gun, and (3) Defendant stole the man's pickup truck and sold it to Page for $800.00. (St. Ex. 61)

7. At his February 12, 2018 evidentiary hearing, Defendant called witnesses to support this claim including (1) Mr. Oldham, Defendant's second chair trial counsel, (2) Dr. John Warren, III ("Dr. Warren"), Defendant's trial psychologist, and (3) Dr. Kristine Herfkens ("Dr. Herfkens"), Defendant's post-conviction neuropsychologist. The State called Mr. Atkinson, Defendant's first chair trial counsel.

8. Both Mr. Oldham and Mr. Atkinson recalled obtaining funds for a forensic psychologist and retaining Dr. Gary Hoover ("Dr. Hoover") to evaluate Defendant prior to trial. Mr. Oldham had worked with Dr. Hoover before and believed he was straightforward and had a good rapport with jurors. Trial counsel asked Dr. Hoover to evaluate Defendant and provide them with an expert opinion regarding any mental health defenses Defendant may have had to the charge of first-degree murder and to assist them in finding any mitigating circumstances Defendant's mental health and background could support. Mr. Atkinson identified a letter he wrote to Dr. Hoover on or about November 9, 2000 which informed Dr. Hoover that a Superior Court Judge had entered an order approving funds for his services. (St. Ex. 32)

9. On or about January 28, 2001, Dr. Hoover sent Mr. Oldham a memorandum informing him that Dr. Hoover had reviewed some of Defendant's mental health records, prison records, jail records, school records, and interviews conducted by Janet Herzog Adams ("Adams"), the mitigation investigator trial counsel retained to work on Defendant's case. (St. Ex. 4) The memorandum also indicated Dr. Hoover had completed preliminary psychometric testing of Defendant with the MMPI-2 and the MCMI-III and that, preliminarily, Defendant did not appear to have antisocial personality disorder. (St. Ex. 4)

10. Dr. Hoover continued his evaluation and, on or about December 3, 2001, Dr. Hoover sent a memorandum to trial counsel indicating he had completed his 5th clinical interview with Defendant, reviewed all the materials trial counsel had provided him, and was ready to prepare a final report. (St. Ex. 5) In the memorandum, Dr. Hoover concluded that he "did not find evidence of a mental disorder that could be offered regarding [Defendant's] mental status at the time of the offense." (St. Ex. 5 p. 1569) Additionally, Dr. Hoover "could not find evidence to corroborate any alleged impairment in [Defendant's] ability to conform his behavior to the requirements of law, or that [Defendant] was under the influence of a mental disorder or defect" at the time Gailey was killed. (St. Ex. 5 pp. 1569-70) Furthermore, after considering Defendant's background, from his early development to his adult life which included "antisocial behaviors recorded by others," and considering it "in regard to non-statutory factors for the jury to consider as mitigating evidence," Dr. Hoover found that evidence of Defendant's background and how it related to his antisocial behaviors as an adult "might not be particularly helpful." (St. Ex. 5 p. 1570) The Court finds Dr. Hoover's opinion on this last point was corroborated by Defendant's family members who testified at his capital sentencing proceeding. According to them, while Defendant's parents had marital problems and moved around from time to time, Defendant grew up in a loving family, had the support of both his parents who were gainfully employed for most of their lives, and had a sizable extended family who cared for Defendant and nurtured him while he was growing up. (St. Exs. 51, 53-59)

11. Unfortunately, Dr. Hoover developed a terminal illness and passed away before Defendant's trial. Both Mr. Oldham and Mr. Atkinson identified correspondence from their files indicating (1) the Office of Indigent Defense Services authorized trial counsel to employ Dr.

Warren to replace Dr. Hoover on or prior to April 4 2003, (2) Dr. Hoover passed away on April 11, 2003, and (3) Dr. Warren wanted copies of the psychological testing results Dr. Hoover completed so he would not have to repeat everything Dr. Hoover had done. (St. Exs. 1-3) The Court finds trial counsel acted reasonably in retaining Dr. Warren to replace Dr. Hoover and that Dr. Hoover's findings are material to determining whether trial counsel acted reasonably in not calling a mental health expert to testify at Defendant's capital sentencing proceeding.

12. Dr. Warren began working on Defendant's case on or about April 28, 2003. (St. Ex. 23 (Amended and Corrected Interim Bill from Dr. Warren)) This was approximately six months before Defendant's capital murder trial, which began October 27, 2003. According to correspondence among Dr. Warren and Defendant's trial counsel, Dr. Warren contacted Dr. Hoover's widow, met with Defendant several times, administered psychological tests to Defendant, and reviewed some type of records for an hour on August 19, 2003. (St. Exs. 18-28, 46) Based on the records he reviewed and the results of the psychological testing he administered to Defendant, Dr. Warren formed the following preliminary opinions: (1) Defendant understood the nature of the proceedings against him, had a good understanding of the legal system, and was able to assist in his defense; (2) Defendant's IQ scores suggested average intellectual functioning, so mental retardation or intellectual disability was not a possible defense; (3) Defendant was reluctant to complete psychological testing, did not see a reason for it, and wanted to either be found not guilty or receive the death penalty; (4) preliminary evaluation of Defendant did not suggest problems with a major mental disorder; (5) maladaptive coping mechanisms and poor judgment were suggested by Defendant's history and may support a diagnosis of personality disorder upon further exploration and corroboration; (6) a substance abuse disorder, cannabis

abuse, appeared warranted by Defendant's history; and (7) the personality disorders Dr. Warren considered would not support the defenses of diminished capacity or not guilty by reason of insanity. Dr. Warren did not form an opinion that the personality disorders he considered would support the (f)(2) and (f)(6) mitigating circumstances. The Court finds the above-listed preliminary opinions of Dr. Warren did not contradict Dr. Hoover's opinions about Defendant's mental health and the potential for using a mental health defense at sentencing.

13. Although he formed the above-listed preliminary opinions, Dr. Warren testified at the February 12, 2018 evidentiary hearing that he did not have sufficient information about Defendant's background to fully evaluate him and testify at Defendant's capital sentencing proceeding. According to Dr. Warren, he did not have sufficient background information because he never received Dr. Hoover's records or any of the mitigation information collected by Adams. The Court finds Dr. Warren's testimony on this point is not credible. The sheer mass of correspondence between Dr. Warren and Defendant's trial counsel, indicating that Dr. Warren was actively seeking Dr. Hoover's records and was communicating with Adams directly, belies Dr. Warren's claim that he did not review these materials. (See St. Exs. 18-28, 46) Of particular importance is Mr. Atkinson's August 15, 2003 letter to Dr. Warren indicating on that date Mr. Atkinson sent Dr. Warren a package containing (1) the mitigation interviews and reports Adams provided to Mr. Atkinson and (2) all documents Mr. Atkinson sent or received from Dr. Hoover. (St. Ex. 21) Dr. Warren confirmed receipt of this package in his August 19, 2003 email to Mr. Atkinson. (St. Ex. 22) Furthermore, Defendant's post-conviction counsel's representation to this Court that Dr. Warren's file has basically been stripped and put to storage means that Dr. Warren's file does not contain all the documents it contained at the time of Defendant's capital sentencing

proceeding. Therefore, the Court finds Defendant has failed to meet his burden of proving by a preponderance of the evidence that Dr. Warren did not review Dr. Hoover's records and the mitigation information collected by Adams when he formed the above-listed preliminary opinions. N.C. Gen. Stat. § 15A-1420(c)(5) (2017) ("If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion.").

