

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal From Dorchester County
The Honorable Diane S. Goodstein, Circuit Court Judge

S.C. Supreme Court

TIMOTHY DION ROGERS,

Respondent,

vs.

THE STATE,

Petitioner.

AMENDED PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Did the PCR judge erroneously find trial counsel ineffective for not adequately advising Rogers “in accordance with *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), prior to and during his aborted guilty plea” to the murder indictment where the only evidence of record is that counsel’s performance was neither deficient nor prejudicial under *Strickland v. Washington* and *Hill v. Lockhart*?
- II. Did the PCR judge err in granting relief on the two charges of CSC with a minor in the second degree because (1) it was improper for Rogers to challenge these separate convictions in his Amended Application, which only properly challenged his murder conviction; (2) the statute of limitations for filing a change to these convictions had long since run?
- III. Did the PCR judge err in granting relief on the two charges of CSC with a minor in the second degree because the supposed error did not involve the Circuit Court’s subject matter jurisdiction and Rogers waived personal jurisdiction; also, the grant of relief, which is based upon assault victim’s testimony, is inconsistent with Rogers’ plea and not supported by the record?
- IV. Did the PCR judge erroneously find trial counsel ineffective in his handling of the guilty pleas to the two charges of CSC with a minor in the second degree, including counsel’s not moving to withdraw the pleas when Rogers reneged on the guilty plea to murder, where the only evidence is that counsel’s strategy in offering the pleas was reasonable and there was no prejudice under *Strickland*, and Rogers’ unilateral rejection of the murder plea without prior notice to counsel did not provide a basis to withdraw his previous knowing and voluntary pleas to these charges?
- V. Is there any evidence of probative value in the record to support the PCR judge’s grant of relief on Rogers’ claim that trial counsel was ineffective for not effectively confronting and rebutting the State’s witnesses through testimony by assault victim and Dex Patterson, since the record does not show any prejudice and this ruling is inconsistent with the finding that there was no prejudice from counsel’s handling of these witnesses in the guilt phase?
- VI. Does the Order support the grant of Post-Conviction relief on the claim that counsel were ineffective in failing to hire an investigator for the resentencing proceeding, since it fails to comply with § 17-27-80 because it does not contain specific factual findings or conclusions of law on this claim?
- VII. Whether there is any evidence to support a finding that counsel were ineffective in failing to hire an investigator for the resentencing proceeding where (1) counsel articulated an objectively reasonable strategic reason for not hiring an investigator; (2) there was no prejudice under *Strickland*; and (3) relief on this claim is inconsistent with

the finding that counsel were not ineffective for not hiring an investigator for the guilt phase?

- VIII. Does the Order support the grant of relief on the claim that counsel were ineffective in failing to hire present an ophthalmologist at resentencing, since it fails to comply with § 17-27-80 because it does not contain specific factual findings or conclusions of law on these claims?
- IX. Did the PCR judge erroneously grant relief on the claim that counsel were ineffective in failing to hire present an ophthalmologist at resentencing there is no evidence to support a finding that counsel were ineffective in failing to employ and present an ophthalmologist at resentencing?
- X. Did the PCR judge erroneously grant relief based on counsel's failure to discover and present a video production and audio enhancement expert at resentencing because there is no evidence of deficient performance or prejudice under *Strickland*?
- XI. Did the PCR judge erroneously grant relief based upon the failure of counsel to discover and present evidence favorable to the defense through the examination of resentencing witness Stephanie Simmons because the record does not support a finding of prejudice under *Strickland*?
- XII. Did the PCR judge erroneously grant relief based upon the failure of counsel to discover and present evidence favorable to the defense through the examination of resentencing witness George Scharf because the record does not support a finding of prejudice under *Strickland*?
- XIII. Did the PCR judge erroneously grant relief based upon the failure of counsel to discover and present evidence favorable to the defense through the examination of resentencing witness James Robinson because the record does not support a finding of prejudice under *Strickland*?
- XIV. Did the PCR judge erroneously grant relief based upon the failure of counsel to discover and present evidence favorable to the defense through the examination of resentencing witness Anthony Riley because the record does not support a finding of prejudice under *Strickland*?
- XV. Did the PCR judge erroneously grant relief based upon the failure of counsel to discover and present evidence favorable to the defense through the examination of resentencing witness Earl Asbell because the record does not support a finding of prejudice under *Strickland*?
- XVI. Did the PCR judge erroneously grant relief based upon the failure of counsel to discover and present Correctional Officer Brown as a mitigation witness because the record does not support a finding of prejudice under *Strickland*?

- XVII. Did the PCR judge erroneously find counsel ineffective for not presenting an adequate case in mitigation of punishment where the only evidence is that counsel made a reasonable strategic decision not to use a social worker or to otherwise present evidence that might “demonize” Rogers’ mother and, instead, chose to present evidence of positive aspects of Rogers’ upbringing; also, there is no prejudice in this record under *Strickland*?
- XVIII. Did the PCR judge erroneously apply a “cumulative prejudice analysis to the various ineffectiveness claims raised because this is inconsistent with *Strickland*?

STATEMENT OF THE CASE

Respondent, Timothy Dion Rogers, is currently under a death sentence for murdering nine year old Stephanie B. on the Wednesday before Thanksgiving 1992. The Dorchester County Grand Jury indicted him for murder in February 1993. The State timely served its Notice Of Intent To Seek The Death Penalty and Notice Of Evidence In Aggravation, as well as an amended Notice Of Evidence In Aggravation. The Hon. Charles W. Whetstone, Jr., held pre-trial hearings on August 17 and 19, 1993. Rogers again appeared before Judge Whetstone on February 2, 1994, to plead guilty to murder.¹ However, he withdrew his plea before it was accepted. The State then notified him that it would seek the death penalty in the ensuing jury trial, and that there would be no further plea negotiations.

On February 28-March 5, 1994, Rogers received a capital jury trial before the Hon. Luke N. Brown, Jr. William Runyon, Esquire, and Mr. Mark Alan Leiendecker, the Dorchester County Public Defender, represented him at trial.² Following the sentencing proceeding, the jury found the statutory aggravating circumstances that the offender, by his act of murder, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and that Rogers killed a child under the age of eleven years old. *See* S.C. Code Ann. § 16-3-20(C)(a)(3)&(10) (Supp. 1994). The jury sentenced Rogers to death and Judge Brown imposed sentence upon him. **App. 29-1278; 1302-05; 1366-76.**

Rogers timely served and filed a Notice of Appeal. Chief Deputy Appellate Defender Joseph L. Savitz, III, represented him on direct appeal. After briefing by the parties **App. 1380-**

¹ He had previously entered pleas to two counts of criminal sexual conduct (CSC) with a minor in the second degree on January 25 and 27, 1994 before Judge Whetstone. **App. 1-25.**

² Walter M. Bailey, Jr., Solicitor for the First Judicial Circuit, and Assistant Solicitor Harrison Bell represented the State.

1477 and oral argument, this Court affirmed Rogers' murder conviction but reversed his death sentence and remanded the matter back for resentencing because the trial judge erroneously refused to give a *Simmons v. South Carolina*, 512 U.S. 154 (1994), instruction on his parole ineligibility. *State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996) (*Rogers I*). **App. 1478-83.**

The Hon. Victor A. Rawl held a motions hearing February 8 **App. 2538-42** and Judge Whetstone held a motions hearing on November 20, 1996. **App. 2544-2605.** On December 2-5, 1996, a resentencing proceeding was held before Judge Whetstone and a jury. Messrs. Runyon and Leiendecker again represented Rogers. The jury unanimously found that Rogers had killed a child under the age of eleven and it recommended a death sentence, which Judge Whetstone imposed. **App. 1485-2535; 2611-20; 2629-32.**

A timely Notice of Appeal was again served and filed. The direct appeal consolidated Rogers' direct appeal with this Court's sentence review under S.C. Code Ann. § 16-3-25(C) (1991). Following briefing by the parties **App. 2633-67** and oral argument, this Court filed a decision affirming Rogers' death sentence on December 6, 1999. **App. 2668-73.** A timely Petition for Rehearing **App. 2674-76** was granted in a January 24, 2000 Order and the Court substituted a re-filed Opinion for the original decision. *State v. Rogers*, 338 S.C. 435, 527 S.E.2d 101 (2000) (*Rogers II*). **App. 2677-83.** The Court also set an execution date for Rogers.

Mr. Savitz then filed a Motion for Stay of Execution, so that Mr. Rogers could pursue Post-Conviction Relief remedies, and the State did not oppose the request. On March 9, 2000, this Court granted a stay. It also appointed the Hon. Diane S. Goodstein to preside over this case and it granted her exclusive jurisdiction. On April 11, 2000, Judge Goodstein appointed Jeffrey P. Bloom, Esquire, and Diana L. Holt, Esquire, to represent Rogers.

Rogers filed his original PCR Application on June 12, 2000 Application. **App. 2688-92**. The State filed a Return on July 12, 2000. **App. 2693-2703**. Rogers then submitted an Amended Application for Post Conviction Relief on August 27, 2004. **App. 2704-18**. Although this was filed only slightly more than a month before the hearing began, it was not the last Application he filed. During the course of the prolonged hearings, he filed a Second Amended Application for Post Conviction Relief on March 30, 2005. **App. 3947-65**. Judge Goodstein held an evidentiary hearing into the matter on September 27- October 1 **App. 2719-3630**, November 22 **App. 3632-78**, and December 21 of 2004 **App. 3880-3945** and May 2 and August 23 of 2005. **App. 3985-4065**. Rogers was present each day of the hearing, and Mr. Bloom and Ms. Holt represented him. The undersigned and Assistant Attorney General Jeffery Jacobs represented the State. Rogers served a proposed Order on September 27, 2006, which he amended on June 11, 2007 **App. 4068-4208**; and the State served its proposed Order on May 11, 2007. **App. 4209-4411**.

Twenty-one months after the evidentiary hearing, Rogers served his Third Amended Application for Post-Conviction Relief on May 31, 2007.³ **App. 4412-35**. The State made a motion to strike the amended application on June 7, 2007. **App. 4436-59**. Following a January 2, 2008 hearing, Judge Goodstein denied the State's motion and allowed the amendment, but she agreed that the State had not been given notice of Rogers' plan to orally amend and assert a substantive *Burkhart* claim. So, she ordered Rogers to give formal notice of this amendment. **App. 4462-63**. Rogers filed a Revised Third Amended Application on September 29, 2008. **App. 4464-90**. The State made its Return to that pleading on October 13, 2008. **App. 4492-4512**. On

³ His amended claim asserted ineffectiveness for eliciting evidence about the conditions of prison confinement and for not objecting to the State's presentation of similar evidence on redirect examination of Associate Warden Priscilla Mack, in violation of *State v. Burkhart*, 371 S.C. 482, 487-88, 640 S.E.2d 450, 453 (2007).

July 21, 2009, Rogers filed a proposed order as to his amended grounds 9(g) and (h). **App. 4541-55.**

On June 17, 2010, this Court filed an Order directing that a final Order be filed in this case by September 1, 2010. **App. 4556-57.** On September 2, 2010, Judge Goodstein filed an Order granting relief on the penalty phase allegations and on the two charges of CSC with a minor in the second degree. Both Rogers **App. 4732-49** and the State **App. 4750-4817** filed Rule 59(e), SCRPC, motions. Judge Goodstein heard arguments on these motions on October 8, 2010. **App. 4718-4856.** She filed an Amended Order Granting New Sentencing on December 10, 2010. A timely notice of appeal was served and filed. This Petition now follows.

ARGUMENTS

I. The PCR judge erroneously found trial counsel ineffective for not adequately advising Rogers “in accordance with *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), prior to and during his aborted guilty plea” to the murder indictment where the only evidence of record is that counsel’s performance was neither deficient nor prejudicial under *Strickland v. Washington* and *Hill v. Lockhart*. (Question I).

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and it will reverse the decision of the PCR court when it is controlled by an error of law. *Suber v. State*, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007). Here, the PCR judge erroneously found that Rogers was entitled to a new resentencing proceeding based upon trial counsel’s failure to adequately advise him as to the possibility of entering a plea under *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) App. 4867-72; 4921-24, and for failing to properly advise him with respect to the negotiated guilty pleas to two charges of CSC with a minor in the second

degree and one count of murder, since the record does not support her findings of deficient performance and prejudice. **App. 4872-76; 4924.**

Although the convictions for CSC with a minor in the second degree clearly did not involve any actual violence by Rogers, they were nevertheless defined as “violent crimes” under S.C. Code Ann. § 16-1-60 (Supp. 1993), at the time of his trial.⁴ As a result, these convictions would have made him ineligible for parole if sentenced to life imprisonment for murder. *See* SC. Code Ann. § 24-21-640 (Supp. 1993). *See also State v. Varner*, 310 S.C. 264, 425 S.E.2d 133 (1992).

The record of the failed murder plea reflects that Rogers understood that he was waving his constitutional right to a death penalty jury trial on the murder charge and the various rights that adhere to such a trial. He indicated that he wished to give up his rights and plead guilty; that he understood he was admitting that he was guilty of the crime charged and that he was admitting that he was guilty of the crime of murder. When asked what he did, however, he indicated that he “accidentally shot” the victim. **App. 1349-57.** Runyon attempted to clarify that Rogers meant “he did not set out” with an intent to do harm to this young child. **App. 1357.** Yet, Rogers disagreed with the State’s proffer of evidence in support of the plea and he gave a factual scenario consistent with his statement to law enforcement that was introduced in both trials as State’s Ex. 18. He then pled not guilty to murder. **App. 1357-62.**

Counsel testified that there was never any discussion about a possible *Alford* plea to murder because the Solicitor, who had been reluctant to any plea bargain, “didn’t want equivocation, he wanted a guilty plea,” in which Rogers admitted his guilt. Also, the Solicitor

⁴ *See* 1991 *Op. Atty. Gen.* No. 91-56, p. 118. Subsequent to the Attorney General Opinion and after this murder, § 16-1-60 was specifically amended to list as a defined violent crime “criminal sexual conduct with minors, first and second degree (Section 16-3-655). . . .” 1993 Acts and Joint Resolutions No. 184, Section 8, effective January 1, 1994.

wanted closure for the victim's family. Rogers had remained in apparent agreement with counsel's proposed strategy until he refused to go forward at the plea. **App. 3498-99; 3740-47.** After the aborted guilty plea to murder, counsel did not make a motion to withdraw the CSC with a minor guilty pleas, although they had been part of a greater plea agreement, because there was no factual basis for such a motion. Rather, the State had upheld its end of the plea bargain but Rogers, himself, decided to change his mind about the guilty plea to murder.⁵ Also, the United States Supreme Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994) was "in the pipeline" and counsel used the two prior convictions for violent crimes to support his request for an LWOP jury instruction. Without such a requested instruction, the original sentence of death in this case would have been affirmed in *Rogers I, supra*. **App. 3501-02; 3746-49.**⁶

Before the guilty pleas were entered to the CSC charges, counsel made Rogers aware of the potential consequence of entering those pleas and not pleading guilty to murder.⁷ Rogers was in apparent agreement. Before the guilty plea to murder, Runyon spoke to Rogers' mother and stepfather and he got them prepared, particularly on the day they were going to do the plea. Runyon also sat down with Rogers, reviewed everything with him and "made sure that this was

⁵ Runyan thought that it would be "very, very difficult" to claim the other offenses had not occurred in light of the plea and said this would be "disingenuous." Relying upon Runyan's testimony at **App. 3494-98**, the PCR judge found that "Mr. Runyan testified that he became very angry with [Rogers] when [Rogers] was unable to complete the final leg of the three-part plea agreement. . . . In fact, . . . Mr. Runyan's anger was still palpable and intense, so much so that he was unable to maintain decorum and uttered a profane response to a question PCR counsel asked him about it. PCR Tr. 1032. **App. 3752.** Although Runyan did inappropriately state, "[d]amned right I was upset with him" at the PCR hearing, he apologized the moment the Court addressed his comment. **App. 3752, ll. 10-14.** Further, this is the only inappropriate word spoken by Mr. Runyan and it only occurred after hours of belabored cross-examination. (Rogers' cross-examination of him comprises approximately one-sixth of the PCR hearings held in 2004). See **App. 3532-3752.** Also, his comment was meant to convey his *agreement* with collateral counsel's question, as opposed to expressing anger or disgust with the length of cross-examination or the manner in which it was conducted. There is no evidence that counsel failed to move to withdraw the earlier pleas based upon Rogers' failure to plead to murder.

