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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

TIMOTHY DION ROGERS,

Respondent,

vs.

THE STATE,

Petitioner.

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Did the PCR judge err in granting relief on the two charges of CSC with a minor in the second degree because (1) it was improper for Rogers to challenge these separate convictions in his Amended Application, which only properly challenged his murder conviction; and (2) the statute of limitations for filing a change to these convictions had long since run?

2. Did the PCR judge erroneously find trial counsel ineffective in his handling of the guilty pleas to the two charges of CSC with a minor in the second degree, including counsel's not moving to withdraw the pleas when Rogers reneged on the guilty plea to murder, where the only evidence is that counsel's strategy in offering the pleas was reasonable and there was no prejudice under *Strickland*, and Rogers' unilateral rejection of the murder plea, without prior notice to counsel, did not provide a basis to withdraw his previous knowing and voluntary pleas to these charges?

STATEMENT OF THE CASE

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

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

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

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

Rogers timely served and filed a Notice of Appeal. Chief Deputy Appellate Defender Joseph L. Savitz, III, represented him on direct appeal. After briefing by the parties **App. 1380-1477** and oral argument, this Court affirmed Rogers' murder conviction but reversed his death sentence and remanded the matter back for resentencing because the trial judge erroneously refused to give a *Simmons v. South Carolina*, 512 U.S. 154 (1994), instruction on his parole ineligibility. *State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996) (*Rogers I*). **App. 1478-83**.

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

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

Mr. Savitz then filed a Motion for Stay of Execution, so that Mr. Rogers could pursue Post-Conviction Relief remedies, and the State did not oppose the request. On March 9, 2000, this Court granted a stay. It also appointed the Hon. Diane S. Goodstein to preside over this case

and it granted her exclusive jurisdiction. On April 11, 2000, Judge Goodstein appointed Jeffrey P. Bloom, Esquire, and Diana L. Holt, Esquire, to represent Rogers.

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

Twenty-one months after the evidentiary hearing, Rogers served his Third Amended Application for Post-Conviction Relief on May 31, 2007.[3] **App. 4412-35**. The State made a motion to strike the amended application on June 7, 2007. **App. 4436-59**. Following a January 2, 2008 hearing, Judge Goodstein denied the State's motion and allowed the amendment, but she agreed that the State had not been given notice of Rogers' plan to orally amend and assert a substantive *Burkhart* claim. So, she ordered Rogers to give formal notice of this amendment. **App. 4462-63**. Rogers filed a Revised Third Amended Application on September 29, 2008. **App.**

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

4464-90. The State made its Return to that pleading on October 13, 2008. **App. 4492-4512**. On July 21, 2009, Rogers filed a proposed order as to his amended grounds 9(g) and (h). **App. 4541-55**.

On June 17, 2010, this Court filed an Order directing that a final Order be filed in this case by September 1, 2010. **App. 4556-57**. On September 2, 2010, Judge Goodstein filed an Order granting relief on the penalty phase allegations and on the two charges of CSC with a minor in the second degree. Both Rogers **App. 4732-49** and the State **App. 4750-4817** filed Rule 59(e), SCRCP, motions. Judge Goodstein heard arguments on these motions on October 8, 2010. **App. 4718-4856**. She filed an Amended Order Granting New Sentencing on December 10, 2010. A timely notice of appeal was served and filed. The State filed a Petition for Writ of Certiorari on October 21, 2011. Respondent's Questions Presented were as follows:

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

II. Did the PCR judge err in granting relief on the two charges of CSC with a minor in the second degree because (1) it was improper for Rogers to challenge these separate convictions in his Amended Application, which only properly challenged his murder conviction; and (2) the statute of limitations for filing a change to these convictions had long since run?

III. Did the PCR judge err in granting relief on the two charges of CSC with a minor in the second degree because the supposed error did not involve the Circuit Court's subject matter jurisdiction and Rogers waived personal jurisdiction; also, the grant of relief, which is based upon [assault victim's] testimony, is inconsistent with not supported by the record?

IV. Did the PCR judge erroneously find trial counsel ineffective in his handling of the guilty pleas to the two charges of CSC with a minor in the second degree, including counsel's not moving to withdraw the pleas when Rogers reneged on the guilty plea to murder, where the only evidence is that counsel's strategy in offering the pleas was reasonable and there was no prejudice under *Strickland*,

and Rogers' unilateral rejection of the murder plea without prior notice to counsel did not provide a basis to withdraw his previous knowing and voluntary pleas to these charges?

V. Is there any evidence of probative value in the record to support the PCR judge's grant of relief on Rogers' claim that trial counsel was ineffective for not effectively confronting and rebutting the State's witnesses through testimony by [assault victim] and Dex Patterson, since the record does not show any prejudice and this ruling is inconsistent with the finding that there was no prejudice from counsel's handling of these witnesses in the guilt phase?

VI. Does the Order support the grant of Post-Conviction relief on the claim that counsel were ineffective in failing to hire an investigator for the resentencing proceeding, since it fails to comply with § 17-27-80 because it does not contain specific factual findings or conclusions of law on this claim?

VII. Whether there is any evidence to support a finding that counsel were ineffective in failing to hire an investigator for the resentencing proceeding where (1) counsel articulated an objectively reasonable strategic reason for not hiring an investigator; (2) there was no prejudice under *Strickland*; and (3) relief on this claim is inconsistent with the finding that counsel were not ineffective for not hiring an investigator for the guilt phase?

VIII. Does the Order support the grant of relief on the claim that counsel were ineffective in failing to hire present an ophthalmologist at resentencing, since it fails to comply with § 17-27-80 because it does not contain specific factual findings or conclusions of law on these claims?

