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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.

STATE OF SOUTH CAROLINA,

Petitioner.

APPENDIX

DIANA HOLT, ESQ.
P.O. Box 6454
Columbia, South Carolina 29260
ATTORNEY FOR RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

DAVID M. PASCOE, JR.
Solicitor, First Judicial Circuit
Post Office Box 1525
Orangeburg, SC 29116-1525
(803) 533-6252

ATTORNEYS FOR PETITIONER

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me what your concern is.

MR. SALTER: Well, first off, again there's -- this witness cannot identify who any of various participants are.

THE COURT: Sure.

MR. SALTER: I don't know who the person is, some person off camera asking a question.

THE COURT: Yes.

MR. SALTER: Another individual responds to the question.

THE COURT: Right.

MR. SALTER: Neither of them are here. In fact, that one segment is on there at least four times, in addition to the enhanced audible version of the entire tape they want Your Honor to see, which I would object to separately as being unnecessarily cumulative and prejudicial.

THE COURT: Okay. Well, let me say this: Help me here because to be -- in order to be hearsay it must be an out-of-court statement. Clearly it is --

MR. SALTER: Correct.

THE COURT: -- by someone not identified, worse than not being present, not identified. But is the statement being admitted for the truth of the matter asserted?

MR. BLOOM: No, ma'am.

MR. SALTER: I believe it is, Your

Honor. I think that's the only purpose that they would have for doing so. I mean, that's the whole point of having, as I see it, four additional segments where that statement is made.

THE COURT: You know, of course not knowing what the statement is puts me a little bit -- my ruling obviously isn't as clear as it would be being made in hindsight I'm certain, but if the statement is being offered for the purpose of indicating, say, that there should be -- have been investigation of this particular comment or statement and the position of the applicant is it did not happen and it should have happened, why isn't that relevant on the issue of ineffective assistance of counsel?

MR. SALTER: First off, Your Honor, it's not the tape that counsel would have been provided. The tape counsel would have been provided was not audibly enhanced. And I think you have to judge trial counsel's performance based on their judgments at the time, not on hindsight where with the benefit of technology, which certainly DVD's were not

available back in 1994, and the technology that's employed I don't know that it was or wasn't, we haven't gone that far into this testimony, but I submit that that's just the wrong -- you're turning Strickland on its head if you'd say, well, now we've come back and we've enhanced audio in 2005 for something that was produced in '94.

THE COURT: I'm with you, Mr. Salter.

It would be Mr. Salter's position that if what I am about, for example, there is a statement on this particular tape that is imperceptive, imperceptible, I don't know which one's the right, on the original VHS tape, DVD wasn't, I don't know, but arguendo say DVD wasn't available, enhancement wasn't available in 19 -- at the time the tape was made available to defense counsel.

Is it then fair now to obligate counsel to know and to avail themselves of two things: Number one, information that's not -- you cannot hear on the VHS tape, that would be the first issue; and secondly, to -- for the Court to hear this information in a forum that wasn't available to counsel in the

early '90s?

MR. BLOOM: Yes, ma'am. If I can respond in several respects.

THE COURT: Sure.

MR. BLOOM: First, Mr. Fesberman can address that. I intend to go there next with him what he did.

THE COURT: Okay.

MR. BLOOM: Secondly, in sum if I could summarize what I propose him to testify to is the videotape itself has not been altered in any manner or tampered with or changed.

Secondly, as to audio there has been some audio enhancement so that you can hear it better, but you can still hear it on the original VHS tape. We had Mr. Fesberman increase the audio just to assist the listener.

Third, Mr. Fesberman can testify that all of that could have been done in '94 or '96. It would have been a little more difficult than it is today, but it could have been done.

Lastly, as to the DVD, we're not arguing defense counsel should have had a DVD

done in '94 or '96, that was done simply to preserve, as Mr. Fesberman has already testified, the quality of the video from this

point forward for the record. We're not arguing defense counsel should have had it converted to DVD. We're simply arguing that defense counsel could have the audio enhanced if needed, could have shown the original videotape that was in Solicitor Bailey's file.

And third, defense counsel could have produced some still photographs, which go to some non hearsay issues. Mr. Fesberman will also testify that the still photographs would have been possible in '94 and '96.

THE COURT: Lay that foundation for me.

MR. BLOOM: Yes, ma'am.

THE COURT: I know that you've done your proffer, but let me hear it just for the record.

MR. BLOOM: Yes, ma'am. And the last thing I would note on the hearsay, the few statements that we feel are relevant are -- are statements made by a witness who has testified in the case. So we would argue

they're prior inconsistent statements.

Now, this witness can't identify the witness that will come with Mr. Leiendecker, just so you understand.

THE COURT: As a proffer.

MR. BLOOM: Yes, ma'am.

THE COURT: Okay.

BY MR. BLOOM:

Q. Mr. Fesberman, let me direct your attention first to the DVD you made. Were there any changes or alterations to the video when you did that?

A. There was no changes or alterations to the content whatsoever, no.

Q. All right. Did you make any audio enhancements?

A. I did make audio enhancements to the section that you specified that you would like to have enhanced.

Q. All right. And that's in relation to a white male depicted on the video making some statements?

A. That's correct. I believe it's Carver, a Mr. Carver.

MR. SALTER: Your Honor, I'm going to object to this witness's knowledge.

MR. BLOOM: I won't ask that witness's

identity, I'll withdraw that.

THE COURT: Sustained.

Q. But the statements are reflected by a white male on videotape?

A. Yes.

Q. You don't know who that is other than what I've told you?

A. I have no idea.

Q. Could you hear that person's statements on

the original tape?
A. Yes.
Q. Okay. So when you say you enhanced the audio, can you just briefly explain what that means?
A. I primarily, and this has been taking place for a number of years when it comes right down to it, and that is cutting down on base frequencies or mid-term frequencies and enhancing the higher frequencies will make it clear, clearer, with less rumble and in certain cases bring out the voice.
There has been technology for some time that you can filter out certain frequency levels as I have done for other law enforcement agencies where they have recorded things. You can, for instance, filter out air conditioner hum. Every case is different.

Q. All right.
A. I mean, in certain cases you can, certain you can't, that's what happened here.
Q. All right. But you didn't change the content of what the audio was?
A. Absolutely not.
Q. All right, sir.
A. No.
Q. In that regard the audio enhancement you did of the white male speaking on the news footage, was that audio enhancement technology available in 1994 and 1996?

A. Yes, it would be available, but probably a little bit more involved in doing it. The computers that came around in the early '90s brought technology that allowed you to do it by computer as opposed to analog filters, but definitely, I mean, I did that back in the '80s and '70s.

Q. All right, sir. Next I also had you produce some still frame photographs of pictures on the video.

A. Correct.

Q. All right. Let me just ask you if you can identify Petitioner's Exhibit Number 57 and 58 both for identification only at this time.

A. Sure.

Q. Are those some of the still frame photographs you produced from the original video?

A. Yes, they certainly appear so.

Q. All right. And was that technology to produce the still frame photograph available in 1994 and 1996?

A. Yes.

Q. All right. And in producing those still frames you didn't change the content of the video at all?

A. Absolutely not.

Q. All right.

MR. BLOOM: Your Honor, that would be our showing in that regard.

THE COURT: There are really two choices that I have at this point. One is to conditionally introduce the exhibit, allow the exhibit to be played, understanding that the link would have to be tied later if this is being used for non hearsay purposes if the voice cannot be identified. The alternative is to allow cross-examination of this witness to this point and allow him to stand down and allow Mr. Leiendecker to be called. My

concern, of course, is I don't know that Mr. Leiendecker's going to be able to.

Mr. Salter, I really -- and the only reason, the only reason that I just simply wouldn't conditionally admit it is, quite frankly, it's non jury, I'm the fact finder, and I hate to hear something -- I'm concerned about hearing something if it would be then excluded because it could not be, the voice could not be identified by someone and therefore authenticated. So what would be your preference? I really want -- Mr. Salter, let me hear from you your preference. I don't care either way.

MR. SALTER: My problem is if it purports to be a videotape taken at the crime scene, and to my knowledge there's no one here that would be able to authenticate the

videotape. No one.

THE COURT: Okay. All right. All right. Here's my concern about that. If this was the trial of the case, absolutely it may or may not be admitted certainly before the trial jury, but as I understand counsel this tape is being admitted for the non

hearsay purpose of showing a need for investigation and to show ineffective assistance of counsel, that the proof of whether or not this tape was shot at the crime scene is -- while it would be critical at the trial phase, what I'm hearing and you all help me, what I am hearing is that it is being offered to show ineffective assistance of counsel because I gather there will be some sort of follow-up testimony that this videotape was not developed or wasn't used and, therefore, could have been important and therefore show prejudice.

MR. SALTER: To the extent -- to the extent it is a videotape of someone who is a witness, then if what the allegation would be is that counsel should have used it for impeachment purposes, as we all know under Copeland impeachment evidence is admissible, the substantive evidence, impeachment with a prior inconsistent statement is substantive

evidence.

THE COURT: Yes, right. That would be -- any response, Mr. Bloom?

MR. BLOOM: Well, it's a statement for

the Court's purposes. It's a statement. Mr. Carver is interviewed at the scene at Spell's Grocery Store, he makes two comments that we think are prior inconsistent statements and could have been used for impeachment.

My next witness, Mr. Leiendecker, I assume can -- will identify Mr. Carver since Mr. Carver was in court at both trials and either Mr. Leiendecker or Mr. Runyon cross-examined him. There's also the still photographs. And so my intent will be to ask Mr. Leiendecker, one, is this Mr. Carver making these statements, could you have used that information as well as the still photographs in your investigation, what would you have done with it. And Mr. Leiendecker will be able to answer what they would have done or not done.

Mr. Bailey is also in court. If you want me to, I could proffer him as my witness to identify the tape as being one from his file and if indeed that's Mr. Carver.

./August 23, 2005
25 I think Your Honor's exactly right,

the statements made on the tape by other people at the scene are non hearsay, they're not being offered for the truth of the matter asserted, it's Mr. Carver's statements which would be used as prior inconsistent statements and impeachment at trial.

Mr. Carver could have been asked did you not say this to a news reporter at the scene that night, did you not say such and such. And he could have said, Yes, I said that; No, I didn't. And it would have been up to the trial judge if he denied it whether this would be extrinsic evidence, inadmissible.

I think we've kind of gone off track here. Mr. Bailey used, introduced, showed to the jury which shows Mr. Rogers walking to his bond hearing behind the jail and that's the same type of news footage and it would just perplex me to no end that a trial judge would allow the solicitor to introduce news footage that helped the State and not on the other hand introduce news footage that the State had that might have helped Mr. Rogers.

So I think we've kind of gotten off on extrinsic issues that are way beyond the -- the non hearsay. I think the tape itself is self-authenticating. It came from Mr. Bailey's file, the clerk of court has had Mr. Bailey's file in its custody, so the chain is satisfied. The tape itself is self-authenticating and it will be up to Mr. Leiendecker and/or Mr. Bailey to identify the witness on the video.

And really in the end it goes to what Mr. Leiendecker or Mr. Runyon could have done with the tape, not whether they would have ever played it to the jury, but what they would have done with it, what additional investigation would it have led to and they're certainly entitled to investigate and listen to hearsay, even if I take the attorney general's argument that's what it is, I don't adopt that, but Mr. Leiendecker and Mr. Runyon clearly could have listened to hearsay and then made investigatory decisions based on that.

I think it's not being offered for the truth of the matter asserted, it's being

offered to what the state of mind of defense counsel would have been had they seen this

videotape that the solicitor had provided them access to in a letter.

THE COURT: Yes, sir, Mr. Salter.

MR. SALTER: So just so the record's clear, I'm not disputing that exhibit was created from a videotape that was in the solicitor's file, my problem is where is the person that videotaped this and is this indeed how long after, you know, the crime occurred, you know, what are the circumstances surrounding it, who asked the question or were there further questions. I mean....

THE COURT: See, here's -- and I understand that, I understand where you are coming from. The issue, though, and I'm trying to find where you are coming from, because the issue I think is in a PCR the questions that you are asking the applicant would say -- are the questions that his lawyer should have asked. And the showing of this videotape to the fact finder would be, number one, is it ineffective for them not to

have. I don't know -- obviously I don't know if they viewed it or they didn't view it, but is it, is it ineffective for them not to have investigated or followed up or used it for impeachment purposes, this particular tape,

rather than which would be a non hearsay purpose.

It very well may have turned into a -- an offered exhibit and, therefore, it would have become hearsay over the course of their investigation, preparation for trial, but I think for these purposes and these issues it's being offered for a non hearsay purpose, and, and to -- and for a hearsay purpose. Because if there is a -- if there is a -- an inconsistent statement then -- then that's correct, there is an alleged inconsistent statement then that certainly would be a non -- that would be a hearsay offering and Mr. Bloom would need to authenticate the voice, the recognition of the voice and who it is. But it's my understanding that this statement would be offered for both those purposes.

Let me ask this question of you,

and it's this: Do we have the DVD unenhanced where the audio is unenhanced? The reason for that is that if -- you know, and I am the fact finder so we got to go with my ears, if I can hear the words and hear them clearly then I am more comfortable than if I'm just hearing the enhanced version.

And the reason for that is because,

of course, Mr. Fesberman said he could certainly hear, but he might have super duper broadcaster ears, I might just have old normal kind of ears so I feel some -- I feel some need to hear first unenhanced to be sure that I can hear something, because in and of itself that may have meant that counsel needed to continue to investigate that further even to the point of enhancement.

MR. BLOOM: All right. I don't know, let me ask Mr. Fesberman.

BY MR. BLOOM:

Q. Mr. Fesberman, let me hand you a copy of a VHS tape you also provided me, and if you can tell me, do you know whether or not the VHS copy you made of the solicitor's news footage videotape contains enhanced audio or not enhanced --

A. No, this does not include enhanced audio. Also the first track on the DVD is not enhanced.

Q. Oh, thank you for correcting me.

A. That is the original footage.

Q. Thank you.

A. That is unenhanced.

Q. Thank you for correcting me in that regard.

THE COURT: Yes. I think then what I would care to do because the expert testimony as I understand it is that the -- all the DVD does is preserve the VHS.

MR. BLOOM: Yes, ma'am.

THE COURT: It does not enhance it, it just preserves it for time.

MR. BLOOM: Yes, ma'am. And just so the court record is clear, I had that done since these cases can often through appellate proceedings linger, we didn't want a copy of a VSH tape deteriorating in an evidence vault somewhere.

THE COURT: I do understand.

MR. BLOOM: Thank you, ma'am.

THE COURT: Would that -- over the objection of the State, I would first hear the DVD of the VHS unenhanced. I sound like

an alphabet kid.

THE WITNESS: Okay.

MR. BAILEY: May I come around so I can view this?

THE COURT: Come wherever you need to, Mr. Bailey. You don't have to stand back there, come as close as you want to or need to.

THE WITNESS: May I make a statement here?

MR. BLOOM: Please, Mr. Fesberman, if you'll orient us to the screen, what we're about to see and whether it's been enhanced or not enhanced, whatever other comments you

need to make as an expert in your field to orient us.

THE COURT: Let me stop. I don't know that Mr. Rogers can see. I have some concerns about that as well. I am sorry that our courtroom is such, it makes it very difficult.

MR. BLOOM: If I may, Your Honor, if we can have him escorted maybe to a seat in the jury box to your left --

THE COURT: Well, I bet he can sit right

there and see.

MR. BLOOM: Yes, ma'am.

THE COURT: I bet right there he can say. Okay. Very well.

MR. BLOOM: Thank you.

THE COURT: All right. You all move as you need to.

THE WITNESS: This DVD contains basically three clips. The first is the supplied news footage. And if you notice, there is no asterisk after that because the asterisk contains the two individual cuts that were modified, not modified, but clarified. In other words, they were equalized for clarity. So the first supplied news footage is the original footage.

THE COURT: Okay.

THE WITNESS: And if you're ready, we'll make a stab at it.

THE COURT: Ready.

(DVD played for the Court.)

MR. BLOOM: Your Honor, if I may, I would like the record to reflect we have all watched, the expert has played the video unenhanced of the supplied news footage.

THE COURT: And I heard clearly a question asked by someone, I gather perhaps a news reporter, but a question asked by someone of a white gentleman there and a response and then perhaps a second response as well. One of them very distinct, one less distinct, but clearly a response that could be heard.

All right. Very well. I will hear the enhanced.

MR. BLOOM: Okay. You want to come back and see it, or...? Okay. Go ahead.

(DVD played for the Court.)

THE WITNESS: You can see that the frequencies are higher and some of the base is out and that's the only enhancement made. Now, the other, if you want to see it, is that same message repeated three times.

THE COURT: But it's the same one?

THE WITNESS: It's the same.

MR. BLOOM: Yes, ma'am. If I can just for the record reflect that we have all now just watched the middle segment of the DVD labeled "Carver Only" with the audio enhanced.

THE COURT: Single play.

MR. BLOOM: Single play.

THE COURT: Yes. And I think the record should reflect that while it was probably in a different frequency and enhanced somewhat, it was not dramatic. You could hear it perhaps clearer, perhaps not. Because I think people hear, don't they, different frequencies differently?

THE WITNESS: I believe they can.

THE COURT: Yes. In other words, I don't think that for the record, at least insofar as my observation is, it did not go to a situation where there was a statement that was -- you could not hear, could not understand, to one that you could hear and could understand. It was one that you could hear, you could understand, and one perhaps that you could hear and understand better.

MR. BLOOM: Yes, ma'am. And I would agree with the Court's assessment of that totally.

THE COURT: Okay. All right. So, you

know, is this a different statement "Carver Only"?

MR. BLOOM: No. And I was not going to actually play that last segment.

THE COURT: Very well.

MR. BLOOM: The "Carver Only" is repeated three times, is exactly what it says as labeled on the DVD, it's the short segment you just saw looped three times so that you can hear the repetition, digest it more easily, but I wasn't actually going to play that part.

THE COURT: Very well. Thank you.

BY MR. BLOOM:

Q. Mr. Fesberman, let me ask you next -- let me stop there before I move ahead.

MR. BLOOM: I take it then, Your Honor, Petitioner's Exhibit Number 56 is entered into evidence?

THE COURT: It is.

MR. BLOOM: That's the DVD.

THE COURT: It is conditionally.

MR. BLOOM: Pardon me?

THE COURT: Let me say this so that my ruling is clear. I think that it's admitted on the issue of ineffective assistance of counsel as a non hearsay purpose, clearly at

this point it's admitted for that purpose. If, however, this -- the tape is also admitted on the issue of prejudice, therefore, an inconsistent statement, it is conditionally admitted for that purpose because of the identification of the gentleman who was making the comments.

MR. BLOOM: And just so I understand Your Honor's ruling, the conditional admission regarding prior inconsistent statement, what the Court will require of me is to have a subsequent witness identify the white male who spoke?

THE COURT: Correct.

MR. BLOOM: Okay. Just wanted to make sure I understood what I needed to do.

(Conditionally entered into evidence was Petitioner's Exhibit 56, DVD.)

(Marked for identification were Petitioner's Exhibits 57 and 58, still frame photographs.)

Q. Mr. Fesberman, let me ask you next, sir, you've been provided Petitioner's 57 and 58 both for identification only. Can you tell us what those are, sir?

A. They are still frames that you and Mrs. Holt

requested that I pull from the VHS tape.

Q. All right.

A. The quality cannot be improved any more than what was on the VHS tape for what we call 72 dpi's per second without going -- 72 dpi's per inch, so they cannot be blown up without blurring out. But at your request, you know, I can still frame and that's what these are, you had requested photographs taken from that VHS tape.

Q. Okay. And so Petitioner's 57 and 58 for identification only at this time are actual photographs taken from the VHS tape in the news footage?

A. That's correct, yes.

Q. Was this a process that was available back in 1994 and 1996?

A. I'd say yes.

Q. All right, sir. In fact, do I understand in the 1990s even before the federal government sometimes in bank robberies or other type robberies printed still frame photographs of suspects from store or bank videotapes?

A. Yes, correct.

Q. So that's a technology that's been around for some time?

A. It has been, sure. It may not be in color, but it would be in black and white at that time.

Q. All right, sir.

MR. BLOOM: Your Honor, at this time I would move Petitioner's 57 and 58 into evidence.

MR. SALTER: Just briefly, there's no one to identify. I don't dispute that this is what he took out of the -- off of the video, but there's no one to identify whether or not this is an accurate and fair depiction of what they propose to depict.

THE COURT: Very well. This would be the Court's ruling. In the context -- of course I don't know what's on the photograph, but certainly in the context that I have admitted the tape and as I understand it there's no contest, Mr. Salter, that this was a tape that was provided pursuant -- or access provided pursuant to Rule 5 on the issue -- I have admitted the tape conditionally on one hand and admitted on the other for the non hearsay purpose, certainly insofar as the admissibility of this -- these photographs as being part of the tape which

has been admitted for non hearsay purposes the objection is it's not properly authenticated?

MR. SALTER: Correct. It's -- I guess my problem is the person who actually videotaped what purports to be the crime

scene should be a person to whom any still photograph was introduced because it can explain.

THE COURT: Okay. All right. But let me ask you this question, Mr. Salter, so that I am clear. Is the objection that you make based upon whether or not this is a tape that came from Solicitor Bailey's file in discovery?

MR. SALTER: No, I don't dispute that.

THE COURT: Okay.

MR. SALTER: No, Your Honor, I do not.

THE COURT: Very well. On that basis, the non hearsay basis, I would admit it.

(Entered into evidence was Petitioner's Exhibit 57, still frame photograph.)

(Entered into evidence was Petitioner's Exhibit 58, still frame photograph.)

MR. BLOOM: Thank you very much.

Mr. Fesberman, please answer any questions Mr. Salter may have or Her Honor may have.

THE WITNESS: Sure.

CROSS-EXAMINATION

BY MR. SALTER:

Q. Good afternoon, Mr. Fesberman. My name is Ed Salter, I'll be as brief as possible.

A. Very good.

Q. You never went to the crime scene at Spell's Grocery Store, did you, sir?

A. No, sir.

Q. So what you had was a videotape that was brought to you by Mr. Rogers' attorneys, correct?

A. What I had was a copy of a videotape that I made that was in evidence here, yes.

Q. I apologize. They brought you here and you made it from here?

A. Yes.

Q. Now, you hesitated a little bit when you said that the audio enhancement technology that you used was available in '94, you said because you would have -- it would have been more cumbersome I believe?

A. Primarily the introduction of computers in what we referred to as nonlinear editing, which is

computer-based editing makes it much easier because there's so many programs that are available for that whereas prior to I would say the '90s it had to be done with analog equipment. And that analog was basically a group of filters that could essentially do it, but it was more of mechanical as opposed to electrical. Does that make sense?

Q. Okay. Yes, sir. When did you first acquire the computer technology?

A. I bought the first nonlinear editing system in the early '90s, in I'm going to say probably '92, '93.

Q. You say bought the first one. The first one for your business or the first one in the state?
A. The first one in the state.
Q. The first one in the state. So that was the only one back in 1992?
A. To the best of my knowledge. And I was told it was the first one in the state. It was called an IMEX Video Cube.
Q. All right, sir.
A. Of which is nonlinear.
Q. It's fair to say you've been in the forefront of the video production/audio production industry?
A. I'd like to think to a degree, yes.

Q. All right, sir. Do you know when other people may have had this technology available to them, other competitors?
A. Immediately after. I mean, right after I bought one I think the Savannah River Plant purchased one and then it mushroomed and now there are many of them out.
Q. All right. And the DVD technology, was that available back in 1994?
A. I would say it was available but not prevalent. I mean, at that time audiocassette was the thing, but that was analog and ultimately in time the DVD and the CD came to be.
Q. All right, sir.
A. Audio is basically a CD, but it is, needless

to say, connected with a DVD. And the CD was available really before the DVD.

Q. All right, sir. Now, with respect to Applicant's Exhibits 57 and 58, when you made the stills did you make them from your -- the digital tape that you had or did you make them from the original VHS?

A. Yes. I put it in the computer and then from the computer you can actually go from frame to frame to frame and create a still photograph from that

frame.

Q. Okay. Now, back in '94 could you do the same thing?

A. Yes. Yes.

Q. All right, sir.

A. In fact, technically you could do it a little prior to that. You could do it -- it would be a little bit different technology, but you could use a still frame with what we referred to as a time-based correcter which would freeze a frame. It was not as easy, as I said, as with the nonlinear system.

Q. And how many people would have offered this service to someone if they sought them out in '94?

THE COURT: Which one are you talking about, the freeze frame or other one?

MR. SALTER: Yes.

THE COURT: The freezing frame?

MR. SALTER: Yes.

A. How many people?
Q. Yes. How many businesses were there like yours that would have had this kind of technology available?
A. I'd say there would be very few at that time but then they -- you know, it would probably multiply 20 a month. But I can't give you specific dates, you

know, that it would be. But it was during the '93s I think that it really started mushrooming with nonlinear.
Q. Okay.
A. Otherwise in most other cases you'd have to go to a television station and get it.
Q. All right, sir. Thank you very much.
A. Sure.
THE COURT: Thank you. Redirect?

REDIRECT EXAMINATION

BY MR. BLOOM:
Q. So at '94, '96 if you didn't have an expert to do this you might have been able to go back to the original television station and ask them to do it?
A. That's correct.
Q. They might have charged you a fee for it?
A. Yes.
Q. But it could have been done by the original TV station?
A. It could have been done.
MR. BLOOM: Thank you, sir. I have no

more questions, but if the Court has questions.

THE COURT: I do, counsel, it's really for the two of you. Am I to understand that

the -- that the tape involving both of these news stories is in evidence and only one of them was played, or is just the first news story on the tape in evidence? Which is in evidence?

MR. BLOOM: It's the latter. Just the first news footage of Mr. Rogers being escorted behind the courthouse out in public view for his bond hearing was put before the jury. My assumption is Solicitor Bailey had both news footages on his tape and he made a strategic decision to use the news footage of Mr. Rogers and had that copied to a separate tape so the jury only saw Mr. Rogers being escorted.

THE COURT: Okay.

MR. BLOOM: And there's -- and we don't assert anything wrong in that strategic decision by him, there's no misconduct there or anything, I don't want that implied.

THE COURT: Very well. That answers --

MR. BLOOM: But his original tape was in evidence.

THE COURT: That answers my question.

MR. BLOOM: Thank you.

THE COURT: Oh, my. Recross, Mr. Salters? I'm sorry.
MR. SALTER: No, Your Honor.
THE COURT: Is this witness free to leave?
MR. BLOOM: I ask that he be allowed to leave.
THE COURT: Very well. Any objection, Mr. Salter?
MR. SALTER: Without objection.
THE COURT: Very well. Thank you.
THE WITNESS: Thank you.
(Whereupon, the witness steps down from the witness stand.)
THE COURT: All right, Mr. Bloom.
MR. BLOOM: Thank you, Mr. Fesberman. Mark Leiendecker.
THE COURT: Mr. Leiendecker.
(Mark A. Leiendecker, called as a witness, having first been duly sworn, is examined and testified as follows:)
THE COURT: Very well. If you would please be seated and, when you are seated, if you'd state your full name for the record.
THE WITNESS: Mark Leiendecker.

THE COURT: Your witness.

DIRECT EXAMINATION

BY MR. BLOOM:

Q. Sir, you've previously testified in this case just so the record's clear?

A. Yes.

Q. Okay. And let me kind of get right to the issue before us today. Let me show you Petitioner's Exhibit Number 59.

MR. BLOOM: And excuse me, let me show it to opposing counsel. I don't think there's an objection.

MR. SALTER: No objection.

THE COURT: Very well.

(Marked and entered into evidence was Petitioner's Exhibit 59, letter.)

Q. Let me show you Petitioner's Exhibit Number 59 which is now in evidence, ask you to take just a moment to review that. I call your attention to the first paragraph.

A. Yes.

Q. All right. And, sir, if I may ask, is that -- can you tell me generally what that letter is? You don't have to go into the content, I mean just in terms of the course of this case.

A. It's a letter from Solicitor Bailey to Mr. Runyon disclosing some additional documents that

the solicitor said he had in his possession and some information regarding potential exculpatory information.

Q. All right, sir. In your experience with Solicitor Bailey, that's a typical type of disclosure or discovery letter?

A. Absolutely. This was after the initial -- well after the initial discovery, it's a follow-up letter.

Q. And it's addressed to Mr. Runyon?

A. Yes.

Q. It was not copied to you though on the bottom?

A. No, it wasn't.

Q. All right. And is it fair to say is today the first time you've seen this letter?

A. In all my testimony before and I think, you know, I've explained this before, I don't remember seeing that letter before, but I mean that letter was written in 1994.

Q. I understand.

A. Eleven years ago. It wasn't sent directly to me and I don't remember seeing it.

Q. All right. And if you had gotten a copy from Mr. Runyon or anyone else, there would be a copy in your office file?

A. Yes.

Q. All right. And there is none to your

knowledge?

A. No. I know that you asked me to look for it -- if you asked me to look for it I haven't been able to find it.

Q. All right. The first paragraph in Petitioner's 59 references news footage from two different TV stations?

A. Yes.

Q. Can you just look at that? And that's Channel 2 and Channel 4?

A. Yes, sir.

Q. Now, was there a videotape that was introduced in evidence by the solicitor of news footage of Tim Rogers?

A. Yes, there was.

Q. And just generally what is your recollection, if you can describe what that news footage of Tim Rogers was just in general terms.

A. It's the information described in the third sentence of the first paragraph which was described

as footage showing Mr. Rogers following his bond hearing.

Q. All right. Now, to your recollection did Mr. Runyon ever call to your attention the additional news footage that Solicitor Bailey refers to in Petitioner's 59?

A. The only videotape information or evidence I remember ever seeing or viewing in preparation for

the trial presentation or representation of the penalty phase was the bond hearing footage. And there was a lot of emphasis on that, we worked to exclude that, and it didn't get excluded.

Q. All right, sir. In preparation of today's hearing did I come by your office with a copy of some news footage and play it for you so you would have a chance to see it in anticipation of your testimony today?

A. A number of weeks ago, yes, you did.

Q. All right, sir. Let me -- and I knew I shouldn't have excused Mr. Fesberman, but I'm going to attempt to operate the -- I think he showed me where the buttons are. Got it.

Let me play for you what is Petitioner's 56 now in evidence and in some respects conditionally admitted so I can ask you some questions about it.

And I am going to play record supplied news footage.

(DVD played.)

Q. Okay. Mr. Leiendecker, is what you just watched, is that to your recollection what I played for you in your office in anticipation of your testimony today?

A. Yes, it is.

Q. All right. And did you see that news footage which you've just watched and reflected in Petitioner's 56 prior to either the 1994 or 1996 trials?

A. No. I believe the first time I saw that was when you brought it this last month to my office.
Q. All right. Next let me ask you, do you recall just watching the video that there is a white male -- bearded white male on it?
A. Yes.
Q. And do you recall which witness that was in 1994 and/or 1996?
A. Mr. Carver.
Q. That would be James Carver?
A. Yes, sir.
Q. As reflected in the trial transcripts?
A. Yes, sir.
Q. All right. If I can direct your attention to

two statements Mr. Carver made.

MR. BLOOM: And excuse me before I do that, Your Honor, you had previously made a conditional admission for prior inconsistent statement purpose dependent on me having a witness identify Mr. Carver. I believe I've done that, so I would renew my submission of Petitioner's 56 of evidence on that point as well unless there's a further connection I need to make?

THE COURT: Mr. Salter, anything further?

MR. SALTER: No, Your Honor.

THE COURT: Counsel, let me see you a

second. I need to ask something of you.
(Whereupon, a bench conference was held off the record.)
THE COURT: Very well. It's admitted.
(Entered into evidence was Petitioner's Exhibit 56, DVD.)
MR. BLOOM: Thank you, Your Honor.
Q. Mr. Leiendecker, let me ask you first, I guess I may need to start calling you Judge Leiendecker?
A. No, please, certainly not here in that

capacity.
Q. Mr. Leiendecker, let me ask you, and if you need to see it again I can isolate that portion of the video. Do you recall on the video there where Mr. Carver made a statement we just pulled up?
A. Yes, sir.
Q. All right. If you had seen that video before 1994 or 1996, could you have used that statement by Mr. Carver as a prior inconsistent statement in any regard or for any impeachment purpose?
A. It certainly wasn't what they have had at trial and not what the evidence demonstrated, because they had been there, gone into the store, gotten some stuff, had an altercation and were leaving.
Q. After Mr. Carver makes that statement on the video, let me direct your attention to it for my next question, he is asked by someone off camera any idea

why he shot at that, and we concede that is -- that statement is not offered for the truth of the matter asserted or that question on the video is not offered for the truth of the matter asserted. Mr. Carver responded no.

If you had seen that video, could you have used that for any prior inconsistent statement or impeachment purpose either at 1994 or 1996?

A. I have a hard time answering that question. It certainly could have been used in consideration. I mean, because like I say, the testimony was clear that there was a heated argument between all the parties.

Q. Thank you, sir. Next let me show you Petitioner's 57 and 58 which are in evidence and have been previously identified as still frame photographs from the video and ask you to look at them.

A. (The witness complies.) Okay.

Q. All right. In your view do those photos fairly and accurately represent a portion of the news video regarding the back of the truck?

A. Yes.

Q. All right. And let me ask you can you identify that from your knowledge of photographs of the scene and other information in the case, is that Mr. B[redacted]'s truck?

A. Yes.

Q. All right. And do there appear to be beer

boxes or at least a beer box in the back of his pickup truck?

A. There is what appears to be a case of Busch beer.

Q. All right. And how could, if anything, that

information have been used by trial counsel in either 1994 or 1996?

A. The beauty of hindsight is it's 20/20, but it certainly is something that could have or maybe should have been discussed at least in the penalty phase concerning the conduct of the parties and the aggravation, whether there were elements involving alcohol that were involved in the argument that ensued or that took place outside that preceded the shooting.

Q. All right, sir.

MR. BLOOM: Court's indulgence one moment, Your Honor?

THE COURT: Yes, sir.

(Mr. Bloom conferring with Ms. Holt.)

MR. BLOOM: Court's indulgence one moment, Your Honor, I'm trying to find a transcript citation.

THE COURT: Yes.

(Pause in proceedings.)

Q. Lastly, your recollection is that Mr. Runyon did not share with you the information Solicitor Bailey disclosed in the February 9th, 1994 letter

reflected in Petitioner's 59?

A. I have recollection of the videotape

concerning the bond hearing, but I have no recollection regarding the other videotape, so I presume at this time, 11 years later, that we didn't look at that, the news footage which I just saw.

Q. All right. And if you had that information, that other news footage which you just saw today and testified to had existed, you certainly would have reviewed it?

A. Absolutely.

Q. All right. And lastly, if in the 1996 transcript James Carver testified on page 749 that he did not see any 12 pack of beer anywhere in the truck, the news footage you've just seen you could have used for impeachment purposes?

A. Oh, yes, absolutely.

Q. As well as the still photographs in Petitioner's 57 and 58?

THE COURT: Tell me who made that statement.

MR. BLOOM: James Carver, page 749 in the 1996 transcript.

THE COURT: Okay.

Q. I'm sorry, did you answer that last question you could have used that?

A. Yes, it could have been used.

Q. Thank you, sir. Please answer any questions Mr. Salter or Her Honor may have.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. SALTER:

Q. Good afternoon, I'll be brief. You've previously testified that your involvement was somewhat limited in the first trial, correct?

A. Yes, sir.

Q. All right. And that consisted primarily of involvement with I believe jury selection?

A. Jury selection and then notes and help during the trial like any second chair in a trial would be.

Q. Correct. All right, sir. And this is some 11 years after the fact that you've been shown the videotape, Applicant's Exhibit 56?

A. Yes, sir.

Q. It's fair to say you just might not remember seeing this at some point in the past?

A. I certainly don't suggest that my recollection is a hundred percent.

Q. Thank you. Do you recall ever seeing crime scene photographs?

A. Yes, sir.

Q. Other crime scene photographs?

A. The sheriff's pictures, yes, sir.
Q. All right, sir. You looked at those?
A. Yes, sir.
Q. All right. And you weren't -- obviously you weren't present when the video was shot?
A. That we watched today?
Q. Correct.
A. No, sir. No, sir.
Q. Could you identify the person who was the white male who was on the video immediately after the gentleman you've identified as Mr. B[redacted]? I'm sorry, Mr. Carver.
A. I'm sorry, I didn't understand the question.
Q. There was another person who appeared in that video footage after Mr. Carver?
A. Who spoke on the video.
Q. Who spoke on the video, yes.
A. Yes, Detective Nivens, Dale Nivens.
Q. Okay. And I believe you initially testified that the statements that were made by Mr. Carver were something that you and co-counsel could have discussed as to whether or not to use them?
A. Yes, sir. Could have discussed, should have discussed probably.
Q. All right. And Mr. Runyon was responsible

for the examination of Mr. Carver, correct?
A. Yes, sir.
Q. That would have been both in the original

trial and in resentencing?
A. Yes, sir.
Q. All right. And again it's been 11 years, hasn't it, since the letter was transmitted in February of 1994?
A. Yes, sir. It has.
Q. Okay.

MR. SALTER: Nothing further, Your Honor.

THE COURT: Very well. Redirect?

REDIRECT EXAMINATION

BY MR. BLOOM:

Q. Detective Nivens' statement on there which Mr. Attorney General asked you about, as trial counsel in the case would you characterize that as more opinion, an opinion statement by him or his assessment of the case?
A. It was a quick snippet with the news, it was opinion. I don't think it reflected facts, once they were all fleshed out anyway.
Q. To your knowledge Detective Nivens was not an eyewitness to anything that night of the incident?

A. No.
Q. From your recollection of the case?
A. No, he wasn't. I don't even remember if he testified at the trial, I'm not sure.
Q. Next Mr. Salter asked you about crime scene photographs. Let me show you Petitioner's Exhibit 18

which has previously been identified in this case and is in evidence as one of the crime scene photos. Can you identify that?

A. Yes, sir.

Q. All right. And whose truck is that?

A. It's B[redacted]'s truck.

Q. And from your recollection and knowledge of the scene as one of the trial counsel, is that a photograph taken at the scene that night?

A. Yes, sir.

Q. Where is it cropped off in relation to the bed of the truck, the laundry basket and what you saw in the news footage and the Petitioner's 57 and 58 regarding the case of Busch beer? I didn't ask that question very well, let me withdraw it.

In Petitioner's 18 can you see the Busch beer in that photograph, that crime scene photograph?

A. No, sir.

Q. Is it cropped off at that point?

A. The photograph stops midway back on the truck bed and does not show the entire laundry basket.

Q. All right. So if you had that in similar crime scene photographs you never would have seen the case of Busch beer as reflected in the news footage and depicted in Petitioner's 58 and 57?

A. No, sir.

Q. Thank you very much, sir.

THE COURT: Recross?

MR. SALTER: Nothing further, Your Honor.

THE COURT: All right. Very well. Is this witness free to leave? Do you have any objection?

MR. SALTER: No, Your Honor.

THE COURT: Very well. You are free to go.

MR. BLOOM: I have no objection.

(Whereupon, the witness steps down from the witness stand.)

THE COURT: Call your next witness, please.

MR. BLOOM: That would be Applicant's case.

THE COURT: Very well.

MR. BLOOM: Thank you.

THE COURT: All right, Mr. Salter.

MR. SALTER: We would recall Mr. Bailey.

THE COURT: Very well. Yes, sir, Mr. Bailey.

(Walter Bailey, called as a witness, having first been duly sworn, is examined and testified as follows:)

THE COURT: Thank you. If you would please be seated and state your full name for the record.

THE WITNESS: Walter Bailey.

./August 23, 2005

THE COURT: Your witness.

DIRECT EXAMINATION

BY MR. SALTER:

Q. Just very briefly. You previously testified that you were the solicitor both at the time of the original trial and in '96 for the resentencing?

A. That's correct.

Q. All right. And before each proceeding did you disclose certain matters to counsel pursuant to Rule 5 and Brady?

A. Yeah. I've got an open file policy and I sent them everything that I had with the exception of anything that would be voluminous like the tapes, the

Channel 2 and Channel 4 tapes. And I advised them I had those tapes, I previously described it for the purpose of identifying the case in case of a discovery question and invited them to look at it at any time they wanted.

Q. All right. I'll show you what has previously been introduced as Applicant's Exhibit 59. Do you recognize that document?

A. Yes, I do. That's out of my file, out of my discovery file.

Q. Okay. What is that document?

A. It's a letter dated February 9th, 1994 to Mr. Runyon who was the lead, lead counsel for the defense, enclosing additional documentation, meaning in addition to the original discovery that I would

have sent. It's my policy as I acquire any documentation, provide that to the defense as soon as I get it and stuff trickles in after the initial discovery, so that's why I've got additional there.

Second paragraph goes into what could conceivably be construed as a consistent statement given by the defendant to several people. And in case someone wanted to mount an argument that was helpful to the defense, I disclosed that just out of an abundance of caution.

Q. With respect to the documents that you disclosed along with that letter, did you reference the videotape we've been shown here today?

A. Yeah. That would have been the Channel 4 tape that was referenced along with the Channel 2 tape. I think we saw the Channel 4 tape.

Q. So you apprised counsel of the existence of that tape?

A. That's correct.

Q. Offered to make it available to them for their inspection?

A. Yes.

Q. Do you recall whether or not counsel ever --

A. I do not recall. I don't recall whether or not they came in, either one or both came in and saw it, at this time I don't remember.

Q. Now, on the second page of this February 9, 1994 letter you have listed both news transcripts

dated 11/25/92 from Channel 4 and a computer printout dated 11/30/92 from Channel 4.

A. Yeah, that's correct. I sent them -- since it was documentation, I went ahead and sent them copies of it. Copies I received.

Q. So those transcripts would have been sent to counsel?

A. Yes.

Q. Okay. Do you have a transcript?

A. I've got copies of it that I brought with me.

Q. Okay.

A. This is a copy of the February 9, 1994 letter, the itemization that was attached to it as well as the -- a transcript and a computer printout is what's referred to in the letter.

Q. Okay.

MR. SALTER: One moment, Your Honor.

THE COURT: All right.

MR. SALTER: Show this to counsel. We'd offer the transcripts into -- another copy of the January -- I'm sorry, February 9, 1994 letter as a Respondent's Exhibit.

THE COURT: Respondent's Exhibit.

MR. SALTER: I do not know, Your Honor, the next number. The next number, yes.

THE COURT: Very well. Tell me how many pages it contains, Mr. Salter.

MR. SALTER: Ten pages, Your Honor.

THE COURT: Very well. Ten pages?

MR. SALTER: Yes, ma'am.

THE COURT: Very well. Thank you.

(Entered into evidence was Respondent's Exhibit 7, February 9, 1994 letter and transcripts.)

Q. Mr. Bailey, I now hand you Respondent's next exhibit which is ten pages long. Is that the copy of the transmittal letter and the transcripts you --

A. Yes, it is.

Q. Okay. You provided those to counsel?

A. Yes.

Q. So any information that's in those transcripts would have been available to counsel, correct?

A. Yes, that's correct.

Q. Is there any discussion in the transcript which would reflect -- excuse me, that would correspond to the video footage at the crime scene?

A. There appears to be part of it, and I'm referring to the third page where there's a question, Do you have any idea why they shot at your truck? And the answer is, Shakes head no. And Dale Nivens came on after that. It appears to me the transcript omitted a portion of what Mr. Carver said.

Q. Okay. But the portion about do you have any idea --

25 A. Any idea how they would have shot at your

1 truck, he shook his head and shakes head no.
2 Q. Okay. So that is in there?
3 A. Yeah.
4 Q. Is there any -- does the transcript reference
5 the portion of the tape where he says that they had
6 just gotten to the store?
7 A. I don't see that in here. We spoke with one
8 of the men who was in the truck when bullets started
9 flying, he's in shock. I guess referring to
10 Mr. Carver. And then it says shooting victim,
11 question, do you have any idea why they would have
12 shot your truck? A for answer, shakes head no. And
13 then Dale Nivens appears on there next.
14 Q. All right, sir. Now, do you have any
15 independent knowledge as to what Mr. Carver may have
16 meant by his statements?
17 A. I have no independent knowledge of it. It
18 appeared to me looking at the tape that he was in
19 shock as the thing has indicated.
20 MS. HOLT: Objection.
21 THE COURT: Sustained.
22 Q. All right. Could you describe his physical
23 appearance as you saw it on the videotape?
24 A. Stunned. He looked to me to be stunned.
25 Q. Okay. Was he very attentive to the

questioner?

