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S.C. SUPREME COURT

South Carolina Supreme Court
Post office Box 11330
Columbia, South Carolina 29211

March 25, 2019

Re: Appellate Case No. 2019-000429
Lower Court Case No. 2016-CP-32-02815

Dear Mr. Shearouse;
In Response To your Letter dated 3/19/2019,
Please Use The discussion Contained in The notice of appeal To be my explanation under Rule 243(c).

Sincerely,
Hayward L. Rogers

CC: S.C. Attorney General

FILED

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	2019 FEB 28 AM 11:12	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
	LISA M. COMER CLERK OF COURT LEXINGTON SC	
Hayward L. Rogers, SCDC #278510,	)	Case No.: 2016-CP-32-2815
	)	
Applicant,	)	
v.	)	ORDER ON RECONSIDERATION
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The issue before the court is the applicant's motion to alter or amend an order dismissing his fourth (at least) state court post-conviction relief ("PCR") action. The order of dismissal was filed on May 14, 2018. The court denies the motion and dismisses this case, with prejudice.

The procedural history of this case is convoluted due to the overlapping filings by the applicant. Mr. Rogers was indicted in February 1999 for the crimes of kidnapping (1999-GS-32-813), strong-arm robbery (1999-GS-32-814), two counts of criminal sexual conduct in the first degree (1999-GS-32-815 and 818), and assault and battery with intent to kill (1999-GS-32-819). He was represented by counsel, and a jury convicted him on September 21, 2001. His convictions were upheld on appeal.

WJM #1

The procedural history in state and federal court has been recited in previous orders. Without intending to list all the filings by the applicant, the file reflects that the applicant filed a federal habeas corpus action on November 18, 2002.

On October 27, 2004, while the applicant's fourth federal habeas action was pending, he filed his first state application for PCR (2004-CP-32-03932). He was represented by counsel on that PCR case. An order of dismissal was filed on August 20, 2009. A motion to alter or amend the first denial of PCR was filed on October 29, 2009.

The applicant appealed to the Supreme Court of South Carolina. On June 8, 2012, the Court affirmed. Rehearing was denied, and on August 23, 2012, the Court issued its remittitur.

While the first PCR was pending, a second PCR application was filed on September 3, 2010. It included a claim of newly-discovered evidence. That case was dismissed by order filed January 4, 2012. The applicant moved to alter or amend, which was denied by order filed September 18, 2012.

The applicant appealed the dismissal of the second PCR. The Supreme Court of South Carolina denied the appeal on November 28, 2012, and issued a remittitur on November 30, 2012.

While the second PCR case was pending, the applicant pursued twenty-three claims in an application filed in federal court on July 6, 2012. [See C/A 2:12-1858-TMC-BHH]

The applicant filed a third PCR action in state court on August 8, 2012 (2012-CP-32-03237). Counsel was appointed to represent the applicant. As amended, the third PCR case also contained an assertion of newly-discovered evidence. The State moved to dismiss, and following a hearing on that motion, the third PCR was dismissed by order filed April 29, 2016. The applicant moved to alter or amend, which was denied by order filed June 13, 2016.

WPL #2

An appeal was filed with the Supreme Court of South Carolina concerning the denial of the third PCR application. On July 25, 2016, the appeal was denied. The remittitur was issued on August 11, 2016.

The current PCR action was filed on August 11, 2016, and assigned Case Number 2016-CP-32-02815.[1] On that same date, several documents were filed with this action, though at

[1] On August 25, 2016, the Clerk also filed a letter from the applicant in which he stated that he had submitted a motion for a new trial and a motion for appointment of counsel in his underlying General Sessions cases, but had heard no response. Much of the confusion in proceeding on the pending PCR case is due to the overlapping requests. The

different times -- some before and some after the time indicated for filing this action. Those documents were captioned as being in a different case - Case Number 2016-CP-32-01873. An affidavit of default, a motion for entry of default, and a motion to dismiss from that case were included in this file. Later on August 11, 2016, the Clerk of Court clocked-in a copy of a SLED serology report dated January 20, 1999, which relates to the underlying criminal case.

The matter pending before the court is a motion to alter or amend an order dated April 26, 2018, filed on April 27, 2018, in which the court confirmed its conditional order of dismissal of this fourth PCR action. The court had requested a proposed order from the Attorney General. The court surmises that before the applicant received a copy of the signed and filed order, the applicant submitted an objection to the proposed order of dismissal on May 2, 2018. Upon receiving a copy of the signed order, he filed this motion to alter or amend on May 14, 2018. By order filed June 1, 2018, the court notified the parties that the motion would be decided on written submissions under Rule 59(f), SCRCP, and deadlines were set.

