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The State of South Carolina

In The Supreme Court S.C. SUPREME COURT

Appeal From Lexington County

Honorable William P. Keesley, Circuit Judge

Case No. 2004-CP-32-3932

Case No. 2016-CP-32-02815

HAYWARD L. ROGERS,

PETITIONER,

VS.

STATE OF SOUTH CAROLINA

Respondent.

Appellate Case No. 2019-000429

Petition for Writ of Certiorari

6-12-19

Hayward L. Rogers

Question Presented

Did The Lower Court err in Summarily dismissing The Petitioner's Current Application (Case No. 2016-CP-32-02815) For Post-Conviction Relief, Without a hearing on The merits of The allegations Contained Therein, Where The Record below indicates That The Petitioner never had a Full and Fair hearing on The merits of all his Collateral Claims Ruled in The PCR Court's Final order, but denying The Petitioner his Full bite at The Apple" By appellate Counsel Refusal To Raise all The issues in The Final order by way of a petition For Writ of Certiorari With The Supreme Court.

3.

STATEMENT OF FACTS

The Applicant is incarcerated with The South Carolina Department of Corrections pursuant To The Lexington County Clerk of Court's orders of Commitment. The Lexington County Grand Jury indicted The applicant at The February, 1999 Term of General Sessions For Two Counts of Criminal Sexual Conduct in The First degree (99-GS-32-815-818), Kidnapping (99-GS-32-813), Assault with intent To Kill (99-GS-32-819), and Strong Armed Robbery (99-GS-32-814). On September 17-21, 2001, The Applicant proceeded To Trial by Jury, he was Found Guilty on all Counts, and Sentenced To Life Without parole pursuant To S.C. Code ANN. 17-25-45.

A notice of Appeal was Filed on The applicant's behalf and an appeal was perfected by Wanda H. Baile, of The South Carolina office of appellate Defense.

Petitioner's current application was Filed August 11, 2016, where applicant amended The application To include "Denial of Right To appeal The Following Grounds That was Raised and Ruled on in The Final order, but was Refused to appeal Those issues by appellate Counsel:

1. Trial Counsel was ineffective For Failing ~~For~~ To Challenge The Sufficiency of The Search Warrant Used to draw The applicant's blood;

The Search was invalid and without probable-cause, because

4.

The affidavit of The Search Warrant Contained a False Statement by The Victim, which entitled applicant to a Franks v. Delaware, Suppression hearing.

2. Trial Counsel was ineffective for failing to challenge the Chain of Custody on The Applicant's blood;

The person that drew The Applicant's Blood was not authorized to collect Blood for DNA Sample pursuant to 23-3-630(A), was not qualified, did not have a Court order, Therefore The process was conducted in violation against Applicant's Fourth Amendment protection against a illegal Search and Seizure.

3. Trial Counsel was ineffective for failing to use readily available experts, funds for whom had already been obtained by previous defense Counsel, in The Applicant's defense at Trial;

Prior to The Applicant's Trial Funds was approved by The Court to hire experts that was needed to prepare The defense for Trial. even though The Funds was paid defense Counsel failed to hire Those experts, and failed to conduct a proper pre-Trial investigation prior to The Trial.

4.

Defense Counsel was ineffective for failing to move for a mistrial when he realized that The Victim was deaf;

5.

Prior To The Trial Defense Counsel Failed To interview The Victim, and was Told by The Solicitor That The only problem he would have concerning The Victim Testifying Was That She Could Not Speak. The Defense did not know That The victim was deaf UNTIL During The Trial.

5. Defense Counsel was ineffective For Failing To interview The Victim prior To The Trial ;

Had defense Counsel interviewed The Victim prior To Trial he would had discovered That The victim was also deaf and Could have prepared The defense accordingly.

6. Appellate Counsel was ineffective For Failing To argue on appeal That The applicant was entitled To a new Trial based on The Fact That The applicant's Speedy Trial Rights were violated ;

The applicant was indicted on Feb. 22, 1999, because of The delay in indicting The applicant a motion For a Speedy Trial was Filed in behalf OF The defense, but applicant's Trial was not held until 31 months Later.

7. Appellate Counsel was ineffective For Failing To argue on appeal That Judge Westbrook should have Recused himself From The Trial OF This Case ;

6.

Through Judicial misconduct, Judge Westbrook, The Solicitor, and defense Counsel met in a motel Room To decide who will Represent The applicant, Then Later it was discovered That The victim worked For Retired Family Court Judge Frank Rogers whom was also law partners and Close Friends with Judge Westbrook.

8. Appellate Counsel was ineffective For Failing To argue That The Applicant's motion For a directed Verdict was improperly denied by The Trial Court.

The applicant was convicted by insufficient evidence and Denial of Due Process, The denial of effective assistance of appellate Counsel Compounded The violations by not arguing This issue on appeal.

Discussion

The Applicant's First Application For Post-Conviction Relief Was Filed on October 27, 2004. An evidentiary hearing was held on May 18, 2009. all grounds For Relief presented in The present petition was Raised in Ruled on in The PCR Court Case No. 2004-CP-32-3932. The applicant Was denied The Right To appeal These issues With The State ~~The~~ Supreme Court, Denying The applicant his Full Bite of The apple.

The Supreme Court Realized That allowing Successive applications Could Cause Litigation To perpetuate indefinitely. Finality must be Realize at some point in order To achieve a Semblance of effectiveness in dispensing justice. At some juncture judicial Review must stop, with only The very Rarest of exceptions, When The system has simply Failed a defendant and where To Continue The defendant's imprisonment without Review Would amount to a Gross miscarriage of justice.

Id. The Supreme Court Later Found That The Facts Fit "The very Rarest of exceptions" in Washington v. State, 478 S.E.2d 833 (S.C. 1996). In That Case, procedural irregularities Led To The Failure To Review an issue of ineffective assistance of Counsel determined in The First application. The S.C. Supreme Court held: That when a PCR applicant is denied Due Process of Law in The PCR proceeding, Then They are entitled To Relief, "Independent" of any Claim of

ineffective assistance of Counsel. Washington v. State, 478 S.E.2d 833 (S.C. 1996) (ToAL Writing For The Court), especially if applicant can prove he was denied due process of law in the first proceeding due to omissions of Counsel's errors may be sufficient reasons.

An exception to the rule against successive applications occurs where the applicant has been denied the opportunity to appeal dismissal of his first PCR application. Austin v. State, 409 S.E.2d 395 (S.C. 1991). The court in Aice distinguished this situation from the general rule on the basis that "Austin never received a full bite at the apple. However, the court refused to allow the applicant in Aice to gain more than 'one procedural bite at the apple.'" Aice, 305 S.C. at 452, 409 S.E.2d at 395.

Final Order and Appeal

The findings of the PCR court must be contained in a final order. Appeal may be taken by either party from the final order to the Supreme Court. S.C.A.C.R. Rule 201. P.C.R. Counsel should file a notice of appeal and if necessary a notice of indigency if the applicant seeks judicial review of the final order. The petitioner then must file a petition for writ of certiorari. Additionally, the petitioner must make an appendix of the record below, which is to include the pleadings of both parties, the clerk of court's records regarding the convictions, the transcripts of the proceedings

9.
in General Sessions and The PCR hearing, and The Final order.

An issue not Ruled on by The PCR judge will not be considered preserved For Review by The Supreme Court. Padgett V. State, 484 S.E.2d 101 (S.C. 1997); Pruitt V. State, 423 S.E.2d 127 (S.C. 1992);

In The instant case, The PCR judge Ruled on (11) Eleven issues, preserving Those issues For appellate Review by The Supreme Court. PCR Counsel, Whom was also PCR appellate Counsel appealed only (1) one of The (11) Eleven issues preserved For The Supreme Court, and denying The applicant his Full bite of The apple, by not appealing The (10) Ten Remaining issues.

An applicant is entitled to seek appellate Review of The denial of Relief. S.C. Code ANN. 17-27-100 (1985). Applicant must seek appellate Review by way of a petition For writ of Certiorari with The Supreme Court. Review of a application is discretionary with The Court. Austin V. State, 409 S.E.2d 395 (S.C. 1991); Knight V. State, 325 S.E.2d 535 (S.C. 1985).

Applicant is entitled To his "one bite at The apple" and This includes appeal From The denial of post-conviction Relief. Austin; Aice V. State, 409 S.E.2d 392 (S.C. 1991). IF The applicant Requests an appeal and none is Given, or if The

1a.

Record otherwise shows that the applicant did not knowingly and intelligently waive his right to appeal. The PCR Court in a successive application may find that the applicant is entitled to a belated appeal of his first application.

Adom v. State, 523 S.E.2d 753 (S.C. 1999); Austin. Procedures for review are the same as for a belated direct appeal. See, S.C.A.C.R. Rule 227(g). The Supreme Court has determined that the statute of limitations does not apply to seeking a belated appeal from a PCR application. Adom.

June 12, 2019

Maynard A. Rogers

CLIENT COPY

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

HAYWARD LEON ROGERS, #278510,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

CASE NO.: 04-CP-32-3932

ORDER

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed on October 27, 2004, and amended on August 21, 2008. The State made its Return on July 18, 2005. An evidentiary hearing was convened in this case on May 18, 2009. The Applicant was present and was represented by Tara Dawn Shurling of the Richland County Bar. The State was represented by A. West Lee, Assistant Attorney General.

I.
PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Lexington County Clerk of Court's orders of commitment. The Lexington County Grand Jury indicted the Applicant at the February 1999 term of General Sessions for two counts of Criminal Sexual Conduct in the First Degree (99-GS-32-815; 818), Kidnapping (99-GS-32-813), Assault and Battery with Intent to Kill (99-GS-32-819), and Strong-Armed Robbery (99-GS-32-814). On September 17-21, 2001, the Applicant proceeded to trial by jury, and was represented by William Y. Rast, Jr., Esquire. He was found guilty as charged on all counts. The Honorable Marc H. Westbrook, presiding circuit judge, sentenced the Applicant to life imprisonment without the possibility of parole pursuant to S.C. Code Ann. §17-25-45.

A Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected by

Wanda H. Haile,¹ Senior Assistant Appellate Defender, with the South Carolina Office of Appellate Defense.² By published opinion, the South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004). Though multiple issues were raised, appellate counsel did not petition for rehearing or seek certiorari to the Supreme Court.

II. ALLEGATIONS RAISED

In his Application for Post-Conviction Relief, the Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel; and
2. Ineffective assistance of appellate counsel.

He alleged generally that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated prior to, during, and after his trial.

In an Amended Application for Post-Conviction Relief filed August 21, 2008, the Applicant more narrowly defined his allegations in support of his claim that he received ineffective assistance of counsel. In that Application, he alleged:

1. Trial counsel was ineffective for failing to require that a certified interpreter be sworn to take the victim's testimony;
2. Trial counsel was ineffective for failing to challenge the sufficiency of the search warrant used to draw the Applicant's blood, ~~WARRANTLESS SEARCH, NO COURT ORDER~~;
3. Trial counsel was ineffective for failing to challenge the chain of custody on the Applicant's blood;

¹ Now Wanda H. Carter.

² Now the South Carolina Commission on Indigent Defense, Division of Appellate Defense.

4. Trial counsel was ineffective for failing to use readily available experts, funds for whom had already been obtained by previous defense counsel, in the Applicant's defense at trial.

At the evidentiary hearing convened in this case, the Applicant raised additional allegations of ineffective assistance of counsel. This Court accepts those allegations as amendments to his Application for Post-Conviction Relief made pursuant to the evidence adduced at the hearing. See Simpson v. Moore, 367 S.C. 587, 599, 627 S.E.2d 701, 208 (2006); Rule 15(b), SCRCP. At the hearing, the Applicant specifically alleged:

5. Defense counsel was ineffective for failing to move for a mistrial when he realized that the victim was deaf;
6. Defense counsel was ineffective for failing to interview the victim prior to the trial.
7. Appellate counsel was ineffective for failing to argue on appeal that the Applicant was entitled to a new trial based on the fact that the Applicant's speedy trial rights were violated.
8. Appellate counsel was ineffective for failing to argue on appeal that Judge Westbrook should have recused himself from the trial of this case.
9. Appellate counsel was ineffective for failing to argue that the Applicant's motion for a directed verdict was improperly denied by the trial court.

III. EVIDENCE BEFORE THE COURT

At the Post-Conviction Relief hearing held in this case on May 18, 2009, the Applicant presented his own testimony, as well as testimony from trial counsel William Y. Rast, Jr., Esquire. In addition to this testimony, this Court has before it a transcript of the trial, a copy of the records of the Lexington County Clerk of Court regarding the subject convictions, a copy of the Applicant's records with the South Carolina Department of Corrections, and a copy of the appellate court documents in this case. What follows below are the findings of fact and rulings

of law made by this Court in accordance with the Uniform Post-Conviction Procedure Act, S.C.