MS. HOLT: Objection.

Q. Did he appear to be very attentive?

A. No, not to me. He was not making eye contact and appeared to be walking away from them.

MS. HOLT: Objection, Your Honor. He doesn't know what was in Mr. Carver's head and Your Honor can judge that the best evidence.

THE COURT: I understand that. The tape speaks for itself where he was walking, what he was doing.

MS. HOLT: Yes.

Q. I don't think I have anything further.

THE COURT: Thank you.

Cross-examination.

MS. HOLT: Court's indulgence.

THE COURT: Certainly.

(Ms. Holt conferring with Mr. Bloom.)

THE COURT: Yes.

CROSS-EXAMINATION

BY MS. HOLT:

Q. Do you recall testifying previously in this matter?

A. I recall testifying, I don't recall word for

word exactly what was asked of me, what the response was, but I do recall testifying.

Q. You were previously asked during your testimony in this matter whether Mr. Runyon or Mr. Leiendecker ever came to view your file. Do you recall your answer?

A. No, I do not.

Q. Your answer was that not at all, not to your recollection.

A. Okay. I don't recall them coming or not coming. At this point in time I don't recall.

Q. So your answer is different than it was in your prior testimony?

A. Could you read back my prior testimony?

Q. I sure couldn't, I don't have it. I apologize.

A. Well, I can't say it was different if I don't remember what it was.

Q. The record will reflect what you said. And the transcript has some omissions or areas where it appears that what is on the tape, the best evidence of what Mr. Carver said, is not included in the transcript; is that accurate?

A. That's correct.

Q. The transcript also includes newscaster

voiceover; is that right?

A. Yeah.

Q. Okay. And you did give this to Mr. Runyon?

A. I mailed it to Mr. Runyon.

Q. And you also not only let him -- made him

aware that there was a videocassette, but you made him aware of what the contents generally summarized?

A. Very briefly, yes.

Q. What the contents of the videocassettes --

A. What I was trying to do is not to summarize the entire contents, but to identify what was on there.

Q. The character?

A. Yeah, the nature of what was being provided.

Q. The nature. And you don't know whether or not Mr. Runyon ever shared that information with Mr. Leiendecker?

A. I have no idea.

Q. Thank you. Please answer any --

THE COURT: All right. Yes. Redirect?

MR. SALTER: Nothing further. We rest.

THE COURT: I have a couple questions.

EXAMINATION

BY THE COURT:

Q. Mr. Bailey, first of all let me see the

letter, I've not seen it. Someone can bring it to me.

MR. BLOOM: Mr. Salter, we're talking about Petitioner's 59, the letter.

THE COURT: Yes. Great.

Q. I'll hand you Petitioner's 59, I'll ask you this question: If you know who generated the transcript, the transcripts?

A. You mean what individual person?
Q. Yes.
A. No, I did not. I didn't know at that time.
Q. To your knowledge was the transcript produced by you or by someone in your office or by someone outside of your office?
A. Someone outside of the office. My best recollection is that we would have subpoenaed all three channels, 2, 4 and 5, any footage, raw footage or production footage they had of the crime scene or anything involved in that case and that the transcript probably came to us along with the tape pursuant to our subpoena.
Q. To the best of your recollection, your office did not generate the transcript?
A. We did not, I can say that for certain. We did not generate the transcript.

Q. That was not your practice?
A. No.
THE COURT: Very well. Does that prompt any questions from either side? Yes, sir.
MR. SALTER: None from the State.
THE COURT: Very well.

RECROSS-EXAMINATION

BY MS. HOLT:
Q. So then you're not making any representations by authenticity of the transcript?
A. To the best of my knowledge this is -- all I

can say is this is what we received pursuant to our subpoena for the tape. As far as authenticity of it, I've got no reason to doubt that this came from Channel 4, I have no knowledge of how it was -- who did it, how it was done or anything of that nature.

Q. And that transcript for the purpose of this hearing is what you're presenting, is what you provided to Mr. Runyon?

A. Yeah.

MS. HOLT: Court's indulgence.

THE COURT: Sure.

(Ms. Holt conferring with Mr. Bloom.)

Q. Did you, Mr. Bailey, did you view the crime scene footage on the tape yourself?

A. You mean today or previously?

Q. Previously, I'm sorry.

A. I would have, yeah. I'm sure I did and I know I did. When we got the tape from both stations I reviewed the tape, see if there was anything there I could possibly use as evidence either at the guilt phase or penalty phase. And then when I realized I thought that it was relevant the portion of it showing the defendant going from the bond hearing over to the jail that might be potentially admissible in the penalty phase, I went ahead and redacted that off of the original tape, but I probably would have reviewed the entire tape one time just to screen it and see if I needed it or didn't need it and, yeah.

Q. So you viewed that crime scene tape, I believe you said, to see if there was anything that you could use as evidence?

A. Yes.

Q. You reviewed it carefully?

A. I mean I played it, I listened to it, I watched it. And, yeah, I'd say carefully.

Q. No further questions.

EXAMINATION

BY THE COURT:

Q. To your recollection -- just to sort of

finish it, to your recollection did you do any comparison between the tape and the transcript?

A. No.

Q. Did you just simply watch the tape yourself?

A. I was more interested in the tape than the transcript. I assumed the transcript was a copy of the tape, might have glanced at it, but I was looking for evidence at that point in time and when I saw some evidence there I got somebody in the office to go ahead and redact that portion out to use in the trial.

Q. Was it your policy to do a comparison between the transcript and a tape when you would receive them before say -- before sending it on to counsel?

A. I don't know that I had a policy. I don't recall in any other case getting the transcript at the same time I got the tape, they would usually just

give us a tape.

Q. Just so I'm clear, the record is clear, you forwarded the transcript and the tape because that's what you had received or you notified them?

A. I forwarded the transcript, the actual copy of the transcript.

Q. And notified them of the tape. The reason you forwarded the transcript is because that's what

you had received?

A. That's what I received and it's a document and I provide all documents to the defense.

Q. And so far as you can recall at the point in time when the transcript was forwarded, you had no knowledge that there was a difference between what was on the tape and what was in the transcript?

A. That's correct.

Q. Okay.

A. In fact, I didn't realize there was a difference until I sat here today and looked at it.

THE COURT: And does that prompt questions from either side?

MS. HOLT: Thank you, Your Honor.

FURTHER RECROSS-EXAMINATION

BY MS. HOLT:

Q. You indicated that when you viewed the tape you were looking for evidence and then when you found something that you considered evidence you redacted the audio portion, is that it?

A. No. I redacted the portion of the tape.
Q. That you found to be evidence?
A. Yeah.
Q. Was that evidence you were looking at both audio and visual?

A. Yeah.
Q. Okay. No further questions.
THE COURT: And Mr. Salter?
MR. SALTER: Nothing further.
THE COURT: Does that prompt anything from you? Very well. Thank you.
THE WITNESS: Thank you.
THE COURT: And is this witness free to leave?
MR. SALTER: Yes, ma'am, Your Honor.
THE COURT: Very well. You are free to go. I gather there's no objection?
MR. BLOOM: None at all.
(Whereupon, the witness steps down from the witness stand.)
THE COURT: Mr. Salter, if you would call your next witness.
MR. SALTER: I don't have any other witnesses.
THE COURT: Thank you. Thank you both. Yes.
MR. BLOOM: Judge, I just have a housekeeping matting. We've been referring

to various news footage and had witnesses identify it. Solicitor Bailey's letter,

which I believe you have, refers to Channel 2 and Channel 4. Where did that get returned to? And I -- just as a housekeeping matter.

THE COURT: I don't know. Let's just stop and take a look. Mr. Bailey had it. Mr. Bailey, did you hand it back to me?

MR. BAILEY: Sorry.

MR. BLOOM: I've done that before myself. I just want to clarify for us in the record, it's obvious to us in the courtroom because we can visually see the news footage on the TV in the courtroom, but Channel 2 in Solicitor Bailey's letter, Petitioner's Exhibit 59, is what we showed today and that's evident at the beginning of the tape, you can clearly see Channel 2. What's already in evidence is Channel 4 and that's the video of Mr. Rogers walking for his bond hearing, but Solicitor Bailey's letter in Petitioner's Exhibit 59 references Channel 2 and Channel 4.

And for the record I just want to reference what you're referring to, it's visually for us in the courtroom what we're referring to, but in the dry transcript it's

not. I wanted to clarify that for the Court.

THE COURT: Very well. Yes.

MS. HOLT: Also for the record, Your Honor, I wanted to make the Court aware, have the record reflect that we have made numerous attempts to locate Mr. Carver and have gone to ten or eleven addresses that were associated with Mr. Carver and we've never been able to locate him. So I didn't want the absence of Mr. Carver's presence at this hearing to be taken as an indication that we spoke with him and elected not to call him as a witness, because we've never been able to locate him.

THE COURT: Okay. All right. Counsel, I think what I -- there are a couple of ways to proceed at this moment. One way, of course, is to ask you for memorandum and we could go forward in that regard, or I could ask you for proposed orders. I chose to ask you for proposed orders because clearly the factual content, the legal argument would necessarily be contained in a prosed order. And I think that's the way that I would prefer.

If, however, upon receiving the proposed orders, if there appears to be a particular issue that needs to be separately briefed, I'll ask for that, but I think the way that I would like to proceed is to proceed in the form of proposed orders, anticipating that you would in your proposed orders include factual bases and then, of course, the attendant legal bases for your position or positions.

So with that in mind, counsel, we can proceed in two ways. The two sides can meet and propose to me a scheduling order or we can actually discuss that now. My only concern is that I'd like you to be as prompt as you can be, but by the same token you need to have an appreciation for your other commitments which I know for all of you are many.

However, obviously once I have concluded the hearing then my need, it gets to be fairly important, and I'd like this to come closer to the front burner so to speak.

So with that in mind do you all -- would you prefer to talk and try to confer or

would you -- or are you prepared to talk about that now, Mr. Salter?

MR. SALTER: I think we can confer and

do that. The only thing I would request is that we do not do simultaneous proposed orders because I did that in another case and I wound up with an extraordinarily long order and I think that could be avoided. When I say extraordinarily long, I mean 350 pages.

THE COURT: Oh, Mr. Salter, I know exactly what you are talking about. How do you feel about that? We can do one of two -- because here's what will happen from my perspective. If I get two orders then I get two more orders and then I have to figure out how to merge even your two orders. If we do it the other way, I get an order from obviously the petitioner first, a responding order and then commentary order, responsive order. I think I like that better.

And the reason for that is I can certainly see in that form the applicant when the applicant perceives the strongest arguments are the response to that and the -- and as well as the attorney general's

position of the strongest argument and then a response back to that. I think for my purposes that probably serves me better. Unfortunately, unfortunately also for me that means a longer scheduling period, but -- but I think that's probably in the end more

efficient.

MR. BLOOM: So we have the last response since we have the burden of proof as I understand the proposal?

THE COURT: That's correct.

MR. BLOOM: Okay.

THE COURT: In other words, I think -- I think that the way that it would work would be you would do your proposed order and, of course, your briefing and then there would be a response in the form of an order and then your response to what -- and what I would do, the only thing that I would ask you all to do would be twofold. Number one, to address it specifically, whatever you wish to address specifically, probably at that point and then incorporate in a separate document your responses in the order itself so I don't have to go looking for it, if that makes sense,

that seems to work pretty well. Okay? Are you all with me?

In other words, you will take their work product, your strongest points and respond to the petitioner's, petitioner would then respond back to your points, but by that point I've already read yours so I think it would be appropriate to isolate probably in some sort of memorandum or supplemental

document, but then incorporate the supplemental information into the proposed order. That way, that way I can look at -- there are going to be some areas that you all are going to have the greatest amount of argument, I can isolate those and then take those isolation of the ones that you've isolated in your reply, if you will, and go back and incorporate those in your order.

MS. HOLT: Would you like those also submitted in computer disc, would that help the Court?

THE COURT: Sure.

MS. HOLT: Okay.

THE COURT: Yes. I couldn't have handled the turning, you know, I'm

technologically challenged for sure. Yeah, that would be very helpful.

Now, it is my belief that certainly the testimonial part of this matter is concluded and we are at this point into the writing. Does anyone disagree with that?

MR. SALTER: No, Your Honor.

THE COURT: No. No. Very well. All right. Thank you all very much. I appreciate that.

All right. Come on back. If you all will just give me a moment of your time,

tell me the time frame that you're thinking of, I'll share, and then you all will come up with the final.

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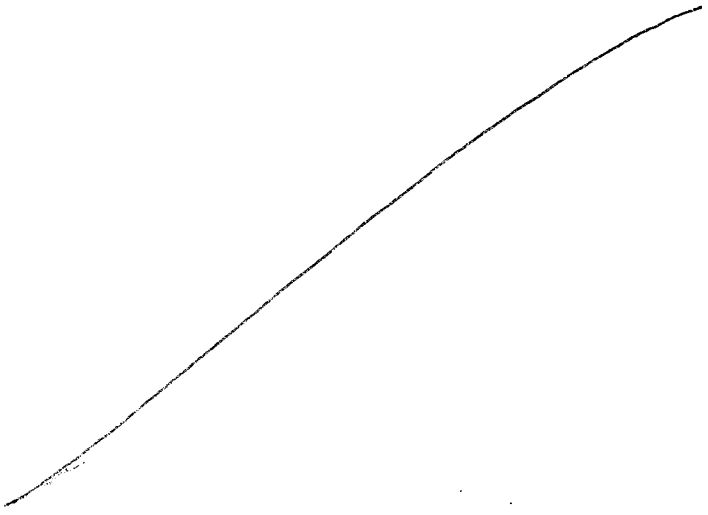
STATE OF SOUTH CAROLINA)
: C E R T I F I C A T E
COUNTY OF DORCHESTER)

I, Robin L. Keil, Registered Merit Reporter and First Judicial Circuit Court Reporter, certify that the preceding pages are a true and correct transcript of the proceedings had at the aforesaid time and place.

I certify that the same was reduced to typewritten form from my original stenograph notes by computer-aided transcription.

I further certify that I am not of counsel or kin to any of the parties to this cause of action,



nor am I interested in any manner in its outcome.

IN WITNESS WHEREOF I have hereunto set my hand this the 22nd day of August 2006.

Robin L. Keil, RMR
Resident Court Reporter
First Judicial Circuit

STATE OF SOUTH CAROLINA)	THE COURT OF COMMON PLEAS
)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER)	
	00-CP-18-575
TIMOTHY DION ROGERS,)	
)	
Applicant,)	
)	(PROPOSED) ORDER
vs.)	
)	
JON E. OZMINT, Director,)	
South Carolina Department)	
of Corrections)	
)	
Respondent.)	
)	

This matter comes before the Court on application for Post-Conviction Relief ("PCR") by Timothy Dion Rogers ("Applicant"), a death-sentenced person. Applicant seeks reversal of his convictions and sentences based on his claims that his trial and appellate counsel were ineffective in their representation of Applicant at all prior stages in the judicial process, that his unrelated guilty pleas, which were used as the bases to establish prior violent felony convictions, are void because the trial court that imposed them was not lawfully vested with jurisdiction, and that the State failed to correct false testimony, the falsity of which, it alone had actual knowledge; Applicant further alleges that the State knew that his trial counsel was unaware of the falsity of the testimony. This Court hereby grants the relief Applicant seeks.

In granting Applicant a new trial, this Court makes the following findings of fact and conclusions of law:

I. FACTUAL BACKGROUND.

On Thanksgiving Eve of 1992, Applicant and his two friends, assault victim and Daxton Patterson, walked to Spell's Grocery Store in Summerville, SC to use a pay phone

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

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

As the argument became more heated, involving all four men by that point, Applicant produced a firearm and fired a warning shot in an attempt to quell the argument. Tempers and tension were high. There is a dispute as to whether Mr. B[redacted]s truck was pulling away from the store or backing up toward Applicant. Stephanie B[redacted] was seated

in the center of the truck cab's interior bench seat. Applicant, who by all accounts was not wearing his prescription glasses that night, fired a second shot shortly after firing the first one. The second bullet pierced the middle of the back window of the truck, entered the back of Stephanie's head, and exited through her forehead. Applicant, Mr. Patterson, and Ms. [assault victim] fled the scene. Stephanie was transported to a hospital where she was pronounced dead the next day. Applicant has never wavered in his contention that he did not intend to harm Stephanie. He has been equally consistent in acknowledging that he fired the shot that killed her.

Applicant was arrested on December 2, 1992, at a college apartment building near Tuskegee University in Alabama, where he had gone to see his friend, Stephanie Simmons. After he was arrested, he gave a statement to Alabama law enforcement in which he acknowledged that he had possessed and fired the weapon that killed Stephanie, that he had pulled the gun and fired it after a racially charged confrontation, and that he never meant to harm the child, only to break up the confrontation.

II. PROCEDURAL HISTORY.

Applicant was arrested on December 2, 1992, on charges that he murdered nine-year-old Stephanie B[redacted]. He was indicted for murder. *See* 93-GS-18-101. On August 3, 1993, the State filed and served a notice of intent to seek the death penalty.

On Applicant's behalf, trial counsel, William Runyon and Mark Leiendecker, entered into a plea agreement with First Judicial Circuit Solicitor Walter Bailey, the result of which was to be a sentence of life without the possibility of parole. As part of the plea agreement, Applicant pled guilty to two unrelated counts of Criminal Sexual Conduct with a minor ["CSC"] that arose out of Applicant's relationship with his then sixteen-year-old girlfriend,

assault victim. These two convictions ultimately served as the two prior violent felonies necessary to ensure Applicant's ineligibility for parole on the murder charge, which was the primary goal of the negotiated plea. On January 25th and 27th 1994, Applicant pled guilty to those two charges, the Honorable Charles W. Whetstone, presiding. Judge Whetstone sentenced Applicant to seven years on each count. *See* 94-GS-18-47 and 94-GS-18-48. On February 2, 1994, Applicant was unable to complete the previously scheduled negotiated plea to the murder charge because he could not agree to say that he fired his weapon with the malicious intent to kill Stephanie B[redacted]. The trial court refused to accept Applicant's plea to murder. PCR Ex. P-3.

The plea withdrawn, Applicant's capital murder trial commenced on February 28, 1994, the Honorable Luke Brown, presiding. Applicant was convicted of murder on March 4, 1994. He was sentenced to death on March 5, 1994, based on the aggravating circumstance found by the jury: the murder of a child under the age of eleven years.

Applicant filed a timely notice of appeal. Joseph Savitz, III, of the Office of Appellate Defense, represented Applicant on his direct appeal. On January 22, 1996, the Supreme Court vacated and reversed Applicant's death sentence but affirmed the murder conviction. *State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996) ("*Rogers I*").

Applicant's resentencing trial took place from December 2nd to December 5th, 1996. The Honorable Charles W. Whetstone presided over Applicant's resentencing, and counsel for the parties remained the same as they were for *Rogers I*. The State submitted two statutory aggravating circumstance for the new jury's consideration: murder of a child the age of eleven or under and that the offender created a great risk of death to more than one person in a public place with a weapon. The jury found the existence of only the former.

Applicant timely appealed.

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

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

The Court held an evidentiary hearing on the application in St. George, Dorchester County, South Carolina, September 27 through October 1, November 22, and December 21 of 2004, and May 2 and August 23 of 2005. At the conclusion of the evidentiary hearing, Applicant moved to amend the pleadings to conform to the evidence adduced at the hearing, pursuant to SCRCP, Rule 15.

III. GROUNDS FOR RELIEF.

GROUND A.

Ineffective assistance of counsel during the guilt-or-innocence phase.

Over-Arching Constitutional Principles.

The central premise of the Sixth Amendment is that truth is best discovered through a genuinely adversarial process in which "powerful statements" are presented "on both sides of the question" of justice. *United States v. Cronic*, 466 U.S. 648, 655 (1984). "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Id.* at 656. When defense counsel fails to perform competently, the trial is no longer a "confrontation between adversaries," but rather "a sacrifice of unarmed prisoners to gladiators." *Id.* at 656-57 (internal citations omitted).

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established the now familiar two-part standard for assessing whether counsel's representation ran afoul of the Sixth Amendment. The first prong asks whether counsel's performance "fell below an objective standard of reasonableness," the second, whether counsel's inadequate representation was prejudicial. *Id.* at 687-88; *accord, Hudgins v. Moore*, 337 S.C. 333, 524 S.E.2d 105, 108 (1999); *Martinez v. State*, 304 S.C. 39, 403 S.E.2d 113 (1991); *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

There is no magic to either part of the test. Counsel's performance is deficient if it is unreasonable under "prevailing professional norms." *Strickland v. Washington*, 466 U.S. at 688; *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); Counsel's performance is prejudicial if there is a "reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different."[1] *Wiggins*, 539 U.S. at 534-35; *Strickland*, 466 U.S. at 695.

In calibrating prejudice, counsel's actions must be examined cumulatively. The Court's duty is to consider each item on the scale of justice. If a single claim or sub-claim is not prejudicial enough of its own weight to tip the scale impermissibly, the Court does not remove that item from the scales as though it were then irrelevant to the Court's analysis. The Court is required to continue to add alleged harms to the scale and consider them as a group. If the impact of the whole of the claims tips the scale, then a new trial is required. In other words, a reviewing court must look at all the ways in which the prosecution's case would have been undermined – and the defense case enhanced –had counsel performed reasonably. *Strickland*, 466 U.S. at 695 ("In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of the evidence."); *Williams v. Taylor*, 529 U.S. 362, 397 (2000) (in assessing prejudice flowing from deficient performance, a reviewing court must consider "the totality of the available evidence...both that adduced at trial, and the evidence adduced in the habeas proceeding. ..[.]"); *Henry v. Scully*, 78 F.3d 51, 53 (2d Cir. 1996) ("aggregate effect of... three instances of inaction by defense counsel" prejudiced Petitioner; no need to determine "whether one or two of these errors would have constituted ineffective assistance"). With the appropriate legal standard in mind, I now address each of Applicant's allegations regarding ineffective assistance of counsel at his 1994 guilt-or-innocence trial.

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[1]The Supreme Court has made clear that the adjective "reasonable" is important. In fact, a reasonable probability is a lower standard than even the preponderance of the evidence standard. *Williams v. Taylor*, 529 U.S. 362, 406 (2000).

The Allegations and Evidence.

Applicant alleges that he was deprived of a fair trial due to the ineffective assistance of counsel during the guilt-or-innocence phase of his trial because counsel failed to prepare for or present available evidence at trial, thereby depriving Applicant of his rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and South Carolina law.

Specifically, Applicant alleges that trial counsel:

- Failed to advise Applicant adequately regarding the attempted but failed guilty plea to murder, which, if Applicant had been properly and effectively advised, would have avoided a death sentence;

- Failed to conduct adequate or any *voir dire* examination of several potential jurors, some of whom sat as jurors;

- Failed to conduct *voir dire* examination concerning possible influence of race of victim and race of Applicant;

- Failed properly or adequately to investigate and prepare the guilt-innocence phase of the trial;

- Failed to seek expert assistance regarding a material medical condition of Applicant;

- Failed effectively to confront and rebut the State's witnesses and evidence;

- Failed to present readily available and favorable defense witnesses and evidence;

- Failed to review critical evidence in the case which the State made available for inspection to trial counsel; and,

Applicant alleges that the cumulative impact of these errors and the resulting prejudice entitle him to a reversal of all convictions and a whole new trial. Applicant alleges that he was prejudiced by all of these errors and that he is entitled to a new trial based on these individual allegations. He further alleges, as a separate subclaim, that the cumulative

impact of these errors and the resulting prejudice considered cumulatively entitle him to a new trial.

I find that trial counsel's failures rendered their representation of Applicant constitutionally deficient during his guilt or innocence trial in 1994, resulting in an unfair trial. Applicant was prejudiced by his counsel's failures, which deprived Applicant of his rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments and South Carolina law. Therefore, I reverse Applicant's convictions for Murder and Criminal Sexual Conduct with a minor and remand his case for a new trial on all charges, based on the following findings of fact and conclusions of law:

PRE-TRIAL

1. *Failure to advise Applicant adequately regarding the attempted but failed guilty plea to murder, which, if Applicant had been properly and effectively advised, would have avoided a death sentence.*

a. Trial Record.

Prior to his 1994 trial, Applicant entered into a negotiated plea agreement with the State. The plan was that Applicant would plead guilty to Murder, and, at the suggestion of trial counsel, he would also plead guilty to two unrelated CSC with a minor charges.[2] PCR

[2]In his testimony before this Court, Mr. Runyon admitted that he revealed to Solicitor Bailey that Applicant was the father of Ms. assault victim's child and raised the idea of charging Applicant with criminal sexual conduct with a minor (the allegedly then-fifteen-year-old Ms. assault victim prior to discussing it with and gaining the approval of Applicant. PCR Tr. 777-78. Mr. Runyon indicated that Ms. assault victim was still pregnant at the time he approached the Solicitor with the idea. *Id.* The Court notes that the latest assault victim could have given birth to a full-term baby would have been late August of 1993, assuming, based on counsel's repeated assertions and Ms. assault victim's PCR testimony that she was pregnant at the time of the murder in late November 1992. Thus, the Court finds that Mr. Runyon's efforts were focused on preparing a negotiated plea as early as August 31, 1993.

Tr. 104. The pleas would be staggered over several days, thus making Applicant subject to the two violent strikes mandatory sentencing guideline, and Applicant would receive a mandatory sentence of life without the possibility of parole, *id.*, thereby avoiding a death sentence. Although Applicant successfully completed the pleas to the CSC with a minor charges on January 25th and 27th (PCR Ex. P-2), he failed to complete the February 2nd plea to the murder charge; the case was immediately set for trial on February 28, 1994. PCR Tr. 105-06, Ex. P-3.

b. PCR Record.

Trial counsel both agreed the plea negotiations and proceedings in fact occurred this way. Regarding Applicant's willingness to accept responsibility for the victim's death and to complete the plea, Mr. Leiendecker testified that Applicant "never had any problem admitting his responsibility or that he fired the gun or that his reckless conduct caused the death of Miss B[redacted]." PCR Tr. 106. According to trial counsel, Applicant's only sticking point with the plea to murder was in saying that he fired the shot with the intention of causing her death. Mr. Leiendecker described Applicant's reticence:

> "[Applicant] had a problem from the beginning with the idea of the intentionality of that act, that it was with malice aforethought as defined under the murder statutes. And he expressed those concerns from the beginning when I knew him until the final time that I spoke with him, you know, with his comments always being that, 'yes, I did it; yes, I pulled the trigger; yes, I'm responsible, but I didn't know and I didn't mean to.' I think that's the easiest way to describe it."

PCR Tr. 106. Mr. Leiendecker was not present at and did not participate as counsel in the two separate CSC with a minor guilty pleas by Applicant.

Mr. Runyon testified that he became very angry with Applicant when Applicant was unable to complete the final leg of the three-part plea agreement that Runyon had devised

to obtain a life sentence for Applicant. PCR 777-81. In fact, in testifying about his anger at his client some ten years after the failed plea, Mr. Runyon's anger was still palpable and intense, so much so that he was unable to maintain decorum and uttered a profanity-infused response to a question PCR counsel asked him about it. PCR Tr. 1032. Mr. Leiendecker testified that, after the plea fell through, Mr. Runyon "was very upset" with Applicant and "just yelled at him, telling him ... he had 'screwed it up.'" PCR Tr. 161-62. Mr. Runyon blamed Applicant's inability to complete the third plea on some unknown person who supposedly told Applicant that a "jury wouldn't convict him of murder for shooting the [victim]," presumably under the circumstances Applicant described in his statement to law enforcement (1996 Tr. 553, S-18). PCR Tr. 784. Other than an unsuccessful attempt to ask Solicitor Bailey for one more try at the failed plea, trial counsel made no further effort to reverse the damage created by the addition of two convictions for violent sexual felonies against "children" to Applicant's record or to otherwise address and correct Applicant's alleged minimal misapprehensions related to the elements of murder. PCR Tr. 119, 1026-27.

When the plea to the murder charge failed, trial counsel failed to attempt to withdraw the first two legs of the tripartite plea agreement. Mr. Runyon testified that it was because "we're sitting there stuck with the fact that we this -- these allegations as to this conduct with this young lady" and trying to "[represent ... that it didn't happen ... would be bordering on ... ethical violations...." PCR Tr. 785. Mr. Runyon admitted that he didn't even consider moving to withdraw Applicant's guilty pleas to CSC with a minor. PCR Tr. 1026. Mr. Leiendecker testified that he was not aware of information that would have supported a motion to withdraw the two CSC pleas at the time of the failed murder plea, but that he had since learned of information – for example, the fact that no criminal sexual conduct

took place within Dorchester County – that would have supported a motion to withdraw them and that the information was attainable at the time of the failed plea. PCR Tr. 182.

Mr. Runyon subsequently claimed he did not seek to withdraw Applicant's two successful guilty pleas because he wanted to use them as a basis for arguing that the jury should be instructed about the implications of a sentence of life without the possibility of parole pursuant to *Simmons v. South Carolina,* 512 U.S. 154 (1994). Runyon testified that was his strategy despite the fact that *Simmons* had not then been decided and was not the law of this state at the time of Applicant's trial. *Id.* (decided June 17, 1994). PCR Tr. 1026-27. At that moment in time, his strategy was a sheer gamble. Moreover, the Court finds that counsel Runyon seemed to offer the *Simmons* reason as almost an afterthought. As such, I find it was a strategy reason of convenience for counsel Runyon, formulated ten years after the fact.

This Court finds former Solicitor Bailey's testimony concerning this issue credible and refreshingly candid. On questioning by this Court, Mr. Bailey acknowledged that all information about and the idea for the two CSC with a minor charges came directly from Runyon and that there was no law enforcement investigation of the alleged offenses. PCT Tr. 1103. He also conceded that he made much of the two CSC with a minor convictions in his closing argument to the jury. PCR Tr. 1104. Mr. Bailey speculated he might have been able to bring out the information to the jury without the convictions. He conceded that it would have been a dangerous tact to take with assault victim, who might have sung Applicant's praises. However, Mr. Bailey felt the fact that she was "fifteen" and that Applicant "was the father of her child," would have been conclusive and she would have had to admit that. PCR Tr. 1104. The Court finds that Mr. Bailey and Mr. Runyon were

mistaken about those particular details. assault victim's birthday is October 3, 1976. PCR Ex. P-19. Her child that she conceived with Applicant was born on August 2, 1993. 1996 Tr. 914. Thus, Ms. assault victim was not fifteen years of age when she became impregnated with Applicant's child, as both Mr. Bailey and Mr. Runyon have stated repeatedly. It would have been relatively easy to establish that Ms assault victim was sixteen years old before and at the time of conception. Although that fact is of little moment technically, the Court finds that Mr. Bailey's assumptions about the ease of demonstrating that the CSC with a minor had occurred without the unfortunate pleas would have not proven true.

Mr. Bailey also admitted in his testimony before this Court that he had specifically disclosed the interlocking nature of Applicant's three-part plea deal to the plea trial court – that the pleas were "part and parcel of a bigger plea where the penalty would incorporate a murder plea to come." PCR Tr. 1100. Mr. Bailey testified that after the murder plea to fell through, he had anticipated that Mr. Runyon would then move to withdraw the pleas, but he did not. PCR Tr. 1101. Thus, the State recognized a legal basis for withdrawing those pleas, even if trial counsel failed to do so.

c. Trial Counsel Rendered Ineffective Assistance in Failing to Advise Applicant Regarding The Series of Negotiated Guilty Pleas.

This Court finds and concludes that trial counsel rendered ineffective assistance of counsel by their failure to move to withdraw the series of negotiated guilty pleas when the overall plea negotiation failed. *See* ABA Guidelines: Appointment and Performance of Defense Counsel in Death Penalty Cases, Guidelines 11.6.1 through 11.6.4 (plea negotiations). The standard enunciated in *Strickland*, applies to challenges to guilty pleas based on allegations of ineffective assistance of counsel." *State v. Jordan, 297 S.C. 52, 54,*

374 S.E.2d 683, 684 (1988) (citing Hill v. Lockhart, 474 U.S. 52, 58 (1985)). Trial counsel acknowledged that the guilty plea to the two counts of CSC with a minor were part of a larger plea negotiation related to the capital murder charge. PCR Tr. 1027-29. Solicitor Bailey testified that the CSC pleas were part of the plea negotiation related to the capital murder case. PCR Tr. 1100-01. The plea transcript fully supports this fact. PCR Ex. P-2. Therefore, this Court finds that the CSC plea was part and parcel of the initial plea negotiation as to the murder indictment. As such, when the murder plea failed, Applicant had a right to move before the trial court to withdraw his guilty pleas to the two CSC indictments.

Trial counsel admitted that they did not consider moving to withdraw the guilty plea after the attempted guilty plea to murder failed and that they did not know how to go about withdrawing the plea. PCR Tr. 182, 784-85, 1027. Counsel's failure to move to withdraw a guilty plea, when the defendant fails to receive the full benefit of the bargain to which he agreed, constitutes ineffective assistance of counsel. *See Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988). The convictions were not a result of an independent police or prosecutor initiated investigation. Trial counsel testified that he approached the State with the information prior to consulting with Applicant. While trial counsel's strategy may have been valid and reasonable if the negotiated murder plea succeeded, once the plea failed, trial counsel had a duty to move to withdraw the pleas and advise Applicant of his right to withdraw them pursuant to *Jordan*. *Id.*

The State relies on *U.S. v. Pellerito*, 878 F.2d 1535 (1st Cir. 1989), rev'd on other grounds, 931 F.2d 148 (1991), and a series of other cases concerning guilty pleas. Respondent's Proposed Order at 26-39. The portion of *Pellerito* cited by the State,

Pellerito, 878 F.2d at 1543, refers to a defendant who decided to plead guilty during the middle of trial without informing his trial counsel and without any plea bargain whatsoever. Pellerito later attempted to claim ineffective assistance of counsel. The facts in *Pellerito* are inapposite to those before this Court because the other cases relied upon by Respondent do not address the principle set forth in *Jordan. Jordan* says that a defendant is entitled to get the benefit of the bargain in a plea negotiation, or the plea may be withdrawn. Here, both trial counsel and the Solicitor agree that the CSC plea and aborted murder plea were part and parcel of the same plan and bargain – at its core a sentence less than the death penalty – which the Applicant plainly did not receive. The record is clear and I find that the CSC and murder pleas were inextricably linked. *See Thrift v. State,* 312 S.C. 282, 292-3, 440 S.E.2d 341, 347 (1993), *reh'g denied,* 312 S.C. 282, 440 S.E.2d 341 (1994) (holding that plea bargains are based on contractual principles, all terms of which must be fulfilled, further noting the "plea agreement analysis must be more stringent than a contract because the rights involved are fundamental and constitutionally based.").

Having found that trial counsel's performance "fell below an objective standard of reasonableness," the Court now turns to the question of whether counsel's inadequate representation was prejudicial. *Strickland,* 466 U.S. at 684; *accord, Hudgins,* 337 S.C. at 338-9, 524 S.E.2d at 108; *Martinez,* 304 S.C. 39, 403 S.E.2d 113 (1991); *Cherry,* 300 S.C. 115, 386 S.E.2d 624.

In assessing prejudice, the Court is now charged with determining whether "there is a reasonable probability that, but for counsel's errors, Applicant would not have pleaded guilty and would have insisted on going to trial." *Hill,* 474 U.S. at 59. Applicant need only establish that the outcome may have been different by a "reasonable probability," which is

a lower standard than even the "preponderance" of the evidence standard. *See, e.g., Williams*, 529 U.S. at 406. I find that Applicant has more than met his burden of proof regarding the required prejudice showing. But for trial counsel's efforts, Applicant would not have even been charged with the offenses in question in the first place. Thus, it is without question to this Court that Applicant would not have entered into, or have been stuck with, the guilty pleas but for trial counsel's ineffectiveness. Trial counsel was the direct and sole cause of the Solicitor's bringing the two CSC charges. Under the facts of Applicant's case, the ripple effect of the prejudice to Applicant is broad and well-defined.

It would be difficult for this Court to imagine prejudice worse than I find that Applicant has suffered because of this particular failure by trial counsel. Applicant now stands convicted of two independent violent felonies, two sexual offenses against a child no less, as a direct and sole result of his trial counsel's failures and inadequate performance. These two convictions were left hanging over Applicant's head like a guillotine. Standing alone, they subject Applicant to all manner of sentencing enhancement.[3] At a minimum, he must register as a sex offender for the rest of his life. These sentences render him potentially eligible to be declared a sexually violent predator, a category of offender the state can literally detain indefinitely under a civil commitment order. S.C. Code Ann. §§ 44-48-10 to -170 (Supp. 2004). I conclude that Applicant was prejudiced by trial counsel's failures because I find there is a "reasonable probability that, but for counsel's unprofessional

[3]The Court notes that the realities of the informal code of conduct among incarcerated men expose Applicant, if left with a record intact of sexually violent offenses against a child, to a form of vigilante justice that does not recognize the Due Process Clause.

errors, the result of the proceeding would have been different."[4] *Wiggins*, 539 U.S. at 534-35; *Strickland*, 466 U.S. at 695. I reverse the convictions for Criminal Sexual Conduct. For this Court to rule otherwise, under the specific circumstances of this case, "would simply mock fundamental constitutional guarantees of 'vital importance.'" *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997) *cert. denied*, 523 U.S. 1133 (1998) (quoting *Strickland*, 466 U.S. at 685)

Voir dire

2. *Failure to conduct adequate or any voir dire examination of several potential jurors, some of whom sat as jurors.*

3. *Failure to conduct voir dire examination concerning possible race of the victim and race of the Applicant.*

a. Trial Record.

Immediately after the failed plea of February 2, 1994, trial counsel agreed to proceed to a merits trial on February 28, 1994. Of all the jurors who underwent *voir dire* examination, Mr. Leiendecker conducted none of the examinations. Of all the jurors who were seated as jurors or alternate jurors, Applicant's counsel conducted no *voir dire* whatsoever of five of them. 1994 Tr. 484 (Juror Addison), 505 (Juror Hutto), 517 (Alternate Juror Norris), 604 (Juror Floyd), and 641 (Juror Berkaw). Of all of the seated jurors and alternate jurors of whom trial counsel did conduct *voir dire*, trial counsel's *voir dire* effort only consumed a grand total of seventeen transcript pages. Of all of the seated jurors of

[4]The Supreme Court has made clear that the adjective "reasonable" is important; in fact, a reasonable probability is a lower standard than even the preponderance of the evidence standard. *Williams v. Taylor*, 529 U.S. 362, 406 (2000).

whom trial counsel conducted *voir dire*, trial counsel did not ask one question that concerned racial matters, gun use, or personal experience with or exposure to violent crime.

b. PCR Record.

Mr. Leiendecker testified that he played little to no role in the preparation of Applicant's case, because the case was on course for a negotiated guilty plea when he became involved, late in December of 1993, after taking over as one of the two contract public defenders for Dorchester County. PCR Tr. 101. When Mr. Leiendecker received Applicant's public defender case file from the former public defender, Charles Feeley, it did not contain or reflect any work product. PCR Tr. 91. At that time, Mr. Leiendecker had no prior involvement with a murder case, let alone a capital murder case, although he had tried a "handful of felony cases." PCR Tr. 94. After the plea failed, Mr. Leiendecker's primary task was to develop information related to jury venire and to assist Mr. Runyon in his preparation for jury *voir dire*. PCR Tr. 111.

Mr. Leiendecker distilled the information from the juror questionnaires by "defining people by age, ... race, ... gender," and location "in the county," which was basically "general background." PCR Tr. 112. He also crafted some suggested *voir dire* questions for the potential jurors. The questions he proposed addressed potential jurors' familiarity with the facts of the crime, familiarity with hand guns, whether violent crime had touched them personally, and whether they had connections to the victim or her elementary school. PCR Tr. 114-15. To Mr. Leiendecker's knowledge and memory, Mr. Runyon rebuffed those suggested questions and proceeded single-mindedly with *voir dire*. The trial record of the 1994 *voir dire* bears out Mr. Leiendecker's memory of events.

Mr. Runyon gave a wide range of reasons for the manner in which he conducted *voir*

dire, most of which this Court finds patently invalid, unreasonable, or implausible. Mr. Runyon first said he simply relied on the state's and the trial court's *voir dire* because he wanted the jurors to like him. PCR Tr. 796. He felt that jurors were probably predisposed to liking the Solicitor because they probably voted for him and that they would like Mr. Runyon less if he conducted *voir dire* of them. PCR Tr. 796.

He did not want to ask pointed questions, like "are you a racist," that would anger the potential jurors, *id.*, although Mr. Runyon acknowledged that "race was an overlay in this case." PCR Tr. 798-9. He also did not want to ask either good or bad questions that would give the Solicitor a reason to strike a potential juror. PCR Tr. 797. He did not want to ask questions of potential jurors who were African-American, because they "will not vote for the death penalty" and the other jurors might accuse them of only voting for life "because you're black." *Id.* at 799. He didn't want to interject race into the *voir dire* process because the white jurors would not like that. PCR Tr. 798. He did not feel the need to ask questions designed to elicit jurors' feelings or views on racial matters because he was able to discern their views primarily based on where they lived within the county, which churches they attended, and where their children were likely to attend school. PCR Tr. 797-8.

c. Trial Counsel Rendered Ineffective Assistance of Counsel During Jury Selection.

Viewing the evidence as a whole, I find that trial counsel's purported strategy to conducting little or no *voir dire* of jurors for Applicant's capital murder trial is unreasonable. Trial counsel rendered ineffective assistance of counsel during jury *voir dire*. Because trial counsel's manner of conducting *voir dire* was constitutionally deficient and

Applicant was prejudiced by counsel's deficient performance, Applicant was deprived of a fair trial and rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments and South Carolina law.

I find trial counsel's assertion that they made a determination of potential jurors' views, personal biases, and racial biases based on assumptions trial counsel drew from information about where jurors' children attended school, both unreasonable and not credible, and, furthermore, without basis in fact. Juror questionnaire forms did not contain information about where a potential juror's children, if any, attended school. PCR Tr. 926, PCR Ex. P-48. Trial counsel did not ask even one potential juror where the juror's children or grandchildren, if any, attended school. PCR Tr. 928-29. Trial counsel made bare assumptions as to where a juror's children attended school based on the jurors' then-current addresses, *two years* after the incident. PCR Tr. 927. Trial counsel's asserted strategy for the manner in which they conducted jury selection is patently unreasonable, when the record demonstrates a total absence of any inquiry on that issue or other evidence to support it. Whether or not a potential juror's children interacted with or knew the victim or the victim's parents in this case would have been important information for trial counsel to consider in selecting jurors to sit in judgment of Applicant, especially considering trial counsel's theory of defense which was, in part, to show that the father of the victim was culpable in the events leading up to the shooting. PCR Tr. 801.

Trial counsel acknowledged that racial considerations were an important issue in jury selection, because race "was an overlay" in the case. Yet, trial counsel neither made an effort themselves to ascertain jurors' racial attitudes, nor asked the trial judge to do so in their steads. PCR Tr. 927. Furthermore, trial counsel asked none of the questions

specifically provided for by Supreme Court precedent in cases where "race is an overlay" -- *i.e.*, where trial counsel believe racial motives might be an issue. *See, e.g., Ham v. South Carolina*, 409 U.S. 524, 527 (1973) (in light of South Carolina law regarding jury *voir dire* and an adequate showing of the potential for the presence of racial bias in a particular case, "the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires" a defendant "be permitted to have the jurors interrogated on the issue of racial bias.");[5] *Turner v. Murray*, 476 U.S. 28, 36-37 (1986) (reaffirming the principles delineated in *Ham* and specifically extending them to capital sentencing proceedings, where a capital murder defendant is "accused of an interracial crime [he] is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias"); *and see State v. Cason*, 317 S.C. 430, 432, 454 S.E.2d 888, 889-90 (1995) (acknowledging that a "specific voir dire question designed to reveal racial prejudices on the part of the juror is required" where race is an integral part of a case").