WPL #3

The dismissal of this action is based on its being improperly successive, time barred, and raising a claim that is not cognizable in a PCR action. Other grounds asserted by the State, such as laches, appear meritorious, though they do not need to be addressed summarily because of the procedural bar. The reasoning for the issuance of the dismissal was covered in the previous order. Having reconsidered the matter, the court finds no basis to alter or amend the order. This case is dismissed, with prejudice. Any request by the applicant to appoint counsel is denied because he

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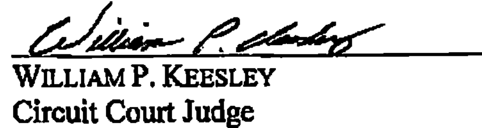
undersigned judge was involved in the case by virtue of being the Chief Judge for Administrative Purposes for Common Pleas court at the time. The Honorable Eugene C. Griffith, Jr. was the Chief Judge for General Sessions. Judge Griffith appointed an attorney on the motion filed in the criminal case wherein Mr. Rogers was seeking a new trial on after-discovered evidence.

has had the benefit of counsel concerning the same issues previously, and each of his grounds has been repeatedly considered by the courts and denied.

THEREFORE, IT IS ORDERED that the dismissal of this action is made final and the application for post-conviction relief is hereby denied and dismissed with prejudice.

If the applicant desires to appeal this order, he is cautioned that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. [See Rule 203, SCACR as well as Rule 243, SCACR.]

AND IT IS SO ORDERED this 26th day of February, 2019.



WILLIAM P. KEESLEY
Circuit Court Judge

#4

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP3202815

Hayward L Rogers 278510		South Carolina State of	
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: ____________

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: ____________

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: ____________

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: ____________

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	Judge Code	2/28/2019 Date

For Clerk of Court Office Use Only

This judgment was entered on **February 28th 2019**, and a copy mailed first class or placed in the appropriate attorney's box on **February 28th 2019**, to attorneys of record or to parties (when appearing pro se) as follows:

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)

Hayward L Rogers 278510 Broad River Correctional Institute 4460 Broad River Rd Columbia, SC 29210

ATTORNEY(S) FOR THE PLAINTIFF(S)

Kelly Oppenheimer Rembert C. Dennis Building PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

LISA COMER/jp

Court Reporter

Lisa M. Comer - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Appellate Case No. 2019-000429
Lower Court Case No. 2016-CP-32-02815

CLIENT COPY

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
HAYWARD LEON ROGERS, #278510, Applicant, v. STATE OF SOUTH CAROLINA, Respondent.	**CASE NO.: 04-CP-32-3932** Exhibit_A **ORDER** Issues That was appealed In Applicants First PCR, but was not appealed to The Supreme Court.

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; WARRENTLESS 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.

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[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. Cronic, 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.

ALAN WILSON
ATTORNEY GENERAL

October 11, 2017

The Honorable William P. Keesley
Post Office Box 10
Edgefield, SC 29824

Re: Hayward L. Rogers v. State of South Carolina
2016-CP-32-02815

Dear Judge Keesley:

Pursuant to your Memorandum of October 11, 2017, I am providing a proposed Final Order of Dismissal. Also submitted is a response served on Respondent which appears to be untimely and was not properly filed in the Clerk of Court's office. However, since it was a response served upon Respondent, Respondent is advising the Court of same. The proposed order is also being emailed to chambers today in Word format along with a scan of this letter and the noted response.

Please let me know if I may be of further assistance.

Sincerely,

Melody J. Brown
Senior Assistant Deputy Attorney General

/MJB
Enclosures (Proposed FOD; Affidavit of Personal Service; Response)

cc: Hayward L. Rogers, 278510
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210

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State of South Carolina Hayward L. Rogers, #278510. Applicant, VS. State of South Carolina Respondent.	County of Lexington Court of Common Pleas Case No. 2016-CP-32-2815 Motion To Amend Return/and Answer To Conditional Order of Dismissal, AND Motion for Summary Judgment

The above Applicant moves To amend his Return and answer To The Respondent's Conditional Order of Dismissal, and motion for Summary Judgment filed July, 2017; To include The Following Ground To show-cause why This action should not become final.

