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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

TIMOTHY DION ROGERS,

Respondent,

vs.

STATE of SOUTH CAROLINA,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI [REDACTED]

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STATEMENT OF THE CASE

Mr. Rogers adopts the Statement of the Case as determined by the lower court, which states in pertinent part:

> Applicant was arrested on December 2, 1992, on charges that he murdered nine-year-old Stephanie B. He was indicted for murder. *See* 93-GS-18-101. On August 3, 1993, the State filed and served a notice of intent to seek the death penalty.
>
> On Applicant's behalf, trial counsel, William Runyon and Mark Leiendecker, entered into a plea agreement with First Judicial Circuit Solicitor Walter Bailey, the result of which was to be a sentence of life without the possibility of parole. As part of the plea agreement, Applicant pled guilty to two unrelated counts of Criminal Sexual Conduct with a minor ["CSC"] that arose out of Applicant's relationship with his then sixteen-year-old girlfriend, Victim. These two convictions ultimately served as the two prior violent felonies necessary to ensure Applicant's ineligibility for parole on the murder charge, which was a primary goal of the negotiated plea. On January 25th and 27th 1994, Applicant pled guilty to those two charges, the Honorable Charles W. Whetstone, presiding. Judge Whetstone sentenced Applicant to seven years on each count. *See* 94-GS-18-47 and 94-GS-18-48. On February 2, 1994, Applicant was unable to complete the previously scheduled negotiated plea to the murder charge because he could not agree to say that he fired his weapon with the malicious intent to kill Stephanie B. The trial court refused to accept Applicant's plea to murder. PCR Ex. P-3.
>
> The plea withdrawn, Applicant's capital murder trial commenced on February 28, 1994, the Honorable Luke Brown, presiding. Applicant was convicted of murder on March 4, 1994. He was sentenced to death on March 5, 1994, based on the aggravating circumstance found by the jury: the murder of a child under the age of eleven years.
>
> Applicant filed a timely notice of appeal. Joseph Savitz, III, of the Office of Appellate Defense, represented Applicant on his direct appeal. On January 22, 1996, the Supreme Court vacated and reversed Applicant's death sentence but affirmed the murder conviction. *State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996) ("*Rogers I*").
>
> Applicant's resentencing trial took place from December 2nd to December 5th, 1996. The Honorable Charles W. Whetstone presided over Applicant's resentencing, and counsel for the parties remained the same as they were for *Rogers I*. The State submitted two statutory aggravating circumstance for the new

jury's consideration: murder of a child the age of eleven or under and that the offender created a great risk of death to more than one person in a public place with a weapon. The jury found the existence of only the former. Applicant timely appealed.

Mr. Savitz again represented Applicant on his direct appeal. The Supreme Court affirmed the death sentence on January 24, 2000. *State v. Rogers*, 338 S.C. 435, 527 S.E.2d 101 (2000) ("*Rogers II*"). Applicant did not petition the United States Supreme Court for a *writ of certiorari.*

As a matter of course at that stage of the process, the Supreme Court set an execution date for Applicant. Pursuant to *In Re Stays of Execution in Capital Cases*, the Supreme Court issued a stay of execution and vested exclusive jurisdiction over this matter in the circuit court, the Honorable Diane Schafer Goodstein presiding by special appointment. *See In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). On April 11, 2000, this Court appointed Diana Holt and Jeffrey Bloom as counsel for Applicant. Applicant filed his initial application for Post-Conviction Relief on June 12, 2000. Applicant filed his first amended application August 24, 2004, and his second amended application on March 31, 2005.

The Court held an evidentiary hearing on the application in St. George, Dorchester County, South Carolina, September 27 through October 1, November 22, and December 21 of 2004, and May 2 and August 23 of 2005. At the conclusion of the evidentiary hearing, Applicant moved to amend the pleadings to conform to the evidence adduced at the hearing, pursuant to SCRCP, Rule 15. Thereafter, prior to the Court's ruling in this matter, the Supreme Court decided *State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450. 453 (2007). Applicant moved to amend his PCR action to include his claims for relief under *Bowman* and *Burkhart*. The State moved to strike the claims. The Court held a hearing on those motions. The Court offered the parties an opportunity to adduce any additional evidence either party wanted to present related to those additional claims. Neither party sought to adduce additional evidence to the Court. Ultimately, the Court granted Applicant's timely motion to amend his PCR application to include claims related to *Bowman* and *Burkhart,* and requested that the parties provide proposed orders related to those claims.

App. 4860-63

The lower court filed an Amended Order granting a new sentencing proceeding and vacating two CSC2nd charges that arose because, and only because, of a plea deal that was part and parcel

of a three part deal, failed, on December 10, 2010.

STATEMENT OF FACTS

Introduction.

This case represents one of more egregious failures by trial counsel in a death penalty case, approaching the level of incompetence that caused the United States Court of Appeals for the Fourth Circuit to overturn a decades-old case. *See Elmore v. Ozmint*, 661 F.3d 783 (2011) (trial counsel's failure to investigate and challenge the state's case required reversal of all charges). Mr. Rogers case was to be resolved by a staggered three part plea, two charges of CSC2nd with a minor (Mr. Rogers' girlfriend) which were created by trial counsel, and a third plea to murder, but fell apart on the final leg. Trial counsel had prepared for a plea version of the case for mitigation, not for a trial. Trial counsel, angry at Mr. Rogers, allowed the case to go forward to a full capital trial a mere twenty-eight days or so after the failed pleas. After this Court overturned Respondent's death sentence, the same trial counsel basically replayed the first failed sentencing phase, except they presented LESS. Aside from Mr. Rogers' own comments, the defense case at resentencing was comprised of less than eleven pages of testimony. All the while, the State argued to Mr. Rogers's juries that he had "sex with children," based on the two CSC2nd charges. In fact, trial counsel's failures were so severe that the *Petitioner* posited that trial counsel "intentionally neglected the matter entrusted to him."[1] App. 4852.

Lower Court's Statement of the Facts.

The Respondent hereafter adopts the lower court's statement of the facts, which follow:

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[1]The lower court declined to find trial counsel's failures rose to the level of intentional neglect.

On Thanksgiving Eve of 1992, Applicant and his two friends, victim and Daxton Patterson, walked to Spell's Grocery Store in Summerville, SC, to use a pay phone located at the front of the exterior of the store. Applicant, Mr. Patterson, and victim had been drinking alcoholic beverages and smoking marijuana most of the afternoon. While at the phone, the trio encountered Mike B and his friend, James Carver, who had arrived at Spell's in Mr. B's pick-up truck, along with Mr. B's nine-year-old daughter, Stephanie. Mr. B had been drinking beer that the afternoon. Carver claimed he had not consumed any alcohol. Stephanie went inside the store to get a sandwich. Mr. B purchased more beer. At some point, Mr. B engaged in a brief conversation with a family friend and employee, Anthony Riley, in front of the store. Mr. B and Mr. Carver were planning on hunting and fishing at the B family lake house, where they were to gather with other B family members for the Thanksgiving holiday.

Mr. Patterson first engaged in a verbal dispute with Mr. Carver and Mr. B. As the dispute among Carver, B, and Patterson, all of whom are White, quickly escalated, Applicant, who was talking on the phone to his brother, sought to intervene on behalf of Patterson. The evidence at trial was that either Mr. B or Mr. Carver, or both, used racial slurs toward Applicant, an African-American, and his friends. Police located several firearms in the cab and bed of Mr. B's truck, one of which was a .9 mm handgun owned by Mr. Carver. Applicant, who had at least one felony conviction at the time of Miss. B's shooting, had a handgun in a pocket of his clothing.

As the argument became more heated, involving all four men by that point, Applicant produced a firearm and intentionally fired his weapon, in what he testified was meant to be a warning shot, in an attempt to quell the argument. Tempers and tension were high. There is a dispute as to whether Mr. B's truck was pulling away from the store or backing up toward Applicant. It matters not. Assuming arguendo that the B truck was backing toward Applicant, he was in unlawful possession of a firearm that he intentionally fired, killing Stephanie B. Stephanie was seated in the center of the truck cab's interior bench seat. A bullet pierced the middle of the back window of the truck, entered the back of Stephanie's head, and exited through her forehead. Applicant, Mr. Patterson, and victim fled the scene. Stephanie was transported to a hospital where she was pronounced dead the next day. Applicant has never wavered in his contention that he did not intend to harm Stephanie. He has been equally consistent in acknowledging that he fired the shot that killed her.

Applicant was arrested on December 2, 1992, at a college apartment building near Tuskegee University in Alabama, where he had gone to see his friend, Stephanie Simmons. After he was arrested, he gave a statement to Alabama law enforcement in which he acknowledged that he had possessed and fired the

weapon that killed Stephanie, that he had pulled the gun and fired it after a racially charged confrontation, and that he never meant to harm the child, only to break up the confrontation.

App. 4859-60.

ARGUMENTS[2]

I. The Lower Court Correctly Concluded that Mr. Rogers Received Ineffective Assistance of Counsel at the Penalty Phase of His Case.

A. Introduction and Standard of Review

The lower court found that Mr. Roger's trial counsel provided ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution when they failed to investigate, develop, and present mitigating evidence at his resentencing proceeding. The State offered witnesses and evidence that it used to argue that Mr. Rogers was a cold-blooded child-killer and child-rapist (App. 2462), to which trial counsel responded by offering the testimony of Rogers himself to say the shooting was an accident and the testimony of his mother and two friends to say he was a nice boy, but despite all his mother's best efforts, he just could not stay out of trouble. App. 2421-33.

At the PCR hearing, the lower court was presented with a mountain of mitigating evidence that counsel could have presented. This evidence fell into three basic categories: The first was mitigating evidence regarding the circumstances of the offense. This evidence supported Rogers' version of events that the tragic shooting of Stephanie B was not a cold-blooded intentional act, but the result an alcohol fueled brawl in which racial epithets were hurled, tempers were high, and Rogers, wantonly shot a gun, but very likely could not have seen

[2]Respondent has compacted all of Petitioner's questions into two questions to facilitate clarity and comprehension.

the little girl inside the truck due to where he was standing, the darkness, and his lifelong visual impairment. The second category demonstrated that Mr. Rogers' was a highly manageable inmate, with only one infraction on his record, which likely overstated his involvement. The third category of evidence presented at the hearing painted a highly mitigating picture of Mr. Rogers' background and character, demonstrating that he was not simply an incorrigible youth, but was the unfortunate heir of a background of trauma, poverty, addiction, and abuse, which then manifested itself in his own life.

In reviewing the judgment below, this Court affords "great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). This Court need only determine whether there "is any evidence of probative value to support the ruling of the lower court, and shall reverse only if the lower court made an error of law." *Jones v. State,* 382 S.C. 589, 677 S.E.2d 20 (2009).