Indeed, in their testimony before this Court, trial counsel staked out an indefensible and repugnant position that this Court must reject. Trial counsel initially stated that place of school attendance for jurors' children was important because it might indicate certain racial attitudes held by jurors. They posited that Dorchester County residents may harbor certain racial attitudes in this case. Trial counsel then declared that questioning jurors about such demographics or attitudes would "not necessarily be totally favorable" to the defense. PCR Tr. 931-33. Thus, counsel failed to question jurors about racial attitudes or views. *See Spencer v. Murray*, 18 F.3d 229, 234 (4th Cir. 1994) (where racial bias is

[5]Mr. Ham was on trial for possession of marijuana. *Ham*, 409 U.S. at 524.

recognized as an area of concern by trial counsel, failure to conduct *voir dire* may be found unreasonable). Trial counsel's assertion that asking jurors any questions designed to ascertain racial views is tantamount to trial counsel's asking a juror "are you a racist?," reveals a misapprehension of the purpose of and an unfamiliarity with the art of *voir dire,* such that trial counsel's level of legal performance was unreasonably inadequate under prevailing norms and Applicant was prejudiced thereby. *See Strickland*, 466 U.S. at 692; *see also Pauling v. State*, 331 S.C. 606, 609-10, 503 S.E.2d 468, 470-1 (1998) (holding a paucity of evidence on a single but substantial aspect of the State's case renders trial counsel's failure to investigate and present evidence beneficial to a defendant prejudicial to a defendant) .

The Court next rejects trial counsel's purported *voir dire* strategy to rely on the use of "internet information" about the jurors, general demographics, and other methods of "amorphous kind of conglomeration" (to quote Mr. Runyon), apparently designed to establish extensive background checks of potential jurors. PCR Tr. 931-32, 935-36. The Court is skeptical of trial counsel Runyon's claims that he had such access to the "internet" at that period in time in internet history.[6] Trial counsel Leiendecker distilled all the "amorphous kind of conglomeration" of evidence gleaned from juror questionnaires and prepared suggested juror-specific *voir dire* questions. PCR Tr. 114-18. Yet, trial counsel Runyon failed to ask even one of those questions of even one potential juror or to utilize otherwise any of the information counsel Leiendecker compiled from the information about

[6]Respondents' confuse the term "computer expert" with "the internet." Respondents' Proposed Order 43. The Court made no finding with respect to whether or not Mr. Runyon had access to or utilized the services of a "computer expert."

the potential jurors that was actually in counsel's possession. PCR Tr. 111-18, 954-56.

Trial counsel could not explain how they actually used demographic information. The *voir dire* record is devoid of evidence that trial counsel explored potential biases with the individual jurors using any such data. Trial counsel was plainspoken in his opinion that he would just as soon pick the first twelve people on the venire because *voir dire* wouldn't really make much difference. He did not want to spend a week of his time with pointless *voir dire* of the potential jurors, an opinion to which trial counsel Leiendecker acquiesced. PCR Tr. 116.

This Court rejects trial counsel's indefensible and constitutionally deficient effort regarding juror *voir dire*. At its heart, juror *voir dire* is a process meant to discover the existence of prejudices and biases and to determine whether a juror can set aside any prejudices, and thus impartially fulfill his obligations as a juror. *See, e.g., Wainwright v. Witt*, 469 U.S. 412, 421-22 (1985); *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968). Trial counsel's failure to conduct any *voir dire* at all of four jurors is unacceptable and falls below reasonable norms of representation, because the Constitution entitles Applicant "to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Parker v. Gladden*, 385 U.S. 363, 366 (1966). For all the reasons stated, I find that trial counsel's failure to conduct any voir dire at all of four jurors constitutes "egregious and obvious error." *Yeats v. Angelone*, 166 F.3d 255, 263 (4th Cir. 1999). Applicant need only establish that the outcome may have been different by a "reasonable probability," which is a lower standard than even the "preponderance" of the evidence standard. *Williams*, 529 U.S. at 406. Applicant is also entitled to counsel whose standards and efforts pass constitutional muster, which requires a level of "representation of a criminal defendant" that, at a minimum, meets "certain basic

duties." *Strickland*, 466 U.S. at 687; *see also Knese v. State*, 85 S.W.3d 628, 632-33. (Mo. 2002) (*en banc*) (capital trial counsel's abdication of juror *voir dire* was structural error). Thus, I find that Applicant has met his burden of proof in showing that trial counsel's failures during the jury *voir dire* process deprived him of a fair trial. But for counsel's failures, the outcome of Applicant's trial might have been different. Counsel's performance is prejudicial if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Wiggins*, 539 U.S. at 534-35; *Strickland*, 466 U.S. at 695

MERITS TRIAL

4. *Failure properly or adequately to investigate and prepare the guilt-innocence phase of the trial.*

5. *Failure to seek expert assistance regarding a material medical condition of Applicant.*

6. *Failure to confront and rebut the State's witnesses and evidence effectively.*

7. *Failure to present readily available and favorable defense witnesses and evidence.*

9. *Failure to review critical evidence in the case which the State made available for inspection to trial counsel.*

a. Trial Record.

assault victim testified that a loud verbal dispute arose among Mr. Carver, Mr. B[redacted], and Mr. Patterson, that Applicant had been talking on the phone but left it to assist Patterson in the dispute, that Applicant had a gun, and that he fired two shots. 1994 Tr. 823-835 (832-833). Trial counsel cross-examined Ms. assault victim about the argument that arose among B[redacted], Carver, and Patterson, and Applicant's subsequent involvement in the

dispute. 1994 Tr. 835-841. The State dismissed all the charges against assault victim in exchange for her testimony. 1994 Tr. 834-35, 879. Mr. Patterson was subpoenaed to appear at the trial, but was not called to the witness stand. Stephanie Simmons, a longtime friend and former sweetheart of Applicant's, testified that Applicant showed up at her apartment near her school, Tuskegee University in Alabama within a few days of the shooting. 1994 Tr. 1994 Tr. 894-897, 895. Applicant had made his way to Ms. Simmons' home in Alabama shortly after the shooting.

Mr. B[redacted] and Mr. Carver testified that they had attempted to avoid becoming involved in the conflict that Mr. Patterson – and later Applicant, too – seemed determined to advance. They testified that they thought Applicant had seen the victim inside the truck cab. 1994 Tr. 735, 945. Anthony Riley, who was present at the scene and had talked briefly with B[redacted], but who left the scene prior to any shots being fired, corroborated much of Mr. B[redacted]'s testimony that he was without fault and had not provoked Applicant or contributed to the incident in any way. 1994 Tr. 784-822, 800-802. James Carver also testified consistent with B[redacted]'s testimony. 1994 Tr. 938-961. James Robinson, a long-time employee of Spell's Grocery who worked there on the evening in question, testified that he heard the gunshots but did not see the incident. 1994 Tr. 852-853.

Several law enforcement officer and an emergency medical technician also testified concerning their involvement with the case. Paramedic and EMT George Scharf, the first Emergency Medical Services ("EMS") responder on the scene, testified about the victim's wound and the condition in which he found her. 1994 Tr. 854-857. Lt. Earl Asbell testified concerning crime scene dynamics, photographs, and evidence collection, as well as to chain of custody. 1994 Tr. 860-882. Trial counsel cross-examined Lt. Asbell briefly. 1994 Tr.

882-883. Two law enforcement officers who arrested Applicant in Alabama also testified. At the start of the sentencing phase, the state introduced into evidence a videotape containing news footage. 1994 Tr. 1055, S-20. The tape contained a segment depicting Applicant prior to and subsequent to a pretrial hearing. *Id.*

Two lay witnesses, Isaiah Jennings (1994 Tr.842-47) and Herthenia Lincoln (1994 Tr. 848-50), testified that they arrived at Spell's Grocery about five or so minutes before the shooting occurred. They both heard two shots fairly close together in time. Neither witness saw a disturbance outside when they entered Spell's. Before he entered Spell's, Mr. Jennings saw Mr. Patterson, who picked on Mr. Jennings. Mr. Jennings did not notice Applicant at the store. He only saw Mr. B[redacted] after shots were fired. 1994 Tr. 842-847.

During the State's case, trial counsel's cross-examination was either brief or non-existent. For example, trial counsel completely overlooked Mr. B[redacted]'s testimony, wherein he stated that at the time he claims Applicant saw Stephanie, that Stephanie was "*laying* in the seat." 1994 Tr. 749 (emphasis added). Trial counsel failed to cross-examine Mr. Scharf at all. 1994 Tr. 857. The defense called no witnesses on Applicant's behalf. 1994 Tr. 965-967. Trial counsel did not seek to introduce any other evidence on Applicant's behalf. *Id.*

b. PCR record and Findings.

I. Witnesses who also previously testified at trial.

assault victim testified before this Court to the following material facts: Mr. Patterson started the argument with Mr. B[redacted]. Applicant did not swear at Mr. B[redacted] or Mr. Carver when they arrived at the store. PCR Tr. 313. Mr. Patterson, *not* Applicant, spit on Mr. B[redacted], which, the Court notes, is consistent with Mr. Carver's initial statement

to law enforcement (PCR Tr. 316, PCR Ex. P-9) and with assault victim's trial testimony (1994 Tr. 831). This witness indicated that she heard either Mr. B[redacted] or Mr. Carver use the word *nigger* during the incident. One time the word was specifically directed at Applicant. PCR Tr. 318. The racial slurs were uttered before any shooting. PCR Tr. 317. assault victim did not see a child in Mr. B[redacted]'s truck. PCR Tr. 311. Based what she saw and heard, she believed that Applicant could not have seen the victim from his position. *Id.*

assault victim indicated that she perceived Mr. Carver and Mr. B[redacted] to be reaching for guns in the truck. PCR Tr. 321. She indicated either Mr. B[redacted] or Mr. Carver called Applicant "nigger" prior to Applicant firing the warning shot. PCR Tr. 317. She saw Applicant fire a "warning shot" that was not aimed at a person. PCR Tr. 323-24. Applicant did not put a gun to Mr. B[redacted]s head or ever point the gun at Mr. B[redacted]. PCR Tr. 312. Applicant did not block Mr. B[redacted]'s truck door. PCR Tr. 312. Applicant did not spit on Mr. B[redacted]. PCR Tr. 315. When she and her companions fled, they did not know anyone had been shot. Applicant did not laugh after the shooting. PCR Tr. 323. Applicant was not wearing eyeglasses at the time of the incident. PCR Tr. 312.

Based on the Court's observation of this witness, including her demeanor and her manner, I find her testimony credible. I find her additional testimony would have made a difference to at least one juror.

Mr. Patterson's testimony was materially consistent with assault victim's testimony. He acknowledged that the argument started between himself and Mr. B[redacted]. PCR Tr. 227-8, 233. Mr. Patterson admitted to being the one who spit on Mr. B[redacted], and account that was also consistent with Carver's first statement to law enforcement. PCR Tr. 235. Mr. Patterson was adamant that Applicant did not spit on B[redacted]. *Id.* Mr. Patterson admitted

that it was he – not Applicant – who was near Mr. B[redacted] in the truck's doorway. PCR Tr. 234. Mr. Patterson stated that Applicant only became involved in Patterson's dispute to come to his aid when the argument became heated. PCR Tr. 231.

Mr. Patterson saw two guns within reach in Mr. B[redacted]'s truck. Indeed, law enforcement officers confiscated two firearms, a .410 shotgun and a .9 mm handgun, from Mr. B[redacted]'s truck. PCR Tr. 148, Ex. P-8. Mr. Patterson testified that he saw Mr. B[redacted] attempt to reach for one of the firearms. PCR Tr. 228-9, Ex. P-8. Mr. Patterson was forthright in admitting he was impaired by large amounts of liquor. PCR Tr. 246-7. He saw a Busch beer carton in Mr. B[redacted]'s truck. PCR Tr. 229-30. He did not see a child in the truck until after she was shot. PCR Tr. 233, 237. Mr. Patterson corroborated that Applicant could not have seen the child from where he was standing and that Applicant was not wearing his glasses the night of the shooting. PCR Tr. 233, 237, 248. When Applicant fired his handgun, he was trying to fire a "warning shot." *Id.* He did not appear to be aiming at anyone. PCR Tr. 232 Mr. Patterson flatly denied that he or Applicant either made profane statements or laughed after the incident. PCR Tr. 235. Mr. Patterson became somewhat emotional when describing seeing the victim after she was shot. PCR Tr. 253-4.

As delineated, *supra*, assault victim and Mr. Patterson provided direct evidence to this Court concerning what they witnessed at the scene. Both witnesses testified that no one associated with Applicant's defense interviewed them or attempted to interview them at any time prior to the commencement of this PCR action. PCR Tr. 224; 308. Both of these witnesses were friends of Applicant's and both testified they would have voluntarily spoken about the incident with Applicant's trial counsel or any other defense team member (had there been any). PCR Tr. 224, 309. Neither of these two witnesses had heard or been

exposed to any other witness' testimony; neither of them have talked with Applicant about the incident. PCR Tr. 235-36, 309. Both witnesses continued to live openly in the Dorchester area and their whereabouts were well-known. PCR Tr. 223, 306.

Based on the Court's observation of these witnesses' demeanor and testimony, I find the testimony of these two witnesses credible. In so finding, the Court notes that Ms. assault victim's and Mr. Patterson's testimony was not in lock-step with either each other or Applicant's statement. I attribute the minor differences to each witness' being in a different proximity to and different level of interaction with the events, and thus each witness had a different perspective. In fact, the Court would be concerned if these two witnesses testified in cookie-cutter fashion to each other, or with Applicant. After finding the witnesses testimony credible, I find that the testimony probably would have made a difference to at least one juror, in that the testimony both corroborated Applicant's statement and was consistent with the defense that trial counsel only anemically pursued at trial. I find that, at a minimum, trial counsel should have interviewed Mr. Patterson and assault victim to discover what information these eye witnesses to the events knew, good or bad.

Stephanie Simmons testified that Applicant came to see her at her college apartment in Alabama. Applicant's statements to her were consistent in his version of events, as contained in his subsequent statement to police, that the shooting was an accident. PCR Tr. 262. Ms. Simmons testified that Applicant called her immediately after the incident and that he was very upset and crying. PCR Tr. 263. Applicant cried about it and said that it was a "bad accident." PCR Tr. 263. Applicant related that either Mr. B[redacted]or Mr. Carver called Applicant a "nigger." PCR Tr. 264. Applicant admitted to her that he fired the gun,

but said he did so only intending to fire a warning shot. PCR Tr. 265. Applicant had seen Mr. B[redacted] or Mr. Carver with firearms. PCR Tr. 266. Ms. Simmons was available and willing to be interviewed by the trial defense team, but no one contacted her on Applicant's behalf until after the instant action was filed. PCR Tr. 260-61.

Based on my observations of Ms. Simmons' testimony and demeanor, I find that she is a credible witness. I find that her additional testimony was favorable to Applicant because it corroborated material aspects of his statement, and it was consistent with the defense that trial counsel attempted to pursue at trial. I find that her testimony probably would have made a difference to at least one juror. Finally, I find that trial counsel should have interviewed Ms. Simmons to determine what information she knew about the events, good or bad. Their failure to do so falls below the prevailing professional norms. *Wiggins*, 539 U.S. at 521.

EMS paramedic George Scharf testified that, upon arriving at the scene, he assessed the circumstances and the victim's condition. His professional opinion was that the shooting was accidental.[7] His opinion was based on the following:

> After getting answers to some questions that we usually ask when we first arrive on the scene as to what happened and how it happened, it appeared that the little girl was sitting in the middle of the front seat of the pickup truck and her head was not all that visible above the seat and that there had been a shot fired into the middle of the pickup truck and it appeared to be an accident that the little girl was hit. PCR Tr. 292-3.

Mr. Scharf further expounded on the basis for his conclusion, testifying that "with the size of the little girl, it didn't appear her head would have been visible above the seat" PCR Tr.

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[7]At trial, Mr. Scharf had been qualified by the State at trial as an expert witness as a paramedic and as an EMT. 1994 Tr. 854-855; 1996 Tr. 674.

297. He noted his conclusion that the shooting of the victim was accidental in the information he relayed to the emergency room doctors when he transported the victim to Trident Medical Center. PCR Tr. 294, 296, 298, Ex. P-20. Trial counsel never attempted to talk with Mr. Scharf before or during either the 1994 or 1996 trials, despite the fact that he was present and available before and during both trials; he testified that he would have spoken with them about his assessment and findings, if asked. PCR Tr. 290-1, 300-1.

Based on my observations of Mr. Scharf's testimony and demeanor, I find that he is a credible witness. I find that his additional testimony was favorable to Applicant because it supported the defense that trial counsel pursued at trial. I find that trial counsel should have, at a minimum, interviewed Mr. Scharf to determine what information he could provide, especially considering that the State vouched for him as an expert in his field. I find that their failure to do so falls below the prevailing professional norms. I find that his testimony probably would have made a difference to at least one juror.

Mr. James Robinson, who had been employed at Spell's Grocery for forty-three years at the time of his appearance before this Court, testified that he had seen Applicant on many, many occasions over the years. His experience with Applicant spanned from the time he and his family first moved to Pigeon Bay Road, when Applicant was a young teen, up to and including the morning of the incident. PCR Tr. 282, 284-5. In describing Applicant, Mr. Robinson painted a picture of a young man who was always respectful and thoughtful. *Id.* Mr. Robinson said Applicant had never given anyone at the store any trouble. PCR Tr. 283-84. Mr. Robinson was not approached by anyone on Applicant's behalf before or during either the 1994 or 1996 trial, despite the fact that the witness was present and available before and during both trials. PCR Tr. 285-86. Mr. Robinson was clear that he

would have spoken with trial counsel if they had asked. *Id.*

Based on my observations of Mr. Robinson's testimony and demeanor, I find that he is a credible witness. I find that his additional testimony was favorable to Applicant because it supported the defense that trial counsel pursued at trial. I find that trial counsel should have, at a minimum, interviewed Mr. Robinson to determine what information he could provide. I find that their failure to do so falls below the prevailing professional norms. I find that his testimony probably would have made a difference to at least one juror.

Anthony Riley testified that he had been a long-time B[redacted] family friend and even had worked for some of the family members for almost twenty years – facts which he and Mr. B[redacted] had somewhat divulged at trial (1994 Tr. 726, 792-93). PCR Tr. 39-40. Mr. Riley described his relationship with the B[redacted] family as practically familial in that Mr. Riley would often babysit Stephanie, considered Mike B[redacted] like a brother, and felt free to borrow money from the B[redacted] family on occasion. PCR Tr. 41-44. Mr. Riley acknowledged that he and Applicant did "not see eye to eye" and that they were not friends, based upon a wrong he felt Applicant did to him when they were both in the Dorchester County Jail, some years prior. PCR Tr. 45-46.

I find that Mr. Riley's additional testimony before me was favorable to Applicant because it provided information that would have impeached the witness' harmful testimony at trial. As such, it would have supported the defense that trial counsel pursued at trial. I find that trial counsel's failure to probe the extent of Mr. Riley's prior friendship with the B[redacted] family on cross-examination was without reason and an abdication their duties. I find that trial counsel should have, at a minimum, interviewed Mr. Riley to determine what information he could provide. I find that their failure to do so falls below the prevailing

professional norms. I find that his additional testimony probably would have made a difference to at least one juror.

Lt. Earl Asbell, of the Dorchester County Sheriff's Department, testified concerning several items of crime scene evidence, the Department's case file, and interaction with trial counsel. Lt. Asbell produced a photograph which depicted a firearm pouch sitting on top of clothes in a clothes basket in the back of B[redacted]s truck. PCR Ex. P-18. The photograph was not among the photographs offered into evidence at Applicant's trials. PCR Tr. 441. Lt. Asbell also had one unopened Busch beer can in a bloodstained brown paper bag, which was collected from the trash can at the front exterior of Spell's. PCR Tr. 440, 448-50, Ex. P-29. Lt. Asbell provided the Court with a copy of a law enforcement wanted poster, created shortly after the crime but before Applicant was arrested. PCR Tr. 451. The wanted poster included information about the crime and the jurisdiction seeking information they hoped would lead to the arrest of Applicant, and included a photograph of Applicant depicting him wearing eyeglasses. PCR Ex. P-30.

Lt. Asbell testified that from the time he had collected the evidence from the crime scene, until the time Applicant's PCR counsel requested to review the evidence in the case, the seal on the evidence container in which Lt. Asbell had placed the bloody Bush beer can at the crime scene had never been broken. PCR Tr. 448. Trial counsel did not review the evidence in Lt. Asbell's custody at any point. PCR Tr. 446-47. Another detective had also taken photographs and collected evidence and information, but this evidence was unavailable. Lt. Asbell was unable to locate the department's case file related to the investigation of Stephanie B[redacted]s death. PCR Tr. 443. He had no explanation as to what might have become of the file. He testified that it was highly unusual for a case file to go

missing and could not recall a prior time when an investigation case file had gone missing. PCR Tr. 444, 459.

Based on my observations of Lt. Asbell's testimony and demeanor, I find that he is a credible witness. I find that his additional testimony was favorable to Applicant because it supported the defense that trial counsel pursued at trial. I find that the additional physical evidence would have been helpful to Applicant's case because it would have provided tangible support for the defense that trial counsel pursued at trial. I find that trial counsel should have, at a minimum, viewed the physical evidence in this witness' possession to determine what information he possessed. I find that their failure to do so falls below the prevailing professional norms. I find that his testimony and the physical evidence he produced probably would have made a difference to at least one juror.

ii. New witnesses.

Trial counsel stated that their strategy was to present a manslaughter defense. According to Mr. Runyon, part of their strategy was to show that Mr. B[redacted] had a role in the argument. Trial counsel's other primary objective was to show Applicant did not intend to kill Stephanie because, Mr. Runyon said, "I don't think" it could "be suggested that [Applicant] knew she was there." PCR Tr. 179, 827-28.

In further pursuit of that goal, Mr. Runyon testified that he interviewed the police officers involved in the case, including Lt. Asbell, and had a telephone call with the pathologist, Dr. Nichols, who performed the autopsy on the victim. PCR Tr. 833-835. He talked to Dr. Nichols and Lt. Asbell because he wanted to develop information about the angle of the bullet in an effort to show "this was an accident versus just some reckless shooting of a gun." PCR Tr. 774.

As an initial matter, the Court is at a loss as to how the angle of the bullet would reveal or constitute evidence tending to prove "accidental shooting" *versus* "reckless shooting." Because counsel's stated strategy in that regard is nonsensical to the Court, I must interpret or attempt to interpret it in a logical fashion. I find that trial counsel intended to say that he sought evidence to show the shooting was an accident versus an intentional shooting, which would be consistent with the rest of Mr. Runyon's testimony on point. In that regard, Mr. Runyon was effective on one point: He did get Dr. Nichols to concede that his statement about the trajectory of the bullet once it hit the victim was *not* evidence of the trajectory of the bullet between the weapon and prior to contact with the victim. 1994 Tr. 781-2.

Mr. Runyon stated that he went to the crime scene at Spell's Grocery on numerous occasions, but he did not interview any witnesses there. PCR Tr. 854. While at Spell's Grocery those numerous times, Mr. Runyon did not avail himself of the opportunity to interview Mr. Robinson, the long-time employee who had worked the night of the shooting. He also failed to attempt to interview Mr. Riley, who lived a relatively short distance from Spell's Grocery. Trial counsel both testified that they did not interview or sincerely seek the assistance of an expert to interview assault victim, Mr. Patterson, Mr. Riley, Mr. Robinson, or Mr. Scharf, or, for that matter, any other of the lay witnesses who were identified by the state as witnesses.[8] PCR Tr. 137-39, 860, 866, 862.

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[8]Despite the Respondents' fervent assertions that trial counsel did interview these witnesses, there is no evidence to support those assertions. Although Mr. Runyon stated that he thought either he or Mr. Leiendecker interviewed these witnesses, Mr. Leiendecker denied interviewing any of them, and they each denied that either Mr. Runyon or Mr. Leiendecker even attempted to interview them at any time. In the face of Mr. Runyon's eventual concession that he did not interview the witnesses, I find that the Respondent's

Trial counsel failed to interview a single crime scene witness, even after the State officially notified trial counsel that several of these witnesses had provided exculpatory information. PCR Tr. 836-41. Mr. Runyon acknowledged that he received all of Solicitor Bailey's letters notifying the defense of exculpatory information. PCR Tr. 825. Mr. Runyon claimed that he may have talked with Stephanie Simmons at the courthouse before her testimony (PCR Tr. 861), though he later claimed that Mr. Leiendecker talked to her (PCR Tr. 991), a claim both Ms. Simmons (PCR Tr. 260) and Mr. Leiendecker flatly denied. PCR Tr. 141. Otherwise, both Mr. Runyon and Mr. Leiendecker admitted that they did not interview any eye witnesses or crime scene witnesses, except for Applicant.

Mr. Runyon gave various reasons for counsel's failure to interview these witnesses. At first, he was not sure whether or not the witnesses had been interviewed by the defense. PCR Tr. 833. He then amended his testimony to say that he did not think the witnesses would be helpful to Applicant. PCR Tr. 838. When confronted with correspondence from Solicitor Bailey notifying Mr. Runyon that Mr. Patterson and assault victim had given the Solicitor some exculpatory information prior to the 1994 trial, Mr. Runyon acknowledged that he had received the information. He was content to rely on the State's investigation. PCR Tr. 837-38. Mr. Leiendecker candidly testified regarding whether or not the failure to interview all these witnesses was a reasoned strategic decision. He said it was not. PCR Tr. 140-4.

When confronted with PCR testimony and evidence that they should have and could have adduced at Applicant's 1994 trial if they had conducted an investigation, Mr. Runyon

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position is without record support .

and Mr. Leiendecker admitted that most, if not all, of that additional information would have been helpful in both furthering the defense case and consistent with the defense theory of the case. PCR Tr. 145, 152, 155, 880-84, 890-91, 1008; PCR 8-2005Supp. Tr. 59-61. (*See Martinez v. State,* 304 S.C. 39, 41, 403 S.E.2d 113, 114 (1991) (where trial counsel admits the testimony of a certain witness may have made the difference in obtaining an acquittal, the Court may find ineffective assistance)). However, Mr. Runyon balked at the idea of presenting testimony that Applicant had impaired vision and had not been wearing his corrective lenses that night. Why? Mr. Runyon was concerned that the jury would have had the impression that Applicant was "recklessly" shooting a gun that night, when Applicant knew he should have been wearing eyeglasses. PCR Tr. 904-05. Mr. Runyon seemed to prefer that the jury view Applicant's shooting Stephanie as an intentional act rather than a reckless one. PCR Tr. 905. The Court must reject Mr. Runyon's "strategy"in that regard as either illogical or disingenuous in that it was incongruent with his stated theory of defense.

Mr. Runyon met with Applicant's family once, in a group setting, five days before the 1994 trial. PCR Tr. 835, 869-70, Ex. P-46. Based upon Mr. Runyon's attorney time sheet entries, he met with Applicant to discuss the case on three occasions before the 1994 trial, those being December 19, 1992, January 31, 1994, and February 23, 1994. PCR Ex. P-46. Mr. Runyon had three telephone calls with Applicant while he was in jail. Those calls occurred on November 23, 1993, December 4, 1993, and December 11, 1993. PCR Ex. P-46. However, Mr. Runyon testified that his time sheets did not reflect every bit of work he did on Applicant's case. PCR Tr. 871.

Trial counsel filed three pretrial motions seeking funds for an investigator. PCR Exs.

P-43, P-44, and P-45. Trial counsel never requested a hearing or otherwise took any action to obtain rulings on those pretrial motions or to obtain funding. PCR Tr. 979. Mr. Runyon candidly testified that he did not pursue rulings on the motions because he felt the assistance of an investigator was unnecessary, in part, since the case was on course for settlement with a negotiated sentence of life without the possibility of parole. However, when the plea agreement failed, Mr. Runyon was angry and agreed to proceed to trial, set to commence just twenty-six days later, without seeking a continuance in order to actually prepare for trial. PCR Tr. 1031. Mr. Runyon testified that he did not need to utilize an investigator because the case was "simple" and he did not want to interview people who might "start screaming and hollering about [Applicant's] shooting the little girl because there was no justification for firing that shot." PCR Tr. 769, 830.

Walter Mitchell testified that before and during the 1994 trial, he was a licensed, private investigator, with his own Private Investigator business. PCR Tr. 469, Ex. P-32. His work area covered a large area, including the Dorchester County area. Mr. Mitchell had previously served as a field investigator with South Carolina Law Enforcement Division ("SLED"), where held the rank of Lieutenant. Prior to his employment with SLED, he had served as a deputy sheriff with the Charleston County Sheriff's Department. PCR Tr. 470, Ex. P-32.

Mr. Mitchell testified that Mr. Runyon had, in fact, called him seeking his expert assistance as a defense investigator for Applicant's case. This fact also indicates that Mr. Runyon recognized the need for some help but still failed to enlist expert assistance. In response to Mr. Runyon's inquiry about his services, Mr. Mitchell indicated that he was available to assist Mr. Runyon. PCR Tr. 470-71. Mr. Runyon made no further contact with

Mr. Mitchell concerning assisting with Applicant's case. PCR Tr. 471, 474-75. Mr. Mitchell's training and experience would have been valuable to trial counsel in locating and interviewing witnesses, as well as locating, obtaining, and identifying the existence of all manner of records, including school, correctional, medical and any other material records. PCR Tr. 472. One particularly astute observation by Mr. Mitchell concerning the value of case investigation and presentation resonates with the Court, and I paraphrase it here: if counsel do not interview a witness or do not obtain or review records, then counsel cannot know what the witness has to say or what the records reveal, good or bad. PCR Tr. 477.

Trial counsel's recollection is that they obtained authorization from the trial court to expend funds for Applicant to have a physical and neurological examination and to purchase courtroom apparel. PCR Tr. 863-64, 898-900. Trial counsel failed, however, to request an ophthalmological exam of Applicant, even though the report from Applicant's medical evaluation, the lone expert report trial counsel bothered to obtain, reflected the information that he needed and wore corrective eyeglasses. PCR Ex. P-50. Moreover, trial counsel were aware and should have known that the wanted poster depicted Applicant wearing eyeglasses. PCR Ex. P-30. Further, Applicant's school and South Carolina Department of Corrections ("SCDC") medical records – if trial counsel had bothered to collect and review those records – also contained what should have been red flags to trial counsel that Applicant's eyesight was materially impaired. PCR Tr. 899-904, 1008-09, Exs. P-36, P-37, and P-50.

Dr. William Price testified as an expert witness in the field of ophthalmology. PCR Tr. 569-71. Dr. Price was asked to render his expert opinion concerning Applicant's visual acuity over the course of his life as contained in historical records and to examine and assess

Applicant's eyesight for himself. PCR Tr. 575. In reaching his expert opinion about Applicant's visual acuity over his lifetime, Dr. Price reviewed and relied upon Applicant's eye examination records from elementary school and from prison. PCR Tr. 572-75, PCR Ex. P-36. Dr. Price noted that Applicant was first diagnosed as requiring eyeglasses to correct his vision in 1974, when he was six years old and had just started elementary school. PCR 578-79, Ex. P-37. Applicant's eyes were also examined and vision impairment was noted by SCDC in 1989 and shortly after the incident, but before the 1994 trial.

Dr. Price's own medical examination of Applicant's eyes resulted in a diagnosis of myopia, which is "commonly called near-sightedness" (PCR Tr. 576), and astigmatism, which basically further causes and compounds blurry vision; in other words, astigmatism adds insult to injury in terms of an individual's degree of impairment of visual acuity. PCR Tr. 581, Ex. P-30. Dr. Price's review of the historical records support his conclusion that Applicant has had these conditions that caused impairment of his visual acuity since he was a young child. PCR Tr. 583. According to Dr. Price, the practical impact of these impairments to Applicant's visual acuity is to render his vision very blurry without corrective lenses. Without corrective lenses, the further away an object is from Applicant, the more blurred it becomes to him. PCR Tr. 577. Dr. Price opined that darkness and alcohol and marijuana ingestion would have further diminished Applicant's already limited visual acuity. PCR Tr. 584-5.[9] Dr. Price practiced in Summerville, South Carolina, and was

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[9]The uncontested record evidence is that the sun set at 5:15 p.m. local time in Summerville the night of the shooting, which occurred at approximately 6:15 p.m. at the earliest, a full hour after the sun had set. PCR Ex. P-31. The Court notes that some artificial lighting was present at the time of the shooting, but darkness was prevalent. PCR Exs. C-6 and P-56. Mr. B[redacted] testified that they exterior lighting at the store was "not that good" (1994 Tr. 721) and "kind of poor." 1996 Tr. 608.

available for consultation regarding Applicant's compromised eyesight prior to both the 1994 and 1996 trials. Trial counsel never contacted him for that purpose regarding Applicant. PCR Tr. 592-93.

Mr. Homer Fesperman, who was offered without objection as an expert in audio and videotape technology, testified concerning raw news video footage which had been in Solicitor Bailey's possession and which Solicitor Bailey had notified trial counsel was available for review prior to trial. PCR Exs. C-6, P-56, and P-59. Mr. Fesperman used his experience and technology to capture still shots from freeze-frames from the videotape. PCR 8-2005Supp. Tr. 26-27, Exs. P-57 and P-58. The Court notes that it was able to see and identify beer cartons in the truck bed. Mr. Fesperman's experience and equipment was not necessary to enable a viewer simply to see and identify the beer cartons. PCR 8-2005Supp. Tr. 16-7. Rather, the still shot frame captures of the videotape enabled the Court, and would similarly enable lay viewers, to discern the contents more quickly and clearly than that which was apparent to the Court when viewing the videotape. *Id.* I find that the still shots provided definitive evidence of what was actually depicted on the videotape.

The videotape of news footage, taken of the crime scene shortly after the incident occurred, depicts at least one, if not two, additional, twelve-pack containers of Busch Light beer, that were partially empty, in the back of B[redacted]s truck, along with more empty beer cans.[10] PCR 8-2005Supp. Tr. 60, Ex. P-56. As testified to by Mr. Leiendecker, State's witness James Carver is depicted walking and standing near the beer as it sits in the back

[10]The Court finds it highly unlikely that the beer cartons were empty because they would have flown out of the back of the pickup when Mr. B[redacted] was driving.

of B[redacted]'s truck bed. PCR 8-2005 Supp. Tr. 57. Mr. Fesperman testified that technology required to prepare PCR Exs. P-56, 57, and 58, was available prior to Applicant's trial in 1994, and was as nearby as the television stations that supplied the original tape in the first place. Thus, trial counsel could have availed themselves of it and utilized these materials. PCR 8-2005 Tr. 43-4, 47-8, 50.

The Court finds that before trial counsel could have made an informed or strategic decision whether to utilize this evidence, they would have had to bother actually to view this evidence that they knew the Solicitor possessed.

Mr. Leiendecker testified that the information contained in PCR exhibits P-56, P-57, and P-58, would have been useful to impeach Mr. Carver's trial testimony in two important ways. Mr. Leiendecker testified that he had never seen the videotaped news footage of the truck bed, beer, and Mr. Carver; he had no indication or information that Mr. Runyon had ever seen the videotape reflected in P-56, either. PCR 8-2005Supp. Tr. 57 and 62. Mr. Leiendecker noted that he had no recollection of receiving a copy of a letter from Solicitor Bailey notifying Mr. Runyon that he could review a videotape of raw news footage at the Solicitor's office. PCR Ex. P-59.

The videotape would have been valuable to trial counsel in impeaching Mr. Carver and possibly Mr. B[redacted] as well in that Mr. Carver's statements on the videotape are inconsistent with their trial testimony about what happened the night of the shooting. PCR Ex. P-10, PCR 8-2005Supp. Tr. 59. Additionally, trial counsel did strategically ask Mr. Carver about the presence of and consumption of beer in the B[redacted] truck on cross-examination. 1994 Tr. 951. As previously noted by the Court, Carver denied it. I find that the videotape would have provided trial counsel with solid impeachment evidence against

Mr. Carver, the State's star closing witness in 1994, concerning the fundamental dynamics of what unfolded at Spell's Grocery the night the victim was shot. *See Moffett v. Kolb*, 930 F.2d 1156 (7th Cir. 1991) (counsel ineffective for failing to present evidence of State witness's prior inconsistent statement).

Former First Judicial Circuit Solicitor Walter Bailey testified concerning his practices regarding disclosure of information to the defense pursuant to the requirements of *Brady v. Maryland*, 373 US 83 (1963) and SCRCrimP, Rule 5. PCR Tr. 1060. Solicitor Bailey's general practice was to maintain an "open door policy" in regards to disclosure of evidence to defense counsel, although he acknowledged that he did exclude some information from the file materials available to defense counsel. *Id.* He estimated that he would typically withhold from defense counsel roughly ten percent of his file on work product grounds. PCR Tr. 1069. In Applicant's case, Solicitor Bailey indicated that he had withheld approximately four to four-and-a-half inches of pages of materials from his file. PCR Tr. 1071.

His practice was to provide a copy of all discoverable material to trial counsel, with a cover letter documenting and inventorying the materials provided, unless the material was too voluminous or otherwise difficult to reproduce. PCR Tr. 1060, 1080. If the material was too voluminous or cumbersome to reproduce, Solicitor Bailey would notify defense counsel of the material's existence and availability for inspection. Solicitor Bailey testified that he intentionally proceeded in that manner in order to be able to prove exactly what he had provided and/or disclosed to defense counsel. PCR Tr. 1080. He maintained his materials in large black notebooks. Although he maintained an open-file policy, he would not, however, disclose any materials that he considered to be his work product. PCR Tr.

1069. Generally, on the rare occasion a defense counsel did take him up on his offer to review his actual file, he would sit with counsel and methodically hand over materials piecemeal from the file. He testified, that while such an occurrence was a rare event, "that [it] has happened on a couple of occasions." He quickly volunteered, "Not in this case that I can recall," thereby indicating that Applicant's counsel did *not* come to his office to review file materials. *Id.*

Solicitor Bailey testified that he documented that he had specifically provided trial counsel with the following exculpatory or impeachment information prior to the 1994 trial:

- The existence of raw television film footage of the crime scene.

- Stephanie Simmons: that she "saw Rogers in Alabama, and he re-related to her the shooting was an accident." PCR Tr. 1061, PCR Ex. P-10.

- Applicant's statement to Alabama authorities with his description of the racial slur and his acknowledgment of responsibility. *Id.*

- assault victim: that Assistant Solicitor Peter Them had promised to drop all charges against assault victim "prior to my election," according to (then-newly-elected) Solicitor Bailey in a letter dated February, 1994. PCR Tr. 1062, Ex. P-11. The Court notes, however, that Solicitor Bailey was elected to office in the general election of November 3, 1992, and took office on January 2, 1993. PCR Ex. C-4 at 59.

- Daxton Patterson: Solicitor Bailey had agreed to a PR bond for Patterson after some months in jail, and that after several conversations with Patterson, Bailey had subpoenaed him but was undecided on whether to call Patterson as a witness. PCR Tr. 1062, Ex. P-11.

- assault victim: letter to Runyon that after an interview with her, Solicitor Bailey would call her as a witness and that her testimony would be exculpatory to some extent and a summary of how it would be exculpatory. PCR Tr. 1062, Ex. P-12.

- A letter to Runyon with inventory of enclosures and with enclosures purporting to be Solicitor Bailey's file as of December 30, 1993. PCR Tr. 1064, Ex. P-42.

- Daxton Patterson: letter to Runyon indicating that he would at least partially corroborate Applicant's statement regarding the sequence of events on the night of the shooting.

PCR Tr. 1064, Ex. P-42

Regarding the videotape of raw news footage that comprises PCR Ex. P-56, discussed, *supra*, Solicitor Bailey testified he mailed Mr. Runyon a letter, which included a brief, general description of the raw news footage, notifying counsel it was available for review at the Solicitor's office. PCR Ex. P-10. In addition, Solicitor Bailey provided trial counsel with a copy of a purported "transcript" that was prepared by the news channel and provided by them to Solicitor Bailey. PCR Ex. R-7, PCR 8-2005Supp. Tr. 71-2. Solicitor Bailey, however, also acknowledged that the transcript was incomplete and did not accurately reflect all of the relevant dialogue that was, in fact, captured on the raw video footage in PCR Ex. P-56. PCR 8-2005Supp. Tr. 75-6. The transcript certainly did not reflect the fact that partially empty Busch beer cartons or containers were in the bed of B[redacted]s truck. *Id.* Solicitor Bailey acknowledged both on cross-examination and under *voir dire* from this Court that he "carefully" reviewed the videotape and was, therefore, personally aware of its contents. PCR 8-2005Supp. Tr. 79-80.

c. Trial Counsel Rendered Ineffective Assistance of Counsel During the Merits Trial of the Guilt-or-Innocence Phase.

Trial counsel Failed properly or adequately to investigate and prepare the guilt-innocence phase of the trial.

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

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

Trial counsel failed to present readily available and favorable defense witnesses and evidence.

Trial counsel failed to review critical evidence in the case which the

State made available for inspection to trial counsel.

As an initial matter, the Court will proceed with a discussion of its analyses and findings for each of Applicant's sub-grounds for relief as one larger, multifaceted allegation concerning the merits portion of Applicant's guilt-or-innocence trial. The Court finds that trial counsel was ineffective in all manners Applicant alleges and that Applicant was prejudiced by trial counsel's failures in myriad ways. Because I find that Applicant is entitled to a new trial, I hereby reverse his convictions and vacate his sentences, for the reasons that follow.

I. Counsel's performance fell below an objective standard of reasonableness.

I find that trial counsel's effort to investigate and prepare Applicant's case for trial was woefully inadequate and constitutionally deficient. Trial counsel wholly failed to conduct any meaningful investigation. Thus, they failed to present favorable evidence on Applicant's behalf or to rebut the State's evidence against Applicant in all the ways Applicant has alleged. Trial "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

The South Carolina Supreme Court long ago imposed a duty on capital trial counsel to "investigate the facts and circumstances of the alleged crime with no less vigor and thoroughness than the publicly compensated solicitor." *Bailey v. State*, 309 S.C. 455, 460, 424 S.E.2d 503, 506 (1992). Although the "Constitution does not impose a duty on defense counsel to have "a scorch-the-earth strategy" in conducting investigations and case preparations, it does impose a requirement that trial counsel investigate "readily available

sources of evidence." *Hall v. Washington*, 106 F.3d 742, 749-50 (7th Cir. 1997). "While trial counsel is afforded tremendous deference over matters of trial strategy, the strategy that is selected must be supported by adequate investigation." *Wiggins*, 539 U.S. at 524-25; *accord Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006) (holding failure to conduct adequate investigation rendered counsel's performance ineffective and required reversal of convictions and death sentence); *Cobbs v. State*, 305 S.C. 299, 408 S.E.2d 223 (1991) (holding failure to conduct adequate investigation required new trial).

ii. Counsel performed no meaningful investigation.

Trial counsel's stated defense strategy was to pursue a manslaughter defense by showing that all the adults involved in the shooting exercised poor judgment and behaved badly, that Applicant did not know Stephanie B[redacted] was present, and that he did not intend to shoot her. Trial counsel's pursuit of this defense was limited to attempts to bring out favorable facts on cross-examination of the victim's father and his friend and to use Applicant's own written statement to the police about the events leading up to the shooting. I find that trial counsel conducted no real investigation. In fact, this Court is hard-pressed to find that trial counsel conducted any investigation at all. Choosing to do nothing is not a strategy. *See U.S. v. Gray*, 878 F.2d 702, 711 (3rd Cir. 1989) (counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when he has not yet obtained the facts on which such a decision could be made."); *accord Knighton v. Maggio*, 740 F.2d 1344, 1350 (5th Cir. 1984) (Petitioner entitled to relief if record shows that "counsel could not make a valid strategic choice because he had made no investigation."). Moreover, this Court rejects trial counsel's "post-hoc rationalizations" to

the extent such rationalizations are apparent to the Court and where the record does not support that the reasons or strategies were held contemporaneous with trial. *Wiggins*, 539 U.S. at 526.

iii. Counsel's failure to investigate was not supported by reasonable strategy.