Denial of Right To Appeal

on August 4, 2016, in The above Civil-action The applicant Raised ineffective assistance of Appellate Counsel, whereas P.C.R. Counsel Raised The Following issues That was Ruled on by The P.C.R. Court:

Allegations Raised

1. Ineffective assistance of Trial Counsel;
2. Ineffective assistance of Appellate Counsel,
3. Trial Counsel was ineffective for failing To challenge The sufficiency of The search warrant used To draw The applicant's blood;

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4. Trial Counsel was ineffective for failing to challenge the chain of custody on the Applicant's blood;

5. 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;

6. Trial Counsel was ineffective for failing to move for a mistrial when he realized that the victim was deaf;

7. Defense counsel was ineffective for failing to interview the victim prior to the trial;

8. 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; 2½

9. Appellate Counsel was ineffective for failing to argue on appeal that Judge Westbrook should have recused himself from the trial of this case;

10. Appellate Counsel was ineffective for failing argue that the Applicant's motion for a directed verdict was improperly denied by the Trial Court.

The above issues was raised, and ruled on by the P.C.R. Court

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in The court's Final order. Appellate counsel was ineffective because appellate denied me The Right To appeal These issues before The Supreme court, and denying me due Process. unlike Washington v. State, 478 S.E.2d 833 (S.C.1996), Counsel Filed a Rule 59(e), S.C.R.C.P., Motion To alter or amend, but did not include The herein Ten issues Raised, and amended To applicant's First P.C.R. Case No. 2004-CP-32-3932, but never The Less, Those Ten issues was Ruled on in The Final order.

Denial of Right To Appeal

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. Justice Burnett dissented, arguing That Washington should have Filed a Rule 59(e), S.C.R.C.P., motion To alter or amend. Id., 324 S.C. at 237, 478 S.E.2d at 835.

An exception To The Rule against Successive applications occurs where The applicant has been denied The opportunity To appeal dismissal of his First P.C.R. 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

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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 39[illegible].

In Aice v. State, The Court explained That every P.C.R. Applicant is entitled To a Full adjudication on The merits of The P.C.R. application - or "one bite at The apple" - which includes The Right To appeal The denial of a P.C.R. application and The Right To assistance of Counsel in That appeal. Aice, 409 S.E.2d at 395. Thus, if a P.C.R. applicant Requested and was denied an opportunity To seek appellate Review from a P.C.R. denial, or if The Right To appeal was not knowingly and intelligently waived, an applicant can petition for certiorari To The S.C. Supreme Court for a new appeal. Id. To effectuate an applicant's Right To appeal a P.C.R. dismissal, The Supreme Court Requires P.C.R. Judges To advise pro se applicant's of both Their Right To appeal and also Their Right To appellate Counsel when Their P.C.R. application are summarily dismissed. Odom v. State, 523 S.E.2d 753, 756 (S.C. 1999).

Finally, a successive application may be permitted where The Court's Refusal To hear The Claim would Constitute a "Gross Miscarriage of Justice", Aice, 409 S.E.2d at 394, where Government interference or The Reasonable

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unavailability of the factual basis of the claim impeded counsel's ability to raise the claim, McCleskey v. Zant, 499 U.S. 467. 468 (1991), or where some other circumstance beyond the applicant's control occurred. Id. at 503.

An applicant is entitled to seek appellate review by way of a petition for writ of certiorari of the denial of P.C.R. Relief. S.C. Code Ann. 17-27-100 (1985). Review of the 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). Although no constitutional right to counsel exists to the discretionary appeal of a collateral attack upon a conviction, the Supreme Court has provided for the appointment of appellate counsel in seeking appellate review of an application. Supreme Court Rule 50 (6). If the applicant requests an appeal and none is given, or if the record otherwise shows that the applicant did not knowingly and intelligently waive his right to appeal, the P.C.R. court in a successive application may find that the applicant is entitled to a belated of his first application. See, (exhibit- A), unappealed issues.

September 14, 2017

Hayward L. Rogers

State of South Carolina Hayward L. Rogers, 278510, Applicant,	County of Lexington Court of Common Pleas Case No. 2016-CP-32-02815
VS.	Certificate of Service
State of South Carolina, Respondent.	

I, The undersigned, hereby Certifies That on This date a Copy of The motion To amend Return and answer To The Conditional order of dismissal has been served upon assistant Attorney General Melody J. Brown by placing a Copy of The Same in The U.S. mail, postage prepaid.

September 14, 2017

Hayward L. Rogers

IRD L. ROGERS, 278510
k Correctional Institution
emption Way, FI-127B
ck, S.C. 29899

South Carolina Supreme Court
Post office Box 11330
Columbia, South Carolina 29211