B. Relevant Legal Principles

In assessing a claim of ineffective assistance of counsel, a reviewing court must first determine whether counsel's performance "fell below and objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Second, the court must determine whether counsel's deficient performance prejudiced the outcome of the case. *Id.* In order to prove prejudice, the court must find a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 695. A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Wiggins v. Smith*, 539 US. 510, 534 (2003). The court is not to examine each of counsel's deficient acts or omissions in a vacuum, but is to examine the results of counsel's

performance on the reliability of the outcome as a whole. *See, e.g., id.* at 695 ("In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of the evidence."); *Williams v. Taylor*, 529 U.S. 362, 367 (2000) (in assessing prejudice, court must consider, "the totality of the evidence...both that adduced at trial, and the evidence adduced in the habeas proceeding.").

The Constitution requires that, at a capital sentencing proceeding, the jury be permitted to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings v. Oklahoma*, 436 U.S. 921 (1978) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978). In determining what, if any mitigating evidence to present, counsel is required to make "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

C. Facts Relevant to this Claim

1. Evidence at the 1996 Resentencing Trial

At the 1996 resentencing, the only issue for the jury to determine was whether to sentence Mr. Rogers to life or death. In support of a death sentence, the State offered its version of how events of November 25, 1992 unfolded, beginning in opening argument. According to the State, Mike B, his daughter Stephanie, and B's friend, James Carver, were en route to a family getaway and hunting trip, when they stopped by Spell's market to get something to eat. App. 2091-92. Earlier in the day, B had purchased a case of beer and consumed three of them. App. 2092-93. When the group arrived at Spell's, at dusk, Stephanie entered the market purchased a sandwich and returned to the car where Carver had remained. App. 2093. B bought another beer and, on

the way back to the car, stopped to chat with his friend Anthony Riley. *Id.*

At this point, Tim Rogers, and his friends victim and Dax Patterson arrived at the store, whereupon, "for no apparent reasons," Patterson began to "curse" at B and Riley. Rogers and victim went to use the phone, while Patterson continued to "antagonize (B and Riley) and began to curse them some more." App. 2093-94. Patterson then flipped a lit cigarette on to Riley's shoe, and Riley left. According to the State's theory, B then attempted to leave, and Patterson attempted to prevent him from getting his truck. Suddenly, goes the State's argument, Rogers appeared with a gun, pointed it at [Mr.] B's head and shouted, "I'm going to kill you!"[3] App. 2094. The child then began to cry, at which point Rogers spit at [Mr.] B and fired a shot into the ground. App. 2095. As B left, the State told the jury it would prove that Rogers then went behind the truck and shot a bullet into the back of the child's head. *Id.*

Following that opening statement, defense counsel William Runyon stood up and said simply that he believed the jury would find that this incident was a "conduit of misjudgment by more than one person," and that "the evidence will show that Stephanie B was not the intended victim of anybody." App. 2099. He did not say what any of this evidence would be, but notified the jury that he would be asking them to return a life sentence. App. 2100.

The State's evidence by and large bore out their theory. They offered the testimony of Mr. B, who stated that when Rogers and his friends arrived at the gas station, Rogers walked by and said, "don't fuck with these crackheads," at which point Patterson began repeatedly shoving B and Riley and "saying obscene gestures." App. 2115. Despite all this, B said he and Riley,

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[3]App. 2094. Both B and Carver acknowledged on cross that they had failed to mention this threat in their statements to police.

"never said a word to [Rogers] at all." When he tried to get in his car, Rogers put a gun to his head, said, "I'm going to kill you mother fucker," shot into the ground, and spat on [Mr.] B. App. 2117-19. [Mr.] B then tried to drive away when he heard the second shot and realized Stephanie had been shot. App. 2121. When he spun back around he said Patterson and Rogers were "standing there laughing," although he was not sure he had seen that. App. 2122.

The State then offered the testimony ofvictim who said that Patterson began arguing with two white men (Riley is black) and that Patterson spat on them. App. 2150. Eventually Rogers went over to where the men were arguing, but she did not hear anything Rogers said. App. 2151. She heard a shot, after which she turned back toward the phone. App. 2152. After the second shot, Rogers and Patterson ran off and the truck started to roll. App. 2153. She ran away.

Isaiah Jenkins said he went to Spell's that night, and a white man was outside picking on him. App. 2162. He went into the store, where he heard two shots. App. 2163. He never saw Mr. Rogers that night. *Id.* Hernethia Jenkins was also in the store that night and heard two shots. App. 2165. James Robinson, who was familiar with the victim and the family through his employment at Spell's, also heard the shots. App. 2168-70.

George Scharf, a paramedic who responded to the scene, described the efforts to rescue the victim and her transport to the hospital. App. 2171-78. He was followed by the medical examiner and the coroner who testified to the manner and means of Stephanie B's death. App. 2179-91. Earl Asbell testified to the evidence collection that was done at the scene. Numerous photos of the crime scene were introduced through him. App. 2192-2205. A ballistics examiner testified next (App. 2205-11), followed by the police officer who arrested Mr. Rogers in Alabama. App. 2211-17.

James Carver testified that he had been planning on going hunting with Mr. B and Stephanie. App. 2220. Carver brought his .9mm pistol and put it in a basket of clothes in the truck. App. 2221-22. He claimed he planned to use the pistol to hunt deer. App. 2222. Carver testified that when the three of them arrived at Spell's, after [Mr.] B came out of the store, he was talking to Anthony Riley, when Rogers, Patterson, and victim arrived. App. 2226-27. According to Carver, Rogers and Patterson were "staggering" like they had been drinking. Patterson was gesturing at [Mr.] B like wanted to fight. App. 2228. Riley left and [Mr.] B and Patterson approached the truck, where Carver was sitting. App. 2228. As Patterson and [Mr.] B were struggling at the truck's driver side door, Carver, who was now standing outside on the passenger side of the truck, claimed to hear Rogers say on the phone, "hold on for a minute, let me get this fellow." App. 2230. He said Rogers approached, stuck a gun to [Mr.] B's head and threatened to kill him. *Id.* He then spat on [Mr.] B and shot his gun at the ground. App. 2232. At that point, Carver got back into the truck and the men began to drive off. App. 2233. He then saw a flash, and when he realized Stephanie had been hit, he told [Mr.] B to back the truck back up. *Id.* He said Patterson and Rogers were laughing[4] and ran away. App. 2234. Carver said he never saw Mr. B drinking or any beer in the truck. App. 2238-39.

The State read Mr. Roger's criminal record including two convictions for criminal sexual conduct with a minor. App. 2254. Then, through a witness from the SCDC, Patricia Mack, the State introduced a record of a prison disciplinary infraction and simply read it into the record with no objection. App. 2254-89.

Stephanie B's parents and grandmother offered powerful victim impact testimony. The

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[4]Carver never mentioned the supposed laughing to police after the event.

State closed by offering the videotape of the "perp walk," of Mr. Rogers in which, while shackled and in prison clothes, he contended that the shooting was as accident. App. 2364-65.

The defense opened its case for life by putting Mr. Rogers himself on the stand. App. 2369. Mr. Rogers testified that he had four children by two different women, that he had been expelled from school, and that he had a lengthy criminal record. App. 2371. He testified that the Criminal Sexual Assault convictions on his record were the result of his relationship with victim, with whom he was having a sexual relationship, despite that fact that he was married, because he and his wife were "somewhat separated." App. 2379. After all of that, Mr. Rogers gave the jury his version of the events of November 25, 1992. According to Mr. Rogers, [Mr.] B's truck was not there when they arrived. App. 2385. The truck arrived while Mr. Rogers was on the phone, and Mr. B ordered him to get off the phone in a very "vulgar" way. App. 2387. At that point, Patterson came over and got in a verbal altercation with [Mr.] B. Carver and [Mr.] B both got out of the car, and victim was trying to restrain Patterson from fighting. App. 2388. Rogers got off the phone and went and asked Carver and [Mr.] B something along the lines of "what's up." App. 2389. [Mr.] B then went to his truck and Rogers thought he might be getting a gun, at which point Rogers shot his gun off. App. 2390-91. He was unable to remember that there were two shots. App. 2391. Then Patterson told him he thought Rogers shot somebody, and he and Rogers ran off. *Id.* Rogers did not find out until later that it was a child he had shot. App. 2392. He never laughed, he never spit, and he never threatened to kill Mr. B. App. 2395-96. He said he did not intend to kill anyone, much less a child, but he admitted that he was guilty of murder and that he had ruined the B [family]'s lives and his own family's lives. App. 2396-99. Mr. Rogers was cross-examined at length on his criminal record, his recollection of the events, and

the circumstances of life in prison. App. 2399-2420.

The remainder of the defense's case for life comprised ten and one half transcript pages. App. 2421-33. The defense offered Jessie Middleton, a carpenter and minster at Mr. Rogers' mother's church, who testified that Mr. Rogers was not a mean person and that his mother and he regularly attended church. App. 2421-24. Elaine Williams testified that Rogers was a good, church-going boy until his family moved to South Carolina. Rogers started getting in trouble after his mother remarried, although she never saw him get angry. App.2424-26. Rogers' mother, Alethia Nichols, stated that she did everything she could to raise him right, including offering him counseling, but he just kept getting in trouble. App. 2427-33.

In its closing argument, the State reminded the jury that although it might feel sorry for Mrs. Nichols, it could not return a life sentence on that basis. App. 2461. The defense argued that this case was not bad enough for death, because Mr. Rogers did not intend to kill anyone.

2. *Evidence offered at PCR hearing that would have supported defense mitigation theory that Mr. Rogers did not specifically intend to kill Stephanie B.*

At the PCR hearing, counsel offered evidence, all available from witnesses who testified at trial, resentencing, or were easily locateable, which would have powerfully supported the defense's apparent mitigation strategy to obtain a sentence of life based on the circumstances of the offense.

a. Victim.

Victim was a friend of Mr. Rogers and was present at the scene of the shooting. Victim testified at Mr. Rogers' 1994 trial that at the time she, Dax Patterson, and Timothy Rogers went to Spell's market, Rogers went to use the phone while Patterson and two white men near a truck

got into an argument. App. 867. As the argument intensified, Mr. Rogers, who was not wearing glasses at the time, got off the phone and victim went over to it. App. 870. She heard a shot and turned around to see Mr. Rogers standing behind the truck with a gun in his hand. She had turned back toward the phone when she heard a second shot. She turned to see the truck driving away. She saw blood and became afraid. The three ran away. App. 871.