14. Dr. Warren claimed to have reviewed several documents and reports from Defendant's post-conviction counsel that he would usually receive from a mitigation investigation. Dr. Warren opined the documents he reviewed would likely have benefitted trial counsel. However, the Court finds that, after reviewing all the information provided him by post-conviction counsel, Dr. Warren's diagnosis of Defendant did not change. When Dr. Warren testified at the February 12, 2018 evidentiary hearing he still had not diagnosed Defendant with a mental health disorder.

15. Additionally, the Court finds Dr. Warren's potential testimony regarding Defendant's tattoos would not be helpful in explaining them to the jury. Defendant never explained the meaning of his tattoos to Dr. Warren, and Dr. Warren had no insight about Defendant's tattoos at the time of trial. At the February 12, 2018 evidentiary hearing, Dr. Warren did not offer any interpretation or delve into the meaning of Defendant's tattoos. According to Dr. Warren, having a tattoo does not mean a person suffers from a mental health condition.

16. Mr. Atkinson recalled obtaining additional funds for Dr. Warren prior to Defendant's trial and receiving several reports from Dr. Warren. However, Mr. Atkinson did not recall Dr. Warren informing trial counsel that he needed more time to evaluate Defendant. Mr.

Atkinson did not recall a specific reason for not calling a mental health expert at sentencing, but did recall consulting with Mr. Oldham on every decision regarding what witnesses to call at sentencing and whether trial counsel believed a particular witness could benefit Defendant's case. Likewise, Mr. Oldham did not recall making a strategic decision not to call a mental health expert during the sentencing phase of Defendant's trial; however, he did recall Defendant refusing to allow trial counsel to advocate in his behalf at sentencing and the efforts he, Mr. Atkinson, other attorneys, and others took to convince Defendant to allow trial counsel to present mitigation evidence at sentencing. Mr. Oldham's recollection of Defendant's refusal to allow trial counsel to advocate in his behalf at sentencing is corroborated by the trial transcript. (St. Ex. 49) When Defendant addressed the trial court on this matter, he told the trial court that he preferred a quick death by execution, rather than a long, slow death held in captivity. (St. Ex. 49) The Court finds Defendant's comments to the trial court mirrored his excuses to Dr. Warren about why he was reluctant to complete psychological testing and fully comply with Dr. Warren's evaluation. After the trial court granted a recess of several days, Defendant allowed trial counsel to advocate in his defense at sentencing. (St. Ex. 50) At that time, Mr. Oldham told the trial court Defendant did not intend to offer a mental health expert at sentencing. (St. Ex. 50)

17. Based on the above-listed evidence, the Court finds trial counsel made a reasonable investigation into Defendant's mental health and background, but Defendant's reluctance to complete psychological testing and refusal to fully comply with Dr. Warren's evaluation, coupled with the lack of evidence that Defendant suffered from a mental health disorder that would assist in his defense, led to Dr. Warren not being called as a mental health expert at Defendant's capital sentencing proceeding. Under these circumstances, any decision trial counsel made not to call a

mental health expert at Defendant's capital sentencing proceeding was reasonable. See Clanton v. Blair, 826 F.2d 1354, 1358 (4th Cir. 1987) (finding no constitutional basis for rule requiring psychiatric evaluation in every capital case and holding that, when seemingly lucid and rational client rejects suggestion of psychiatric evaluation and there is no indication of mental or emotional problem, trial counsel may reasonably forgo insistence on mental health examination), cert. denied, 484 U.S. 1036, 98 L. Ed. 2d 779 (1988); Gardner v. Ozmint, 511 F.3d 420, 427 (4th Cir. 2007) (finding that a state court may consider a defendant's own degree of cooperation when determining whether counsel has delivered constitutionally deficient performance, even in a capital case), cert. denied, 555 U.S. 856, 172 L. Ed. 2d 96 (2008). Therefore, the Court finds trial counsel's decision not to call a mental health expert at Defendant's capital sentencing proceeding was a reasonable decision made after a reasonable investigation into Defendant's mental health and background.

18. At the February 12, 2018 evidentiary hearing, Dr. Herfkens was tendered and accepted as an expert in adult neuropsychology and forensic adult neuropsychology. Dr. Herfkens began working on Defendant's case in 2007, so her evaluation of Defendant was post-conviction and post-sentencing. Dr. Herfkens met with Defendant three times, administered cognitive and intelligence tests to him, and reviewed Defendant's medical, school, and mental health records, except for the findings of Dr. Hoover and Dr. Warren. Also, Dr. Herfkens reviewed the typed interview notes and mitigation reports Adams produced prior to trial and a summary of Defendant's trial and capital sentencing proceeding provided by Defendant's post-conviction counsel. On the Wechsler Adult Intelligence Scale-III test Dr. Herfkens administered, Defendant received a verbal IQ score of 106 which is in the average range, a nonverbal IQ score of 119 which

is in the high average range, and full scale IQ score of 112 which is in the high average range. Based on the tests she administered and her review of Defendant's history, Dr. Herfkens opined Defendant suffered from Attention-Deficit/Hyperactivity Disorder ("ADHD"), Inattentive Type. Also, Dr. Herfkens opined Defendant was under the influence of ADHD, Inattentive Type, at the time of the crime.

19. However, the Court finds Dr. Herfkens' opinion insufficient to establish a statutory mitigating circumstance for Defendant. Dr. Herfkens did not base her diagnosis on the criteria listed in the DSM-5 for ADHD, Inattentive Type. Instead, Dr. Herfkens based her diagnosis of Defendant on what she called a triad of (1) attention, (2) thinking speed, and (3) cognitive flexibility. Although Dr. Herfkens claimed her triad was supported by mental health literature, she could not cite a single learned treatise in support. On cross-examination, Dr. Herfkens admitted she relied heavily on the cognitive testing she administered to form her opinion and could not have formed her opinion based on the criteria she noted from her review of Defendant's history. While Dr. Herfkens claimed Defendant did not malinger on the cognitive testing, she identified a letter Defendant sent her after she administered the tests, admitting he malingered on the tests she gave him. (St. Ex. 30)

20. When confronted with the diagnostic criteria listed in the DSM-5 on cross-examination, Dr. Herfkens claimed she could diagnose Defendant with ADHD, Inattentive Type, based on the DSM-5 as well. According to Dr. Herfkens, the criteria Defendant met in the DSM-5 for ADHD, Inattentive Type, are as follows: (1) often fails to give close attention to details or makes careless mistakes; (2) often has difficulty sustaining attention and remaining focused; (3) often does not follow through on instructions; (4) often has difficulty organizing tasks and

activities; (5) often avoids, dislikes, or is reluctant to engage in tasks that require sustained mental effort; and (6) is often easily distracted by external stimuli.