⁶ The United States Supreme Court granted certiorari in *Simmons* after the pleas to CSC with a minor in the second degree but before the aborted guilty plea to murder (see *Simmons v. South Carolina*, 510 U.S. 811 (1993)), and the opinion was decided on June 17, 1994.

⁷ "[O]ne of the biggest things" that he discussed with Rogers "was this whole concept of perhaps working out a plea bargain; which we did in fact work out."

what he wanted to do.” He explained the legal definition of malice; the elements of murder, how Rogers “was culpable of the crime of murder” and why the guilty plea was in Rogers’ best interest. Rogers “felt good about going forward and understood that it was going to save his life.” Importantly, Rogers never suggested that the sexual activity did not occur in Dorchester County. **App. 3476-77; 3492-3520; 3564-70; 3739-40.**

Former Solicitor Bailey testified that Runyon contacted him “shortly after” he became Solicitor and proposed a guilty plea to voluntary manslaughter. Although Mr. Bailey turned down the offer and served the Notice of Intent to Seek the Death Penalty, plea negotiations continued. Eventually, Runyon proposed that Rogers plead guilty to two charges of CSC with a minor, which were violent crimes under South Carolina law. Then, under the “three strikes law” which was in effect, he would be parole ineligible if he pled guilty to murder. Solicitor Bailey discussed this with the family and they reluctantly agreed to the plea bargain, with the assurance that Rogers would be parole ineligible.⁸ **App. 3776-79.** The agreement was then worked out with Runyon, but Rogers failed to go through with the guilty plea. After that point, Mr. Bailey had no interest in a plea bargain. **App. 3776-79.** There was never any need for an *Alford* plea because the parties agreed on a guilty plea. Also, this was not something to which Rogers had initially agreed. **App. 3778-79.**

To prevail on this allegation under *Strickland v. Washington*, 466 U.S. 668 (1984), Rogers must first demonstrate that his attorneys’ “representation fell below an objective standard

⁸ Solicitor Bailey was uncertain that the pleas could be entered simultaneously. So, he contacted the South Carolina Department of Probation, Parole and Pardon Services and was told that if Rogers’ plea to the CSC charges was entered before the murder plea, then he would be parole ineligible on a sentence for murder.

of reasonableness.” *Strickland*, 466 U.S. at 688.⁹ He must show ‘that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.’ *Id.*, at 687, 104 S.Ct. 2052.” *Harrington v. Richter*, 131 S.Ct. 770, 787 (2011) (quoting *Strickland*).¹⁰ Even if counsel’s performance is deficient, he must prove that he was prejudiced by counsel’s errors, *i.e.*, “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*. 466 U.S. at 694. The prejudice standard for guilty pleas requires proof “that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill*, 474 U.S. 52, 59 (1985). In the context of a capital sentencing proceeding, he must prove that “there is a reasonable probability that ... the sentencer—including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Id* at 695; *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).¹¹

The PCR judge erred in finding deficiency in counsel’s handling of the three pleas. First, the manner in which counsel advised Rogers about the proposed guilty pleas was not deficient, including the plea to murder. He was apprised of the charges he faced, he understood those charges and he agreed to the strategy. He also was aware of the benefit of a plea to murder and the potential consequences if he did not go through with the plea to that offense; and he agreed to counsel’s proposed strategy with the full understanding that he would have to admit his factual

⁹ “Judicial scrutiny of counsel’s performance must be highly deferential,” and “every effort [must] be made to eliminate the distorting effects of hindsight ... and to evaluate the [challenged] conduct from counsel’s perspective as the time.” *Id.* at 689.

¹⁰ “Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is ‘all too tempting’ to ‘second-guess counsel’s assistance after conviction or adverse sentence.’” *Id* at 787 (citation omitted).

¹¹ It is insufficient to prove “that the errors had some conceivable effect on the outcome of the proceeding.” [*Strickland* 488 U.S. at 693]. Rather, “[c]ounsel’s errors must be ‘so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *Richter*, 131 S.Ct. at 787 (quoting *Strickland*, 466 U.S. at 687).

guilt to the crime of murder. While Rogers' consent to trial strategy does not, alone, vitiate all ineffective assistance claims, his consent is probative both of the reasonableness of the chosen strategy and of counsel's performance. *Strickland*, 466 U.S. at 689; *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995).

Further, counsel was not deficient for failing to pursue an *Alford* plea to the murder charge. This Court held that an *Alford* plea could "form a valid basis for imposition of the death penalty" on February 1, 1993, in *State v. Ray*, 310 S.C. 431, 434-35, 427 S.E.2d 171, 173 (1993). However, *Ray* is the only South Carolina case of which the State is aware where an *Alford* plea was entered to capital murder.¹² More importantly, the *only* evidence in the record is that Rogers completely agreed with trial counsel's proposed strategy, until *he* reneged on the plea to murder. Therefore, it was unnecessary to pursue a possible *Alford* plea. The Order overlooks that Rogers cannot render counsel's representation constitutionally ineffective under *Strickland* through his own actions. See *United States v. Pellerito*, 878 F.2d 1535, 1543 (1st Cir. 1989) ("If counsel was ineffective in any sense, it was only because the client rendered him so That is not the sort of "ineffectiveness" for which relief can be granted").¹³ Nor is there any conceivable prejudice to Rogers since, once again, the only evidence is that Solicitor Bailey would not have accepted

¹² The State recognizes that the defendant's plea in *Alford* was entered because of a desire to avoid the death penalty. However, that does not alter the uncontroverted evidence that the State was unwilling to entertain an *Alford* plea to Rogers' murder indictment, or that he was in complete agreement with the decision to enter a traditional guilty plea, until he was in front of the trial court for that plea. The same is true of the Solicitor's willingness to permit an *Alford* plea to another murder case. The Court's Order also relies upon Leiendecker's opinion that Rogers would have been able to satisfy the requirements of such a plea. App. 2824-28. However, he acknowledged that all *Alford* pleas that he had any involvement in involved conversations with both the judge and the Solicitor because a criminal defendant does not have a constitutional right to enter a guilty plea. He was also unaware of any basis to move to withdraw the August 1994 pleas to the CSC with charges at the time. App. 2809-01.

¹³ See also *Roberts v. Dretke*, 356 F.3d 632, 638-39 (5th Cir.2004) (citing *Autry v. McKaskle*, 727 F.2d 358, 361 (5th Cir.1984) ("By no measure can [a defendant] block his attorney's efforts and later claim the resulting performance was constitutionally deficient.")).

anything other than a guilty plea in which Rogers admitted his factual guilt to the crime of murder.

Further, the PCR judge erroneously found that counsel was ineffective in failing to move to withdraw the August 1994 guilty pleas to the CSC with a minor charges after the aborted guilty plea to murder. **App. 4873-76**. First, Rogers did not prove deficient performance by counsel. “The withdrawal of a guilty plea is generally within the sound discretion of the trial judge.” *State v. Riddle*, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982). An abuse of discretion occurs only when a trial judge’s decision is unsupported by the evidence or controlled by an error of law. *State v. Lopez*, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002). A determination the guilty plea was voluntarily entered “will normally show the trial judge did not abuse his discretion.” *Riddle*, 278 S.C. at 150, 292 S.E.2d at 796.¹⁴ In finding that counsel’s performance did not meet the requirements of *Strickland*, the PCR judge relies upon the ABA Guidelines: Appointment and Performance of Defense Counsel in Death Penalty Cases, Guidelines 11.6.1 through 11.6.4 (plea negotiations). *E.g.*, **App. 4873**. Her reliance is misplaced. These are merely guidelines, *at best*, and trial counsel need not comply with them to render objectively reasonable representation. *Bobby v. Van Hook*, 130 S.Ct. 13, 17 (2009); *see also id* at 20 (Alito, J., concurring).¹⁵ The State submits that, contrary to the finding of the PCR judge, Runyon’s explanation for not moving to withdraw the guilty pleas is credible: there was no basis

¹⁴ See also *State v. Cantrell*, 250 S.C. 376, 378, 158 S.E.2d 189, 191 (1967); *State v. Rikard*, 371 S.C. 295, 301, 638 S.E.2d 72, 75 (Ct. App. 2006).

¹⁵ Likewise, the PCR court’s reliance upon *Jordan v. State*, 294 S.C. 52, 374 S.E.2d 683 (1988) is misplaced. **App. 4873**. In *Jordan*, counsel was found ineffective for not moving to withdraw the plea when the prosecution reneged on the plea bargain after the defendant had pled guilty. *Id.* at 54-55, 374 S.E.2d at 684-85. Here, however, the only person in breach of the agreement was Rogers. Again, it was not deficient performance and certainly not prejudicial for counsel not to move to withdraw his plea. See *Com. v. Jefferson*, 777 A.2d 1104, 1106-07 (Pa. Sup. Ct. 2001).

for such a motion. This reasoning is consistent with Rogers' representations at the time of his pleas and his 1996 resentencing testimony. **App. 2378-81.**

With regard to the January 24 plea in 94-GS-18-0047, the record clearly reflects that Rogers was not under the influence of drugs or alcohol. The record also demonstrates that he understood: (1) the nature of the charges to which he was pleading guilty; (2) the maximum punishment for the offenses; (3) he had a right to a jury trial on these charges but was waiving that right and the rights inherent thereto by entering his pleas; (4) his guilty plea waived his right to challenge any defenses he had or deficits in the State's case; (5) and each conviction would be considered a violent offense under South Carolina law. However, he admitted that he had sex with a fifteen year old girl "knowingly;" and he indicated a desire to plead guilty. **App. 1-9.** On January 25, the Solicitor stated on the record that there were no plea negotiations in regard to 94-GS-18-0047, and both Runyon and Rogers agreed. Rogers stated that he had not been promised anything to get him to plead guilty to the charge and that he was pleading guilty of his own free will. **App. 9-10.** Rogers stated, again, that this was what he wanted to do. He assured the trial court that he was pleased with counsel's representation; that counsel had done everything that he had asked counsel to do to prepare the case; that he had enough time to discuss the case with Runyon; and that he had understood his conversation with Runyon. Rogers likewise waived the three days notice request with respect to the indictment. Based upon this record, the trial court properly found that there was a factual basis for the guilty plea and sentenced him to seven years imprisonment. **App. 10-14.**

On January 27, the trial court accepted the plea in 94-GS-18-0049. The record of that plea likewise reflects a knowing and voluntary plea within the mandates of *Boykin* and contains a

virtually identical colloquy as the January 24 plea.¹⁶ Notwithstanding the PCR judge's contrary finding, a review of the CSC with a minor guilty pleas clearly shows that they were freely and voluntarily entered in accordance with *Boykin v. Alabama*, 395 U.S. 238 (1969). Thus, there was no factual basis to withdraw these pleas.¹⁷

Indeed, the Order is contrary to *Blackledge v. Allison*, 431 U.S. 63 (1977). There, the Court noted that a defendant's representations at the time of his guilty plea are not "invariably insurmountable" when challenging the voluntariness of his plea. However, the defendant's representations, as well as any findings made by the judge accepting the plea, "constitute a formidable barrier Solemn declarations in open court carry a strong presumption of verity," and a subsequent presentation of conclusory allegations and contentions that are wholly incredible in the face of the record are subject to summary dismissal. *Id* at 73-74. *See also Crawford v. United States*, 519 F.2d 317 (4th Cir. 1975). As a result, the PCR judge erroneously found that Rogers provided her with sufficient reason to permit him to depart from his earlier representations at the time of his guilty pleas based upon assault victim's testimony, and he should not have been permitted to undermine otherwise valid guilty pleas without testifying. This error is exceptionally egregious, since assault victim's testimony conflicts with both Rogers' representations at the time of the plea and his subsequent sworn testimony. **App. 2378-81.**¹⁸

¹⁶ Once again, Rogers admitted that he "knowingly had sex with a minor on a regular basis." **App. 18**. He also admitted having sex with her before she turned sixteen. **App. 19**. Further, the Solicitor placed on the record that this plea and the January 24 plea were part of "a larger plea negotiation" involving a plea to murder and an LWOP sentence to avoid the death penalty. Both Rogers and Runyon agreed with the explanation. **App. 14-21**. Other than the plea negotiation, there were no promises or inducements for Rogers' plea. The trial court imposed a seven year sentence. **App. 21-25**.

¹⁷ For the reason set forth in **Argument II**, Rogers' challenges to his CSC convictions were not properly before the PCR court.

¹⁸ Any suggestion that counsel failed to make a motion to withdraw as the result of his displeasure with Rogers' decision not to go forward with the subsequent guilty plea to murder is meritless because the record demonstrates that the reasons stated by Runyon are credible: they are supported by the testimony of Mr. Bailey and the record of the plea and they are supported under the law. Runyon candidly admitted that he was "extremely concerned" when

Nor did counsel have a basis to withdraw the guilty pleas to the CSC offenses because they were part of a greater plea negotiation for a sentence of LWOP on the charge of murder and that plea fell through. Although the pleas to these offenses were part of the negotiations on the murder charge, they remained freely and voluntarily entered despite Rogers' subsequent change of mind about pleading guilty to murder. A guilty plea rests upon contract principles. *E.g.*, *State v. Thrift*, 312 S.C. 282, 292-93, 440 S.E.2d 341, 347 (1994) (*citing Santobello v. New York*, 404 U.S. 257 (1971)); *see also United States v. Chase*, 466 F.3d 310 (4th Cir. 2006). Here, the record conclusively demonstrates that both sides had received the "benefit of their bargain:" in exchange for the pleas to CSC with a minor and the subsequent plea to murder, the State agreed not to seek the death penalty and allow a negotiated sentence of LWOP. The only reason that sentence was not ultimately imposed is because *Rogers unilaterally changed his mind* and decided to enter a plea of not guilty to the murder charge. This was his constitutional right, but his exercise of that right does not render the earlier pleas involuntary or provide any basis for a motion to withdraw those pleas. *See Pellerito*, 878 F.2d at 1543. Again, Rogers should not be allowed to prevail on ineffectiveness claims that are entirely based on his own unilateral breach the plea agreement with which the State had fully complied, he and counsel had previously agreed upon and the trial court was willing to accept.

Similarly, there is no merit to the PCR judge's finding that the Solicitor and Runyan were mistaken about assault victim's age and the county in which the CSC offenses occurred. Her

Rogers failed to go forward with the guilty plea to murder because "the whole deal was getting blown." **App. 3501**. Rogers had not discussed his decision to plead not guilty with counsel. **App. 3752**. Regardless of whether counsel's discussion with Rogers was heated, as Mr. Leiendecker testified **App. 2879-83** or whether it was more civil, as described by Runyon **App. 3752**, there is no indication from either witness that the subsequent actions of either attorney were taken as the result of their displeasure with Rogers' decision. Rather, Runyon was merely upset that Rogers was not following what he considered to be a sound strategy that was designed to save Rogers's life. Indeed, Leiendecker clearly testified that "I'm certainly not trying to give the impression that Bill did not buckle down and go to work, because he's a professional and dedicated to what he did." **App. 2881-83**.

finding of deficient performance is contrary to *Strickland*'s admonition that "counsel has a duty to make *reasonable* investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-691.¹⁹ Also, "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id* at 691.²⁰ Here, the PCR judge's finding is based upon the erroneous assumption that Rogers did not have intercourse with assault victim before the date of her pregnancy. Also, counsel's testimony is un-refuted by his former client: he based his strategy upon information provided to him by Rogers, who admitted to sex with the fifteen year old victim and Rogers never suggested that the crimes did not occur in Dorchester County. Further, Rogers admitted to the crimes in 1996. **App. 2378-81**. Thus, counsel's performance was not deficient. *Id*.

Alternatively, the PCR judge improperly found that Rogers had established prejudice based on counsel's failure to make the motion. Apart from the previously stated reasons, the State submits that he was not prejudiced because the two CSC convictions resulted in him being convicted of two violent felonies for which he may never have been otherwise charged, and these convictions provided the basis for future sentencing enforcement. **App. 4875-76**. Again, Rogers knowingly, intelligently, and voluntarily allowed counsel to pursue the strategy that was followed. *Bell*, 72 F.3d at 429.²¹ Moreover, without counsel's strategy in not withdrawing these pleas, the original death sentence would have been affirmed on direct appeal because the only

¹⁹ "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id*.