IX. Did the PCR judge erroneously grant relief on the claim that counsel were ineffective in failing to hire present an ophthalmologist at resentencing there is no evidence to support a finding that counsel were ineffective in failing to employ and present an ophthalmologist at resentencing?

X. Did the PCR judge erroneously grant relief based on counsel's failure to discover and present a video production and audio enhancement expert at resentencing because there is no evidence of deficient performance or prejudice under *Strickland*?

XI. Did the PCR judge erroneously grant relief based upon the failure of counsel to discover and present evidence favorable to the defense through the examination of resentencing witness Stephanie Simmons because the record does not support a finding of prejudice under *Strickland*?

XII. Did the PCR judge erroneously grant relief based upon the failure of counsel to discover and present evidence favorable to the defense through the examination of

resentencing witness George Scharf because the record does not support a finding of prejudice under *Strickland*?

XIII. Did the PCR judge erroneously grant relief based upon the failure of counsel to discover and present evidence favorable to the defense through the examination of resentencing witness James Robinson because the record does not support a finding of prejudice under *Strickland*?

XIV. Did the PCR judge erroneously grant relief based upon the failure of counsel to discover and present evidence favorable to the defense through the examination of resentencing witness Anthony Riley because the record does not support a finding of prejudice under *Strickland*?

XV. Did the PCR judge erroneously grant relief based upon the failure of counsel to discover and present evidence favorable to the defense through the examination of resentencing witness Earl Asbell because the record does not support a finding of prejudice under *Strickland*?

XVI. Did the PCR judge erroneously grant relief based upon the failure of counsel to discover and present Correctional Officer Brown as a mitigation witness because the record does not support a finding of prejudice under *Strickland*?

XVII. Did the PCR judge erroneously find counsel ineffective for not presenting an adequate case in mitigation of punishment where the only evidence is that counsel made a reasonable strategic decision not to use a social worker or to otherwise present evidence that might "demonize" Rogers' mother and, instead, chose to present evidence of positive aspects of Rogers' upbringing; also, there is no prejudice in this record under *Strickland*?

XVIII. Did the PCR judge erroneously apply a "cumulative prejudice analysis to the various ineffectiveness claims raised because this is inconsistent with *Strickland*?

Rogers filed a redacted Return to Petition for Writ of Certiorari on May 30, 2012. With the Court's approval, the State filed an Amended Petition was filed on June 21, 2012. On January 24, 2013, this Court filed an Order granting certiorari on Respondent's Questions II, III and IV, but denying certiorari on all other Questions. The State now submits the Brief of Petitioner.

ARGUMENTS

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

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them. However, it will reverse the decision of the PCR court when its decision is not supported by probative evidence of record or it is controlled by an error of law. *Suber v. State*, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007).

Here and despite Rogers' 1996 resentencing testimony, the PCR judge found that the trial court was without jurisdiction to accept his January 25 and 27, 1994 guilty pleas to CSC with a minor in the second degree based on the assault victim's PCR testimony that she only had sex with him in Charleston County. **App. 4924; 4973-84**. This was error because (1) it was improper for Rogers to challenge these separate convictions in his Amended Application, which only properly challenged his murder conviction; (2) the statute of limitations for filing a PCR change to these convictions had long since run and barred any challenge the CSC with a minor convictions; and (3) the grant of relief, based upon the assault victim's testimony, is inconsistent with and not supported by the record. Also, the only evidence of probative value in the record is

that Rogers did not prove either deficient performance or prejudice on his related ineffectiveness claim.

A. Relevant factual background.

1. The guilty pleas.

As to the January 24 plea in 94-GS-18-0047, the record clearly reflects that Rogers was not under the influence of drugs or alcohol. The record also demonstrates that he understood: (1) the nature of the charges to which he was pleading guilty; (2) the maximum punishment for the offenses; (3) that he had a right to a jury trial on these charges but that was waiving this right and the rights inherent thereto by entering his pleas; (4) that his guilty plea waived his right to challenge any defenses he had or deficits in the State's case; (5) and that each conviction would be considered a violent offense under South Carolina law. However, he admitted that he had sex with a fifteen year old girl "knowingly;" and he indicated his desire to plead guilty. **App. 1-9.**

On January 25, the Solicitor stated on the record that there had not been any plea negotiations in regard to 94-GS-18-0047, and that both Runyon and Rogers agreed. Rogers stated that he had not been promised anything to get him to plead guilty to the charge and that he was pleading guilty of his own free will. **App. 9-10.** Rogers stated, again, that this was what he wanted to do. He assured the trial court that he was pleased with counsel's representation; that counsel had done everything that he had asked counsel to do to prepare the case; that he had enough time to discuss the case with Runyon; and that he had understood his conversation with Runyon. Rogers likewise waived the three day notice requirement with respect to the indictment. Based upon this record, the trial court properly found that there was a factual basis for the guilty plea and sentenced him to seven years imprisonment. **App. 10-14.**

On January 27, the trial court accepted the plea in 94-GS-18-0049. The record of that plea likewise reflects a knowing and voluntary plea within the mandates of *Boykin v. Alabama*, 395 U.S. 238 (1969) and he record contains a virtually identical colloquy as the January 24 plea. Once again, Rogers admitted that he "knowingly had sex with a minor on a regular basis." **App. 18**. He also admitted having sex with her before she turned sixteen. **App. 19**.

Further, the Solicitor placed on the record that this plea and the January 24 plea were part of "a larger plea negotiation" involving a plea to murder and an LWOP sentence to avoid the death penalty. Both Rogers and Runyon agreed with the explanation. **App. 14-21**. Other than the plea negotiation, there were no promises or inducements for Rogers' plea. The trial court imposed a seven year sentence. **App. 21-25**.