21. Dr. Herfkens did not diagnose Defendant with depression, maladaptive coping mechanism, personality disorders, or any of the mental health disorders Dr. Warren preliminarily considered. Dr. Herfkens did not diagnose Defendant with ADHD, Hyperactive and Impulsive Type. Dr. Herfkens could not show a nexus or connection between her diagnosis of ADHD, Inattentive Type, and the murder in this case. Hence, her testimony did not establish the (f)(2) mitigating circumstance under the facts of this case. See State v. Bonnett, 348 N.C. 417, 444, 502 S.E.2d 563, 581 (1998) (finding no merit to defendant's claim that the trial court erred in failing to submit the (f)(2) mitigating circumstance to the jury because "neither of defendant's experts' testimony suggested any nexus between defendant's personality characteristics and the crimes he committed or any mental or emotional disturbance at the time of the killing"); State v. Hill, 347 N.C. 275, 300-303, 493 S.E.2d 264, 279-80 (1997) (finding no error in the trial court's failure to submit the (f)(2) mitigating circumstance to the jury because "the manner of the killing and defendant's subsequent actions indicate that he was not under the influence of a mental or emotional disturbance at the time of the killing" and "the testimony given by defendant's expert witnesses did not provide a nexus between defendant's personality characteristics and the crimes he committed"), cert. denied, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998). Based on her evaluation of Defendant, Dr. Herfkens could not address the (f)(6) mitigating circumstance of whether Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. Therefore, Dr. Herfkens' testimony did not establish a statutory mitigating circumstance.

22. Additionally, the Court finds Dr. Herfkens' diagnosis of ADHD, Inattentive Type, insufficient to establish a non-statutory mitigating circumstance for Defendant. The evidence presented at trial showed (1) Defendant lured Gailey into the Uwharrie forest on the promise of recovering guns to sell for drugs, (2) Defendant followed Gailey for some distance into the forest before shooting him in the back and knee with a sawed-off shotgun, (3) Defendant threw rocks at Gailey in the dark to determine if Gailey was still alive, causing Gailey to groan repeatedly, and (4) Defendant stole Gailey's truck and sent Smith to steal his wallet, so Defendant and Smith could buy more drugs. See Allen, 360 N.C. at 301-303, 626 S.E.2d at 276-78. If Defendant was under the influence of ADHD, Inattentive Type, at the time of the murder, he had to work against it to keep his focus and follow through with his plan to murder Gailey. Evidence that Defendant had to work against a mental health condition to accomplish his goal and realize his pecuniary gain would not have helped Defendant at sentencing.

23. Furthermore, the Court finds Dr. Herfkens' potential testimony regarding Defendant's tattoos would not be helpful in explaining them to the jury. Dr. Herfkens thought Defendant's tattoos were part of his "feeling like he lives outside the norms" and believed having such feelings could arise, in part, out of untreated ADHD, Inattentive Type. Dr. Herfkens admitted tattoos could also be a sign of defiance and a passive-aggressive way of defying one's parents. According to the school records and family history Dr. Herfkens reviewed, Defendant exhibited a passive-aggressive way of manipulating others. (St. Ex. 31) The Court finds the jury was in just as good a position as Dr. Herfkens to make these speculative determinations about Defendant's tattoos. Consequently, the Court finds Defendant has failed to show deficient performance and has failed to show the existence of a reasonable probability that, but for trial counsel not calling a

mental health expert to testify at sentencing, the result of his capital sentencing proceeding would have been different.

B. Conclusions of Law Regarding Claim 7

24. This matter and these parties are properly before the Court pursuant to Defendant's MAR and SMAR filed pursuant to N.C. Gen. Stat. §§ 15A-1411, 15A-1415, and 15A-1420.

25. As the moving party, Defendant has the burden of proving by a preponderance of the evidence every fact essential to support his MAR and SMAR. N.C. Gen. Stat. § 15A-1420(c)(5) (2018).

26. To prevail on his ineffective assistance of counsel claims, Defendant must show (1) that his counsel's performance was deficient and (2) that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674 (1984); see also State v. Braswell, 312 N.C. 553, 324 S.E.2d 241 (1985). To establish deficient performance, Defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. Wiggins v. Smith, 539 U.S. 510, 156 L. Ed. 2d 471 (2003). To establish prejudice, Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of his capital sentencing proceeding would have been different. Strickland, 466 U.S. at 694.

27. In evaluating counsel's performance, Strickland directs that "a court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and that a defendant must overcome this presumption to succeed on an ineffective assistance of counsel claim. Id. at 689, 50 L. Ed. 2d at 694. "A fair assessment of attorney 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." Id. The question is not whether counsel's performance "deviated from best practices or most common custom." Premo v. Moore, 562 U.S. 115, 122, 178 L. Ed. 2d 649, 659 (2011). Instead, trial counsels' actions are deficient only if "no competent attorney" would have taken the action counsel did. Id. at 124, 178 L. Ed. 2d at 660.

28. Based on the above-listed findings of fact, the Court concludes as a matter of law that Defendant has failed to establish deficient performance. Defendant has failed to overcome the Strickland presumption that trial counsel acted reasonably in not calling a mental health expert to testify at his capital sentencing proceeding. Dr. Hoover's evaluation showed (1) there was no evidence Defendant suffered from a mental disorder that could be offered regarding his mental status at the time of the offense, (2) there was no evidence to corroborate any alleged impairment of Defendant's ability to conform his behavior to the to the requirements of the law, and (3) evidence of Defendant's background and how it related to his antisocial behaviors as an adult would not be helpful in establishing non-statutory mitigating circumstances. Dr. Warren's preliminary opinions did not contradict Dr. Hoover's evaluation findings. Dr. Warren's preliminary findings showed Defendant understood the nature of the proceedings against him, had a good understanding of the legal system, and was able to assist in his defense. In spite of his understanding of the legal system, Defendant was reluctant to complete the psychological testing Dr. Warren administered and refused to fully comply with Dr. Warren's evaluation. Consequently, Defendant has failed to show deficient performance.