²⁰ Counsel simply does not have to investigate matters at odds with what client has said and what victim will testify. **Error! Main Document Only.** *Mobley v. Head*, 267 F.3d 1312, 1318-19 (11th Cir. 2001); *Ames v. Endell*, 856 F.2d 1441, 1444-45 (9th Cir. 1988).

²¹ Also, he was undeniably aware that he was pleading guilty to violent crimes under state law; and there was no suggestion that the entry of his plea to CSC was contingent upon his subsequent guilty plea to murder.

sentencing phase raised on direct appeal in *Rogers I* - and the issue on which this Court granted relief - was the trial judge's failure to give a *Simmons* charge on parole ineligibility if Rogers was sentenced to life imprisonment, as the result of the two convictions for violent crimes. See *Rogers I*, 320 S.C. at 526-28, 466 S.E.2d at 363-64. Further, in accordance with Rogers' position at the November 20, 1996 pre-trial motions hearing **App. 2565-67**, the trial judge included a *Simmons* instruction in his jury charge. **App. 2505-06.**²²

As a result, he received an LWOP instruction in the 1996 resentencing proceeding only because of the existence of the two CSC with a minor convictions. This is a benefit that was strategically pursued by counsel after the aborted guilty plea to murder. Finally, a finding of prejudice ignores that **he** has never testified that his representations at his pleas or that his 1996 admission to the CSC charges, given under oath and in an effort to mitigate the murder, were false. Thus, there was no prejudice under *Hill* and *Strickland*. See *United States v. Guerrero*, 938 F.2d 725, 730 (7th Cir. 1991) (there is no ineffective assistance of counsel even where the attorney chooses one reasonable strategy to the exclusion of another).

II. The PCR judge erroneously granted relief on the two charges of CSC with a minor in the second degree because (1) it was improper for Rogers to challenge these separate convictions in his Amended Application, which only properly challenged his murder conviction; (2) the statute of limitations for filing a PCR change to these convictions had long since run; (3) the supposed error did not involve the Circuit Court's subject matter jurisdiction and Rogers waived personal jurisdiction; and (4) the grant of relief, based upon assault victim's testimony, is inconsistent with not supported by the record. Also, the only evidence of probative value in the record is that Rogers did not prove either deficient performance or prejudice on his related ineffectiveness claim. (Questions II-IV).

Despite Rogers' 1996 resentencing testimony, the PCR judge found that the trial court was without jurisdiction to accept his January 25 and 27, 1994 guilty pleas to CSC with a minor

²² He also similarly instructed the entire resentencing *venire*. **App. 1507-08.**

in the second degree based on assault victim's PCR testimony that she only had sex with him in Charleston County. **App. 4973-84**. This was error for the following reasons.

First, as a matter of law, Rogers cannot utilize the current Application to challenge both his murder conviction and sentence and his guilty pleas to the two CSC with a minor charges - entered on separate days at a different term of court, and based upon different indictments and judgments - under the Uniform Post Conviction Relief Act, S.C. Code Ann. §§ 17-27-10 through -160 (1988 & Supp. 2007) because the clear intent of the Act was that only one judgment of conviction and sentence may be attacked in a PCR application. This conclusion is supported by a review of the various provisions in the Act, which refer to a "judgment" or a "conviction" and "sentence," in the singular. *See, e.g.*, § 17-27-40 ("A proceeding is commenced by filing an application verified by the applicant with the clerk of the court in which the *conviction* took place") (emphasis added); § 17-27-45(A) ("An application for relief filed pursuant to this chapter must be filed within one year after the entry of a *judgment of conviction* or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later") (emphasis added); §§ 17-27-50 & -80.²³

Second and even assuming that a PCR applicant may challenge more than one judgment in a PCR application, the PCR judge ignored that Rogers' challenge to the CSC convictions is barred by § 17-27-45(A). He did not take an appeal from those convictions.²⁴ Instead, he first

²³ *See also* § 17-27-20(a) & (b); § 17-27-160 (governing capital case post-conviction relief procedures). This conclusion is likewise supported by Rule 71.1(b), SCRPC. ("An application for post-conviction relief cannot be made while an appeal *from the conviction or sentence* is pending or during the time in which an appeal may be perfected") (emphasis added). The reason for this requirement is obvious. Different judgments often involve different trial counsel or different witnesses. There also may be different defenses to the separate judgments, as in the present case. Here, the CSC convictions were part of Rogers' plea negotiations to the murder charge but were not factually related to it, unlike the underlying non-murder convictions in *State v. Charping*, 313 S.C. 147, 437 S.E.2d 88 (1993), which were originally tried with the charge of murder.

²⁴ He did not claim that counsel was ineffective in failing to perfect an appeal therefrom. *Contra Wilson v. State*, 348 S.C. 215, 559 S.E.2d 581 (2002).

challenged the subject matter jurisdiction for his CSC guilty pleas in **Ground 9(C)** of the August 27, 2004 Amended Application for Post Conviction Relief.²⁵ Because his convictions and sentences were entered before the passage of §17-27-45(A), he had until July 1, 1996, to file a PCR application challenging them. *See Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). He did not challenge them until eight years later. Thus, the statute of limitations barred his challenge to the supposed lack of subject matter jurisdiction. *Id.*

Third, this allegation does not truly involve the subject matter jurisdiction of the Court of General Sessions, contrary to the PCR judge's conclusion. *See State v. Gentry*, 363 S.C. 93, 100-01, 610 S.E.2d 494, 498-99 (2005) ("subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong;" and "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters"). Clearly, there was no basis in the record upon which to conclude that the trial court lacked subject matter jurisdiction. Rather, Rogers claim is one of personal jurisdiction, which he waived by answering the charges and pleading guilty to them in Dorchester County. *See State v. Dudley*, 354 S.C. 514, 542, 581 S.E.2d 171, 186 (Ct.App. 2003); *State v. Douglas*, 245 S.C. 83, 138 S.E.2d 845 (1964); *State v. Castleman*, 219 S.C. 136, 138-39, 64 S.E.2d 250, 251 (1951) (a defendant may waive any complaints he may have regarding personal jurisdiction by failing to object to the lack of personal jurisdiction and by appearing to defend his case). Thus, Rogers waived personal jurisdiction by appearing and entering knowing and voluntary pleas to these charges. *Id.*

Fourth, the PCR judge should have rejected the supposed lack of subject matter jurisdiction on the "merits" because no credible evidence supports this claim. Rogers admitted

²⁵ This was over four years after he filed the original Application. Rogers original Application only challenged the murder conviction and sentence. **App. 2688-92.**

his guilt to each of the CSC offenses in the Dorchester Court of General Sessions and he never contested that, in fact, the offenses occurred in Charleston County. *See Blackledge*, 431 at 73-74. He has never given contrary testimony. Without his testimony to support this claim, he should not be permitted to depart from the representations at the time of his plea and relief should have been denied. *Id.*²⁶ Additionally, his 1996 resentencing testimony admitting these offenses is in apparent conflict with this allegation. **App. 2378-81**. As a result, the PCR judge erroneously allowed Rogers to undermine his guilty plea without requiring him to testify and admit to perpetrating a fraud on the court by lying to the trial judge at the time of his pleas.

Further and for the reasons set forth in **Argument I**, counsel's investigation into the location of the CSC charges and assault victim's age when the crimes occurred was not deficient because it was based upon information given to him by Rogers. *See Strickland*, 466 U.S. at 690-691; *Mobley*, 267 F.3d at 1318-19. Also, given Rogers' 1996 testimony and his refusal to testify and be subject to cross-examination in PCR, this allegation is predicated entirely upon T. B.'s credibility. However, the record does not support the PCR court's finding that she was credible. In reaching a contrary conclusion as to this allegation, the finding of credibility ignores a number of factors, not the least of which is Rogers' contrary sworn testimony.²⁷ The bottom line is that

²⁶ *Cf. Bean v. Calderon*, 166 F.R.D. 452, 454-55 (E.D.Cal. 1996) (State was entitled to depose capital habeas petitioner who claimed ineffective assistance of counsel and prosecutorial misconduct. While petitioner had the right to invoke Fifth Amendment, the district court could draw adverse inference from invocation of privilege if questions to which privilege was asserted directly related to allegation made by petitioner in verified petition). As the Court explained in *Bean*, "Petitioner has invoked the court's process to overturn what would otherwise be a final state conviction, and must prove that it should be overturned. It is not at all untoward to hold that petitioner must establish the facts that would give rise to the overturning, and if he refuses to put forth facts that are within his knowledge, and which are pertinent to the claims that he has made in habeas, an adverse inference may be drawn." *Id.*

²⁷ First, assault victim was originally Rogers' co-defendant, the charges against her have long ago been dismissed, and she no longer had any reason to fear prosecution in this case. **App. 872-73; 917**. Also, her credibility was impeached with her criminal record under Rule 609, SCRE, and by evidence that she was incarcerated under a five-year sentence for shoplifting and a probation revocation at the time of the PCR hearing. **App. 3066-67**. Further, she is the mother of Rogers' child, and her PCR account of the crime was inconsistent with her statement to law enforcement and her trial testimony. Finally, the finding that she was credible ignores that she was with Rogers on

she had nothing to lose but everything to gain by giving false testimony that might spare the father of her child from either a sentence of death or one of life without parole. Finally, there is no prejudice under *Strickland* for the reasons set forth in **Argument I**.

III. There is no evidence of probative value to support the PCR judge's finding that trial counsel was ineffective for not effectively confronting and rebutting the State's witnesses through testimony by assault victim and Dex Patterson, since the record does not show any prejudice and the PCR judge's ruling is inconsistent with the finding that there was no prejudice from counsel's handling of these witnesses in the guilt phase. (Question V).

The State submits that the PCR judge erred by finding that trial counsel was ineffective for not effectively confronting and rebutting the State's witnesses through testimony by assault victim and Dex Patterson (**App. 4936; 4941-43**), because Rogers failed to prove any prejudice under *Strickland*. Indeed, granting relief on this allegation and the other witnesses addressed in **Argument VII** is inconsistent with the PCR judge's contrary findings that there was no prejudice from counsel's handling of these witnesses in the guilt phase. **App. 4885-90**. Rogers' resentencing claims are weaker because the same points would be made in resentencing by these witnesses; he had already been convicted by the time of resentencing; and there is no constitutional right to argue residual doubt. *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988) (the Eighth Amendment "in no way mandates reconsideration by capital juries, in the sentencing phase, of their 'residual doubts' over a defendant's guilt ... [s]uch lingering doubts are not over any aspect of petitioner's 'character,' 'record,' or 'circumstance of the offense'"); *State v. Southerland*, 316 S.C. 377, 386, 447 S.E.2d 862, 868 (1994).

the night of the murder; that she ran in the same direction as he and Patterson after the murder; and that there has never been any suggestion that she was going home that night.

While Runyon's testimony concerning the pretrial preparation for resentencing supports a finding that counsel's pretrial preparation for resentencing was not deficient under *Strickland*,²⁸ it is unnecessary for this Court to address the deficiency prong because there is no evidence to support the finding that Rogers was prejudiced by counsel's handling of assault victim and Dex Patterson at resentencing. Rogers testified in 1996 that he and his cousin had been working on a car the day of the shooting. He and Patterson²⁹ had been drinking on the day of the murder, and they went to Spell's around 6:00 p.m. When he got there, he went to use the phone. A pickup truck containing Mr. B., Mr. Carver and Stephanie B. thereafter pulled into the parking lot. Rogers knew where Patterson was but he "wasn't really paying attention to what" Patterson was doing. **App. 2384-86.**

Rogers claimed that the trouble began when Mr. B. said that he needed to use the phone and Rogers told Mr. B. that he would be through in a minute. After Rogers turned back around to talk on the phone, Mr. B. continued "mumbling that he needed to use the phone now" and said "give [me] the phone, boy." Rogers said that Mr. B. was being very vulgar about it, and that Patterson and Mr. B. got into a verbal argument. Rogers got involved when he heard Mr. B. and Carver get out of the truck. At that point, Patterson was trying to attack the men and assault victim (Rogers' girlfriend) was trying to restrain him. Mr. B. and Carver were approaching Patterson, with Carver toward the back of the truck. **App. 2388-89.** Rogers then asked the person

²⁸ Counsel did not interview either Patterson or assault victim before the 1996 proceedings but he had assault victim's statement and was aware that Patterson would not provide favorable testimony. **App. 3477; 3503-05; 3507-09; 3553; 3560-66; 3584-90; 3613-18; 3770-71.** Leiendecker's testimony that he did not interview Patterson lacks credibility; and that it is almost impossible to believe he that represented Patterson in a matter shortly after the original trial in this case and the senseless murder of a nine year old victim would not be discussed. His testimony also appears to be in conflict with representations made by him and co-counsel at a November 20, 1996 hearing on a continuance motion, in which Rogers admitted working on the case and counsel wanted to alert the trial court that a continuance may be necessary because of the terminal illness of Leiendecker's grandfather in Ohio. **App. 1626-37.**

²⁹ He testified that Patterson was twenty-three or twenty-four at the time of the resentencing. **App. 2384.**

to whom he had been talking to hold on; he put the phone down and he stepped between Mr. B. and Carver. He admittedly was not "as polite as a scholar or anything, but I asked him ... what's up." Carver "pretty much stayed by the back of the truck," but Mr. B. turned around and "was pulling something from the behind the backseat of the truck." Rogers thought that Mr. B. was reaching for a weapon. So, he immediately pulled out his gun and fired it into the air to stop Mr. B. from producing a weapon. Mr. B. stopped what he was doing. "Then, Dax told me that I had shot somebody in the truck."³⁰ This all occurred before the truck moved. He denied laughing and claimed that he was scared. Therefore, he ran "down the street through some woods." Eventually, he made his way to Alabama. **App. 2389-93.**

He denied knowing that he killed a child at the time of the shooting. Also, he said he did not know the Bs or Carver before the shooting. He denied pointing a gun at Mr. B., or telling Mr. B. to get in the truck or Rogers would kill him. He likewise denied spitting and said that he did see Patterson spit. Although he understood he had been convicted of murder for killing Stephanie B., he claimed the shooting was "an accident," and that he had not intended to kill either her or anyone else in the truck. He further claimed that his statement to the police in Alabama accurately described what had happened on November 25, 1992; and he acknowledged that his actions ruined the Bs' lives, his family members' lives and his life. Finally, he asked to spend the rest of his life in prison. **App. 2393-99.**

The PCR judge found that both witnesses could testify that Rogers was not wearing the glasses that he needed to properly see, and that they have testified that Mr. B. and Carver were reaching for weapons when the shooting occurred. She further found that the testimony of these witnesses was consistent and that both were credible. **App. 4941-44.** However, her credibility

³⁰ Rogers admitted that he possibly shot twice, but both shots were fired while the truck was stationary.

determinations are inconsistent with the record. *See Suber*. Patterson did not testify in either trial. assault victim testified at trial and in 1996 and her testimony in both trials is very similar. **Compare App. 860-79 with App. 2145-57.** Notwithstanding the PCR judge's finding, assault victim's PCR testimony **substantially differed** from her 1994 trial testimony, her 1996 testimony and her statement to police (Appl.'s Ex. 21) in several respects. Contrary to Mr. B.'s testimony (**App. 2118-20**), she claimed that Rogers did not get up in the driver's side door with Mr. B. and put a gun to Mr. B.'s head; that Rogers was never near the truck; and that he did not see the victim. She likewise did not see the victim and, from her perspective, the shooting appeared to be an accident because Rogers did not see the victim. **App. 3028-31.** Assault victim further testified that Rogers did not make any comment to either of the white men in the truck when they first arrived; and she denied that he had cussed at the men. Patterson had started the argument when Rogers was on the telephone, and she was uncertain what the argument was about. Rogers became involved in the argument after she unsuccessfully attempted to persuade Patterson to leave the men alone. **App. 3031-34.**³¹ When the white man got in the truck and started to pull away from the store, assault victim claimed that Mr. B. and Carver "were reaching for something," which she thought was a weapon. At roughly the same time, she noticed that the brake lights were coming on and off. Rogers then fired a second shot.³² She turned around, but Rogers and Patterson were gone. **App. 3034-42.**

She again turned around when one of the white men used a racial slur, and she ran.³³ She claimed that she did not previously mention use of the racial insult or other information to which

³¹ As she had testified in 1994 and 1996, she indicated that Patterson spit on one of the white men. However, she added that Rogers never spit on either of them and she claimed that she heard the word "n----r" used by one of the men while she was standing at the phone. She indicated that this was both insulting and scary.