The Court is required to consider the evidence in a light most favorable and "deferential" to trial counsel's stated strategy. *See, e.g., Strickland*, 466 U.S. at 689. Therefore, let us assume, *arguendo*, that trial counsel's failure to conduct an independent investigation is based on counsel's reasonable concern that they not unearth more negative witnesses against Applicant and that they lacked the funds to employ an investigator. PCR Tr. 864-64. Regarding witnesses who actually testified at the trial of the case, trial counsel failed even to attempt to interview the eyewitnesses and crime scene witnesses, at least four of whom – Ms. Simmons, assault victim, Mr. Patterson, and Mr. Robinson – had positive, preexisting relationships with Applicant. Moreover, all of these witnesses, adding Mr. Scharf, Mr. Riley, and Lt. Asbell to the list, were both subpoenaed by the State to testify (and were, thus, present and readily available during the trial) *and* had knowledge that would either undermine the State's case or provide favorable information that was consistent with trial counsel's own theory.

Trial counsel's stated reasons for failing to interview assault victim are illogical and apply, to some extent, to all of the witnesses they failed to interview. I find that none of counsel's purported strategies justify their failure to investigate and interview any of the witnesses. Mr. Runyon stated he did not interview assault victim, because cross-examination would be more advantageous, he knew what she would say from her

statements to police, she had an "affection" for Applicant, so her testimony would be suspect, and he thought Mr. Leiendecker had interviewed her. PCR Tr. 838-39. Mr. Leiendecker's lone task, however, under trial counsel's division of labor, was to prepare for jury *voir dire,* and he did not interview any witnesses in preparation for the 1994 trial. After careful consideration of all the facts and the relevant legal standards, the Court rejects trial counsel's strategy reasons as without merit, because trial counsel failed to even attempt to interview any of the witnesses.

Trial counsel offered several purported strategic justifications for failing to interview Mr. Patterson, that were specific to Mr. Patterson. Mr. Runyon's reasons for not interviewing Mr. Patterson are that he had Patterson's written statements and they were "not favorable," Mr. Patterson's "statements to police" hurt Applicant's case, Mr. Patterson "did not want to be in jail" so he would not help Applicant, Mr. Patterson said Applicant had the gun, Mr. Runyon asked Mr. Leiendecker to interview Mr. Patterson, and Mr. Patterson had an attorney, Robert Robbins, who would not have allowed an interview. PCR Tr. 836-38.

As an initial matter, I reject trial counsel's purported strategy regarding their failure to interview Mr. Patterson because they are without bases in reason or fact. Because there is no dispute that Applicant had the gun, Mr. Patterson's knowledge of it is irrelevant. Trial counsel's assertion that they knew what Mr. Patterson would say because they had his written statement is without record support. The evidence before this Court is that Mr. Patterson did not make a formal or written statement to the State -- the State certainly has never produced one; thus, counsel could not have possessed one. As to trial counsel's concern that Mr. Patterson's attorney would not permit an interview, Mr. Patterson testified

he would have consented to such an interview. The client's desire controls in such an instance, because the right to remain silent is the client's right to waive or not. *See, e.g., State v. Binney*, 362 S.C. 353, 360, 608 S.E.2d 418, 421 (2005) (capital defendant had appointed counsel but chose to waive his rights and give a statement). Additionally, the Solicitor had unfettered access to Mr. Patterson, with his attorney's consent. PCR Tr. 737-38, 744. Trial counsel could have sought access from the trial court under principles of due process. PCR Tr. 876. Alternatively, trial counsel acknowledged that the Solicitor had an "open witness" policy. PCR Tr. 875-76. At the end of the day, these reasons are just as devoid of merit as the rest of trial counsel's purported strategies, because trial counsel did not even attempt to interview Mr. Patterson.

Trial counsel offered several reasons for failing to utilize the evidence that Mr. B[redacted] or Mr. Carver used a racial slur, specifically, the word *nigger*. Counsel's supposed strategy was that they did not want to "beat up" on Mr. B[redacted] or to "inject race" into the case, and that Applicant's written statement about the slur was part of the record (1994 Ex. S-8), thus the jury already had that information, according to counsel Runyon. PCR Tr. 839-41. The Court rejects these claimed strategies because they are inconsistent with trial counsel's actual efforts and defenses at trial. Trial counsel successfully used evidence of the racial slur in arguing for a manslaughter instruction. 1994 Tr. 974. As documented, trial counsel acknowledged that race was an "overlay" in the case and considered that factor during jury selection. PCR. Tr. 927. Trial counsel cannot rely on the racial slur as the basis for arguing to the trial judge for a jury instruction on manslaughter, and then assert at PCR that he did not use it because it was counterproductive. 1994 Tr. 974.

The jury had Applicant's written statement but they *did not know* which racial slur

Mr. B[redacted]or Mr. Carver actually used because it is not included in the statement the jury heard. The particular racial slur uttered is perhaps the most incendiary word a white person can use to refer to an African-American person. Moreover, neither the State nor defense counsel "injected race" into the case. Race was part of the facts of the case. Identification of the precise racial slur and corroboration that it was used likely would have affected at least one member of Applicant's jury.

Regarding trial counsel's failure to interview either Mr. Patterson or assault victim, Respondent has asserted that trial counsel Runyon's strategy reason of not wanting to be in a position of "vouching" for Patterson or assault victim as witnesses justifies trial counsel's failure to interview the two witnesses. Respondent's Proposed Order p.64.

The Court is at a loss to understand what merely *interviewing* a witness has to do with the now-defunct legal concept of *"vouching"* for a witness. Vouching was the concept that a party who called a witness to testify at a trial thereby endorsed the credibility of the witness. At the time of Applicant's 1994 trial, caselaw did forbid a party from impeaching a witness it called to testify at trial, with one exception. *See State v. Russ*, 208 S.C. 449, 452, 3 S.E.2d 385, 386 (1946) ("Generally, a party cannot impeach a witness he has introduced, either in a criminal case or a civil case."); *but see Gilfillan v. Gilfillan*, 242 S.C. 258, 261, 130 S.E.2d 578, 580 (1963) ("Contradictory statements may not be used to impeach a party's own witness except upon a showing of surprise."); *c.f.* Rule 607, SCRE (allowing any party to impeach a witness without regard to whether a party called the witness to testify) (enacted 1995)[11]. Interviewing these witnesses would have informed trial

[11]Thus, the "vouching" excuse would not have even applied in 1996 at Applicant's resentencing trial.

counsel as to what the witnesses knew and what they would say about the events. After interviewing the witnesses, trial counsel might have made a reasoned decision as to whether or not to call these witnesses in the event *the State did not call them as witnesses in its case in chief.* Moreover, as regards assault victim, trial counsel had the golden opportunity to capitalize on a witness who the State *actually did* vouch for by calling her as a witness. That was, if anything, an excellent chance for trial counsel to profit from the imprimatur of trust the State bestowed on assault victim as a witness, in light of all the additional favorable information she could have related to the jury. I find that trial counsel's failure to interview these witnesses *at all* exposes trial counsel's "vouching" strategy for what it is: a fatuous *post hoc* justification for his failures.

iv. Counsel's deficient performance prejudiced Applicant.

Having fully considered all of trial counsel's purported strategies for failing to interview witnesses, to seek expert assistance of a private investigator, or to bring out certain facts to the jury, the Court now turns to whether the trial counsel's failures prejudiced Applicant. I find that counsel's failure to interview the eye witnesses and crime scene witnesses, who were within the same building as trial counsel and/or whom trial counsel knew to possess exculpatory information or information favorable to trial counsel's theory of the case, rendered their representation of Applicant unconstitutional. I further find that the State did everything but use a neon marker to highlight the fact for trial counsel that assault victim, Ms. Simmons, and Mr. Patterson possessed a potential pot of golden exculpatory information about which they could testify. The responsibility for the failure to elicit this information from these witnesses lies squarely at trial counsel's feet. I find that trial counsel's failure to investigate and present exculpatory information resulted

in prejudice to Applicant because the jury was not informed of readily available evidence which tended to rebut the State's case and which would have supported the defense that trial counsel did pursue.

As part of trial counsel's duty to conduct a reasonable investigative effort or to make, at least, a reasonable decision not to conduct an investigation, trial counsel must, at the bare-bones-minimum, review materials and evidence *in* trial counsel's actual possession or made available to counsel by the state. *Rompilla v. Beard*, 125 S.Ct. 2456, 2466 (2005) (holding counsel ineffective where the Supreme Court could not "think of any situation in which defense counsel should not make some effort to learn the information in the possession of the prosecution and law enforcement authorities"). Because trial counsel failed to conduct even the most basic and least onerous of investigative reviews of such materials, trial counsel's performance fell impermissibly below "prevailing professional norms." Trial counsel conceded that if they had conducted a review of those materials, they would have found favorable information that was consistent with their theory of the case and would have rebutted the State's evidence. Their failure to do so prejudiced Applicant.

The school and prison records in their possession included information that Applicant's eyesight had been impaired since he was six years old. In fact, the one extra measure trial counsel undertook on Applicant's behalf was to have him undergo a medical exam through the Medical University of South Carolina. However, they even ignored their own report indicating Applicant needed corrective lenses. PCR Ex. P-50. Lt. Asbell also produced and presented the 1992 wanted poster, which included that photograph of Applicant wearing corrective lenses. PCR Ex. P-30. This would have shown he could not see well.

At the hearing before this Court, Lt. Asbell had still-sealed evidence, meaning trial counsel did not bother to review it, collected from the crime scene that included a blood-stained, unopened Busch beer can that Mr. B[redacted] had purchased at Spell's before the shooting. PCR Ex. 29. The state provided trial counsel with photographs of the crime scene, one of which was of the truck bed and driver's door area, showing a laundry basket of clothes with a gun pouch on top and an empty or partially empty, trampled Busch beer container apparent in the floorboard of the driver's side of the truck. PCR Ex. P-18. The State also provided trial counsel with access to (but not their own copy of) a videotape of and a partial transcript of raw television news footage. PCR Ex. P-10, R-7. The information the State provided about the videotape was sufficient to put trial counsel on notice to review the videotape. Trial counsel failed to review these materials. Mr. Runyon admitted that evidence that showed that the presence of guns and "the presence of alcohol on the part of the people who had custody" of the victim "was important for the jury to consider," from the defense perspective. PCR Tr. 880.

The State provided trial counsel with notice that assault victim, Mr. Patterson, and Ms. Simmons had information that corroborated Applicant's account of the shooting and contradicted Mr. B[redacted]s, Mr. Carver's, and Mr. Riley's in the innumerable ways already discussed, *supra*. *See, e.g., Sullivan v. Fairman*, 819 F.2d 1382 (7th Cir. 1987) (counsel ineffective for failing to locate witnesses whose statements would have contradicted the testimony of State's witnesses). PCR Exs. P-10, P-11, P-12. Applicant was prejudiced by trial counsel's failure to avail themselves of the evidence on Applicant's behalf.

Trial counsel initially recognized a need for investigative assistance. To that end, trial counsel contacted Mr. Mitchell, an experienced investigator in the area, who relayed

that he was available to assist counsel. Trial counsel filed three motions requesting funding for investigative assistance, but failed to pursue the motions with the trial court. Trial counsel's failures in this regard prejudiced Applicant. Because trial counsel failed to conduct even a minimal investigation, I cannot find that they made a reasonable determination about the usefulness of the assistance of these particular witnesses or these categories of witnesses, *per se*. Therefore, I find that trial counsel's failures prejudiced Applicant regarding these aspects of Applicant's defense because they deprived Applicant of evidence that would have rebutted the State's evidence and would have been consistent with the defense that trial counsel pursed at trial. The overlooked evidence would have provided crucial evidence about the true nature and characteristics fo the events that evening. This additional information would have assisted the defense both on the key element of malice and provided additional bases for a voluntary manslaughter jury charge.

I find that trial counsel's failures prejudiced Applicant and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See, e.g., Strickland,* 466 U.S. at 694; *accord Williams,*529 U.S. 362, 397. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *See Pauling v. State,* 350 S.C. 278, 285, 565 S.E.2d 769, 772 (2005) (counsel's failure to object to improper jury instruction was prejudicial and undermined confidence in the outcome of the trial). The magnitude of the additional favorable information the eyewitnesses provided, along with other corroborating testimony and evidence, leads this Court to find and conclude that, but for trial counsel's numerous failures, the outcome of Applicant's trial would have been different. Stated differently, I find that there is certainly one juror for whom all the additional evidence would have made

a difference. *See Williams*, 529 U.S. 362, 397; Wiggins, 539 U.S. at 534. Applicant was prejudiced because trial counsel had the ability to corroborate key aspects of their stated defense theory and to rebut the State's case. *See generally, Frett v. State*, 298 S.C. 54, 55, 378 S.E.2d 249, 250 (1988) (trial counsel ineffective for failing to investigate or to interview witnesses). Counsel's performance prejudiced Applicant because I find that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[12] *Wiggins*, 539 U.S. at 534-35; *Strickland*, 466 U.S. at 695.

v. The cumulative impact of the prejudice rendered Applicant's trial fundamentally unfair.

If trial counsel had performed in a manner consistent with prevailing professional norms, trial counsel would have realized they had an embarrassment of riches of favorable material evidence, most of it virtually at their very fingertips, to place before the jury. The jury would have known that James Carver was not truthful when he testified that he had not seen or was not aware of any beer in or around B[redacted]s truck. PCR Exs. P-57 and P-58. The jury would have known that Mr. Carver's testimony about what happened at Spell's Grocery was irreconcilable with his statement and image captured live on film within an hour or two of the shooting, in which he stated that they had "just pulled up" to the store. PCR Ex. 56. The jury would have seen numerous multi-pack, partially empty containers of Busch beer all about the B[redacted] vehicle. I find that the visual impact of that evidence would have been significant. As noted, Mr. Runyon admitted that evidence that showed that "the

[12]The Supreme Court has made clear that the adjective "reasonable" is important; in fact, a reasonable probability is a lower standard than even the preponderance of the evidence standard. *Williams v. Taylor*, 529 U.S. 362, 406 (2000).

presence of alcohol on the part of the people who had custody" of the victim "was important for the jury to consider," from the defense perspective. PCR Tr. 880. Applicant was prejudiced because trial counsel failed to present it.

Both assault victim and Mr. Patterson could have and would have corroborated key points of Applicant's statement and supported Applicant's manslaughter defense, as well as providing evidence tending to show a lack of malice on Applicant's part. assault victim and Mr. Patterson would have provided independent impeachment of Mr. B[redacted] and Mr. Carver and independent corroboration of Applicant's statement that Mr. Patterson started the argument and spit on B[redacted], not Applicant. assault victim heard either Mr. B[redacted] or Mr. Carver utter the word *nigger* toward Applicant prior to the shooting, as such her testimony would have been additional evidence supporting the manslaughter defense. Both assault victim and Mr. Patterson would have testified that Applicant did not laugh after the shooting. As it was, that highly inflammatory statement went unchallenged. Both witnesses would have testified that Applicant did not put a gun to Mr. B[redacted]'s head. Most importantly, both assault victim and Mr. Patterson would have testified that they saw Mr. Carver and possibly Mr. B[redacted] reach for firearms. This testimony very likely would have made a difference to at least one juror, especially since the record evidence is clear that they did possess and have access to weapons in the truck.

Ms. Simmons would have provided admissible testimony about Applicant's prior consistent statements to her concerning the shooting, including Mr. B[redacted]s or Mr. Carver's use of the word *nigger*. She would have also been able to relate that Applicant was crying, that he stated he did not know the victim was there, and that he did not intend to hit anyone when he fired the weapon. Mr. Scharf, qualified as an expert by the State, would

have testified concerning his conclusion that the victim's death was the result of an accident, and why and how he reached that conclusion. *See Jowers v. State*, 396 S.E.2d 891 (Ga. 1990) (counsel ineffective for failing to investigate and discover that the state experts would have supported the defense theory). Mr. Robinson would have testified to his years of experience and positive interaction with Applicant, as recently as the morning of the shooting. Mr. Riley's testimony at trial would have been impeached with information about his long, personal relationship with the victim's family, which included his being employed for almost two decades by the B[redacted] family. At the very least, testimony by Mr. Riley and Mr. B[redacted] provided red flags requiring trial counsel to delve further into the matter. Trial counsel would have also learned of Mr. Riley's apparent long-held animosity towards Applicant from a prior altercation. This information was consistent with trial counsel's defense theory and likely would have made a difference to at least one juror.

Trial counsel failed to seek the assistance of an expert ophthalmologist, because they never meaningfully reviewed relevant and available records that documented Applicant's long history of impaired eyesight. Applicant's school records and SCDC records, all of which pre-date his 1994 trial, indicate that Applicant's vision was deficient and that Applicant was nearsighted.[13] Trial counsel's failure to collect and use these records prejudiced Applicant, especially where the records went to a material issue in the case and would have furthered trial counsel's theory of defense.

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[13]Trial counsel Runyon also asserted that he wouldn't have presented information that Applicant was not wearing his corrective lenses because it might inflame the jury. PCR Tr. 907. However, the jury already knew Applicant was under some influence of alcohol and that he fired the gun. The fact that he could not see well because he was not wearing corrective lenses is markedly more sympathetic than evidence that he was drunk.

The State did not argue that Applicant fired the gun indiscriminately at the truck and thus that his reckless conduct caused a death. To the contrary, the State argued at trial that the defendant deliberately and maliciously aimed at the truck. More specifically, the State argued that Applicant knew a child was in the truck so that he directly aimed at her.

Much of the easily available but unused evidence would have been very beneficial and persuasive in demonstrating a lack of malice on Applicant's part.[14] The fact that Applicant had medically significant blurry vision would have undermined the State's theory. Moreover, the fact is wholly consistent with Applicant's repeated contention that the shooting death was a tragic "accident," within the scope of the manslaughter defense.[15] At a new trial, it will provide further corroboration for Applicant's statement to police, the testimony of assault victim, Mr. Patterson, and Ms. Simmons, regarding Applicant's assertion that he did not see the child and did not aim at the truck, in any event.

Morever, trial counsel failed to utilize the most powerful evidence that the victim's own father provided concerning what Applicant knew about the victim's presence. Assuming all facts in deference to trial counsel's assertions about them, the Court is at a loss to understand how or why counsel failed to capitalize on Mr. B[redacted]'s own testimony that Stephanie B[redacted] was "*laying* in the seat," not sitting up, when Applicant "saw" her, if he

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[14]Respondent's assertion that Applicant cannot meet the prejudice prong under *Strickland* because none of the evidence amounts to sufficient proof that he would have been legally entitled to a manslaughter jury instruction wholly misses the mark. Applicant is not required to prove any such thing to make a showing of prejudice and Respondent cannot point to any caselaw in support of that assertion.

[15]As previously noted, Applicant has always adamantly asserted that he is responsible for Stephanie B[redacted]'s death. His assertion that her death was an accident is his layperson's moral claim, not a legal technician's use of a term of art..

could see her at all. 1994 Tr. 735. I find that trial counsel's intractable excuses cannot justify that glaring oversight, in light of their theory of defense at the trial and their assertions about it before me.

This case does not present a close question for this Court. A virtual mountain of information and evidence was readily available to trial counsel. A great deal of information was available to them right there in the courtroom, subpoenaed by the State and available to speak with counsel on the spot in the form of the witnesses discussed. *See generally, Frett,*, 298 S.C. at 55, 378 S.E.2d at 250 (trial counsel ineffective for failing to investigate or to interview witnesses). While such a tactic – seat-of-the-pants interviews in court and during trial -- would not have been enough to satisfy the Sixth Amendment, it would have at least been something, some measure of representation. As it was, Applicant was deprived of a fair trial due to counsel's failures.

This Court finds as fact and concludes as a matter of law that trial counsel's prejudicial failures deprived Applicant of the effective assistance of counsel and rendered Applicant's 1994 guilt-or-innocence-trial unfair, thereby depriving Applicant of his rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments and South Carolina law. Counsel cannot make a strategic decision not to present evidence that he does not have and has not sought to discover. Counsel's failure to uncover and present evidence is not a "deliberate, tactical decision," because "'counsel had not fulfilled their obligations to conduct a thorough investigation.'" *Wiggins*, 530 U.S. at 543 (quoting *Williams*, 529 U.S. at 396). I find that Applicant was prejudiced by trial counsel's failures because I find that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Wiggins*, 539 U.S. at 534-35; *Strickland*, 466

U.S. at 695.

This holding is also made pursuant to *Strickland*, 466 U.S. 668; *Frett*, 298 S.C. at 55, 378 S.E.2d at 250 , and *Pauling v. State*, 331 S.C. 606, 610, 503 S.E.2d 468, 471 (1998) (ineffective assistance where counsel failed to discover existence of and to seek introduction of substantial impeachment evidence); *see also* ABA Guidelines: Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 11.4.1 (investigations). Therefore, for all the reasons stated, this Court vacates Applicant's convictions and sets aside Applicant's death sentence. I hereby remand the case to the trial court for a new trial.

GROUND B.

Ineffective Assistance of Counsel at Applicant's Resentencing Trial.

Although the Court grants relief on Ground A, the Court will address the remainder of the Application on the merits as required by the South Carolina Supreme Court. *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127, 128 (1992).

Over-Arching Constitutional Principles.

The United States Supreme Court has recently reiterated the now familiar test for evaluating claims of ineffective assistance of counsel, originally articulated in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

> Ineffective assistance of counsel under Strickland is deficient performance by counsel resulting in prejudice with performance being measured against an 'objective standard of reasonableness,' 'under prevailing professional norms.'

Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 2462 (2005) (internal citations omitted); *See also, Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (counsel's decision not to expand investigation in face of notice to counsel of additional favorable information "falls short of professional standards").

The Supreme Court has also reaffirmed that counsel's strategies will only be considered reasonable to the extent that they are supported by a corresponding reasonable investigation. *Wiggins*, 529 U.S. at 524. Counsel's performance is prejudicial if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[16] *Id.* at 534; *Strickland*, 466 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the case. *Wiggins*, 539 U.S. at 534 (quoting *Strickland*, 466 U.S. at 694).

The Supreme Court has also made clear that the Constitution requires that a capital sentencing jury should have at its disposal all information possible concerning a defendant's life and characteristics. *Woodson v. North Carolina*, 428 U.S. 280 (1976). Accurate and complete information is highly relevant, if not essential, to the jury's determination of the appropriate sentence. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (sentencer must have before it all possible relevant information about the individual defendant whose fate it must determine). A capital sentencing jury, however, can consider evidence in mitigation only if trial counsel investigates and presents such evidence. If the accused's attorney is an ineffective advocate, there is no assurance that the adversarial system will produce a just result. *Williams v. Taylor*, 529 U.S. 362, 390 (2000).

Evidence of a deprived background, absent parents, and intellectual limitation is "the kind of troubled history [the Supreme Court] has declared relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 513, *citing Penry v. Lynaugh*, 492 U.S.

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[16]The Court has made clear that the adjective "reasonable" is important; in fact, a reasonable probability is a lower standard than even the preponderance of the evidence standard. *Williams v. Taylor*, 529 U.S. 362, 406 (2000).

302 (1989) ("Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable...[.]"); *Tennard v. Dretke,* 542 U.S. 274, 287 (2004) (impaired intellectual functioning is "inherently mitigating"); *Eddings v. Oklahoma,* 455 U.S. 104, 112 (1982) ("consideration of the offender's life history is a 'part of the process of inflicting the penalty of death'").

With the appropriate legal standard in mind, I now address each of Applicant's allegations regarding ineffective assistance of counsel at his 1996 resentencing trial.

The Allegations and Evidence.

Applicant alleges that he was deprived of a fair trial due to the ineffective assistance of counsel during the sentencing phase of his trial, because counsel failed to prepare for or present available evidence and failed to object to improper evidence and argument, all thereby depriving Applicant of a fair trial and his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law.

Specifically, Applicant alleges that trial counsel:

- Failed adequately to advise Applicant in accordance with *North Carolina v. Alford,* 400 U.S. 25, 37 (1970), prior to and during the aborted guilty plea;

- Failed to conduct adequate or any *voir dire* examination of several potential jurors, some of whom sat as jurors;

- Failed to conduct *voir dire* examination concerning possible race of victim and race of Applicant;

- Failed to seek expert assistance regarding a material medical condition of Applicant;

- Failed effectively to confront and rebut the State's witnesses and evidence;

- Failed to present readily available and favorable defense witnesses and evidence;
- Failed to object to introduction of a Department of Corrections incident report;
- Failed to review critical evidence in the case which the State made available for inspection to trial counsel;
- Failed to present available mitigating evidence;
- Failed to object to improper closing arguments by the State; and,

Applicant alleges that he was prejudiced by all of these errors and that he is entitled to a new sentencing trial based on these individual allegations. He further alleges, as a separate subclaim, that the cumulative impact of these errors and the resulting prejudice considered cumulatively entitle him to a new sentencing trial.

I find that trial counsel's failures rendered their representation of Applicant constitutionally deficient during his resentencing trial in 1996, resulting in an unfair sentencing trial. Applicant was prejudiced by counsel's failures, which deprived him of his rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments and South Carolina law. Therefore, I hereby reverse Applicant's convictions for Criminal Sexual Conduct with a minor and remand his case for a new resentencing trial, based on the following findings of fact and conclusions of law:

PRE-TRIAL

1. *Failure to adequately to advise Applicant in accordance with* ***North Carolina v. Alford****, 400 U.S. 25, 37 (1970), prior to and during the aborted guilty plea.*

a. Trial Record.

Applicant entered a into a negotiated plea agreement that would entail the State's adding the two unrelated CSC with a minor charges against Applicant– at the suggestion

of trial counsel – and Applicant's entering guilty pleas to those charges and the murder charge.[17] PCR Tr. 104. The parties planned to stagger the guilty pleas over several days, thus making Applicant subject to the two violent strikes mandatory sentencing guideline; Applicant was to receive a mandatory sentence of life without the possibility of parole. *Id.* Although Applicant successfully completed the pleas to the CSC with a minor charges on January 25th and 27th (PCR Ex. P-2), he failed to complete the February 2nd plea to the murder charge; the case was immediately set for trial on February 28, 1994. PCR Tr. 105-06, Ex. P-3.

b. PCR Record.

Trial counsel's testimony was consistent regarding Applicant's desire to and agreement with resolution of his charges under the terms of the negotiated series of pleas for a life sentence. Regarding Applicant's willingness to accept responsibility for the victim's death and to complete the plea, Mr. Leiendecker testified that Applicant "never had any problem admitting his responsibility or that he fired the gun or that his reckless conduct caused the death of Miss B[redacted]." PCR Tr. 106. According to trial counsel, Applicant's only sticking point with the plea to murder was in saying that he fired the shot with the intention of causing her death. Mr. Leiendecker described Applicant's reticence

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[17]In his testimony before this Court, Mr. Runyon admitted that he revealed to Solicitor Bailey that Applicant was the father of assault victim 's child and raised the idea of charging Applicant with criminal sexual conduct with a minor, the then fifteen-year-old Ms. assault victim, prior to discussing it with and gaining the approval of Applicant. PCR Tr. 777-78. Mr. Runyon indicated that Ms. assault victim was still pregnant at the time he approached the Solicitor with the idea. *Id.* The Court notes that the latest assault victim would have given birth to a full-term baby would have been late August of 1993, assuming based on counsel's repeated assertions and Ms. assault victim's PCR testimony acknowledging that she was pregnant at the time of the murder. Thus, the Court finds that Mr. Runyon's efforts were primarily focused on preparing for a negotiated plea as early as August 31, 1993.

as follows:

> [Applicant] had a problem from the beginning with the idea of the intentionality of that act, that it was with malice aforethought as defined under the murder statutes. And he expressed those concerns from the beginning when I knew him until the final time that I spoke with him, you know, with his comments always being that, 'yes, I did it; yes, I pulled the trigger; yes, I'm responsible, but I didn't know and I didn't mean to.' I think that's the easiest way to describe it.

PCR Tr. 106.

Mr. Runyon testified that he became very angry with Applicant when Applicant was unable to complete the final leg of the three-part plea agreement that Runyon had devised. PCR 777-81. In fact, in testifying about his anger at his client some ten years after the failed plea, Mr. Runyon's anger was still palpable and intense, so much so that he was unable to maintain decorum and uttered a profanity-infused response to a question PCR counsel asked him about it. Mr. Leiendecker testified that, after the plea fell through, Mr. Runyon "was very upset" with Applicant and "just yelled at him, telling him ... he had 'screwed it up.'" PCR Tr. 161-62. Mr. Runyon blamed Applicant's inability to complete the third plea on some unknown person who supposedly told Applicant that a "jury wouldn't convict him of murder for shooting the [victim]," presumably under the circumstances Applicant described in his statement to law enforcement (1996 Tr. 553, S-18). PCR Tr. 784. Other than an unsuccessful attempt to ask Solicitor Bailey for one more try at the plea, trial counsel made no further effort to reverse the damage created by the addition of two convictions for violent sexual felonies against children to Applicant's record or to otherwise address and correct Applicant's alleged minimal misapprehensions related to the elements of murder. PCR Tr. 119, 1026-27.

Both Mr. Leiendecker and Runyon testified that they did not consider the prospect

of pursuing a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).[18] Mr. Runyon's stated reasons for not doing so evolved over the course of his testimony before this Court and include that:

- Runyon never considered *Alford* and it never "entered the conversation." PCR Tr. 781.
- In Runyon's professional opinion, "what was done was ... murder" and that "a jury would conclude [murder]" or, if it was a bench trial, "a judge would conclude [murder]." *Id.*
- Solicitor Bailey did not want a plea that would be attacked on appeal or on PCR. PCR Tr. 1021.
- Bailey "wasn't going to an *Alford* plea" because he would not agree to any "wishy-washing around." PCR Tr. 1022.
- Bailey did not want a contract type plea, "one in which a defendant contractually agrees to waive parole and other types of consideration." *Id.*
- Runyon admitted that he did not specifically address the possibility of an *Alford* plea with Solicitor Bailey. *Id.*

Mr. Leiendecker acknowledged that under the facts of Applicant's case – and considering that Applicant never denied legal responsibility for killing Stephanie B[redacted], only that he never meant to hurt her – an *Alford* plea would have provided an appropriate

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[18]Although Respondents indicated they were not aware of any death penalty cases in which an *Alford* plea were entered to capital murder. Respondents' Proposed Order p. 31. First, the issue before the Court concerns advisement of Applicant about an *Alford* plea with a negotiated sentence less than death, not an un-negotiated sentence as was true in the case Respondents' cite. *Id.* Moreover, Applicant's counsel Ms. Holt has herself been counsel in at least two such cases: *Sterling Barnett Spann v. State*, 1982-GS-46-1796-99, York County; after having his convictions and death sentence over turned in 1999, Mr. Spann entered a negotiated plea for a parole-eligible life sentence pursuant to *Alford in 2002*; and, *Willie T. Hicks v. Catoe*, 1999-CP-02-436, Aiken County; after reversal of Mr. Hicks' convictions and death sentence in 2003, Mr. Hicks entered a negotiated sentence to a term of years pursuant to *Alford*, in 2003. Additionally, Respondents' own witness, former Solicitor Walter Bailey, testified that, as Solicitor, he had agreed to an Alford plea in a case (*State v. Buskey*) very similar to Applicant's case. PCR Tr. 1098.

vehicle to resolve Applicant's turmoil related to moral responsibility for her murder and would have secured the successful execution of the guilty plea. PCR Tr. 109.

Former Solicitor Bailey testified that he would not likely have considered agreeing to an *Alford* plea *after* the attempted plea fell though, because it upset everyone. However, Mr. Bailey made clear that trial counsel never even discussed the possibility of an *Alford* plea in Applicant's case *before* the attempted pleas. PCR Tr. 1057-58. Additionally, Mr. Bailey conceded that he had agreed to *Alford* pleas in his career as a prosecutor, including a case in which he sought the death penalty, where a child, a three-year-old boy, was the victim. PCR Tr. 1098.

c. Trial Counsel Rendered Ineffective Assistance of Counsel in Failing to Advise Applicant Regarding The Series of Negotiated Guilty Pleas.

This Court finds and concludes that trial counsel rendered ineffective assistance of counsel by their failure to move to withdraw the series of negotiated guilty pleas, when the overall plea negotiation failed. *See* ABA Guidelines: Appointment and Performance of Defense Counsel in Death Penalty Cases, Guidelines 11.6.1 through 11.6.4 (plea negotiations). The standard enunciated in *Strickland*, applies to challenges to guilty pleas based on allegations of ineffective assistance of counsel." *State v. Jordan, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988) (citing Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

Voir dire

2. *Failure to conduct adequate or any voir dire examination of several potential jurors, some of whom sat as jurors.*

3. *Failed to conduct voir dire examination concerning possible race of victim and race of the Applicant.*

a. Trial Record.

Of the fourteen jurors seated, including the two alternates, trial counsel failed to ask eleven of the jurors their opinions on the death penalty at all. PCR Tr. 664-65, 938-39, 957-59, 963; 1996 Tr. 42-49, 57-65, 65-72, 110-20, 120-29, 211-20, 398-406, 423-31, 436-44, 470-78, 513-21, 529-37. Three jurors (including one alternate) who were seated were not asked any questions whatsoever by defense counsel. 1996 Tr. 42-49, 398-406, 513-21, 663-64. Trial counsel made unfounded assumptions, without asking any questions, about jurors' religious beliefs that the juror would be opposed to the death penalty and seated such jurors based on such unfounded assumptions. PCR Tr. 948-49. The total number of pages involving defense counsel *voir dire* consists of only twenty-six pages for all fourteen seated jurors. Trial counsel used eight peremptory strikes to excuse jurors without ever asking these jurors a single question. PCR Tr. 667. All of these facts illustrate the lack of attorney involvement and effectiveness at *voir dire*.

b. PCR Record.

Mr. Leiendecker's primary task was to develop information related to jury venire and to assist Mr. Runyon in his preparation for jury *voir dire*. PCR Tr. 111. Mr. Leiendecker distilled the information from the juror questionnaires by "defining people by age, ... race, ... gender," and location "in the county," which was basically "general background." PCR Tr. 112. He also crafted some suggested *voir dire* questions for the potential jurors. The questions he proposed addressed potential jurors familiarity with the facts of the crime, familiarity with handguns, whether violent crime had touched them personally, and whether they had connections to the victim or her elementary school. PCR Tr. 114-15. To Mr. Leiendecker's knowledge and memory, Mr. Runyon rebuffed those suggested questions

and proceeded single-mindedly with *voir dire*. The trial record of the *voir dire* bears out his memory of events. Mr. Leiendecker said that Mr. Runyon's strategy regarding jury *voir dire* in 1996 was the same as it was in 1994. PCR Tr. 116. The trial record bears Mr. Leiendecker's testimony out on this point, as well.

Mr. Runyon gave a wide range of reasons for his strategy and the manner in which he conducted *voir dire*, most of which this Court finds invalid, unreasonable, or implausible. He first said he simply relied on the state's and the trial court's *voir dire* because he wanted the jurors to like him best. PCR Tr. 795-6. He felt that jurors were probably predisposed to liking the Solicitor because they probably voted for him and that they would like him less if he conducted *voir dire* of them. PCR Tr. 796. He did not want to ask pointed questions, like "are you a racist," that would anger the potential jurors, *id*, although he acknowledged that "race was an overlay in this case." PCR Tr. 798-9. He also did not want to ask either good or bad questions that would give the Solicitor a reason to strike a potential juror. PCR Tr. 797. He did not want to interject race into the *voir dire* process because the white jurors would not like that and he did not want to make this "a racist kind of case." PCR Tr. 798, 930. He did not ask questions about race or ask the trial court to ask questions about racial matters because "most jurors in Dorchester County had a position on race that is not favorable." PCR Tr. 932. He did not feel the need to ask questions designed to elicit jurors feelings or views on racial matters because he was able to discern their views primarily based on where they lived within the county, which churches they attended, where their children were likely to attend school, and other types of demographic information. PCR Tr. 797-8. He did not want to ask questions of potential jurors who were African-American because they "will not vote for the death penalty" and

the other jurors might accuse them of only voting for life "because you're black." *Id.* at 799.

c. Trial Counsel Rendered Ineffective Assistance of Counsel During Jury Selection.

Viewing the evidence as a whole, I find that trial counsel's stated strategies for conducting little or no *voir dire* of jurors for Applicant's capital murder trial are patently unreasonable. Trial counsel rendered ineffective assistance of counsel during jury *voir dire*. Because trial counsel's manner of conducting *voir dire* was constitutionally deficient, in that it fell below the "prevailing professional norms," and Applicant was prejudiced by counsel's deficient performance, Applicant was deprived of a fair trial and rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments and South Carolina law.

I. Trial counsel's performance fell profoundly below prevailing professional norms.

a. Lack of defense voir dire on death penalty views.

It is a fundamental tenet of trial advocacy that *voir dire* is among the most valuable tools in a capital trial lawyer's arsenal: *voir dire* is a process that allows counsel to probe and unearth potential juror bias or prejudice which may merit a challenge for cause against a potential juror, preserving precious peremptory strikes for use against other jurors counsel disfavors. *Morgan v. Illinois,* 504 U.S. 719 (1992). *See generally* Marshall Dayan, Robert Steven Mahler, and M. Gordon Widenhouse, *Searching for an Impartial Sentencer Through Jury Selection in Capital Trials,* 23 Loy. L.A. L. Rev. 151, 151 - 191 (1989). Finally, it is apparent to the Court that, when viewing the entire *voir dire* record as a whole and considering trial counsel's responses to questioning about their *voir dire* strategy, trial counsel's performance fell short of "prevailing professional norms" during jury selection, a critical stage of Applicant's trial. *Wiggins,* 539 U.S. at 521; *and see* ABA Guidelines:

Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 11.7.2 (jury selection).

Trial counsel claimed they did not ask questions concerning potential jurors' views on the death penalty pursuant to *Morgan v. Illinois*, 504 U.S. 719, because the trial court had asked sufficient questions of each juror and trial counsel did not want to "antagonize" jurors. PCR Tr. 943; *accord* PCR Tr. 117 (Mr. Leiendecker). Mr. Runyon further claimed that he did not question jurors about their feelings concerning the death penalty because, he did not "think jurors, in this neck of the woods ... are really candid." PCR Tr. 951. He didn't need to inquire of the jurors individually because he knew where they lived and knew the politics of the areas in which they lived, and thus could discern their personal views from that information, as well as the other demographic information. PCR Tr. 945. He claimed he had information about their precincts because he was chairman of the *Charleston* County election commission. PCR Tr. 945. Applicant's jury venire was comprised of residents of *Dorchester* County. It bears repeating that trial counsel asked ***no*** questions of *eleven members* of Applicant's jury about views on the death penalty. For all the reasons stated, I find that trial counsel's failure to conduct any *voir dire* at all of four jurors constitutes "egregious and obvious error." *Yeats v. Angelone*, 166 F.3d 255, 263 (4th Cir. 1999).

Moreover, the Court is very disturbed by trial counsel's assertion and belief that *voir dire* as to jurors death penalty views and other matters is fruitless because potential jurors are not "candid" in their responses when asked under oath about their positions. PCR Tr. 950-51. Trial counsel repeatedly stated that they both, but primarily Mr. Runyon, interacted with Applicant during the *voir dire* process regarding their advice and opinions.

PCR Tr. 114-18, 173, 798, 800, 848-51, 942-45. Our system of justice will not countenance trial counsel's statements and advisements to his client that jurors are inherently dishonest and, thus, jury *voir dire* was just short of an exercise in futility. Counsel's advisement of a capital defendant that jury *voir dire*, a right to which he is entitled by law, is inherently flawed because potential jurors are not candid is strictly impermissible because it is fundamentally erroneous. *See State v. Owens*, 362 S.C. 175,176-78, 607 S.E.2d 78, 79 (2004) (new trial required where trial court's advice to capital defendant that potential jurors conceal truth about feelings on death penalty was fundamentally erroneous); *accord State v. Crisp*, 362 S.C. 412, 415-16, 608 S.E.2d 429, 431-32 (2005) (same).

The Supreme Court has made clear the constitutional bases for requiring the proper advisement of a defendant. *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000). In *Quattlebaum*, the Court held that:

> The Sixth Amendment right to counsel protects the integrity of the adversarial system of criminal justice by ensuring that all persons accused of crimes have access to effective assistance of counsel for their defense. The right is grounded in 'the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense.'

Id. at 446, 107 (quoting *United States v. Levy*, 577 F.2d 200, 209 (3d Cir.1978). The Court finds that on trial counsel's improper advisement of Applicant regarding juror *voir dire* was fundamentally erroneous and rendered trial counsel's representation substantially below the prevailing professional norms.

The trial record reflects that the trial court did not ask specific *Morgan*-type questions about whether a juror might automatically vote for the death penalty. Even if the trial court had done so, a death penalty defendant has an absolute right under constitutional and state law to ask questions of the potential jurors, independent of any

questions asked by the trial court or prosecutor. S.C. Code § 16-3-20 (D); *see also*, S.C. Code § 16-3-20 (E).

Pursuant to S.C. Code Ann. § 16-3-20(D), "Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person called as a juror *must be examined* by the attorney for the defense." (Emphasis added). Section 16-3-20(D) "grants to a capital defendant the right to examine jurors through counsel." *State v. Smart*, 278 S.C. 515, 522, 299 S.E.2d 686, 690 (1982); *accord State v. Tucker*, 334 S.C. 1, 10, 512 S.E.2d 99, 103 (1998). Thus, the Court finds that trial counsel's failure to examine potential jurors in his resentencing trial, where the primary decision before the jurors was whether or not to impose the death penalty on Applicant, rendered trial counsel's representation well-below an objective standard of reasonableness under state law.

b. Lack of voir dire regarding other potential biases.

I find trial counsel's assertion that they made a determination of potential jurors' views, personal biases, and racial biases based on assumptions trial counsel drew from information about where jurors' children attended school, unreasonable, not credible, and without basis in fact. Juror questionnaire forms did not contain information about where a potential juror's children, if any, attended school. PCR Tr. 926, PCR Ex. P-48. Trial counsel did not ask one potential juror where the juror's children or grandchildren, if any, attended school. PCR Tr. 928-29. Trial counsel made bare assumptions as to where a juror's children attended school based on the jurors' then-current addresses, *four years* after the incident. PCR Tr. 927. The juror questionnaire forms do not contain a question concerning length of time at current residence. PCR Ex. P-48. Trial counsel's asserted strategy behind the manner in which they conducted jury selection is patently

unreasonable, when the record demonstrates a total absence of any inquiry on that issue or other evidence to support it. Whether or not a potential juror's children interacted with or knew the victim or the victim's parents in this case would have been important information for trial counsel to consider in selecting jurors to sit in judgment of Applicant, especially considering trial counsel's theory of defense.

Trial counsel acknowledged that racial considerations were an important issue in jury selection, because race "was an overlay" in the case. Yet, trial counsel neither made an effort themselves to ascertain jurors' racial attitudes, nor asked the trial judge to do so in their steads. PCR Tr. 927. Furthermore, trial counsel asked none of the questions specifically provided for by Supreme Court precedent in cases where "race is an overlay" -- i.e., where trial counsel believe racial motives might be an issue. *See Turner v. Murray*, 476 U.S. 28, 36-37 (1986) (that a capital murder defendant "accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias").

Indeed, in their testimony before this Court, trial counsel staked out an indefensible and repugnant position that this Court must reject. Trial counsel initially stated that place of school attendance for jurors' children was important because it may indicate certain racial attitudes held by jurors. They posited that Dorchester County residents may harbor certain racial attitudes in this case. Trial counsel then declared that questioning jurors about such demographics or attitudes would "not necessarily be totally favorable" to the defense. PCR Tr. 931-33. Thus, counsel failed to question jurors about racial attitudes or views, and they failed to ask the trial court to do so. *See Spencer v. Murray*, 18 F.3d 229, 234 (4th Cir. 1994) (where racial bias is recognized as an area of concern by trial counsel,

failure to conduct *voir dire* may be found unreasonable). Trial counsel's assertion that asking jurors any questions designed to ascertain racial views is tantamount to trial counsel asking a juror "are you a racist?," is absurd. I find that trial counsel's remark reveals a misapprehension of the purpose of and an unfamiliarity with the art of *voir dire* such that trial counsel's level of legal performance was unreasonably inadequate under prevailing norms and Applicant was prejudiced thereby. *See Strickland*, 466 U.S. at 692; *see also Pauling v. State*, 331 S.C. 606, 609, 503 S.E.2d 468, 470 (1998).