2. PCR evidence.

Mr. Runyon testified that the facts of the murder case were relatively simply but the "case started to develop as just a bad case" because there was a "totally innocent" nine year old which had been shot in the back of the head. In going through the evidence, counsel discovered that Roger's girlfriend, the assault victim, was underage at the time she had sex with Rogers, and counsel realized that this could create a possible plea to murder with an LWOP sentence if there were two prior offenses for violent crimes. **App. 3476-77; 3492-97; 3564-70; 3739-40**.

Counsel had previously worked out a similar plea in a Berkeley County case that had racial overtones. **App. 3492-94**. So, he contacted then-Solicitor Bailey about the possibility of pleading to two counts of CSC with a minor in the second degree and then pleading guilty to murder and receiving an LWOP sentence. Although Solicitor Bailey was initially reluctant to offer a plea, he ultimately agreed. **App. 3476-77; 3492-98; 3564-70; 3739-40**.

Before the guilty pleas were entered to the CSC charges, counsel made Rogers aware of the potential consequence of entering those pleas and not pleading guilty to murder.[4] Rogers was in apparent agreement. Before the guilty plea to murder, Runyon spoke to Rogers' mother and stepfather and he got them prepared, particularly on the day they were going to do the plea. Runyon also sat down with Rogers, reviewed everything with him and "made sure that this was what he wanted to do." He explained the legal definition of malice; the elements of murder, how Rogers "was culpable of the crime of murder" and why the guilty plea was in Rogers' best interest. Rogers "felt good about going forward and understood that it was going to save his life." Importantly, the information that counsel had about Rogers having sex with his underage girlfriend came from Rogers, and Rogers never suggested that the sexual activity did not occur in Dorchester County. **App. 3476-77; 3492-3520; 3564-70; 3739-40.**

On cross-examination by collateral counsel, Mr. Runyon admitted that he did not interview the assault victim. **App. 3696; 3733-34; 3750-52.** However, he did not feel that he needed to interview her in connection with the CSC with a minor offenses because Rogers did not deny where the offenses occurred in Dorchester County, and counsel never learned that the offenses supposedly occurred in Charleston County. **App. 3750-52.**

Counsel testified that there was never any discussion about a possible *Alford* plea to murder because the Solicitor, who had been reluctant to accept a plea bargain, "didn't want

[4] Although the convictions for CSC with a minor in the second degree clearly did not involve any actual violence by Rogers directed to the assault victim, they were nevertheless defined as "violent crimes" under S.C. Code Ann. § 16-1-60 (Supp. 1993), at the time of his trial. As a result, these convictions would have made him ineligible for parole if sentenced to life imprisonment for murder. *See* SC. Code Ann. § 24-21-640 (Supp. 1993*). See also State v. Varner*, 310 S.C. 264, 425 S.E.2d 133 (1992). In 1991, the Attorney General's Office issued an opinion that criminal sexual conduct with a minor in the second degree, set forth in S.C. Code Ann. § 16-3-655 (Supp. 1991) was a "violent crime" as defined in § 16-1-60. See 1991 *Op. Atty. Gen.* No. 91-56, p. 118. Subsequent to the opinion of the Attorney General and after this murder, § 16-1-60 was specifically amended to list as a defined violent crime "criminal sexual conduct with minors, first and second degree (Section 16-3-655). ..." See 1993 Acts and Joint Resolutions No. 184, Section 8, effective January 1, 1994.

equivocation, he wanted a guilty plea," in which Rogers admitted his guilt. Also, the Solicitor wanted closure for the murder victim's family. Further, Rogers had remained in apparent agreement with counsel's proposed strategy until he refused to go forward at the plea for his own reasons. **App. 3498-99; 3740-47.**

Mr. Leiendecker, who was second chair in the case, also testified that Rogers never told him that the sex occurred in Charleston County. He also had not interviewed the assault victim. **App. 2900-01.**

Former Solicitor Bailey testified that Runyon contacted him "shortly after" he became Solicitor and proposed a guilty plea to voluntary manslaughter. Although Mr. Bailey turned down the offer and served the Notice of Intent to Seek the Death Penalty, plea negotiations continued. Eventually, Runyon proposed that Rogers plead guilty to two charges of CSC with a minor, which were violent crimes under South Carolina law. Then, under the "three strikes law" that was in effect, he would be parole ineligible if he pled guilty to murder. Solicitor Bailey discussed this with the family and they reluctantly agreed to the plea bargain, with the assurance that Rogers would be parole ineligible.[5] **App. 3776-79.**

The agreement was then worked out with Runyon, but Rogers failed to go through with the guilty plea. After that point, Mr. Bailey had no interest in a plea bargain. **App. 3776-79.** There was never any need for an *Alford* plea because the parties agreed on a guilty plea. Also, this was not something to which Rogers had initially agreed. **App. 3778-79.**

After the aborted guilty plea to murder, counsel did not make a motion to withdraw the guilty pleas to CSC with a minor, although they had been part of a greater plea agreement,

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

because there was no factual basis for such a motion. Rather, the State had upheld its end of the plea bargain but Rogers, himself, decided to change his mind about the guilty plea to murder. Runyan thought that it would be "very, very difficult" to claim the other offenses had not occurred in light of the plea and said this would be "disingenuous."[6] Also, the United States Supreme Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994) was "in the pipeline" and counsel used the two prior convictions for violent crimes to support his request for an LWOP jury instruction.[7] The State notes that, without such a requested instruction, the original sentence of death in this case would have been affirmed in *Rogers I.* **App. 3501-02; 3746-49**.