³² It is confusing from her PCR testimony **App. 3041** as to when she says the first shot was fired.

³³ Again, it appeared that Rogers was trying to scare off Mr. B. and Carver and that he was not aiming at anyone.

she testified at the PCR hearing because she was shocked and scared. She also claimed that no one asked her about these matters at trial.³⁴ **App. 3024; 3026-28; 3042-44; 3050; 3056-57.** The State impeached assault victim on cross-examination by establishing that her 1996 testimony was inconsistent with her PCR testimony. **App. 3058-59.** At resentencing, she testified that the men in the truck had not threatened either Patterson or Rogers. Still, Rogers was standing with the gun in his hand in the back of the truck at the time the shooting occurred. Although she turned around each time she heard a gunshot, she did not see what led up to either shot. **App. 2151-55.**³⁵

Patterson, who was belligerent throughout his testimony on cross-examination, testified that neither of Rogers' attorneys ever spoke with him before the 1994 trial or the 1996 resentencing; and that he would have spoken to them had they contacted him. He stated that he, Rogers and assault victim went to Spell's Grocery Store on the night of the shooting in order to use the telephone. When they arrived, *he got on the phone*, and a man came out of the store while he was talking to Rogers' brother. This man (Mr. B.) asked him in a vulgar manner how long he was going to be on the phone and he indicated it was a payphone. The next thing he knew, Carver (whom he described as a "little short dude") jumped out of the door of the truck and onto his back. He also claimed that Mr. B. attempted to reach behind the seat of his truck and get one of two weapons that Patterson saw.³⁶ **App. 2940-48.**

After Mr. B. reached into the back of the truck for a weapon, "*my partner* [Rogers] ... came around the back of the truck, [and] fired two [shots] in the air." (Emphasis added). Patterson then grabbed Mr. B. He further claimed that Mr. B. had started the conflict and that he

³⁴ She testified that Mr. Bailey interviewed her prior to the 1994 trial or before the 1996 resentencing, but neither of Rogers' attorneys spoke with her.

³⁵ She was then cross-examined extensively by Runyon and she admitted that she could not tell him what the argument was about. Also, she did not remember what anyone had said. **App. 2155-57.**

³⁶ He claimed he saw a 9mm. Pistol and a shotgun. **App. 2946.** He further testified that he saw a box of Busch Beer on the floorboard of the truck. See Appl.'s Ex. 18.

could have refuted Mr. B.'s trial testimony. Like assault victim, he claimed that the shooting appeared to be accidental and he claimed that neither he nor Rogers ever saw the victim before the shooting. **App. 2948-56.** On cross-examination, he admitted that he and Rogers were still good friends and would remain so "until I leave this earth or him." He also admitted that he had signed an authorization permitting Rogers' attorneys to obtain copies of all of his records and reports (*see* Resp.'s Ex. 4), which were otherwise confidential. **App. 2957-59.** He further admitted that counsel represented him at the time of the first trial, but he denied that he did not wish to be cooperative with the defense at that time. He also that the shooting was anything other than an accident; and he claimed that Rogers was not wearing glasses at that point in time. **App. 2959-67.** Moreover, *he testified that Rogers had watched someone work on a truck that afternoon, as opposed to assault victim's testimony in both trials and in PCR that the person had worked on a car (see App. 2967-69)*³⁷ and he did not recall Mr. Riley being present on the night of the shooting. The State further impeached his account by noting the inconsistency between that version of the shooting and Rogers' December 2, 1992 statement, in which he indicated that he was the one on the phone, as opposed to Patterson. **App. 2970-72; 2974-75.** Moreover, his PCR testimony was refuted by that of his attorney at the time of the original trial.³⁸ Thus, the record does not support a finding that Patterson and assault victim testified credibly.

³⁷ The sun was going down when the incident occurred but there was lighting outside the store. **App. 2970.**

³⁸ Robert D. Robbins, Esquire, testified that before he became Solicitor in June 1997, he had been employed for ten years with Jim Bell, Esquire, in St. George. As part of his practice, he represented Patterson on charges stemming from the killing of Stephanie B. From the very first time Mr. Robbins spoke with Patterson, Patterson indicated that he wanted "to make sure everybody understood that he did not have anything to do with shooting the little girl, and that he did not ask anyone to shoot her, and that he basically wanted everyone to know that that was not his intent that day, and he wanted me to advocate that for him. Patterson went so far as to engage in writing letters in an effort to make sure everyone understood that he was not involved in shooting a defenseless child. Further, he had fired his first attorney and Mr. Robbins' appointment came thereafter. **App. 3448-50; 3452-54.** Patterson told Mr. Robbins that he got on the telephone when he and his group were at Spell's Grocery Store, and that he eventually got into an argument with the victim's father over the use of the phone. Robbins' recollection was that this was strictly a verbal argument and that no weapons were involved. Also, Patterson told Robbins that Rogers had "presented a weapon

More importantly and regardless of their credibility, Rogers cannot show prejudice in the penalty phase because this testimony was directed at his culpability for the murder and the PCR judge found no prejudice from failing to present this evidence in the guilt phase. **App. 4585-90.** Also, her finding of prejudice in the penalty phase was predicated on the wrong standard. **App. 4943.** (“The Court finds that the testimony of these two witnesses, or the information from their testimony, probably would have made a difference to at least one juror in determining the appropriate punishment for Applicant”). The State recognizes that the Supreme Court has held that “such use of the unadorned word ‘probably’ is permissible shorthand when the complete *Strickland* standard is elsewhere recited.” *Holland v. Jackson*, 542 U.S. 649 (2004). However, in *Holland* and in *Woodford v. Visciotti*, 537 U.S. 19, 23-24 (2002) (per curiam), the lower court had elsewhere stated the proper prejudice standard, which was not done here. Application of the correct *Strickland* standard does not support relief. Further, Rogers did not preserve any challenge to counsel’s failure to discover and present an ophthalmologist in the sentencing phase, and the record does not support a finding of prejudice on that ground. *See Argument V.* Finally, there was overwhelming evidence of Rogers’ guilt of murder and the statutory aggravating circumstance. As a result, he did not show “a reasonable probability that ... the sentencer ... [can] conclude [] that the balance of aggravating and mitigating circumstances [do] not warrant death,” as required for relief under *Strickland*, 466 U.S. at 695, by its exclusion.

IV. Assuming that the issue was otherwise adequately addressed below, in spite of the failure of the Order to comply with § 17-27-80, there is no evidence to support a finding that counsel were ineffective in failing to hire an investigator for the resentencing proceeding. (Questions VI-VII).

and fired it, and after the weapon was fired, they ran down Pigeon Bay Road.” Patterson never asked Robbins to assist him in contacting either Rogers or Rogers’ counsel; and he never signed a release allowing trial counsel to have access to Robbins’ file and notes. While Robbins did not recall whether or not trial counsel ever approached him, he would not have allowed trial counsel to speak to his client, unless he had some assurances from the Solicitor as to what would happen to his client if his client cooperated and gave a statement to them. **App. 3450-56.**

Initially, the State submits that the Amended Order does support a grant of relief on Rogers' claim of ineffectiveness for failing to hire an investigator for resentencing because it Order because it fails to comply with S.C.Code Ann. § 17-27-80 (2003), with respect to Rogers' Grounds 9(B)(viii)-(xii), including this claim. The original Order contains the following list of Rogers's sub-grounds:

Trial Counsel Rendered Ineffective Assistance of Counsel During the Merits Portion of Applicant's Resentencing Trial.

Counsel failed to seek expert assistance regarding a material medical condition of Applicant.

Counsel failed effectively to confront and rebut the State's witnesses and evidence.

Counsel failed to present readily available and favorable defense witnesses and evidence.

Counsel failed to object to introduction of a Department of Corrections incident report.

Counsel failed to review critical evidence in the case which the State made available for inspection to trial counsel.

Counsel failed to present available mitigating evidence.

Counsel failed to object to improper closing arguments by the State.

The cumulative impact of counsel's failures and the resulting prejudice entitle him to a reversal of his CSC convictions and a new trial as to punishment for the murder conviction.

See App. 4696. (Emphasis in original). The Order further states that:

As an initial matter, the Court will proceed with a discussion of its analyses and findings for each of Applicant's sub-grounds for relief as one larger, multifaceted allegation concerning the merits portion of Applicant's resentencing trial. The Court finds that trial counsel was ineffective in all manners Applicant alleges and that Applicant was prejudiced by trial counsel's failures in myriad ways. Because

I find that Applicant is entitled to a new sentencing trial, I hereby vacate his death sentence for the reasons that follow.

App. 4696-97.

The remainder of the PCR judge's discussion of this allegation, however, only discusses the deficient performance and prejudice resulting from counsel's failure to present an adequate case in mitigation. It does not address the present claim or the claim discussed in **Argument V**.³⁹ To the extent that the PCR court intended to grant relief on this or any other allegation(s) not specifically addressed in the Order, the Order did not support relief because it does not comply with § 17-27-80, which provides that "[t]he court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." *See also Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266, 266 (2007).⁴⁰ The State brought this glaring defect to the PCR judge's attention in its Rule 59(e) motion **App. 4773-74** and it emphasized the necessity for complying with the requirements of § 17-27-80 at the hearing on the parties' cross-motions, but the PCR judge agreed with Rogers' contrary position. **App. 4822-56**. As a result, the Amended Order suffers from this same defect. **App. 4967-68**. Therefore, the Amended Order does not support a grant of a new sentencing hearing on this claim or the allegations in **Argument V**. *Id.*

Nor is there merit to Rogers' contention that trial counsel was ineffective for failing to utilize the services of an investigator, even after counsel had requested funding for investigative services because the record does not show either deficiency or prejudice to him under *Strickland*.

³⁹ The Amended Order discusses the ineffectiveness of counsel's investigation for resentencing but does not address counsel's failure to employ an investigator. **App. 4936-56**. For the reasons set forth in Arguments **IV-VII**, there is no prejudice under *Strickland* resulting from counsel's investigation for and presentation of evidence related to the facts surrounding the crime.

⁴⁰ The Court in *Marlar* stated, "We take this opportunity to reiterate our admonition that '[c]ounsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by 17-27-80 and Rule 52(a), SCRCP.'" *Marlar*, 375 S.C. at 410, 653 S.E.2d at 267.

Id. Mr. Walter Mitchell was one of the various witnesses Rogers presented at the PCR hearing. He testified that he was a private investigator from 1992 until 2002 and was licensed by SLED throughout that time period. This was his own business and he worked on murder cases, domestic matters and cases involving mutual funds. Before opening his private business, he had worked as a field investigator for SLED and had worked for the Charleston County Sheriff's Department. **App. 3187-89.** Mr. Mitchell learned about Rogers' case by seeing it on the television. He thereafter received a phone call from Runyon, whom he knew well. Runyon told Mr. Mitchell that he may need his services in this case. After that call, however, he did not receive any further contact from Mr. Runyon. **App. 3189-90.**

Based on Mr. Mitchell's experience, he knew how to locate witnesses if necessary. Also, he could collect school, probation, correctional and jail records, as well as general background records for any individual. If he had a potential witness' date of birth and social security number or their race and gender, he could get a subpoena from an attorney and go to the appropriate law enforcement agency to get information on an individual. He was not asked to do this in this case and was never employed by the defense. **App. 3190-94.** On cross-examination, he admitted he did not know what anyone else had done in the case. He also agreed that there was no need to go out and discover facts if a person already knew the facts. Although he thought he could do a better job as a private investigator, he agreed that other individuals can go out and interview witnesses or obtain records. He further reiterated that he would have to rely upon an attorney to give him a subpoena in order to utilize databases to investigate people. **App. 3194-96.**

Runyon testified that he had tried two or three capital cases before he was appointed in Rogers' case. He had also tried twelve or thirteen in which the State had served a Notice of Intent to Seek the Death Penalty; and he had other, extensive experience in handling both murder

cases and major felony trials before his appointment. In fact, he had tried approximately four hundred jury trials, fifty or sixty of which were in Dorchester County. **App. 3473-75; 3760-61.** Runyon felt the facts were relatively simple and he was looking for someone who could provide some justification for the shooting. While counsel filed three pretrial motions for funding in order to hire an investigator (*See Appl.'s Exs. 43-45*), he and co-counsel ultimately decided they did not need the services of an investigator because of the simplicity of the facts. Also, "things were so tied up by that point in time as to what actually happened," he felt the chances of finding someone who would provide unfavorable material were better than "50/50." **App. 3476-77; 3487-89; 3548-51; 3698-3700.** Moreover, he felt that any effort to further investigate might result in someone going to the Sheriff's Department with unfavorable information concerning the case. Runyon was quite familiar with Walter Mitchell and indicated that he may very well have spoken to Mr. Mitchell about the case but he did not have a specific independent recollection because he did not have his file. He later reiterated that the facts were such that they warranted "us going out and looking for, quote, additional witnesses or what have you." Even later, he again reiterated that the request for an investigator, which is reflected on pages 10-14 of Appl.'s Ex. 1, was not followed up on because of the way the case developed.⁴¹ **App. 3476-77; 3487-89; 3548-51; 3698-3700.**

⁴¹ Runyon also went to the crime scene on several occasions, in order to determine whether or not there was "any conceivable way that Mr. Rogers could have thought Mr. B. was going out to wheel around in that truck and come at him. Because the vehicle in its smallest state is a deadly weapon, trying to look for some shred of something to further pursue that might get us out of, "the unjustifiable act of shooting that seemed to be in our face." However, he did not find any information that helped. To the contrary, he spoke with Detective Asbell. Det. Asbell had a chart that had the various measurements from every point in the parking lot; and the chart seemed to be inconsistent with Applicant's version of what happened. Moreover, either he or Leiendecker spoke to the various officers involved; Runyon had contacted the pathologist's office and discussed the case; and counsel had the hospital records of S.B.'s treatment after the shooting. Finally, counsel were aware that assault victim would be a prosecution witness and he noted the problem at the time of the original trial was that a party who presented a witness was "vouching" for the witness. **App. 3478-82; 3486-88; 3548-51; 3698-3706.** In addition to the work done before the 1994 trial, Runyon testified that his original case was unavailable from Appellate Defense (where he had sent it when Rogers' first

Based upon the current record, the State submits that Rogers failed to show that counsel's failure to hire the services of an investigator was deficient. *Strickland* requires "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. A defendant who alleges failure to investigate on the part of trial counsel must allege with specificity what a reasonable investigation would have revealed and how it would have altered the outcome of the trial. *See Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982). Here, trial counsel made a reasonable investigation into a factually simple case, and they thereafter determined that the services of a private investigator would be unnecessary. Further, lead trial counsel had the various witness statements and other information provided to him by the prosecution available to him; counsel had talked on numerous occasions to his client; and several, if not all, of the police officers involved in the case. Counsel likewise visited the crime scene. Under these circumstances, the failure retain the services of an investigator was not deficient. *See Solomon v. Kemp*, 735 F.2d 395, 402 (11th Cir. 1984) (petitioner did not prove ineffective assistance of counsel based on counsel's failure to file a motion for expenses to hire an investigator and failure to discuss with petitioner whether petitioner had funds to hire a private investigator where "counsel's alleged failures to investigate were merely the result of reasoned tactical decisions").