29. In evaluating the question of prejudice, it is necessary to consider all the relevant evidence the jury would have had before it if counsel had pursued a different path – not just the

favorable evidence counsel could have presented, but also the prejudicial evidence that almost certainly would have come in with it. Wong v. Belmontes, 558 U.S. 15, 20, 175 L. Ed. 2d 328, 333 (2009) (per curiam). To assess prejudice in the context of a capital sentencing proceeding, a reviewing court must "reweigh the evidence in aggravation against the totality of available mitigating evidence." Wiggins, 539 U.S. at 534, 156 L. Ed. 2d at 493.

30. Based on the above-listed findings of fact, the Court concludes as a matter of law that Defendant has failed to establish prejudice pursuant to Strickland. After reweighing the evidence in aggravation against the totality of the available mitigating evidence, the Court concludes Defendant has failed to show there is a reasonable probability that, but for trial counsel not calling a mental health expert to testify at sentencing, the result of his capital sentencing proceeding would have been different. First, as noted in the above findings of fact, the evidence presented at trial strongly supported the jury's finding of three aggravating circumstances. Second, the evidence presented by Defendant's mental health experts at the MAR evidentiary hearing would not support the submission of additional statutory mitigating circumstances. See Bonnett, 348 N.C. at 444, 502 S.E.2d at 581; Hill, 347 N.C. at 300-303, 493 S.E.2d at 279-80. Third, the evidence presented by Defendant's mental health experts at his MAR evidentiary hearing would not support the submission of additional non-statutory mitigating circumstances. Finally, the jury was in just as good a position as Defendant's mental health experts to decipher the meaning of Defendant's tattoos and to understand the significance of traumatic events in Defendant's life and family background. Therefore, the Court concludes Defendant has failed to show the existence of a reasonable probability that, but for trial counsel not calling a mental health expert to testify at sentencing, the result of his capital sentencing proceeding would have been different.

C. **Findings of Fact Regarding Claim 8**

31. All prior findings of fact are incorporated by reference herein as if fully set forth.

32. In this claim, Defendant contends trial counsel were ineffective for failing to adequately investigate and present available mitigation evidence at his capital sentencing proceeding.

33. In support, Defendant argues (1) trial counsel conducted an inadequate investigation into Defendant's family and social history, (2) trial counsel failed to provide Defendant's mitigation investigator with direction and failed to involve themselves in the mitigation investigation in a meaningful way, and (3) there were other mitigation witnesses trial counsel should have called.

34. At his February 12, 2018 evidentiary hearing, Defendant called witnesses to support this claim including (1) Christina Fowler Chamberlain ("Chamberlain"), Defendant's friend, (2) Mr. Oldham, Defendant's second chair trial counsel, (3) Kelly Racobs ("Racobs"), Defendant's former girlfriend, (4) Adams, Defendant's trial mitigation investigator, (5) Lois Lawson ("Lawson"), Defendant's sister-in-law and the former wife of Jamie Fender, (6) Jordan Allen ("Jordan"), Defendant's daughter who testified at trial, (7) Michael Kevin Byrd ("Byrd"), Defendant's maternal cousin, and (8) Alice Blaylock ("Blaylock"), Defendant's paternal aunt who testified at trial. Also, through Dr. Herfkens, Defendant offered the affidavits of some family members who testified at sentencing, some family members who did not testify at sentencing, and a social worker who met with Defendant when he sought mental health treatment for depression in 1992, when his girlfriend broke up with him. This Court sustained the State's objection to the affidavits being admitted for the truth of the matters asserted therein, but allowed Dr. Herfkens to

testify regarding the affidavits, to the extent she reviewed them and regularly relied upon such affidavits to assist her in forming her opinion as to whether certain mitigating factors may or may not be present in a particular case. The State called Mr. Atkinson, Defendant's first chair trial counsel.

35. Adams began her career as a legal assistant in the Cumberland County Public Defender's Office in 1978. In 1998, she became a Public Defender Investigator and worked under then Public Defender of Cumberland County, Maryann Tally ("Ms. Tally"). While working under Ms. Tally, Adams shadowed mitigation investigators who came to Cumberland County to work on capital cases, performed many of the duties a mitigation investigator would do for the Public Defender's Office, and actively worked on capital cases, including performing mitigation investigations for Ms. Tally and meeting with Ms. Tally and outside mitigation investigators. In 1999, Adams began to hold herself out as a mitigation investigator and accept employment in capital cases from sources other than the Cumberland County Public Defender's Office. Although Adams received no formal training or certification as a mitigation investigator, she accepted employment as a mitigation investigator in Defendant's case and at least two other capital cases. Adams worked on these cases while she maintained full-time employment as an investigator with the Cumberland County Public Defender's Office. By the time of Defendant's October 2003 capital murder trial, Adams had been a mitigation investigator for about four years. In 2007, Adams left the Cumberland County Public Defender's Office to accept employment as a mitigation investigator for the North Carolina Capital Defender's Office, where she remained until she retired in 2016.

36. On 6 January 2001, Adams began working as a mitigation investigator in Defendant's case. On that day, Adams met with Defendant's trial counsel for 2 hours, with Defendant's brother for 1 hour, and with Defendant's parents for 2.5 hours. (St. Ex. 10) During her meeting with trial counsel, Mr. Atkinson provided Adams with a copy of the State's discovery, informed Adams that the defense had hired a fact investigator, and instructed Adams to focus her investigation on mitigation evidence, in the event Defendant's capital murder trial reached the sentencing phase. Mr. Atkinson also provided Adams with a copy of the fact investigator's interviews.

37. During the course of her investigation, Adams obtained copies of Defendant's school records, birth records, mental health records, and prison records. Adams provided copies of all the records she obtained to Defendant's trial counsel, and trial counsel provided Adams with copies of records they obtained. Adams first interviewed Defendant in Central Prison on 13 January 2001, and interviewed him several other times before and during his capital sentencing proceeding. (St. Exs. 10 & 11) Adams interviewed Defendant's friends and family members to gather mitigation evidence including: (1) Benny Allen; (2) Sherry Allen; (3) Kenny Allen; (4) Blaylock; (5) Vera Coble; (6) Joyce Allen, Defendant's estranged wife; (7) Gladys Barclay; (8) Racobs; and (9) Frances Parker. Each time Adams interviewed a potential mitigation witness, she asked them for information regarding other potential mitigation witnesses, typed her detailed notes of the interview, and provided her typed notes to trial counsel. Then, Adams followed up on the potential mitigation witness leads she received from the people she interviewed. Also, Adams transcribed a video dialog of Defendant's interview with law enforcement in Denver on the day he was arrested for the murder of Gailey, obtained copies of photographs from Defendant's mother,

and had the photographs copied and enlarged to be used as exhibits in the sentencing phase of Defendant's trial.