On resentencing, victim gave substantially similar testimony, App. 2145 -57. Although she was somewhat confused in her memory about when Mr. Patterson and Mr. Rogers ran off after the second shot, she ultimately agreed that her testimony was that Mr. Rogers was still standing there as the truck pulled off, and then ran away. App. 2154. Trial counsel conducted a brief cross examination of her. App. 2155-57.

At the PCR hearing, victim testified to essentially the same events she described in the prior two proceedings, but answered a number of questions that trial counsel had not asked her. She testified that had she been asked, she would have testified that she believed, based on the circumstances, that the shooting must have been an accident because neither she, Mr. Patterson, nor Mr. Rogers saw the girl in the car. App. 3044. She further testified that Mr. Rogers loved kids and would have never intentionally killed a child. App. 3044. Unlike [Mr,] B, she testified that Mr. Rogers was never anywhere near the door of [Mr.] B's truck and never held a gun to his head. App. 3031. She further testified that Mr. B and Carver never tried to retreat from the argument until after the first shot was fired, and they were in or near their truck. At that time, she testified, she saw them trying to reach for what she feared was a gun. App. 3037, 3040-41. She stated at no time did Mr. Rogers laugh about these events. App. 3042. Victim also testified that [Mr.] B and Carver hurled the epithet "nigger" prior to the first shot, and again following the

second shot[5]. App. 3036, 3037, 3043.

b. Daxton Patterson

Daxton "A" Patterson did not testify at trial or resentencing. He testified that he,victim, and Mr. Rogers had been working on a truck and drinking when they decided to go to Spell's market. He recalled that he was talking on the phone when [Mr.] B started an altercation with him. After that, the events happened very fast. He, not Rogers, spat on [Mr.] B. App. 2953. He and [Mr.] B struggled, and [Mr.] B went to the door of his truck and attempted to get a weapon. App. 2952. Mr. Patterson saw two weapons and a beer carton in the truck. App. 2947. While he was struggling with Mr. B, Mr. Rogers, who was not wearing his glasses, fired two shots into the air. App. 2949, 2952. When Mr. B screamed that his daughter had been shot, that was the first time Mr. Patterson noticed that the child was there. App. 2950. Mr. Patterson testified that at that moment, "he broke down." He is sure that he and Mr. Rogers never saw the girl. App. 2954. He had a seven year old brother at the time, and Rogers, who loves children, had four of his own. App. 2953. Mr. Patterson said, "not one day in his life would [Rogers] have ever done that regardless whether we were drinking or my man had made a remark." App. 2956. Patterson was adamant that nobody was laughing after this horrible incident. App. 2953.

c. Stephanie Simmons

Stephanie Simmons was an old friend of Rogers. At trial, she testified that following the shooting, Rogers had called her, very upset. He then came down to stay with her at Tuskegee University. He was arrested fairly soon after that and returned to South Carolina. At the PCR

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[5]Although victim had testified previously that she did not hear what the arguing men were saying, it is clear from her PCR testimony that she understood those questions to regard the subject matter of the argument in general. App. 3069.

hearing, Simmons testified that Rogers had told her that the shooting was an accident. She said Rogers had relayed that there had been an altercation at Spell's after a white man yelled for "that nigga to get off the phone." App. 2984. Rogers said he had fired a warning shot but did not intend to kill anyone. App 2984. Simmons also testified that Rogers was a truthful person, and that she believed the bad things he did in his life always drew more attention than the good things he did. App. 2987-90.

d. George Scharf

George Scharf was the paramedic who responded to the scene and transported the victim to the hospital. On a form, not reviewed by trial counsel, he characterized the incident as a "firearm accident." App. 3013-14, Rogers' Exhibit 20 He testified at the PCR hearing that it appeared to him that based on the way the shot appeared to have entered the truck and the size of the victim, it did not appear to him that the shooter could have seen her. App. 3015.

e. James Robinson

Mr. Robinson testified at the resentencing for the State that he worked at Spell's Market and heard the shots on the night of the shooting. At the time of the PCR hearing, James Robinson had worked at Spell's grocery store for forty three years. He testified that he had known Mr. Rogers from the time he moved to Pigeon Bay Road, when Mr. Rogers was just a young teen, until the time of the incident. Mr. Robinson always knew Mr. Rogers to be respectful and thoughtful. He never gave any one any trouble at the market.

f. Lt. Earl Asbell

Dorchester County Sheriff's Lieutenant Earl Asbell was one of the investigative officers at the crime scene. At Mr. Rogers' request, he produced several items from the police file at the

PCR hearing that were not introduced at Mr. Rogers' resentencing.[6]

a) a photograph depicting a 9mm gun on top of a basket of clothes;

b) a bloodied paper bag containing a Busch beer can;

c) a wanted poster for Mr. Rogers including a picture of him wearing glasses.

g. Homer Fesperman

Homer Fesperman was presented as an expert in audio and videotape technology without objection. Mr. Fesperman reviewed a videotape that had been created by a news crew at the crime scene. This tape had been obtained by Solicitor Bailey, who notified trial counsel it was available for review. Fesperman slowed the tape, using technology that would have been available in 1996, and generated two still photos from it. The lower court found that this tape, and still photos generated from it, "depicts at least one, if not two, additional, twelve-pack containers of Busch Light beer, that were partially empty, in the back of [Mr.] B's truck, along with more empty beer cans."[7] App. 4950-51. The lower court also found that the tape showed

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[6]Notably, PCR counsel requested that Mr. Asbell produce "all photographs, negatives, or any videotapes that the police might have taken." He testified, however, that he was unable to locate the Dorchester County Sheriff's Department file in this case, ***which is apparently missing***. He further stated he had never known of a case file to go missing before.

[7]The State twice makes the bold assertion, without citing a page from the record, that "it is *undisputed* that review of the tape would not have disclosed the empty twelve pack of beer in the truck bed." To the contrary, the lower court expressly said,

> The Court notes that it was able to see and identify beer cartons in the truck bed. Mr. Fesperman's experience and equipment was not necessary to enable a viewer simply to see and identify the beer cartons. PCR 8-2005Supp. Tr. 16-7. Rather, the still shot frame captures of the videotape enabled the Court, and would similarly enable lay viewers, to discern the contents more quickly and clearly than that which was apparent to the Court when viewing the videotape. *Id.* I find that the still shots provided definitive evidence of what was actually depicted on the videotape.

App. 4950-52.

Carver in the presence of the beer in the truck and that Carver, whose off-screen voice was identified by trial counsel Mr. Leiendecker at the PCR hearing, stated on the videotape that he and [Mr.] B had "just pulled up" when the altercation began. App. 4951. A transcript of the tape prepared by the Solicitors office prior to trial also reflected that when Mr. Carver was asked "if he had any idea why she was shot at," he shook his head.

Solicitor Bailey viewed this tape and mailed trial counsel inviting them to examine it. Counsel never did.

h. Dr. William Price

Dr. William Price is an ophthalmologist. He examined Mr. Rogers prior to the PCR hearing, reviewed Mr. Roger's medical records from school and prison and rendered an opinion regarding Mr. Rogers' visual acuity. He concluded that Mr. Rogers suffers from myopia (a.k.a. nearsightedness) and astigmatism, which causes and compounds blurriness resulting from myopia. Dr. Price explained that for a person with Mr. Rogers' impairments, the further away an object becomes, the blurrier it gets, and that alcohol, marijuana, and darkness would compound this problem.[8] Price added that Mr. Rogers has had documented visual impairment since childhood which requires glasses to correct. The measurements of his impairment have varied from 20/70 to 20/200.

Price's testimony complemented other evidence at the PCR hearing. Mr. Rogers' mother

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[8]Mr. Rogers' trial counsel Mr. Leiendecker testified at the PCR hearing that he had no recollection of reviewing records regarding Mr. Rogers' eyesight or considering the matter all. He acknowledged that such information would have been helpful given their defense because, "it could have been relevant to what happened." "The ultimate act involved people at distances and a truck driving away, and what he saw or perceived to have seen regarding Mr. B on his testimony and whether he could have actually been able to see at a distance whether there was a weapon or other things that he discussed or described in his testimony" App. At 2854-55.

testified that she noticed that her son, from a very young age sat very close to the television and had trouble picking things up from the floor. He was prescribed glasses, but resisted wearing them. Rogers' school records indicated he was given an eye test in fifth grade. Some photographic evidence also depicted Rogers wearing glasses.

3. Evidence of Mr. Rogers' ability to adapt to life in prison

At the 1994 sentencing, the State called SCDC Correctional Officer Anthony Brown. Mr. Brown testified that Mr. Rogers was written up for allegedly being involved in a fight in prison on February 9, 1993. At the 1996 resentencing, however, the State simply admitted the report of this incident with no objection from trial counsel.

At the PCR hearing, Mr. Brown testified that, had he been asked, he would have testified that his overall impression of Mr. Rogers was that he was "always courteous, always complying with what was expected of him as an incarcerated inmate, he's always polite and just self-disciplined." He added that Rogers "complied and abided by the rules that's set forth by [SCDC]." He explained why he believed Mr. Rogers was written up for this disciplinary infraction despite his generally good comportment: It was Mr. Brown's impression that Mr. Rogers was only charged with this incident because he was one of the bystanders around the episode, and that it is not uncommon for all bystanders to be charged. He said it is not uncommon for the charges to make the incident seem more serious than it was. He believed the only reason Mr. Rogers was found guilty of this incident is that he was unable to muster a defense.

4. Evidence of Mr. Rogers' background of poverty, trauma, addiction, and abuse

At the PCR hearing, Mr. Rogers offered evidence from a variety of witnesses, all easy to locate and willing to speak with counsel, that completely changed the picture of Mr. Rogers' life history.

a. Alethia Nichols

Alethia Nichols is Mr. Rogers' mother. At trial, she testified that she had trouble with Mr. Rogers, that she tried to get him help, but was unable to handle his behavioral problems. At the PCR hearing, she recounted a harrowing and heartbreaking story of her background. She was the third of her mother's eight children, although the children were from five or six different fathers. App. When Alethia was about five, her mother moved to Brooklyn, New York. About a year later, the young girl started to be raped and orally sodomized by her mother's boyfriends. The abuse continued for years, as the men bribed her not to tell her mother. She felt powerless and ashamed. When she finally gained the courage to report the abuse to her mother, her mother blamed her, and slapped her in the mouth. Not surprisingly the abuse continued, and Alethia internalized her mother's message that she was to blame. Ms. Nichols' mother was also physically abusive and subjected Alethia and her siblings to beatings with electrical cords, belts, and hands.

When Alethia was twelve, she met Robert Rogers who would become the father of her first three children, the first of whom, Al Curtis Rogers, was born when Alethia was only thirteen. Timothy Rogers was born when his mother was fifteen. Alethia then dropped out of school after the eighth grade and had a third child, Robert Bryant, at sixteen.