Code Ann. §17-27-10 *et seq.* (1985).

As a threshold matter, this Court would note that the Applicant was represented by an experienced trial attorney who is generally regarded for his competence. On the facts of this case, however, this Court finds that the combined effect of his errors and omissions was such that the Applicant was deprived of a fair trial. Specifically, this Court finds a reasonable probability that but for counsel's errors and omissions, the outcome of this trial would have been different. For that reason, this Court finds that trial counsel failed to provide the Applicant reasonable, professional assistance of counsel.

IV. RELEVANT FACTS

The South Carolina Court of Appeals' decision in this case contains an excellent summary of the facts, see State v. Rogers, supra. For the purposes of evaluating this action, this Court incorporates that factual summary by reference. In addition, this Court notes the following relevant facts.

The Applicant was charged with sexually assaulting the victim, Ethel Tillman, a fifty-seven year old woman, on September 28, 1998. The evidence presented by the State supported the following view of the facts. The victim was walking away from a video poker establishment when the Applicant came up to her. The Applicant forced her behind a nearby building and forced her to have vaginal and oral intercourse with him. She fought him off and he ran away with her purse.

After the incident, the victim was taken to a hospital and treated for her injuries. Notably, her treating physician did not find any physical evidence that she had been sexually assaulted. See Trial Tr. p. 804, line 22-p. 805, line 3. Three days after the incident, investigator

Wendy Frazier interviewed her. During this meeting, Investigator Frazier returned the purse and clothing worn by the victim the night of the incident. Investigator Frazier went to the victim's home six days after this interview to take possession of those items again.

The victim gave a composite sketch of the assailant a week after the assault. Police officer Jason Amodio took the sketch to local businesses and ultimately showed it to a man named Harley Hancock (known as "Pop"). After speaking with Pop, Officer Amodio and other police officers waited for a man, who would turn out to be the Applicant, to arrive at Pop's house. Shortly thereafter, the Applicant arrived at Pop's home and was arrested.

The Applicant's fingerprints were then compared with latent fingerprints taken from items that were inside the victim's purse. SLED agent Ted Shealy testified that a latent print that matched the Applicant's fingerprint was found on a pay stub with the victim's name on it in the purse. Furthermore, a blood stain on the victim's sweater, which had been returned to her and then picked back up by Investigator Frazier, was tested by SLED.³ SLED agent Gray Amick testified that this stain contained a mixture of the Applicant's and the victim's blood. See Trial Tr. p. 767, line 5- p. 768, line 21.

Of particular import at trial, and to this Court, was the victim's ability to testify. The victim became deaf at a very young age and never learned sign language. Instead, the victim communicated by a unique combination of hand gestures and speaking. At trial, the assistant solicitor was permitted to lead the victim throughout the course of her testimony. When defense counsel attempted to cross-examine her, the trial court appointed the victim's son to be her

³ This stain was initially found to be insufficient to test under the RFLP DNA testing procedures that SLED used at the time of the incident. However, while the case was pending, a new type of DNA testing—polymerase chain reaction testing ("PCR testing")—was adopted by SLED. It was under PCR testing that SLED was able to determine that the blood on the sweater was a mixture of the Applicant's blood and the victim's blood.

interpreter. Defense counsel's numerous failures with regard to this damaging testimony will be addressed below.

V. STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRCP. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that trial counsel 1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and 2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

On the one hand, where trial counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy

or tactics. In the case of Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the South

Carolina Supreme Court found that

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

(Emphasis in original) (internal citations omitted).

**VI.
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**A. Defense Counsel's Failure to Take Adequate Measures Prior to, and During, the
Victim's Testimony**

The Applicant alleges that defense counsel was ineffective for failing to take numerous actions with regard to the victim's testimony, including: (1) failing to interview the victim prior to the trial; (2) failing to request that a qualified interpreter be appointed, prior to trial, to interpret the victim's testimony; and (3) failing to move for a mistrial once defense counsel discovered that the victim's impediment was far more severe than had been disclosed pretrial. The Applicant contends that he was prejudiced by defense counsel's failure to take any of these actions. Accordingly, the Applicant argues that he is entitled to a new trial. This Court agrees.

At the PCR hearing defense counsel testified that prior to trial he had been informed by the assistant solicitor prosecuting the case that the victim's possible impediment to testifying was that she had trouble speaking. Importantly, defense counsel was not told that the victim had trouble *hearing*. Defense counsel testified that he had asked the assistant solicitor about having an interpreter for the victim's testimony at trial, but he was reassured on numerous occasions that the victim would be capable of testifying at trial. However, defense counsel did not take any action, prior to the start of trial, to ascertain for himself the extent of the victim's impediment. Furthermore, defense counsel did not move to have an interpreter appointed.

At trial, it became abundantly clear that the victim was having great difficulty testifying.

On direct examination, and over defense counsel's repeated objections, the assistant solicitor was permitted to lead the victim with virtually every question.⁴ Furthermore, on cross-examination, defense counsel was having so much difficulty questioning the victim that her son was appointed to serve as her interpreter. Defense counsel testified that this resulted in a constructive denial of his ability to cross-examine the victim. However, at no point in time prior to or during direct examination did defense counsel ask that an interpreter be sworn to assist with the victim's testimony.⁵ Furthermore, defense counsel never moved for a mistrial based on the State's misrepresentations concerning the degree of the victim's impairment, and their erroneous assurances that the victim was capable of testifying without the assistance of an interpreter.⁶ This Court finds that defense counsel committed error in failing to take any of these actions.

⁴ For example, the following testimony was permitted regarding the initial assault:

Q: ... He grabbed you by the back of the neck?
A: (Witness nods.) (Indicating affirmative response.) And threw.
Q: He pushed you down?
A: (Witness nods.) (Indicating affirmative response.) In the wall.
Q: In the wall. And it cut your head?
A: (Answer unintelligible.)
Q: The tree and the ground?
A: (Answer unintelligible.)

...

Q: He pushed you into the ground?
A: (Witness nods.) (Indicating affirmative response.)
Q: Then you got back up?
A: (Witness nods.) (Indicating affirmative response.)
Q: And he pushed you into the wall?
A: (Witness nods.) (Indicating affirmative response.)

Trial Tr. p. 162, line 22-p. 163, line 22.

⁵ On appeal, appellate counsel argued that the trial court erred in not appointing an interpreter during direct examination. The Court of Appeals found that the issue was not preserved because defense counsel never made an objection. See *State v. Rogers, supra*, at 183, 603 S.E.2d at 913.

⁶ While the problems would obviously not be readily apparent until the victim actually testified, this Court would note that the victim's sister, Ann Bryant, testified that the victim was deaf immediately prior to the victim's testimony. See Trial Tr. p. 113, line 20-p. 115, line 24.

~~An interpreter for a deaf witness must not be a family member of that witness, unless the~~
trial court finds that the use of the family member as a qualified interpreter "is in the best interest of the individual and is in the best interests of justice." S.C. Code Ann. §15-27-15. Had defense counsel requested a qualified interpreter in advance, the parties would have had the opportunity to locate a qualified interpreter who was not related to the victim. Counsel's failure to adequately deal with this issue pretrial resulted in the Court's authorization of the use of the victim's son as an interpreter in the midst of this trial. The use of the son as an interpreter, and all the inherent risks of bias attendant that decision, could therefore have been avoided.

"A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). "The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way." Id.

The record before this Court demonstrates that defense counsel took little to no affirmative action to ensure that his client's ability to effectively challenge the victim's testimony would be preserved. While defense counsel asked the assistant solicitor about having an interpreter appointed, he did not request permission to personally interview the victim or make a motion to appoint an interpreter as a precaution. Such a motion would have resulted in a pretrial hearing at which the Court, and defense counsel, could have explored the need for an interpreter by questioning the victim. Given her testimony at trial, this Court believes such a hearing would clearly have resulted in a pretrial ruling that a qualified interpreter was needed to insure that reliable testimony could be obtained. Furthermore, when it became abundantly evident during this trial that an interpreter would be needed to properly take the victim's

testimony, defense counsel did not ask that an interpreter be sworn. Finally, defense counsel did not move for a mistrial when he realized that the assistant solicitor's repeated assurances that the victim could testify were not accurate and had been misleading.⁷ As noted *supra*, a mistrial is an extreme remedy. Where, however, defense counsel discovered in the midst of the Applicant's trial that the prosecution had misrepresented the victim's level of impairment, a mistrial was the only viable remedy. Defense counsel admitted that he did not take these actions and testified that he believed that the Applicant did not receive a fair trial because of the numerous problems with the victim's testimony. This Court finds that defense counsel's repeated failure to take any preventative or corrective action to ensure that his client's right to a fair trial was preserved was error.

The Applicant was prejudiced by defense counsel's numerous failures.⁸ This Court does not agree with the State's contention that the evidence against the Applicant was overwhelming.⁹

✓ As noted above, the standard of proof in Post-Conviction Relief actions is whether or not there is a reasonable probability that the result at trial would have been *different*. Importantly, the Applicant does not have to show that there is a reasonable probability that he would have been *acquitted* of any criminal wrong doing had defense counsel taken the appropriate actions. Given the vague nature of the victim's communication with regard to this incident, the jury could easily have found the known facts supported a far less serious view of the Applicant's culpability.

⁷ Defense counsel testified that he did not believe that he had been intentionally misled by the assistant solicitor. However, the fact remains that what he had been assured would occur by the assistant solicitor did not actually occur, and defense counsel should have taken immediate action to correct the problem. He did not do so.

⁸ Initially, this Court is uncertain whether the factors present in this case warrant the standard harmless error inquiry because this is not a case where, for example, there is a particular piece of evidence which was admitted in violation of the Confrontation Clause. In this case, the Applicant asserts that the problems with the victim's testimony amounted to a constructive denial of the ability to cross-examine the victim, which resulted in an error "so fundamental and pervasive that [it] require[s] reversal without regard to the facts or circumstances of the particular case." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1985). See also United States v. Cronin, 466 U.S. 648 (1984). For the sake of argument, this Court will assume that the Applicant must show that he was prejudiced by defense counsel's errors.

⁹ This Court would also note that at no point did the Court of Appeals find that the evidence against the Applicant was overwhelming. See State v. Rogers, *supra*.

At trial, the State admitted evidence that the Applicant's blood was found on the victim's

sweater. The State also admitted evidence that the Applicant's fingerprint was found on a document inside the victim's purse. Finally, the victim also sustained an injury to her forehead. However, while this evidence could be considered as establishing that the Applicant was present at the time of the assault, none of these facts *prove* that: (1) the victim was sexually assaulted; (2) the victim was kidnapped; or (3) the Applicant committed an ABWIK against the victim. This same evidence, without the uncorroborated claims of the victim, could be evidence of a simple assault and a purse snatching. Likewise, this evidence might be viewed as circumstantial evidence of a strong-armed robbery.¹⁰ The only direct evidence that the Applicant committed the particular crimes he was tried for was the highly questionable testimony of the victim. By defense counsel's inaction, the Applicant was deprived of his opportunity to effectively cross-examine the victim regarding her testimony on these crucial issues. Had the Applicant been provided the opportunity to cross-examine the victim about her testimony, instead of permitting the assistant solicitor's leading questions to be, in effect, her *only* testimony on the record, there is a reasonable likelihood that the result at trial would have been different. Additionally, given the circumstances in this case, especially the assistant solicitor's pretrial assurances to defense counsel that the victim would be able to testify without an interpreter, this Court finds that a mistrial would have been warranted. Consequently, the Applicant is entitled to a new trial.

¹⁰ While the Applicant was not charged with either purse snatching or strong-armed robbery, defense counsel would have been free to argue that there were other less serious crimes the State had elected not to charge which equally fit the evidence.

B. All Other Allegations

As to any and all other allegations presented at the evidentiary hearing convened in this case, this Court finds that there was insufficient evidence introduced to support granting the requested relief. Accordingly, those allegations are denied and dismissed.

VII. CONCLUSION

This Application for Post-Conviction Relief is hereby granted. The Applicant's convictions and sentences are vacated, and the Applicant's case is remanded to the Lexington County Court of General Sessions for a new trial.

IT IS SO ORDERED.

Roger M. Young
Presiding Circuit Judge
Eleventh Judicial Circuit

This ____ day of _____, 2009.

_____, South Carolina.

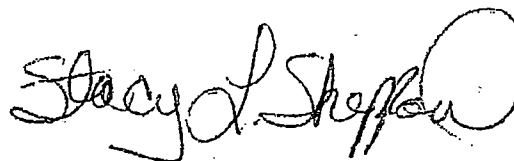
C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

I, the undersigned, Stacy L. Sheppard, Circuit Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Circuit Court for Lexington County, South Carolina, on the 18th of May, 2009.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

May 3, 2010



Stacy L. Sheppard, RPR
Circuit Court Reporter

1 preserved at trial that were not raised on appeal.