Rogers failed to testify at the PCR hearing and personally controvert the representations that he had made at the time of his guilty plea. Instead, he called the assault victim in the CSC cases. The assault victim was also his girlfriend at the time of the murder; the mother of a child by him; and, at one point, his co-defendant in this case. However, those charges had been dropped long before her PCR testimony. **App. 872-73; 917**. At the time of the PCR hearing, she was likewise incarcerated under a five-year sentence for shoplifting and a probation revocation at the time of the PCR hearing. **App. 3066-67**.

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[6] Relying upon Runyan's testimony at **App. 3494-98**, the PCR judge found that "Mr. Runyan testified that he became very angry with [Rogers] when [Rogers] was unable to complete the final leg of the three-part lea agreement. . . . In fact, . . . Mr. Runyan's anger was still palpable and intense, so much so that he was unable to maintain decorum and uttered a profane response to a question PCR counsel asked him about it. PCR Tr. 1032. **App. 3752**. Although Runyon did inappropriately state, "[d]amned right I was upset with him" at the PCR hearing, he apologized the moment the Court addressed his comment. **App. 3752, ll. 10-14**. Further, this is the only inappropriate word spoken by Mr. Runyon and it only occurred after hours of belabored cross-examination. (Rogers' cross-examination of him comprises approximately one-sixth of the PCR hearings held in 2004). *See* **App. 3532-3752**. Also, his comment was meant to convey his *agreement* with collateral counsel's question, as opposed to expressing anger or disgust with the length of cross-examination or the manner in which it was conducted. There is no evidence that counsel failed to move to withdraw the earlier pleas based upon Rogers' failure to plead to murder.

[7] Certiorari was granted in Simmons on October 4, 1993, *see Simmons v. South Carolina*, 510 U.S. 811 (1993) and the opinion was decided on June 17, 1994. Thus, certiorari was granted after the pleas to CSC with a minor in the second degree but before the aborted guilty plea to murder

She testified that she lived at her grandmother's home at the time of the murders. Her grandmother's residence is located in Charleston County. *See* **Applicant's Ex. 22**. She testified that she had known Rogers for five or six months at the time of the victim's murder. Also, she claimed that she only had sex with him in her grandmother's home, and that her uncles supposedly allowed this to occur. The assault victim further testified that neither of Rogers' attorneys had interviewed her before either the 1994 trial or the 1996 re-sentencing proceeding, and that no one ever interviewed her about the two charges of criminal sexual conduct with a minor in the second degree. **App. 3022; 3025; 3027-28; 3045-46; 3052-53**.

3. The PCR judge's Order.

In the Amended Order Granting a New Sentencing Trial and Vacating Applicant's CSC 2d Convictions, the PCR judge found that the trial court had subject matter jurisdiction over the two CSC with a minor charges, and that Rogers had waived personal jurisdiction. **App. 4973-74; 4979**. However, she granted relief based upon her findings that trial counsel was ineffective in failing properly investigate where those crimes occurred and the victim's age, as well as failing to move to withdraw those convictions after Rogers had refused to go through with a plea to the murder charge. **App. 4924; 4979-84**.

B. Discussion.

1. It was error to allow Rogers to challenge the CSC convictions in the same Application challenging the murder conviction because, under the Uniform Post Conviction Relief Act, only one judgment of conviction and sentence may be attacked in a PCR application.

At least two errors of law require reversal without discussion of the facts surrounding the guilty pleas upon which relief was granted. The first error of law in the grant of relief is quite glaring. The PCR judge improperly permitted him to proceed in this action on a claim related to

the CSC convictions. As a matter of law, Rogers could not properly utilize the current Application to challenge both his murder conviction and sentence and his guilty pleas to the two CSC with a minor charges - entered on separate days at a different term of court, and based upon different indictments and judgments - under the Uniform Post Conviction Relief Act, S.C. Code Ann. §§ 17-27-10 through -160 (1988 & Supp. 2007) because the clear intent of the Act was that only one judgment of conviction and sentence may be attacked in a PCR application.

This conclusion is supported by a review of various provisions in the Act, all of which refer to a "judgment" or a "conviction" and "sentence," in the singular. First, § 17-27-20(a)(1)-(6) only speaks of "the conviction" or "the sentence" in the singular. Likewise, § 17-27-20(b) provides that "[t]his remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. Except as otherwise provided in this chapter, it comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence." The same is true of other provisions in the PCR Act. *See, e.g.,* § 17-27-40 ("A proceeding is commenced by filing an application verified by the applicant with the clerk of the court in which the *conviction* took place") (emphasis added); § 17-27-45(A) ("An application for relief filed pursuant to this chapter must be filed within one year after the entry of *a judgment of conviction* or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later") (emphasis added); § 17-27-50 ("The application shall identify the proceedings in which the applicant was convicted, give the date of the entry of *the judgment and sentence complained of,* ....") court of competent jurisdiction in the county in which *the conviction* took place"). Indeed, the contrary construction given to the PCR Act in this case runs afoul of this Court's decision in *Al-Shabazz v. State*, 338

S.C. 354, 367-368, 527 S.E.2d 742, 749 (2000) (We hold that, aside from two non-collateral matters specifically listed in the PCR Act, PCR is a proper avenue of relief *only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence* as authorized by Section 17-27-20(a)") (emphasis in original).[8]

"The primary rule of statutory construction is that the Court must ascertain the intention of the legislature. *E.g., State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). When

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[8] Respondent would also direct the Court's attention to § 17-27-160 (governing capital case post-conviction relief procedures).This conclusion is likewise supported by Rule 71.1(b), SCRCP. ("An application for post-conviction relief cannot be made while an appeal *from the conviction or sentence* is pending or during the time in which an appeal may be perfected") (emphasis added).