Alethia applied for public assistance for her children, but also worked full time in a factory which left the daily care of her children to her grandmother, who was responsible for the

supervision of ten children all together. Finally, Alethia fled the brutality of her mother's home and went to live with her pastor. Despite any respite the move may have offered, Robert Rogers remained abusive to Alethia and he developed worsening addictions to alcohol, cocaine, and heroin. Finally, Mr. Rogers stopped coming around.

Ultimately, Alethia met and married Martin Nichols, and the couple had a daughter, Faith. The family then moved to Summerville, South Carolina. Mr. Nichols was unable to provide financially at all, and the couple moved approximately twenty three times, fleeing an endless barrage of evictions. The family regularly went without power and water and, although Alethia was committed to feeding her children something every day, food was often limited to rice, grits, or dry cereal.

Alethia followed the model of discipline she learned from her mother, and beat her sons with cords, belts, and broomsticks, although she spared her daughter any of the physical abuse dealt to the sons. The boys all ended up incarcerated at one time or another. Faith became much more successful and has never been in legal trouble in her life. The PCR court delineated the aspects of Alethia's testimony that it found most compelling and found her testimony compelling, such that it would have made a difference in the outcome. App. 4959.

b. Robert Bryant

Robert Bryant is Mr. Rogers' brother. He testified that when he and his brother were children they suffered "repeated and fiercely administered beatings with belts and electrical extension cords that would leave him with welts and bruises." He testified about the fear and disruption in their lives occasioned by the move from Brooklyn to South Carolina and the poverty they experienced once they arrived: going without food or shelter, and suffering serial

evictions. The boys longed for their father to come and rescue them. The PCR court found Mr. Robert Bryant's testimony was moving and would have affected the outcome of the resentencing. App. 4961.

c. Faith Nichols Brown

Faith Nichols Brown is Mr. Rogers' sister. She testified to the family's extreme poverty during her childhood. She also testified that she witnessed the horrifying beatings that her brothers received. Faith remembered her brothers being beaten with brooms so hard that the brooms would break. She recalled buying a lot of new brooms to replace the ones broken in the beatings. Faith, however, was spared, and had a protected and sheltered childhood.

Her testimony regarding her relationship with her brother was particularly compelling to the lower court. App. 4962. Brown testified that the two saddest days of her life were the day that Stephanie B was shot and the day that Mr. Rogers was sentenced to death. "She wanted to die with him." *Id.*

d. Carol Rogers

Carol Rogers is Mr. Rogers' paternal aunt. She testified as to the extent of addiction and dysfunction on the paternal side of Mr Rogers' family. She said that Richard Rogers and all of his brothers were drug addicts or alcoholics from an early age and were unable to maintain employment. She described the longing of Tim Rogers and his brothers for their father to appear from Brooklyn to rescue them, and their palpable heartbreak when he did not. She testified that Timothy Rogers even traveled to Brooklyn at one point to try to convince his father to take him in, but was rejected yet again and went to stay with her. During that time, Ms. Rogers' noticed a real desire and willingness by Tim to bond with her husband as a father substitute. She also saw

an incredibly brave and compassionate side of her nephew. As the lower court characterized the testimony, "Applicant tried valiantly to save a little girl who was caught in a burning house in her neighborhood. Ms. Rogers testified that it took several grown men to stop Applicant from entering the blazing structure to save the child. She said Applicant was inconsolable after the child had died in the fire." The PCR court found her testimony credible and favorable to Respondent. App. 4963-64.

e. Timeka R

Timeka R is Mr. Rogers daughter. She was eight years old at the time of the resentencing. She testified that she would have told the jury how much she loved her father and asked them to spare his life. The Court found her testimony credible and quite moving. App. 4964

f. Jeffrey Yungman

Jeffrey Yungman is a forensic social worker. He reviewed a variety of background records and conducted numerous interviews with people that knew Mr. Rogers. He was able to explain the effects on Mr. Rogers' of his troubled family history and background. First, Mr. Yungman "found the presence of a history of inter-family violence significant because it is a particularly traumatic stressor for a child and directly impacts how a child will react and behave even into adulthood." He noted that sometimes the abuse happened for little or no reason – at one point, the boys were beaten with an electrical cord for eating a Twinkie cake. Mr. Yungman explained how Mr. Rogers' difficulty interacting with other children and self-control problems likely resulted from the abuse.

Second, Mr. Yungman explained that the widespread, severe substance abuse in his

history normalized substance abuse for the children. As result, when care-givers began supplying Mr. Rogers with alcohol and marijuana when he was just ten years old, he and his brothers were much more susceptible to becoming addicts. Third, Mr. Yungman pointed to the inability of Ms. Nichols to be an adequate parent, through no fault of her own. She was a highly traumatized, abused child when she began to have children herself. She was so depressed that, at the age of sixteen, she attempted suicide.

Finally, Mr. Yungman testified as to the trauma that resulted from Alethia's remarriage and move to South Carolina. The boys of the family strongly resented Mr. Nichols' presence, because not only did he continue the cycle of physical abuse, but he was a financial burden on the family. The move to South Carolina that followed his arrival in their lives resulted in their being plunged into debilitating poverty. These factors, combined with the constant moves, made it impossible for Mr. Rogers to have the stability that he needed for normal development.

D. The Lower Court's Analysis

1. Deficient performance

The Supreme Court requires that defense counsel undertake reasonable investigation or make a reasonable decision that investigation is unnecessary. *Strickland*, 466 U.S. at 691. The lower court found that defense counsel conducted little to no investigation regarding either the circumstance of the offense or his prison adaptability. The court found that counsel

*interviewed no witnesses from the crime scene

*interviewed no witnesses at Spell's market

*did not hire an investigator to seek out any of these witnesses

*did not review physical evidence made available to them

*did not review a videotape of the crime scene made available to them.

*did not retain an ophthalmologist, despite an indication in the medical report that counsel obtained that Rogers needed and wore corrective lenses

*did not obtain Rogers school records which would have indicated visual impairment

Not surprisingly, regarding the investigation of the circumstances of the offense, the court found, "counsel conducted no real investigation."[9] The lower court found that the purported strategies justifying counsel's failures were without support in the record, or otherwise not worthy of belief. App. 4909-10, 4971-72. *et seq.*

With regard to the evidence of his character and background, the court found that counsel

*met with Rogers' family once, in a group setting, five days before the 1994 trial

The lower court concluded once again that counsel "performed virtually no investigation," to unearth mitigating background information, and unreasonably ignored important red flags pointing to the mitigating evidence ultimately presented at the PCR hearing. App. 4970, (citing *Wiggins,* 539 U.S. at 524-25; *accord Nance v. Ozmint,* 367 S.C. 547, 626 S.E.2d 878 (2006) (holding failure to conduct adequate investigation rendered counsel's performance ineffective and required reversal of convictions and death sentence); *Cobbs v. State*, 305 S.C. 299, 408 S.E.2d 223 (1991) (holding failure to conduct adequate investigation required new trial)). The lower court found that no reasonable strategy, supported by reasonable investigation, justified

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[9]The State has not asked this Court to review the lower court's determination of deficient performance with regard to circumstances of the offense. *See, e.g.* pet. at 33 (it is "unnecessary to address the deficiency prong" with regard to ophthalmologist; pet. at 47 ("it is unnecessary to reach the first prong" with regard to James Robinson; pet. at 53 ("it is unnecessary to address the first prong" regarding Anthony Brown).

counsel's failure to discover and present this readily available mitigating evidence. App. 4971-72.

The court's conclusion is supported amply in the record. Mr. Leiendecker testified that when he and Runyon proceeded to trial, they were "not ready," "having not prepared any sincere or serious mitigation case." App. 2879. In fact, Mr. Leiendecker has actually apologized to Mr. Rogers' mother, because he believes he and Runyon were "remiss" in their preparation of the mitigation case. App. 2889.

2. *Prejudice*

The lower court found each and every witness that testified at the PCR hearing testified credibly and would have been available to be interviewed by counsel and to testify on Mr. Rogers' behalf had they been asked. The court then concluded that the omission of the readily available, copious mitigating evidence supporting Mr. Rogers' version of events, individually and cumulatively, "'might well have influenced the jury's appraisal' of [Mr. Rogers'] culpability," and that "the likelihood of a different result had the evidence gone in is 'sufficient to undermine confidence in the outcome,' reached at sentencing." *Wiggins*, 539 U.S. at 534 (quoting *Strickland*, 466 U.S. at 694). App. 4972-73. The court further concluded that counsel's failures left the jury with little more than "an image of Applicant as just a ne'er do well, with little regard for his mother, society, or the law." App. 4972. The undiscovered evidence would have provided "context for Applicant's life" and "humanized him." App. 4972. Finally, the lower court noted, just as the Supreme Court concluded in *Rompilla,*, that the evidence adduced at the PCR hearing, that counsel failed to investigate or present "adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." *Rompilla v.*

Beard, 545 U.S. 374, 393 (2005).

The lower court's decision echoes those of the United States Supreme Court that have found evidence regarding poverty, abuse, and intellectual limitations are "the kind of troubled history [that is] relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 513. *Accord Penry v. Lynaugh*, 492 U.S. 302 (1989) ("evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background... may be less culpable..[.]"). Just as important, the lower court leaned heavily on this Court's opinion in *Council v. State*, 670 S.E.2d 356, 367-368 (S.C. 2008), as follows and noting:

> This is exactly the type of testimony and evidence about a defendant's background and social history which the Court in *Council* found to be powerfully mitigating evidence which trial counsel should have investigated and presented:
>
> > We believe it was unreasonable for trial counsel not to further investigate Respondent's background and present even the minimal mitigating evidence that was obtained...
> >
> > Even the limited information obtained should have put counsel on notice that Respondent's background, with additional investigation, could potentially yield powerful mitigating evidence....
> >
> > [N]ot only did counsel delay in investigating Respondent's background, he failed to conduct an adequate investigation...
> >
> > [E]ven though the funding was available, trial counsel chose not to hire a social history investigator...
> >
> > [E]ven counsel's brief interviews with several of Respondent's family members and the DJJ records should have alerted him to the fact that the family was dysfunctional, Respondent had been raised in a violent home environment, and experienced learning disabilities. All of these factors constituted mitigating evidence and warranted further investigation.

> Even if trial counsel's investigation could be deemed sufficient or adequate, we believe trial counsel also failed to present any significant mitigating evidence. Trial counsel's mitigation presentation consisted solely of Respondent's mother's extremely limited testimony.

Council v. State, 670 S.E.2d at 363-64 (internal citations omitted).

App. at 4969-70.