The Court rejects trial counsel's purported *voir dire* strategies resting on the use of "internet information" about the jurors, general demographics, and other methods of "amorphous kind of conglomeration" (to quote Mr. Runyon), apparently designed to establish extensive background checks of potential jurors. PCR Tr. 931-32, 935-36. The Court is skeptical of trial counsel Runyon's claims. Trial counsel Leiendecker distilled all the "amorphous kind of conglomeration" of evidence gleaned from juror questionnaires and prepared suggested juror-specific *voir dire* questions. PCR Tr. 114-18. Yet, trial counsel Runyon failed to ask one of those questions of even one potential juror or to otherwise utilize any of the information counsel Leiendecker compiled, the kind of information trial counsel deemed so crucial to jury selection. PCR Tr. 111-18, 663, 954-56, Ex. P-48.

ii. Applicant was prejudiced by trial counsel's ineffective representation of him.

Trial counsel was plainspoken in his opinion that he would just as soon pick the first twelve people on the venire because it would not really make much difference and he did not want to spend a week of his time with pointless *voir dire* of the potential jurors, an opinion to which trial counsel Leiendecker acquiesced. PCR Tr. 116. While counsel's

attitudes and performances might be good enough in a game of horseshoes, the Constitution and South Carolina law require much more of counsel charged with representation of a capital defendant at trial. This Court rejects trial counsel's indefensible and constitutionally deficient effort regarding juror *voir dire*. At its heart, juror *voir dire* is a process meant to discover the existence of prejudices and biases and to determine whether a juror can set aside any prejudices and impartially fulfill his obligations as a juror. *See, e.g., Wainwright v. Witt*, 469 U.S. 412, 421-22 (1985); *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968).

The South Carolina Supreme Court has "unequivocally declare[d] that *voir dire* examination upon the issue of capital punishment is essential to accomplish the legitimate aim of section 16-3-20(E), which is to assure a jury capable of performing its duty under the law." *State v. Truesdale*, 278 S.C. 368, 375, 296 S.E.2d 528, 532 (1982). Logically, a failure to examine *eleven* of the jurors on the issue of capital punishment fails to assure a jury capable of performing its duty under the law. Due to trial counsel's unreasonable and illogical failure to question jurors, Applicant was deprived "a personal opportunity to question each juror." *State v. Atkins*, 293 S.C. 294, 297, 360 S.E.2d 302, 304 (1987), *overruled on other grounds by, State v. Torrence*, 406 S.E.2d 315 (1991)). As a result jurors with bias may have been seated and Applicant's jury returned a sentence of death.

Trial counsel's failure to conduct any *voir dire* at all of four jurors is unacceptable and unreasonable and falls below prevailing professional norms of representation. The Constitution entitles Applicant "to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Parker v. Gladden*, 385 U.S. 363, 366 (1966). Applicant need only establish that the outcome may have been different by a "reasonable probability," which is

a lower standard than even the "preponderance" of the evidence standard. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 406 (2000); *Wiggins*, 539 U.S. at 534-35; *Strickland*, 466 U.S. at 695. Applicant is also entitled to counsel whose standards, advise and efforts pass constitutional muster, which requires a level of "representation of a criminal defendant" that at a minimum meets "certain basic duties." *Strickland*, 466 U.S. at 687; *see also, Knese v. State*, 85 S.W.3d 628, 632-33. (Mo. 2002) (trial counsel's abdication of juror *voir dire* was structural error). Thus, I find that Applicant has met his burden of proof in showing that, but for trial counsel's utter failures during the jury *voir dire* process, there is a reasonable probability the outcome of his resentencing trial might have been different.

Applicant has established that trial counsel rendered ineffective assistance of counsel during jury selection, depriving him of his right to a fair trial, a right guaranteed him by the Sixth and Fourteenth Amendments and South Carolina law. Applicant was prejudiced by such ineffectiveness because the facts, as set forth by the Court, lead me to find and conclude that the sentence of death as decided by the jury was inherently unreliable. Trial counsel failed to ask the eleven of the jurors, who were actually seated and who sat in judgment of Applicant, any questions concerning their views on the death penalty, trial counsel failed to ask several of the seated jurors any questions at all, and trial counsel failed to make inquiry of potential jurors regarding areas of concern relevant to established United States Supreme Court precedent. This Court vacates the sentence of death, remands this matter for a new trial on the issue of punishment. The Court's decision regarding this sub-ground for relief is independent of, and alternative to, any other finding contained in this order.

MERITS TRIAL

6. *Failure to present available mitigating evidence.*

7. *Failure to seek expert assistance regarding a material medical condition of Applicant.*

8. *Failure effectively to confront and rebut the State's witnesses and evidence.*

9. *Failure to present readily available and favorable defense witnesses and evidence.*

10. *Failure to object to introduction of a Department of Corrections incident report.*

12. *Failed to review critical evidence in the case which the State made available for inspection to trial counsel.*

The Defense Strategy Roadmap: Opening Statement

The defense offered the following opening statement, in pertinent part:

The solicitor has outlined briefly what he's going to show you. And, he said one thing which I want you to – to remember, he said that Timothy Rogers brought about these circumstances. I think, based on his recitation of the evidence you're going to hear, you're going to find that it was a conduit of misjudgment by more than one person, that Mr. Rogers ultimately got into.

Now the fact that Mr. Rogers is guilty of murder as he sits here does not – and we're not suggesting that you have to decide you can decide anything but the fact that this was a murder, because that is not your choice. Your choice is purely the sentence.

But we're going to ask you to listen to the verdict – listen to the evidence. And I think you're going to find that the evidence will show that Stephanie B[redacted] was not an intended victim of anybody. But listen to the evidence.

At the close of all of the evidence we're going to be able to talk to you, as the solicitor has indicated he will be able to talk to you. And we're going to ask you find that the defendant should be sentenced to life imprisonment. Which in his case is life imprisonment without any possibility of parole. We're going to ask you to consider all the facts and circumstances you hear.

No one's going to suggest to you that the death of this young child should be – should be approved of. No one's going to suggest to you that the death of

> this young child is nothing but a – just a – waste of a young life and she's a totally innocent victim.
>
> But the simple fact of the matter is, we're going to ask you to find that the defendant should be sentenced to life imprisonment without the possibility of parole. His Honor's going to charge you that that is the law.
>
> We're going to hear tears, we're going to hear lots of tears. But you the jury have an extremely difficult job, you've got to decide the punishment of this gentleman. And we're going to ask you, as the solicitor has said he's going to ask you to bring back the death penalty, we're going to ask you to bring back life without the possibility of parole. Not out of sympathy for Mr. Rogers, but because it's the right thing, it's the just thing under the circumstances of this case and the circumstances of Mr. Rogers.

1996 Tr. 599-601.

a. Trial Record.

assault victim testified that a loud verbal dispute arose between Mr. Carver, Mr. B[redacted], and Mr. Patterson, that Applicant had been talking on the phone but left it to assist Patterson in the dispute, that Applicant had a gun, and that he fired two shots. 1996 Tr. 649-55. Trial counsel cross-examined assault victim generally as to the argument that arose among B[redacted], Carver, and Patterson, and Applicant's subsequent involvement in the dispute. 1996 Tr. 656-658. In his very brief cross-examination of assault victim, trial counsel failed even to bring out in the resentencing trial that the State dismissed the charges against assault victim in exchange for her testimony, as was at least done at the first trial. 1994 Tr. 878-879. Mr. Patterson was not subpoenaed and did not otherwise appear at the resentencing. Stephanie Simmons, a longtime friend and former sweetheart of Applicant's, was not subpoenaed and did not otherwise appear at the resentencing.

Mr. B[redacted] and Mr. Carver testified that they had attempted to avoid becoming involved in the conflict that Patterson – and later Applicant, too – seemed determined to

advance. 1996 Tr. 619-23,630-4. They testified that they thought Applicant had seen or could have seen the victim inside the truck cab. 1996 Tr. 621, 732. James Carver testified consistent with Mr. B[redacted]s testimony. 1996 Tr. 728-32, 741-2. Mr. Carver swore he did not see a twelve-pack of beer anywhere in B[redacted]'s truck and he never saw B[redacted] with a beer that day. 1996 Tr. 739, 744, 749. James Robinson, a long-time employee of Spell's Grocery who worked there on the evening in question, testified that he heard the gunshots but did not see the incident. 1996 Tr. 669-72. Mr. Anthony Riley did not testify at Applicant's resentencing.

Two lay witnesses, Isaiah Jennings (1996 Tr. 662-65) and Herthenia Lincoln (1996 Tr. 665-67), testified that they arrived at Spell's about five or so minutes before the shooting occurred. They both heard two shots fairly close together in time. Neither witness saw a disturbance outside when they entered Spell's. Before he entered Spell's, Mr. Jennings saw Mr. Patterson and he picked on Mr. Jennings, but he did not see Applicant outside the store.

Several law enforcement officers and an emergency medical technician also testified concerning their involvement with the case. Paramedic and EMT George Scharf, the first EMS responder on the scene, testified about the victim's wound and the condition in which he found her. 1996 Tr. 674-9. Lt. Earl Asbell testified concerning crime scene dynamics, photographs, and evidence collection and chain of custody. 1996 Tr. 694-705. Trial counsel cross-examined Lt. Asbell briefly. 1996 Tr. 706. A law enforcement officer who arrested Applicant in Alabama also testified. 1996 Tr. 713-6. It is noteworthy that trial counsel cross-examined this witness primarily about how polite and forthright Applicant was in his presence. 1996 Tr. 717-9.

The victim's family members testified about her unique qualities. The jurors saw photographs of her beautiful, sparkling smile; they heard about her sunny disposition and her beloved little Chihuahua dog named Tippy. They learned how Stephanie was the only one her grandfather would respond to after he had a stroke, and how his love for her, his only grandchild, was the impetus for his improvement afterwards. Her loved ones searched for words, and did find words, to convey the deepness of the loss of her love and her light to their lives. 1996 Tr. 810-34.

The State introduced a videotape containing news footage at the start of the sentencing phase. 1996 Tr. 854, S-20. The tape contained a segment depicting Applicant prior and subsequent to a pretrial hearing. *Id.* A former SCDC associate warden testified about SCDC conditions. The State offered 1996 Ex. S-39 into evidence, an SCDC violation report regarding an incident involving Applicant. It was admitted without objection from trial counsel. 1996 759-60.

The defense called four witnesses on Applicant's behalf, including Applicant. The witnesses were Applicant, 1996 Tr. 862 - 914, Jessie Middleton, a life-long friend of Applicant's, 1996 Tr. 915-7, Elaine Williams, a family friend, 1996 Tr. 917-9, and Applicant's Mother [redacted], Applicant's mother. 1996 Tr. 920-6. Applicant's testimony aside, the mitigation presentation comprises a mere *ten and a half transcript pages* of testimony on Applicant's behalf. It is noteworthy that trial counsel called three *fewer* witnesses on Applicant's behalf in this resentencing than they called on Applicant's behalf in the original sentencing trial at which Applicant was sentenced to death in 1994. Applicant's own 1994 sentencing phase testimony aside, the 1994 mitigation presentation comprised thirty-one pages of testimony on Applicant's behalf.

Applicant testified briefly about his life and criminal history, the shooting, and his children and family. He said that he did not finish high school because he was expelled, but that he had obtained his GED. 1996 Tr. 864. He testified that he had been a disappointment to his mother, that he had one child out of wedlock, married, then had a child from the marriage. 1996 Tr. 864-5. Applicant was asked to detail his criminal encounters with law enforcement, which began in 1985 when he was sixteen years of age. 1996 Tr. 867-71. He was out on parole at the time of the instant offense, when he was charged with murder and also pled guilty to two counts of CSC with a minor. 1996 Tr. 871. He testified about each of his children, and photographs of his two daughters and oldest son were entered into evidence. 1996 Tr. 875-6, D 1-4.

Applicant testified about the events leading up to the shooting. 1996 Tr. 877-90. Trial counsel took Applicant through the afternoon of the shooting, which he spent drinking with assault victim and Mr. Patterson. 1996 Tr. 877-8. He described using the payphone at Spell's Grocery and being interrupted by men in a pickup truck–Mr. B[redacted] and Mr. Carver– who wanted to use the phone. 1996 Tr. 879. Applicant said that Mr. B[redacted] was being "vulgar about" wanting the phone and that Mr. B[redacted] got into a shouting match over it with Mr. Patterson. 1996 Tr. 880. Applicant said he got involved only when he heard the men get out of the truck and start to approach assault victim and Mr. Patterson. 1996 Tr. 881. Applicant testified he interceded by placing himself between Mr. B[redacted] and Mr. Carver and assault victim and Mr. Patterson. When he did that, he saw Mr. B[redacted] return to the door of his truck and begin to reach behind the truck seat. At that point, Applicant testified that he pulled out his handgun and fired a shot, intending to fire it into the air as a warning shot. 1996 Tr. 883. Mr. Patterson told Applicant that he had shot someone in the

truck. Applicant said he did not realize he had fired two rounds. He ran down the street and through the woods, and he thinks Mr. Patterson and [assault victim] must have run after he did. 1996 Tr. 884-6. Applicant testified that he did not stand there and laugh at Mr. B[redacted] afterwards. 1996 Tr. 885.

Applicant was able to admit freely that he had caused Stephanie B[redacted]s death. However, he denied putting a gun to Mr. B[redacted]s head and threatening to kill him. He denied spitting in Mr. B[redacted]'s face. He acknowledged telling the media that the shooting was an accident. 1996 Tr. 889. He explained that what he meant by accident is that he did not point the gun at Stephanie B[redacted] and intend to kill her. He admitted that he intentionally had the gun, intentionally pulled out the gun, and that he intentionally pulled the trigger. He agreed that he is guilty of causing Stephanie's death based on his own account of what happened that night. 1996 Tr. 890. He acknowledged that he has ruined the lives of the B[redacted] family and his own family. He testified that he felt he should spend the rest of his life in prison. 1996 Tr. 891.

Jessie Middleton, a close family friend from church who was a minister and a carpenter, testified that Applicant is not a "mean" person. Mr. Middleton has known Applicant all his life and knew that he has gotten into a little trouble since he came down from New York. 1996 Tr. 916. Mr. Middleton testified that Applicant's mother did her best to raise him right. *Id.*

Elaine Williams, Applicant's mother's friend and former housemate in New York, has known Applicant all of his life. Applicant was a very good kid when he was young. He went to church three times a week in New York. After Applicant moved here, Ms. Williams noticed changes in him. Applicant did not like that his mother had married. 1996 Tr. 919.

He started getting in trouble at school when his mother married. Ms. Williams testified she had never seen Applicant get angry. 1996 Tr. 919.

The final witness on Applicant's behalf was his mother, Applicant's Mother. Applicant's Mother testified that she raised Applicant in the church and tried to make sure he went to school. 1996 Tr. 921. She only started having trouble with her son after she married. Her husband worked to support the family. After Applicant was expelled from school, he would get jobs but fail to keep them because he would get into trouble. 1996 Tr. 922. Applicant was raised in a loving family, who all tried to do their best for him. When he would get in trouble, she would send him to the pastor and church counselors. Applicant's Mother did not approve of what happened to Stephanie and wished with all her heart she could bring Stephanie back to life. Applicant's Mother testimony concluded with her asking the jury to have mercy on her son. 1996 Tr. 926.

b. PCR record.

I. Witnesses who also previously testified at the trials.[19]

assault victim testified before this Court to the following material facts: Mr. Patterson started the argument with Mr. B[redacted]. Applicant did not swear at Mr. B[redacted] or Mr. Carver when they arrived at the store. PCR Tr. 313. Mr. Patterson, *not* Applicant, spit on Mr. B[redacted] which, the Court notes, is consistent with Mr. Carver's initial statement to law enforcement. PCR 316, PCR Ex. P-9. This witness indicated that she heard either Mr. B[redacted] or Mr. Carver use the word *nigger* during the incident, and on one occasion the word was specifically directed at Applicant. PCR Tr. 318. The racial slurs were uttered

[19]Although Applicant's Mother testified at the 1996 resentencing, her PCR testimony will be reflected in a subsection entitled "Life Witnesses," *infra*.

before any shooting. PCR Tr. 317. assault victim did not see a child in Mr. B[redacted]s truck. PCR Tr. 311. Based what she saw and heard, she believed that Applicant would not have been able to see the victim from his position. *Id.*

assault victim indicated that she perceived Mr. Carver and Mr. B[redacted] to be reaching for guns in the truck. PCR Tr. 321. She saw Applicant fire a "warning shot" that was not aimed at a person. PCR Tr. 323-24. Applicant did not put a gun to Mr. B[redacted]s head or ever point the gun at Mr. B[redacted] PCR Tr. 312. Applicant did not block Mr. B[redacted]'s truck door. PCR Tr. 312. When she and her companions fled, they did not know anyone had been shot. Applicant did not laugh after the shooting. PCR Tr. 323. Applicant was not wearing eyeglasses at the time of the incident. PCR Tr. 312. Based on the Court's observation of this witness, including her demeanor and her manner, I find her testimony credible. I find her additional testimony would have made a difference to at least one juror.

Mr. Patterson's testimony was materially consistent with assault victim's testimony. He acknowledged that the argument started between himself and Mr. B[redacted]. PCR Tr. 227-8, 233. Mr. Patterson admitted to being the one who spit on Mr. B[redacted]. PCR Tr. 235. Mr. Patterson was adamant that Applicant did not spit on B[redacted] *Id.* Mr. Patterson admitted that it was he – not Applicant – who was near Mr. B[redacted] in the truck's doorway. PCR Tr. 234. Mr. Patterson stated that Applicant only became involved in Patterson's dispute to come to his aid when the argument became heated. PCR Tr. 231.

Mr. Patterson saw two guns within Mr. B[redacted]s reach in Mr. B[redacted]'s truck. Indeed, law enforcement officers confiscated two firearms, a .410 shotgun and a .9 mm handgun, from Mr. B[redacted]'s truck. PCR Tr. 148, Ex. P-8. Mr. Patterson testified that he saw Mr. B[redacted] attempt to reach for one of the firearms. PCR Tr. 228-9, Ex. P-8. Mr.

Patterson was forthright in admitting he was under the influence of significant amounts of alcohol. PCR Tr. 246-7. He saw a Busch beer carton in Mr. B[redacted]s truck. PCR Tr. 229-30. He did not see a child in the truck until after she was shot. PCR Tr. 233, 237. Mr. Patterson corroborated that Applicant could not have seen the child from where he was standing and that Applicant was not wearing his glasses the night of the shooting. PCR Tr. 233, 237, 248. When Applicant fired his handgun, he was trying to fire a "warning shot." *Id.* He did not appear to be aiming at anyone. PCR Tr. Mr. Patterson denied that he or Applicant made profane statements or laughed after the incident. PCR Tr. 235.

As delineated, *supra*, assault victim and Mr. Patterson provided direct evidence to this Court concerning what they witnessed at the scene. Both witnesses testified that no one associated with Applicant's defense interviewed them or attempted to interview them at any time prior to the commencement of this PCR action. PCR Tr. 224; 308. Both of these witnesses were friends to Applicant and both of them testified they would have voluntarily spoken about the incident with Applicant's trial counsel or any other defense team member, had there been one, and had the witnesses been asked to do so. PCR Tr. 224, 309. Neither of these two witnesses had heard or been exposed to any other witness' testimony; neither of them have talked with Applicant about the incident. PCR Tr. 235-36, 309. Both witnesses continued to live openly in the Dorchester area and their whereabouts were well-known. PCR Tr. 223, 306.

Based on the Court's observation of these witnesses' demeanor and testimony, I find the testimony of these two witnesses credible. In so finding, the Court notes that Ms. assault victim's and Mr. Patterson's testimony was not in lock-step with either each other or with Applicant's statement. I attribute the minor differences to each witness' being in a different

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

I find that counsel's failure to interview these witnesses fell below 'prevailing professional norms." I find that the testimony of these two witnesses, or the information from their testimony, probably would have made a difference to at least one juror in determining the appropriate punishment for Applicant. The witnesses corroborated Applicant's statement and their testimony was consistent with the defense that trial counsel pursued at trial. I find that, at a minimum, trial counsel should have interviewed Mr. Patterson and assault victim to discover what information these eye witnesses to the events knew, good or bad.

Stephanie Simmons testified that Applicant came to see her at her college apartment in Alabama. Applicant was consistent in his version of events, as contained in his subsequent statement to police, that the incident was an accident. PCR Tr. 262. Ms. Simmons testified that Applicant called her immediately after the incident and that he was very upset and crying. PCR Tr. 263. Applicant cried to the witness that it was a "bad accident." PCR Tr. 263. Applicant related to her that either Mr. B[redacted] or Mr. Carver, or both, called Applicant a "nigger." PCR Tr. 264. Applicant admitted to her that he fired the gun, but said he did so only intending to fire a warning shot. PCR Tr. 265. Applicant had seen Mr. B[redacted] or Mr. Carver with firearms. PCR Tr. 266. Ms. Simmons was available and willing to be interviewed by the trial defense team, but no one contacted her on Applicant's behalf until after the instant action was filed. PCR Tr. 260-61.

Based on my observations of Ms. Simmons' testimony and demeanor, I find that she

is a credible witness. I find that her additional testimony was favorable to Applicant because it corroborated material aspects of his statement and it was consistent with the defense that trial counsel pursued at trial. I find that her testimony probably would have made a difference to at least one juror in reaching a decision about the appropriate punishment for Applicant. Finally, I find that trial counsel should have interviewed Ms. Simmons to determine what additional information she knew about the events, good or bad. Their failure to do so falls below the "prevailing professional norms."

EMS paramedic George Scharf testified that upon arriving at the scene, he assessed the circumstances and the victim's condition. His professional opinion was that the shooting was accidental.[20] His opinion was based on the following:

> After getting answers to some questions that we usually ask when we first arrive on the scene as to what happened and how it happened, it appeared that the little girl was sitting in the middle of the front seat of the pickup truck and her head was not all that visible above the seat and that there had been a shot fired into the middle of the pickup truck and it appeared to be an accident that the little girl was hit. PCR Tr. 292-3.

Mr. Scharf further expounded on the basis for his conclusion, testifying that "with the size of the little girl, it didn't appear her head would have been visible above the seat." PCR Tr. 297. He noted his conclusion that the shooting of the victim was accidental in the information he relayed to the emergency room doctors when he transported the victim to Trident Medical Center. PCR Tr. 294, 296, 298, Ex. P-20. Trial counsel never attempted to talk with Mr. Scharf before or during either the 1994 or 1996 trials, despite the fact that he was present and available before and during both trials. He testified that he would have

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[20]At trial, Mr. Scharf had been qualified by the State at trial as an expert witness as a paramedic and as an EMT. 1994 Tr. 854-855; 1996 Tr. 674.

spoken with them about his assessment and findings, if asked. PCR Tr. 290-1, 300-1.

Based on my observations of Mr. Scharf's testimony and demeanor, I find that he is a credible witness. I find that his additional testimony was favorable to Applicant because it supported the defense that trial counsel pursued at trial. I find that trial counsel should have, at a minimum, interviewed Mr. Scharf to determine what information he could provide, especially considering that the State vouched for him as an expert in his field. I find that their failure to do so falls below the prevailing professional norms. *See Jowers v. State*, 396 S.E.2d 891 (Ga. 1990) (counsel ineffective for failing to investigate and discover that the state experts would have supported the defense theory). I find that his testimony probably would have made a difference to at least one juror in reaching a decision about the appropriate punishment for Applicant.

Mr. James Robinson, who had been employed at Spell's Grocery for forty-three years at the time of his appearance before this Court, testified that he had seen Applicant on many occasions over the years. His experience with Applicant spanned from the time Applicant and his family first moved to Pigeon Bay Road, when Applicant was a young teen, up to and including the morning of the incident. PCR Tr. 282, 284-5. In describing Applicant, Mr. Robinson painted a picture of a young man who was always respectful and thoughtful. *Id.* Mr. Robinson said Applicant had never given anyone at the store any trouble. PCR Tr. 283-84. Mr. Robinson was not approached by anyone on Applicant's behalf before or during either the 1994 or 1996 trial, despite the fact that the witness was present and available before and during both trials. PCR Tr. 285-86. Mr. Robinson was clear that he would have spoken with trial counsel if they had asked requested it. *Id.*

Based on my observations of Mr. Robinson's testimony and demeanor, I find that he

is a credible witness. I find that his additional testimony was favorable to Applicant because it supported the defense that trial counsel pursued at trial. I find that trial counsel should have, at a minimum, interviewed Mr. Robinson to determine what information he could provide. I find that their failure to do so falls below the prevailing professional norms. I find that his testimony probably would have made a difference to at least one juror in reaching a decision about the appropriate punishment for Applicant.

Anthony Riley testified that he had been a long-time B[redacted] family friend and even had worked for some of the family members for almost twenty years – facts which he partially divulged at trial. PCR Tr. 39-40. Mr. Riley described his relationship with the B[redacted] family as practically familial in that Mr. Riley would often babysit Stephanie, considered Mike B[redacted] like a brother, and felt free to borrow money from the B[redacted] family on occasion. PCR Tr. 41-44. Mr. Riley acknowledged that he and Applicant did "not see eye to eye." He testified that he was not friends with Applicant, based upon a wrong Mr. Riley felt Applicant did to him when they were both in the Dorchester County Jail, some years prior. PCR Tr. 45-46.

I find that Mr. Riley's additional testimony before me was favorable to Applicant because it provided information that would have impeached the witness' harmful testimony at trial, and as such would have supported the defense that trial counsel pursued at trial. I find that trial counsel should have, at a minimum, interviewed Mr. Riley to determine what information he could provide. I find that their failure to do so falls below the prevailing professional norms. I find that his testimony probably would have made a difference to at least one juror in reaching a decision about the appropriate punishment for Applicant.

Lt. Earl Asbell, of the Dorchester County Sheriff's Department, testified concerning several items of crime scene evidence, the Department's case file, and interaction with trial counsel. Lt. Asbell produced a photograph which depicted a firearm pouch sitting on top of clothes in a clothes basket in the back of B[redacted]s truck. PCR Ex. P-18. The photograph was not among the photographs offered into evidence at Applicant's trials. PCR Tr. 441. Lt. Asbell also had one unopened Busch beer can in a bloodstained brown paper bag, which was collected from the trash can at the front exterior of Spell's. PCR Tr. 440, 448-50, Ex. P-29. In addition, Lt. Asbell provided the Court with a copy of law enforcement wanted poster created shortly after the crime but before Applicant was arrested. PCR Tr. 451. The wanted poster included information about the crime and the jurisdiction seeking information they hoped would lead to the arrest of Applicant, and it included a photograph of Applicant depicting him wearing eyeglasses. PCR Ex. P-30.

Lt. Asbell testified that from the time he had collected the evidence from the crime scene, until the time Applicant's PCR counsel requested to review the evidence in the case, the seal on the evidence container in which Lt. Asbell had placed the bloody Busch beer can at the crime scene had never been broken. PCR Tr. 448. Another detective had also taken photographs and collected evidence and information, but this evidence was unavailable. Lt. Asbell was unable to locate the department's case file related to the investigation of Stephanie B[redacted]s death. PCR Tr. 443. He had no explanation as to what might have become of the file. He testified that it was highly unusual for a case file to go missing, and could not recall a time when an investigation case file had gone missing. PCR Tr. 444, 459. Trial counsel did not review the evidence in Lt. Asbell's custody at any point. PCR Tr. 446-47.

Based on my observations of Lt. Asbell's testimony and demeanor, I find that he is a credible witness. I find that his additional testimony was favorable to Applicant because it supported the defense that trial counsel pursued at trial. I find that the additional physical evidence would have been helpful to Applicant's case because it would have supported the defense that trial counsel pursued at trial. I find that trial counsel should have, at a minimum, should have viewed the physical evidence in the witnesses possession to determine what information Lt. Asbell possessed. I find that their failure to do so falls below the prevailing professional norms. I find that his testimony and the physical evidence he produced probably would have made a difference to at least one juror in reaching a decision about the appropriate punishment for Applicant.

ii. New witnesses.

a. Trial Counsel.

In preparation for Applicant's resentencing trial, trial counsel's strategy was to put on the same case they had put on in the original sentencing trial, but less. PCR Tr. 128. As an initial matter, the Court finds that the fact that an approach that was not enough in the first sentencing trial, should have *de facto* notice to counsel that less of the same would not be enough in the second penalty trial. Trial counsel Mark Leiendecker testified that he did not interview any of the crime scene witnesses, including Mr. Patterson and assault victim, and that his failure to interview any of these witnesses was not a strategic decision. PCR Tr. 140-3. Mr. Runyon admitted that evidence that showed that "the presence of alcohol on the part of the people who had custody" of the victim "was important for the jury to consider," from the defense perspective. PCR Tr. 880. Likewise, trial counsel would have found information that Mr. Carver had five burglary convictions – instead of the two reported to

trial counsel and the jury by the State – useful impeachment in the resentencing. PCR Tr. 1007-08, P-49.

When confronted with PCR testimony and evidence that they should have and could have adduced at Applicant's 1996 resentencing trial if they had conducted an investigation, Mr. Runyon and Mr. Leiendecker admitted that most, if not all, of that additional information would have been helpful in both furthering the defense case and consistent with the defense theory of the case. PCR Tr. 145, 152, 155, 880-84, 890-91, 1008; PCR 8-2005Supp. Tr. 59-61. *See Martinez v. State,* 304 S.C. 39, 403 S.E.2d 113 (1991) (where trial counsel admits the testimony of a certain witness may have made the difference in obtaining an acquittal, the court may find ineffective assistance). However, Mr. Runyon balked at the idea of presenting testimony that Applicant had impaired vision and had not been wearing his corrective lenses that night. Why? Mr. Runyon was concerned that the jury would have had the impression that Applicant was "recklessly" shooting a gun that night, when Applicant knew he should have been wearing eyeglasses. PCR Tr. 904-05. Mr. Runyon seemed to prefer that the jury view Applicant's shooting Stephanie as an intentional act rather than a reckless one. PCR Tr. 905.

Mr. Homer Fesperman, who was offered without objection as an expert in audio and videotape technology, testified concerning raw news video footage which had been in Solicitor Bailey's possession and which Solicitor Bailey had made available to trial counsel for review prior to trial. PCR Exs. C-6, P-56, and P-59. Mr. Fesperman used his experience and technology to capture still shots from freeze-frames from the videotape. PCR 8-2005Supp. Tr. 26-27, Exs. P-57 and P-58. His experience and equipment was not necessary to enable a viewer simply to see and identify the beer cartons. PCR 8-2005Supp. Tr. 16-7. Rather, the still shot frame captures of the videotape did enable the court, and would similarly enable lay viewers-jurors, to discern the contents more quickly and clearly than

that which was apparent to the Court when viewing the videotape. *Id.* I find that the still photography shots of the videotape provided definitive evidence of what was actually depicted on the videotape.

The videotape of news footage, taken at the crime scene shortly after the incident occurred, depicts at least one, if not two, additional twelve-pack containers of Busch Light beer, that were partially empty, in the back of B[redacted]'s truck, along with more empty beer cans. PCR 8-2005Supp. Tr. 60, Ex. P-56. As testified to by Mr. Leiendecker, state's witness James Carver is depicted on film walking and standing near the beer as it sits in the back of B[redacted]'s truck bed. PCR 8-2005 Supp. Tr. 57. Mr. Fesperman testified that technology required to prepare PCR Exs. P-56, 57, and 58, was available prior to Applicant's trial in 1994, and was as nearby as the television stations that supplied the original tape in the first place; thus, trial counsel could have availed themselves of it and utilized these materials. PCR 8-2005 Tr. 43-4, 47-8, 50. However, the Court finds that before trial counsel could have made an informed decision whether to utilize this evidence, they would have had to bother to view this evidence that they knew the Solicitor possessed.

Mr. Leiendecker testified that the information contained in PCR exhibits P-56, P-57, and P-58, would have been useful to impeach Mr. Carver's trial testimony in two important ways. Mr. Leiendecker testified that he had never seen the videotaped news footage of the truck bed, beer and Mr. Carver; he had no indication or information that Mr. Runyon had ever seen the videotape reflected in P-56, either. PCR 8-2005Supp. Tr. 57 and 62. Mr. Leiendecker noted that he had no recollection of receiving a copy of a letter from Solicitor Bailey notifying Mr. Runyon that he could review a videotape of raw news footage at the solicitor's office. PCR Ex. P-59.

The videotape would have been valuable to trial counsel in impeaching Mr. Carver and possibly Mr. B[redacted] as well in that Mr. Carver's statements on the videotape are inconsistent with their trial testimony about what happened the night of the shooting. PCR

Ex. P-10, PCR 8-2005Supp. Tr. 59. Additionally, trial counsel strategically asked Mr. Carver about the presence of and consumption of beer in the B[redacted] truck on cross-examination. 1994 Tr. 951. I find that the videotape would have provided trial counsel with solid impeachment evidence against Mr. Carver, the state's star closing witness in 1994, concerning the fundamental dynamics of what unfolded at Spell's Grocery the night the victim was shot. *See Moffett v. Kolb*, 930 F.2d 1156 (7th Cir. 1991) (counsel ineffective for failing to present evidence of State witness's prior inconsistent statement). I find that this evidence probably would have made a difference to at least one juror in reaching a decision about the appropriate punishment for Applicant.

Former First Judicial Circuit Solicitor Walter Bailey testified concerning his practices regarding disclosure of information to the defense pursuant to the mandates of *Brady v. Maryland*, 373 U.S. 83 (1963) and SCRCrimP, Rule 5. PCR Tr. 1060. Solicitor Bailey's general practice was to maintain an "open door policy" in regards to disclosure of evidence to defense counsel, although he acknowledged that he did exclude some information from the file materials available to defense counsel. *Id.* He estimated that he would typically withhold from defense counsel roughly ten percent of his file on work product grounds. PCR Tr. 1069. In Applicant's case, Solicitor Bailey indicated that he had withheld approximately four to four-and-a-half inches of pages of materials from his file. PCR Tr. 1071.

Mr. Baily's practice was to provide a copy of all discoverable material to trial counsel, with a cover letter documenting and inventorying the materials provided to defense counsel, unless the material was too voluminous or otherwise difficult to reproduce. PCR Tr. 1060, 1080. If the material was too voluminous or cumbersome to reproduce, Solicitor Bailey would notify defense counsel of the material's existence and availability for inspection. Solicitor Bailey testified that he intentionally proceeded in that manner in order to be able to prove exactly what he had provided and/or disclosed to defense counsel. PCR

Tr. 1080. He maintained his materials in large black notebooks. Although he maintained an open-file policy, he would not, however, disclose any materials that he considered to be his work product. PCR Tr. 1069. Generally, on the rare occasion a defense counsel did take him up on his offer to review his actual file, he would sit with counsel and methodically hand over materials piecemeal from the file. He testified, that while such an occurrence was a rare event, "that [it] has happened on a couple of occasions." He quickly volunteered, "Not in this case that I can recall," thereby indicating that Applicant's counsel did *not* come to his office to review file materials. *Id.*

Solicitor Bailey testified that he documented that he specifically provided trial counsel with the following exculpatory or impeachment information prior to the 1994 trial:

- The existence of raw television film footage of the crime scene.
- Stephanie Simmons: that she "saw Rogers in Alabama, and he re-related to her the shooting was an accident." PCR Tr. 1061, PCR Ex. P-10.
- Applicant's statement to Alabama authorities with his description of the racial slur and his acknowledgment of responsibility. *Id.*
- assault victim : that Asst. Sol. Peter Them had promised to drop all charges against assault victim "prior to my election," according to (then-newly-elected) Solicitor Bailey in a letter dated February, 1994. PCR Tr. 1062, Ex. P-11. The Court notes, however, that Solicitor Bailey was elected to office in the general election of November 3, 1992, and took office on January 2, 1993. PCR Ex. C-4 at 59.
- Daxton Patterson: Solicitor Bailey had agreed to a PR bond for Patterson after some months in jail, that after several conversations with Patterson, Bailey had subpoenaed him but was undecided on whether to call Patterson as a witness. PCR Tr. 1062, Ex. P-11.
- assault victim : letter to Runyon that after an interview with her, Solicitor Bailey would call her as a witness and that her testimony would be exculpatory to some extent and a summary of how it would be exculpatory. PCR Tr. 1062, Ex. P-12.
- A letter to Runyon with inventory of enclosures and with enclosures purporting to be Solicitor Bailey's file as of December 30, 1993. PCR Tr. 1064, Ex. P-42.
- Daxton Patterson: letter to Runyon indicating that he would at least partially corroborate Applicant's statement regarding the sequence of events on the

night of the shooting.

PCR Tr. 1064, Ex. P-42.

Regarding the videotape of raw news footage that comprises PCR Ex. P-56, Solicitor Bailey testified that he mailed Mr. Runyon a letter, which included a brief, general description of the raw news footage, notifying counsel it was available for review at the Solicitor's office. PCR Ex. P-10. In addition, Solicitor Bailey provided trial counsel with a copy of a purported "transcript" that was prepared by the news channel and provided by them to Solicitor Bailey. PCR Ex. R-7, PCR 8-2005Supp. Tr. 71-2. Solicitor Bailey, however, also acknowledged that the transcript was incomplete and did not accurately reflect all of the relevant dialogue that was, in fact, captured on the raw video footage. PCR 8-2005Supp. Tr. 75-6, Ex. P-56. The transcript certainly did not reflect the fact that partially empty Busch beer cartons and containers were in the bed of B[redacted]'s truck. *Id.* Solicitor Bailey acknowledged both on cross-examination and under *voir dire* from this Court that he "carefully" reviewed the videotape and was, therefore, personally aware of its contents. PCR 8-2005Supp. Tr. 79-80.

Trial counsel each testified that discovering all available information about Applicant was an important first step to take prior to deciding how much information and which pieces of information to present to the jury charged with determining whether Applicant should live or die. PCR Tr. 823-4. Mr. Runyon testified he did not interview any of Applicant's family members prior to or during the resentencing trial, other than one conference call with them just prior to the start of the resentencing. PCR Tr. 896. He also testified that his mitigation theory involved not "demonizing" Applicant's mother, which was also his reason for not utilizing an expert to assist with preparing a life history of Applicant. PCR Tr. 846. He also didn't want to insult and antagonize the jury by having Applicant's daughter testify because she was too close in age to the victim or by blaming Applicant's crime on society. PCR Tr. 847-48.

Mr. Leiendecker did have some limited interaction with Applicant's mother, Ms. applicant's mother, prior to the resentencing trial. He testified that he has also had some interaction with applicant's mother since the resentencing trial, during which time he has expressed his apologies to her because he and Mr. Runyon "were remiss in preparation for" and "presentation of" Applicant's case, "especially in the area of the mitigation during the penalty phase." PCR Tr. 170. The trial record bears out Mr. Leiendecker's assessment of trial counsel's inadequate and ineffective representation.

Trial counsel admitted that the knew Applicant had grown up in harsh conditions. They acknowledged that they were aware of the severe "corporal punishment" and "poverty" Applicant suffered throughout his life. They knew Applicant had a drug and alcohol problems and that he dropped out of school. Yet, trial counsel chose to ignore all these red flags, PCR Tr. 124-27, 786-87, despite the fact that Mr. Leiendecker had attended a comprehensive conference on how to develop and present mitigation evidence in a capital sentencing trial just months before Applicant's resentencing trial. PCR Tr. 121-22.

SCDC correctional officer Anthony Brown, a twenty-three year veteran of the department, testified about his knowledge concerning an SCDC disciplinary report on Applicant. 1996 Ex. S-39. Officer Brown was a witness to a fight between some inmates, one of whom was Applicant. Officer Brown testified that the incident was minor and Applicant was better characterized, in Officer Brown's opinion, as a bystander. PCR Tr. 1112. Applicant was "compliant" and an easy inmate to manage. PCR Tr. 1111. He also indicated that Applicant was always "courteous" and non-aggressive in his interaction with Officer Brown. *Id.* Trial counsel did not contact Officer Brown prior to Applicant's resentencing – another red flag missed. PCR 1116-17, 1123.

The Court finds that Officer Brown's testimony at Applicant's 1994 sentencing about the incident report and Applicant's behavior and adaptability to prison life were highly favorable to Applicant and consistent with Officer Brown's testimony before me. 1994 Tr.

1070-72. Trial counsel had no reasoned or logical explanation for failing to object to the improper admission of the cold incident report, 1996 Ex S-39, or failing to call Officer Brown as a witness at the resentencing hearing. Their failure to do so renders their performance below the "prevailing professional norms." I find that Officer Brown's testimony probably would have made a difference to at least one juror in determining the appropriate punishment for Applicant.

b. Life Witnesses.

A number of witnesses testified for the first time before this Court concerning Applicant's life experiences. With the exception of one of these witnesses, they were all plain-spoken, lay witnesses who were Applicant's family or friends. Based on my observation of these witnesses, I find their testimony was compelling and sincere. They testified forthrightly about very painful and intimate aspects of their lives and Applicant's life, as they touched and concerned each other, as follows:

applicant's mother described her own harrowing childhood and how it affected her as a mother in raising Applicant and his three siblings. applicant's mother was the third of eight children born to her mother, but fathered by five or six different men. PCR Tr. 368. Her mother moved her and her siblings, there were only two of them at that time, to Brooklyn, New York, when applicant's mother was about five years of age. PCR Tr. 365. applicant's mother was repeatedly sexually assaulted by her mother's boyfriends, starting from the time she was approximately six or seven years old and continuing for a number of years. PCR Tr. 371. These men raped and orally sodomized her. PCR Tr. 371-72. The men gave her money or treats to bribe her not to tell her mother, although even at the time, she felt ashamed for accepting them. PCR Tr. 372. She also felt powerless because they were so much bigger and stronger than she was. *Id*

When young applicant's mother gathered the courage to tell her mother what was happening to her, her mother "chastised" her and slapped her in her mouth. PCR Tr. 372-73. applicant's mother

never again complained to her mother about being raped by her mother's boyfriends, and the rapes continued. PCR Tr. 373-74. applicant's mother's mother's reaction to the rapes left applicant's mother feeling dirty, like she was to blame for what the men did to her. She was also enraged and felt even more violated by the ultimate betrayal by her mother. PCR Tr. 374. Affected by the impact of the childhood sexual batteries her whole life, applicant's mother testified she has only recently learned to forgive herself and her mother for her role in these events. PCR Tr. 373-4.

applicant's mother learned how to discipline children from her mother. Her mother's weapons of choice for disciplining children included electrical cords, belts, and hands, used with great force on the tender flesh of children who were helpless to stop it. PCR Tr. 368-69. The sexual and physical abuse left applicant's mother desperate for love. PCR Tr. 375.

When she was twelve years old, applicant's mother met Robert Rogers, who would father her three sons, the second of which was Applicant. She was pregnant with her first child by the age of thirteen and gave birth to Applicant when she was fifteen years old. PCR Tr. 376. She also dropped out of school at that time, having only completed the eighth grade. PCR Tr. 384. By the age of sixteen, applicant's mother had given birth to her third child. PCR Tr. 376-77.

applicant's mother's mother applied for and received public assistance for each of her children. PCR Tr. 380. applicant's mother started working full-time in a factory at the age of fifteen. Care of Applicant and his brothers was left to applicant's mother's grandmother, while applicant's mother worked full-time. PCR Tr. 386. Including applicant's mother's own babies, her grandmother was responsible for the with the day-to-day care of ten children, six of whom were under the age of twelve. PCR Tr. 386-87. applicant's mother and her three young sons eventually escaped the harsh brutality of applicant's mother's mother's home, when she took them to live with her pastor and her family, who lived in the area. PCR Tr. 388.

applicant's mother and Robert Rogers never married. Robert became increasingly physically abusive to her and grew more and more addicted alcohol, cocaine, and heroin.