2 Thank you.

3 **THE COURT:** I'm figuring you'll figure out a
4 way to cover that in your order.

5 All right. Anything else?

6 **MR. LEE:** Nothing from the State, Your Honor.

7 **MS. SHURLING:** Thank you, sir.

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9 **END OF PROCEEDINGS**

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1 necessary for Judge Westbrook to make an appropriate
2 decision on the objections adduced at trial
3 concerning this matter.

4 And, lastly, that counsel should have made a
5 motion for a mistrial once, in counsel's own words,
6 it became apparent that his client could not receive
7 a fair trial as the client was proceeding -- I mean,
8 pardon me -- as the trial was proceeding without an
9 interpreter. Thank you, Your Honor.

10 **THE COURT:** All right. Well, let's --

11 **MS. SHURLING:** Your Honor, I swear, I'm going
12 to shut up. There is one last thing.

13 There were several issues that my client felt
14 that the trial counsel had not adequately preserved
15 for appellate review. In my review of the
16 transcript, as I pointed out in questioning
17 Mr. Rast, there were some objections on those
18 matters as I said earlier in the hearing.

19 To the extent those issues can go either way, I
20 would ask that they be couched in terms of
21 ineffective assistance of trial counsel to the
22 extent any of those issues were not thoroughly and
23 adequately preserved for appellate review, but
24 ineffective assistance of appellate counsel to the
25 extent there were issues that were adequately

1 the case with appellate counsel issues, let me give
2 you 30 days to come up with proposed orders.

3 MS. SHURLING: Thank you.

4 Your Honor, if I might, I'm sorry, but based on
5 the additional testimony heard today, I would
6 narrowly define the allegations to include an
7 allegation that defense counsel should have
8 personally interviewed the complaining witness in
9 this case prior to trial. He had been informed, at
10 least to some degree, that the witness had some
11 hearing and speech problems.

12 And while I certainly can understand his
13 willingness to take the prosecution's word on some
14 level for her ability to communicate, I think the
15 prudent thing to do would have been to have
16 personally interviewed her, at least briefly, to
17 ascertain the degree to which she was capable of
18 answering and understanding questions.

19 So we would amend to allege counsel was
20 ineffective for failing to do that and specifically
21 allege that trial counsel was ineffective for
22 failing to place on the record what he had been told
23 concerning this witness' physical limitations with
24 regard to hearing and speech prior to trial. I
25 believe that that information would have been

1 additional issues, that we would be proceeding on
2 the ones that I had raised in the amended
3 application.

4 It was my intent to convey that there would be
5 nothing new additional to that which was in the
6 application and that which was in the formal amended
7 application. I did not intend to be excluding
8 anything in the original application, but I may
9 have, in fairness to Mr. Lee, I may have been less
10 than clear on that point, so I'll try to make myself
11 available. I would say that I am teaching a course
12 on post-conviction relief cases in Greenville on
13 Wednesday.

14 **THE COURT:** Well, if we can't work it all back
15 in, I mean, we'll try to work out something where
16 either I'll come back here for, you know, a little
17 bit or y'all can come to Charleston. We'll see what
18 we can work out. Let's see, first of all, if
19 there's something he needs to talk to appellate
20 counsel about. It may be moot.

21 All right. We'll leave it open for now. And
22 what I was thinking about doing anyway was giving
23 y'all, there are some issues I'd like to read about,
24 I'll give you 30 days to come up with proposed
25 orders. So just in case we don't reconvene on that,

WILLIAM RAST - CROSS BY MS. SHURLING

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1 Whether it was deliberate or not --

2 A I do not think it was deliberate let me put
3 that. I don't think Mr. Riddle would have lied to
4 me. I don't believe that.

5 Q And I, too, would like to give the gentleman
6 the benefit of the doubt. Professionally, he's
7 always been courteous to me. But the point being,
8 you did not put on the record that based on the
9 State's representations to you, you had been led to
10 believe that communicating with this woman was not a
11 problem?

12 A That is correct.

13 Q And that had you been given a more accurate
14 description of her limitations and her abilities,
15 you would have insisted on a certified interpreter
16 before the trial?

17 A That's true.

18 MS. SHURLING: A moment's indulgence.

19 (Pause.)

20 MS. SHURLING: I have no further questions,
21 Your Honor.

22 THE COURT: Anything from the State?

23 MR. LEE: Your Honor, we sort of passed out all
24 of our various copies of the transcript, if I may
25 just have a moment to take a quick look at the --

WILLIAM RAST - CROSS BY MS. SHURLING

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1 A No, I did not and I probably should have.

2 Q Nor did you make a motion for a mistrial based
3 on the fact that it became apparent that --

4 A I don't recall if I did or not specifically to
5 tell you the truth. I might not have. I don't
6 recall.

7 Q Once it became apparent that this woman's
8 answers could not be understood, do you agree that
9 it was equally impossible to know whether or not she
10 understood the questions?

11 A I agree with you, yeah.

12 Q Once you arrived at that juncture, do you
13 believe there was any way Mr. Rogers could get a
14 fair trial?

15 A No.

16 Q In the face of that, should you have made a
17 motion for a mistrial?

18 A Yes, I should have.

19 Q And in order to support the motion for a
20 mistrial, would it not have been necessary to let
21 Judge Westbrook know that you were kind of
22 sandbagged on this issue?

23 A I think so now looking back on it, but I didn't
24 think so at the time, but, yes, you're right.

25 Q Thank you. Now -- and let me rephrase that.

WILLIAM RAST - CROSS BY MS. SHURLING

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1 MR. LEE: What page number are we on?

2 MS. SHURLING: I'm sorry. Page 151 line ten
3 and it goes all the way through line 24.

4 BY MR. LEE:

5 Q Now, going over to page 152, you begin to cite
6 Rule 611(c) for what the problems are associated
7 with leading questions; do you recall that?

8 A Yes.

9 Q Okay. There -- Your Honor -- from there all
10 the way through this woman's testimony is a running
11 theme of your objecting to the State leading the
12 witness?

13 A That's correct.

14 Q Okay. At no point that I see did you object to
15 the trial proceeding without a qualified trained
16 interpreter present. Do you recall making any --

17 A I remember objecting and telling the judge
18 there was a statute that we're supposed to use to
19 appoint an interpreter. I remember bringing that up
20 on a couple occasions, but...

21 Q And, once again, without being too redundant,
22 it did not occur to you to place on the record the
23 fact that you had not been given any advanced
24 warning of what difficulty there would be
25 communicating with this woman?

WILLIAM RAST - CROSS BY MS. SHURLING

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1 with you?

2 A Not with me. I left it out in my truck.

3 MS. SHURLING: Your Honor, may I approach?

4 THE COURT: You may.

5 BY MS. SHURLING:

6 Q On page 149 of the record, and I'll just
7 publish it, you say, Judge, I can't understand one
8 word she's saying. I don't think Coconut can
9 either. We are not going to have a transcript if
10 this continues, I don't believe. I can't allow
11 Dayton to repeat her answers when I can't understand
12 her answers. I don't know if he is telling the
13 truth or not. We have got a problem.

14 A I don't specifically remember that.

15 Q Okay. And then the transcript goes on at
16 several points, looking at page 151 line ten, you go
17 on to say, The witness is making statements other
18 than just yes or no. If you ask, Coconut can verify
19 it. I don't understand it. I don't think the court
20 reporter understands it. She doesn't know what to
21 put down. Now, I'm going to have to object if
22 you're going to allow Mr. Riddle to lead her all the
23 way through her testimony.

24 Do you recall that?

25 A I recall that.

WILLIAM RAST - CROSS BY MS. SHURLING

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1 It wasn't her hearing as much as it was her
2 speech that nobody could understand. It did not
3 appear to be a problem with her hearing. She seems
4 to be able to hear the question, but her replies
5 nobody could understand them.

6 Q Well -- and I reiterate my earlier question, if
7 you could not understand her answers, how could you
8 be sure she understood the question?

9 A Well, I wasn't sure. I had assumed that you
10 could, you know, to tell you the truth.

11 Q Okay. And so during direct examination, it was
12 clear that there was a real problem with this
13 woman's ability to hear?

14 A That is correct.

15 Q Why did you wait till cross to object to
16 their --

17 A I objected to start with. Judge Westbrook told
18 the Solicitor, Ask all questions that can be
19 answered yes or no. From that point on, there was
20 no interpreter for her until cross-examination, if
21 I'm not mistaken.

22 MS. SHURLING: A moment's indulgence, Your
23 Honor.

24 (Pause.)

25 Q Do you have a copy of the transcript up there

WILLIAM RAST - CROSS BY MS. SHURLING

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1 mind is all there. It's just when it comes to legal
2 matters, he has a tendency to go off on a tangent,
3 but as far as knowing what he's doing, his mind is
4 there. I had no problem with that.

5 Q I just wanted to make sure the Court was very
6 clear since there was a competency eval done. Now,
7 you believe that that eval was probably prompted by
8 counsel before you came on board?

9 A I'm sure it was because it was not prompted by
10 me.

11 Q And based on your experience with him, you
12 didn't have any question about his competency to aid
13 and assist you in preparing his case?

14 A No, none at all.

15 Q Now --

16 MS. SHURLING: One moment's indulgence.

17 (Pause.)

18 Q You objected to the use of the son as an
19 interpreter during cross-examination?

20 A That's correct.

21 Q Was it apparent how profound this woman's
22 hearing loss was during direct?

23 A It was obvious all the way through, that is why
24 at the beginning, Judge Westbrook told Mr. Riddle,
25 Ask all questions that can be answered yes or no.

WILLIAM RAST - CROSS BY MS. SHURLING

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1 reflect that the State's competency report was
2 introduced and that it was basically, what I call,
3 an abbreviated Blair proceeding. There were no
4 witnesses introduced or anything.

5 Q I'm trying to think of a diplomatic way to say
6 this. We will both agree that our client is
7 somewhat stubborn; is that fair to say?

8 A That's true.

9 Q And that our client can be somewhat
10 argumentative?

11 A But he's serving life without the possibility
12 of parole, I'd probably be the same way in his
13 situation.

14 Q And I was going to get there I promise. Would
15 it be fair to say that he's taken a very active role
16 in how his case is handled?

17 A That's correct.

18 Q And that he was very upset and angry about this
19 prosecution?

20 A Right.

21 Q Aside from those factors, which are somewhat
22 understandable given the life without parole being
23 on the table, you didn't actually have any concerns
24 about him being mentally ill, did you?

25 A No. No. I don't think he's mentally -- his

WILLIAM RAST - CROSS BY MS. SHURLING

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1 in there. And Judge Westbrook was asking me if I
2 would consider representing him, being court
3 appointed.

4 Q One thing that's real important --

5 A Now, who got my name, I don't know, whether
6 that was Judge Westbrook -- I don't know where that
7 came from.

8 Q Probably the same list Knox McMahon got mine
9 off of. I'm just teasing.

10 There was a competency evaluation in this case,
11 wasn't there?

12 A Not that I know of.

13 Q You don't recall there being a competency
14 evaluation --

15 A It was probably done before I got involved in
16 it because I didn't get involved until December of
17 2000.

18 Q Do you recall there being at least an
19 abbreviated Blair hearing at the outset of this
20 case?

21 A Not specifically I don't.

22 Q It's been a long time.

23 A Yeah, it has.

24 MS. SHURLING: But if the record, Your Honor,
25 at page 46 line eight through 47 line six, will

WILLIAM RAST - CROSS BY MS. SHURLING

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1 Q So when you were being asked to consider
2 whether or not you would accept this appointment --

3 A Right.

4 Q -- because you were past an age where you could
5 say no if you wanted to.

6 A And I might mention they didn't tell me the
7 victim was Frankie Rogers' maid at that time either.
8 I found that out later.

9 Q I bet they didn't. But at that time when
10 you're called in for an in chambers conference about
11 whether you would be willing to serve if pressed to
12 do so, present is Judge Westbrook and Dayton Riddle?

13 A That's correct.

14 Q Participating in the conversation about whether
15 or not you're going to be the defense lawyer in this
16 case?

17 A Yes, ma'am.

18 Q And he was the prosecutor in this case?

19 A Yes, ma'am.

20 Q Did you consider that there might be anything
21 inappropriate in the prosecution being allowed to
22 play a role in picking this man's lawyer?

23 A No. I'm not sure the prosecution had anything
24 to do with picking me. I just know that Dayton was
25 sitting in the room with Judge Westbrook when I was

WILLIAM RAST - CROSS BY MS. SHURLING

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1 page 51 line 12 and going through His Honor's ruling
2 on 51 line 18.