38. Adams corresponded with Defendant's trial counsel by letter, by telephone, and met with trial counsel on five separate occasions before Defendant's capital sentencing proceeding. (St. Exs. 8, 10-12, 14, 16-17) One of these meetings lasted for at least five hours and included penalty phase preparation and meetings between Defendant's trial counsel and mitigation witnesses. (St. Ex. 11 p. 1) In spite of the above-listed facts, Adams claimed she did not perform enough work on Defendant's mitigation case, she did not obtain sufficient direction from Defendant's trial counsel, and she would have performed the investigation differently if she had the experience she gained as a mitigation investigator for the Capital Defender's Office from 2007 to 2016. The Court finds Adams' opinion about her work product and the level of instruction she received from trial counsel is contradicted by the record which shows Adams received a substantial amount of direction from trial counsel and performed a substantial amount of work in Defendant's mitigation case.

39. Mr. Oldham recalled Adams serving as Defendant's mitigation investigator. Mr. Oldham had never employed a mitigation investigator prior to representing Defendant because it was a relatively new concept at that time. In previous capital cases, Mr. Oldham relied on psychological reports produced by mental health experts who evaluated his capital murder clients and evidence of mitigating circumstances developed with the help of a private investigator. Mr. Oldham had represented about 15-20 defendants charged with first-degree murder who were eligible for the death penalty, and 7-8 of those cases went to trial. Mr. Oldham recalled meeting with Ms. Tally at the Randolph County Courthouse to consult with her about Defendant's case at

the behest of a representative from the North Carolina Center for Death Penalty Litigation ("CDPL"). Ms. Tally introduced Adams to Mr. Oldham, told Mr. Oldham that Adams was a good person, and told Mr. Oldham that she had used Adams as a mitigation investigator in previous cases.

40. Likewise, Mr. Atkinson recalled obtaining funds and retaining Adams to serve as Defendant's mitigation investigator. According to Mr. Atkinson, trial counsel retained Adams upon the recommendation of Ms. Tally and CDPL. Upon retaining Adams, Mr. Atkinson recalled instructing her to gather information needed to develop Defendant's mitigation strategy for sentencing. Specifically, Mr. Atkinson told Adams to interview Defendant's family members and to develop additional mitigation leads through them. By letters dated 9 January 2001, Mr. Atkinson set up an appointment between Adams and Defendant at Central Prison and informed Defendant that Adams was a member of the defense team working as his mitigation investigator. (St. Exs. 38 & 39)

41. While working on Defendant's case, Adams communicated with trial counsel personally, by telephone, by facsimile, and by mail. (St. Exs. 8-17, 42) Adams never informed Mr. Atkinson that she had any problems performing her job, and Mr. Atkinson had no recollection of Adams asking for help or asking for another mitigation investigator to be appointed. If Adams had asked, Mr. Atkinson would have made arrangements for additional help. When Adams informed Mr. Atkinson she had exceeded the funding authorized for her services, Mr. Atkinson sought and obtained additional funding for Adams to continue working as Defendant's mitigation investigator. (St. Ex. 14) From the correspondence and communications Mr. Atkinson received

from Adams, he had no reason to think Adams was not fulfilling her duties as Defendant's mitigation investigator.

42. Based on the above-listed evidence, the Court finds trial counsel's decision to hire Adams as Defendant's mitigation investigator, based on the recommendations of Ms. Tally and CDPL, was reasonable. Also, the Court finds trial counsel gave Adams sufficient direction and instruction to complete her task as a mitigation investigator, and Adams did complete that task without complaint or notice to counsel that she could not complete her assigned task. Furthermore, the Court finds Adams completed a substantial amount of work on Defendant's mitigation case, that trial counsel relied on Adams' work and other sources to plan Defendant's mitigation strategy, and that trial counsel's investigation and presentation of mitigation evidence at Defendant's capital sentencing proceeding were more than adequate.

43. When he was appointed to Defendant's case, Mr. Oldham met with Defendant and instructed him not to make any statements about the case to anyone other than his court-appointed counsel. Then, Mr. Oldham sought discovery from the State and filed a motion to obtain funds for a private investigator. Mr. Oldham and the private investigator went to Defendant's parents' residence and met with them. Mr. Oldham knew Defendant's father and had a good rapport with him because Mr. Oldham had represented Defendant in some church breaking and entering cases in the mid-1990s. Mr. Oldham informed Defendant's parents that they needed to cooperate with him and the private investigator. That same day, Mr. Oldham went to the Troy Police Department and met with Defendant's brother, Kenny. Mr. Oldham recalled that, in addition to interviewing fact witnesses, the private investigator accompanied him on at least one visit to the crime scene in the Uwharrie Forrest where Gailey's body was found and obtained Defendant's mental health

records from a mental health center in Albemarle, NC. Also, Mr. Oldham recalled clearing his schedule for about a month before Defendant's trial, meeting with Adams at Mr. Atkinson's office, meeting with potential mitigation witnesses and preparing a list of mitigating circumstances with Mr. Atkinson to present to the trial court.

44. At Defendant's February 12, 2018 evidentiary hearing, Mr. Atkinson testified he would not have called a witness at the sentencing phase of Defendant's trial to present cumulative mitigation evidence. Instead, Mr. Atkinson would consider (1) the credibility of the witness, (2) the opportunity the witness had to know Defendant, and (3) what the witness knew about Defendant that may help at sentencing. Also, Mr. Atkinson would take into account what the State's cross-examination of a particular witness might be and whether the potential cross-examination of that witness may hurt Defendant's case.

45. Additionally, Mr. Atkinson stated that it was not his practice to call a witness to the stand that he had not talked with and prepared to testify. Mr. Atkinson had represented 10 defendants charged with first-degree murder who were eligible for the death penalty, three of which were tried to completion. The first case ended in a death sentence that was commuted to life when the United States Supreme Court declared North Carolina's former death penalty statute unconstitutional, the second case ended in a verdict of not guilty, and the third case was Defendant's.

46. Mr. Atkinson sought and obtained strategic assistance on Defendant's case from CDPL. Mr. Atkinson consulted frequently with CDPL regarding Defendant's case and traveled to CDPL on or about 15 July 2003 to consult with attorneys about Defendant's trial and mitigation strategy. (St. Exs. 48 & 49) During this meeting with CDPL, Mr. Atkinson received, inter alia,

the following advice about Defendant's sentencing phase mitigation strategy: (1) CDPL believed trial counsel should involve as many of Defendant's family members as possible; (2) CDPL cautioned trial counsel to avoid presenting mitigation testimony centered on Defendant's character, such as "'he's a good boy, etc.' as that will open doors to rebuttal evidence;" and (3) CDPL recommended presenting a family sympathy mitigation strategy such as, "'he came from a good family, don't punish us by killing our son, brother, husband, etc." (St. Ex. 48) The Court finds trial counsel's strategy of presenting a family sympathy mitigation defense, attempting to garner sympathy for Defendant by focusing on his childhood and certain traumas suffered therein, and showing Defendant could be housed safely in a prison setting for the rest of his life, was a reasonable mitigation strategy. The Court finds trial counsel's strategy of avoiding the presentation of Defendant's character as an adult, which could open the door to rebuttal evidence about Defendant's extensive criminal and antisocial behavior, was also a reasonable mitigation strategy.