E. The State's Objections to the Lower Courts Ruling Do Not Demonstrate a Lack of Probative Evidence in Support of the Court's Conclusion or an Error of Law

1. Deficient Performance

a. The Lower Court Did Not Err In Finding that Counsel Unreasonably Failed to Discover and Present Evidence of Circumstances of the Offense

Although the State does not invite this Court's review of counsel's performance with regard to most of the evidence in this category, it does attempt to defend counsel's failure to discover and offer evidence from the videotape of the crime scene which depicts James Carver making statements affecting his credibility and which depicts "one if not two" empty cases of beer and empty beer cans in the bed of [Mr.] B's truck. The State attempt to circumvent the lower court's finding of deficient performance by trying to turn the claim into one about failure to cross-examine rather than one about failing to discover and present evidence in the form of a video and photos that have an impeaching *effect*. The State then contends that cross-examination is a matter of attorney discretion.[10]

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[10]The cases cited by the State do not help its cause. Rogers' case involves failure to discover and present impeachment evidence not the asking of a regrettable question that elicited a harmful answer as in *Hunt v. Nuth*, 57 F.3d 1327, 1333 (4th Cir. 1995) or the extent or quality of cross-examination as in *Yarrington v. Davies*, 779 F.Supp. 1304, 1308 (D.Kan. 1991). The State also cites *Dyer v. Crisp*, 613 F.2d 275 (10th Cir. 1980). This case involves the developing standard for ineffectiveness claims prior to *Strickland*. Rogers is at a loss as to the State's reason for citing this case.

There are two problems with the State's argument. First, a witness does not have to be confronted with evidence on cross-examination in order to be impeached. *See, e.g.*, 1 MCCORMICK ON EVIDENCE § 46 (Kenneth S. Broun ed., 6th ed. 2006) (discussing impeachment by specific contradiction); *People v. Williams*, 769 N.E.2d 518 (Ill. App. Ct. 2002) (counsel ineffective for failing to call police officers to testify to police reports that contradicted victim's testimony).[11] The lower court found that this evidence would have been impeaching, not simply that counsel should have cross-examined on it.

Second, while the State claims that failure to pursue certain avenues of cross-examination was supported by strategy, the State does not indicate what counsel's purported strategy was, nor does it attempt to speculate as to what such a strategy might have been. Any such strategy would be nonsensical in any event as the evidence counsel simply chose never to look at was utterly consistent with their apparent strategy to impeach Carver and [Mr.] B. Regardless, "strategic choices made after less than complete investigation are reasonable precisely to the extent that

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[11]For the same reason, this Court should also reject the State's argument that in order to prove prejudice resulting from failing to offer visual evidence that contradicts a witness' testimony, the applicant must offer the testimony of the witnesses whose testimony the court found would have been impeached to see "what their responses would be." Pet. at 41. Obviously, the entire exercise of determining prejudice is to some extent an exercise in speculation - no judge can determine with certainty what the outcome of the trial would have been with the newly discovered evidence. But the point of the PCR hearing is not to stage a mini-retrial. In support of its contention, the State cites *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807, 809 (1999). *Bannister* stands simply for the proposition that if an applicant wants to demonstrate that counsel was ineffective for failing to present a particular piece of evidence, he cannot prove the omission was prejudicial without actually offering the evidence. Mr. Rogers has offered the overlooked evidence here. Similarly *Moss v. Hofbauer*, 286 F.3d 851, 864-865 (6th Cir. 2002), cited at Pet. at 41, involves counsel's alleged failure to pursue a particular line of questioning, not a failure to produce tangible evidence that contradicted the witness' stories. *Moss*, itself, actually notes, in Rogers' favor, that "we disagree with the dissent's implication that the only way to discredit a witness is through cross-examination." *Id.* at 865.

reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. The lower court found it would not credit any strategy counsel offered, because before trial counsel could have made an informed or strategic decision whether to utilize this evidence, they would have had to bother actually to view this evidence that they knew the Solicitor possessed." App. 4903. *See Rompilla*, 545 U.S. at 389 (Court could not "think of any situation in which defense counsel should not make some effort to learn the information in the possession of the prosecution and law enforcement authorities"). The lower court was absolutely correct that counsel's failure to present evidence made available to it by the State and which it never viewed is deficient performance. This Court should not disturb the lower court's judgment on this ground.

b. Lower Court Did Not Err in Finding that Counsel's Purported Strategy for failing to Present Evidence of Mr. Rogers' Character and Background was Unreasonable

The State believes that trial counsel's failure to present mitigating evidence regarding Mr. Rogers' background should be excused, because counsel stated that he:

1) did not want to "demonize" Mrs. Nichols because he had tried such a strategy in another case and it did not work;[12]

2) he believed a better strategy would be to have Mrs. Nichols plead for her son's life, which would be effective because she was a "big church lady."

The State claims that the purported strategy was reasonable because it was based on reasonable investigation: Mr. Runyon knew of the available mitigating evidence and abandoned

[12]Interestingly, nowhere in Mr. Leiendecker's testimony does he recall Mr. Runyon's having articulated this strategy. Instead, according to Mr. Leiendecker, they chose not to investigate mitigation evidence through a mitigation specialist or a social worker because they did not think that Mr. Rogers would be sentenced to death. App. 2841-2, 2845.

it in favor of the above strategies. The State's position is simply not borne out by the record.

First, the discovery and presentation of the evidence presented by PCR counsel would not have been precluded by counsel's strategy in that it *does not* demonize Ms. Nichols. In fact, the narrative of her devastating past makes her more sympathetic. There is nothing "demonizing" about being the victim of childhood sexual abuse and maternal abandonment. There is nothing "demonizing" about being in poverty and struggling to feed one's children. It is true that Ms. Nichols physically abused her children, but the social worker ably placed that in the context of Ms. Nichols' traumatic background and her following the only example she knew. There is nothing demonizing about being poor or having trouble paying bills, or about the fact that some of her children were not law abiding. Thus, the decision not to present this information or follow the leads that this information generated was not reasonable. *See Wiggins*, 539 U.S. at 533 (a decision not to investigate... 'must be directly assessed for reasonableness in all circumstances.")

Moreover, much of the evidence presented by PCR counsel has nothing to do with Mr. Rogers' mother - it explores the history of addiction and criminality on his father's side of the family, the trauma of Rogers' abandonment by his father, and his own daughter's love for him. Rogers' early introduction to alcohol and marijuana had nothing to do with his mother, either. Perhaps the most glaring omission by counsel is their failure to discover and present evidence that Mr. Rogers attempted at, his own peril, to rescue a young girl from a burning building, and his devastation when he was not successful. In a case in which the defendant is adamant that he did not intend to hurt a child and has demonstrated extreme remorse about doing so, such evidence is highly mitigating and its omission does nothing to protect the reputation of his mother. *See Adams v. Bertrand*, 453 F.3d 428 (7th Cir. 2006) (counsel ineffective where they

"committed to a predetermined strategy without a reasonable investigation that could have produced a pivotal witness").

Third, it is simply not reasonable to assume that because a mitigation strategy failed in one case that it should not be pursued in another. Even if it were, however, more important, of course, than what strategy did or did not work in another case, is what happened in *Mr. Rogers'* first sentencing proceeding -- the strategy that Mr. Runyon decided on had already failed once *in this case*, which should presumably be the best indicator that another strategy should be considered. The lower court did not err in finding that counsel's alleged justification for curtailing investigation and presentation of mitigation on this basis was unreasonable.

Finally, simply deciding on a mitigation strategy based on protecting the reputation of the defendant's mother shirks counsel's constitutionally mandated obligations. "The Supreme Court has emphasized that the reliability of a capital sentencing proceeding hinges upon the jury making an individualized determination based, in part, upon "the particularized characteristics of the individual defendant." *Battenfield v. Gibson*, 236 F.3d 1215 (10th Cir. 2001) (quoting *Gregg v. Georgia*, 428 U.S. 153, 206 (1976)). A defense attorney "has *a duty* to conduct a reasonable investigation, including an investigation of the *defendant's* background, for possible mitigating evidence.' " *Brecheen v. Reynolds*, 41 F.3d 1343, 1366 (10th Cir. 1994) (emphasis added). The fact that Runyon knew a few things about defendant's background from a couple of conference calls with his family, simply does not excuse him from conducting the constitutionally required investigation.

Moreover, Runyon's "strategy" was based on a misunderstanding of the law. The state argues that the lower court was required to defer to counsel's mitigation strategy of simply

"having a sympathetic mother plead for her son's life," but fails to note that the Solicitor, in his closing argument, correctly told the jury that "although we all feel sorry for Ms. Nichols, that cannot enter into your deliberations" app. 2447, and that they may feel sorry for her but "you cannot base your verdict on mere sympathy." *Id.*; *see also* trial court's instruction to the jury. App. 2521. Thus, counsel's decision to abandon any meaningful mitigation, where the available "evidence adds up to a case for mitigation bearing no relation" to the "few naked pleas for mercy" trial counsel made, was not reasonable. *See Rompilla*, 545 U.S. at 393. *See also Battenfield,* 236 F.3d at 1229 (strategy to plead for mercy unreasonable where counsel failed to investigate other strategies and thus "was ignorant of various other mitigation strategies [trial counsel] could have employed").

There is ample probative evidence in the record to support the lower court's conclusion that counsel's performance in the investigation and presentation of mitigating evidence was deficient and unsupported by an objectively reasonable strategy.

2. *Prejudice*

a. The State is Incorrect that the Lower Court Adjudicated the Claim Under an Improper Standard.

The Petitioner contends that the lower court applied the wrong standard in determining the prejudice emanating from counsel's omission of the testimony of victim and Dax Patterson, when, in the discussion of each particular witness, the lower court stated that it found prejudice because the witness' testimony "probably would have made a difference to at least one juror" in determining sentence. App. 4942, 4943. "All it would have taken is for 'one juror [to] have struck a different balance' between the competing stories." *See Ramonez v. Berghuis,* 490 F.3d

482, 491 (6th Cir. 2006) (quoting *Wiggins v. Smith*, 529 U.S. at 537). The State repeats this argument with regard to Stephanie Simmons, George Scharf, James Robinson, Earl Asbell, and Anthony Brown. Pet. at 43-46, 48-51.