3 You also did, in fact, move to dismiss this
4 case based on extensive pretrial delay; do you
5 recall that?

6 A Uh-huh.

7 Q So that issue was preserved for appellate
8 review and was not briefed as well, correct?

9 A That's correct.

10 Q Okay. You've heard the Applicant say that he
11 believes appellate counsel should have briefed the
12 sufficiency of the evidence to sustain a judgment in
13 this case. Do you share his belief that the
14 directed verdict motion should have been briefed on
15 appeal?

16 A Yes, I do.

17 Q If I understood you correctly, when you were
18 called to serve, you were called in for a meeting
19 with Judge Westbrook and Dayton Riddle?

20 A That's correct.

21 Q And am I given to understand from that that
22 Dayton Riddle was participating with the judge in
23 finding a defense lawyer for the Applicant?

24 A I don't know. I got a phone call. When I came
25 up here, I was meeting with both of them.

WILLIAM RAST - CROSS BY MS. SHURLING

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1 grant that motion.

2 Q But in any event on appeal, might the issue
3 concerning the interpreter have had more weight and
4 a better chance of prevailing had you put on the
5 record the fact that you had been given to
6 understand she could communicate prior to trial?

7 A It probably would have, yes.

8 Q Thank you. And there are issues that were not
9 raised on appeal that I would like to ask you about
10 and one of them is the one you just raised. You
11 made a motion for Judge Westbrook, God rest his
12 soul, to recuse and he declined?

13 A That's correct.

14 Q But that issue was preserved for appeal and was
15 not raised on appeal, correct?

16 A I don't know. I didn't read the appeal to tell
17 you the truth. And I made that motion now before
18 the case was set for trial and before any judge had
19 been assigned the case. This was not a last minute
20 motion.

21 Q Yes, sir. And you renewed that motion at
22 trial, in fact, did you not?

23 A I am not positive of that to tell you the
24 truth.

25 Q The record will reflect that you did looking at

WILLIAM RAST - CROSS BY MS. SHURLING

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1 A That's right.

2 Q And based on your observations of her in the
3 courtroom, that would appear to be inaccurate?

4 A In my opinion, yes.

5 Q So --

6 A Unless she was putting on, like I said.

7 Q Did it occur to you to raise to Judge Westbrook
8 in your argument on this issue that you were not
9 better prepared to address the issue because you had
10 been told in advance of trial that communication
11 with this woman was not a problem?

12 A I don't think I specifically said that, no.

13 Q In retrospect, do you think that might have
14 aided you in championing this issue with Judge
15 Westbrook?

16 A You want to know the truth? No, I don't think
17 it would have helped at all. I -- let me explain
18 this. The first thing I did when I got appointed
19 was I made a motion for Judge Westbrook not to try
20 this case. The victim was the maid for Frankie
21 Rogers, Jr., a family court judge that had retired.
22 Judge Westbrook and Frankie Rogers were family court
23 judges in Lexington at the same time. I did not
24 want Judge Westbrook to try this case and this was
25 before we had been set for trial. He would not

WILLIAM RAST - CROSS BY MS. SHURLING

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1 then when she didn't, that caught me by surprise.

2 The judge let the Solicitor ask all questions that
3 are leading questions. I was kind of flabbergasted
4 to tell you the truth.

5 Q And, Mr. Rast, and I appreciate how forthright
6 you're being and I'm not trying to be difficult, but
7 at trial when this issue was discussed --

8 MS. SHURLING: Looking roughly, Your Honor,
9 from page 194 line 25 through 216 line 16.

10 Q -- when you objected to the victim's son acting
11 as an interpreter, did you at any time advise the
12 court that the State had misled you with regard to
13 this woman's ability to understand and testify prior
14 to trial?

15 A No, I didn't. Because I didn't think it was an
16 intentional mislead. I think the woman was putting
17 on if you want to know the truth. I think she could
18 understand and talk more clearly than she did during
19 the trial because there were several times I would
20 ask her questions, she just ignored it, she wouldn't
21 say a word.

22 Q Let's back up for just a minute. If I
23 understand you correctly, Mr. Riddle told you he had
24 had multiple meetings with her and had had no
25 trouble communicating with her whatsoever?

WILLIAM RAST - CROSS BY MS. SHURLING

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1 Q Okay.

2 A The only evidence was one drop of blood that
3 was supposed to have been a mixture between
4 Mr. Rogers and the victim.

5 Q But there was no pubic hair evidence?

6 A No.

7 Q No semen evidence?

8 A No.

9 Q No vaginal tearing or bruising or anything that
10 would be purely consistent with a sexual assault?

11 A No, there was not. And it was my opinion at
12 the trial that she was not sexually assaulted, that
13 maybe because of her difficulty in hearing and
14 talking, the police misunderstood assault.

15 Q Okay.

16 A Because I would have thought there would have
17 been some evidence there, if there had been a rape,
18 that she stated.

19 Q Once it became apparent that her hearing loss
20 was profound at trial, did it occur to you that the
21 fact of her physical condition with regard to
22 hearing was Brady material?

23 A It didn't occur to me during the trial, no. I
24 mean, I was caught by surprise. I thought she could
25 testify because of what Mr. Riddle had told me. But

WILLIAM RAST -- CROSS BY MS. SHURLING

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1 and no real clearly.

2 Q Well --

3 A But the other things she said it was not clear.

4 Q Mr. Rast, if someone cannot answer questions
5 clearly, how do you know that they heard the
6 questions correctly?

7 A You got a point there, too.

8 Q So -- and if I am understanding correctly, at
9 least the Court of Appeals opinion reflects, that
10 she had lost her hearing at age eight?

11 A This is my understanding, too, for a long time.

12 Q And all of this was a surprise to you at trial?

13 A Yes, it was.

14 Q Did you consider making a motion for a mistrial
15 based on the State's failure to disclose to you the
16 severity of her hearing loss and her communication
17 problems prior to trial?

18 A No. I did not think about it, but it might
19 have been a good idea.

20 Q In retrospect, there was no physical evidence
21 of sexual battery in this case; is that correct?

22 A No, not according to the testimony and my
23 recollection, no.

24 Q There was none?

25 A No.

WILLIAM RAST - CROSS BY MS. SHURLING

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1 A No. I had some indication from reading the
2 police reports that she could not speak clearly,
3 okay. I talked to Dayton Riddle on a separate
4 occasion, Dayton, do we need an interpreter? No,
5 I've talked to her in the office on numerous
6 occasions, she understands me, she can talk, she can
7 testify, there won't be a problem. I was assured of
8 that. So I made no prior motion.

9 I never did talk to her myself, but Mr. Riddle
10 assured me that, yes, she could testify, no problem.
11 Then we get in the courtroom and there's a big
12 problem.

13 Q Well, what did the State tell you about her
14 ability to hear? I mean, I'm assuming they didn't
15 tell you she was deaf?

16 A No. They told me that she had had problems
17 with her ear for some time and she couldn't hear
18 correctly and therefore she'd lost the ability to
19 speak correctly. It was my impression that her main
20 problem was the speak not the hearing.

21 Q Okay.

22 A But she didn't appear to have a problem
23 hearing. The problem was in talking so somebody
24 could understand her. That's why Mr. Riddle asked
25 all questions that could be leading. She said yes

WILLIAM RAST - CROSS BY MS. SHURLING

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1 to the introduction of the fingerprint testimony and
2 the blood testimony?

3 A Right.

4 Q Correct.

5 MS. SHURLING: Your Honor, the transcript will
6 reflect that there were objections on the record
7 throughout the testimony relevant to those matters.

8 Q Real specifically on page 174 about line 21
9 through 176 line nine, you make specific objections
10 to the admission of evidence concerning the dress
11 and the sweater and, at another point, you object to
12 evidence from the pocketbook, correct?

13 A Right.

14 Q So it's your belief that those issues were
15 adequately preserved for appellate review?

16 A That's correct.

17 MS. SHURLING: Your Honor, at this time,
18 obviously, to the extent issues -- those issues were
19 preserved for appellate review and were not argued,
20 then that would be a component of his claim of
21 ineffective assistance of appellate counsel.

22 Q Now, with regard to the interpreter issue, I
23 want to make real sure I understood you clearly.
24 You did not know in advance of trial that this woman
25 was deaf?

WILLIAM RAST - CROSS BY MS. SHURLING

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1 asked to, she did not do it. We were flat denied
2 all of our rights to cross-examine her because she
3 wouldn't answer my questions. The ones she did
4 answer, nobody could understand. No, I don't think
5 he got a fair trial.

6 Q Okay. But all of these issues, such as the
7 interpreter and the chain of custody and the other
8 issues that the Applicant brought up, you -- did you
9 object to these and did you make --

10 A Yeah, I objected to them, but just got
11 overruled on everything I was objecting to.

12 Q Did you see any problems with the nurse not
13 testifying about drawing his blood?

14 A No.

15 Q And why not?

16 A Because the officer was there and witnessed it
17 and saw what happened. If we suppress that, they're
18 going to turn around and get another warrant and do
19 it the right way.

20 MR. LEE: And I apologize for going a little
21 out of order there, but I believe that's all the
22 from the State. Thank you, Your Honor.

23 CROSS-EXAMINATION

24 BY MS. SHURLING:

25 Q Mr. Rast, you, in fact, did object repeatedly

WILLIAM RAST - DIRECT BY MR. LEE

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1 **A** That never really came up. There was nothing
2 in the file about a statement from him.

3 The case was set for trial for a Tuesday and I
4 think the Tuesday before trial, I got a phone call
5 from Dayton Riddle, the Solicitor, that they had the
6 tape of his interview right after it had happened
7 two years ago that had not been given to anybody.
8 He gave it to me. I could move to continue.

9 I think the case was put off for two weeks for
10 us to review this taped interview with Mr. Rogers,
11 but it was not introduced at trial, nothing came up
12 on the Miranda rights, just to keep his mouth shut
13 and evidently he did except for that one interview
14 that nobody used.

15 **Q** Mr. Rast, are there any other concerns that you
16 want to address at this time? I think I've gone
17 through all of my questions for you.

18 **A** My concern is I don't think he got a fair
19 trial.

20 **Q** Now, what -- and by saying that, what exactly
21 do you mean?

22 **A** We've got a victim that doesn't testify. She
23 can't testify, nobody can understand what she's
24 saying, half the questions she won't even answer.
25 She never identified him in the courtroom, she was

WILLIAM RAST - DIRECT BY MR. LEE

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1 that Wendy Frazier had a taped interview of him
2 right after the thing that occurred where he had
3 stated that he was in Charlotte, so he decided he
4 would not testify.

5 Q Did you in any way pressure him not to testify?

6 A No, I did not. I left it completely up to him.

7 Q Now, did you make any motions at the conclusion
8 of the State's case in chief?

9 A I'm sure I did.

10 Q Now, this is -- there was a mention of the
11 strike law and whether or not that was in effect at
12 the time of his first offense. I believe the
13 Applicant said that he felt you were ineffective for
14 not objecting to the use of that original offense as
15 a predicate. Was there some issue with the strike
16 law that you recall?

17 A Not that I recall.

18 MR. LEE: Beg the Court's indulgence for one
19 second.

20 (Pause.)

21 BY MR. LEE:

22 Q Did the defendant ever discuss with you his
23 claim that he was never read his Miranda rights or
24 given an attorney when he was arrested and
25 interrogated by the police officers?

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1 nothing to do with any kind of a sexual assault, it
2 was something else all together.

3 Q Was it actually for a cervical polyp?

4 A Right.

5 Q Now, did the doctor present any testimony
6 regarding whether there was any evidence of rape?

7 A There was no evidence of rape. They did the
8 fingernail scraping, they did -- no sperm, no
9 evidence that there had been a rape.

10 Q Okay. So, basically, if I'm understanding you
11 correctly, are you saying that your strategy was
12 both to tear down the State's case and presenting
13 evidence that there was no actual rape?

14 A Right.

15 Q Other than the doctor, did you call any
16 witnesses?

17 A I don't believe so.

18 Q Did the Applicant testify?

19 A No.

20 Q Did you discuss whether or not he would testify
21 with him?

22 A Yes.

23 Q Now, whose decision was it ultimately for him
24 not to testify?

25 A Initially, he wanted to. I then reminded him

WILLIAM RAST - DIRECT BY MR. LEE

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1 A It was for trial.

2 Q Now, in talking with him, do you remember or is
3 it your usual practice to discuss the benefits of
4 going to trial versus a plea or --

5 A When I got the case, it was ready for trial. I
6 mean, that was my understanding from him he wanted a
7 trial and it was the understanding that it was going
8 to be tried.

9 Q Okay. Now, Mr. Rast, did you have an overall
10 trial strategy in this case?

11 A Just trying to tear down their case as much as
12 I could.

13 Q And before I get too far off track and forget,
14 let me back up a little bit. You said earlier that
15 you did actually introduce the testimony of a
16 doctor, correct?