47. Additionally, Mr. Atkinson brought Defendant's case to the Capital College, a seminar sponsored by CDPL and the entity formerly known as the North Carolina Academy of Trial Lawyers. At the seminar, Mr. Atkinson spent four days brainstorming Defendant's case with attorneys experienced in capital litigation. The seminar included Mr. Atkinson presenting portions of Defendant's case to a panel of experienced capital litigation attorneys and receiving feedback from those attorneys in the form of breakout sessions. Based on the advice Mr. Atkinson received from CDPL, trial counsel decided that one aspect of Defendant's mitigation case would be to focus on Defendant's early life with his family, rather than his character. To this end, Mr. Atkinson

recalled communicating with Defendant's family members in person, over the telephone, through Defendant's private investigator, and through Defendant's mitigation investigator.

48. During the course of their investigation, trial counsel also met with witnesses identified by their private (fact) investigator, including but not limited to: (1) Chamberlain; (2) Racobs; and (3) Lawson. Trial counsel met with one another to plan Defendant's mitigation strategy and met with Defendant's mitigation investigator, private investigator, mental health professional, and potential mitigation witnesses. Trial counsel met with Defendant's family members in a group and met with potential mitigation witnesses separately. Based on their mitigation investigation, trial counsel prepared a list of mitigating circumstances, including 1 statutory and 18 non-statutory mitigating circumstances, for the trial court to consider.

49. Based on the above-listed evidence, the Court finds trial counsel conducted a reasonable mitigation investigation. Additionally, based on the mitigation investigation conducted, any decision trial counsel made to forgo further mitigation investigation as unnecessary was a reasonable decision.

50. Chamberlain testified at the February 12, 2018 evidentiary hearing that she met with Defendant's trial counsel and private investigator prior to trial, but was not called as a witness. She attended the same high school as Defendant and hung out with him on occasion, but they did not share the same group of friends. Chamberlain claimed she never dated Defendant. Chamberlain never asked Defendant about his tattoos, but presumed he wore them to get people's attention. Chamberlain maintained sporadic contact with Defendant when she went to college, but lost track of him from 1992 to the end of June 1999. Chamberlain claimed to remember Defendant showing up at her house on the night Gailey was killed, but only claimed to have seen Defendant

from 2:30 a.m. to 3:00 a.m., when she returned from work the morning after Gailey's murder. The Court finds Chamberlain's testimony regarding her interaction with Defendant on the night of Gailey's murder is not credible because it was in direct conflict with the pretrial statements she made to Defendant's trial counsel when she emphatically denied that Defendant was at her house on the night Gailey was killed. This Court has previously ruled that trial counsel was not ineffective for failing to call Chamberlain at the guilt phase of Defendant's trial. (08/18/16 Order Summarily Dismissing Certain Claims of Defendant's MAR and SMAR pp. 25-26) The Court finds Chamberlain's testimony does not establish an alibi for Defendant. The Court finds trial counsel's decision not to call Chamberlain to testify at Defendant's capital sentencing proceeding was reasonable. Additionally, the Court finds Defendant has failed to show the existence of a reasonable probability that, but for trial counsel not calling Chamberlain as a witness, the result of his capital sentencing proceeding would have been different.

51. Racobs testified at the February 12, 2018 evidentiary hearing that she met with Defendant's trial counsel and private investigator prior to trial, but did not testify at Defendant's trial. Trial counsel subpoenaed her, and she was present at Defendant's trial, but trial counsel did not call her to testify. Racobs met Defendant in Colorado in March 1999 and dated him for 4 or 5 months, until law enforcement arrested Defendant and Racobs at Racobs' residence in Colorado in August 1999. Racobs was arrested for harboring a fugitive, plead guilty to a misdemeanor, and was sentenced to 6 months of supervised probation. When Racobs met Defendant, Smith was with Defendant and was paying all his expenses. While Smith was present, Defendant did not talk to Racobs. Smith told Racobs to stay away from Defendant because he was hers. In spite of Smith's instruction, Racobs began dating Defendant when Smith went back to North Carolina. While in

North Carolina, Smith called Racobs' residence several times to speak with Defendant, and Racobs occasionally refused to let Smith speak with him. When she called, Smith cussed at Racobs and called her names over the telephone. Racobs concluded that Smith was jealous of her relationship with Defendant. This Court has previously found that Smith's alleged jealousy regarding Racobs' relationship with Defendant was the subject of extensive cross-examination of Smith by trial counsel at the guilt phase of Defendant's trial. (08/18/16 Order Summarily Dismissing Certain Claims of Defendant's MAR and SMAR p. 27) The Court finds trial counsel's decision not to call Racobs to testify at Defendant's capital sentencing proceeding was reasonable. Additionally, the Court finds Defendant has failed to show the existence of a reasonable probability that, but for trial counsel not calling Racobs as a witness, the result of his capital sentencing proceeding would have been different.

52. Lawson testified at the February 12, 2018 evidentiary hearing that she met with Defendant's trial counsel prior to trial, but did not testify at trial. Lawson was Defendant's sister-in-law, and had known Defendant for years. At the time of Gailey's murder, Lawson was married to Jamie Fender ("Fender"). According to Lawson, Fender was mad at Defendant because Defendant stole some record albums from Fender around 3 July 1999. On a Friday night, a few days before Lawson found out about Gailey's murder, Fender dressed in camouflage pants and a black T-shirt and went after Defendant with an assault rifle. The assault rifle fired long, single-shot bullets. Lawson told Defendant's wife to call Defendant at his friend Brian Thompson's house to warn him that Fender was on the way. Lawson did not know whether Fender found Defendant, but Fender returned an hour after he left. Also, Lawson was having an affair with Gailey, used cocaine with Gailey that he supplied, and used alcohol and drugs prior to and during

her affair with Gailey. Additionally, Lawson claimed the tattoo on Defendant's head was supposed to refer to a song entitled "Hate Breeders," even though the tattoo only contained the word "Hate." This Court has previously ruled that trial counsel was not ineffective for failing to call Lawson at the guilt phase of Defendant's trial and that trial counsel was not ineffective for failing to call Lawson on the issue of third party guilt regarding Fender's search for Defendant with a single-shot rifle. (08/18/16 Order Summarily Dismissing Certain Claims of Defendant's MAR and SMAR pp. 23-24, 59-60) The Court finds Lawson's testimony does not establish third party guilt for the murder of Gailey. The Court finds trial counsel's decision not to call Lawson to testify at Defendant's capital sentencing proceeding was reasonable. Additionally, the Court finds Defendant has failed to show the existence of a reasonable probability that, but for trial counsel not calling Lawson as a witness, the result of his capital sentencing proceeding would have been different.