More importantly, Rogers cannot show any prejudice. First, a finding of prejudice is inconsistent with denial of the same claim relating to counsel's guilt phase performance. **App. 4896-4900; 4907-17.** Rogers' claim is weaker with respect to resentencing because the same points would be made in resentencing by these witnesses; he had already been convicted by the

appeal was taken), after the case was reversed in *Rogers I*. So, he and Leiendecker reconstructed the file. They obtained copies of all the statements, photographs and other matters. They also had to "go back and check on the various cases and what have you that we might have to use." Also, either he or Mr. Leiendecker had interviewed the police officers involved at some point. **App. 3471-73.**

time of resentencing; and there is no constitutional right to argue residual doubt. *Franklin*, 487 U.S. at 174; *Southerland*, 316 S.C. at 386, 447 S.E.2d at 868. Second, he has failed to demonstrate that evidence pertaining to assault victim or Patterson would have been available at any time prior to 1994, since their testimony is simply not credible. Also, there was no prejudice from counsel's handling of these witnesses at resentencing, as shown. The failure to present an ophthalmologist likewise does not entitle him to relief. See **Argument V**. There is neither deficiency nor prejudice with respect to Mr. Robinson, since his testimony was inadmissible. See **Argument VII**. Further, counsel took reasonable steps to investigate and Rogers has not demonstrated that anything he has presented could undermine confidence in the outcome of the proceeding. *Id. Contra United States v. Gray*, 878 F2d 702 (3^d Cir. 1989). Finally, there was overwhelming evidence proving Rogers guilty of murder and the statutory aggravator. Therefore, he failed to prove "a reasonable probability that ... the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

V. Assuming that the issue was otherwise adequately addressed below, in spite of the failure of the Order to comply with § 17-27-80, there is no evidence to support a finding that counsel were ineffective in failing to employ and present an ophthalmologist at resentencing. (Questions VIII-IX).

For the reasons set forth in **Argument IV**, the State submits that the Order does not support a grant of relief based upon Rogers' claims that counsel were ineffective because they "failed to seek expert assistance regarding a material medical condition of Applicant, specifically, an expert in ophthalmology." **Ground 9(B)(vii)**. See **App. 4967-68**. Moreover, Rogers cannot show prejudice from counsel's alleged errors on either claim. In particular, the State notes that the PCR court rejected these allegations in connection with the claims of

ineffective assistance of counsel in the guilt phase. **App. 4901-02; 4907-17.** Again, Rogers' claims are weaker with respect to resentencing because the same points would be made in resentencing by these witnesses; he had already been convicted by the time of resentencing; and there is no constitutional right to argue residual doubt. *Franklin*, 487 U.S. at 174.

Additionally, the State notes that Rogers' mother testified at the PCR hearing that she began noticing that even as a young child, Rogers would sit very close to the television set, and he had trouble picking up things from the floor. Through the school system, it was determined that he had trouble with his vision and glasses were prescribed for him. She thought he was in kindergarten at the time. However, he did not like to wear his glasses as a child and he would not wear them when he had an opportunity not to wear them. **App. 3128-33; 3140-41; 3145.** Moreover, Rogers introduced a series of photographs to substantiate this. *See* Appl.'s Exs. 24-26. Rogers' social worker, Jeffrey Yungman, testified that Rogers' school records reflected that he received an eyesight test in the fifth grade. A newspaper photograph of Rogers in Mr. Yungman's file, taken after his arrest, reflects that he is wearing glasses (*See* Resp.'s Ex. 5), as does a wanted poster (Appl.'s Ex. 30). **App. 3251-52, 3281-82, 3620.**

Dr. William Price testified that he is an ophthalmologist with a general practice in Summerville, South Carolina. Rogers' collateral counsel contacted him; and asked him to review certain records⁴² and perform an eye examination on Rogers. He likewise reviewed "very cursory" school records (Appl.'s Ex. 37) containing referenced to visual acuities on May 1974, October 1974, September 1975, March 1977 and September 1978. **App. 3287-94.** Dr. Price

⁴² These records included SCDC records dated July 5, 1989; some SCDC sick call clinic notes beginning July 1994 and going through December 1994; an analytical eye examination by SCDC's Division of Health Services and dated November 22, 1994; "a similar record" from September 21, 1994; and these computer generated notes entitled "medical summary" from SCDC generated on November 20, 2000. (*See* Appl.'s Ex. 36). Dr. Price relied upon this as background information.

further testified that the November 1, 2002 eye examination he performed on Rogers revealed that Rogers had myopia and astigmatism.⁴³ Dr. Price described Rogers' myopia as "[m]oderate," and he opined that Rogers is correctible to 20/30 in his right eye and 20/25 in his left eye.⁴⁴ Dr. Price's report was introduced as Appl.'s Ex. 35. **App. 3294-98.**

Dr. Price testified on cross-examination that, between 1994 and Dr. Price's examination in 2002, Rogers' visual acuity had varied between 20/70 to 20/200, which he opined was not abnormal. Also, both myopia and astigmatism are common; and he opined that "probably at least half of the population" is myopic. Additionally, 20/40 is the visual acuity needed to get a driver's license in South Carolina; and 20/70 is significantly worse than 20/40 "in terms of the amount of blurriness" that a person would have (although the person would have blurrier vision).⁴⁵ More importantly, Dr. Price opined that **it was impossible to determine what Rogers' visual acuity was on November 25, 1992.** If Rogers could see well enough to run through the woods in the dark on the night of the murder, Dr. Price "would expect that he would see better in a lighted parking lot," and Dr. Price opined that a person with 20/70 vision "[p]robably [could] make out" that there were three people in a truck from a distance of twenty feet. **App. 3305-10.**

Although the record contains sufficient evidence to support the conclusion that counsel's failure to obtain an ophthalmologist was not deficient,⁴⁶ it is unnecessary to address the deficiency prong because Rogers cannot show prejudice. *Strickland*, 466 U.S. at 687. First, it is

⁴³ Dr. Price explained that myopia is commonly referred to as near-sightedness; and that a person who has myopia has blurred vision unless this is corrected by some refractive means. Also, a myopic person sees things better close than at a distance.

⁴⁴ The school records revealed that Rogers had an uncorrected visual acuity of 20/70 in each eye in 1974. In September 1978, his uncorrected vision was 20/70 in his left eye and 20/100 in his right eye.

⁴⁵ He agreed that there is a degree of subjectivity in an eye examination because the examiner must depend upon the examinee to indicate his vision has improved. **App. 3307.**

⁴⁶ Most importantly, (1) he never told either attorney that his eyesight played any role in the shooting; (2) there was no suggestion of this in his statement to police, State's Ex. 18; and (3) he received complete physical before the 1994 trial and he apparently did not complain of his eyesight at that time. **App. 2901; 3493; 3519-20; 3618-20; see also App. 1316-19.**

impossible to know the precise acuity he had at the time he murdered S.B. However, Dr. Price's testimony makes clear that the limitations on his vision were only moderate and that, although his vision might be blurrier than a person with 20/40 vision, it would not be significantly worse. More importantly, squinting would improve his eyesight; and Dr. Price's testimony is that he could probably see that there were three people in the truck from a distance of twenty feet. Finally, Dr. Price would expect him to be able to see better in a lighted parking lot than in a dark wooded area, where the record demonstrates Rogers ran after the shooting. Further, this evidence would not help mitigate the murder. Any presentation of evidence of Rogers' problems with his eyesight would only tend to aggravate the shooting and make the shooting appear even more malicious because he was obviously aware of his "need" to wear glasses to see properly but he nevertheless voluntarily chose not to wear glasses and thereby endangered the lives of three people at the time of the shooting, as the State argued. *See* § 16-3-20(C)(a)(3). Further, the State presented overwhelming evidence proving that he was guilty of murder and the statutory aggravating circumstance. As a result, there is no reasonable probability of a different result but for counsel's errors under *Strickland*, and this argument lacks merit. *Strickland*, 466 U.S. at 695.

VI. The PCR judge erroneously granted relief based on counsel's failure to discover and present a video production and audio enhancement expert at resentencing because there is no evidence of deficient performance or prejudice under *Strickland*. (Question X).

The State also submits that the PCR judge erroneously granted relief based on counsel's failure to present a video production and audio enhancement expert at resentencing. Specifically, she found that counsel were ineffective in failing to utilize a portion of a videotape taken at the crime scene to impeach State's witness James Carver with inconsistent statements contained on the crime scene video footage, and for failing to present still photographs from that footage which depicts an empty one case box of Busch beer. **App. pp. 4949-55; 4970-73.** However,

there is no evidence of deficient performance or prejudice under *Strickland* from counsel's failure to uncover the evidence at issue during their investigation or from their failure to present the expert testimony at issue.

The key witness Rogers contends counsel should have presented in this regard was Homer V. Fesperman, who owns a video production business in West Columbia, South Carolina. Although the largest percentage of his work is corporate video production, he has done work for law enforcement in the past. Collateral counsel contacted him and asked him to make a copy of a videotape that had originally been in the Solicitor's file and had been supplied by a television station. He copied this onto a DVD. **App. 3972-79.**⁴⁷ Over the State's objection that the tape contained hearsay within hearsay and there was not adequate authentication of either the participants therein or the circumstances surrounding the creation of the videotape,⁴⁸ the PCR court allowed Rogers to introduce the DVD created by Mr. Fesperman (Appl.'s Ex. 56) for the non-hearsay purpose of showing that counsel was ineffective.⁴⁹ Mr. Fesperman testified that he made audio enhancements to the section specified by collateral counsel and did not otherwise change or alter the contents of the tape when he created the DVD, other than making a loop of the section of the VHS tape upon which counsel asked him to focus. He also explained the manner in which he had enhanced the audio portion of it and indicated that this technology was available in 1994 and 1996. However, it would have been somewhat more cumbersome for someone to make that type of enhancement during that time period. Also, the enhancement would have not been to a DVD, but to a VHS videotape. Mr. Fesperman also developed two still

⁴⁷ This transcript is of the hearing was held on August 23, 2005. He originally copied the VHS video onto a digital tape and then transferred that onto a DVD. **App. 3978-79.**

⁴⁸ The PCR court listened to the unenhanced audio and watched the video portion of Appl.'s Ex. 56. Clearly, a question is asked by someone off camera and a person on camera answers that question. This hearsay is inadmissible at a trial.

⁴⁹ The State submits that its objections were improperly overruled for the reasons argued at the hearing.

photographs from the videotape, which were introduced as Appl.'s Exs. 57 and 58. He indicated that the technology needed to make these photographs would have existed in the 1990's, but stated that the photographs may have only been in black and white. **App. 3979-4034.**

Leiendecker, who previously testified that he had very little involvement in the 1994 trial, also testified at the August 23, 2005 hearing as a reply witness. He did not recall Appl.'s Ex. 59, a February 9, 2004 letter from then-Solicitor Bailey to Mr. Runyon disclosing additional documents in the course of the State's compliance with the requirements of discovery.⁵⁰ The first paragraph of this letter refers to news footage from two different television stations, Channel 2 and Channel 4, on a videotape that the Solicitor had. A portion of the video was later introduced in the penalty phase of both the 1994 and 1996 proceedings. Leiendecker only remembered viewing the portion of the videotape containing the footage of Rogers being transported after his bond hearing, but he admitted that the letter was sent over eleven years prior to the hearing and he simply did not recall it. He identified the individual making the statements in Appl.'s Ex. 56 as James Carver. **App. 4036-42; 4047-48.**

With respect to the portion of the audio on Appl.'s Ex. 56 where the person supposedly identified as Carver made a statement "we just pulled up," Leiendecker testified that this "certainly wasn't what they have had at trial and not what the evidence demonstrated, because they had been there, gone into the store, gotten some stuff, had an altercation and were leaving." Leiendecker further testified that the defense could have given some consideration to the negative response by Carver when asked if he had any idea why he was shot at because the testimony showed that there was a heated argument between all of the parties. When asked

⁵⁰ In his experience in dealing with Solicitor Bailey, this was typical of the type of disclosure or discovery letter that Mr. Bailey would employ. **App. 4038.**

whether counsel could have used Appl.'s Exs. 57 and 58, he testified that, **in hindsight**, *contra Strickland*, "it certainly is something that could have or maybe should have been discussed at least in the penalty phase concerning the conduct of the parties and the aggravation, whether there were elements involving alcohol that were involved in the argument that ensued or that took place outside that proceeded the shooting." **App. 4043-46.**

Former Solicitor Bailey was the remaining witness called at the August 23, 2005 hearing. He testified concerning the manner in which he disclosed documents to the defense. Before the 1994 and 1996 proceedings, he disclosed documents to the defense pursuant to Rule 5 and *Brady v. Maryland*, 373 U.S. 83 (1963). He explained that he had "an open file policy." He basically sent everything that he had to the defense, with the exception of anything he considered to be work product or documents that were voluminous like the videotape of the news footage from Channel 2 and Channel 4. With respect to these he advised them that he had those tapes, "I previously described it for the purposes of identifying the case in case of a discovery question and invited them to look at it at any time they wanted." He specifically identified Appl.'s Ex. 59 as a letter from his file, but he did not recall whether or not the defense ever came to his office and inspected the videotape. On the second page of his February 9, 1994 letter, he listed both a transcript dated 11/25/92 from Channel 4 and a computer printout dated 11/30/92 from Channel 4. Copies of these documents were provided to counsel. **App. 4052-55.**

The State then introduced a copy of the February 9, 1994 letter, complete with the attached itemization and the transcript and computer printout referred to in the letter, as Resp.'s Ex. 7. The transcript in Resp.'s Ex. 7 clearly reflects on the third page that a question was asked "do you have any idea why they shot at your truck?" The answer was "shakes head no." Mr. Bailey indicated that he had, at least on one occasion carefully watched the videotape and would

have seen the entire tape prior to its disclosure because he redacted a portion of it so that he could utilize the portion actually presented to the sentencing phase jury in 1994 and 1996. **App. 4055-57.**

The State submits that Rogers failed to prove deficient performance or, more importantly, prejudice resulting from trial counsel's failure to employ an expert in audio and video enhancement, such as Mr. Fesperman. First, counsel had been provided a copy of the transcript of the crime scene video. Although it only contained one of the two statements on the videotape, it certainly alerted counsel to the existence of potential impeachment information on the videotape, which was made available to the defense by former-Solicitor Bailey. These statements are, however inadmissible as hearsay and would require authentication of the persons speaking. Further, it is undisputed that review of the tape would not have disclosed the empty twelve pack of beer in the truck bed.

Runyon's failure to use the prior inconsistent statements on Appl.'s Ex. 56 in his cross-examination of Carver does not demonstrate that his performance was deficient. "[D]ecisions whether to engage in cross-examination and if so to what extent and in what manner, are . . . strategic in nature" and will not support an ineffective assistance claim." *United States v. Nersesian*, 824 F.2d 1294, 3121 (2nd Cir. 1987); *see also Hunt v. Nuth*, 57 F.3d 1327, 1333 (4th Cir.1995) (refusing to indulge in a "grading of the quality of counsel's cross-examination"). The extent of cross-examination of witnesses is an area of trial tactics left to counsel's discretion. *Yarrington v. Davies*, 779 F.Supp. 1304, 1308 (D. Kan. 1991), *aff'd*, 992 F.2d 1077 (10th Cir. 1993). Counsel is not required to raise every conceivable issue or pursue every avenue of

inquiry, but is required only to exercise normal skill, judgment, and diligence. *Dyer v. Crisp*, 613 F.2d 275 (10th Cir. 1980).⁵¹

Here, counsel cross-examined Carver - just not in the manner Rogers suggests he should have. This does not show deficient performance under *Strickland*. 466 U.S. at 689. Counsel cross-examined Carver at length concerning his version of the events of November 25, and the roles of the various participants involved. He established that Patterson started the confrontation and that Rogers only later intervened; he established the friendship between Mr. B. and Carver; and that they had spoken to each other the next day, supposedly without discussing the incident. Counsel also examined Carver about difference between Carver's trial testimony that Rogers spit at Mr. B. and his statement to police that Patterson had spit, even though Rogers and Patterson were different races and different sizes.⁵² **App. 2235-49**. Under *Strickland*, there is no ineffective assistance of counsel even where the attorney chooses one reasonable strategy to the exclusion of another. *Id.* See also *United States v. Adamo*, 882 F.2d 1218, 1227-28 (7th Cir.1989) (same).