17 A Right.

18 Q And what was the contents of that doctor's
19 testimony?

20 A From what I understand, there was testimony
21 that she had to have some operation in her private
22 areas right after this alleged rape, but what -- the
23 operation had nothing to do with a sexual attack.
24 And I wanted the doctor to testify to make it clear
25 to the jury that the operation the doctor did had

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1 Q But he was not successful?

2 A No.

3 Q Now, we already talked a little bit about the
4 search warrant and your objection with that, but
5 when it comes to the blood and the sweater, did you
6 come across a problem with the chain of custody
7 during the trial?

8 A I sure did. When West Columbia takes it, gives
9 it back to the victim and leaves it there for a week
10 or so and then picks it up and takes it to SLED, I
11 had a big problem with it.

12 Q Now, at any point in time, did you enter into
13 plea negotiations on behalf of the Applicant?

14 A No.

15 Q You did not. Was there an offer ever made by
16 the State?

17 A Not that I knew of. That must have been while
18 the public defender was representing him because
19 when I got it, it was ready for trial. He had been
20 hollering he wanted a trial, but they gave me time
21 to get ready before they tried him, but there were
22 no negotiations as far as I knew of.

23 Q So when you entered, you never discussed plea
24 negotiations because your understanding was that you
25 were going to trial?

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1 to explain to the Supreme Court why the transcript
2 was going to read like it did. But there are
3 several places in there nobody could understand her.
4 And there were several spots she would not even
5 answer my questions, did not attempt to.

6 Q Now, did it become apparent at some point that
7 there was going to be an interpreter needed?

8 A I raised that issue several times with Judge
9 Westbrook that there is a statute that stated how we
10 were supposed to do this. And the problem, the way
11 I understand it, is she did not give any legitimate
12 sign language or any other legitimate deaf speaking.
13 She spoke her own little language.

14 They initially wanted her sister who she lives
15 with to interpret for her. And I strongly objected
16 to that because the sister testified at the trial
17 and that's when Judge Westbrook said, well, we'll
18 let her brother. Her brother couldn't understand
19 her. Nobody could.

20 Q And so -- now, excuse me, just for
21 clarification, did you mean brother or son?

22 A Excuse me, son.

23 Q So if I'm hearing correctly, are you saying
24 that the son then attempted to interpret?

25 A He attempted to.

WILLIAM RAST - DIRECT BY MR. LEE

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1 your discussions with the defendant. Do you
2 remember if you told the defendant prior to trial
3 that the victim was deaf?

4 A I didn't know she was deaf. I knew she had a
5 problem talking by looking at the discovery. I had
6 three or four separate conversations with Dayton
7 Riddle about whether or not she was going to be able
8 to testify. Mr. Riddle assured me, yes, he talked
9 to her in the office, she could testify, that was
10 not going to be a problem. He assured me that
11 before trial. At trial, I found out it was
12 different.

13 Q Now, at what point during the trial did you
14 find that out?

15 A During the direct examination when he was
16 trying to ask her questions.

17 Q And did you make an objection at that point?

18 A Yes, I did. And that's when Judge Westbrook
19 decided Mr. Riddle ask all questions that can be
20 answered yes or no because she says yes and no real
21 clear. Her testimony was so bad that Coconut, who
22 was the court reporter, could not take down her
23 testimony.

24 I had a family court reporter take the
25 testimony -- the deposition -- testimony of Coconut

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1 questioning, is that why the evidence in question,
2 the sweater that the Applicant mentioned and the
3 purse, is that why those things were originally
4 returned to --

5 A No. Wendy Frazier was a police officer with
6 the City of West Columbia. She testified that the
7 night of the crime, if there was a crime, whatever,
8 they gathered all of the evidence, they put it in
9 the evidence room at the City of West Columbia.
10 Some time after that, she took it back at the
11 directions of Captain Owens from West Columbia and
12 gave it all back to the victim. Then a week or so
13 later, she went back to the victim, picked up the
14 evidence and took it to SLED to be analyzed.

15 Q Now, when that issue came up at trial, did you
16 object to that?

17 A I objected to it definitely. The judge
18 overruled me.

19 Q Okay.

20 A I might say I also asked detective --
21 Investigator Frazier, I told her, I said, That's not
22 the proper procedure, is it? She says, No, it's
23 not. Shortly afterwards she was fired by West
24 Columbia.

25 Q Now, you said you don't remember specifically

WILLIAM RAST - DIRECT BY MR. LEE

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1 learn of any fact witnesses whatsoever throughout
2 your discussions with the Applicant or your
3 investigation of the case?

4 A No.

5 Q Now, at trial, did you present any expert
6 witnesses?

7 A No expert witnesses, no. Well, I did call a
8 doctor, yes, the doctor that had examined the
9 victim.

10 Q Okay. And why did you not call any other
11 expert witnesses?

12 A It's my understanding that when this first
13 occurred, they tried to get DNA evidence, but they
14 could not do it. Before trial, there was a new
15 procedure developed so they could. The DNA evidence
16 was a mixture supposedly of Mr. Rogers' blood and
17 the victim's blood and they could not separate it
18 initially. Then they came up with a new procedure
19 where they could.

20 I called one DNA expert, I got the name from
21 Beth Fullwood, and he didn't know anything about it.
22 He gave me another one's name and he didn't know
23 anything. I couldn't find anybody that knew
24 anything about that new procedure.

25 Q Now, sort of along that same line of

WILLIAM RAST - DIRECT BY MR. LEE

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1 against him?

2 A I don't think I did that. I was under the
3 assumption the public defender had already done that
4 because he knew a lot of the evidence anyway.

5 Q Would you say that you had ample time before
6 proceeding to trial to prepare the Applicant's case?

7 A Right.

8 Q During the course of those discussions, did any
9 viable defenses for the Applicant ever come up?

10 A No.

11 Q Did he inform you of any defenses?

12 A No. And he never gave me any alibis either. I
13 don't know where that comes up from. There was
14 nothing in the file about any alibi witnesses and he
15 never told me of any alibi witnesses.

16 Q Did he ever bring up any search and seizure
17 issues, anything about the search warrant used to
18 obtain his blood, for example?

19 A No, not to me.

20 Q Not to you. Were you aware of any issues that
21 he had with that?

22 A I didn't see where there was an issue with the
23 search warrant.

24 Q Now, did you -- we already covered this a
25 little bit, but let me back up a little. Did you

WILLIAM RAST - DIRECT BY MR. LEE

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1 A Uh-huh. Yes, I'm sure I did.

2 Q Did you discuss the possible penalties
3 associated with this?

4 A Yeah, everybody knew life without the
5 possibility of parole.

6 Q Now, did you file a Rule Five and Brady motion
7 to get the State's evidence in this case?

8 A No. The public defender already had it.
9 They'd been representing him for two years before I
10 got involved in it, but I did talk and discuss the
11 case with Dayton Riddle, the Solicitor, on numerous
12 occasions.

13 Q Do you recall discussing the State's evidence
14 with the Applicant?

15 A I'm sure I did. I don't specifically recall
16 that.

17 Q Was it typically your practice in situations
18 like that?

19 A Sure.

20 Q Now --

21 MR. LEE: Beg the Court's indulgence for one
22 second.

23 (Pause.)

24 Q Now, do you remember if you provided the
25 Applicant with a copy of the State's evidence

WILLIAM RAST - DIRECT BY MR. LEE

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1 A Yes, I did.

2 Q About how many times would you say that you met
3 with him?

4 A That was eight years ago, I don't know how many
5 times. Most of my time I had to get the file from
6 the public defender's office and I went through the
7 file and then I talked with him on several
8 occasions.

9 Q Okay. And during the course of those
10 conversations, would you say that the Applicant was
11 cooperative with you? Did you guys engage in a
12 dialogue?

13 A He was hard to get along with. In fact, he
14 made a motion for me to be relieved from
15 representing him. He was a difficult client.

16 Q Okay. But did he -- during the course of those
17 conservations, did he seem to understand the
18 discussions?

19 A Yes, sir.

20 Q Was there any trouble communicating with him?

21 A No, no trouble communicating at all.

22 Q Now, when you met with him to discuss the
23 charges, and you may not remember this, you may, but
24 did you discuss the indictments, the charges against
25 him?

WILLIAM RAST - DIRECT BY MR. LEE

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1 please.

2

WILLIAM RAST,

3

having been duly sworn, testified as follows:

4

DIRECT EXAMINATION

5

BY MR. LEE:

6

Q Mr. Rast, how long have you been practicing
7 law?

8

A Since 1965.

9

Q And what portion of your practice was or is
10 criminal law?

11

A Probably half of it.

12

Q Now, how did you and the Applicant come into
13 contact regarding this particular case, were you
14 appointed or retained?

15

A I got a phone call from Judge Westbrook. I met
16 with him and Dayton Riddle, the Solicitor. They
17 said that Mr. Rogers had had several lawyers, that
18 the public defender had gone through them. I was
19 exempt from being appointed at that time. And Judge
20 Westbrook said, I think you can handle him, would
21 you consent to being appointed? So he appointed me
22 in December of 2000, I believe it was.

23

Q And after you were appointed to represent the
24 Applicant, did you meet with the Applicant to
25 discuss the charges?

HAYWARD LEON ROGERS - REDIRECT BY MS. SHURLING

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1 Q And you and I have subsequently discussed those
2 persons, have we not?

3 A Yes, ma'am, we have.

4 Q And I have advised you that at this late date
5 seven years later, that I met with no success in
6 locating them?

7 A Right.

8 MS. SHURLING: Thank you. No further
9 questions.

10 THE COURT: Do you want to ask him anything
11 based on what she just asked him?

12 MR. LEE: No questions from the State.

13 THE COURT: All right. You can step down.
14 Are you going to have any other witnesses, Ms.
15 Shurling?

16 MS. SHURLING: No further witnesses for the
17 Applicant, Your Honor.

18 THE COURT: Are y'all going to have any?

19 MR. LEE: Yes, Your Honor.

20 THE COURT: All right. Let's take ten minutes.

21 (Brief Recess.)

22 THE COURT: All right. State ready?

23 MR. LEE: Yes, Your Honor.

24 THE COURT: Go ahead.

25 MR. LEE: The State would call Mr. Bill Rast,

HAYWARD LEON ROGERS - REDIRECT BY MS. SHURLING

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1 **THE COURT:** Go ahead.

2 I'll give you a chance to ask him anything else
3 you want to.

4 **MS. SHURLING:** Thank you.

5 **BY MS. SHURLING:**

6 **Q** Wasn't there another piece of clothing that
7 became an issue at your trial that was found at
8 another spot?

9 **A** I think it was the panties and the pantyhose.

10 **Q** Okay. But there was no DNA evidence introduced
11 from any of that, right?

12 **A** No, ma'am.

13 **Q** Okay. So you feel comfortable we've raised
14 everything?

15 **A** (No response.)

16 **Q** Tell me what your remaining concern is as
17 briefly as you can.

18 **A** Also, when I was arrested in October the 6th of
19 1998, when David Shea was my attorney, I told him
20 about I had three alibi witnesses. I also -- when
21 Mr. Rast became my attorney, I also informed him
22 about my alibi witnesses. This is a copy of the
23 motion that was filed for my alibi witness and I
24 think he was ineffective for not -- for failing to
25 ever contact them.

HAYWARD LEON ROGERS - REDIRECT BY MS. SHURLING

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1 represented you during the course of, you know, all
2 the way up and through your trial were Mr. Shea and
3 Mr. Rast, the two lawyers?

4 A Right.

5 MR. LEE: Nothing further for the Applicant,
6 Your Honor.

7 MS. SHURLING: A moment's indulgence.

8 (Pause.)

9 REDIRECT EXAMINATION.

10 BY MS. SHURLING:

11 Q Mr. Rogers, I'm going to trust that your memory
12 of this record is even better than mine, although
13 I've certainly spent a lot of time with it.

14 A Okay.

15 Q There was a sweater that was taken from the
16 victim, returned to her and evidence was taken from
17 that. We've already talked about that.

18 A Right.

19 Q Wasn't there another article of clothing --

20 MR. LEE: Objection, Your Honor. This is well
21 outside the scope of my last question on
22 cross-examination.

23 MS. SHURLING: Your Honor, I am trying to
24 ensure that this is the one and only PCR hearing we
25 have to have in this case.

HAYWARD LEON ROGERS - CROSS BY MR. LEE

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1 A Promise -- you did.

2 Q Now, Mr. Rogers, I want you to apply the same
3 rules I told you, listen carefully to the questions
4 that the State's lawyer asks, answer them very
5 directly, speak up and speak as clearly as you can.