The PCR judge's ruling that Rogers could attack the CSC with a minor conviction in his action attacking the murder conviction and sentence is also contrary to this Court's decision in *State v. Atkins*, 303 S.C. 214, 399 S.E.2d 760 (1990). In *Atkins*, the prosecution's sole aggravating circumstance was the defendant's 1970 murder conviction, which he claimed was invalid because of ineffective assistance of counsel. However, this Court affirmed the trial judge's refusal to allow him to contest the validity of that conviction in his resentencing proceeding for unrelated murders, as follows:

> The State's sole aggravating circumstance was Atkins' 1970 murder conviction, which Atkins contends was invalid due to ineffective assistance of counsel. His request to attack its validity was properly denied by the resentencing Court.
>
> Atkins relies upon the United States Supreme Court decision in *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). However, the facts here are clearly distinguishable from those in *Johnson*.
>
> In *Johnson*, the aggravating circumstance relied upon by the State was the defendant's prior felony conviction. Subsequent to his death sentence, that conviction was invalidated. Understandably, the U.S. Supreme Court held impermissible the State's reliance upon the invalid conviction as an aggravating circumstance warranting the death penalty.
>
> Here, Atkins' 1970 murder conviction has not been reversed or set aside. FN1 His resentencing trial was not the proper forum for collateral attack upon that conviction. *See, Dewitt v. South Carolina Department of Highways*, 274 S.C. 184, 262 S.E.2d 28 (1980).
>
> FN1. Atkins' 1986 application for Post-Conviction Relief was dismissed on the ground of laches and this Court denied his Petition for Certiorari. We express no opinion as to any relief Atkins may obtain in a Federal Habeas Corpus proceeding. However, the fact that Atkins may be allowed to collaterally attack the prior conviction in another forum does not entitle him to relief unless and until the conviction is invalidated. *See, e.g., Eutzy v. State*, 541 So.2d 1143 (Fla.1989); *Bundy v. State*, 538 So.2d 445 (Fla.1989); *Moon v. State*, 258 Ga. 748, 375 S.E.2d 442 (Ga.1988).

Atkins, 303 S.C. at 218, 399 S.E.2d at 762.

the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning, without resort to subtle or forced construction to limit or expand the statute's operation. *Id.* Furthermore, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant. *Id.*" *Kerr v. State*, 345 S.C. 183, 188, 547 S.E.2d 494, 496-97 (2001). "Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007) (citations omitted).

In the present case, the General Assembly has spoken in clear and unambiguous throughout the Uniform Post Conviction Relief Act, such that the legislative intent is clear: a PCR application may only challenge one judgment. The reason for this requirement is obvious. Different judgments often involve different trial counsel or different witnesses. There also may be different defenses to the separate judgments, as in the present case.

Here, the CSC convictions were part of Rogers' plea negotiations to the murder charge but were not factually related to it, unlike the underlying non-murder convictions in *State v. Charping*, 313 S.C. 147, 437 S.E.2d 88 (1993) or *Cooper v. Moore*, 351 S.C. 207, 569 S.E.2d 330 (2002). Those cases are distinguishable because each involved the deprivation of a right that each defendant could have exercised in the course of his capital trial – *i.e.*, the right to personally address the jury. Thus, the PCR judge erred as a matter of law in permitting Rogers to attack the CSC convictions in the Application challenging the murder conviction and sentence. Because the PCR court's jurisdiction is established by the PCR statutes, *see* § 17-27-20(b), it lacked jurisdiction to grant relief on these claims.

2. The statute of limitations barred relief on the CSC convictions.

By allowing Rogers to challenge the CSC convictions in the same Application in which he challenged the subsequent murder conviction and the death sentence following the still later re-sentencing proceeding, the PCR judge ignored - if not completely eviscerated - the PCR statute of limitations, which is the second glaring error of law. Because, even assuming *arguendo* that a PCR applicant may challenge more than one judgment in a PCR application, the PCR judge ignored that Rogers' challenge to the CSC convictions is barred by S.C. Code Ann. § 17-27-45(A) (Supp. 2012).

Rogers did not take an appeal from those convictions,[9] and he did not challenge these convictions in an earlier Post-Conviction Relief application. Also, even his original Application in the present case only challenged the murder conviction and sentence, and it did not mention the CSC convictions, whatsoever. **App. 2688-92**. Instead, he first challenged the subject matter jurisdiction for his CSC guilty pleas in **Ground 9(C)** of the August 27, 2004 Amended Application for Post-Conviction Relief. **App. 2711-13**. This was over four years after he filed the original Application. Because his convictions and sentences were entered before the passage of §17-27-45(A), he had until July 1, 1996, to file a PCR application challenging them. *See Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). He did not make any effort to challenge them until over eight years later.

Moreover, he obviously was aware, at the time of his guilty pleas, of where the crimes took place and with whom, as well as other matters that he later litigated (but to which he refused to testify). As a result, he cannot avail himself of § 17-27-45(C), which governs the limitations period for factual claims based upon supposed after-discovered evidence.[10]

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[9] Also, in the lower court, he did not claim that counsel was ineffective in failing to perfect an appeal therefrom. *Contra Wilson v. State*, 348 S.C. 215, 559 S.E.2d 581 (2002).