53. Jordan, Byrd, and Blaylock testified at the February 12, 2018 evidentiary hearing regarding the following aspects of Defendant's social and family history: (1) Defendant loves his daughter and maintains a good relationship with her, even though he is incarcerated; (2) Jordan loves her father very much and visits him in prison; (3) as a child, Defendant loved to stay with his maternal grandparents and stayed there often; (4) Defendant loved animals and was not a hunter; (5) Defendant was very close to his maternal grandfather, erroneously blamed himself for his grandfather's death, and never got over the death of his grandfather; and (6) Defendant's family members loved him. The Court finds this testimony is cumulative of the testimony trial counsel presented through the witnesses called at Defendant's capital sentencing proceeding.

54. Also, Byrd testified he did not understand Defendant's tattoos, he did not know why Defendant got them, and, although Defendant enjoyed heavy metal and hard rock, he did not know Defendant to be a hateful or violent person. Byrd and Blaylock recalled Defendant effectively covered up his tattoos at a family wedding by wearing a turtleneck under his suit and a beanie hat to cover his head. According to Byrd, Defendant's mother actively kept his generation of Defendant's family from getting involved in Defendant's capital murder trial. The Court finds testimony regarding Defendant's character as an adult did not fit trial counsel's mitigation strategy, and testimony that Defendant effectively covered up his tattoos for a family wedding would have drawn unnecessary attention to them at sentencing. Consequently, the Court finds trial counsel's decision not to call Byrd to testify at Defendant's capital sentencing proceeding was reasonable and trial counsel's decision to limit the testimony of Blaylock and Jordan to relevant mitigating circumstances in line with trial counsel's mitigation strategy was reasonable. Additionally, the Court finds Defendant has failed to show the existence of a reasonable probability that, but for trial counsel not calling Byrd to testify and not examining Blaylock and Jordan about Defendant's character as an adult, the result of his capital sentencing proceeding would have been different.

55. The Court finds the affidavits of Defendant's family members who testified at Defendant's capital sentencing proceeding which were introduced through Dr. Herfkens do not establish deficient performance. These include the affidavits of: (1) Sherry Allen, Defendant's mother; (2) Benny Allen, Defendant's father; (3) Kenny Allen, Defendant's brother; (4) Vera Coble, Defendant's maternal aunt; and (5) Robert Byrd, Defendant's maternal uncle. (Def. Ex. 15) This Court sustained the State's objection to the affidavits being admitted for the truth of the matters asserted therein, but allowed Dr. Herfkens to testify regarding the affidavits, to the extent

she reviewed them and regularly relied upon such affidavits to assist her in forming her opinion as to whether certain mitigating factors may or may not be present in a particular case. In each of these affidavits, the affiants claimed to have felt limited by trial counsel's only asking them questions about specific subjects at sentencing. However, trial counsel's decision to call these witnesses for a specific purpose, and to keep them from straying into areas that would undermine Defendant's mitigation strategy, was reasonable. For instance, Robert Byrd's potential testimony that Benny Allen was "full of himself," used "foul language," and always thought Sherry Allen was wrong when he argued with her would have undermined the sympathy trial counsel sought to generate for Benny when Sherry testified at sentencing that Benny had been diagnosed with terminal cancer, so she would have to face the execution of Defendant's sentence alone. Consequently, Defendant has failed to establish deficient performance. Additionally, the Court finds Defendant has failed to show the existence of a reasonable probability that, but for trial counsel limiting the testimony of these witnesses to relevant mitigating circumstances in line with trial counsel's mitigation strategy, the result of his capital sentencing proceeding would have been different.

56. The Court finds the affidavits of Defendant's family members who did not testify at Defendant's capital sentencing proceeding which were introduced through Dr. Herfkens do not establish deficient performance. These affidavits were not admitted for the truth of the matters asserted therein. These include the affidavits of: (1) Lamar Blalock ("Lamar"); Shawn Byrd ("Shawn"); and Eric Byrd ("Eric"). (Def. Ex. 15) Lamar, Shawn, and Eric are Defendant's cousins. The Court finds their potential testimony about Defendant's childhood is cumulative to the family members who testified at Defendant's capital sentencing proceeding. Additionally,

their potential testimony about Defendant's teenage years depict Defendant as an illegal drug-seeking runaway who had no regard for the rules his parents set for him. Furthermore, their potential testimony about Defendant's parents is condescending and paints Defendant's parents in a bad light, thus undercutting the family sympathy mitigation defense trial counsel sought to present. Consequently, the Court finds Defendant has failed to establish deficient performance. Additionally, the Court finds Defendant has failed to show the existence of a reasonable probability that, but for trial counsel not calling Lamar, Shawn, and Eric to testify, the result of his capital sentencing proceeding would have been different.

57. The Court finds the affidavit of Denise Ross ("Ross"), the social worker who did not testify at Defendant's capital sentencing proceeding, which was introduced through Dr. Herfkens does not establish deficient performance. (Def. Ex. 15) This affidavit was not admitted for the truth of the matters asserted therein. Ross was a social worker who did not have an independent recollection of Defendant, but refreshed her memory through Piedmont Behavioral Healthcare ("PBHC") records that Dr. Hoover reviewed when evaluating Defendant. According to the records, Defendant sought treatment from PBHC in 1992 for depression after breaking up with his girlfriend. The Court finds Defendant seeking mental health treatment for depression after breaking up with his girlfriend in 1992 has no relevance to the murder Defendant committed in 1999 and would have no evidentiary value in establishing a mitigating circumstance. By the time Defendant murdered Gailey in 1999, he had married, cheated on his wife with Smith, and left Smith for Racobs. Obviously, Defendant got over his girlfriend breaking up with him and moved on to other relationships. Consequently, the Court finds Defendant has failed to establish deficient performance. Additionally, the Court finds Defendant has failed to show the existence of a

reasonable probability that, but for trial counsel not calling Ross to testify, the result of his capital sentencing proceeding would have been different.

58. The Court finds trial counsel's decision not to call Smith to testify at Defendant's capital sentencing proceeding or to offer extrinsic evidence of a purported statement Smith allegedly made to law enforcement about the church breaking and entering cases Mr. Oldham represented Defendant on in the mid-1990s was reasonable. Mr. Oldham testified Defendant entered a plea bargain in those cases during his mid-1990s trial, at the behest of the presiding judge. The single sheet of paper with typewritten notes on it that Mr. Oldham identified as coming from his file was not signed by Smith, was not signed by any law enforcement officer, and was not authenticated at Defendant's 12 February 2018 evidentiary hearing. (Def. Ex. 5) Mr. Atkinson testified he and Mr. Oldham discussed whether or not to attempt to bring that subject up at Defendant's 2003 capital murder trial, but decided against it because they did not want the jury to hear that Defendant entered a plea bargain to church breaking and entering cases. The Court finds this strategic decision by trial counsel was reasonable. Therefore, the Court finds Defendant has failed to establish deficient performance. Additionally, the Court finds Defendant has failed to show the existence of a reasonable probability that, but for trial counsel not calling Smith to testify at sentencing or presenting extrinsic evidence of Smith's purported statement to law enforcement about the church breaking and entering cases, the result of his capital sentencing proceeding would have been different.