PCR Tr. 382-83. Eventually Robert stopped coming to visit applicant's mother and their sons.

After some years, applicant's mother met and married Martin N[redacted], a member of her church. PCR Tr. 398. The new couple had one child, a girl, before uprooting the family and following her pastor to Summerville, South Carolina, in the fall of 1979. PCR Tr. 403. Martin, who was seldom, if ever, employed when they lived in Brooklyn, was not much of a provider after the family moved to the South, either. PCR Tr. 401. By applicant's mother's count, the family moved in and around Summerville approximately twenty-three times after they first arrived. The moves were largely due to evictions because the family failed to pay the rent. PCR Tr. 403. The family also went without power or water countless times. PCR Tr. 405-06. applicant's mother testified that although food was scarce for long periods of time, she always managed to feed the family something, even if it was only grits or rice for all three meals. PCR Tr. 406. The children often went without milk, and had to eat cereal with water or dry. PCR Tr. 407.

applicant's mother testified that she disciplined her sons by beating them with electrical cords, belts, and broomsticks. PCR Tr. 394-97, Ex. P-27 and P-28. She believed that Applicant was the only child she beat with brooms. She testified that she had never beaten her daughter, Faith, with any item. applicant's mother could only remember striking Faith with her hand a time or two before Faith reached adulthood. PCR Tr. 416. Each of applicant's mother's three sons dropped out of school and each has been incarcerated. Faith, who has been very sheltered by her mother and family her entire life, grew into a successful adult who has never been arrested and who has attained a paralegal's degree. (*See* Testimony of Faith N[redacted] Brown and Jeffrey Yungman).

During her testimony before this Court about the squaller in which her family lived, applicant's mother was momentarily overcome with grief. After a brief break, she was able to regain her composure and continue her testimony about these gritty details of her life, Applicant's life. PCR Tr. 407-08. She indicated that she would have been able and willing

to testify about all these matters in front of a jury. She indicated that trial counsel had not asked her any detailed questions about Applicant's life. She would have answered any such questions asked of her. PCR Tr. 417-18. I find that trial counsel's failure to conduct a meaningful investigation of Applicant's life rendered their representation below the "prevailing professional norms." I further find that applicant's mother's additional testimony was credible and probably would have made a difference to at least one juror in determining the appropriate punishment for Applicant.

Robert Bryant's testimony about his and Applicant's lives growing up impoverished and without the presence of their father was both compelling and disturbing. Although Robert has overcome many of the effects of his childhood, it was a long and rocky road from there to the productive citizen, father, and husband that he has become. He was arrested as a teen and has a burglary conviction. He entered a guilty plea, accepted complete responsibility, and has put that part of his past behind him. PCR Tr. 640.

Robert testified about the brutal beatings that he and his brothers, including Applicant of course, suffered at the hands of their mother and, later, their step-father. He described repeated and fiercely administered beatings with belts and electrical extension cords that would leave him with welts and bruises. PCR Tr. 620-24, Ex. P-27. Robert testified that his mother and step-father were "role models" for him in raising his own two children: Role models of "what not to do." He was adamant that his children would not suffer in life at his hands, the way he had his mother's and step-father's. PCR Tr. 643-44.

Mr. Bryant described being very afraid of moving to the South because of all the bad stories he and his brothers had heard about racism. PCR Tr. 625-26. Whether or not the stories about the South were true, Robert and his brothers believed them. The move was a great culture shock for them. *Id.* Robert described the poverty of the family's existence: days without water or power, food or shelter, moving, being evicted, and moving again. The brothers longed for their father to come from New York and rescue them, and the pain

Robert described from his father's absence was intense. PCR Tr. 630, 634-36.

Robert Bryant would have either testified about all these issues or discussed them with an investigator or other expert on Applicant's behalf, if asked to do so. He testified that trial counsel did not ask him anything about his and Applicant's life. As evidence of his willingness, he attended one meeting with the rest of his family prior to Applicant's 1994 trial. PCR Tr. 637. However, trial counsel focused almost exclusively on his mother and did not ask him or his other siblings any questions. *Id.*

Although Robert Bryant requested that his family members absent themselves from the courtroom for his PCR testimony, I find that he would have been able to testify in front of a jury. PCR Tr. 637-38. Mr. Bryant testified it would have been hard but that he could have and would have done it, if trial counsel had asked. Robert wanted to and would have been able to ask the jury for mercy for his brother. PCR Tr. 638. I find that trial counsel's failure to conduct a meaningful investigation of Applicant's life by interviewing Robert rendered their representation below the "prevailing professional norms." I further find that Mr. Bryant's testimony probably would have made a difference to at least one juror in determining the appropriate punishment for Applicant. I have already found that trial counsel did not conduct a meaningful investigation by failing to interview Mr. Bryant. If they had, and then still reached an informed decision not to use him as a trial witness, this information could have been presented through an expert witness.

Applicant's younger sister, Faith N[redacted]Brown, testified about her very close relationship with Applicant and the painful childhood they shared. Where her brothers suffered brutal beatings by their mother with electrical cords, belts, and brooms, Faith was spared. PCR Tr. 721-23. Faith described witnessing her mother beating Applicant and her other brothers with electrical cords and watching her mother beat them with brooms to the point of breaking them on their backs. PCR Tr. 723. It was not a rare event. Faith said they bought a lot of new brooms to replace the ones broken on her brothers. *Id.* Where her

brothers were left in the care of any available relative or to their own devices, Faith was protected at all times. Her first kiss was with her husband at the altar following their wedding vows. PCR Tr. 714.

Faith and her brothers were greatly impacted by the abject poverty of the childhood she and Applicant shared. She described going without food, water, or power and being evicted time and time again. PCR Tr. 716-19. Her humiliation and pain were still fresh and palpable as she described those days and experiences to this Court.

Faith's testimony about her relationship with Applicant was perhaps the most significant aspect of her potential contribution to Applicant's mitigation evidence. Her description of her reaction to Applicant's arrest, trial, and conviction would have been compelling to a jury. The two saddest days of Faith's life stem from Applicant's involvement in Stephanie B[redacted]'s death. The first was the night Stephanie was shot. Faith related how everyone gathered at the church to pray that Stephanie would survive, after they heard what Applicant had done. PCR Tr. 725. The second saddest moment was when Applicant was sentenced to death. Faith wanted to die with him. PCR Tr. 726. She testified she wanted to do anything possible to help save Applicant's life. She would have testified at the trial and asked the jury to spare Applicant's life; she testified that she had even practiced what she would have said to the jurors, if given the chance. PCR Tr. 726. Trial counsel never asked her any questions and never asked for her help. PCR Tr. 727.

Based on my observations of Faith's testimony and demeanor. I find that she is a credible witness. I find that her testimony was favorable to Applicant because it was consistent with the defense that trial counsel pursued at resentencing. I find that her testimony probably would have made a difference to at least one juror in reaching a decision about the appropriate punishment for Applicant. Ultimately, I find that trial counsel should have interviewed Faith to determine what additional information she could provide about Applicant's life. Their failure to do so falls below the "prevailing professional norms."

Carol Rogers, Applicant's paternal aunt, testified about Applicant's father and his paternal family history, as well as her experiences with Applicant when he was a boy and a teen. Of Applicant's paternal uncles and his father, all were drug addicts or alcoholics, most never held jobs in their lives, all started abusing substances as teens. Applicant's father was both a drug addict and an alcoholic. PCR Tr. 603-08.

Ms. Rogers testified concerning the ache that Applicant felt at not having a relationship with his father. She recalled one holiday gathering at her house were Applicant and his two brothers sat together, "hungry" for their dad to appear. PCR Tr. 610. Throughout that day, each time one of their dad's brothers entered the house, the boys would ask, "is that my daddy? is that him?" PCR Tr. 609. This witness described their heartbroken young faces crumpling in disappointment each time they learned that the man was just an uncle, not their father. Their father never appeared. PCR Tr. 610.

Ms. Rogers testified about Applicant's teenaged attempt to connect with his father. Applicant came back to Brooklyn in the mid-1980's because he wanted to live with his father. PCR Tr. 610. She described Applicant's yearning to be with his father. Applicant's effort was met with more paternal "rejection." PCR Tr. 612. Abandoned by his father again, Applicant lived with Ms. Rogers and her family a number of weeks. PCR Tr. 611. Ms. Rogers testified that Applicant was drawn to and quickly bonded with his uncle, Ms. Rogers' husband. PCR Tr. 611.

During his stay with her, Applicant tried valiantly to save a little girl who was caught in a burning house in her neighborhood. PCR Tr. 613. Ms. Rogers testified that it took several grown men to stop Applicant from entering the blazing structure to save the child. She said Applicant was inconsolable after the child died in the fire. *Id.*

Ms. Rogers testified about her willingness to assist in Applicant's defense. She would have traveled to South Carolina to testify or would have spoken with an investigator or trial counsel concerning her knowledge of Applicant. Trial counsel never contacted her or asked

to do either of those things. PCR Tr. 613-14.

Based on my observations of Ms. Rogers' testimony and demeanor. I find that she is a credible witness. I find that her testimony was favorable to Applicant because it was consistent with the mitigation defense that trial counsel pursued at trial. I find that her testimony probably would have made a difference to at least one juror in reaching a decision about the appropriate punishment for Applicant. Finally, I find that trial counsel should have interviewed Ms. Rogers to determine what additional information she could provide. Their failure to do so falls below the "prevailing professional norms."

Miss Timeka R[redacted], Applicant's oldest child, testified concerning her willingness to testify at her father's resentencing trial in 1996. PCR Tr. 461. She said trial counsel never talked to her or asked her to testify. *Id.* She was eight years of age in 1996. Timeka testified that she would have told a jury how much she loved her father and asked them to spare his life. PCR Tr. 462.

Based on my observations of Timeka R[redacted]' testimony and demeanor, I find that she is a credible witness. I find that her testimony was favorable to Applicant because it was consistent with the mitigation defense that trial counsel pursued at trial. I find that her testimony probably would have made a difference to at least one juror in reaching a decision about the appropriate punishment for Applicant. I find that trial counsel should have interviewed Timeka R[redacted] to determine what additional information she could provide. Their failure to do so rendered their representation below the "prevailing professional norms."

Jeffrey Yungman, qualified as an expert in the field of forensic social work, testified about his preparation of a psycho-social assessment of Applicant which examined how forensically significant social stressors impacted Applicant's life. PCR Tr. 486-87. Mr. Yungman reviewed a voluminous amount of materials about Applicant, including trial records, SCDC records, school records, divorce records, criminal records, and family death

certificates – all of which contained important red flags that should have alerted counsel to delve further into Applicant's background. PCR Tr. 487-89. Mr. Yungman also conducted several interviews each with several family members and people who have had an important impact on Applicant's life. PCR Tr. 490. All the information and witnesses relied upon by Mr. Yungman were available in 1996. PCR Tr. 500. Mr. Yungman testified that one-on-one contact and rapport-building with witnesses were essential to obtaining personal and painful information from witnesses who might otherwise be reluctant to disclose such information, or who might be inclined to minimize or even deny such information. PCR Tr. 493-4. Initial reluctance on the part of witnesses, even those who do want to help a loved one, is common, Mr. Yungman said, because "nobody likes their dirty laundry" or to have their family secrets "aired in public." PCR Tr. 495. This was an important reason he gave for conducting interviews one on one and over time, which helps build rapport. His professional opinion was that meeting with a number of family members in a group setting, as trial counsel did, would be counterproductive to obtaining information of any depth about significant events in their lives. PCR Tr. 497-98.

Mr. Yungman's psycho-social assessment of Applicant yielded a wealth of significant information about Applicant's social development in myriad ways. The witness compiled a genogram –or family tree– of Applicant's family. A family tree was helpful to the Court in illustrating the incidents of physical and sexual batteries on family members, in a line starting with his maternal grandmother, to his mother, passed on from her to Applicant and his male siblings. applicant's mother's three sons each experienced extreme corporal punishment at the hand of their mother, as had applicant's mother at the hands of her mother. PCR Tr. 508-10. Mr. Yungman found the presence of a history of inter-family violence significant because it is a particularly traumatic stressor for a child and directly impacts how a child will react and behave, even into adulthood. PCR Tr. 508. Mr. Yungman pointed to Appellant's school records and references in them to Applicant's difficulty in interacting well with others and

self-control problems as examples of the impact of abuse. PCR Tr. 510-11.

Mr. Yungman pointed to the prevalence of drug abuse and alcoholism in Applicant's family as significant to his socialization. Applicant's father and three paternal uncles died from cirrhosis of the liver as the result of extreme drug and alcohol abuse. Applicant's father was addicted to heroin and cocaine and was an alcoholic. PCR Tr. 513-14. Three of Applicant's maternal uncles abused drugs and alcohol, and each of them had drug or alcohol-based incarcerations. PCR Tr. 514. When a child grows up with those around him, care-givers, abusing substances, he perceives substance abuse as acceptable. PCR Tr. 515.

Applicant's mother left him and his siblings in the care of abusive and abusing care-givers who provided Applicant with alcohol and marijuana starting when he was just ten years old. PCR Tr. 517-18. Applicant and his brothers were regularly beaten with electrical cords, belts, and brooms for little reason; their step-father once flogged all three of them with an electrical cord because one of the brothers had eaten a Twinkie cake. PCR Tr. 528. Applicant and both of his male siblings have abused drugs and alcohol and have criminal records. PCR Tr. 519.

Mr. Yungman produced a chart of significant life events related to Applicant's development. PCR Ex. P-7. The chart included applicant's mother's repeated rapes as a child and the fact that she was the mother of three babies, all under twenty-six months old, by the time she was herself only sixteen years old. He said that a sixteen year old girl is hardly physically, emotionally, or mentally prepared to bear and care for three babies. She was so depressed over being a young mother of three babies, that she attempted suicide not long after her third baby was born. PCR Tr. 523-24, Ex. P-7.

Mr. Yungman testified that applicant's mother's marriage to Martin N[redacted] and their subsequent move from New York to South Carolina were very negative events in Applicant's young life. Applicant and his brothers were opposed to their mother's marrying because they did not feel a need for another man in their lives. They had grown quite accustomed

to living without their father. However, they certainly did not view Martin N[redacted] as a substitute for their real father, whom they ached to know. PCR Tr. 527. As Mr. Yungman termed it, Applicant had stepped in and taken on a protective role toward his mother and siblings. He resented Martin N[redacted]' presence, in part, because Mr. N[redacted] was just as physically abusive toward the boys as was their mother and because Mr. N[redacted] ended up being just another mouth for their mother to feed because he was habitually unemployed. PCR Tr. 527-28. When the family left the relative cocoon of their Brooklyn home and neighborhood for South Carolina, they were plunged into debilitating poverty, characterized by an absence of indoor plumbing, frequent change of shelter, and lack of food and water. PCR Tr. 529. The resulting "cultural shock" was just one more stressor in the already overburdened young life of Applicant and his brothers. *Id.* That the family moved at least twenty times over the next ten years, Mr. Yungman explained, decimated any semblance of stability that Applicant needed to cope and develop appropriately. PCR Tr. 531.

I find that Mr. Yungman's testimony was credible and helpful to the Court. His testimony demonstrated how useful a trained social worker can be in developing a capital defendant's life history. Mr. Yungman or other equally qualified experts were available to trial counsel. Trial counsel failed to seek any expert or investigative assistance.

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

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

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

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

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

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

Counsel failed to present available mitigating evidence.

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

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

As an initial matter, the Court will proceed with a discussion of its analyses and findings for each of Applicant's sub-grounds for relief as one larger, multifaceted allegation concerning the merits portion of Applicant's resentencing trial. The Court finds that trial counsel was ineffective in all manners Applicant alleges and that Applicant was prejudiced by trial counsel's failures in myriad ways. Because I find that Applicant is entitled to a new sentencing trial, I hereby vacate his death sentence for the reasons that follow.

The *Strickland* standard for attorney ineffectiveness is satisfied if a defendant establishes both that his attorney's representation "fell below an objective standard of reasonableness," 466 U.S. at 688, and that the defendant was "prejudiced" by his attorney's substandard performance. *Id.* at 692. Here, Applicant was denied the effective assistance of counsel at his resentencing because counsel failed to fulfill their duty to discover, evaluate, and present the available mitigation evidence, and Applicant was prejudiced by that failure.

I. Counsel's performance fell below an objective standard of reasonableness.

I find that Applicant has met his burden of proof in establishing that trial counsel's representation of him "fell below an objective standard of reasonableness." The evidence presented to me about Applicant's life was easily available to trial counsel. Trial counsel failed to interview almost every one of the witnesses who testified in 1994 and 1996, and who testified before this Court. Unlike many other death penalty cases, Applicant's case did not require trial counsel to travel around the country in search of information. Applicant's case did not require all manner of psychiatrists or neurologists. Trial counsel failed to

investigate and interview witnesses almost all of whom lived within a *two county area* and many of whom were eager and willing to help. *See, e.g., Woodson,* 428 U.S. at 304 ("the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender . . . as a constitutionally indispensable part of the process of inflicting the penalty of death").

ii. Counsel performed no meaningful investigation.

As already discussed extensively by the Court, trial counsel performed virtually no investigation prior to Applicant's resentencing trial, even though counsel were aware of information in Applicant's background that should have been red flags to counsel and even though counsel were aware of resources to utilize in conducting a mitigation investigation. Trial counsel had numerous indications that there was a wealth of mitigation evidence. In light of all the available information actually in trial counsel's possession, I find that "they could not reasonably have ignored mitigation evidence or red flags." *Rompilla,* 125 S.Ct. at 2468.

iii. Counsel's failure to investigate was not supported by reasonable strategy.

The amount of investigation conducted will also impact on the determination of whether counsel's strategic choices were reasonable.

> [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.

Strickland, 466 U.S. at 690-91. *See also, Williams,* 529 U.S. at 396 (counsel ineffective because they did not "fulfill their obligation to conduct a thorough investigation of the defendant's background"); *Wiggins,* 539 U.S. at 536 (counsel ineffective because "counsel were not in a position to make a reasonable strategic choice . . . because the investigation

supporting their choice was unreasonable"); *Rompilla*, 125 S. Ct. at 2466 (counsel ineffective where the Supreme Court could not "think of any situation in which defense counsel should not make some effort to learn the information in the possession of the prosecution and law enforcement authorities").[21]

Based on all the mitigation evidence before this Court and with great deference to trial counsel's stated strategies, I find that trial counsel had no justifiable strategy for failing to conduct an investigation of Applicant's life history. I further find that, had they conducted even the most rudimentary investigation, they would have had a wealth of mitigation evidence to pick and choose from in making the case for Applicant's life to the jury. Because they did not investigate, they could not make an informed decision about how best to proceed at the resentencing trial. I find that trial counsel conducted no meaningful investigation. In fact, this Court is hard-pressed to find that trial counsel conducted any investigation at all. Choosing to do nothing is not a strategy. *See U.S. v. Gray*, 878 F.2d 702, 711 (3rd Cir. 1989) (holding "counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when he has not yet obtained the facts on which such a decision could be made."); *accord Knighton v. Maggio*, 740 F.2d 1344, 1350 (5th Cir. 1984) (petitioner entitled to relief if record shows that "counsel could not make a valid strategic choice because he had made no investigation."). I find counsel performed

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[21]Respondents rely on *Abdul-Kabir v. Quarterman*, ____ U.S. ____, 127 S.Ct. 1654 (2007), for the proposition that 'residual doubt' is not admissible at sentencing. As an initial matter, residual doubt is not at issue in this case. Nevertheless, the Court in *Quarterman* reversed a death sentence and remanded the case for the lower court to address sentencing instructions in a statutory scheme that bears little or no resemblance to South Carolina's. Moreover, *Quarterman* distinguishes the admissibility and importance of mitigating evidence, quoting extensively from *Franklin v. Lynaugh*, 487 U.S. 164 (1988), on this point. *Quarterman*, 127 S.Ct. at 1657-8. If anything, *Quarterman* supports Applicant's position because the evidence at issue is mitigating in nature. Applicant's available mitigating evidence went specifically to his character and the nature of his offense. *See Lockett v. Ohio*, 438 U.S. 586 (1978) (holding sentencing scheme which prevents jury from considering defendant's character or the circumstances of the offense is unconstitutional); *See also, Brewer v. Quarterman*, 127 S. Ct. 1706.

deficiently because "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 539 U.S. at 523.

iv. Counsel's deficient performance prejudiced Applicant.[22]

In choosing not to "demonize" Applicant's mother, trial counsel virtually demonized Applicant. Instead of developing information that revealed the significant tragedy and life trauma in the lives of Applicant and his family, trial counsel presented the jury with an image of Applicant as just a ne'er-do-well with little regard for his mother, society, or the law. Applicant was and is a product of his mother's trauma. Far from demonizing Applicant's mother, I find that this and all the other testimony and evidence Applicant adduced about his life helps provide context for Applicant's life, and further *humanizes* him.

The Court finds that "[t]his evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." *Rompilla v. Beard*, 125 S.Ct. at 2469. I find that, viewing the allegations separately or cumulatively, "'the undiscovered 'mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Mr. Rogers'] culpability," *Wiggins*, 539 U.S. at 538 (quoting *Williams*, 529 U.S. at 398), and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" reached at sentencing, *Strickland*, 466 U.S. at 694. Therefore, based on all the stated reasons and findings, I find that Applicant is entitled to a new sentencing trial.

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[22]The Court incorporates by specific reference its findings and legal conclusions in Ground A, *supra*, related to the witnesses who testified in both 1994 and 1996.

GROUND C.

Trial court lacked jurisdiction to accept the defendant's guilty plea for criminal sexual conduct with a minor.

Over-Arching Constitutional Principle.

A trial court must have jurisdiction in order to try a defendant's case or accept a guilty plea. *United States v. Cotton*, 535 U.S. 625, 630 (2002); *State v. Dudley*, 364 S.C. 578, 582, 614 S.E.2d 623, 625-26 (2005); *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005); U.S. Const. Amend. VI; S.C. Const. Art. I, §14, Art. V, § 11. A mere defect in an indictment does not deprive a court of jurisdiction. *Cotton*, 535 U.S. at 867; *accord Gentry*, 363 S.C. at 100, 610 S.E.2d at 498. However, lack of either territorial jurisdiction, *Dudley*, 364 S.C. at 582, 614 S.E.2d at 625-26, or subject matter jurisdiction, *Gentry*, 363 S.C. at 101-01, 610 S.E.2d at 498), deprives the court of the authority to try a case.

The central premise of the Sixth Amendment is that truth is best discovered through a genuinely adversarial process in which "powerful statements" are presented "on both sides of the question." *United States v. Cronic*, 466 U.S. 648, 655 (1984). "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Id.* at 656. When defense counsel fails to perform competently, the trial is no longer a "confrontation between adversaries," but rather "a sacrifice of unarmed prisoners to gladiators." *Cronic*, 466 U.S. at 656-57 (internal citations omitted).

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established the now familiar two-part standard for assessing whether counsel's representation ran afoul of the Sixth Amendment. The first prong asks whether counsel's performance "fell below an objective standard of reasonableness," the second, whether counsel's inadequate representation was prejudicial. *Id.* at 687-88; *see also Hudgins v. Moore*, 337 S.C. 333, 524 S.E.2d 105, 108 (1999); *Martinez v. State*, 304 S.C. 39, 403 S.E.2d 113 (1991); *Cherry v.*

State, 300 S.C. 115, 386 S.E.2d 624 (1989).

There is no magic to either part of the test. Counsel's performance is deficient if it is unreasonable under "prevailing professional norms." *Id., Wiggins,* 539 U.S. at 521. Counsel's performance is prejudicial if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[23] *Id.,* at 534-35; *Strickland,* 466 U.S. at 695.

In calibrating prejudice, counsel's actions must be examined cumulatively. The Court's duty is to consider each item on the scale of justice. If a single claim or sub-claim is not prejudicial enough of its own weight to tip the scale impermissibly, the Court does not remove that item from the scales as though it were then irrelevant to the Court's analysis. The Court is required to continue to add alleged harms to the scale and consider them as a group. If the impact of the whole of the claims tips the scale justice, then a new trial is required. In other words, a reviewing court must look at all the ways in which the prosecution's case would have been undermined – and the defense case enhanced –had counsel performed reasonably. *Strickland,* 466 U.S. at 695 ("In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of the evidence"); *Williams v. Taylor,* 529 U.S. at 397 (in assessing prejudice flowing from deficient performance, reviewing court must consider "the totality of the available. . .both that adduced at trial, and the evidence adduced in the habeas proceeding. .. [.]"); *Henry v. Scully,* 78 F.3d 51, 53 (2d Cir. 1996) ("aggregate effect of . . . three instances of inaction by defense counsel" prejudiced petitioner; no need to determine "whether one or two of these errors would have constituted ineffective assistance").

With the appropriate legal standard in mind, I now address Applicant's allegations

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[23]The Supreme Court has made clear that the adjective "reasonable" is important; in fact, a reasonable probability is a lower standard than even the preponderance of the evidence standard. *Williams v. Taylor,* 529 U.S. 362, 406 (2000).

regarding lack of jurisdiction in the first instance. As an alternative ground, I will address whether counsel rendered ineffective assistance of counsel, as to Applicant's guilty pleas to the two indictments for CSC with a minor, and the resulting impact of these convictions on Applicant's 1996 resentencing trial.

The Allegation and Evidence.

Applicant alleges that the trial court lacked proper jurisdiction to accept his guilty pleas to two counts of CSC with a minor, thereby depriving Applicant of a fair trial at sentencing and his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law. Alternatively, Applicant alleges that trial counsel rendered ineffective assistance of counsel in advising Applicant to plead guilty to the CSC indictments, and that Applicant was prejudiced thereby, depriving Applicant of a fair trial at sentencing and his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law.

Specifically, Applicant alleges that:

- The trial court lacked jurisdiction to accept Applicant's guilty pleas because the crimes occurred in Charleston County, and not in Dorchester County;
- Trial counsel erroneously suggested the CSC guilty plea to the Solicitor without first consulting with Applicant, when no such charge was pending;
- Trial counsel failed to conduct any investigation of the CSC with a minor charges;
- Trial counsel failed to interview assault victim, the apparent "victim" of the CSC with a minor charges;
- Trial counsel failed to ascertain the jurisdiction or location of the alleged CSC acts; and,
- Trial counsel had a misapprehension of the law and the facts on this matter.

Applicant alleges that he was prejudiced by all of these errors, which he states entitle him to have the CSC convictions vacated. He claims these errors and the prejudice that

flows from them entitle him to a new sentencing trial based on these individual allegations. He further alleges that the cumulative impact of these errors and those raised in Ground B, *supra*, and the resulting prejudice considered cumulatively, entitle him to a new sentencing trial.

a. Trial Record.

Prior to his 1994 trial, Applicant entered into a negotiated plea agreement with the State. The plan was that Applicant would plead guilty to Murder, and, at the suggestion of trial counsel, he would also plead guilty to two unrelated CSC with a minor charges.[24] PCR Tr. 104. The pleas would be staggered over several days, thus making Applicant subject to the two violent strikes mandatory sentencing guideline, and Applicant would receive a mandatory sentence of life without the possibility of parole, *id.*, thereby avoiding a death sentence. Although Applicant successfully completed the pleas to the two CSC with a minor charges on January 25th and 27th (PCR Ex. P-2), he failed to complete the February 2nd plea to the murder charge, and the case was immediately set for trial on February 28, 1994. PCR Tr. 105-06, Ex. P-3.

The State relied heavily on the two violent sexual felony convictions in arguing for a death sentence at Applicant's resentencing trial. In closing argument at the 1996 resentencing trial, the Solicitor used Applicant's two convictions for CSC with a minor as evidence in aggravation. 1996 Tr. 955. The Solicitor further argued that not only had

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[24]In his testimony before this Court, Mr. Runyon admitted that he revealed to Solicitor Bailey that Applicant was the father of assault victim's child and raised the idea of charging Applicant with criminal sexual conduct with a minor (the allegedly then-fifteen-year-old Ms. assault victim) prior to discussing it with and gaining the approval of Applicant. PCR Tr. 777-78. Mr. Runyon indicated that assault victim was still pregnant at the time he approached the Solicitor with the idea. *Id.* The Court notes that the latest assault victim could have given birth to a full-term baby would have been late August of 1993, assuming, based on counsel's repeated assertions and Ms. assault victim's PCR testimony that she was pregnant at the time of the murder in late November 1992. Thus, the Court finds that Mr. Runyon's efforts were focused on preparing a negotiated plea as early as August 31, 1993.

Applicant murdered a child, but he had also been convicted of having sex with a child. *Id.*

b. PCR Record.

Trial counsel devised the strategy to create and include the CSC charges in Applicant's plea to murder, in an attempt to make Applicant ineligible for parole, thereby inducing the State to waive the death penalty and agree to a life sentence. PCR Tr. 104, 1026-27. assault victim testified that the underlying alleged incidents in these indictments arose in Charleston County, not Dorchester County. PCR Tr. 326-330. Ms. assault victim stated that her sexual relationship with Applicant always occurred at her grandmother's house, located at [redacted], Ladson, South Carolina. PCR Tr. 326. The evidence is uncontested that [redacted] is located in Charleston County, South Carolina. Applicant adduced a certified copy of the relevant portion of a Charleston County tax map reflecting that information. PCR Ex. P-22.

No one charged with the responsibility of investigating the factual bases for the two CSC charges did so. Neither trial counsel nor the State investigated where the two alleged incidents occurred or interviewed assault victim about the facts underlying these charges. PCR Tr. 119, 327-28, 1030; PCR Tr. 327, 1103, 1105.

1. The Trial Court Lacked Jurisdiction to Accept Applicant's Guilty Plea.

As noted, both the State and Applicant's trial counsel failed to determine whether the Dorchester County trial court possessed territorial jurisdiction to adjudicate the alleged CSC offenses. Trial counsel hatched the ill-fated plea scheme based on a few unconfirmed facts, which themselves were based on a few false assumptions. Thus, it follows that Applicant could not have waived jurisdiction, because his own trial counsel never advised him regarding the plea, nor apparently even asked Applicant about any of the fundamental details of the matter.

The facts of Applicant's case are within the ambit of *State v. Dudley*, 364 S.C. 578, 614 S.E.2d 623 (2005). In *Dudley*, the State indicted and tried the defendant for a drug

trafficking crime in South Carolina, while the defendant had remained within the state of Georgia during the entire criminal enterprise, thus making the crime alleged essentially one of a drug conspiracy. *Dudley*, 364 S.C. at 580-81, 614 S.E.2d at 624-25. The court found no evidence that the defendant participated in any criminal acts within South Carolina. *Id.* at 582-83, 614 S.E.2d at 626. The court held that territorial jurisdiction "is a fundamental issue that may be raised by a party or by a court at any point in the proceeding." *Dudley*, 364 S.C. at 582, 614 S.E.2d at 625-26. While *Dudley* specifically addressed a factual scenario arising between two different states, the same principle applies to Applicant's case. The Dorchester County Court of General Sessions lacked territorial jurisdiction over an offense that may have arisen in Charleston County.

Territorial jurisdiction is not a component of subject matter jurisdiction. *Id.* at 582, 614 S.E.2d at 625. In distinguishing the two jurisdictional issues, the court explained that subject matter jurisdiction relates to the court's power "to hear and determine cases of the general class to which the proceedings belong...[.]" *Id.* (quoting *Gentry*, 363 S.C. at 100, 610 S.E.2d at 498). Pointing to *Gentry*, the *Dudley* Court distinguished between the separate concepts of territorial and subject matter jurisdiction. *Id.* at 582, 614 S.E.2d at 625-26. *Gentry* changed the rule in this state so that mere defects in an indictment do not deprive a court of subject matter jurisdiction, and objections to mere defects must be made before a jury is sworn. *Gentry*, 363 S.C. at 101, 610 S.E.2d at 499. Thus, a claim that an indictment is defective does not, standing alone, deprive a trial court of subject matter jurisdiction. *Id.*

A defendant may separately challenge, however, a trial court's authority to hear a case based on lack of subject matter jurisdiction, which, again, is distinguishable from a claim of mere defect in an indictment. *Gentry*, 363 S.C. at 101-02, 610 S.E.2d at 499. In fact, the power – or lack of it – of the trial court to hear a particular case "can never be forfeited or waived. Consequently, defects in subject matter-jurisdiction require correction regardless of whether the error was raised [below]." *Id.* at 100, 610 S.E.2d at 498, (quoting

Cotton, 535 U.S. at 630).

The Court finds that Applicant's case warrants reversal under a subject matter jurisdiction analysis. Applicant's case does not involve a mere defect of the indictment. The specific issue here centers on the trial court's lack of jurisdiction to accept Applicant's guilty pleas to these particular indictments or to call the case for trial in Dorchester County. Under *Gentry*, the Dorchester County Court of General Sessions lacks the power to try cases which did not occur in Dorchester County. *Id.* The crimes alleged in the indictments, if they happened at all, did not occur in Dorchester County or the First Judicial Circuit. Therefore, in Applicant's case, the Dorchester County Court of General Sessions lacked the authority or power to try Applicant or accept his guilty pleas for these particular indictments in Dorchester County. In this instance, *Gentry* mandates reversal. *Id.*

This Court finds and concludes as a matter of law that the trial court lacked proper jurisdiction to accept Applicant's guilty pleas, and therefore vacates the convictions to CSC with a minor. If a court lacks jurisdiction, there is no prejudice inquiry. However, this Court further finds and concludes as a matter of law that Applicant was severely prejudiced, and adopts the same findings of prejudice, as set forth below. Furthermore, Applicant was specifically prejudiced by the improper convictions at his resentencing trial so that this Court vacates Applicant's death sentence and grants Applicant a new trial as to the issue of sentencing.

2. *Trial Counsel Rendered Ineffective Assistance of Counsel in Failing to Investigate and Determine Jurisdiction of the two CSC with a Minor Charges.*

Alternatively, and as an independent ground of sentencing phase relief, this Court finds and concludes that Applicant received ineffective assistance of counsel, and was prejudiced, with regard to his guilty pleas to the CSC with a minor indictments. Applicant received erroneous advice from his attorney to plead in Dorchester County to an alleged crime arising in Charleston County.

Trial counsel suggested to the Solicitor that Applicant be indicted for CSC with a minor, when the State was unaware that Applicant may have engaged in that criminal conduct. Trial counsel proposed this plea scheme to the Solicitor before trial counsel had discussed it with Applicant. Trial counsel failed to interview the alleged victim, Ms. [assault victim]. If trial counsel had done this basic, initial task, then counsel would have readily discovered the territorial jurisdiction issue. Trial counsel allowed Applicant to plead guilty to an offense for which the trial court lacked jurisdiction, since the alleged offense did not occur in Dorchester County. Trial counsel never corrected their own misapprehension of the law and the facts on this matter, never informed his client of the error, and never informed appellate counsel of this issue.

Therefore, this Court finds and concludes that trial counsel rendered ineffective assistance of counsel in allowing Applicant to plead guilty to the CSC indictments. *See Tilley v. State*, 334 S.C. 24, 511 S.E.2d 689 (1999) (counsel ineffective for failing to advise defendant of the no parole consequences of his guilty plea); *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997) (counsel ineffective for failing to timely notify defendant of right to appeal so direct appeal issues were reviewed on the merits in PCR appeal); *Shirley v. State*, 306 S.C. 241, 411 S.E.2d 215 (1991) (counsel ineffective for failing to advise defendant about inadmissibility of incriminating statements); *Cobbs v. State*, 305 S.C. 299, 408 S.E.2d 223 (1991) (trial counsel ineffective for failing to investigate possible defenses); *Kerrigan v. State*, 304 S.C. 561, 406 S.E.2d 160 (1991) (counsel ineffective for failing to advise defendant about jury instruction as to lesser-included offense); *Jivers v. State*, 304 S.C. 556, 406 S.E.2d 154 (1991) (counsel ineffective for failure to advise defendant as to double jeopardy); *see also*, ABA Guidelines: Appointment and Performance of Defense Counsel in Death Penalty Cases, Guidelines 11.6.1 through 11.6.4 (plea negotiations).

While trial counsel asserted that the pleas were intended to obtain a life sentence for Applicant, trial counsel's utter failure to investigate the facts resulted in a clear

misapprehension of the facts and law. Trial counsel cannot simply confer jurisdiction upon the trial court by wishing it so; nor, as in Applicant's case, by inventing a guilty plea out of whole cloth. When counsel's conduct is based on an erroneous understanding of the law "counsel made no tactical 'choice.'" *Luchenburg v. Smith*, 79 F.3d 388, 392-93 (4th Cir. 1996). Thus, this Court rejects trial counsel's purported strategy on this matter.

The prejudice to Applicant is tremendous. The Solicitor used Applicant's convictions of CSC to the State's advantage at closing argument during the resentencing trial. Indeed, the Solicitor in essence took full advantage of trial counsel's error by arguing not only that Applicant had murdered a child in the case at bar, but that Applicant had been convicted of having sex with a child. In Applicant's resentencing trial, due entirely to the two CSC with a minor convictions, the trial court denied Applicant a judicial instruction on a very important statutory mitigating circumstance, that being: "The defendant has no significant history of prior criminal conviction involving the use of violence against another person." S.C. Code § 16-3-20 (C)(b)(1) (1976 Code as amended). But for the guilty pleas – which are based upon improper and faulty jurisdiction, as well as ineffective assistance of counsel – Applicant would have received the benefit of this significant statutory mitigating circumstance. The conviction did not result from an independent police or prosecution-initiated investigation, but by defense counsel himself. In fact, trial counsel failed to obtain Applicant's consent prior to embarking on such a course. At a minimum, counsel should have been prepared to deny, rebut, or explain the convictions at sentencing. *Gardner v. Florida*, 430 U.S. 349 (1977).

In vacating the guilty pleas to and convictions for the CSC with a minor convictions, federal precedent entitles Applicant to a resentencing trial on the issue of punishment. The United States Supreme Court has addressed a very similar situation and concluded that a new resentencing trial is warranted. *Johnson v. Mississippi*, 486 U.S. 578 (1988). In *Johnson*, the State used evidence of the defendant's incarceration to prove a statutory

aggravating circumstance that he had been "previously convicted of a felony involving the use or threat of violence to the person of another." *Id.* at 581. The prior conviction at issue in *Johnson* was also one of three statutory aggravating circumstances, and Applicant's case is no different. The prosecutor in *Johnson* urged jurors to consider death, because the defendant had a prior conviction for violence involving sexual assault. *Johnson*, 486 U.S. at 586. Similarly, the Solicitor in Applicant's case urged the jurors to consider a death sentence based on Applicant's violent felony conviction for "sex with children." 1994 Tr. 955. In effect, this made the prior conviction a non-statutory aggravating circumstance by the thrust of the State's argument.

Additional prejudice arose when the Solicitor told jurors that Applicant had two violent, sexual felony convictions involving a child, because it was coupled with a death eligible crime for which the statutory aggravating circumstance was the homicide of a child. Indeed, the Solicitor's argument emphasized, incorrectly, that Applicant's prior conviction involved "sex with children," specifically invoking the plural. The prosecutor knew that the conviction involved a consensual relationship with the State's own witness, assault victim. In fact, assuming that Applicant even engaged in the requisite conduct with assault victim in September or August of 1992, assault victim, whose sixteenth birthday was October 3, 1992, was only a month or two below the legal age of consent. She certainly was not the typical "child," as inferred from the Solicitor's argument. In Applicant's case, where the Solicitor relied on the CSC convictions during his closing argument, the prejudice to Applicant equals that found in *Johnson*.

In *Johnson*, where the prosecutor repeatedly urged jurors to give substantial weight to the prior violent crime conviction and in support of a death sentence, the Court declared that,"[e]ven without that express argument, there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be 'decisive' in the 'choice between a life sentence and a death sentence.'" *Id.* at 586, (quoting *Gardner*, 430 U.S. at

359). Likewise, in Applicant's case, even if the Solicitor's reliance on the CSC convictions had been minimized, the Court finds that the prior convictions for a crime of sexual violence may have been the decisive factor in a juror's individualized decision for death or life.

In Applicant's case, the prior convictions for a crime of sexual violence becomes critical where the death penalty-eligible crime involved the homicide of a child. The jury only found one aggravating factor: the death of a child. The Solicitor's closing argument urged jurors to link that aggravating factor with the prior conviction, even erroneously arguing that Applicant's conviction involved sex crimes with children. The prejudice to Applicant could not be greater.

The fact that *Johnson* involved the prior conviction as a statutory aggravating circumstance does not make it materially different from Applicant's case. "[M]ore importantly, the error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate." *Id.* at 590. This analysis applies directly to Applicant's case, because Applicant's jury was allowed to consider evidence that has been revealed to be "materially inaccurate." *Id.* This holding is made pursuant to *Strickland*, 466 U.S. 668; and *Pauling*, 331 S.C. 606, 609, 503 S.E.2d 468, 470; *see also* ABA Guidelines: Appointment and Performance of Defense Counsel in Death Penalty Cases, Guidelines 11.6.1 through 11.6.4 (plea negotiations).

Based on the foregoing factual findings and conclusions of law, this Court finds that the errors probably made a difference to at least one juror. If the two CSC with a minor convictions had not existed, Applicant would not have had any prior convictions involving a crime of violence. This Court finds and concludes as a matter of law that trial counsel's prejudicial failures deprived Applicant of the effective assistance of counsel and rendered Applicant's guilty pleas to the CSC with a minor indictments unfair and void. Applicant was thereby deprived of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution and South Carolina law. Therefore, for all the reasons stated, this Court vacates the convictions to CSC with a minor. Furthermore, Applicant was prejudiced by the improper convictions at his resentencing trial so that this Court vacates Applicant's death sentence and grants Applicant a new trial as to the issue of sentencing. This decision is independent of and alternative to any other finding contained in this Order.

GROUND D.

Ineffective Assistance of Appellate Counsel.

Over-Arching Constitutional Principle.

The Fourteenth Amendment guarantees the right to counsel on a defendant's direct appeal as of right. *Douglas v. California*, 372 U.S. 353 (1963). Because of the legal complexities involved in an appeal, especially in a capital case, "[t]he services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). Like the trial, the appeal is an adversarial proceeding "governed by intricate rules that to a layperson would be hopelessly forbidding." *Id.* at 396. Without appellate counsel "to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the [appeal] itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980); *see also United States v. Ash*, 413 U.S. 300, 307 (1973) (counsel serves as a "guide through complex legal technicalities").

In order to successfully advance a claim of ineffective assistance of appellate counsel, Applicant must show that counsel's performance was deficient "as measured by the standard of reasonableness under prevailing professional norms." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Applicant must prove that "he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*

v. Washington, 466 U.S. 668, 695 (1984); *accord Smith v. State*, 309 S.C. 413, 424 S.E.2d 480 (1992); *see also Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999).

The Allegation and Evidence.

Applicant alleges that he received ineffective assistance of appellate counsel. Applicant specifically alleges that appellate counsel was ineffective because he failed to raise and argue that the trial court improperly admitted prejudicial and unreliable hearsay testimony from a state's witness during the guilt or innocence phase of applicant's trial. Applicant contends that trial counsel raised a timely objection to the hearsay and the error was preserved for appellate review; appellate counsel's failure to raise the issue on direct appeal fell below the "prevailing professional norms." *Ibid.; Wiggins v. Smith, supra,* at 521. Applicant alleges that he was prejudiced by appellate counsel's errors and that he is, therefore, entitled to a new trial as a result of appellate counsel's prejudicial errors.

a. Trial record.

During the guilt-or-innocence phase of Applicant's trial, counsel made a hearsay objection to the admission of a previously undisclosed statement testified to by State's witness Anthony Riley on direct examination. 1994 Tr. 805-12. According to Mr. Riley, he left the Spell's Grocery before the shooting, and jogged toward his home. Before he reached his home, he heard one gunshot. 1994 Tr. 803. Mr. Riley testified he heard a second gunshot by the time he reached his front porch. 1994 Tr. 804. Mr. Riley went inside his home for some undefined period of time. *Id.* He said he returned to his front porch in order to smoke a cigarette. *Id.* He testified that it was after he had reached his home, looked after his kids, and come back outside to smoke that he heard two males running down his street and past his house. 1994 Tr. 804. He said two people were coming from the direction of Spell's. 1994 Tr. 813. As Mr. Riley began to testify about a statement he claimed one of the males said, trial counsel objected.