[10] Section 17-27-45(C) provides that:

The Court of Appeals explained in *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct.App. 1996):

> **Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system.** 54 C.J.S. *Limitations of Actions* § 2, at 16-17 (1989). Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. 51 Am.Jur.2d, *Limitation of Actions* § 18, at 603 (1970). One purpose of a statute of limitations is "to relieve the courts 'of the burden of trying stale claims when a plaintiff has slept on his rights.' " *McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct.App.1989) (quoting *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428, 85 S.Ct. 1050, 1054, 13 L.Ed.2d 941, 945 (1965)). Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation. 51 Am.Jur.2d *Limitation of Actions* § 17, at 602-03 (1970).

(Emphasis added).

By failing to hold that the challenge to the CSC convictions was barred by the statute of limitations, the PCR court allowed Rogers to circumvent the this fundamental restriction on the ability of an inmate to challenge his conviction(s), which is necessary to a "well-ordered" administration of justice, and rewarded him for not being diligent and "sleeping on his rights." *Contra Id. See also Peltzer v. State*, 378 S.C. 516, 519-20, 662 S.E.2d 618, 619-20 (Ct. App. 2008); *Nowlin v. General Telephone Co.*, 310 S.C. 183, 186, 426 S.E.2d 114, 116 (Ct.App. 1992) ("The purpose of the statute of limitations is to put to rest claims after the passage of time"). Thus, the statute of limitations barred his challenge to the CSC convicitons. *Id. Accord Robinson v. State*, 387 S.C. 568, 576, 693 S.E.2d 402, 406 (Ct. 2010) ("Significantly, Robinson did not appeal his June 2000 pleas nor did he file a PCR application within the statute of

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If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence

limitations. Consequently, we find Robinson is precluded from now attacking the validity of his pleas") (footnote omitted).

3. Rogers did not establish ineffective assistance of counsel.

Third, the PCR judge erroneously found that counsel was ineffective for not adequately investigating where the CSC offenses occurred and the assault victim's age at the time of the offense, as well as in failing to move to withdraw the pleas.

To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" Hill v. Lockhart, 474 U.S. 52, 56 (1986); see also See also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight").

The Court in Hill adopted the *Strickland v. Washington*, 466 U.S. 668 (1984), standard for allegations that trial counsel was ineffective in representation at a plea. First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. 668, 688 (1984). "The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.' *Id.*, at 687, 104 S.Ct. 2052." *Harrington v. Richter*, 131 S.Ct. 770, 787 (2011) (quoting *Strickland*). *See also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight").

The Court in *Strickland* explained the deference owed counsel's strategic judgments in terms of the adequacy of the investigations supporting those judgments:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-691. *See also See Wiggins v. Smith*, 539 U.S.510, 521-22 (2003).

In assessing counsel's investigation, this Court "must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' Strickland, 466 U.S., at 688,[...], which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time,' id., at 689 [...] ('[E]very effort [must] be made to eliminate the distorting effects of hindsight')" *Wiggins*, 539 U.S. at 523.

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Therefore, to warrant relief, he must prove that he was prejudiced by counsel's error(s). "The *Strickland* ineffective assistance of counsel standard is somewhat different in the context of a guilty plea. In the context of a guilty plea, the petitioner must demonstrate ... that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

Here, the information relied upon by counsel as to where the offenses occurred and the victim's age at the time that they occurred came from his client, Rogers. Contrary to the PCR

judge's findings, it was quite reasonable for counsel to rely upon this information in developing a strategy designed to save Rogers' life because it is reasonable for counsel to rely upon the information provided by his or her client. *Strickland*, 466 U.S. at 691 ("the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions"); *see also Stevens v. Delaware Correctional Center*, 295 F.3d 361, 373 (3rd Cir. 2002) (counsel does not have to investigate matters at odds with what client has said and what victim will testify); *Mobley v. Head*, 267 F.3d 1312, 1318-19 (11th Cir. 2001) ("When the defendant has given counsel reason to believe that pursuing certain investigations would be fruitless . . . counsel's failure to pursue those investigations may not later be challenged as unreasonable") (citing *Strickland*, 466 U.S. at 691); *Ames v. Endell*, 856 F.2d 1441, 1444-45 (9th Cir. 1988) (Counsel need not investigate that which conflicts with the defendant's admission).

Further, the PCR judge relied solely upon the assault victim's testimony in finding that the crimes occurred in Charleston County, rather than in Dorchester County. In doing so, the Order also contravenes *Blackledge v. Allison*, 431 U.S. 63 (1977). In *Blackledge*, the Court explained that a defendant's representations at the time of his guilty plea are not "invariably insurmountable" when challenging the voluntariness of his plea. However, the defendant's representations, as well as any findings made by the judge accepting the plea, "constitute a formidable barrier . . . . Solemn declarations in open court carry a strong presumption of verity," and a subsequent presentation of conclusory allegations and contentions that are wholly incredible in the face of the record are subject to summary dismissal. *Id* at 73-74. *See also Crawford v. United States*, 519 F.2d 317 (4th Cir. 1975); *Dalton v. State*, 376 S.C. 130654 S.E.2d 870 (Ct. App. 2007).

Also, the record does not support the PCR court's finding that the assault victim's PCR testimony was credible. In reaching a contrary conclusion as to this allegation, the finding of credibility ignores a number of factors, not the least of which is Rogers' contrary sworn testimony.[11] The bottom line is that she had nothing to lose but everything to gain by giving false testimony that might spare the father of her child from either a sentence of death or one of life without parole.