The State concedes that the lower court's shorthand for the prejudice standard is acceptable provided that *Strickland*'s full "reasonable probability" standard is cited elsewhere. Pet. at 25 (citing *Holland v. Jackson*, 542 U.S. 649 (2004) ("We have held that such use of the unadorned word "probably" is permissible shorthand when the complete *Strickland* standard is elsewhere recited."). Although the State represents that the lower court did not cite the correct standard, Pet. at 25, of course the lower court did do so. *See* App. 4917-19. (citing *Strickland* and articulating standard). Moreover, the Supreme Court has itself articulated the standard a similar way. "All it would have taken is for 'one juror [to] have struck a different balance' between the competing stories." *See Ramonez v. Berghuis,* 490 F.3d 482, 491 (6th Cir. 2006) (quoting *Wiggins v. Smith*, 529 U.S. at 537).

b. The Mitigating Evidence Offered at the PCR hearing involved the "Circumstances of the Offense" not Residual Doubt

The State contends that the lower court erred in concluding that counsel's failure to offer copious evidence supporting the defendant's version of the circumstances of the offense was prejudicial, because it constituted the evidence was inadmissible evidence of "residual doubt," Pet. at 19. The State is wrong. First, it is hornbook Eighth Amendment law that a defendant in a capital sentencing proceeding may not be precluded from offering evidence bearing on his "character or record and *any of the circumstances of the offense* that the defendant proffers as a basis for a sentence less than death." *Eddings,* 436 U.S. at 110 (citing *Lockett,* 438 U.S. 605. The

Supreme Court is clear that

> [f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.

Woodson v. North Carolina, 428 U.S. 280 (1976) (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U. S. 51, 55 (1937).

The case law restricting the defendant's right to introduce evidence of "residual doubt" involves alibi evidence which would perforce require the jury to revisit its finding of guilt. *See, Oregon v. Guzek*, 546 U.S. 517 (2006). As the Supreme Court noted in *Guzek*, the evidence of "circumstances of the offense" as discussed in *Lockett*, *Eddings* and their progeny "was traditional sentence-related evidence, evidence that tended to show *how, not whether*, the defendant committed the crime. Nor was the evidence directly inconsistent with jury's finding of guilt." *Id.* at 524 (emphasis added). *See also State v. Charping*, 333, S.C. 124, 132, fn. 5, 508 S.E.2d 851, 856 (1998) ("a codefendant's participation might be relevant to the circumstances of the offense and, therefore[13], a mitigating circumstance to be considered at sentencing")" *State v. Cooper*, 291 S.C. 332, 338, 353 S.E.2d 441,444 (1980) (error not to permit photos showing condition of house which was the source of the dispute leading to the crime as it provided evidence of circumstances of the offense). The evidence Mr. Rogers advances is precisely such "circumstances" evidence, thus there is nothing in the Supreme Court's case law that would

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[13]Notably, this is the argument that the defense actually made at sentencing – albeit poorly – and part of the reason they offered the testimony of Mr. Rogers, all without objection by the State.

technically or logically preclude it.[14] Mr. Rogers is just as legally culpable whether he saw Stephanie B and intended to shoot her as he is if she was killed as a result of his "general malignant recklessness of the lives and safety of others." *State v. Mouzon*, 231 S.C. 655, 662, 99 S.E.2d 672, 675-76 (1957) (offering this definition of malice). But his *moral* culpability is greatly diminished if his guilt was the result of an admittedly reckless shot in the air that killed her. It is this moral culpability with which the sentencing phase is concerned.

The same logic squarely defeats the State's argument that because the lower court found the omitted evidence would not have changed the outcome of the guilt phase, it could not have changed the outcome of the sentencing phase. Pet. at 19. The evidence does not absolve Mr. Rogers of murder. It mitigates how that murder happened. Thus the lower court made absolutely no error in concluding that counsel's failure to discover and present this admissible evidence was prejudicial at the penalty phase and not the guilt phase.[15]

c. There is a reasonable probability a jury would have returned a life sentence in this case if the available mitigation had been offered.

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[14]The State also cites *State v. Southerland*, 316 S.C.377, 386, 447 S.E.2d 862, 868 (1994) and *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988) in support of its argument. These cases provide no more help for the State as the *Southerland* court did not reach the issue because it found that the defendant did put on the evidence in question, but also reiterated that "sentencing traditionally concerns how, not whether, a defendant committed the crime." Mr. Rogers' evidence obviously involves how, not whether, he shot Stephanie B. The *Franklin* Court also did not reach the issue because it found the sentencing scheme at issue did not preclude the introduction of the contested evidence.

[15]The same reasoning defeats the State's argument that the missed testimony of Simmons and Scharf were found not to support an instruction of voluntary manslaughter, and thus the absence of the same testimony cannot be prejudicial at the penalty phase. Moreover, the State actually misconstrues this Court's opinion in *Rogers I* which held that evidence of racial slurs and [Mr.] B's leaning into the truck did not support the manslaughter instruction. This has nothing to do with whether the evidence weighs in favor of a life verdict in sentencing.

The State argues that the lower court erred in finding any of trial counsel's deficiencies to be prejudicial because there was "overwhelming evidence of guilt and the statutory aggravator." *See* Pet. 31, 24, 45, 47, 51, 53, 60. This argument is a bit mystifying, because in order for there to be a sentencing proceeding at all, the jury must perforce have found guilt beyond a reasonable doubt, so the presence of the conviction itself should hardly stand for the proposition that no mitigating evidence could have persuaded even a single juror to vote for life.[16] *Williams*, 529 U.S. at 398 ("Mitigating evidence . . . may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case). To be sure, this was a tragic case, in which a young girl was killed, and the aggravating factor reflecting her age made Mr. Rogers death eligible, but the fact pattern, and especially not the fact pattern in Mr. Roger's case, simply does not make the case impervious to mitigation.[17] *See, generally*, *Williams*, 529 U.S. at 398 (prejudice found despite formidable evidence of Williams' future dangerousness); s*ee also, Wiggins*, 539 U.S. at 535 (noting relative strength of aggravating evidence and of mitigating evidence supporting relief in that case). "Although this mitigating evidence may not have risen to the level of 'abuse, neglect, and predator and prey situations found in other cases,' as the State contends, it nevertheless may have swayed the jury as in Wiggins." *See Council v. State*, 670 S.E.2d at 366.

In this case, the State's case in aggravation was its version of the facts, Mr. Rogers'

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[16]It is also awkward at best that the State characterizes the evidence for its version of events as "overwhelming," while simultaneously asserting that defense counsel "impeached Mr. Riley, Mr. B, and Carver," Pet. at 40, the only eyewitnesses that support the State's theory.

[17]Cases much more highly aggravated than Mr. Rogers' have resulted in life sentences, *see e.g.*, *State of South Carolina v. Susan Smith* and *United States v. Zacarious Moussaoui.*

criminal record, one disciplinary infraction in jail, and victim impact. With the exception of the victim impact, which is of course unrebuttable, but present in every case, the evidence put forth by Rogers at the PCR hearing dramatically changes the balance of the case. It depicts a much more mitigating version of events (or circumstances of the offense), explains that the most aggravating part of Mr. Rogers' criminal record was generated by his own lawyer, puts an entirely different spin on his jail conduct, and tells a compelling story of his troubled background. There is almost no aspect of the State's case in aggravation unaddressed by the sentencing presentation that the lower court found that counsel could have and should have presented. As the United States Supreme Court recently stated in *Porter v. McCollum*, 130 S.Ct. 447 (2009):

> The aggravation evidence "[o]n the other side of the ledger" was not substantial. *Id.* at 454. Had the ju
> the mitigating side of the scale," and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the advisory jury–and the sentencing judge–"would have struck a different balance," *Wiggins*, 539 U.S. at 537, and it is unreasonable to conclude otherwise.

Porter, 130 S. Ct. at 454.

d. Credibility Determinations

In a number of contexts, the State contends that this Court should review the lower court's decision because it does not agree with the court's credibility determinations. Of course, as a threshold matter, it is axiomatic that credibility determinations are in the province of the trial court and demand great deference from this Court. *Solley v. Navy Federal Credit Union, Inc.* --- S.E.2d ----, 2012 WL 288501 (S.C.App. 2012). ("Questions regarding credibility and weight of evidence are exclusively for the trial court").

Specifically, the State complains that the lower court's finding that victim's testimony

was credible is not supported by the record, and therefore the lower court should not have found the omission of her testimony to be prejudicial. The State contends that victim's testimony "substantially differed" from her testimony in the 1994 and 1996 proceedings. To prove this point, however, the State proceeds to describe how her testimony differed from *Mr. B's* testimony. Pet. at 21. The State then recites different parts of her resentencing and PCR testimony but does not spell out what it believes was inconsistent. Pet. at 21-23 As stated previously, victim's PCR testimony was primarily supplemental to and not different from her previous testimony. This Court should not disturb the lower court's credibility determination on this ground.

The State lodges the same objection with regard to Mr. Patterson's testimony, pointing to the utterly irrelevant fact that Mr. Patterson recalls that he and victim and Rogers had been working on a truck rather than a car prior to going to Spell's. Pet at 24. The State also points to the fact that Patterson did not recall seeing Anthony Riley at the scene, and that he recalled that he, not Mr. Rogers, had been talking on the phone when the incident started.[18] As the lower court expressly noted, however, it is not uncommon for witnesses to the same, fast-paced, highly charged event not to remember each detail identically. App. 4943. If they did, the State would surely charge that the witnesses had conspired to match their testimony. In addition to considering their demeanor, the lower court actually found that minor differences in the witness' testimony actually augmented their credibility. *Id.*

In so finding, the Court notes that victim's and Mr. Patterson's testimony was not

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[18]The State also claims that Mr. Patterson's testimony was inconsistent with what he told his own attorney. Pet at 24. The State's description of Patterson's attorney's recollection, see Pet. at 24 n. 38 does not contradict Mr. Patterson's PCR testimony.

> in lock-step with either each other or with Applicant's statement. I attribute the minor differences to each witness' being in a different proximity to and different level of interaction with the events, and thus each witness had a different perspective. In fact, the Court would be concerned if these two witnesses testified in cookie-cutter fashion to each other, or with Applicant's testimony.

App. 4943. The lower court's findings should not be disturbed.