6 A Yes, ma'am.

7 Q And one last rule, tell the truth, okay?

8 A I will, yes, ma'am.

9 MR. LEE: Court's indulgence for one second.

10 THE COURT: Go ahead.

11 (Pause.)

12 MR. LEE: Just one brief question, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. LEE:

15 Q Mr. Rogers, how many attorneys did you go
16 through during the course of your trial, how many
17 lawyers?

18 A Two.

19 Q So it was just Mr. Shea and Mr. Rast, is that
20 correct, or is there another at trial?

21 A It was Mr. Shea and -- no, it was Elizabeth
22 Fullwood and Kathleen Hodges, but Mr. Shea, he
23 relieved his self because he went to another firm.

24 Q So let me make sure I'm understanding you
25 correctly. The only two people that actually

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

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1 justify your life without parole sentence?

2 A Yes, ma'am.

3 Q And if I understand you correctly, that fact
4 along with the fact that your prior was more than
5 ten years old --

6 A Yes, ma'am.

7 Q -- you believe are matters that your lawyer
8 should have raised in defense against your receiving
9 a life without parole sentence?

10 A Yes, ma'am.

11 Q Now, didn't Mr. Rast address some of that in
12 your sentencing?

13 A Partially.

14 Q Okay. To the extent that he did raise it, is
15 that an issue you believe should have been briefed
16 on appeal?

17 A Yes, ma'am.

18 Q To the extent that he didn't raise it, it's an
19 issue you believe he should have more fully
20 preserved for appeal?

21 A Yes, ma'am.

22 Q Anything else?

23 A That's it.

24 Q Are you satisfied that we've fully and
25 completely covered your issues?

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

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1 of my being convicted and sentenced to life without
2 parole that was -- it was an illegal statute because
3 of the fact it was over ten years old and the
4 statute haven't come into effect when I was
5 sentenced to life without parole. And other than
6 that and what my lawyer have discussed, that's about
7 it.

8 Q Let's back up on that last one, okay?

9 A Uh-huh.

10 Q You're saying that the strike law was not in
11 effect at the time of your trial on these charges?

12 A Right. It was not in effect when they used it
13 to give me life without parole.

14 Q Let me -- I think you're mixing up apples and
15 oranges. Let me see if I understand you. Am I
16 correct in saying that your concern is that there
17 was no strike law on the books at the time of the
18 predicate offense?

19 A Correct.

20 Q Okay. You're not saying there wasn't a strike
21 law on the books when you were tried in 2002.
22 You're saying there was no strike law on the books
23 at the time of your first offense --

24 A You're correct.

25 Q -- that was used as a predicate offense to

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

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1 morning because it contained no evidentiary value.
2 And I feel like the trial counsel was ineffective
3 for not thoroughly researching the transcript and
4 investigating this matter.

5 Also, he know from the Jackson versus Denno
6 hearing, that my rights, Miranda rights, was not
7 read to me. There was no written waiver of saying I
8 was refused a lawyer during that time.

9 And would the Court like to have these
10 transcripts for exhibits?

11 BY MS. SHURLING:

12 Q Just, Mr. Rogers, if you will state for the
13 record which portions of the trial transcript you
14 believe support your positions, that's all you need
15 to do.

16 A Okay. I believe pages 360 to 385 supports our
17 position that counsel was ineffective for not
18 challenging the evidence that was given back to the
19 victim, that evidence being the sweater and the
20 pocketbook.

21 Also, to support my position, on page 426 of
22 the transcript where Detective Jason Armondo said --
23 stated on line 18 that nobody ever advised me of my
24 Miranda rights.

25 Also, I would like to further support the issue

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

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1 there?

2 **MS. SHURLING:** With the Court's permission, may
3 I?

4 **THE WITNESS:** With the Court's permission?

5 **THE COURT:** Sure.

6 (Pause.)

7 **MS. SHURLING:** Your Honor, could he have one
8 hand uncuffed so he can look at his materials?

9 **THE COURT:** Sure. Go ahead.

10 **MR. LEE:** Your Honor, I believe this question
11 calls for a narrative. I'm just stating an
12 objection for the record.

13 (Pause.)

14 **THE WITNESS:** Your Honor, May it please the
15 Court. Your Honor, in support of my attorney
16 arguments, I'd like to state for the record that I
17 was not advised of my Miranda rights when I was
18 arrested. During the process of my being
19 interrogated, I was not advised of my rights and I
20 was refused a lawyer.

21 Also, in support of the argument that there was
22 no chain of custody on the sweater and the
23 pocketbook, in the trial transcript on page 360 and
24 385, Ms. Frazier testified under oath that she was
25 instructed to give this evidence back the next

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

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1 any of that stuff?

2 A No, ma'am.

3 Q And you would have wanted your lawyer to raise
4 that?

5 A Yes, ma'am.

6 Q Okay. Now, Mr. Rogers, I have tried as clearly
7 as I know how to articulate what your major concerns
8 about your trial are.

9 A Yes, ma'am.

10 Q But if I've left anything out, this is -- we've
11 been waiting a long time for this day, haven't we?

12 A Yes, ma'am.

13 Q This is your one and, barring extraordinary
14 circumstances not likely to exist in your case, only
15 PCR hearing and you've got a life without parole
16 sentence.

17 A Yes, ma'am.

18 Q So I'm going to ask the attorney general's
19 lawyer and His Honor to bear with us for a minute.
20 Anything I've left out that you want this Court to
21 consider in deciding whether you are deserving of a
22 new trial, I'm going to give you your chance now,
23 with the Court's permission, to tell the Court what
24 I've left out.

25 A Okay. Could you pass me up my paperwork right

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

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1 Q And I believe, from my prior interviews with
2 you, that that is yet another sustaining ground that
3 you believe defense counsel should have raised in a
4 challenge of that evidence?

5 A Yes, ma'am.

6 Q That that nurse was not present to testify to
7 the procedures employed in drawing and preserving
8 the evidence sample?

9 A Yes, ma'am, correct.

10 Q Did your lawyer raise that issue at trial?

11 -A No, ma'am.

12 Q Did you ask him to?

13 A I didn't know, Your Honor -- I mean, Ms.
14 Shurling.

15 Q Is that one of the things that since you've
16 been in the penitentiary and had a chance to do some
17 reading and studying, you feel he should have
18 raised?

19 A Yes, ma'am.

20 Q Okay. And you believe that that would have
21 been a good basis for challenging the chain of
22 custody on your blood sample?

23 A Yes, ma'am, I think so.

24 Q Because nobody testified to the procedure that
25 was used to draw the blood or how it was marked or

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

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1 BY MS. SHURLING:

2 Q Do you remember when that hearing before Judge
3 Nicholson was held?

4 A I think that hearing was held in February of
5 2001, I think.

6 Q Who was your lawyer at that time?

7 A Mr. Rast.

8 Q And then you did not go to trial until
9 September of 2001?

10 A Right.

11 Q So a few months later you were tried?

12 A Right.

13 Q Okay.

14 MS. SHURLING: A moment's indulgence, Your
15 Honor.

16 (Pause.)

17 Q Going back for a moment to your allegation that
18 trial counsel did not challenge the blood evidence
19 in your case.

20 A Yes, ma'am.

21 Q At trial, the officer who was present when your
22 blood was drawn testified, correct?

23 A Yes, ma'am.

24 Q Did the nurse who drew the blood testify?

25 A No, ma'am.

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

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1 pretrial transcripts that I be tried in a certain
2 time and I was not tried by that time.

3 Q Okay. So Judge Nicholson instructed that you
4 be tried by a certain time?

5 A Yes, ma'am.

6 Q And you were not tried within that time limit?

7 A No, ma'am.

8 Q Did your lawyer then make a motion for you to
9 be released from custody?

10 A No, ma'am.

11 Q Based on the delay in prosecution?

12 A No, ma'am.

13 MR. LEE: Objection, Your Honor. I understand
14 this is the Applicant's one bite at the apple, but
15 it was my impression that you're supposed to stay
16 within the actual claims listed in the application.
17 And this, at least according to my review of the
18 application and my conversations with Ms. Shurling,
19 appears to be outside that scope.

20 MS. SHURLING: Your Honor, there's also a
21 Supreme Court decision last year that allows me to
22 develop any issue that is presented that becomes
23 evidence based on the testimony adduced during the
24 PCR proceeding.

25 THE COURT: Go ahead.

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

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1 A No, ma'am.

2 Q So you sat in detention for 36 months with
3 nobody ever filing a motion for a speedy trial?

4 A May I clarify that? I tried to file a motion
5 myself, but as far as an attorney, no, ma'am, nobody
6 filed it.

7 Q Okay. You attempted to file a motion for a
8 speedy trial with the Clerk of Court in Lexington?

9 A Yes, ma'am.

10 Q And was it rejected because you had a lawyer?

11 A The Honorable J.C. Buddy Nicholson, he granted
12 the speedy trial.

13 Q So Judge Nicholson heard your pro se motion for
14 a speedy trial?

15 A Yes, ma'am.

16 Q Is that how your case finally got tried after
17 36 months?

18 A It still proceeded on without the speedy trial.

19 Q Okay. Let me back up. You said Judge
20 Nicholson granted your motion for a speedy trial?

21 A Yes, ma'am.

22 Q But then you weren't tried right away?

23 A Right.

24 Q Well, then he didn't grant your motion.

25 A He had left on the record in one of the

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

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1 Q All right. What other issues do you believe
2 she should have raised that she did not raise?

3 A Those are the only ones I can think of.

4 Q Okay. You sure? I want you to take your time
5 and think. We're making pretty good time. I don't
6 want you to rush.

7 A There was one issue dealing with the fast and
8 speedy trial that was never briefed.

9 Q And how long were you in custody before you
10 were tried?

11 A I think it was something like 36 months,
12 something like that.

13 Q Did your lawyer make a motion for your charges
14 to be dropped as a result of the delay in trial?

15 A No, ma'am.

16 Q So that issue would not have actually been
17 preserved for appeal, would it?

18 A No, ma'am.

19 Q So would your problem be that trial counsel
20 didn't make a motion to drop the charges based on
21 the delay in prosecution?

22 A Yes, ma'am.

23 Q Did your lawyer, either one of them, either
24 David Shea or Mr. Rast, ever file a motion for a
25 speedy trial?

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

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1 the Court of Appeals find?

2 A That it was in the best interest of the victim.

3 Q Pardon?

4 A I believe it was something in the grounds, it
5 was in the best interest of the victim.

6 Q Well, let me read directly from the opinion:
7 Here, Rogers never raised the issue of using an
8 interpreter during direct examination to the trial
9 court, therefore this issue is not preserved for
10 appellate review.

11 That's right, isn't it?

12 A Yes, ma'am, that's right.

13 Q Okay. So at least with regard to that issue,
14 it wasn't appellate counsel's fault, it was trial
15 counsel's lack of preservation on that issue that
16 impeded your appeal?

17 A Yes, ma'am, I agree.

18 Q Now, what other issues do you feel like Wanda
19 Haigler should have raised that she did not raise?

20 A I felt like she should have had raised the
21 issue of a directed verdict on the lack of evidence.

22 Q Okay. So you believe that Ms. Haigler should
23 have briefed the question of the sufficiency of the
24 evidence for the case to go to the jury?

25 A Yes, ma'am.

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING.

30

1 Q Well --

2 A Is that the same?

3 Q Mr. Rogers, we're about to get into the part
4 about listening closely to my questions again. Were
5 you ever offered a plea bargain in this case?

6 A Yes, ma'am.

7 Q And if I understood your last answer, the offer
8 was to plead for a 25 year sentence?

9 A Yes, ma'am.

10 Q And do you know what you would have been
11 - pleading to? What the charge would have been?

12 A No, ma'am. It didn't go that far.

13 Q Okay. And why did you decline that offer?

14 A Because I was innocent.

15 Q Okay. Had you known that the State alleged
16 they had a DNA match to you, would that have made a
17 difference in your decision to accept or reject the
18 offer?

19 A No, ma'am.

20 Q It would not?

21 A No.

22 Q The Office of Appellate Defense, Wanda Haigler
23 Haile, I believe, handled your direct appeal?

24 A Yes, ma'am.

25 Q And on the issue of the interpreter, what did

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

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1 Q And, once again, before trial, you knew about
2 the fingerprint evidence?

3 A Yes, ma'am.

4 Q And you knew about the DNA evidence?

5 A I didn't know about the DNA evidence.

6 Q You did not know about the DNA evidence in
7 advance of trial?

8 A No, ma'am.

9 Q Okay. But you knew about the fingerprint
10 stuff?

11 A Yes.

12 Q And you knew that they had at least drawn --
13 you at least did know they'd drawn blood from you?

14 A Yes, ma'am.

15 Q And I'm sorry to be redundant, but this needs
16 to be real clear. You did not know in advance of
17 trial that this woman was deaf?