The same is true of counsel's failure to have still photographs developed from the videotape, such as Appl.'s Exs. 57-58. First, it is undisputed that review of the tape would not have disclosed the empty twelve pack of beer in the truck bed. Thus, counsel would not have been alerted to the need for further investigation. Second, counsel examined Carver about the fact that he did not see any twelve pack of beer in the truck. Although the answer of "no" (**App. 2248-49**) was consistent with his testimony on direct examination, his response was *inconsistent* with Mr. B.'s testimony that he was drinking that day and evening. **See App. 2126-27p; 2136-37**

⁵¹ "In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." *Willis v. United States*, 87 F.3d 1004, 1006 (8th Cir. 1996).

⁵² Further, counsel elicited that Mr. B. never lost his temper during the conversation and that Carver had never seen Mr. B. lose his temper.

(cross-examination of Mr. B. established that the twelve pack of beer he had been drinking from earlier was in the cab of the truck, as opposed to the bed; and, he purchased another beer at Spell's to drink).⁵³ Carver was thereby impeached. The other portions of counsel's cross-examination referred to earlier also provided additional impeachment of him. Mr. B.'s testimony was likewise impeached in 1994, as discussed elsewhere in the Petition.

Nor has Rogers proven any Sixth Amendment prejudice from counsel's performance. There was overwhelming evidence of his guilt of murder and the statutory aggravator from both eyewitnesses. Also, counsel had already impeached Mr. B. and Carver.⁵⁴ As to the statements on Appl.'s Ex. 56, The State submits that Carver appeared to be stunned, he never made eye contact with the camera and it did not appear that he was fully paying attention to the - as of yet unidentified - questioner. For these reasons, any impeachment from the prior inconsistent statements would have been marginal, at best. Further, all that could be gained through presentation of the photographs is that Mr. B. might have been drinking. However, this point was undisputed. Moreover, the still photographs do not show the presence of beer in the bed of the truck, merely an empty container; and, thus, they could not provide any significant impeachment value. Also, Rogers did not present any evidence at the PCR hearing to establish how long the container had been there, whether it contained beer close to the time of the shooting or whether it

⁵³ Contrary to the PCR judge's finding, Mr. B. was not denying that there was an empty beer container in the bed of his truck but that the twelve pack from which he had been drinking was in the cab.

⁵⁴ Counsel's examination of Mr. B. elicited that Mr. B. had drank three or four beers by the time he reached Spell's grocery. He purchased yet another beer at the store, which he threw in the trash, unopened, after his daughter was shot. Counsel thereafter suggested that Mr. B. had consumed too much alcohol. Counsel further established that Patterson started the confrontation and Rogers only later intervened. Also, counsel established that Mr. B. was angry, and that the confrontation with Patterson became so heated that Mr. Riley left the store and went home. Mr. B. was impeached with his statement to Solicitor Bailey, in which he did not indicate that Rogers and Patterson had laughed in his face. Nor could Mr. B. remember at what point Carver got out of the truck. Further, counsel established the friendship between Mr. B. and Carver; and he established that a 9 mm. pistol was in the clothes basket in the bed of the truck. Moreover, Carver admitted that he had a twelve pack of beer in the cab of the truck. Finally, counsel established that Mr. B. did not think Rogers threatened to kill him right before Mr. B. got back into the truck. **App. 2126-44.**

was seen by Carver. Thus, counsel's cross-examination fully set forth enough information for the jury to properly assess the credibility of Carver and Mr. B., and for counsel to demonstrate the supposed lack of it. *See Mills v. Singletary*, 161 F.3d 1273, 1288 (11th Cir. 1998). Also, the PCR court rejected these allegations in connection with the claims of ineffective assistance of counsel in the guilt phase. **App. 4902-17.** Rogers' claims are weaker with respect to resentencing because the same points would be made in resentencing by these witnesses; he had already been convicted by the time of resentencing; and there is no constitutional right to argue residual doubt. *Franklin*, 487 U.S. at 174. Additionally, in light of the abundance of other evidence and argument impeaching both M.B.'s and Carver's credibility, the additional impeachment at issue would have been merely cumulative. Hence, Rogers cannot show prejudice from counsel's error. *Cf. State v. Gunn*, 313 S.C. 124, 136-38, 437 S.E.2d 75, 82 (1993). Finally, with respect to the statements on Appl.'s Ex. 56, the State submits that Rogers did not prove a reasonable probability of a different result, but for counsel's errors, because he did not present either Carver or M.B. as witnesses, and all this Court has is speculation as to what their responses would be if confronted with the statements or photographs (Appl.'s Exs. 57-58). *See Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807, 809 (1999); *Moss v. Hofbauer*, 286 F.3d 851, 864-65 (6th Cir. 2002). In the absence of prejudice, Rogers was not entitled to relief.

VII. The PCR judge erred by granting relief based on counsel's failure to discover and present evidence favorable to the defense through the examination of trial witnesses Stephanie Simmons, George Scharf, James Robinson Anthony Riley and Earl Asbell because the record does not support a finding of prejudice under *Strickland*. (Questions XI-XV).

The PCR judge erroneously granted relief on Rogers' claims that trial counsel was ineffective for failing to adequately investigate and develop information through resentencing

witnesses Stephanie Simmons, George Scharf, James Robinson, Anthony Riley and Lieutenant Earl Asbell (**App. 4944-49; 4968-73**) because the record does not support a finding that he was prejudiced by counsel's errors. Initially, the State notes that the grant of relief is inconsistent with the PCR judge's denial of relief as to the same witnesses in connection with counsel's performance in the guilt phase. **App. 4890-96; 4907-17**. Again, Rogers' claims are weaker with respect to resentencing because the same points would be made in resentencing by these witnesses; he had already been convicted by the time of resentencing; and there is no constitutional right to argue residual doubt. *Franklin*, 487 U.S. at 174. Also, the PCR judge's analysis addresses counsel's failure to adequately investigate and thereby discover favorable matters that these witnesses had to offer. However, the record does not support the finding of prejudice for the following reasons:

1. Stephanie Simmons.

The record does not support the PCR judge's finding that counsel's handling of Simmons was prejudicial. **App. 4944**. Rogers fled the State of South Carolina following the murder. Stephanie Simmons, a student at Tuskegee University, testified in 1994 that he showed up at her home on November 29, 1992. Rogers told her that he needed a place to stay but did not explain why he left South Carolina to come to Alabama. Although Ms. Simmons was preparing to go to Montgomery with her friends, she allowed him to use her telephone. Later that week, she saw him sitting down on the steps of her apartment complex, but they did not speak. **App. 932-36**. Simmons did not testify at resentencing.

Ms. Simmons testified at the PCR hearing that she did not recall either of Rogers' attorneys discussing the case with her prior to either the 1994 or 1996 proceedings. The only one whom she had spoken to was Solicitor Bailey. As to the events of November and December,

1992, she testified that she was a student and lived in off-campus housing at Tuskegee University, in Alabama. She claimed that Rogers called her after the incident and said he was coming to Alabama. He “wasn’t really coherent, he was upset, [and] he had been crying.” He did not tell her what had happened, other than saying it was “something really bad” and that it “was a bad accident that had happened.” On the following day, he arrived in Alabama and told her that there was an incident which occurred while he was at a pay phone in Summerville. He claimed that he and Dax Patterson had gotten into an altercation and there were some “racial slurs that were thrown.”⁵⁵ Ms. Simmons further testified that Rogers also talked to her over the telephone following his arrest and return to South Carolina for prosecution. She added that Rogers and Patterson “hung out together” constantly; and that Rogers was protective of everybody. **App. 2984-86.** Further, she claimed that Rogers had a reputation for being truthful. **App. 2991.**

In granting relief, the PCR court overlooked that it became clear, on cross-examination, that the information Rogers imparted to her did not occur all in one conversation. She testified that they “really didn’t talk much in Alabama. I was going to class, I had my own thing going on at school. And mainly, he wanted some place to stay.” Thus, most of the information that Roger’s imparted to her was in conversations after his arrest. **App. 2994-97.**⁵⁶ The finding that Rogers proved prejudice resulting from counsel’s failure to present her testimony is based upon a misapprehension of *Strickland* and state law. First, any conversations that she may have had with him were inadmissible as a matter of state law, both in 1994 and the subsequent 1996 resentencing proceeding because any statement by him would constitute hearsay and he was not

⁵⁵ Rogers told Simmons her that someone said “the n-i-g-g-a needs to get off the phone.” He also supposedly told her that one of the men involved in the altercation “had gone to the truck” and Rogers thought there was going to be “some altercation with weapons.” Then, he fired a shot “more or less to say back off, and a little girl had been shot.” **App. 2977-84.**

⁵⁶ Rogers had previously contacted her while she was living in Tuskegee, but he had never driven six hours to see her before the day he showed up at her house.

an unavailable declarant. *See State v. Terry*, 339 S.C. 352, 529 SE2d 274 (2000); *State v. South*, 285 S.C. 529, 331 S.E.2d 775 (1985). Even if her testimony was *somehow* admissible, it is only relevant to whether or not the killing was manslaughter, as opposed to murder. This would be cumulative to Rogers' own testimony. The problem with the PCR court's conclusion is that this Court in *Rogers I*, *supra*, indicated that he was not entitled to a voluntary manslaughter instruction although similar information was presented at the original trial. Also, and contrary to the PCR court's Order, there is nothing in her testimony at the 1994 trial that was otherwise beneficial to him.⁵⁷ Thus, at most, Rogers has merely shown that he could have presented corroborative and cumulative evidence that does not mitigate his conduct. Because this evidence was already before the jury, he cannot show any prejudice. *See Strickland*, *supra*. Further, if Simmons had been presented as a defense witness, then the State would have been able to elicit evidence, such as that presented at the PCR hearing, that "the bad things that he did do, whether it be small or few, out-shined all the good things that he always did." **App. 2989. See also App. 2998-99.** Also, her assessment of Mr. Rogers' family was contrary to the presentation of the family history at the PCR hearing and consistent with the presentation by trial counsel. **App. 2998.**

Of equal importance, the PCR court misapplied the prejudice prong of *Strickland* in granting relief. First, the grant of relief is based upon inconsistent factual findings. Although the Court found that counsel's failure to interview Simmons was prejudicial, the Court specifically found that "I find that her testimony probably would have made no difference to the jury in reaching a decision about the appropriate punishment for Applicant." **App. 4944.** Aside from this

⁵⁷ Moreover, her testimony at the PCR hearing that the crime was an "accident" or that racial epithets were used was not credible because it is inconsistent with her testimony from 1994.

inconsistency, the *Strickland* prejudice prong is not satisfied by a finding that counsel's error "probably would have made [a] difference" in the outcome. Rather, he had to prove that "there is a reasonable probability that ... the sentence . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Rogers did not meet that standard, particularly given the overwhelming proof of murder and the statutory aggravator.

2. George Scharf.

The State further submits that the Court erred by granting relief based upon trial counsel's failure to interview George Scharf and present testimony consistent with testimony he gave at the PCR hearing that the shooting appeared to be accidental. **App. 4944-46** Contrary to the PCR court's findings, Rogers did not show any prejudice. Mr. Scharf testified at the PCR hearing that he went to the scene on the night of the murder and transported S.B. to Trident Hospital. There, he relayed basic information to the emergency room staff. On a physician's form from the hospital (**Appl.'s Ex. 20**), he characterized the shooting as a "firearm accident." When asked why he characterized it as an accident, he explained that it "just appeared to be that way from the fact that the shot went through the back window in the middle of the seat rather than in the direction of the passenger's seat or the driver's seat. And with the size of the little girl, it didn't appear to us at the time that her head would have been visible above the seat." **App. 3012-15; 3017.** On cross-examination, however, he clearly testified that "*I'm not trying to say ... that there was no intentional shot.*" (Emphasis added). Rather, he meant that it did not appear that the victim had been selected. **App. 3018.** On redirect examination, he indicated that trial counsel had not spoken to him before his testimony in 1994 or 1996. **App. 3019-20.**

Again, he has failed to prove prejudice resulting from the failure to introduce Appl.'s Ex. 20 or the testimony by Mr. Scharf at the PCR hearing. *See Strickland*, 466 U.S. at 687. First, testimony that the shooting was an "accident" would be merely cumulative to Rogers' testimony that the shots were not fired directly at any individual. Moreover, this Court has previously held on direct appeal that such evidence did not support a jury instruction on voluntary manslaughter in *Rogers I*. Likewise, this evidence could not otherwise mitigate the murder. *Id.* At best, it showed Rogers' willingness to endanger the lives of more than one individual and it would support an inference of malice. Finally, any suggestion that this was an "accident" is inconsistent with Dr. Price's testimony, *supra*, which Rogers likewise suggests should have been presented, that Rogers should have been able to discern that there were three people in the cab of the truck under the circumstances which were reflected in the transcript. As with the preceding witness and the claim related to Patterson and assault victim, the PCR court also applied an improper, lesser test for the prejudice prong. **App. 4945-46**. Applying the correct standard, *see Strickland*, 466 U.S. at 695, it is clear that Rogers did not meet his burden of proof. In the absence of any conceivable prejudice, this Court should reverse the grant of relief.

3. James Robinson.

The PCR court further erred by finding that trial counsel were ineffective for failing to adequately examine Mr. James Robinson, the clerk at Spell's Store was one of three people in the store when the shooting occurred who testified at trial (**App. 4946**) because there is absolutely no evidence of prejudice in the record and the PCR judge's contrary finding is based upon a lesser standard than *Strickland*.⁵⁸ At the PCR hearing, Mr. Robinson testified that Rogers' attorneys had not spoken to him prior to his testimony in 1994 or in 1996. However, he knew

⁵⁸ Mr. Isaiah Jennings and his cousin, Herthenia Lincoln, were also in the store.

Rogers before the November 25, 1992, shooting. Mr. Robinson stated that Rogers “was an allright fellow, he was fine, he stopped by the store at my job all the time and just come in and say hello and he was always respectful.” He had known Rogers since Rogers was approximately 12 or 13 years old. Rogers had never been disrespectful to him, and neither his boss nor anyone else had ever told him that Rogers had stolen anything. **App. 3001-05.**

Mr. Robinson also testified that Rogers had stopped by the store the morning of the shooting to say “hello.” However, he did not know what Rogers did when Rogers was not at the store. Finally, Mr. Robinson was inside the store at the time of the shooting. **App. 3005-08.** Thus, he could not know what occurred at the time of the shooting.

Although counsel’s performance was reasonable under *Strickland*, it is unnecessary to reach the first prong because there is no prejudice. While this evidence would have been admissible at sentencing, it was merely cumulative to the evidence counsel actually presented and which Rogers now contends amounted to ineffective assistance of counsel. *See App. 2370; 2372-74; 2381-83; 2421-33.*⁵⁹ Further, in concluding that there was prejudice, the PCR judge again applied a lesser standard than *Strickland*. **App. 4946.** Rogers is not entitled to relief if *Strickland* is applied. Also, there was overwhelming proof that established Rogers’ guilt of murder and the statutory circumstance found by the sentencing jury. As a result, he did not show “a reasonable probability that ... the sentencer ... [can] conclude [] that the balance of aggravating and mitigating circumstances [do] not warrant death,” as required for relief under *Strickland*, 466 U.S. at 695, by its exclusion. *See also Wiggins*, 539 U.S. at 537.

4. Anthony Riley.

⁵⁹ The mitigation evidence presented by counsel in 1996 is discussed more fully, *infra*.

The PCR judge also erred by granting relief based upon counsel's handling of Anthony Riley because there was no prejudice under *Strickland* and the Amended Order applies the wrong standard in granting relief. **App. 4946-47.** Rogers argued below that if counsel had interviewed him, they would have learned that Mr. Riley was close friends with Mr. B., the victim's father; that Mr. Riley had previously been involved in an incident with Rogers; and that the two "did not see eye to eye." He argued that counsel could have thereby impeached his trial testimony. The PCR court found that "Mr. Riley's additional testimony before me was favorable to [Rogers] because it provided information that would have impeached the witness' harmful testimony at trial, and as such would have supported the defense that trial counsel pursued at trial." **App. 4947.** However, Rogers failed to demonstrate Sixth Amendment prejudice because Mr. Riley did not testify in 1996! Also, Rogers was not prejudiced by counsel's failure to present him because, like Simmons, any favorable testimony he might have offered would have been outweighed by testimony that would have further tied Rogers to the murder. *See Rogers, I.* Further, in granting relief, the PCR judge again applied a lesser standard than *Strickland*. **App. 4947.** Rogers is not entitled to relief if *Strickland* is applied. Also, there was overwhelming proof that established Rogers' guilt of murder and the statutory circumstance found by the sentencing jury. As a result, he did not show "a reasonable probability that ... the sentencer ... [can] conclude [] that the balance of aggravating and mitigating circumstances [do] not warrant death," as required for relief under *Strickland*. *See Wiggins*, 539 U.S. at 537.