Again, the State believes the PCR court erred in finding that the omitted testimony of SCDC officer Anthony Brown would have contributed to a different outcome because the State did not find his testimony to be credible. The problem for the State is that the *lower court judge did*, and concluded that despite whatever "bias" the State may believe it could have shown at trial on cross-examination, the lower court found the testimony would have been reasonably likely to sway the jury to impose a life sentence.

e. Hearsay objections

The State contends that the lower court erred in concluding that the trial counsel were ineffective in viewing the videotape that contained statements by James Carver that were contrary to his testimony and to Mr. B's testimony.[19] Pet. 35. The state's objection to Carver's statements on the videotape fails because Mr. Carver was available at trial and did testify and he could have been roundly impeached with the prior inconsistent statement. The lower court did

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[19]In a different vein, the State contends omission of Stephanie Simmons' testimony was prejudicial, because Ms. Simmons' testimony was hearsay. The State plainly overlooks the clear fact that rules against hearsay do not "mechanistically" apply to sentencing proceedings. *See, e.g., State v. Gulledge* 326 S.C. 220, 487 S.E.2d 590 (1997); *see also, Green v. Georgia*, 455 U.S. 95 (1979) ("the hearsay rule may not be applied mechanistically to defeat the ends of justice."). The cases cited by the State in support of its erroneous claim that Ms. Simmons' testimony constituted impermissible hearsay both involve guilt-phase testimony. *See* Pet. at 43 (citing *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000); *State v. South*, 285 S.E. 529, 331 S.E.2d 775 (1985). Even if the state were correct that her testimony were inadmissable it would not effect the outcome here as she was one of many witnesses.

not err.

f. Cumulative testimony

The State attempts to defeat the lower court's finding of prejudice based on an argument that some of the undiscovered and un-presented testimony would have been cumulative.

First, the State claims the Simmons testimony would not have made a difference because it was cumulative to Rogers' own testimony. On the contrary, the lower court found that the testimony *corroborated* Rogers' testimony. App. 4944. Without such corroboration, the State would surely be claiming Mr. Rogers' testimony was self-serving and untruthful. *See, e.g., Jones v. Leagan*, 384 S.C. 1, 681 S.E.2d 6 (S.C. App. 2009) ("testimony regarding these acts was contradictory and self-serving and was neither supported by documentary evidence nor corroborated by any witnesses").

Second, the State contends that Mr. Scharf's assessment of the scene as an accident was merely cumulative of Rogers' testimony. On the contrary, Scharf's assessment, by a neutral observer, experienced in responding to crime scenes was highly probative, particularly when the State alleged that Mr. Rogers was a child-murdering liar. *See State v. Doctor*, 306 S.C. 527, 530, 413 S.E.2d 36, 38 (1992) ("When a witness' testimony is disputed or his credibility called into question, other testimony verifying the facts or opinions given by the witness is not merely cumulative").

Third, the State claims that the testimony of James Robinson that Mr. Rogers was a respectful young man that never created problems at Spell's Market was cumulative. It was not. This was a character opinion from a man who was not related to or close with Mr. Rogers' family and who attested to the fact that Mr. Rogers' behavior at the store that night was anomalous.

App. 4946. No other witnesses offered such testimony.

Next, the State contends that photographic and physical evidence produced by Lt. Asbell was cumulative. The State says that the photo depicting the gun in the basket of clothes found in the back of [Mr.] B's truck is cumulative because Carver already testified there was a gun in the basket, and the bloody beer can was cumulative to [Mr.] B's testimony that he threw the bloodied bag into the trash can after his daughter was shot. Mr. Rogers is unaware of any rule or case that states that photographic and physical evidence that corroborates testimony is cumulative. In fact, such evidence is highly corroborating. *See, e.g., Stickels v. General Rental Co., Inc.*,750 F.Supp. 729, 732 (E.D.Va.1990) ("this Court is not blind to the unique nature of photographs. They provide detailed and unusually credible evidence, beyond that possible by even the most reliable testimony").

Finally, in a logically challenging argument, the State claims that evidence from the crime scene videotape regarding the presence of at least one empty case of beer in the bed of [Mr.] B's truck would not have been useful to impeach Carver's statements regarding his lack of knowledge of [Mr.] B's drinking that day because it was inconsistent with [Mr.] B's testimony on that point. Obviously that argument assumes that [Mr.] B's testimony on the point was truthful, but the State says in the next breath that "[Mr.] B[]'s testimony was likewise impeached." Pet. at 40. Leaving aside that Mr. Runyon himself admitted that "the presence of alcohol on the part of the people who had custody" of the victim "was important to consider," app. 3598, the State's contortions are proof in and of themselves why a picture is worth a thousand words. *See Old Chief v. United States*, 519 U.S. 172, 187 (1997) ("persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that

the law places on them").

This Court should not disturb the judgment of the lower court based on the State's mistaken impression that the evidence not presented by trial counsel was cumulative.

g. The omitted evidence did not represent a "double-edged sword."

The State contends that the lower court erred in finding that counsel's omission of Ms. Simmons testimony was prejudicial, because the State interprets some of Ms. Simmons' testimony to be counter to the remainder of the mitigation picture painted at the hearing. Pet. at 2998. (Simmons briefly said the family were nice, church-going people). This aspect of Ms. Simmons' testimony is easily explicable. Ms. Simmons testified that she did not really know about Mr. Rogers life prior to age sixteen. She testified that he was fiercely protective of his mother. None of these things are inconsistent with the history of abuse demonstrated at the PCR hearing. As Mr. Yungman pointed out, it is not uncommon at all that friends and neighbors will be unaware of dysfunction inside a family. App. 3222-24. It is even more common that a child will not tell on his abuser out of a complex loyalty common to abusive parent-child relationships.

The State also attempts to convince this Court that the lower court erred in finding that the omission of Ms. Simmons' testimony was not prejudicial because she made the statement that "the bad things that he did do, whether it be small or few, out-shined all the good things he always did." First, this statement is not aggravating. It is clear from the context of Ms. Simmons' testimony that she was saying that Rogers' parents and school would always pay the most attention to the bad things he did, and therefore Rogers was never "given a chance to show those [good] qualities consistently." App. 2989, 3000. Second, even if this statement were slightly aggravating, the quantum of mitigating evidence that counsel should have offers far

outweighs the damage of this minuscule statement. *See Williams*, 529 U.S. at 362.

h. The Court Was Correct that Evidence that Mr. Rogers' is visually impaired was critical in a case where he denied seeing the victim

The State apparently does not believe that, in a case in which the defendant is adamant that he did not see the victim, the jury would have benefitted from evidence that the defendant suffers from visual impairment. In arriving at this conclusion, the State takes the evidence in the light most favorable to the State: squinting improves clarity in a person with Mr. Rogers' condition, app. 3304, and Mr. Rogers *may* have been squinting. Pet at. 33. Mr. Rogers' level of impairment has varied over time from 20/70 to 20/200, app. 3299-3300, and it *might* have been at its best on the night of the crime when he was intoxicated. Pet. At 33. But neither the PCR court nor the jury was required to accept the State's *interpretation* of the evidence. The jury could have found that Mr. Rogers' poor eye sight, exacerbated by poor lighting,[20] alcohol use, and marijuana use, lent credence to Rogers' explanation of the events of that evening.

i. The lower court did not make an error of law by finding cumulative prejudice

The state objects to the lower court's consideration of the cumulative prejudice arising from the totality of counsel's omissions. This is consistent with the Supreme Court's decisions on capital sentencing ineffectiveness. *See Williams,* 529 U.S. at 399 (PCR court was correct that "the entire post-conviction record, viewed as a whole and cumulative of mitigation evidence

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[20]The uncontested record evidence is that the *sun set at 5:15 p.m.* local time in Summerville the night of the shooting, which occurred at approximately 6:15 p.m. at the earliest, a full hour after the sun had set. PCR Ex. P-31. The lower court noted that some artificial lighting was present at the time of the shooting, but darkness was prevalent. PCR Exs. C-6 and P-56. Mr. B testified that they exterior lighting at the store was "not that good" app. at 759, and "kind of poor." App at 2107.

presented originally, raised "a reasonable probability that the result of the sentencing proceeding would have been different" if competent counsel had presented and explained the significance of all the available evidence"); *Wiggins*, ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence"); *see also Council v. State*, 670 S.E.2d at 366. As the thrust of all of these cases is, in fact, the fairness and reliability of a proceeding as a whole, it is illogical to arbitrarily parse individual pieces of evidence which would collectively have changed the entire picture of the trial. This Court need not concern itself with the State's concern that cumulative prejudice analysis will result in competent performance being found prejudicial. Pet. at 62-63. The lower court found that counsel was deficient in failing to investigate and discover each and every piece of evidence and testimony that PCR counsel offered concerning the guilt phase and the sentencing retrial, but only found prejudice as to sentencing.

II. The Record Supports the Lower Court's Conclusion that Counsel Provided Constitutionally Ineffective Assistance By Advising the State to Charge Mr. Rogers with Two Counts of Criminal Sexual Conduct as Part of a Plea Deal and then Failing to Withdraw those Pleas when the Deal Fell Through.

A. Facts Relevant to this Claim.

Prior to Mr. Rogers' trial, counsel Runyon decided to seek resolution of Mr. Rogers' case via plea. At the time, Mr. Rogers' murder charge did not carry a sentence of life without parole, which was the only sentence Mr. Runyon believed Solicitor Bailey would agree to. Mr. Rogers, however, did not have any prior criminal offenses on his record that would subject him to the sentencing enhancement allowing imposition of an LWOP sentence. So Mr. Runyon decided to generate some. Mr. Rogers had a longstanding relationship with his girlfriend, victim. Mr. Runyon figured that victim, who was sixteen at the time of the offense,

must have been underage at some point during her relationship with Mr. Rogers, and therefore, Mr. Rogers must have been guilty of Criminal Sexual Conduct with a minor. Mr. Runyon decided, without discussing the matter with Mr. Rogers first, or interviewing victim, to bring the matter to the attention of Solicitor Bailey. Prior to that time, as plainly stated by Solicitor Bailey at the PCR hearing, there had been no investigation whatsoever of Mr. Rogers with regard to these offenses. The State obliged and charged Mr. Rogers. Mr. Rogers entered guilty pleas to the CSC offenses on January 25 and January 27, 1994. These pleas were entered in Dorchester County despite the fact that none of the offending conduct had occurred there.

When he appeared to enter his plea to the murder charge, Mr. Rogers refused to state that he had intentionally shot "little Stephanie B." While he was willing to admit he fired the shot that killed her, he simply could not admit that he had meant to kill anyone, much less a child. As a result, the court was unable to accept the plea, and the deal fell through. Despite that fact, trial counsel took no steps to vacate the pleas to the CSC charges that he himself had concocted.