18 A No, ma'am, I didn't.

19 Q Okay. Now, were any plea bargains offered to
20 you in this case?

21 A No, ma'am.

22 Q There were no offers to plead guilty to lesser
23 charges or to a lesser penalty than life without
24 parole?

25 A There was an offer to plead to 25 years.

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

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- 1 A Yes, ma'am.
- 2 Q Got orders from the court approving money for
3 experts?
- 4 A Yes, ma'am.
- 5 Q What kind of experts are we talking about?
- 6 A Crime scene, fingerprint expert, identification
7 expert, a DNA expert, a private investigator and an
8 expert in identification.
- 9 Q Okay. And once you got a new lawyer, once you
10 had Mr. Rast, did he discuss with you the
11 possibility of hiring any of those experts?
- 12 A No, ma'am.
- 13 Q And you think he should have?
- 14 A Yes, ma'am.
- 15 Q Now, would it be fair to say that the lack of
16 an interpreter at trial is the main issue in your
17 case that you feel justifies a new trial?
- 18 A Yes, ma'am, I believe so.
- 19 Q Without an interpreter, do you feel your lawyer
20 could adequately cross-examine this woman?
- 21 A No, ma'am.
- 22 Q Without an interpreter, do you feel your lawyer
23 could explore other possibilities for explaining
24 some of the evidence in the State's case?
- 25 A No, ma'am.

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

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1 trial if your lawyer didn't go over discovery with
2 you?

3 A Oh, that -- it was somewhere close to trial and
4 my lawyer told me that there was an alleged print
5 found in the pocketbook, but he never went over it.
6 He just told me a print was found in the pocketbook.

7 Q Okay. How about the blood evidence? Did he
8 discuss with you the blood evidence?

9 A Huh-huh. He didn't discuss that with me.

10 Q Now, did you testify at your trial?

11 A No, ma'am.

12 Q Did you discuss whether or not you should with
13 your attorney?

14 A No, ma'am.

15 Q Why didn't you testify at trial?

16 A Because he never explained to me what I would
17 testify to.

18 Q Okay. Now, you have also alleged, and I've
19 raised it for you because you felt strongly about
20 it, that trial counsel was ineffective for failing
21 to use readily available experts funds for which had
22 already been obtained by previous defense counsel in
23 defense at trial?

24 A Yes, ma'am.

25 Q Now, your first lawyer, David Shea.

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

26

1 Q After you were tried and convicted and put in
2 the penitentiary, did you start doing a little
3 research on your own?

4 A Yes, ma'am.

5 Q And when you discovered what discovery
6 materials are, did you request a copy of the
7 discovery materials in your case?

8 A Yes, ma'am.

9 Q Okay. Did your lawyer, regardless of whether
10 you knew what they were called or not, did your
11 lawyer ever come and sit down with you and go over a
12 big stack of materials that he'd been given by the
13 Solicitor's office?

14 A No, ma'am.

15 Q At no time?

16 A At no time.

17 Q Well, did he come and sit and go over with you
18 what evidence the State intended to use against you
19 at trial?

20 A No, ma'am.

21 Q Were you aware, prior to trial, that the State
22 allegedly had a fingerprint of yours found inside
23 this purse?

24 A Yes, ma'am.

25 Q And how did you become aware of that prior to

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

25

1 A Yes, ma'am.

2 Q Because the police had let go of that purse for
3 a significant period of time before retrieving it
4 and allegedly finding damning evidence in it?

5 A Yes, ma'am.

6 Q Okay. And your lawyer didn't raise that issue?

7 A No, ma'am, he didn't.

8 Q Okay. Now, let's talk about pretrial. Do you
9 know what I mean when I talk about discovery
10 materials?

11 A Yes, ma'am.

12 Q You do now. Did you at the time of your --

13 A I do now.

14 Q Okay. What's the other rule I told you about
15 testifying?

16 A Wait and listen.

17 Q And one of us gets to talk at a time or else we
18 make that nice lady crazy, okay?

19 A Right.

20 Q And that one even might have been my fault, but
21 let's just both try to be better.

22 A Okay.

23 Q Prior to trial, did you know what discovery
24 materials were?

25 A No, ma'am.

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

24

1 A Yes, ma'am.

2 Q Now, was the victim's pocketbook returned to
3 her the day after this incident along with the
4 sweater?

5 A Yes, ma'am.

6 Q So the victim's pocketbook was in her custody
7 for that same period of time the sweater was?

8 A Yes, ma'am.

9 Q And after that, the pocketbook was picked back
10 up and the fingerprint was found on a piece of paper
11 inside the purse?

12 A Yes, ma'am.

13 Q What kind of piece of paper was it; do you
14 remember?

15 A I believe it was a white piece of paper or
16 envelope or something to that nature.

17 Q Was it possibly referred to as a pay stub, I
18 believe?

19 A It's a possibility.

20 MS. SHURLING: Your Honor, my memory might not
21 be accurate on that, but I think that's correct, a
22 pay stub.

23 Q So it is your position once again that this was
24 evidence that your lawyer should have challenged
25 being admitted at your trial?

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

23

1 clearly.

2 Q You also, I believe, wanted to challenge trial
3 counsel's failure to challenge the admissibility of
4 evidence taken from the victim's pocketbook?

5 A Yes, ma'am.

6 Q Can you explain that to the Court?

7 A It was to my belief that they found a piece of
8 paper inside the pocketbook where they claim to
9 have found a partial thumb print that supposed
10 (inaudible) --

11 COURT REPORTER: I'm sorry, can you say that
12 again?

13 THE WITNESS: To my belief, there was a piece
14 of paper in the pocketbook that supposed to have a
15 partial print that supposed to have matched to my
16 prints.

17 MS. SHURLING: So if I can have a little
18 latitude, Your Honor, I'll be careful.

19 BY MS. SHURLING:

20 Q At trial, evidence was introduced that a
21 partial fingerprint was found on a piece of paper
22 inside the alleged victim's pocketbook?

23 A Yes, ma'am.

24 Q And that that partial fingerprint matched your
25 fingerprint?

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

22

1 **THE COURT:** Can I ask you a question for
2 clarification? Was the sweater in custody of the
3 police at the time that the blood samples were taken
4 off of it, or how does the sweater play in -- there
5 was blood on it?

6 **MS. SHURLING:** It was given back to the victim
7 and remained at her home for about a week and then
8 they picked it back up and did the forensic testing
9 on it.

10 **THE COURT:** Got you, okay.

11 **BY MS. SHURLING:**

12 **Q** And so it's your position that that so fatally
13 damaged the chain of custody, that your lawyer
14 should have challenged the admissibility of the test
15 results from that sweater?

16 **A** Yes, ma'am.

17 **Q** And he did not?

18 **A** He did not.

19 **Q** Okay. Now, you've also said that trial counsel
20 was ineffective for --

21 **MS. SHURLING:** Your Honor, I'm sorry, I'm being
22 less than articulate. On item number three, the
23 failure of trial counsel to challenge chain of
24 custody on Applicant's blood, I apologize, there is,
25 really, a second one that I didn't understand

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

21

1 Q Now, are you talking about the handbag or the
2 sweater?

3 A The sweater was, also.

4 Q Okay. So the sweater was returned to the
5 victim the morning after the incident?

6 A Yes, ma'am.

7 Q And a week later, it was picked up?

8 A Yes, ma'am.

9 Q And you believe that that created a chain of
10 custody issue that your lawyer should have used to
11 challenge the admissibility of the blood evidence as
12 well?

13 A Yes, ma'am.

14 Q When you say that trial counsel was ineffective
15 for failing to challenge the chain of custody on the
16 Applicant's blood, we need to clarify. What you
17 mean is that defense counsel should have challenged
18 the admissibility of the evidence that your blood
19 was allegedly on the sweater?

20 A Yes, ma'am.

21 Q And that he should have done so based on the
22 fact that the trial transcript reveals that the
23 sweater was not in law enforcement custody for a
24 significant period of time after the incident?

25 A Yes, ma'am.

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

20

1 Q And what was his position on this issue?

2 A They never made no follow up.

3 Q What did he tell you about the issue?

4 A Okay. My first attorney then, Mr. David Shea,
5 told me that it would be entered into the record,
6 but somewhere down the line he was dismissed for
7 Mr. Rast. And when Mr. Rast became my lawyer, I
8 told him about the events that led during the time
9 that they was taking my blood and so forth and he
10 told me that he would move for a timely motion to
11 suppress.

12 Q Okay. Now, were the results of testing on that
13 blood introduced at trial?

14 A Orally, yes, ma'am.

15 Q And what was the State's position was the
16 significance of that blood?

17 A They say that they had matched a DNA of my
18 blood on a spot of blood that was on a sweater.

19 Q On a sweater?

20 A Yes, ma'am.

21 Q Now, where was that sweater found?

22 A The morning after the incident happened,
23 Sergeant Frazier took it back to the victim's house
24 where it stayed for a week before the officer went
25 back and got it.

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

19

1 is that you would have the right to counsel when
2 giving that evidence to law enforcement?

3 A Yes, ma'am.

4 Q And that your attorney at trial --

5 MR. LEE: Your Honor, I'd like to object.
6 There's a little bit of leading going on here.

7 MS. SHURLING: I'm just trying to avoid being
8 here all day, Your Honor.

9 THE COURT: I'll give you a little bit of
10 leeway on that. Go ahead.

11 MS. SHURLING: Thank you.

12 BY MS. SHURLING:

13 Q What is it that you think your trial lawyer
14 should have done about it?

15 A I think he should have moved for a suppression
16 hearing.

17 Q And you think he should have moved to suppress
18 your blood results on what ground?

19 A That I wasn't advised of my right to an
20 attorney and I asked for an attorney.

21 Q And you told him you had asked for an attorney?

22 A Yes, ma'am.

23 Q Okay. Did you actually discuss that issue with
24 your trial attorney?

25 A When I finally got an attorney, I did.

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

18

1 blood from you?

2 A It was anywhere from a week to eight days.

3 Q And did you have a lawyer by then?

4 A No, ma'am.

5 Q You did not have counsel?

6 A No, ma'am.

7 Q Did they take you to court for something called
8 a Schmerber hearing?

9 A No, ma'am.

10 Q Had anyone discussed with you the differences
11 in the standards for when you can be called upon to
12 give bodily fluids or hair or evidence of that sort
13 versus any other kind of physical evidence?

14 A No, ma'am, nobody.

15 Q Okay. So when they came to draw blood, what
16 did they tell you?

17 A They told me that they wanted a sample of my
18 blood.

19 Q And did you consent to your blood being taken?

20 A No, ma'am.

21 Q And you believe that that was unlawful and
22 illegal for what reason?

23 A For the reason that I couldn't have an
24 attorney.

25 Q So it is your belief that the lawful standard

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

17

1 A Yes, ma'am.

2 Q Did you feel comfortable having the lady's son
3 be the interpreter?

4 A No, ma'am.

5 Q Did your lawyer discuss with you at any point
6 whether you had any objections to her son being the
7 only interpreter in this case?

8 A He didn't ask me nothing.

9 Q Okay. Had he discussed this fact with you,
10 would you have insisted that he contact, prior to
11 the trial, State of South Carolina Association for
12 the Deaf and Blind or some other organization and
13 get a suitable certified court interpreter?

14 A Yes, ma'am.

15 Q Okay. And you believe that that is one of the
16 major ways in which he failed to provide you with
17 effective assistance of counsel?

18 A Yes, ma'am.

19 Q All right. Additionally, trial counsel was
20 ineffective for failing to challenge the sufficiency
21 of the search warrant used to draw your blood. Now,
22 in my experience, you get real excited when you're
23 talking about this issue and I understand why, okay,
24 but let's just try to focus. After you were
25 arrested, how long was it before they came to draw

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

16

1 speak up and be heard.

2 A Okay.

3 Q All right. Let's get started.

4 The victim in this case was deaf or had been
5 since she was eight years old and that's documented
6 in the Court of Appeals decision, correct?

7 A Yes, ma'am.

8 Q And you knew that ahead of time from the
9 discovery materials that you had discussed with
10 Mr. Rast, correct?

11 A No, I didn't.

12 Q You did not know in advance of trial that this
13 woman was deaf?

14 A No, ma'am.

15 Q Your lawyer had never discussed with you the
16 fact that the victim had acute hearing loss?

17 A No, ma'am.

18 Q If he had done so, would you have wanted him to
19 make arrangements for a certified interpreter for
20 court?

21 A Yes, ma'am.

22 Q Now, you've heard me read from the Court of
23 Appeals decision the fact that the court allowed the
24 alleged victim's son to serve as an interpreter in
25 this case; is that correct?

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

15

1 A Yes, ma'am.

2 Q Because I know, from my experience in talking
3 with you, that that can be kind of distracting and
4 we really want Judge Young to focus his attention on
5 these issues, okay?