5. Lt. Asbell.

Further, the PCR court erred by granting relief based upon counsel's handling of Lt. Earl V. Asbell (**App. 4947-49**) because there is no evidence of prejudice in the record, and the PCR judge's conclusion that there was prejudice is based upon a lesser standard than *Strickland*.

Lt. Asbell testified at resentencing that he was a crime scene technician employed by the Dorchester County Sheriff's Department in 1992. He arrived at Spell's store around 7:00 p.m. on November 25. He then photographed the scene and searched for evidence. He saw where a bullet had entered through the rear window of the truck's cab. This bullet passed through the cab and exited through the front windshield. *See* State's Exs. 1-7. Also, he photographed an area of the back, left (driver's side) tire of the truck, where the paint had been knocked off of the vehicle. *See* State's Ex. 10. **App. 897-908; 919; 922-27.** Lt. Asbell found a spent .380 caliber cartridge on the ground, underneath the front of the truck and another spent .380 caliber cartridge on the ground to the left of the truck.⁶⁰ In addition to the spent cartridges, Lt. Asbell found a very small piece of lead on the far left window of the store front, and a piece of a copper bullet "jacket" on the sidewalk behind a garbage can. However, these items were of no evidentiary value. **App. 2193-2206.**

Lt. Asbell testified at the PCR hearing that he had been subpoenaed by Rogers' PCR counsel to bring to court "all photographs, negatives or any videotapes that the police might have taken." However, he was unable to locate the Dorchester County Sheriff Department's file in the matter and it apparently is missing. Consistent with his trial testimony, he testified that he went to the crime scene on November 25, 1992, and photographed it. He also did a drawing of the crime scene, in which he triangulated the measurements of the parking lot. In a response to the subpoena issued by Rogers, he likewise brought evidence that he had collected at the crime scene but which was not entered into evidence. **App. 3155-57; 3159; 3162-63; 3172-73.** Lt. Asbell further testified at the PCR hearing that the evidence he produced for the court had been sealed

⁶⁰ Subsequent expert analysis by SLED Agent David Collins, a firearms examiner, showed that the same weapon had fired both cartridges. Agent Collins further opined that the defect to the left rear wheel of the truck was consistent with having been caused by a bullet.

from the time he collected it on the night of November 25, 1992, until it was opened for Rogers' PCR counsel. **App. 3167.** He also produced a photograph which he had taken but was not introduced at trial (Applicant's Ex. 18), which depicts a clothes basket in the bed of the pickup truck with clothes in it.⁶¹ He likewise produced an unopened Busch beer (Applicant's Ex. 29) and a bloodstained brown paper bag, which he collected from the trash can at the front of the parking lot of Spell's. **App. 3159-62; 3165-69.** Lt. Asbell sees Runyon "all the time" and he has spoken with Runyon. However, he could not recall whether or not he had spoken to Runyon in connection with the case. He also did not recall whether or not he had sat down with Mr. Runyon, Mr. Leiendecker, or Mr. Feeley. **App. 3176-77.**

Again, the PCR court improperly found that Rogers had established prejudice resulting from counsel's performance. First, this appears to be further evidence relevant to lingering doubt, which he was not entitled to present. *Franklin and Simpson, supra.* Moreover, Mr. B. admitted that he had been drinking three beers prior to the shooting, and he admitted buying a beer at the grocery store. However, he said that he did not get a chance to drink it and that he threw it into the trash can after his daughter was shot. **App. 2103; 2105-06; 2112-13; 2126-27; 2136-37.**

Also, despite the PCR judge's finding of prejudice, the record demonstrates that Runyon did cross-examine Mr. B., at resentencing, about his drinking on the day of the shooting. Counsel established that Mr. B. had had at least three before the shooting and that Mr. B. had purchased another beer before the shooting. **App. 2126-27; 2136-37.** Although Carver subsequently testified that he was unaware of whether or not there was any beer in the truck and that Mr. B. did not have anything to drink in his presence, Mr. B.'s contrary testimony was

⁶¹ The Court found that it depicts "a firearm pack sitting on top of clothes in a clothes basket." **App. 4947.** However, Lt. Asbell specifically refused to agree with PCR counsel's description of this. Rather, he testified that he could not determine what was in the basket, other than clothes. **App. 3162.**

already before the sentencing phase jury. Moreover, Carver clearly testified that he had a 9 mm. pistol in the clothes basket that was in the bed of the pickup truck and an unloaded shotgun, in a case, in the cab of the truck. **App. 2221-23.** Moreover, there was overwhelming proof of Rogers' guilt of murder and the statutory aggravating circumstances. Finally, as with several other witnesses, the PCR court also applied the improper test for the prejudice prong. **App. 4948-49.** Applying the correct standard, see *Strickland*, 466 U.S. at 695, it is clear that Rogers did not meet his burden of proof.

VIII. The PCR judge erred by granting relief based upon the failure of counsel to discover and present Correctional Officer Brown as a mitigation witness because the record does not support a finding of prejudice under *Strickland*. (Question XVI).

Because Rogers did not prove prejudice under *Strickland*, the PCR judge erroneously found that trial counsel were ineffective for failing to present SCDC correctional officer Anthony Brown in the 1996 resentencing hearing and for not objecting to introduction of an SCDC incident report (State's Ex. 39). **App. 4956-73.**

Mr. Brown did not testify in the resentencing trial but he was a prosecution witness in the original sentencing phase in 1994. At that time, he testified that he was a Correctional Officer assigned to the Reception and Evaluation Unit of the Broad River Correctional Institution (BRCI). His duties were to supervise, control and insure the safety of the inmates in that unit. On the morning of February 9, 1993, Rogers was accused of being involved in an altercation with another inmate. Although Mr. Brown claimed that his only recollection was that Rogers had conformed and adapted to life in prison, Rogers later testified and admitted that he received three months in lockup, as punishment for this incident. **App. 1112-14; 1116; 1181-82.**

Brown testified at the PCR hearing that he was still employed as a correctional officer, and he was working at BRCI when Rogers was housed there before the 1994 trial. Rogers was

“always courteous, always complying with what was expected of him as an incarcerated inmate, he’s always polite and just self-disciplined.” Rogers “complied and abide[d] by the rules that’s set forth by [SCDC] for the inmates to conduct” themselves, he was “[v]ery easy” to manage, and Brown was unaware of any serious problems Rogers had with other inmates. **App. 3832-33**⁶² Brown then testified that he was a witness to the incident reflected in State’s Ex. 39 in the 1996 resentencing proceeding, the SCDC incident report. On direct examination, he admitted that another officer prepared the report, but that Brown determined on his arrival that Rogers supposedly “had no involvement at all” in the disturbance and was allegedly one of many “bystanders.” Brown added that “the way they have it charged ..., it seems a little bit harsher than what it really is,” and he stated that inmate fights occur in prison. Brown also did not see Rogers hit, punch, strike or kick anyone. Also, it is customary to charge all inmates present when a fight occurs, until it is determined which inmates were involved. **App. 3834-36; 3838.** He further testified that Rogers’ trial attorneys did not contact him before either the 1994 or 1996 trials. However, he could have testified that Rogers did not have any involvement in the incident, and he was not aware that any weapons were involved. **App. 3836-39.**⁶³

On cross-examination, Brown admitted that he did not personally witness the fight; and that Rogers was charged, as a result of someone being injured. He also saw the injured inmate, but, again, attempted to minimize the seriousness of the incident. He admitted that throwing urine or feces are manners in which inmates may be non-compliant. However, when asked if fighting was another sign of an inmate’s non-compliance, he initially said that it “depend[s] on the circumstances.” Eventually, he very reluctantly admitted that SCDC does not permit inmates

⁶² Brown’s testimony that Rogers was never a problem in the general population (**App. 3833**) and the question eliciting it ignore that he was being housed on death row, in the Edisto Unit, at the time. *See App. 3847.*

⁶³ The PCR court sustained an objection to hearsay testimony about Rogers being remorseful. **App. 3841-45.**

to fight. **App. 3845-48.** Although Mr. Brown's duties include protecting the general public and inmates, he was also reluctant to admit that he was protecting them from fights, as well as other forms of misbehavior. As to the February 1993 incident reflected in State's Ex. 39 in resentencing, he claimed that no one knows now whether any inmate was hurt during that incident; and asserted that this was "just pure speculation." However, he finally admitted that the adjustment committee had found that Rogers committed the offense, and that the adjustment committee does not fabricate charges. Rather, Rogers did not have a defense to the charge and was therefore convicted. **App. 3848-52.**

Again, it is unnecessary to address the first prong of *Strickland* because Rogers clearly did not meet his burden of proving that he was prejudiced by counsel's performance. *See Strickland*, 466 U.S. at 687. First, there was overwhelming proof that established his guilt of murder and the statutory circumstance. Second, the State's cross-examination of Brown demonstrated clear evidence of bias that could be readily exploited by a prosecutor in front of a jury. Also, his PCR testimony is inconsistent with his participation in the incident, as reflected in the report, State's Ex. 39. More importantly, Brown ultimately admitted that Rogers was guilty of the offense. Also, counsel's 1996 examination of Ms. Priscilla Mack – through whom State's Ex. 39 was introduced – established that fights occasionally occur in prison; and, that this was the only substantial infraction against Rogers or evidence of a rules violation. **App. 2263-64.** Therefore, trial counsel established the position points Rogers brought out in the PCR hearing without any of the cross-examination undermining Brown's credibility. *See Bell v. State*, 879 So.2d 423, 444 (Miss. 2004); *Cf. McNeill v. Polk*, 476 F.3d 206, 217 (4th Cir. 2007). Also,

Rogers admitted at resentencing that he had committed a number of bad acts.⁶⁴ Finally, the PCR court, again, misapplied the *Strickland* prejudice prong in granting relief on this allegation. **App. 4956.** Applying the correct standard, it is clear that Rogers did not meet his burden of proof. See *Strickland*, 466 U.S. at 695.

IX. The PCR judge erred by finding counsel ineffective for not presenting an adequate case in mitigation of punishment where the only evidence is that counsel made a reasonable strategic decision not to use a social worker or to otherwise present evidence that might “demonize” Rogers’ mother and, instead, chose to present evidence of positive aspects of Rogers’ upbringing; also, there is no prejudice in this record under *Strickland*. (Question XVII).

The PCR judge erred by finding counsel ineffective for not presenting an adequate case in mitigation of punishment (**App. 4956-73**), where the only evidence is that counsel made a reasonable strategic decision not to use a social worker or to otherwise present evidence that might “demonize” Rogers’ mother and, instead, chose to present evidence of positive aspects of Rogers’ upbringing. Also, there is no prejudice in this record under *Strickland*.

Trial counsel knew either from discussions with Rogers’s family, from Leiendecker or the records in counsel’s possession, that Rogers’ family was poor; that there was evidence of drug and alcohol problems; that he and his brothers had been in trouble; that Rogers’ mother had been a very strict disciplinarian; that the parents “rode herd” on the boys; that the family “didn’t

⁶⁴ He paid a fine in magistrate’s court to a charge of trespassing; and in 1986, at age seventeen, he pled guilty to unlawfully carrying a pistol. He received a fine and probation. He also forfeited bond in 1987 on a charge of possession of marijuana; and he forfeited bond in 1988 on a charge of resisting arrest. He indicated that the latter charge resulted from his failure to pay attention when an officer told him that he was under arrest. He likewise pled guilty in 1988 to grand larceny of a motor vehicle and received a six year Youthful Offender Act sentence. He served nine months and was paroled but his parole was revoked and he served his sentence. **App. 2374-78.** In 1991, he pled guilty to simple possession of cocaine, and received a forty-five day sentence. Finally, he admitted to the two CSC convictions involving assault victim, who was his girlfriend at the time. He explained that he and his wife were separated at the time; that he did not know she was fifteen; that the relationship was voluntary; and that he was misled about her age. However, he pled guilty. **App. 2378-81.** On cross-examination, he stated that he was expelled from school for striking a teacher, and he had only been out of prison for seven months when the murder occurred. **App. 2406-07; 2409-12.**

have the best background with regards to paying bills and holding long-term jobs, things of that sort.”⁶⁵ At that point, counsel had to make a decision of whether to “demonize” Rogers’ mother and blame his problems on his background or to have a sympathetic mother plead for her son’s life. Runyon further testified that counsel discussed whether or not to hire a social worker. Ultimately, counsel decided not to present a social worker and not to demonize Rogers’ mother. He had done this in *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1991), and the jury was very unreceptive to that approach.⁶⁶ This factored into counsel’s decision not to present that type of information to a jury from a small, predominantly white and conservative county. Counsel also did not think that presenting expert testimony on why jurors should spare Rogers’s life would play well with a Dorchester County jury. Also, “it wasn’t inherently bad for him in one sense. Mother was a big church lady.” Therefore, counsel did not present a social worker or the type of evidence presented by Rogers at the PCR hearing. **App. 3477; 3503-05; 3507-09; 3553; 3560-66; 3584-90; 3613-18; 3770-71.**⁶⁷

⁶⁵ In addition to investigation and preparation before the original trial, Rogers again received a physical examination. **App. 2041**. Counsel made a strategic decision not to inject race as an issue in the case any more than it was already present. The defense’s primary objective was to obtain a sentence of LWOP, and an LWOP instruction was given by the trial judge. They also unsuccessfully sought to exclude the videotape of Rogers’ “perp walk.” Although Leiendecker dealt primarily with Rogers’ family because he had a good relationship with Rogers’ mother (whom he continued to represent in matters at the time of the 2004 hearings), Runyon had previously met with family members and discussed the case before the 1994 trial. **App. 3586-90; Appl.’s Ex. 46**. He also had at least three conference calls with Rogers’ family and one with Rogers’ mother before the resentencing, as reflected by his timesheets. **App. 3522-23; 3525-26; 3553; 3558-60; 3584; 3613-18; 3729-32; 3736-38; 3770-71**. They also discussed whether or not to present Rogers’ stepfather as a witness but ultimately decided not to present him because they felt that he was not an effective witness. **App. 3525-29**.

⁶⁶ They considered this same approach in 1994 but rejected it for the same reason. **App. 3503**.