Mr. Riley was testifying that he heard two men running past his house and "heard

one of them say ...," when trial counsel objected on hearsay ground that "unless he's going to identify...[them]." 1994 Tr. 805. The trial court sustained Applicant's objection, "unless he [Mr. Riley] can identify them [the two unknown declarants]. 1994 Tr. 805. The State asked Mr. Riley if he could "identify the two people." He responded, "No." *Id.* The trial court excused the jury from the courtroom. *Id.* The State's position was that the statements were *res gestae* and that they were statements against penal interests. 1994 Tr. 808. Mr. Riley was not able to identify the race of either man. 1994 Tr. 806. Based on Mr. Riley's *in camera* testimony that he heard two males, neither of whom he was able to identify by voice or sight, make highly inflammatory statements, the trial court found that the statements were *res gestae* and that they were not offered for the truth of the matter asserted. 1994 Tr. 810. Trial counsel objected on hearsay grounds and that the statement was not previously disclosed to trial counsel. 1994 Tr. 809-10.

Mr. Riley was allowed to testify that he heard one of the unidentifiable males say, "Did you get the mother fucker?" 1994 Tr. 814. Mr. Riley testified the other unidentified male responded, "Yeah, I got **his** ass."[25] 1994 Tr. 804-15 (emphasis added).

b. PCR record.

Mr. Riley attempted to testify about the statements he alleged two unknown males made while passing his house. He said this occurred some "five, ten minutes" after the second shot was fired. PCR Tr. 56. PCR counsel objected on the basis that the alleged statements of the two unknown males was "rank hearsay." PCR Tr. 54. Respondent argued that the statements were admissible under the *res gestae* exception. This Court found the statements to be inadmissible hearsay and sustained the objection. PCR Tr. 58.

Appellate counsel, Joseph Savitz, III, of the Office of Appellate Defense, testified

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[25]However, Mr. Riley's testimony in front of the jury was slightly different; he testified that he heard one male say, "Did you get the motherfucker, and the other male responded, "Yeah, I got that motherfucker." 1994 Tr. 814.

concerning his appellate representation of Applicant. Mr. Savitz testified that trial counsel did timely object to Mr. Riley's testimony about the hearsay and that Mr. Savitz viewed the issues as properly preserved by trial counsel. 1994 Tr. 73. Mr. Savitz said he did not pay much attention to the issue and did not really think too long about it. He noted that he must have thought the statements were not hearsay. He further testified that he had no strategic reason for not raising the claim. If he was wrong, he said, then the claim would have been a legitimate basis for appellate relief. PCR Tr. 73.

c. Appellate counsel rendered ineffective assistance of counsel.

I. Legal standard regarding the hearsay statement.

It is well-settled law in this state that, in order for a statement to qualify as an exception under *res gestae*, the "statement must be substantially contemporaneous with the litigated transaction and be the spontaneous utterance of the mind while under the active, immediate influence of the event."[26] *See State v. Long*, 186 S.C. 439, 445, 195 S.E. 624, 626 (1938); *State v. McDaniel*, 68 S.C. 304, 310, 311, 47 S.E. 384, 386 (1904); and, *Magill v. Southern Railway*, 95 S.C. 306, 78 S.E. 1033 (1913)). The rationale behind this exception and the primary basis for holding that the Confrontation Clause is not violated by the admission of such testimony "lies in the special reliability accorded to a statement uttered in spontaneous excitement, which limits the declarant's powers of reflection and fabrication." *Id.; see also State v. Harrison, 298 S.C. 333, 380 S.E.2d 818 (1989).* In assessing whether a statement falls within the exception, a court must examine the "totality

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[26]Applicant's 1994 trial took place prior to the adoption of the rules of evidence. However, the pre-Rules *res gestae* standard is essentially reflected in SCRCrimP, Rule 803(1) and Rule 803(2). Thus, the analysis of this statement in this case would result in the same outcome under either a pre-rules or a post-rules assessment. *See State v. Harrison*, 298 S.C. 333, 380 S.E.2d 818 (1989) (holding testimony of witness who was not present at shooting but who claimed to hear statements some minutes afterwards did not fit within the *res gestae* or excited utterance exceptions). The Court also notes that the State chose not to call this witness to testify at Applicant's post-rules resentencing trial in 1996.

of the circumstances" surrounding the making of the statement. This analysis requires a court to consider the presence or absence of indicia of reliability, as well. In other words, the statement must be "trustworthy" to meet evidentiary and constitutional strictures concerning admissibility out of court statements. *Id.; accord State v. Hill*, 331 S.C. 94, 501 S.E.2d 122 (1998), cert. denied, *Hill v. South Carolina*, 525 U.S. 1043 (1998).

Mr. Riley's Statements were Rank Hearsay.

I find that the statements were hearsay and, as such, the admission of them against Applicant was error. The party seeking to admit such statements of this nature has the burden of proving their admissibility. The State could not prove the reliability of the statements because the identity of the unidentified out of court declarants is crucial to the admissibility of the statements under the facts of Applicant's case. Under the facts of Applicant's case the State needed to prove the identity of the out of court declarants because the statements were irrelevant on their face. The record evidence is that two males passed Mr. Riley's house, discussing whether one of the two had "gotten" some unknown person, and that the unknown person being discussed by the out of court declarants was a **male**. The victim was a little girl. The males could have just as well simply been people who heard the gun shots and decided to run in a direction away from the gunshots or two people who were discussing the details of some completely unrelated event. This Court cannot be sure of the meaning of the information or whether or not the two unknown men even witnessed the events at Spell's grocery that night. I find that the statements leave too much to pure speculation as to the meaning of them or the identities of the makers of them.

It is clear to this Court, and there is strong evidence in the record indicating that it was clear to the trial court as well, that the statements could not be tied to Applicant or his companion, Mr. Patterson, to wit: The trial court refused to accept the State's assertion that the statements were admissible as statements *against the declarants' penal interest* and the trial court held that the statements were *not offered* for the truth of the matter

asserted. The jury was left to speculate that the highly inflammatory statements were uttered by Applicant. In fact, the State argued to the jury that the highly inflammatory statements were, in fact, uttered by the Applicant and that those statements were strong evidence of his intent to kill the victim. 1994 Tr. 994. With all due respect to the trial court, those findings rendered the statements irrelevant and unreliable. Because "[t]here is no evidence the unidentified declarant[s] witnessed the shooting ... [and because it is] unknown whether the declarant[s were] under the stress of excitement caused by the event," the admission of the statements was reversible error. *Long*, 183 S.C. 439, 195 S.E. 624.

ii. Appellate counsel's performance fell below prevailing professional norms.

I find that appellate counsel failed to raise the hearsay issue on appeal, even though the issue was preserved and meritorious, and would have constituted reversible error. In order to successfully advance a claim of ineffective assistance of appellate counsel, Applicant must show that "counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms." *Id.; Wiggins, 539* U.S. at 521. I find that appellate counsel's failure to raise the hearsay issue on direct appeal rendered his performance "deficient as measured by the standard of reasonableness under prevailing professional norms." *Id.; Wiggins, 539*U.S.at 521. Therefore, I find that Applicant has met his burden of proof regarding the first prong of the *Strickland* standard.

iii. Applicant was prejudiced by appellate counsel's failure.

To prevail on his claim of ineffective assistance of appellate counsel, Applicant must now show that he "was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 695; *accord Smith v. State*,

309 S.C. 413, 424 S.E.2d 480 (1992). The South Carolina Supreme Court has explained that the key to determining prejudice in a claim of ineffective assistance of counsel is recognizing the meaning of the phrase "the proceeding" in the second prong of the *Strickland* standard. *Southerland v. State*, 337 S.C. 610, 616-17, 524 S.E.2d 833, 836 (1999). Thus, this Court need only determine whether the proceeding in which the ineffective assistance of counsel occurred, *i.e.*, the outcome of the *direct appeal*, would have been different. *Id.* In other words, this Court does *not* assess whether or not the inadmissible hearsay was prejudicial to Applicant in light of the record evidence at trial. *Id.* at 616-17, 524 S.E.2d at 836; *accord Evitts v. Lucey*, 469 U.S. 387 (1985). Having found that inadmissible hearsay was admitted into the guilt-or-innocence phase of Applicant's trial, that trial counsel timely objected and that the error was properly preserved, that appellate counsel failed to raise the error on direct appeal, I must find, pursuant to *Southerland*, that Applicant has met his burden of proof regarding both *Strickland* prongs on Ground D. Therefore, I find that Applicant is entitled to the relief he seeks. I hereby reverse his conviction for murder and vacate his death sentence. I remand this matter back to the trial court for a new trial.

GROUNDS E & F.[27]

State deprived Applicant of fair trial when it failed to disclose exculpatory and impeachment information as required by Brady v. Maryland

State deprived Applicant of fair trial when it allowed a witness' false testimony to go uncorrected.

Over-Arching Constitutional Principles.

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[27]Applicant also raised claims of ineffective assistance of counsel as to his 1994 trial and his 1996 sentencing trial, Grounds A and B. The factual bases for Grounds A, B, E, and F are incorporated into each other by specific reference. To the extent counsel failed to avail themselves of the evidence about which the State notified them, then counsel were ineffective because their representation of Applicant fell below the "prevailing professional norms" and Applicant was prejudiced by the failures such that I find a reasonable probability that, but for counsel's failures, the outcome may have been different. *Id.*; *Wiggins*, 539 U.S. at 521. *See* Grounds A and B, *supra*.

Ground E: The *Brady* Claim

The Fourteenth Amendment guarantee of due process is violated by "the suppression by the prosecution of evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "[I]mpeachment evidence . . . falls within the *Brady* rule" because impeachment evidence "if disclosed and used effectively, . . . may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985).

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 281-82 (1999). "Suppressed evidence is 'information which had been known to the prosecution but unknown to the defense.'" *Spicer v. Roxbury Correctional Institution,* 194 F.3d 547, 557 (4th Cir. 1999) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)). Moreover, even if the individual prosecutor does not know of or possess all of the evidence, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley,* 514 U.S. 419, 437 (1995).

Evidence is material under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, 685 (adopting the test enunciated in *Strickland v. Washington,* 466 U.S. 688 (1984), for resolving Sixth Amendment claims of ineffective assistance of counsel). "[T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the

remaining evidence is sufficient to support the jury's conclusions." *Strickler*, 527 U.S. at 290. "The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial "resulting in a verdict worthy of confidence." *Riddle v. Ozmint*, 369 S.C. 39, 45, 631 S.E.2d 70, 73 (2006) (quoting *Kyles*, 514 U.S. at 434). Finally, *Brady* requires a cumulative analysis of prejudice. *Kyles*, 514 U.S. at 436 (materiality must be "considered collectively, not item-by-item").[28]

Ground F: The *Napue* Claim

The Fourteenth Amendment prohibits the use of testimony the prosecution knows or reasonably should know is false or misleading. *Miller v. Pate*, 386 U.S. 1, 6-7 (1968); *Davis v. Zant*, 36 F.3d 1538, 1548 (11th Cir. 1994) (holding "[l]ittle time and no discussion is necessary to conclude that it is improper for a prosecutor to use misstatements and falsehoods"). The error is established when a conviction is based on the State's "deliberate deception of court and jury by the presentation of testimony known to be perjured." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). The result is the same whether the State solicits the false evidence or merely "allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). "[T]he prosecutor has a duty to correct testimony he knows to be false, even if its introduction was not knowing and intentional." *Bracy v. United States*, 435 U.S. 1301, 98 S.Ct. 1171 (1978). The South Carolina Supreme Court recently reaffirmed that tenet, holding that "[t]he [State's] failure to correct false evidence is as reprehensible as its presentation." *Riddle v. Ozmint*, 369 S.C. at 47-49, 631 S.E.2d at 76, *citing Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996). Prejudice is

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[28]Like *Brady*, the South Carolina Rules of Criminal Procedure "ha[ve] the same goal of ensuring the criminal defendant's right to a fair trial." *State v. Kennerly*, 331 S.C. 442, 454, 503 S.E.2d 214, 220 (Ct. App. 1998), *aff'd*, 337 S.C. 617, 524 S.E.2d 837 (1999). Thus, S.C.Crim.P. Rule 5 also applies to evidence within the actual possession of the prosecutor or within "the possession of other government agencies" and uses the same definition of materiality used in the *Brady* context. *Id.*

established if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue*, 360 U.S. at 271).

The Allegations and Evidence.

Applicant was denied his right to a fair trial in both phases of his capital murder trial and resentencing, a right guaranteed by both the Fourteenth Amendment and South Carolina law, because the State failed to disclose favorable impeachment evidence and to correct false testimony from one of its primary witnesses, James Carver. The State had possession of photographic and videotape film evidence revealing that James Carver's testimony was patently false regarding the presence of absence of packages of beer in the vehicle driven by the victim's father and regarding what had transpired among the adults involved in the shooting. The solicitor acknowledged that he had carefully examined the evidence prior to trial.

a. Trial Record.

The amount of alcohol ingested by the adults who engaged in the argument that preceded the shooting of Stephanie B[redacted] was a key issue at both of Applicant's trials. Applicant, assault victim and Mr. Patterson, all of whom arrived together at Spell's Grocery on foot, acknowledged at trial that they were intoxicated.[29] Applicant's 1994 testimony included his statement that he had been drinking liquor and beer. 1994 Tr. 1108. At the 1996 resentencing, Applicant acknowledged that they had shared about a case and a half of beer and a half of a 5th of vodka. 1996 Tr. 878. assault victim testified consistently at both trials that they were all drinking "white liquor" and beer (1994 Tr. 827) and "beer and

[29]Mr. Patterson testified that he saw a "Busch beer box" inside the truck. Upon being shown PCR Ex. P-18, Mr. Patterson indicated that the beer carton depicted on the photograph is inside the truck cab, on the floorboard. PCR Tr. 229, PCR Ex. P-18. Mr. Patterson admitted he was intoxicated the night of the shooting.

liquor." 1996 Tr. 648. At both trials, assault victim characterized the degree of drunkenness: she had "a good bit," Applicant had "sort of a lot," and Mr. Patterson had "a lot" to drink. 1996 Tr. 648-49.

The adults who were responsible for Stephanie's care before she was shot have made somewhat varied representations over the years about the amounts of alcohol they had consumed or possessed before the shooting. Mr. B[redacted] testified that he purchased a twelve-pack of Busch Lite beer after he picked Stephanie up from school. 1994 Tr. 717; 1996 Tr. 604. He drank his first beer of the day in the parking lot of the store where he bought the beer at approximately "4:00 p.m." 1994 Tr. 717; 1996 Tr. 604. He then drove himself and his daughter to Mr. Carver's place of employment to wait for him; he had two more beers while there. 1994 Tr. 720; 1996 Tr. 605-06. Mr. B[redacted]'s testimony at Applicant's original trial was that he had "three or four [beers] at the most." 1994 Tr. 728, *cf.* 1996 Tr. 607 (B[redacted] testimony that he had three beers over "two and a half to three hour[]" period). B[redacted] also testified that the remainder of the twelve-pack that he bought that afternoon was inside the cab of the truck. 1994 Tr. 744; 1996 Tr. 638. Mr. B[redacted] testified that there was no beer in the back of his truck. 1994 Tr. 744. He acknowledged that he purchased a can of cold Busch Lite beer at Spell's when he purchased Stephanie's sandwich, but did not drink it. He threw it in the garbage can at Spell's after his daughter was shot. 1994 Tr. 727; 1996 Tr. 613, 637. According to both Mr. B[redacted] and Mr. Carver, Mr. Carver did not ingest beer that afternoon. 1994 Tr. 720, 931-32; 1996 Tr. 607, 744. Mr. Carver swore he didn't see a twelve-pack of beer or any beer, anywhere in B[redacted]'s truck and he never saw B[redacted] with a beer that day. 1994 Tr. 950; 1996 Tr. 739, 744, 749.

b. PCR record.

As detailed extensively in Grounds A and B, *supra*, Mr. Carver and Mr. B[redacted] testified at length about a dispute that arose between the two of them and Applicant and Patterson. Mr. B[redacted] testified that the argument "between [him] and Mr. Patterson went

on for about five or ten minutes," that their confrontation started at about "6:05 p.m. and ended by 6:20 p.m." 1994 Tr. 760-61. However, in the videotape of news footage, Mr. Carver states that they had "just pulled up" when the shots were fired. Mr. Carver is seen on the videotape, responding to a question from a person who is not visible in the videotape. The person off-camera asks if Mr. Carver has any idea why someone shot at the at truck. Mr Carver responds, "No. We just pulled up." PCR 8-2005Supp. Tr. 57-59,73, Ex. P-56.

Regarding the videotape of raw news footage that comprises PCR Ex. P-56, discussed in Ground A and B, *supra*, Solicitor Bailey testified he mailed Mr. Runyon a letter, which included a brief, general description of the raw news footage, notifying counsel it was available for review at the Solicitor's office. PCR Ex. P-10. In addition, Solicitor Bailey provided trial counsel with a copy of a purported "transcript" that was prepared by the news channel and provided by them to Solicitor Bailey. PCR Ex. R-7, PCR 8-2005Supp. Tr. 71-2. Solicitor Bailey, however, also acknowledged that the transcript was incomplete and did not accurately reflect all of the relevant dialogue that was captured on the raw video footage in PCR Ex. P-56. PCR 8-2005Supp. Tr. 75-6. The transcript certainly did not reflect the fact that partially empty Busch beer cartons or containers were present in the bed of Mr. B[redacted]'s truck. *Id.* Solicitor Bailey acknowledged both on cross-examination and under *voir dire* from this Court that he "carefully" reviewed the videotape and was, therefore, personally aware of its contents. PCR 8-2005Supp. Tr. 79-80. Based on the Court's observation of Mr. Bailey's testimony, I find his testimony credible.

Mr. Leiendecker testified that the information contained in PCR exhibits P-56, P-57, and P-58, all of which he had never seen before, would have been useful to impeach Mr. Carver's trial testimony in two important ways. Mr. Leiendecker testified that he had never seen the videotaped news footage of the truck bed, beer, and Mr. Carver; he had no indication or information that Mr. Runyon had ever seen the videotape reflected in P-56,

either. PCR 8-2005Supp. Tr. 57 and 62. Mr. Leiendecker noted that he had no recollection of receiving a copy of a letter from Solicitor Bailey notifying Mr. Runyon that he could review a videotape of raw news footage at the Solicitor's office. PCR Ex. P-59.

The videotape would have been valuable to trial counsel in impeaching Mr. Carver, and possibly Mr. B[redacted] as well, in that Mr. Carver's statements on the videotape are inconsistent with their trial testimony about what happened the night of the shooting. PCR Ex. P-10, PCR 8-2005Supp. Tr. 59. Additionally, trial counsel strategically asked Mr. Carver about the presence of beer in the B[redacted] truck on cross-examination and about his and Mr. B[redacted]'s beer consumption. 1994 Tr. 951. Based on the Court's observation of Mr. Leiendecker's testimony, I find his testimony credible.

c. State deprived Applicant of a fair trial by allowing a witness' false testimony to go uncorrected.[30]

The State's failure to correct James Carver's false testimony entitles Applicant to a new trial if the State knew or reasonably should have known that his testimony was false or misleading. *See, e.g., Miller v. Pate*, 386 U.S. 1, 6-7 (1968). I find that the State knew that both Mr. B[redacted] and Mr. Carver testified falsely concerning the presence of beer (Mr. Carver) and the amount of beer (Mr. B[redacted]) present in Mr. B[redacted]'s truck. Further, the State, as Solicitor Bailey testified, knew that trial counsel did not know about the falsity of the testimony regarding the consumption and quantity of beer involved.

Although the State did not elicit this false testimony, I find that the State did allow the false testimony to go uncorrected. Solicitor Bailey acknowledged that he, himself, had carefully reviewed the videotape. PCR 8-2005Supp. Tr. 79-80. According to the South Carolina Supreme Court, a solicitor's "failure to correct false evidence is as reprehensible

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[30]In the alternative, to the extent the State failed to disclose the relevant evidence to which Applicant was entitled under Due Process requirements delineated in *Brady v. Maryland*, 373 U.S. 83. Applicant was deprived of his right to Due Process of law in the manner he claimed in his Ground E of his application for post-conviction relief. All fact findings are hereby incorporated herein by specific reference.

as its presentation." *Riddle v. Ozmint*, 369 S.C. at 47-49, 631 S.E.2d at 76. The result to Applicant's case is the same whether the State solicits the false evidence or merely "allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. at 269; *see also Banks v. Dretke*, 540 U.S. at 694 (state's failure to correct witness' false testimony about the amount and type of contact with law enforcement was tantamount to state's deliberately presenting false which was "incompatible with rudimentary demands of justice" (quoting *Giglio*, 405 U.S. at 153; *Mooney*, 294 U.S. at 112)). Finally, if I find that Mr. B[redacted]'s or Carver's "false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271), Applicant will have established the requisite prejudice.

I find that the videotape would have provided trial counsel with solid material, impeachment evidence against Mr. Carver, whose testimony figured prominently in both the 1994 trial and the 1996 resentencing trial, concerning the fundamental dynamics of what unfolded at Spell's Grocery the night the victim was shot. The videotape would have also been very useful in impeaching Mr. B[redacted] on the amount of beer he had at his immediate disposal. Because "a picture is worth a thousand words," I find that the videotape and the still photographs derived from it would have been important visual evidence for the jury on the issue of both Mr. B[redacted]'s and Mr. Carver's credibility. I find that the State knew, and admitted as much, that trial counsel had not viewed the videotape and that the State was fully aware of the contents of the video. The statement, that they [Mr. Carver, Mr. B[redacted], and Stephanie] had "just pulled up" to Spell's would have been material evidence with which trial counsel could have impeached Mr B[redacted] and Mr. Carver. Impeachment of Mr. B[redacted]'s and Mr. Carver's testimony was the key strategy to trial counsel's theory of the case. Therefore, I find a "reasonable likelihood" that the false testimony of the two witnesses "affected the judgment of the jury." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue*, 360 U.S. at 271).

Because the State failed to correct false testimony that it knew to be false, Applicant was deprived of his rights guaranteed by the Fourteenth Amendment and South Carolina law, I hereby reverse his conviction for murder, vacate his death sentence, and grant him a new trial.

IV. CONCLUSION.

For all the foregoing reasons and legal bases, the Court finds that Applicant has met his burden of proof as to each allegation, individually, and he is entitled to the reversal of his convictions for criminal sexual conduct with a minor, indictment numbers 94-Gs-18-047 and 94-GS-18-048, and for murder, indictment number 93-GS-18-101. I hereby reverse each of those convictions, vacate all sentences and, specifically, Applicant's death sentence, and remand the indictments to the trial court.

AND IT IS SO ORDERED.

Honorable Diane Schafer Goodstein
Circuit Court Judge
Presiding by Order of the Supreme Court

_____, *2007*

St. George, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF DORCHESTER)	00-CP-18-575
TIMOTHY DION ROGERS,)	
Applicant,)	CERTIFICATE OF SERVICE
vs.)	
JON E. OZMINT, Director, South Carolina Department of Corrections)	
Respondent.)	

I, Diana L. Holt, hereby certify that I have this date served the Applicant's (Amended) Proposed Order granting post-conviction relief on all allegations, as detailed, in the above-captioned case upon counsel for Respondent by U.S. Mail and by electronic transmission via .pdf file to their address as follows:

Wm. Edgar Salter, III
Senior Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

DIANA L. HOLT
Counsel for Mr. Rogers

June 11, 2007
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	
Timothy Dion Rogers,	)	C. A. No. 00-CP-18-575
	)	
Applicant,	)	
	)	
vs.	)	
	)	
Jon E. Ozmint, Director, South Carolina Dept. of Corrections,	)	PROPOSED ORDER
	)	
Respondent.	)	
	)	

This matter is before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed on June 12, 2000. Respondent submitted its Return on July 12, 2000. The Court held an evidentiary hearing into the matter on September 27 – October 1, November 22, and December 21 of 2004 and May 2 and August 23 of 2005, at the Dorchester County Courthouse in St. George, South Carolina. Applicant was present at the hearing, and Jeffrey Bloom and Diana Holt, Esquires, represented him. Senior Assistant Attorney General William Edgar Salter, III, represented the State.

Applicant testified on his own behalf at the hearing. He also presented testimony from Anthony Riley; Joseph Savitz, Esquire; Mark Leiendecker, Esquire; Daxton Patterson; Stephanie Simmons; James Robinson; George Scharf; assault victim; Applicant's Mother; Charles Feeley; Earl Asbell; Timeka R[redacted]; Walter Mitchell; Jeffrey Yungman; Dr. William Price; Carol Rogers; Robert Bryant; Denise De La Rue; Faith N[redacted]-Brown; Anthony Brown; and Ashley Pennington. The State presented Robert D. Robbins; William Runyon, Jr., Esquire; and the former First Circuit Solicitor, Walter Bailey. The Court also had before it: the trial transcript (including pre-trial motions

hearings); the records from Applicant's direct appeal to the South Carolina Supreme Court on both direct appeals; the March 9, 2000 Order of the South Carolina Supreme Court appointing the undersigned to hear this matter pursuant to *In Re: Stays of Execution in Capital Cases*; the Order Appointing Counsel for Post-Conviction Relief; the Dorchester County Clerk of Court's records; the Post-Conviction Relief Application; the First and Second Amended Applications for Post-Conviction Relief; and the Return. The Court denies relief for the following reasons:

PROCEDURAL HISTORY

Timothy Dion Rogers (Applicant) presently is confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) pursuant to commitment orders from the Dorchester County Clerk of Court. The Dorchester County Grand Jury indicted Applicant for murder at the February 1993 term of court. On January 27, 1993, the State served its Notice Of Intent To Seek The Death Penalty and Notice Of Evidence In Aggravation. It served an amended Notice Of Evidence In Aggravation on July 29, 1993.

The Honorable Charles W. Whetstone, Jr., held pre-trial hearings on August 17 and 19, 1993. Applicant again appeared before Judge Whetstone on February 2, 1994, to plead guilty to murder. However, he withdrew his plea before it was accepted. The State then notified Applicant 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, Applicant was tried by the Honorable Luke N. Brown, Jr., and a jury. William Runyon, Esquire, and Mr. Mark Alan Leiendecker, the Dorchester County Public Defender, represented him at trial. The Honorable Walter M.

Bailey, Jr., Solicitor for the First Judicial Circuit, and Assistant Solicitor Harrison Bell represented the State. The jury found Applicant guilty of murder on March 3.

Following Applicant's exercise of his right to a twenty-four hour waiting period, *see* S.C. Code Ann. § 16-3-20(B) (Supp. 1999), a sentencing proceeding was held on March 5, 1994. The State relied upon two statutory aggravating circumstances: (1) 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 (2) that Applicant killed a child under the age of eleven years old. *See* § 16-3-20(C)(a)(3)&(10). Applicant relied upon the statutory mitigating circumstance that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired, *see* § 16-3-20(C)(b)(6), as well as three non-statutory mitigating circumstances. After hearing all of the evidence and listening to arguments from the prosecution, defense counsel and Applicant, the jury unanimously found the existence of both statutory aggravating circumstances and sentenced Applicant to death on March 5 and Judge Brown imposed sentence upon him.

A timely Notice of Appeal was served and filed. Applicant filed his Final Brief of Appellant in the South Carolina Supreme Court, in which he raised the following grounds for relief on direct appeal:

1. The trial judge erred by refusing to instruct the jury on voluntary manslaughter, where appellant's statement and other evidence in the case would have supported a verdict finding appellant guilty of that lesser offense.

2. The judge erred by refusing to instruct the jury that 'a life sentence imposed on this defendant means life without hope for release by operation of law,' because appellant,

Judge Whetstone imposed the death sentence. Before imposing this sentence, he first found as an affirmative fact that the death penalty was warranted under the evidence presented, and that it was not the result of prejudice, passion or any other arbitrary factor. A timely Notice of Appeal was again served and filed. The direct appeal consolidated Applicant's direct appeal with the South Carolina Supreme Court's sentence review under S.C. Code Ann. § 16-3-25(C) (1991).

On June 17, 1998, Applicant filed his Final Brief of Appellant, in which he presented the following ground for relief to the South Carolina Supreme Court:

> The judge erred by refusing to instruct the jury, under S.C. Code Section 16-3-20(C)(b)(1), to consider whether appellant had 'no significant history of prior criminal conviction involving the use of violence against another person.'

***Rogers II*, Final Brief of Appellant at 1**. The Final Brief of Respondent was also filed on June 17, 1998. Mr. Savitz, from the South Carolina Office of Appellate Defense, again represented Applicant on direct appeal.

The South Carolina Supreme Court heard oral arguments on October 21, 1998, and it filed a decision affirming Applicant's death sentence on December 6, 1999. A timely Petition for Rehearing was filed. On January 24, 2000, the State Supreme Court issued an unpublished Order denying the rehearing petition but substituting a re-filed Opinion for the original decision. *State v. Rogers*, 338 S.C. 435, 527 S.E.2d 101 (2000) (*Rogers II*). The Court also set an execution date for Applicant. Mr. Savitz then filed a Motion for Stay of Execution so that Mr. Rogers could pursue Post-Conviction Relief remedies. Respondent did not oppose the request, and the Supreme Court granted a stay

pursuant to *In Re: Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), in its March 9, 2000, Order.

In the same Order, the Supreme Court appointed the undersigned to preside over this case and granted this Court exclusive jurisdiction over it. The Supreme Court's Order also directed this Court to hold a hearing to determine whether Mr. Rogers desired to pursue an Application for Post-Conviction Relief and whether he wished to have counsel appointed. In accordance with *In Re: Stays of Execution*, the South Carolina Supreme Court's March 9, 2000, Order and S.C. Code Ann. § 17-27-160 (Supp. 1999), this Court convened a hearing at the Charleston County Courthouse.

At the conclusion of this hearing, the Court indicated it would appoint Jeffrey P. Bloom, Esquire, and Diana L. Holt, Esquire, to represent Applicant. On April 11, 2000, the Court signed an Order appointing Mr. Bloom and Ms. Holt. Applicant thereafter timely filed his PCR Application in accordance with *In Re: Stays*.

Applicant raised the following ground for relief in his June 12, 2000 Application:

> 9. (a) Applicant was denied the effective assistance of counsel at the guilt phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.
>
> Applicant's trial counsel failed to conduct an adequate and independent investigation of applicant's case in order to develop and present evidence to create a reasonable doubt as to applicant's guilt or to effectively cross-examine state's witnesses.
>
> 9. (b) Applicant was denied the effective assistance of counsel at the sentencing phase of his trial due to counsel's deficient performance in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.

> Defense counsel failed to thoroughly investigate and present relevant evidence in mitigation of punishment during applicant's resentencing trial although such evidence was available. Counsel failed to adequately prepare for the sentencing re-trial and failed to prepare and present adequate defenses to the aggravating circumstances presented by the State, and failed to adequately cross-examine state's witnesses.

The Respondents' Return was filed on July 12, 2000. Applicant submitted an Amended Application for Post Conviction Relief on August 27, 2004, in which he alleged the following grounds for relief:

> 9(A) Applicant was denied the right to effective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that trial counsel
> (i) failed adequately to advise the Applicant regarding the attempted but failed guilty plea to murder, which, if the Applicant had been properly and effectively advised, would have avoided a death sentence;
> (ii) failed to conduct adequate or any voir dire examination of several potential jurors, some of whom sat as jurors;
> (iii) failed to conduct voir dire examination concerning possible race of victim and race of the Applicant;
> (iv) failed to object to the improper removal of a potential juror for cause;
> (v) failed to object to removal of a selected and seated African-American juror for hardship when a white selected and seated juror with an identical situation was not excused from service;
> (vi) failed properly or adequately to investigate and prepare the guilt-innocence phase of the trial;
> (vii) failed to seek expert assistance regarding a material medical condition of Applicant,
> (viii) failed effectively to confront and rebut State's witnesses and evidence;
> (ix) failed to present readily available and favorable defense witnesses and evidence;
> (x) failed to object to introduction of actual Department of Corrections incident report;
> (xi) failed to object to improper closing arguments by the State; failed to request jury instructions to which the applicant was entitled and,

(xii) the cumulative impact of these errors and the resulting prejudice.
Applicant was prejudiced by trial counsels' failures. Trial counsel did not investigate and present facts and circumstances which would have supported the defense at the trial phase.

9(B) Applicant was denied the right to effective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that during the sentencing phase of applicant's trial, trial counsel
(i) failed adequately to advise Applicant in accordance with *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), prior to and during the aborted guilty plea;
(ii) failed to conduct adequate or any voir dire examination of several potential jurors, some of whom sat as jurors;
(iii) failed to conduct voir dire examination concerning possible race of victim and race of the Applicant;
(iv) failed to object to the improper removal of a potential juror for cause;
(v) failed to object to removal of a selected and seated African-American juror for hardship when a white selected and seated juror with an identical situation was not excused from service;
(vi) failed to present available mitigating evidence at the sentencing phase of Applicant's trial;
(vii) failed to seek expert assistance regarding a material medical condition of Applicant,
(viii) failed effectively to confront and rebut State's witnesses and evidence;
(ix) failed to present readily available and favorable defense witnesses and evidence;
(x) failed to object to introduction of actual Department of Corrections incident report;
(xi) failed to object to improper closing arguments by the State;
(xii) failed to request jury instructions to which the applicant was entitled; and,
(xiii) the cumulative impact of these errors.
Trial counsel failed to present mitigating evidence at sentencing phase. Trial counsel's failures were unreasonable. Counsel's conduct was prejudicial to Applicant.

9(C) Applicant was denied the right to effective assistance of counsel, and the due process of law, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the

U.S. Constitution in that the trial court lacked jurisdiction as to the indictment(s) for criminal sexual conduct with a minor, and as such, the convictions for said offense(s) were inadmissible and Applicant's death sentence must be vacated. Additionally, trial counsel was ineffective for failing to object to lack of jurisdiction as to the indictments for criminal sexual conduct with a minor; and, counsel was ineffective for failing to withdraw the plea to such offences.

9(D) Appellate counsel was ineffective for failing to raise and argue that reversal of the conviction was required because (i) trial court improperly admitted a highly prejudicial and wholly unreliable hearsay statement during the guilt-or-innocence phase of applicant's trial, the admission of which trial counsel preserved for review; and, (ii) Applicant's sentence should be reversed because the trial court erred in striking a qualified juror for cause all thereby depriving Applicant or rights guaranteed him by the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and South Carolina law.

9(E) Applicant was deprived of a fair trial and the interest of justice requires his conviction be vacated and he be granted a new trial because a material witness committed perjury when the witness testified he had no prior knowledge of or experience with Applicant. The witness' false testimony, when it is true that the witness both, in fact, knew Applicant and held a grudge against him, all in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and South Carolina law, which resulted in a miscarriage of justice. Far from being an unbiased and uninvolved eyewitness, Mr. Riley concealed his bias. Further, the state failed to disclose the fact that Mr. Riley was also a long-time employee of the victim's uncle, in violation of *Brady v. Maryland*, 373 US 83 (1963). *Brady* entitles Applicant to this information because it would have further exposed the witness' bias against Applicant. In the alternative, to the extent trial counsel failed to discover this close employer/employee relationship, Applicant was deprived of the effective assistance of counsel required by the Sixth, Eighth, and Fourteenth Amendments and South Carolina law. This false testimony was highly prejudicial to Applicant and requires a new trial for Applicant. The state's failure to disclose the impeachment evidence requires a new trial because Mr. Riley's testimony was highly material. In the alternative, trial counsel's

failure to learn this information about Mr. Riley was unreasonable and it prejudiced Applicant at both phases of the trial.

Applicant submitted a Second Amended Application for Post Conviction Relief on March 30, 2005, in which he alleged the following grounds for relief:

9(A) Applicant was denied the right to effective assistance of counsel at the guilt or innocence phase of his trial in violation of the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that trial counsel
(i) failed adequately to advise the Applicant regarding the attempted but failed guilty plea to murder, which, if the Applicant had been properly and effectively advised, would have avoided a death sentence;
(ii) failed to conduct adequate or any voir dire examination of several potential jurors, some of whom sat as jurors;
(iii) failed to conduct voir dire examination concerning possible race of victim and race of the Applicant;
(iv) failed properly or adequately to investigate and prepare the guilt-innocence phase of the trial;
(v) failed to seek expert assistance regarding a material medical condition of Applicant;
(vi) failed effectively to confront and rebut the State's witness and evidence;
(vii) failed to present readily available and favorable defense witnesses and evidence;
(viii) failed to object to introduction of actual Department of Corrections incident report;
(ix) failed to request jury instructions to which the applicant was entitled;
(x) failed to review critical evidence in the case which the state made available to trial counsel; and
(xi) the cumulative impact of these errors and the resulting prejudice.
Applicant was prejudiced by trial counsels' failures. Trial counsel did not investigate and present facts and circumstances which would have supported the defense at the trial phase.

9(B) Applicant was denied the right to effective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that during the sentencing phase of Applicant's 1996 trial, trial counsel

(i) failed adequately to advise Applicant in accordance with *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), prior to and during the aborted guilty plea;
(ii) failed to conduct adequate or any voir dire examination of several potential jurors, some of whom sat as jurors;
(iii) failed to conduct voir dire examination concerning possible race of victim and race of the Applicant;
(iv) failed to object to the improper removal of a potential juror for cause;
(v) failed to object to removal of a selected and seated African-American juror for hardship when a white selected and seated juror with an identical situation was not excused from service;
(vi) failed to present available mitigating evidence at the sentencing phase of Applicant's trial;
(vii) failed to seek expert assistance regarding a material medical condition of Applicant,
(viii) failed effectively to confront and rebut State's witnesses and evidence;
(ix) failed to present readily available and favorable defense witnesses and evidence;
(x) failed to object to introduction of actual Department of Corrections incident report;
(xi) failed to object to improper closing arguments by the State;
(xii) failed to review critical evidence in the case which the state made available to trial counsel; and
(xiii) the cumulative impact of these errors.
Trial counsel failed to present mitigating evidence at sentencing phase. Trial counsel's failures were unreasonable. Counsel's conduct was prejudicial to Applicant.

9(C) Applicant was denied the right to effective assistance of counsel, and the due process of law, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that the trial court lacked jurisdiction as to the indictment(s) for criminal sexual conduct with a minor, and as such, the convictions for said offense(s) were inadmissible and Applicant's death sentence must be vacated. Additionally, trial counsel was ineffective for failing to object to lack of jurisdiction as to the indictments for criminal sexual conduct with a minor; and, counsel was ineffective for failing to withdraw the plea to such offences

9(D) Appellate counsel was ineffective for failing to raise and argue that reversal of the conviction was required because

(i) trial court improperly admitted a highly prejudicial and wholly unreliable hearsay statement during the guilt-or-innocence phase of applicant's trial, the admission of which trial counsel preserved for review; and, (ii) Applicant's sentence should be reversed because the trial court erred in striking a qualified juror for cause all thereby depriving Applicant or rights guaranteed him by the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and South Carolina law.

9(E) Applicant was deprived of a fair trial and the interest of justice requires his conviction be vacated and he be granted a new trial because a material witness committed perjury when the witness testified he had no prior knowledge of or experience with Applicant and two other witnesses either downplayed the amount of beer present in their vehicle and the amount of beer consumed by them. The witnesses' false testimony deprived Applicant and the jury of important facts that would impeach the witnesses' testimony, when it is true that the witness both, in fact, knew Applicant and held a grudge against him, and the other two witnesses had access to and did consume and possess very large amounts of beer, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and South Carolina law, and which resulted in a miscarriage of justice. Far from being an unbiased and uninvolved eyewitness, Mr. Riley concealed his bias and Mr. B[redacted] and Mr. Carver lied about the amount of beer they possessed and consumed. Further, the state failed to disclose the fact that Mr. Riley was also a long-time employee of the victim's uncle, in violation of *Brady v. Maryland*, 373 US 83 (1963). *Brady* entitles Applicant to this information because it would have further exposed the witness' bias against Applicant. In the alternative, to the extent trial counsel failed to discover this close employer/employee relationship, Applicant was deprived of the effective assistance of counsel required by the Sixth, Eighth, and Fourteenth Amendments and South Carolina law. ... This false testimony was highly prejudicial to Applicant and requires a new trial for Applicant. Further, the state's failure to disclose the impeachment evidence requires a new trial because the testimony of Mr. Riley, Mr. B[redacted] and, Mr. Carver was highly material. In the alternative, trial counsel's failure to learn this information about Mr. Riley was unreasonable and it prejudiced Applicant at both phases of the trial. As

noted in Ground F, *infra*, James Carver and Michael B[redacted] both testified falsely concerning the amount of beer they possessed and consumed. To the extent the State failed to disclose the videotaped film and the photograph depicting numerous empty or partially empty multi-pack beer containers prior to the 1994 and 1996 trials, the State deprived Applicant of a fair trial and to impeachment and exculpatory evidence guaranteed him by the Fifth, Sixth, Eighth and Fourteenth Amendments and South Carolina law.

9(F) Applicant was denied of his right to a fair trial in both phases of his capital murder trial and resentencing, a right guaranteed by both the Fourteenth Amendment and South Carolina law, because the State failed to correct false testimony from one of its primary witnesses, James Carver. The state had possession of photographic and videotape film evidence revealing that James Carver's testimony was patently false regarding the absence of packages of beer in the vehicle drove by the victim's father. The videotaped film of the crime scene was disclosed to the Applicant subsequent to the December 21, 2004, hearing date; ... The possession of beer, the amount of beer possessed, and the amount of beer consumed by the victim's father was in dispute and was an issue of great importance to the Applicant's case and the jury's decision-making process. The Solicitor was aware of the film footage revealing one or more opened and partially consumed beer cartons in the back portion of B[redacted]s truck. ... The Solicitor was aware, according to his sworn testimony during the first week of the evidentiary hearing in this matter, that defense counsel did not view the videotape of the crime scene. The Solicitor was aware as well of the photograph of the empty or almost empty beer carton in the front of Mr. B[redacted]'s truck and on the driver's side floorboard, as the only copy of that photograph none to be in existence was obtained from the Solicitor's file ... The Solicitor never corrected the false testimony and the jury did not see either the photograph of the beer in the front of the truck on the floorboard of it or the videotaped film of the crime scene including footage of the beer in the back of the truck, evidence that belies witnesses Carver and Michael B[redacted]s misrepresentation about how much beer they possessed or consumed.

STATEMENT OF FACTS

The direct and circumstantial evidence presented at the 1994 trial, viewed in the light most favorable to the State, is as follows. In November, 1992, Mr. Mike B[redacted] lived in Summerville, South Carolina, with his wife and his nine-year-old daughter, Stephanie. On the week of November 25, 1992, the B[redacted] were staying on the houseboat at Santee Resort, with Mrs. B[redacted]'s parents. Because school was in session, Mr. B[redacted] drove Stephanie back to Summerville for school each weekday morning. He returned in the afternoons, and took her back to Santee Resort. On Wednesday, November 25, 1992, he drove to Summerville to pick her up in the mid-afternoon. She came home from school around 3:30 p.m., and they left several minutes later. **1994 R. p. 714-17; 742–43.**[1]

They first stopped at a grocery store. Mr. B[redacted] bought some food for Stephanie, and he purchased a twelve-pack of beer for himself. He drank one of these beers around 4:00 p.m. Mr. B[redacted] had also asked his friend, Jimmy Carver, to go fishing and squirrel hunting with him at the Santee Resort. He and Stephanie left the grocery store and went to the logging company, where Mr. Carver lived and worked. However, Mr. Carver was not there. When he finally returned, he had a flat tire. While they waited for him to change the flat tire, Mr. B[redacted] drank one or two more beers. However, he was not intoxicated, and he was able to drive without any difficulty. **1994 R. p. 717–20; 740; 743–44; 928-34; 950.**

[1] The Record on Appeal from the 1994 trial is designated as "1994 R.," while the 1996 resentencing hearing is designated "1996 R." The designation "PCR Tr." refers to the hearing held in 2004, and the designation "2005 PCR Tr." refers to the August 23, 2005 hearing.