B. The Lower Court Correctly Determined that Counsel Was Ineffective for Failing to Move to Withdraw the Pleas.

The lower court found that trial counsel's conduct regarding the CSC pleas was constitutionally deficient on a number of levels. Op. At 16 (citing *Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988).(applying *Strickland* to the plea context)).[21] First, counsel failed to

[21]The State's attempt to convince this Court that the lower court may not consider the ABA Standards for the Appointment and Compensation of Counsel in Death Penalty Cases, Pet. at 10, is counter to this Court's and United States Supreme Court precedent. The Supreme Court said in *Bobby v. Van Hook*, 130 S.Ct. 13, 17 (2009) that counsel's failure to strictly follow the Guidelines is not per se ineffective, but never said that courts may not look to the guidelines to determine what reasonable performance includes. *See also Council v. State*, 380 S.C. 159, 171, 670 S.E.2d 356, 362 (2008).

discharge their obligation to withdraw the guilty pleas as soon as it became clear that Mr. Rogers would not receive the benefit of the plea bargain as intended: a sentence of LWOP. *See Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988).[22] Mr. Runyon stated he did not so move because he simply believed "we're sitting there stuck with the fact that we this -- these allegations as to this conduct with this young lady" and trying to "[represent] ... that it didn't happen ... would be bordering on ... ethical violations...." App. 3502.[23] The lower court found, however, that the two CSC2nds charges were quite clearly part and parcel of a larger plea agreement for the murder. App. 4872, 4873, 4874. The lower court's finding is supported by the fact that the existence of the larger plan was put on the record at the second CSC 2nd plea, *by the Solicitor.* App. 19-20, 3822-24. Thus all parties and the court were thus aware that these three pleas were bound together as one bargain and, thus, certainly could have been withdrawn when the larger plan fell through. The lower court also rejected Mr. Runyon's suggestion that he did not move to withdraw the pleas so that he could get an LWOP instruction in light of *Simmons* as an afterthought, formulated of convenience ten years after the fact. App. 4871. This is a credibility finding and is entitled to deference.

Second, the lower court found that trial counsel unreasonably failed to investigate the incidents by failing even to interview victim to determine where this conduct had taken place prior to advising Rogers to enter the pleas. Had they done so, they would have learned that no

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[22]The State attempts to avoid *Jordan* by saying that case involved a breach of the plea agreement by the prosecution. Pet. at 10. The point of *Jordan* is that a plea may be withdrawn if a party is not getting what he was entitled to under the plea.

[23]Notably, the lower court found that Mr. Runyon apparently took the failure of the plea very personally, placing all responsibility for it on his client, and was very angry with him. App. 4922.

conduct supporting Mr. Rogers' convictions for CSC2nd took place in Dorchester County. *Id.* Finally, the court found that counsel rendered ineffective assistance when they advised Mr. Rogers to enter guilty pleas in Dorchester county for offenses that took place elsewhere. *Id.*

The lower court further found that counsel's ineffective assistance with regard to the CSC plea prejudiced Mr. Rogers in myriad ways. First, as Solicitor Bailey candidly admitted, he relied heavily on these convictions in his closing argument to the jury, App. 3826, 4872, and indeed the court found that two convictions for CSC, which the Solicitor characterized as "sex with children" was almost indescribably prejudicial in a sentencing for the murder of a nine year old girl. App. 4874-76. Second, the court found that the CSC convictions were the proximate cause of Mr. Rogers' jury not being offered the statutory mitigating factor that the defendant was not previously convicted of any crimes of violence. App. 3827. The lower court found that the CSC convictions both augmented the State's case in aggravation and diminished the defense's case in mitigation that there was a reasonable probability that but for counsel's deficient performance, the result of the sentencing proceeding would have been different. App. 4875, 4981-82, 4983. The lower court further found that the existence of the CSC convictions themselves, which resulted entirely from counsel's ineffectiveness, also prejudiced Mr. Rogers in that they will remain on his record and require him to register as a sex offender for the remainder of his life and therefore should also be vacated. *Id.*

The State asks this court to review the lower court's conclusion on this claim because it disagrees with the court's credibility determination that counsel's strategy for obtaining the pleas excused his failures to investigate the factual and jurisdictional bases for them. Pet. at 10. Trial counsel testified that he advised Mr. Rogers to plead guilty to charges over which the court had

no jurisdiction as part of an overall strategy to achieve a sentence of LWOP. The State contends that "Runyon's explanation for not moving to withdraw the guilty please is credible." Pet. At 10. The State overlooks, however, that the lower court said that "this Court rejects trial counsel's purported strategy on this matter." App. 4981. This honorable Court does not sit to review credibility determinations which are entirely within the province the lower court. *State v. Weik*, 356 S.C. 76, 587 S.E.2d 683 (2002) (trial judge who was able to view the appellant's demeanor).

Second, in one of its more credulity-straining arguments, the State contends that Mr. Runyon had no obligation to investigate the factual and legal validity of the charges that *he brought to the attention of the State*. Pet. at 18. Instead, the State claims that it was Mr. Rogers' obligation to disclose to his lawyer that the sexual conduct that formulated the basis of the charges that Mr. Runyon directed the state to bring, did not occur in Dorchester county. Pet at 7, 17-18. Mr. Rogers is a lay person with a tenth grade education. It is not his obligation to bring to the attention of his attorney the legal or factual infirmities of the charges which *counsel himself initiated*, and on the correctness of which Mr. Rogers was entitled to rely. The State offers no earthly reason why, when counsel told Mr. Rogers he should plead guilty to these charges, that he should be obliged to inform Mr. Runyon that the charges were legally invalid.

Third, the State contends that the CSC pleas remain valid because pleas are based on contract principles and the State held up its part of the bargain. The State's argument defeats itself. The State received benefit from this "bargain." It achieved two convictions that were handed to it on a silver platter by Mr. Rogers' advocate and used these to tremendous aggravating

affect at sentencing.[24] If contract principles are to apply, Mr. Rogers' pleas must be vacated because to enforce them would unjustly enrich the state.[25] App. 4868.

Finally, the State contends that there were no grounds on which to vacate the CSC pleas because it was Rogers' "unilateral" action in balking at the stipulated facts that resulted in the breakdown of the plea agreement. There is no law that a defendant must somehow be punished for a failed plea. These happen all the time, and the result is simply that each party is returned to the position it held prior to the failed plea. Moreover, trial counsel's assertion that Mr. Rogers fully understood what he was going to be asked to admit – which was inconsistent with everything he had ever said – but inexplicably decided to balk at the time of the murder plea simply defies credulity. Every shred of evidence in the record supports the conclusion that Mr. Rogers was never willing to admit he intentionally killed a child. This was the statement he gave to the police who arrested in him in Alabama (App. 951, 957), this is what he told his friend following the event, app. 4944, this is what he told the press, app. 2360, and this is what he testified to at trial (App. 1164). In fact, this was the testimony of trial counsel Leiendecker himself:

> [Mr. Rogers] had a problem from the beginning with the idea of the intentionality of that act, that it was with malice aforethought as defined under the murder

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[24]If trial counsel believed that he was now stuck with the CSC pleas, he should have requested that the State withdraw the death penalty. There is no chance Mr. Rogers would not have been convicted at trial, and the State would have achieved the agreed-upon LWOP sentence as bargained for. He did not do so, and left Mr. Rogers holding a highly aggravating bag he had filled himself.

[25]"The elements to recover for unjust enrichment ...are: "(1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it..[.]" *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8–9, 532 S.E.2d 868, 872 (2000).

> statutes. *And he expressed those concerns from the beginning when I knew him until the final time that I spoke with him..[.]*

App. 2824. (emphasis added).

The decision whether to allow a defendant to withdraw a guilty plea is in the discretion of the trial court. *State v. Riddle*, 278 S.C. 148, 292 S.E.2d 795 (1982). In this case, the trial court was aware that the CSC pleas were part of the tripartite deal to achieve a sentence to LWOP, and acknowledged that this was part of Rogers' incentive to enter the pleas. There is a reasonable probability that had counsel performed reasonably, these pleas would have been vacated.

The lower court did not err in finding that counsel provided ineffective assistance of counsel for failing to move to withdraw Mr. Rogers' highly aggravating and prejudicial guilty pleas *which would not even have occurred but for Mr. Runyon's actions*, or for vacating those convictions. *See Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) (PCR court must craft a remedy to correct the unfairness which has occurred); *see also State v. Haselden*, 353 S.C. 190, 202, 577 S.E.2d 445 (2003) (holding evidence adduced in capital sentencing proceeding, the thrust of which was "only to inflame the jury and leave them with ... [a false] impression, required reversal of death sentence").

CONCLUSION.

For all the reasons stated above, this Court should deny petitioner's petition for *writ* of *certiorari.*

Respectfully Submitted,

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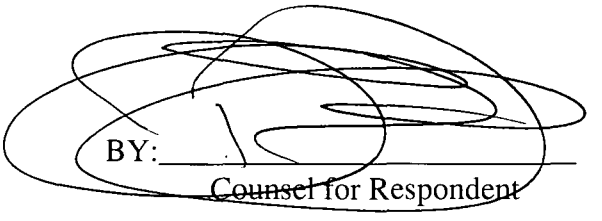


BY:_____
Counsel for Respondent

Unredacted version filed
March 5, 2012

Redacted version filed
May 30, 2012
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Case No. 2000-CP-18-575

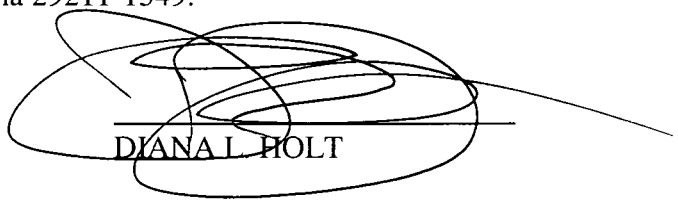
TIMOTHY DION ROGERS . . . . . .Respondent,

v.

STATE of SOUTH CAROLINA, ...Appellant.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Respondent's redacted return to the petition for *writ* of *certiorari* in the above-entitled case has been served upon Petitioner's counsel by first class mail, postage prepaid, addressed to counsel of record, Edgar Salter, III, Post Office Box 11549, Columbia, South Carolina 29211-1549.



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May 30, 2012

The Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211-1330

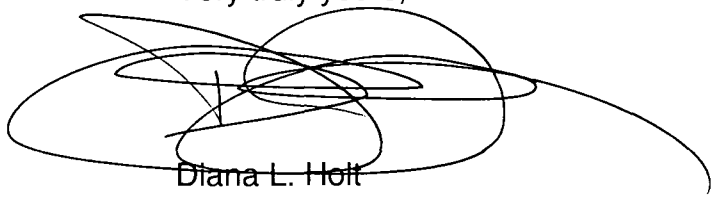
Re: *Timothy Dion Rogers (Respondent) v. State of South Carolina (Petitioner)*, 2000-CP-18-575, Respondent's Return to the Petition for Writ of certiorari, REDACTED

Dear Mr. Shearouse:

In compliance with the Court's order in this matter dated May 23, 2012, enclosed for filing are six copies and the original pleading referenced above, with certificate of service.

With highest personal regards, I remain

Very truly yours,



Diana L. Holt

cc: Mr. Ed Salter, Esq., to AGESalter@scag.gov (By U.S. Mail, also)
Mr. Robert Dudek, Esq., to rdudek@sccid.sc.gov (Electronically only)