⁶⁷ Leiendecker testified that he had attended a national continuing educational program on representing capital defendants entitled “Life in the Balance,” between the 1994 trial and the resentencing proceeding. This seminar greatly emphasized the importance of using mitigation experts in the penalty phase, so the defense could be prepared to show the defendant’s background and to determine “if there were factors or influences that could or should be presented to a jury that would mitigate the need for a death sentence.” This seminar purportedly “opened my eyes as to avenues in the zealous representation” in a capital case. He then gave conflicting responses as to why the defense did not present this type of case in mitigation. He first testified that “I think it was discussed ... but there was some disbelief that he had been convicted and sentenced to death a first time.” Counsel did not think that he would be resentenced to death, and they “did not ever seriously discuss hiring any expert.” However, he immediately thereafter testified that he and Runyon considered and did discuss hiring a mitigation investigator for the

Rogers presented several witnesses who testified about the background of Rogers and his family at the PCR hearing. Most of these witnesses were family members: Rogers' mother; Robert Bryant (his brother); Mrs. Faith N. Brown (his younger sister); Carol Rogers (his paternal aunt); and Timeka R. (his child). The remaining witness was Mr. Yungman, the social worker. Through the family witnesses, Rogers presented evidence that: (1) his mother was the third of eight children born to Rogers' maternal grandmother, and the children were fathered by five or six different men; (2) Rogers' mother was repeatedly sexually assaulted by several of her mother's boyfriends, beginning when she was six or seven and continuing for several years;⁶⁸ (3) Rogers' maternal grandmother did not believe the reports of the sexual abuse and slapped her, so the abuse continued for some time; (4) Rogers' mother learned how to discipline children from her own mother, who would use electrical cords, belts and hands, even when the children were small; (5) Rogers' mother met Rogers' father Robert Rogers when she was twelve years old, and although they never married, she had three sons by him. The first was born when she was thirteen, Rogers was born when she was fifteen and a third son was born when she was sixteen; (6) Rogers' mother dropped out of school after she completed eighth grade; (7) Rogers' mother applied for and received public assistance for her three sons; and she began working full-time in

resentencing proceeding. **App. 2839-42; 2845-47; 2904-05.** He agreed that the facts of the case "were fairly simple." Also, "we felt that his family and the people that knew his family could provide some history or background." Counsel allegedly "had not found anything in initial reviews that suggested we had any of these outstanding or interesting facts, like he was a victim of drugs before birth or ... he had some traumatic accident in his youth or [had] been the victim of violence as a child." Counsel supposedly "didn't have any information, and I think we decided not to follow up on it." In *hindsight, contra Strickland*, Leiendecker felt that counsel had not done an adequate job in presenting the case in mitigation. He also denied being involved in any in-depth interview of any of Rogers' family members or others who knew him. He added that his only responsibilities for the 1996 resentencing was meeting with Rogers to prepare his testimony, reviewing the original transcript and helping prepare for the examination of witnesses. **App. 2842-44; 2846-48.** Leiendecker then testified that he did not "remember any strategic decision either way regarding an expert in mitigation. However, counsel were attempting not to belittle the grief of the victim's family but to demonstrate that what happened was simply a tragedy." **App. 2853; 2884-88; 2893-95; 2898; 2904-08.**

⁶⁸ Rogers' mother felt powerless because of the size of the men; and she felt ashamed because she accepted treats they gave her to remain silent.

a factory at age fifteen while Rogers' material grandmother cared for the sons; (8) Robert Rogers became more physically abusive and addicted to alcohol, cocaine and heroin; (9) there are problems with alcohol and drug abuse with Rogers' paternal uncles; (10) Rogers and his brothers were exposed to alcohol at an early age by their uncles; (11) Rogers' mother eventually met and married Martin N., and the two of them moved the family to Summerville in 1979; (12) after the family moved to Summerville, they often were evicted, and they had the electricity or water cut off because they could not pay bills; (13) food was often in short supply and the meals might consist only of rice, grits or bread; (14) Rogers' mother was a strict disciplinarian and would punish her sons by beating them with an electrical cord, a belt or even a broom handle; (15) Mr. and Mrs. N. were "role models," in terms of what not to do; (16) Rogers' brother, Robert Bryant, was able to overcome the mistakes he made in his life, including a burglary conviction, and is a productive citizen; (17) Mrs. Brown, Rogers' sister, is also a productive citizen; (18) Rogers was never able to have his father in his life, in any positive manner, even though he wanted this very much; (19) Rogers attempted to save the life of a child on one occasion when he was a teen; (20) Rogers was very protective of his family; (21) and his daughter, Timeka R., would have been willing to testify at resentencing, as would the other family members. **App. 3079-3145; 3180-88; 3317-63; 3427-47.**

Mr. Yungman, the social worker, testified that he reviewed trial, school, divorce and criminal records; as well as family death certificates, in preparing a psycho-social assessment of Rogers. Mr. Yungman also conducted several personal interviews with several of Rogers' family members and people who have had a significant impact on his life. Yungman criticized group interviews, such as Runyon had with Rogers' family; and he suggested this type of interview might not be effective because of the reluctance of people to talk about embarrassing "family

secrets.” **App. 3205-17.** Yungman thereafter testified to his findings, which were consistent with the testimony of Rogers’ family members; and he explained why each factor was significant, such as the history, corporal punishment, as well as drug and alcohol abuse. **App. 3227-34.**

Despite this showing, Rogers failed to prove that trial counsel’s performance was deficient. The United States Supreme Court held in *Wiggins* that *Strickland* does not “require defense counsel to present mitigating evidence at sentencing in every case” because this would interfere with right of counsel to make independent decisions as a matter of trial strategy. Rather, the Court “emphasize[d] that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the ‘constitutionally protected independence of counsel’ at the heart of *Strickland*, ... We base our conclusion on the much more limited principle that ‘strategic choices made after less than complete investigation are reasonable’ only to the extent that ‘reasonable professional judgments support the limitations on investigation.’ . . . A decision not to investigate thus ‘must be directly assessed for reasonableness in all the circumstances.’ *Id.*, at 691.” *Wiggins*, 539 U.S. at 533 (citations omitted). *See also Lovitt v. True*, 403 F.3d 171, 179 (4th Cir. 2005). Here, the record shows that counsel’s investigation for possible mitigating evidence, and the subsequent strategic decision not to present mitigating evidence similar to that presented in PCR by Rogers’ PCR counsel, were objectively reasonable.

The question of reasonableness under *Strickland* is not whether the reviewing court would follow the same strategy, but whether no rational defense counsel would under these circumstances. The problem with the finding of deficiency is that counsel knew either from

discussions with Rogers' family, from Leiendecker or from the records in counsel's possession, that Rogers' family was poor; that there was evidence of drug and alcohol problems; that he and his brothers had been in trouble; that Rogers' mother had been a very strict disciplinarian; that the parents "rode herd" on the boys; that the family "didn't have the best background with regards to paying bills and holding long-term jobs, things of that sort." Thus, counsel were aware of much of the evidence concerning Rogers' background and family life that was presented in the PCR hearing. **App. 3477; 3503-05; 3507-09; 3553; 3560-66; 3584-90; 3613-18; 3770-71.** Once counsel discovered this information, counsel made a decision to have a sympathetic mother plead for her son's life instead of "demonizing" Rogers' mother and blame his problems on his background or the family. He had done this in *Sims*, and the jury was very unreceptive to that approach.⁶⁹ This factored into counsel's decision not to present that type of information to a jury from a small, predominantly white and conservative county. In connection with this decision, counsel specifically discussed whether or not to hire a social worker but ultimately decided not to use a social worker because Runyon did not think that presenting expert testimony on why jurors should spare Rogers' life would play well with a Dorchester County jury. Further, counsel was able to present the family as a good one where Rogers' mother was "a big church lady," **App. 3477; 3503-05; 3507-09; 3553; 3560-66; 3584-90; 3613-18; 3770-71.**⁷⁰

Contrary to the PCR judge's finding, counsel's strategic choice was objectively reasonable because it was made after an adequate investigation under *Wiggins*, and that

⁶⁹ They considered this same approach in 1994 but rejected it for the same reason. **App. 3503.**

⁷⁰ It is unfathomable that counsel would not have thoroughly discussed and considered whether or not to present a social worker or to otherwise present evidence of Rogers' social history of which counsel was aware. To the extent Leiendecker's vacillating testimony is contrary, it should have been rejected as patently inconsistent with his testimony that he attended a death penalty-related seminar wherein the importance of these matters was emphasized. The Court should be unwilling to accept that counsel would have **deliberately neglected** a matter as important as Rogers' sentencing proceeding. *Cf.* Rule 1.1 (Competence), Rule 407, SCACR and comments to Rule 1.1.

“reasonable professional judgments support the limitations on investigation” and their presentation of evidence. *Strickland*, 466 U.S. at 690-691.⁷¹ They had “fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background,” *contra Williams v. Taylor*, 529 U.S. 362, 396 (2000), and made a reasonable determination that the type of evidence at issue would not be favorably received by a conservative Dorchester County jury based upon counsel’s knowledge of jurors in the County and his prior experience in the *Sims* case. Many courts have recognized that the presentation of mitigating evidence may present a “double-edged sword.” *E.g.*, *Burger v. Kemp*, 483 U.S. 776 (1987); *Darden v. Wainwright*, 477 U.S. 168 (1986); *Truesdale v. Moore*, 142 F.3d 749, 754-55 (4th Cir. 1998).

Further, Rogers cannot show how he was prejudiced by counsel’s actions. First, the PCR judge only found prejudice after applying a cumulative prejudice analysis (**App. 3972 & n. 21**), a she had with guilt phase issues (*see App. 4867; 4917*), and this was wrong. *See Argument X*. Second, counsel presented a sympathetic family member to ask for mercy. Third, there was

⁷¹ Unlike *Wiggins*, counsel in Rogers’ case had developed the mitigating evidence but they made a reasonable decision, as his attorneys, to follow a different course to mitigate his conduct. The PCR court’s Order seems to find deficiency based upon the testimony of the various witnesses that collateral counsel presented on this allegation. However, that analysis is appropriate for the prejudice prong, as opposed to the deficiency prong. Again, trial counsel’s decisions were reasonable under *Strickland*. *See Wood v. Allen*, 130 S.Ct. 841 (2010); *Kornahrens v. Evatt*, 66 F.3d 1350, 1361 (4th Cir. 1995) (counsel, Mr. Runyon, was not ineffective for failing to present evidence that defendant was in dissociative state at time of murders, where counsel made deliberate decision to portray defendant as a normal person who simply snapped under the pressure of his divorce and his ex-wife's constant badgering, where counsel decided to pursue that approach from his conversations with defendant, and where counsel was attempting to prove voluntary manslaughter at trial, and, at sentencing, was attempting to appeal to the jury's compassion for one of their peers who was thrust into an unfortunate and stressful position; any evidence that defendant was not an average person who snapped under pressure would have been inconsistent with overarching trial strategy); *Rutherford v. State*, 727 So.2d 216, 223 (Fla.1998) (finding no error where retrial counsel was aware of mental mitigation "but made a strategic decision under the circumstances ... to instead focus on the 'humanization' of Rutherford through lay testimony"). Again, *Wiggins* makes clear that the “principal concern in deciding whether [trial counsel] exercised ‘reasonable professional judgment’ is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel’s decision not to introduce mitigating evidence of *Wiggins*’ background was itself reasonable.” *Id* at 522-24 (internal citations omitted).

overwhelming evidence proving that Rogers was guilty of murder and the alleged statutory aggravating circumstance. The PCR judge found prejudice on this allegation.

However, in rejecting the guilt phase claims because no prejudice was shown, she recognized the extent of the State's proof: "At the time of the shooting, [Rogers] was a felon in possession of a firearm and he has consistently acknowledged that he fired the weapon, and that his action in so doing resulted in the death of [Stephanie B.]" **App. 4867**. He had a prior conviction for unlawfully carrying a pistol, and, as the result of another charge, he had only been out of prison for seven months when the murder occurred. **App. 2374-78; 2406-07; 2409-12**. Additionally, he murdered a child, who had done absolutely nothing wrong, much less anything to him to provoke him. Also, he deliberately escalated a confrontation that his accomplice, Patterson, initiated; he used lethal force without attempting to peacefully end the confrontation; and he waited until the truck and its occupants were leaving before firing two shots and endangering all three occupants of the truck as well as anyone who might pass by the scene.

Also, much of the omitted evidence pertained to hardships that his mother faced before his birth; and there is no mental health diagnosis of him that might explain or somehow mitigate the murder. Moreover, if this evidence of his background had been presented, then the jury would have heard that any hardships that he may have faced were not so severe that they prevented other family members from being productive citizens, and a brother and his sister have become productive citizens. Also, the State could have cross-examined the social worker and family members about negative background information and reemphasized the bad things Rogers has done in his life, including his record and his expulsion from school for striking a teacher. The PCR judge clearly failed to consider this negative information, which must be considered in

assessing prejudice. *See Wong v. Belmontes*, 130 S.Ct. 383, 386 (2009).⁷² Given this record, there is no “reasonable probability . . . that the balance of aggravating and mitigating circumstances did not warrant death” if his family members or the social worker had testified at sentencing. *See Strickland*, 466 U.S. at 695.

X. The PCR judge erred by applying a “cumulative prejudice analysis to the various ineffectiveness claims raised because this is inconsistent with *Strickland*.(Question XVIII).

The PCR court erred by applying a cumulative prejudice analysis in analyzing the sentencing phase and guilt phase claims Rogers raised (App. 3972 & n. 21 [sentencing phase]; App. 4867; 4917 [guilt phase issues]) in her consideration of the claims raised by Rogers, such as that used in *Brady* cases. In *Green v. State*, 569 S.E.2d 318, 324-25 (2002), and in *Simpson v. Moore*, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006), this Court declined to address the issue of whether a PCR applicant is entitled to relief based upon the supposed cumulative effect of trial counsel’s alleged errors. The State submits that such an analysis is not constitutionally required, is inconsistent with *Strickland* and was erroneously used.

Even in the absence of a cumulative prejudice analysis, a reviewing court, quite properly, analyzes the same class of errors together, such as the failure to present adequate evidence of mitigation. Yet, it is inappropriate to consider the cumulative prejudice from various alleged errors that are not related.⁸⁸ This is especially erroneous here because there was no prejudice on

⁷² *Belmontes* makes clear that an assessment of prejudice under *Strickland* requires a reviewing court “to consider all the relevant evidence that the jury would have had before it if [counsel] had pursued the different path” not just the positive information that counsel could have presented” through the witness(es), but also the damaging evidence from the prosecution “that almost certainly would have come in with it.” *Id.*

⁸⁸ While it is perfectly logical to consider the cumulative effect of failing to disclose evidence under *Brady*, since the determination to be made is whether non-disclosure of evidence deprived the defendant of due process, *see Kyles v. Wheatly*, 514 U.S. 419 (1985), the same is not true when focusing upon whether trial counsel rendered ineffective assistance of counsel. For example, the adequacy of counsel’s advice to enter the guilty plea to murder and receive an LWOP sentence should not be aggregated to supposed errors by counsel that occurred during Rogers’ subsequent trial. Likewise, counsel’s performance in *voir dire* is not connected in any manner with counsel’s supposed ineffectiveness for failing to hire an ophthalmologist. Moreover, alleged errors, which are not unconstitutional

any claim. A number of other jurisdictions have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. *E.g.*, *Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998); *Wainwright v. Lockhart*, 80 F.3d 1226 (8th Cir. 1996); *Jones v. Sotts*, 59 F.3d 143, 147 (10th Cir. 1995). To hold otherwise is to conclude that even non-deficient performance may result in reversal of a conviction, a conclusion that is manifestly contrary to the analysis set forth in *Strickland*. *See Strickland*, 466 U.S. at 687 (“Unless a defendant makes both showings [i.e., both deficient performance and prejudice] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable”). *See also Fisher*, 163 F.3d at 852-53. Further and analyzing Rogers’ allegations cumulatively, it is clear that he was not entitled to relief because the record does not support a finding that he was prejudiced by any or all of the alleged errors. *See Westley*, 83 F.3d at 726 (claims that are not prejudicial cannot be cumulated, regardless of the number raised). Therefore, the PCR judge erred by aggregating the claims to find prejudice and must be reversed. *Fisher*, 163 F.3d at 852.

CONCLUSION

For all of the foregoing reasons, the State submits that this Court should grant certiorari and reverse the Opinion and judgment of the PCR court.

Respectfully submitted,

ALAN WILSON
Attorney General

individually, simply cannot be added together to create a constitutional violation. *See United States v. Stewart*, 20 F.3d 911, 917-18 (8th Cir.1994). Following Rogers’ position would result in a PCR applicant obtaining relief, even though no one alleged constitutional violation was prejudicial to him, simply by raising a vast number of allegations such as in this case. This is a ludicrous result that is not mandated by *Strickland* or any decision of this Court. Indeed, it appears to be contrary to *Florida v. Nixon*, 534 U.S. 175 (2004) and *Bell v. Cone*, 535 U.S. 685, 696-97 (2002), both of which clearly require inmates to meet both prongs under *Strickland*.

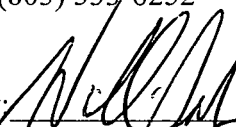
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June 21, 2012

WES

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From Dorchester County
The Honorable Diane S. Goodstein, Circuit Court Judge**

TIMOTHY DION ROGERS,

Respondent,

vs.

THE STATE,

Petitioner.

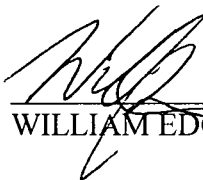
PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Petitioner, certify that I have served the within Motion to File Amended Petition for Writ of Certiorari and Amended Petition for Writ of Certiorari, and Proof of Service on Respondent by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Diana Holt, Esq.
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I further certify that all parties required by Rule to be served have been served.

This 21st day of June, 2012.



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