6 A Yes, ma'am.

7 Q You will get your time at the end if you'll be
8 patient and persevere to add to anything that I've
9 put on the record.

10 A Okay.

11 Q Fair enough?

12 A That's fair.

13 Q All right. Now, one last thing, the nice lady
14 in front of you has got to write down every word you
15 say.

16 A Okay.

17 Q And despite being, shall I say, strong willed,
18 you're also soft spoken. So I need you to speak up
19 and speak clearly for two reasons: Number one,
20 she's got to write it down. Number two, if he
21 doesn't hear you and understand you, it won't be any
22 good. Okay?

23 A Yes, ma'am.

24 Q You don't have to bellow like me. I've been
25 told my voice carries too well, but you do need to

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

14

1 critical to the adequate collateral review of your
2 judgments and sentences, I'm going to ask the Court
3 to allow you to articulate those for the record as
4 well.

5 A Yes, ma'am.

6 Q Okay. But for now, what have I told you about
7 answering questions in the courtroom here today?

8 A Listen.

9 Q Listen. What else did I tell you?

10 A (No response.)

11 Q Answer the questions?

12 A Answer the question.

13 Q Do not go off on side trips, okay?

14 A Okay.

15 Q It's very important that His Honor hear what we
16 have to say in this discussion in the courtroom in
17 this question and answer format.

18 A Right.

19 Q It's very important that he understands the
20 point that I'm trying to make at any particular
21 juncture, okay?

22 A Yes, ma'am.

23 Q So I know it's tempting, during that
24 questioning, it may remind you of something that you
25 want to go off on, please don't, okay?

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

13

1 Q We have butted heads, to use a good 'ol
2 southern term, rather regularly, haven't we?

3 A Yes, ma'am.

4 Q Do you think we've come to a sufficient
5 understanding at this point that you feel
6 comfortable with me?

7 A Yes, ma'am.

8 Q All right. Then let's start at the beginning.
9 You have alleged both ineffective assistance of
10 trial counsel and ineffective assistance of
11 appellate counsel; is that correct?

12 A Yes, ma'am.

13 Q All right. Now, specifically, after meeting
14 with you, I attempted to separate the weak from the
15 chaff, to use a biblical expression, and narrow your
16 major complaints down to the four that I raised in
17 amended application for post-conviction relief. You
18 heard me publish those allegations for the record
19 earlier?

20 A Yes, ma'am.

21 Q I'd like to go over those one at a time and let
22 you state your position on those.

23 A Yes, ma'am.

24 Q Now, with leave of Court, as I've promised you,
25 at the end, if there are issues that you feel are

HAYWARD LEON ROGERS - DIRECT BY MS. SHURLING

12

1 parole for the other charges. And, of course, the
2 decision of the lower court was affirmed on appeal.

3 With that factual background, Your Honor, I
4 would call the Applicant to the stand.

5 THE COURT: I'll remind you you're still under
6 oath, okay?

7 MR. ROGERS: Okay.

8 HAYWARD LEON ROGERS,
9 having been previously duly sworn, testified as
10 follows:

11 DIRECT EXAMINATION

12 BY MS. SHURLING:

13 Q Mr. Rogers, would you state your full name for
14 the record?

15 A Hayward Leon Rogers.

16 Q Mr. Rogers, I've been your lawyer for some time
17 now, haven't I?

18 A Yes, ma'am.

19 Q Have I met with you on multiple occasions at
20 your correctional facility?

21 A Yes, ma'am.

22 Q Have I, at each of these meetings, given you an
23 opportunity to discuss with me the issues you wanted
24 to raise on collateral review?

25 A Yes, ma'am.

1 the hospital where a rape protocol kit was prepared.
2 A week later the victim helped police draw a
3 composite sketch of her assailant, which was used to
4 arrest the Applicant.

5 Obviously, it says Rogers in the opinion, Your
6 Honor.

7 The victim, who was 57 years at the time of the
8 attack, has been deaf since the age of eight. As a
9 result, her speech is difficult to understand and
10 she communicates through some vocalization combined
11 with gestures. Because of this unique system of
12 communication, both the Solicitor and Rogers'
13 counsel had problems eliciting testimony from the
14 victim at trial.

15 To cope with the problems, the trial court
16 allowed the extensive use of leading questions
17 during the victim's direct examination. During
18 cross-examination, however, leading questions alone
19 did not facilitate communication between the victim
20 and defense counsel, thus the court found it
21 necessary to allow the victim's son to serve as an
22 interpreter.

23 Rogers was convicted on all charges and
24 sentenced concurrently to 15 years for robbery and
25 four years -- and four sentences of life without

1 **THE COURT:** All right. Well, you're ready to
2 proceed today?

3 **MR. ROGERS:** Yes, sir.

4 **THE COURT:** All right. Sounds to me like you
5 know what you're doing. All right, that's fine.
6 Are you ready?

7 **MS. SHURLING:** Thank you, Your Honor.

8 Your Honor, I believe that a little bit of
9 factual background is always helpful. And the
10 statement of the facts found in the decision of the
11 Court of Appeals is fairly succinct. With the
12 Court's permission, I'll just read that for the
13 record real quickly.

14 **THE COURT:** Okay.

15 **MS. SHURLING:** On the evening of September
16 28th, 2002, the victim left a fast food restaurant
17 in West Columbia and was walking toward a video
18 poker parlor when a man pushed her to the ground and
19 raped her. The victim fought back and eventually
20 caused her perpetrator to flee by throwing sand in
21 his eyes. When the perpetrator fled, he took with
22 him the victim's purse and her newly purchased food.

23 A police officer on patrol found the victim
24 shaking and crying on the side of the road and he
25 called an ambulance. The victim was transported to

1 **THE COURT:** Okay. Well, I tell you, it's been
2 my experience she probably knows more about these
3 things than just anybody that does it, probably
4 including everybody in this courtroom and that
5 includes me, too. She's been doing them longer than
6 I've been doing them. So if anybody can figure out
7 what is an issue in this case, it'd be her.

8 So if you didn't want her, I don't know who you
9 would get any better in that field. So I want you
10 to feel comfortable with that as far as I'm
11 concerned. It doesn't mean you'll win, but if
12 there's anybody that can help you out on a PCR,
13 you're sitting there next to that lady and she's
14 your lawyer, so I think you've probably made a good
15 decision.

16 How old are you?

17 **MR. ROGERS:** Fifty-four.

18 **THE COURT:** Okay. How far did you get in
19 school?

20 **MR. ROGERS:** Finished.

21 **THE COURT:** Finished high school?

22 **MR. ROGERS:** Yeah.

23 **THE COURT:** How long have you been in jail on
24 these charges?

25 **MR. ROGERS:** Going on 11 years.

1 for a second.

2 HAYWARD ROGERS,

3 having been duly sworn, testified as follows:

4 **THE COURT:** Now, Ms. Shurling just gave me a
5 little background on what this case is all about.
6 And she's told me that you've changed your mind a
7 couple of times about whether or not you want to
8 have her as your lawyer in this proceeding. What's
9 your thoughts on that today?

10 **MR. ROGERS:** After I took a closer look at what
11 she did and so forth, right, I finally saw the
12 picture on what she did, so it made a lot of sense,
13 so I'm satisfied.

14 **THE COURT:** Okay. You understand now we're
15 going to start here in a minute, you can't change
16 your mind in the middle of the hearing and decide
17 you don't want her to be your lawyer anymore?

18 **MR. ROGERS:** Right.

19 **THE COURT:** So you want to proceed now and have
20 her represent you?

21 **MR. ROGERS:** See, Your Honor, at first, I
22 didn't understand the issues that she raised, right.
23 And then I took a look at them from a different
24 viewpoint and it more than less covered what I was
25 worried about.

1 comfortable with me being his lawyer and wanting me
2 to be relieved as his counsel.

3 As recently as approximately three weeks ago, I
4 had received a letter from Mr. Rogers asking -- or
5 indicating that he was going to ask that I be
6 discharged from this matter. I had indicated
7 previously that while I was happy to serve, I don't
8 have any desire to represent someone who does not
9 want me as his counsel. Subsequent to that, it was
10 -- and I apologize, it was either a phone message or
11 a letter, I don't remember which, I think it was a
12 letter about three weeks ago when he had wanted me
13 to be relieved.

14 I received another piece of correspondence in
15 the last ten days indicating that in light of my
16 experience and reputation in this field, that he had
17 decided that it would be in his best interest to
18 keep me.

19 So I think before we get started and waste
20 valuable court resources, it's probably in
21 everyone's best interest that the Court question
22 Mr. Rogers somewhat at length and determine that
23 we're not going to get halfway into this proceeding
24 and him ask that I be relieved.

25 **THE COURT:** Okay. Mr. Rogers, stand up there

1 failing to require that a certified interpreter be
2 sworn to take the victim's testimony, that trial
3 counsel was ineffective for failing to challenge the
4 sufficiency of the search warrant used to draw his
5 blood, that trial counsel was ineffective for
6 failing to challenge the chain of custody on the
7 Applicant's blood and that trial counsel was
8 ineffective for failing to use readily available
9 experts funds for which had already been obtained by
10 previous defense counsel in the Applicant's defense
11 at trial.

12 Your Honor, I would be remiss if I did not
13 advise the Court that the case has a somewhat
14 checkered history. I am far from Mr. Rogers' first
15 lawyer. He's had a few before me.

16 I took the case at the request of the court. I
17 received a call from the Honorable Knox McMahon
18 requesting that I consider taking this appointment.
19 He wanted to ensure, hopefully, that Mr. Rogers'
20 most recent court-appointed lawyer would be his last
21 one.

22 I've been representing him for some time. Over
23 the last year in particular, I have met with
24 Mr. Rogers frequently. We've been to court a couple
25 of times. And he has vacillated between being

1 William Rast, Your Honor, on September 21st, 2001.
2 He was tried by a jury and found guilty on all
3 counts.

4 He was sentenced by the late Mark Westbrook to
5 confinement for a period of life without parole for
6 kidnapping, both counts of criminal sexual conduct
7 in the first degree and assault and battery with
8 intent to kill. He was also sentenced to 15 years
9 for strong arm robbery.

10 Your Honor, he filed his application for
11 post-conviction relief in October of 2004 following
12 an unfavorable decision on direct appeal issued by
13 the Court of Appeals in August of 2004. His
14 application for post-conviction relief alleges
15 generally that he received ineffective assistance of
16 counsel both at trial and on appeal in violation of
17 his rights pursuant to the Sixth and Fourteenth
18 Amendments to the United States Constitution, as
19 well as our own State Constitution Article 1 Section
20 14.

21 Your Honor, in addition, we filed an amended
22 application for post-conviction relief back on
23 August 21st, 2008, alleging some more narrow
24 allegations of Sixth Amendment violations,
25 specifically that trial counsel was ineffective for

1 (The following proceedings were held on May
2 18, 2009.)

3 **THE COURT:** We've got here Hayward Rogers.
4 You're Mr. Rogers?

5 **MR. ROGERS:** Yes, sir.

6 **THE COURT:** Let the record reflect Mr. Rogers
7 is present in the courtroom. This is Hayward Rogers
8 versus the State of South Carolina, 2004-CP-32-3932.
9 This is a post-conviction relief action. Ms.
10 Shurling represents Mr. Rogers. Are y'all ready to
11 go?

12 **MR. LEE:** Yes, sir.

13 **MS. SHURLING:** We are, Your Honor.

14 **THE COURT:** All right. What would you like to
15 tell me about this before we start, anything?

16 **MS. SHURLING:** Your Honor, generally, the
17 attorney general's office likes to set up a little
18 procedural history on the case. I'll be happy to do
19 it if you prefer.

20 Thank you, Your Honor. The Applicant, Your
21 Honor, was indicted by the Lexington County Grand
22 Jury, of course, for kidnapping, two counts of first
23 degree criminal sexual conduct, assault and battery
24 with intent to kill and strong arm robbery. He was
25 represented in the Court of General Sessions by

1	EXHIBITS			
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
3				
4	(There were no exhibits.)			
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JUN 14 2019

S.C. SUPREME COURT

The State of South Carolina
In The Supreme Court
Appeal From Lexington County
Honorable William P. Keesley Circuit Judge
Case No. 2004-CP-32-3932
Case No. 2016-CP-32-2815
Appellate No. 2019-000429

HAYWARD L. ROGERS,

PETITIONER,

VS.

STATE OF South Carolina,

Respondent.

Certificate of Service

I, The undersigned, Hereby do Certify That on This date a Copy of The "Petition for Writ of Certiorari" was served upon Kelly Oppenheimer, E.S.Q., by placing a Copy of The same in The U.S. mail postage prepaid.

June 12, 2019

Hayward L. Rogers

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petition



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