Additionally, the PCR judge's finding as to the assault victim's age is based upon the erroneous assumption that Rogers did not have intercourse with assault victim before the date of her pregnancy. Again, this is quite obviously inconsistent with Rogers' own representations to counsel and the trial court at the time of his pleas. *Blackledge*, 431 U.S. at 73-74. Thus, it was error to grant relief without requiring him to testify and admit to perpetrating a fraud on the court by lying to the trial judge at the time of his pleas, if, in fact, the location of the offenses or the age of the assault victim were erroneously stated at that time.

Also, Rogers bore the burden of proof and counsel's testimony is un-refuted by his former client: counsel based his strategy upon information provided to him by Rogers, who admitted to sex with the fifteen year old victim, and Rogers never suggested that the crimes did not occur in Dorchester County. Further, Rogers admitted to these crimes in 1996 (**App. 2378-81**) and he has never testified otherwise. Thus, counsel's performance was not deficient. *Id.*

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[11] Again, the assault victim was originally Rogers' co-defendant, the charges against her have long ago been dismissed, and she no longer had any reason to fear prosecution in this case. **App. 872-73; 917**. Also, her credibility was impeached with her criminal record under Rule 609, SCRE, and by evidence that she was incarcerated under a five-year sentence for shoplifting and a probation revocation at the time of the PCR hearing. **App. 3066-67**. Further, she is the mother of Rogers' child, and her PCR account of the crime was inconsistent with her statement to law enforcement and her trial testimony. Finally, the finding that she was credible ignores that she was with Rogers on the night of the murder; that she ran in the same direction as he and Patterson after the murder; and that there has never been any suggestion that she was going home that night.

Notwithstanding the PCR judge's contrary finding, there was no deficiency or prejudice from not moving to withdraw he pleas to CSC after Rogers unilaterally decided not to go through with the plea to murder. A review of the CSC with a minor guilty pleas clearly shows that they were freely and voluntarily entered in accordance with *Boykin*. Thus, there was no factual basis to withdraw these pleas.

As a result, the PCR judge erroneously found that Rogers provided her with sufficient reason to permit him to depart from his earlier representations at the time of his guilty pleas based upon assault victim's testimony, and he should not have been permitted to undermine otherwise valid guilty pleas without testifying. This error is exceptionally egregious, since the assault victim's testimony conflicts with both Rogers' representations at the time of the plea and his subsequent sworn testimony. **App. 2378-81.**[12]

Nor could the assault victim answer the question that both the PCR judge and this Court are called upon to determine: whether counsel acted reasonably under *Strickland*. Further, the State would urge, as a matter of sound policy, that it is unconscionable to grant relief under circumstances where an applicant who alleges deficiencies in his plea or counsel's representation at a guilty plea, but who never testifies to the alleged deficiencies or inadequacy of counsel's representation an counsel's testimony, which supports only a finding of reasonable conduct

[12] Any suggestion that counsel failed to make a motion to withdraw as the result of his displeasure with Rogers' decision not to go forward with the subsequent guilty plea to murder is meritless because the record demonstrates that the reasons stated by Runyon are credible: they are supported by the testimony of Mr. Bailey and the record of the plea and they are supported under the law. Runyon candidly admitted that he was "extremely concerned" when Rogers failed to go forward with the guilty plea to murder because "the whole deal was getting blown." **App. 3501**. Rogers had not discussed his decision to plead not guilty with counsel. **App. 3752**. Regardless of whether counsel's discussion with Rogers was heated, as Mr. Leiendecker testified **App. 2879-83** or whether it was more civil, as described by Runyon **App. 3752**, there is no indication from either witness that the subsequent actions of either attorney were taken as the result of their displeasure with Rogers' decision. Rather, Runyon was merely upset that Rogers was not following what he considered to be a sound strategy that was designed to save Rogers's life. Indeed, Leiendecker clearly testified that "I'm certainly not trying to give the impression that Bill did not buckle down and go to work, because he's a professional and dedicated to what he did." **App. 2881-83**.

under Strickland. The State submits that the potential for deception of the court, and the contravention of the United States Supreme Court precedent cited in this argument, is simply too great.

Nor did counsel have a basis to withdraw the guilty pleas to the CSC offenses because they were part of a greater plea negotiation for a sentence of LWOP on the charge of murder and that plea fell through. Although the pleas to these offenses were part of the negotiations on the murder charge, they remained freely and voluntarily entered despite Rogers' subsequent change of mind about pleading guilty to murder. A guilty plea rests upon contract principles. *E.g.*, *State v. Thrift*, 312 S.C. 282, 292-93, 440 S.E.2d 341, 347 (1994) (*citing Santobello v. New York*, 404 U.S. 257 (1971)); *see also United States v. Chase*, 466 F.3d 310 (4th Cir. 2006).

Here, the record conclusively demonstrates that both sides had received the "benefit of their bargain:" in exchange for the pleas to CSC with a minor and the subsequent plea to murder, the State agreed not to seek the death penalty and allow a negotiated sentence of LWOP. The only reason that sentence was not ultimately imposed is because *Rogers unilaterally changed his mind* and decided to enter a plea of not guilty to the murder charge. This was his constitutional right, but his exercise of that right does not render the earlier pleas involuntary or provide any basis for a motion to withdraw those pleas. *See Pellerito*, 878 F.2d at 1543. Again, Rogers should not be allowed to prevail on ineffectiveness claims that are entirely based on his own unilateral breach the plea agreement with which the State had fully complied, he and counsel had previously agreed upon and the trial court was willing to accept.