59. The Court finds trial counsel's decisions not to present evidence of the following were reasonable decisions made after a reasonable mitigation investigation: (1) Defendant burning his forehead, face, and chest with a mug of hot chocolate when he was 16 months old, leading to

hospitalization; (2) Defendant witnessing his father pointing a shotgun at his mother's head on one occasion, and his older brother grabbing the shotgun away from his father; (3) Defendant witnessing his father verbally abuse his mother on occasion; and (4) Defendant having a family history showing substance abuse by different family members. The Court finds the above-listed events were either too remote in time or circumstances from Defendant's capital sentencing proceeding to have an appreciable impact on the jury's sentencing recommendation or would undermine Defendant's family sympathy mitigation defense. Consequently, the Court finds Defendant has failed to establish deficient performance. Additionally, the Court finds Defendant has failed to show the existence of a reasonable probability that, but for trial counsel not introducing evidence of the above-listed events, the result of his capital sentencing proceeding would have been different.

60. Based on the above-listed evidence, the Court finds trial counsel conducted a reasonable investigation into Defendant's family and social history and presented substantial mitigating evidence at his capital sentencing proceeding. Also the Court finds trial counsel made reasonable decisions about which witnesses to call at sentencing. Furthermore, the Court finds the additional witnesses Defendant claims trial counsel should have called either (1) did not know Defendant very well, (2) had substantial character flaws that would have weakened Defendant's mitigation case, (3) would present only cumulative evidence, (4) did not present valid mitigating evidence, or (5) did not fit the mitigation strategy trial counsel chose to pursue at sentencing. Therefore, Defendant has failed to establish deficient performance and has failed to show a reasonable probability that, but for trial counsel's not presenting additional allegedly mitigating evidence, the result of Defendant's capital sentencing would have been different.

61. Furthermore, the Court finds that, in light of all the mitigation evidence trial counsel actually presented, testimony claiming Defendant was a good person or possessed a non-violent character would have no appreciable impact on the jury's sentencing recommendation. The jury knew from the guilt phase that Defendant (1) was a fugitive from justice, (2) escaped his prison work release to gallivant around the country consuming alcohol and drugs with Smith, (3) obtained a fake identification document to facilitate his run from the law, (4) lured his best friend and drug dealer into the forest so he could shoot him in the back with a sawed-off shotgun because Defendant thought he was going to "rat him off" as an escapee, (5) threw rocks at his best friend from a distance while his best friend was groaning and bleeding out, and (6) stole his best friend's truck, drove it to Shallotte, and sold it to a guy while bragging to the guy about shooting his best friend in the forest. Allen, 360 N.C. at 301-304, 626 S.E.2d at 276-78. Thus, any attempt to focus on Defendant's "good character" as an adult had the potential to backfire with the jury. Consequently, trial counsel's strategic decision to focus on a family sympathy mitigation defense, Defendant's childhood and certain traumas suffered therein, and Defendant's suitability for lifetime imprisonment was reasonable. Therefore, Defendant has failed to establish deficient performance and has failed to show a reasonable probability that, but for trial counsel's not presenting evidence of his "good character" as an adult, the result of Defendant's capital sentencing would have been different.

D. Conclusions of Law Regarding Claim 8

62. All prior conclusions of law are incorporated by reference herein as if fully set forth.

63. Based on the above-listed findings of fact, the Court concludes as a matter of law that Defendant has failed to establish deficient performance. Defendant has failed to overcome

the Strickland presumption that trial counsel acted reasonably in investigating and presenting available mitigation evidence at his capital sentencing proceeding.

64. Based on the above-listed findings of fact, the Court concludes as a matter of law that Defendant has failed to establish prejudice pursuant to Strickland. After reweighing the evidence in aggravation against the totality of the available mitigating evidence, the Court concludes Defendant has failed to show there is a reasonable probability that, but for trial counsel not conducting further mitigation investigation, the result of his capital sentencing proceeding would have been different. Additionally, after reweighing the evidence in aggravation against the totality of the available mitigating evidence, the Court concludes Defendant has failed to show there is a reasonable probability that, but for trial counsel not calling the additional witnesses or presenting the additional evidence suggested in Defendant's MAR and SMAR, the result of his capital sentencing proceeding would have been different.

E. Findings of Fact Regarding Claim 9

65. All prior findings of fact are incorporated by reference herein as if fully set forth.

66. In this claim, Defendant contends trial counsel were ineffective for failing to adequately prepare witnesses to testify or otherwise prepare for sentencing.

67. The Court finds this claim is merely a permutation of Defendant's MAR and SMAR Claim 8, which is addressed above. Therefore, all of the above-listed findings of fact applying to Claim 8 apply to this claim as well.

F. Conclusions of Law Regarding Claim 9

68. All prior conclusions of law are incorporated by reference herein as if fully set forth.

69. Based on the above-listed findings of fact, the Court concludes as a matter of law that Defendant has failed to establish deficient performance. Defendant has failed to overcome the Strickland presumption that trial counsel acted reasonably in investigating, preparing, and presenting mitigation evidence at his capital sentencing proceeding, including the preparation of mitigation witnesses.

70. Based on the above-listed findings of fact, the Court concludes as a matter of law that Defendant has failed to establish prejudice pursuant to Strickland. After reweighing the evidence in aggravation against the totality of the available mitigating evidence, the Court concludes Defendant has failed to show there is a reasonable probability that, but for trial counsel not further preparing witnesses to testify or further preparing for sentencing, the result of his capital sentencing proceeding would have been different. Additionally, after reweighing the evidence in aggravation against the totality of the available mitigating evidence, the Court concludes Defendant has failed to show there is a reasonable probability that, but for trial counsel not calling the additional witnesses or presenting the additional evidence suggested in Defendant's MAR and SMAR, the result of his capital sentencing proceeding would have been different.

IT IS THEREFORE ORDERED:

1. The State's motion to dismiss Claim 7 of Defendant's MAR and Claims 8 and 9 of Defendant's MAR and SMAR is **GRANTED**.

2. Defendant's Claims 7, 8, and 9 are hereby **DISMISSED**.

This the 6th day of February, ~~2018~~ 2019.

Honorable V. Bradford Long
Senior Resident Superior Court Judge