Alternatively, the PCR judge improperly found that Rogers had established prejudice based on counsel's failure to make the motion. Apart from the previously stated reasons, the State submits that he was not prejudiced because the two CSC convictions resulted in him being

convicted of two violent felonies for which he may never have been otherwise charged, and these convictions provided the basis for future sentencing enforcement. **App. 4875-76**. Again, Rogers knowingly, intelligently, and voluntarily allowed counsel to pursue the strategy that was followed. *Bell*, 72 F.3d at 429. Also, he was undeniably aware that he was pleading guilty to violent crimes under state law; and there was no suggestion that the entry of his plea to CSC was contingent upon his subsequent guilty plea to murder.

Moreover, without counsel's strategy in not withdrawing these pleas, the original death sentence would have been affirmed on direct appeal because the only sentencing phase raised on direct appeal in *Rogers I* - and the issue on which this Court granted relief - was the trial judge's failure to give a *Simmons* charge on parole ineligibility if Rogers was sentenced to life imprisonment, as the result of the two convictions for violent crimes. *See Rogers I*, 320 S.C. at 526-28, 466 S.E.2d at 363-64. Further, in accordance with Rogers' position at the November 20, 1996 pre-trial motions hearing **App. 2565-67**, the trial judge included a *Simmons* instruction in his jury charge. **App. 2505-06.**[13]

As a result, he received an LWOP instruction in the 1996 resentencing proceeding only because of the existence of the two CSC with a minor convictions. This is a benefit that was strategically pursued by counsel after the aborted guilty plea to murder. Finally, a finding of prejudice ignores that **he has never testified that his representations at his pleas or that his 1996 admission to the CSC charges, given under oath and in an effort to mitigate the murder, were false**. Thus, there was no prejudice under *Hill* and *Strickland*. *See United States v. Guerrero*, 938 F.2d 725, 730 (7th Cir. 1991) (there is no ineffective assistance of counsel even where the attorney chooses one reasonable strategy to the exclusion of another).Without his

[13] He also similarly instructed the entire resentencing *venire*. **App. 1507-08**.

testimony to support this claim, he should not be permitted to depart from the representations at the time of his plea and relief should have been denied. *Id. Cf. Bean v. Calderon*, 166 F.R.D. 452, 454-55 (E.D.Cal. 1996) (State was entitled to depose capital habeas petitioner who claimed ineffective assistance of counsel and prosecutorial misconduct. While petitioner had the right to invoke Fifth Amendment, the district court could draw adverse inference from invocation of privilege if questions to which privilege was asserted directly related to allegation made by petitioner in verified petition).

As the Court explained in *Bean*, "[Rogers] has invoked the court's process to overturn what would otherwise be a final state conviction, and must prove that it should be overturned. It is not at all untoward to hold that [Rogers] must establish the facts that would give rise to the overturning, and if he refuses to put forth facts that are within his knowledge, and which are pertinent to the claims that he has made in habeas, an adverse inference may be drawn." *Id.*

Finally, the State submits that the PCR judge erroneously analogized the present case to that of *Johnson v. Mississippi*, 486 U.S. 578 (1986). **App. 4981-83**. In *Johnson*, the Court held that a prior New York felony conviction that was subsequently held to be invalid after the defendant's Mississippi trial for capital murder was not a statutory aggravating circumstance which supported the imposition of death penalty, even though the murder defendant had actually served time pursuant to that conviction.

"[T]he fact that [he] served time in prison pursuant to an invalid conviction does not make the conviction itself relevant to the sentencing decision." Nor was the defendant's conduct which gave rise to that charge relevant, since "the jury was not presented with any evidence describing that conduct-the document submitted to the jury proved only the facts of conviction and confinement, nothing more." *Johnson*, 486 U.S. at 585-86. The Court further found that "[i]t

is apparent that the New York conviction provided no legitimate support for the death sentence imposed on petitioner. It is equally apparent that the use of that conviction in the sentencing hearing was prejudicial." *Id* at 586. Further, the Court determined that the error was not harmless. Therefore, it vacated the judgment and remanded the case for further proceedings in state court. *Id* at 589-90.

Contrary to the PCR judge's Order, the State submits that Johnson supports the State's argument that reversal is required because the defendant in *Johnson* obtained relief from the New York conviction in the proper forum to grant it, the New York Court of Appeals. He did not litigate the supposed invalidity of that conviction in the Mississippi PCR court. Rather, he sought relief from his death sentence in the Mississippi courts based upon the action of the New York Court of Appeals of invalidating his New York conviction. Similarly, Rogers had the ability to properly and timely challenge the propriety of his CSC convictions in a separate action but he chose not to do so. Also, the CSC convictions were not used to enhance his sentence, but merely made him parole ineligible.

CONCLUSION

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

Respectfully submitted,

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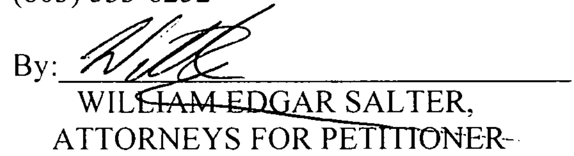

By: ______________________
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ATTORNEYS FOR PETITIONER

February 25, 2013
WES, III

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

TIMOTHY DION ROGERS,

Respondent,

vs.

THE STATE,

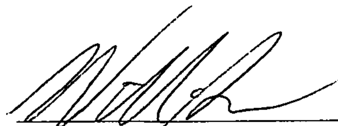
Petitioner.

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Petitioner, certify that I have served the within Brief of Petitioner and Proof of Service on Respondent by depositing two (2) copies of the same in the United States Mail, first class mail, postage prepaid, to his attorney of record, Diana L. Holt, Esq., P.O. Box 6454, Columbia, South Carolina 29260-6454.

I further certify that all parties required by Rule to be served have been served.

This 25th day of February, 2013.



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