Before they left, Stephanie put Mr. Carver's 410 shotgun behind the seat in the truck. This gun was not loaded. Mr. Carver also brought a 9mm. pistol, which was underneath some clothes in the clothes basket.[2] They put the basket in the bed of the truck. They left Mr. Carver's residence around 5:55 p.m. **1994 R. p. 717-20; 740; 743-44; 928-34; 950.**

Stephanie was hungry. So, they stopped to get her a sandwich at Spell's store, on Pigeon Bay Road in Summerville. It was shortly after 6:00 p.m. Mr. B[redacted] parked his truck parallel to the store and near a pay telephone. He and Stephanie went inside to get her a sandwich. However, Mr. Carver stayed in the truck. On his way into the store, Mr. B[redacted] saw Mr. Anthony Riley, another friend, talking on the telephone.[3] **1994 R. p. 720-30; 744-45; 791-97.**

When Mr. B[redacted] came out of the store, he spoke to Mr. Riley for several minutes. Then, he went back inside to check on his daughter. He bought another beer but never got a change to drink it. After Stephanie got her sandwich, they walked out of the store. Stephanie got into the truck. Mr. B[redacted] wanted to finish his conversation with Mr. Riley. Therefore, he walked over to the corner of Pigeon Bay Road and spoke with his friend. Unfortunately, this decision soon proved to be fatal for his daughter. **1994 R. p. 720-30; 744-45; 934-39.**

As Mr. B[redacted] and Mr. Riley were talking, Applicant,[4] assault victim (assault victim) and Daxton Patterson (Patterson) walked up behind them from Pigeon Bay

[2] Mr. Carver took this weapon in case he needed it for deer hunting.
[3] While Mr. B[redacted] and Mr. Carver are white, Mr. Riley is black.
[4] Applicant and assault victim are black. Patterson is white. Also, at the time of the incident, Applicant was not as clean cut and well groomed as he was at trial. Rather, he had long braided hair or "dreadlocks," similar to those worn by Rastafarian inmates who led a

Road. (They had come from the direction of Mr. Riley's house).[5] Neither Mr. B[redacted] nor Mr. Carver had ever seen these people before. Mr. Riley had seen Applicant, but not Patterson or [assault victim]. According to Mr. Riley, Applicant asked Patterson for a quarter. He then told Patterson, "Stand right there and listen to them, and if they talk about us I'll take care of the mother fuckers."[6] **1994 R. p. 728-32; 734; 745-48; 754-55; 764; 798-801; 939-41; 958.**

Then, Applicant walked over to the telephone, which was approximately twenty feet or so away from Mr. B[redacted] and Mr. Riley. While Applicant talked on the phone, Mr. B[redacted] and Mr. Riley continued their conversation. However, Patterson, soon began pacing back and forth between them and the telephone booth. Also, even though no one had said or done anything to Patterson, he did his best to provoke both Mr. B[redacted] and Mr. Riley into a fight. He told Mr. B[redacted] "Come on you white son-of-a-bitch. ...Come on so I can beat your ass." **1994 R. p. 728-32; 734; 745-48; 754-55; 764; 801-02; 939-41; 958.**

Mr. B[redacted] and Mr. Riley ignored Patterson's taunts. When Patterson flipped a lit cigarette on Mr. Riley's shoe, Mr. Riley simply left the store and walked back home. Mr. B[redacted] did not want any trouble either, so he decided to leave. He walked back over to his truck and got into it; but Patterson would not let him leave. Every time he tried to close the door, Patterson pulled on it and would not let him close it. Patterson also kept trying to fight him. At some point, Mr. B[redacted] got out of the truck and told Patterson

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prison riot at Broad River Correctional Institute on April 17, 1995. *See* "Inmates heard; hostages freed," The State, A-1, April 18, 1995.

[5] This portion of Pigeon Bay Road dead ends a short distance away from Mr. Riley's home.

[6] Mr. B[redacted] recalled either Applicant of Patterson saying, "Don't fuck with them crack-head-mother fuckers ..."

they did not want any trouble. Still, Patterson would not let him close the door; and Patterson attempted to goad him into a fight and obstructed his efforts to close the door. **1994 R. p. 731-33; 748-49; 754-56; 758-60; 764-65; 801-03; 818-19; 941-44; 953-55; 958-59.**

After Mr. Riley left, Mr. B[redacted] and Patterson struggled over the door for several minutes. Applicant told the person to whom he had been talking, "Hold on. Let me get this fellow." Then, he dropped the phone and walked over to the truck. He reached into his jacket pocket and pulled out a .380 caliber semi-automatic pistol. He pointed this gun at Mr. B[redacted]'s forehead and said, "I'll kill you." Neither Mr. B[redacted] nor Mr. Carver had done anything to provoke or threaten Applicant, Patterson or [assault victim]. To the contrary, Mr. B[redacted] had gotten out of the truck at one point and reassured Applicant that he was not looking for trouble. As soon as Applicant pointed the gun at Mr. B[redacted] Stephanie began crying very hard. When she made eye contact with Applicant, he backed up, lowered the pistol from her father's forehead, and shot once at the back (driver's side) left hubcap of the pickup truck. He also spit on Mr. B[redacted] **1994 R. p. 733-35; 748-50; 760; 763; 943-45; 955-56; 960.**

When Mr. B[redacted] was finally able to close his door, he immediately cranked up his truck and attempted to leave the parking lot. As he was in the middle of a "wide swing" to pull out onto Richardson Avenue,[7] Applicant pointed the gun at the truck and fired a second shot. This bullet went through the rear window of the cab and struck Stephanie in the back of the head. **1994 R. p. 734-40; 750-53; 754-55; 761; 945-50; 953-57; 960.**

[7] Both Mr. Carver and Mr. B[redacted] testified that the truck was headed forward. Therefore, Applicant, Patterson and [assault victim] could not have been hit by it.

As soon as Mr. B[redacted] realized his daughter had been shot, he pulled back around and parked in front of the store. When he got out of the truck, he yelled at Applicant and Patterson, "You just shot my daughter ..." However, they briefly stood there and laughed at him. Then, they took off running. Mr. B[redacted] immediately went into the store and asked for some to call for help. **1994 R. p. 734-40; 750-55; 761; 945-50; 953-57; 960.**

Meanwhile, Mr. Carver went over to pay the telephone and called the operator. He asked the operator to send both the Sheriff's Department and an ambulance to the scene. Both Mr. B[redacted] and Mr. Carver denied pulling a weapon on Applicant, Patterson, or [assault victim]. They also denied doing anything else that could have provoked Patterson's behavior or Appellant's shooting of Stephanie. **1994 R. p. 734-40; 750-55; 761; 945-50; 953-57; 960.**

As noted, Mr. Riley left Spell's store before the shooting occurred. He ran all of the way home because Applicant and Patterson were "looking for trouble," and he did not want to be alone with them on a dark road. However, he heard a gunshot before he reached his house. He heard a second shot as soon as he reached his house. Afterwards, he walked inside momentarily. Then, he went back out onto the porch and smoked a cigarette. As he was standing outside, he saw two men run by his house. He could not identify either of these men, but testified that they were coming from the direction of Spell's Grocery Store, and he had not passed anyone on the way home from the store. He heard the first man ask, "Did you get the mother fucker?" The second man said, "Yeah, I got the mother fucker." Roughly a minute later, Mr. Riley saw a girl running away from the direction of Spell's as she cut across his property to get to Pigeon Bay Rd.. **1994 R. pp. 803-05; p. 813-15.**

EMS personnel arrived at the scene shortly after the shooting, and Stephanie was transported to Trident Hospital, for treatment of her head wound. However, she never regained consciousness, and she died the following day as a result of this wound. **1994 R. p. 854-59.**

assault victim[8] is Applicant's seventeen year old girlfriend, and he is the father of her child. assault victim spent the afternoon of November 25, 1992, with Applicant and Patterson, who were working on an automobile at a house on Pigeon Bay Road. All three were drinking beer and some "white liquor" that Patterson had brought with him. assault victim was not very intoxicated, but both Patterson and Applicant drank "[q]uite a bit ..." At some point, they walked up Pigeon Bay Road and went to Spell's Grocery Store. Applicant carried a .380 caliber semi-automatic pistol with him, which she had seen in Applicant's possession earlier that day. **1994 R. p. 822-28.**

When they reached the store, Applicant walked over to the telephone and made a call. However, Patterson soon began arguing with two white men who were present.[9] The confrontation was not violent, and assault victim could not hear what was being said. Neither of these men was fighting with Patterson, nor had they done anything else to make him mad. Yet, at some point, he spit on one of them. Applicant then turned around, dropped the telephone and began arguing with the men as well. When he did so, assault victim went over to the phone and started talking to the person on the other end of the conversation. **1994 R. p. 829-32; 835-39.**

[8] The State originally filed a Juvenile Petition in the Family Court, charging assault victim with murder, as a result of the November 25, 1992 incident. Her case was later waived up to the Court of General Sessions. However, the State agreed to dismiss the charges against her if she testified truthfully, **1994 R. pp. 834-35**, and the charges were later dismissed. *See* **1994 R. p. 879.**

[9] assault victim claimed that she did not see Patterson arguing with a black man.

As she was talking on the phone, she heard a gunshot. She turned around and saw Applicant pointing the gun at the bottom of the truck. She then turned back around and resumed her conversation. A "couple of minutes" later, she heard a second gunshot and turned around again. The truck was in the process of leaving the store. Applicant was standing in the back of the truck, with the gun in his hand. Applicant and Patterson immediately ran away from the scene. The other two men were yelling. [assault victim] got scared because she saw blood. Therefore, she also ran away from the store. Neither of the two men had threatened Applicant, her or Patterson at any time. Nor had they done anything to provoke Applicant or Patterson. **1994 R. p. 833-34; 839-41.**

Several other people who were present at Spell's store when the shooting occurred also testified. Mr. Isaiah Jennings walked up to the store shortly before closing time. He saw a white man outside of the store, who came up to him and attempted to pick a fight. However, Mr. Jennings walked into the store. His cousin, Herthenia Lincoln, and Mr. James Robinson (the store's clerk) were also in the store. Several minutes later, all three witnesses heard two gunshots. After the second shot, Mr. B[redacted] ran into the store and asked the owner to call the police because someone had shot his daughter in the head. **1994 R. p. 842-53.**

Detective Earl V. Asbell was a Crime Scene Technician employed by the Dorchester County Sheriff's Department. He arrived at Spell's store around 7:00 p.m. on November 25. He then photographed the scene and searched for evidence. He saw where a bullet had entered through the rear window of the truck's cab. This bullet passed through the cab and exited through the front windshield. *See* State's Exs. 1-7. Also, he

photographed an area of the back, left (driver's side) tire of the truck, where the paint had been knocked off of the vehicle. *See* State's Ex. 10. **1994 R. p. 859-70; 881; 884-89.**

Detective Asbell found a spent .380 caliber cartridge (State's Ex. 13) on the ground, underneath the front of the truck. He found another spent .380 caliber cartridge (State's Ex. 13) on the ground to the left of the truck. Subsequent expert analysis by SLED Agent David Collins, a firearms examiner, showed that the same weapon had fired both cartridges. Agent Collins further opined that the defect to the left rear wheel of the truck was consistent with having been caused by a bullet. **1994 R. p. 859-70; 881; 884-89.**

In addition to the spent cartridges, Detective Asbell found a very small piece of lead on the far left window of the store front, and a piece of a copper bullet "jacket" on the sidewalk behind a garbage can. See State's Exs. 14-A and 14-B. However, these items were of no evidentiary value. Detective Asbell also measure the parking lot at Spell's store. His measurements corroborated eyewitness testimony that the parking lot was a closely-confined area. **1994 R. p. 870-89.**

Following the murder, Applicant fled the State of South Carolina. On November 29, 1992, he showed up at the home of Ms. Stephanie Simmons, a student at Tuskegee University. Applicant told Ms. Simmons that he needed a place to stay but did not explain why he was in Alabama. Although Ms. Simmons was preparing to go to Montgomery with her friends, she allowed him to use her telephone. Later that week, she saw Applicant sitting down on the steps of her apartment complex. **1994 R. p. 894-98.**

Several days after the murder, Detective David Shankle, of the Dorchester County Sheriff's Department, obtained an arrest warrant charging Applicant with Stephanie's

murder. He faxed a copy of this arrest warrant to Detective Rodney Douglas, of the Tuskegee Police Department. Detective Douglas then obtained a fugitive warrant for Applicant's arrest. Based upon information that Applicant might be on the campus of Tuskegee University, on December 2, Detective Rogers and several other officers[10] went to the apartment of a student named Elgin Green. They knocked on the door and rang the doorbell, but no one answered. They stationed themselves around the apartment until on the officers obtained a master key to it. Then they entered the apartment. Although each of the officers identified himself, no one responded. The officers subsequently found Applicant hiding underneath a sofa. **1994 R. p. 892-93; 906-13; 916; 919-20.**

After the officers arrested Applicant, Detective Douglas read Applicant's *Miranda* rights[11] to him and transported him to the county jail. Applicant was again advised of his rights. This time, he signed a written waiver thereof. See State's Ex. 19. Following this waiver, Applicant freely and voluntarily gave a statement. In this self-serving attempt to limit his culpability,[12] Applicant claimed that he thought the man in the pickup (Mr. B[redacted] was reaching behind the seat for a weapon. Therefore, he allegedly fired a single shot into the air to scare the man. Several days later, Detective Shankle went to Tuskegee and transported Applicant back to South Carolina. **1994 R. p. 893; 908-13; 915-23;** State's Exs. 17-18.

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[10] Chief McLaughlin and Lieutenant Lester Patrick of the Tuskegee Police Department, as well as an agent from the Alabama Bureau of Investigations accompanied him.

[11] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[12] Applicant claimed that he overheard the truck driver (Mr. B[redacted]) making racist remarks. However, all of the eyewitnesses – including his girlfriend – testified that B[redacted] had not done anything to provoke either Patterson or Applicant. More importantly, Applicant's claim would not seem to be credible. The State submits it is extremely unlikely that Mr. B[redacted] would direct racist remarks towards Patterson, who is white, in front of his own friend (Mr. Riley, who is black.)

Dr. Clay A. Nichols is a forensic pathologist employed by the Medical University of South Carolina. On November 27, 1992, he performed an autopsy on Stephanie B[redacted]'s body. The cause of death was cerebral laceration and skull fracture, due to a distant gunshot wound[13] to the head. The bullet had entered the left back portion of Stephanie's head, approximately two inches from the top of her head and roughly one inch to the left of midline. It had passed through her cerebral hemisphere (which controls a person's motor and thought functions), and it had exited approximately three inches from the top of her head and 1.5 inches to the left of midline. Thus, the bullet had followed a slightly downward trajectory. Dr. Nichols found some brain tissue protruding from the exit wound. This indicated swelling and inflammation, which was a sign that Stephanie had survived for some time after the injury. Dr. Nichols opined that she had died approximately twenty-four hours after the injury. **1994 R. p. 771-78;** State's Ex. 4.

GROUND 9(A)(1)

Applicant's first allegation is that trial counsel was ineffective for failing to adequately advise their client concerning his ultimately aborted guilty plea to murder, **1994 R. pp. 2304-30**. He further contends that counsel were ineffective for failing to make a motion to withdraw his previous January 25 and 27, 1994 guilty pleas to criminal sexual conduct (CSC) with a minor in the second degree (Applicant's Ex. 2) after he unilaterally backed out of his plea to murder. The Court disagrees and finds that he has failed to prove either deficient performance or resulting prejudice.

Mark Leiendecker, Esquire, one of his attorneys in both the 1994 trial and the 1996 resentencing, testified that he became one of the Dorchester County contract Public

[13] This shot was fired at least several inches away from Stephanie, but it could have been fired at the maximum firing range of the weapon.

Defenders in December 1993. All of the files of the previous Public Defender, Charles Freeley, Esquire, were transferred to him that some months, including Applicant's. There was already a notation in the file that William Runyon, Esquire, had been appointed as lead counsel. **PCR Tr. pp. 89-93; 96; 171-72.**[14]

With respect to the current allegation, Mr. Leiendecker testified that his initial discussions with Mr. Runyon in January 1994 revealed that Mr. Runyon was attempting to negotiate a guilty plea in the case. Mr. Leiendecker "didn't have any role in that" but he was kept informed by co-counsel; and he did not object to the proposed strategy. **PCR Tr. pp. 700-01.** At the time of the murder plea, "there was no conviction which carried life without the possibility of parole in the [S]tate without someone having" prior serious felony convictions. Applicant did not have any prior violent convictions before the plea negotiations began, which was the reason behind the two guilty pleas to CSC with a minor in the second degree. **PCR Tr. pp. 101-03; 180.**

Mr., Runyon "had worked out a deal," whereby Applicant would enter guilty pleas to the two CSC offenses; and, on a later date, he would plead guilty to murder and receive a sentence of life without parole. The plea agreement was fully explained to Applicant, including the requirement that he had to plead guilty to murder and he was in apparent agreement with this strategy. **PCR Tr. pp. 103-08; 172; 180-81.**

However, Mr. Leiendecker added that:

> From the time I began my involvement until the day we finished the second trial or retrial of the penalty phase, Timothy never had any problem admitting his responsibility or that he fired the gun or that his reckless conduct caused the death of Miss. B[redacted] He had a

[14] Mr. Runyon was appointed on December 11, 1992. Applicant's Ex. 5. *See also* **PCR Tr. p. 815.**

> problem from the beginning with the idea of the intentionality of the act, that it was with malice aforethought as defined under the murder statutes. And he expressed those concerns from the beginning when I knew him until the final time that I spoke with him, you know, with his comments being that, yes, I did it; yes, I pulled the trigger; yes, I'm responsible, but I didn't know and I didn't mean to. I think that's the easiest way to describe it.

PCR Tr. pp. 105-06; 179. This is what caused the guilty plea to be rejected by Judge Whetstone. There was never any discussion of a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), and Mr. Leiendecker was of the opinion that Applicant would have been able to satisfy the requirements of such a plea. **PCR Tr. pp. 106-10.** However, he acknowledged that all *Alford* pleas that he had any involvement in involved conversations with both the judge and the Solicitor because a criminal defendant does not have a constitutional right to enter a guilty plea. Further, he was unaware of any basis to move to withdraw the August 1994 pleas to the charges of CSC with a minor at the time. **PCR Tr. pp. 180-82.**

Mr. Runyon stated that the facts of this 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 gong through the evidence,[15] he discovered that assault victim, Applicant's girlfriend, was underage at the time she had sex with Applicant; and he realized that this could create a possible plea to murder with an LWOP sentence if there were two prior offenses for violent crimes. 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

[15] Counsel's pre-trial investigation is discussed in connection with Applicant's allegations of ineffective assistance of counsel surrounding the trial, *infra*.

sentence. Although Solicitor Bailey was initially reluctant to offer a plea, he ultimately agreed. **PCR Tr. pp. 759-60; 775-80; 846-52; 1019-20.**[16]

Before the guilty pleas were entered to the CSC charges, counsel made Applicant aware of the potential consequence of entering those pleas and not pleading guilty to murder. "[O]ne of the biggest things" that he discussed with Applicant "was this whole concept of perhaps working out a plea bargain; which we did in fact work out." Applicant was in apparent agreement. Before the guilty plea to murder, Mr. Runyon spoke to Applicant's mother and stepfather and he got them prepared, particularly on the day they were going to do the plea. Mr. Runyon also sat down with Rogers, went over 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 Applicant "was culpable of the crime of murder" and why the guilty plea was in Applicant's best interest. Applicant "felt good about going forward and understood that it was going to save his life." Applicant never suggested that the sexual activity did not occur in Dorchester County. **PCR Tr. pp. 759-60; 775 – 803; 846-52; 1019-20.**

Further, at the suggestion of Solicitor Bailey, it was decided that the two pleas to CSC with a minor would be entered at one term of court and the murder plea would be entered at a separate term of court. The first indication that Applicant did not agree with a guilty plea to murder came during the plea, itself, when Applicant refused to go through with it. Counsel learned that Applicant's reason for changing his mind was predicated on the contrary advice he received in the jail. **PCR Tr. pp. 759-61; 775-83; 784; 846-47; 1019-20; 1025.** *See United States v. Pellerito*, 878 F.2d 1535, 1543 (1st Cir. 1989) ("If

[16] Counsel had previously worked out a similar plea in a Berkeley County case that had racial overtones. **PCR Tr. pp. 775-77.**

counsel was ineffective in any sense, it was only because the client rendered him so .... That is not the sort of "ineffectiveness" for which relief can be granted").

The record of the failed murder plea reflects that Applicant understood that he was waving his constitutional right to a death penalty jury trial on the murder charge and the various rights that adhere to such a trial. He also indicated that he wished to give up his rights and plea guilty; that he understood he was admitting that he was guilty of the crime charged and that he was admitting that he was guilty of the crime of murder. When asked what he did, however, he indicated that he "accidentally shot" the victim. **1994 R. pp. 2305-13**. Mr. Runyon attempted to clarify that Applicant meant "he did not set out" with an intent to do harm to this young child. **1994 R. p. 2313**. Yet, Applicant disagreed with the State's proffer of evidence in support of the plea, **1994 R. pp. 2313-15**, and he gave a factual scenario consistent with his statement to law enforcement, which was introduced in both trials as State's Ex. 18. He then plead not guilty to murder. **1994 R. pp. 2316-18**.

Mr. Runyon testified that there was never any discussion about a possible *Alford* plea to murder because the Solicitor, who had been reluctant to any plea bargain, "didn't want equivocation, he wanted a guilty plea," in which Applicant admitted his guilty. Also, the Solicitor wanted closure for the victim's family. Further, Applicant had remained in apparent agreement with counsel's proposed strategy until he refused to go forward at the plea because of the contrary advice he received from someone else. **PCR Tr. pp. 781-82; 1020-27.**

Mr. Runyon did not make a motion to withdraw the pleas to CSC with a minor after the aborted guilty plea to murder, although they had been part of a greater plea

agreement, because there was no factual basis for such a motion. To the contrary, the State had upheld its end of the plea bargain, but Applicant, himself, decided to change his mind about the guilty plea to murder.[17] Also, the United States Supreme Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994) was "in the pipeline" and counsel decided to use the two prior convictions for violent crimes to support his request for an LWOP jury instruction. Without such a requested instruction, the original sentence of death in this case would have been affirmed in *Rogers I, supra.* **PCR Tr. pp. 784-85; 1026-29.**[18]

Former Solicitor Bailey testified that Mr. Runyon contacted him "very, very early on shortly after" he became Solicitor and proposed a guilty plea to voluntary manslaughter. Mr. Bailey turned down the offer and served the Notice of Intent to Seek the Death Penalty. However, plea negotiations continued. Eventually, Mr. Runyon proposed that Applicant plead guilty to two charges of CSC with a minor, which were violent crimes under South Carolina law. Then, under the "three-strikes law" which was in effect, he would be parole ineligible if he pled guilty to murder. Solicitor Bailey discussed this with the family and they reluctantly agreed to the plea bargain, with the assurance that Applicant would be parole ineligible. **PCR Tr. pp. 1055; 1058.**

Because it was unclear to Solicitor Bailey whether the three pleas could be entered simultaneously, he contacted the South Carolina Department of Probation, Parole

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[17] Mr. Runyon testified 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."

[18] 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.

and Pardon Services; and they told him that if Applicant's plea to the CSC charges was entered before the murder plea, he would be parole ineligible on a sentence for murder. The agreement was then worked out with Mr. Runyon, but Applicant failed to go through with the guilty plea. After that, Mr. Bailey had no interest in a plea bargain. **PCR Tr. pp. 1055-58**. There was never any need for an *Alford* plea because the parties agreed on a guilty plea. Also, this was not something to which he had initially agreed, as the Solicitor. **PCR Tr. pp. 1057-58**.

A. Counsel's advice about the aborted plea.

Based upon the current record, the Court finds that Applicant is not entitled to relief based upon *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny. To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. *See Wiggins v. Smith,* 539 U.S. 510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objecting standard of reasonableness." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight ... and to evaluate the [challenged] conduct from counsel's perspective as the time." *Id.* at 689. *See also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automotive. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight"). Further, there is a strong presumption that the actions taken by counsel were sound trial strategy. *Strickland*, 466 U.S. at 690.

Even if an inmate establishes that counsel's performance was deficient, he is only entitled to relief if he can also demonstrate that he was prejudiced by his attorneys'

ineffectiveness, *i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. *See also Florida v. Nixon*, 543 U.S. 175 (2004); *Palacio v. State*, 511 S.E.2d 62 (S.C. 1999).

In the context of a capital sentencing proceeding, he must prove that "there is a reasonable probability that ... the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. See also *Wiggins*, 539 U.S. at 537; *Jones v. State*, 504 S.E.2d 822, 829-30 (S.C. 1998) (petitioner did not meet burden).

Applying these principles to the present case, the Court finds that Applicant's argument lacks merit. The Court finds that trial counsel's strategy to pursue an LWOP sentence in the manner that was done was quite reasonable under *Strickland.*

Although the convictions for CSC with a minor in the second degree clearly did not involve any factual violence by Applicant, at the time of his trial they were nevertheless considered defined "violent crimes" under S.C. Code Ann. § 16-1-60 (Supp. 1993) and by the Attorney General's Office.[19] As a result, these convictions would have made him ineligible for parole if he received a sentence of life imprisonment in the

[19] 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. 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, fist and second degree (Section 16-3-655). ..." 1993 Acts and Joint Resolutions No. 184, Section 8, effective January 1, 1994.

present case. See SC. Code Ann. § 24-21-640 (Supp. 1993). See also *State v. Varner*, 310 S.C. 264, 425 S.E.2d 133 (1992).

The Court further finds that counsel was not deficient in the manner in which Applicant was advised about the proposed guilty pleas, including the plea to murder. Applicant was aware of the charges against him, he understood those charges and he agreed to the strategy. He also was aware of the benefit of a plea to murder and the potential consequences if he did not go through with the plea to that offense, and he agreed to counsel's proposed strategy with the full understanding that he would have to admit his factual guilt to the crime of murder.

The Court finds that trial counsel was not deficient for failing to pursue an *Alford* plea to Applicant's murder charge. The South Carolina Supreme Court held that an *Alford* plea could "form a valid basis for imposition of the death penalty" on February 1, 1993, in *State v. Ray*, 310 S.C. 431, 434-35, 427 S.E.2d 171, 173 (1993). However, *Ray* is the only South Carolina case of which this Court is aware where an *Alford* plea was entered to capital murder.[20] More importantly, the only credible evidence before the Court is that Applicant was in complete agreement with trial counsel's proposed strategy until he reneged – for reasons satisfactory to himself but against the advice of counsel - on the plea to murder. Therefore, it was unnecessary to pursue a possible *Alford* plea. The Court will not allow Applicant to use his own conduct, after his agreement to

[20] Also, there is a paucity of cases from other jurisdictions in which a defendant was allowed to plead *nolo contendre* to capital murder and received a death sentence in state court. *See Braun v. State*, 909 P.2d 783 (Ok. Cr. App. 1995), *cert. denied*, 517 U.S. 1144 (1996); *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876, *cert. denied*, 434 U.S. 912 (1977), *reh. denied*, 434 U.S. 998 (1977) (*Holtan I*). *See also Carpenter v. State*, 929 P.2d 988 (Ok. Cr. App. 1996) (upholding *nolo contendre* plea to capital murder of defendant who was sentenced *in absentia*).

counsel's strategy and after 2/3 of the strategy had been completed, to create an ineffectiveness claim. This is not "ineffectiveness" under *Strickland*. *Pellerito*, 878 F.2d at 1543 ("If counsel was ineffective in any sense, it was only because the client rendered him so .... That is not the sort of "ineffectiveness" for which relief can be granted").

Nor is there any conceivable prejudice to Applicant since, once again, the only credible evidence is that Solicitor Bailey would not have accepted anything other than a guilty plea in which Applicant admitted his factual guilty to the crime of murder. Therefore, there is no reasonable probability of a different result but for counsel's errors under *Strickland*.

B. Counsel's failure to move to withdraw the pleas to CSC with a minor in the second degree after the aborted guilty plea to murder.

The Court further finds that counsel was not deficient in failing to move to withdraw the August 1994 guilty plea that the CSC with a minor charges after the aborted guilty plea to murder.

"The withdrawal of a guilty plea is generally within the sound discretion of the trial judge." *State v. Riddle*, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982). An abuse of discretion occurs when a trial judge's decision is unsupported by the evidence or controlled by an error of law. *State v. Lopez*, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002). A determination the guilty plea was voluntarily entered "will normally show the trial judge did not abuse his discretion." *Riddle*, 278 S.C. at 150, 292 S.E.2d at 796; *see State v. Cantrell*, 250 S.C. 376, 378, 158 S.E.2d 189, 191 (1967) ("A motion to withdraw a plea of guilty, and be allowed to enter a plea of not guilty, addresses itself to the discretion of the trial judge before whom the plea is entered, and, in the absence of a

clear abuse of discretion, this court will not interfere."); *State v. Rikard*, 371 S.C. 295, 301, 638 S.E.2d 72, 75 (Ct. App. 2006).

The Court finds that Mr. Runyon's explanation for not moving to withdraw the guilty plea is credible. There was no factual basis to file a motion to withdraw the guilty plea. A review of the guilty plea to the charges of CSC with a minor in the second degree clearly shows that they were freely and voluntarily entered by Applicant in accordance with *Boykin v. Alabama*, 395 U.S. 238 (1969).

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

On January 25, the Solicitor stated on the record that there were no plea negotiations in regard to 94-GS-18-0047, and both Mr. Runyon and Applicant agreed. Applicant stated that he had not been promised anything to get him to plead guilty to the charge and he was pleading guilty of his own free will. Applicant's Ex. 2, pp. 9-10. He stated, again, that this was what he wanted to do; and he assured the trial court that he was pleased with counsel's representation. He indicated that counsel had done everything Applicant asked him to do to prepare the case, he had enough time to discuss

the case with Mr. Runyon and he had understood his conversation with Mr. Runyon. Further, Applicant waived the three days notice request with respect to the indictment. Based upon this record, the trial court found that there was a factual basis for the guilty plea and sentenced him to seven years imprisonment. Applicant's Ex. 2, pp. 10-14.

On January 27, the trial court accepted the plea in 94-GS-18-0049. The record of that plea likewise reflects a knowing and voluntary plea within the mandates of *Boykin* and contains a virtually identical colloquy as the January 24 plea. Once again, Applicant admitted that he "knowingly had sex with a minor on a regular basis." Applicant's Ex. 2, p. 18. He also admitted having sex with her before she turned sixteen. Applicant's Ex. 2, p. 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 Applicant and Mr. Runyon agreed with the explanation. Applicant's Ex. 2, pp. 14-21. Other than the plea negotiation, there were no promises or inducements for Applicant's plea. The trial court imposed a seven year sentence. Applicant's Ex. 2, pp. 21-25.

Notwithstanding Applicant's position to the contrary, the Court finds that the pleas to the counts of CSC with a minor in the second degree were freely and voluntarily extended. The Court therefore finds that there was no factual basis to withdraw these pleas. The Court specifically rejects Applicant's contention that counsel failed to make a motion to withdraw as the result of his displeasure with Applicant's decision not to go forward with the subsequent guilty plea to murder. Rather, the Court finds the reasons stated by counsel are credible and supported under the law.

Mr. Runyon candidly admitted that he was "extremely concerned" when Applicant failed to go forward with the guilty plea to murder because "the whole deal was getting blown." **PCR Tr. p. 784**. Applicant had not discussed his decision to plead not guilty with counsel. **PCR Tr. p. 1032**. It is unnecessary for the Court to resolve whether or not it's discussion with Applicant was heated, as testified by Mr. Leiendecker (**PCR Tr. pp. 161-64**) or whether it was more civil, as described by Mr. Runyon (**PCR Tr. p. 1032**) because there is no indication from either witness that the subsequent actions of either attorney were taken because of displeasure with Applicant's decision. Rather, Mr. Runyon was simply upset that Applicant was not following what he considered to be a sound strategy that was designed to save Applicant's life.[21]

Nor is there any merit to Applicant's claim that counsel was deficient under *Strickland* and *Hill* for failing 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. It is true that the plea to these offenses were part of the negotiations on the murder charge. However, the Court finds that the South Carolina Supreme Court has ruled that a guilty plea rests upon contract principles. *State v. Thrift*,

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[21] Indeed, Mr. 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." **PCR Tr. pp. 163-64**. The Court would further note that Applicant erroneously refers to "a profanity-infused response to a question PCR counsel asked him about it." Applicant's (Proposed) Order p. 10. Although Mr. Runyon did utter the inappropriate expression, "[d]amned right I was upset with him," he apologized the moment the Court addressed his comment. **PCR Tr. p. 1032, ll. 10-14**. Moreover, this is the only inappropriate word spoken by Mr. Runyon and occurred only after hours of cross-examination. Indeed, Applicant's cross-examination of him comprises approximately one-sixth of the PCR hearings held in 2004. ***See* PCR Tr. pp. 814-1032**. Also, the inappropriate expression was meant to communicate his agreement with collateral counsel's question, as opposed to communicating anger or disgust with the length of cross-examination or the manner in which it was conducted.

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) (a court's "review of a plea agreement is 'guided by contract law, and parties to the agreement should receive the benefit of their bargain'") (*citing United States v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1997)).

Here the Court finds that both sides had received the "benefit of their bargain:" in exchange to the plea 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 this sentence was not ultimately imposed is because Applicant unilaterally changed his mind and decided that he was led to enter a plea of not guilty to the murder charge. Although this was his constitutional right, the Court finds that his decision does not render the earlier pleas involuntary or provide any basis for a motion to withdraw those pleas. *See Pellirito, supra.*

In support of his position, Applicant relies up the ABA Guidelines: Appointment and Performance of Defense Counsel in Death Penalty Cases, Guidelines 11.6.1 through 11.6.4 (plea negotiations). However, nothing in these guidelines suggests that counsel has a duty to make a motion to withdraw a guilty plea under the circumstances presented in this case. To the contrary, the Court finds that Mr. Runyon's advise concerning the plea in this case fully complied with those guidelines and that Applicant was fully aware of both the direct consequences of his guilty pleas and the adverse consequences that the CSC convictions would be considered prior convictions in a jury trial if he reneged on the guilty plea to murder. The Court refuses to allow Applicant to predicate a successful

ineffectiveness claim on his own decision to breach the plea agreement with which the State had fully complied and the trial court was willing to accept. *Id.*

Likewise, the Court finds that his reliance upon *Jordan v. State*, 294 S.C. 52, 374 S.E.2d 683 (1988) is misplaced. In *Jordan*, the prosecution reneged on the plea bargain after the defendant had pled guilty. Therefore, counsel was ineffective for not moving to withdraw the plea. *Id.* at 54-55, 374 S.E.2d at 684-85. In the present case, however, the only person in breach of the agreement was Applicant. Again, it was not deficient performance for counsel not to move to withdraw his plea. *See Com. v. Jefferson*, 777 A.2d 1104 (PA. Sup. Ct. 2001) (defendant was not prejudiced by counsel's failure to make motion to withdraw plea where only plea agreement accepted by the trial court required a particular sentence provided the defendant presented himself to court on a certain date and defendant did not do so).

The Court alternatively finds that Rogers has failed to prove any prejudice resulting from counsel's failure to make the motion. Again, there was no basis for such a motion. Nor is there any merit to Applicant's contention that he was prejudiced because the two CSC with a minor convictions resulted in him being convicted of two violent felonies for which he man never have been otherwise charged, and that these convictions provide the specter for future sentencing enforcement. Applicant's (Proposed) Order p. 14. Again, the Court finds that Applicant knowingly, intelligently, and voluntarily allowed counsel to pursue the strategy that was followed. Further, Applicant was 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 failing to withdraw these pleas after the

aborted murder plea, the original death sentence would have been affirmed on direct appeal.

In Applicant's original direct appeal, he argued that the trial judge erred in failing to give him a *Simmons* instruction "because Appellant, who had previously been convicted of two violent crimes would have been ineligible for parole under S.C. Code § 24-21-640 if sentenced to life, and the state made his future dangerousness a major issue at sentencing." *Rogers I*, Final Brief of Appellant at p. 24. The Supreme Court agreed that his prior convictions were "violent" crimes and held in pertinent part that:

> Rogers was twice convicted of violating S.C. Code Ann. § 16-3-655 (1985) (criminal sexual conduct with a minor), which crimes we find constituted violent crimes within the meaning of the original version of S.C. Code Ann. § 16-1-60, 1986 S.C. Acts 2992, when they were committed in August and September 1992. See 1991 Op.Atty.Gen. 91-46, p. 118.

Rogers I, 320 S.C. at 526 n.1, 466 S.E.2d at 363 n.1. In light of these convictions, the Court held it was error not to give a *Simmons* charge. Therefore, the Court reversed Rogers' death sentence and remanded for a new sentencing proceeding. *Id.* at 526-528, 466 S.E.2d at 363-364.

In accordance with Appellant's position at the November 20, 1996, pre-trial motions hearing (**1996 R. pp. 1058-60**), the trial judge instructed the entire *venire* that Appellant had previously been convicted of murder, and that their purpose was to recommend the appropriate punishment. Also, the only choices of punishment would be the death penalty or life without parole. **1996 R. pp. 19-20.** The trial judge likewise included a *Simmons* instruction in his jury charge. **1996 R. pp. 998-999**. Therefore, it is clear that he received an LWOP instruction in the 1996 resentencing proceeding only

because of the existence of the two CSC with a minor convictions. The Court finds that this is a benefit to Applicant that counsel strategically pursued after Rogers caused the guilty plea to murder to fall through. 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); *United States v. Adamo*, 822 F.2d 1218, 1227-28 (7th Cir. 1989) (same).

GROUNDS 9(A)(2)-(3)

Applicant next two allegations are that trial counsel: (1) failed to conduct any *voir dire* with respect to a number of jurors (Ground 9(A)(2)), and (2) failed to ask jurors if they would discriminate against Applicant because he was black and his victim was white. Ground 9(A)(3). The Court finds that Applicant has failed to prove either deficient performance or prejudice under *Strickland*.

Strickland's "objective standard of reasonableness" performance prong, and its prejudice prong, have been previously stated. Effective assistance of counsel is required during the *voir dire* process. *Brown v. Jones*, 255 F.3d 1273, 1279-80 (11th Cir.2001); *Hughes v. United States*, 258 F.3d 453, 456 (6th Cir.2001). However, the Court finds that the conducting of *voir dire* is particularly within the control of counsel and *voir dire* techniques are vastly different. Therefore, the review of counsel's performance in *voir dire* is "highly deferential;" and any *voir dire* error must be egregious and obvious. *See, e.g., Yeatts v. Angelone*, 166 F.3d 255, 265 (4th Cir. 1999) (citing *Strickland*, 466 U.S. at 689); *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir.1995) (a petitioner claiming ineffective assistance of counsel during *voir dire* must show that trial counsel's actions

were "so ill chosen that it permeates the entire trial with obvious unfairness"); *DeLong v. Thompson*, 790 F. Supp. 594, 603 (E.D. Va. 1991), *aff'd*, 985 F.2d 553 (4th Cir. 1993) (unpublished); *Beintema v. State*, 936 P.2d 1221, 1227 (Wyo. 1997); *Arner v. State*, 872 P.2d 100 (Wyo. 1994).[22] A challenged action is ineffective assistance if it cannot be considered sound trial strategy under the wide range of reasonable professional conduct. *Arnold v. Evatt*, 113 F.3d 1352 (4th Cir. 1997).

A. General Rules for *Voir Dire* in Capital Cases.

South Carolina law allows the attorney for a capital defendant to examine potential jurors. S.C. Code Ann. § 16-3-20(D) (1985). However, this subsection does not expand the scope of *voir dire* in § 14-7-1020, and the control of *voir dire* still remains

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[22] In *Arner*, which is one of the few cases addressing claims of ineffective *voir dire* in depth, the Supreme Court of Wyoming made a very persuasive argument for the standard in reviewing these *Strickland* claims:

> Voir dire and the exercise of challenging jurors is trial strategy. *Stover v. State*, 674 P.2d 566, 568 (Okla. Cr. App. 1984) (citing *Walter*, 386 F. Supp. 309). In *Jahnke v. State*, 682 P.2d 991 (Wyo.1984), while add*ressing* the process and purpose of voir dire, we quoted the United States Supreme Court:
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> > "'Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.'" *Dennis v. United States*, 339 U.S. [162] at 172 [(1950)], *quoting from United States v. Wood*, 299 U.S. 123, 145-146 (1936).
>
> *Jahnke*, 682 P.2d at 999. *Because voir dire questioning techniques are diverse, any alleged voir dire error must be egregious and obvious in order to fall below the line of competence.*

Arner, 872 P.2d at 105 (emphasis added).

within the discretion of the trial court. *State v. Hill*, 331 S.C. 94, 501 S.E.2d 122 (1998).[23]

Jurors in capital cases should be excluded if their views on capital punishment would "prevent or substantially impair" their ability to follow their oath and the trial court's instructions on the law. Jurors should be excluded for cause either if they "in no case would vote for capital punishment, regardless of [their] instructions," or if they would "automatically vote for the death penalty in every case [and] will fail in good faith to consider ... aggravating and mitigating circumstances." *Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992). *See also State v. Bennett*, 328 S.C. 251, 493 S.E.2d 845 (1997). *Voir dire* must be sufficient to allow a determination of whether a juror falls within one of the prohibited categories, but general questions about whether a juror can be fair and follow the law are insufficient. *Morgan*, 504 U.S. at 734-36.

B. No *Voir Dire* of Five Jurors.

Applicant first complains that his counsel conducted no *voir dire* with respect to five veniremen who were seated as jurors or alternate jurors: **1994 R. p. 484 (Juror Addison); 505 (Juror Hutto); 517 (Alternate Juror Norris); 604 (Juror Floyd); and 641 (Juror Berkaw).**

Mr. Leiendecker testified that his primary task for the 1994 trial was to develop information related to jury *venire* and to assist co-counsel in his preparation for jury *voir dire*. So, he focused his "attention on reviewing the already pulled *venire* and comparing it to the county and helping prepare for *voir dire*." He further testified that counsel

[23] South Carolina Code § 14-7-1020 provides that *voir dire* is permissible to explore relation to a party, interest in the cause, prior expression or forming of opinions on the case, or bias and prejudice.

receives a great deal more information about jurors in death penalty cases than in other felony trials. He began by going through the juror questionnaires and "defining people by age, ... race, ... education or occupation, where they lived in the county, examining all those kinds of things."[24] **PCR Tr. pp. 111-13.**

Mr. Leiendecker also prepared some suggested *voir dire* questions for potential jurors. These questions addressed the jurors' personal knowledge about the case; whether the jurors or members of the family had been victims of violent crimes; the types of bumper stickers they may have on their cars or magazines they may have in their house; and questions to the jurors "about firearms and experience with firearms." Additionally, he was sure that he and counsel discussed questioning jurors concerning their knowledge or contact with any magistrate's office, since the victim's father was a constable; and whether or not the jurors had possible contact with the elementary school that the victim had attended. Moreover, the State had provided him with rap sheets on the veniremen. Respondent's Exs. 1-3. However, Mr. Runyon had his own "*voir dire* strategy in mind;" and, although they discussed the issues in his questions, Mr. Runyon did not utilize the specific questions prepared by Mr. Leiendecker. Mr. Runyon "certainly made it obvious that he didn't want to go through a week-long *voir dire* and get the jury to the point that they were agitated with the process before the trial even started." As a result, most of his examinations were very brief. **PCR Tr. pp. 114-17.**

Both parties examined Mr. Runyon at length concerning his *voir dire* strategy. He testified that he had tried roughly four hundred jury trials, and fifty or sixty of these

[24] In his initial assessment, it appeared that the *venire* had a higher percentage of whites that those in the general population. Therefore, he researched the matter. He ultimately determined that the *venire* accurately reflected the percentage of those whites in Dorchester County.

were in Dorchester County. Two or three of the trials were capital cases, and the State had served notice of intent to seek the death penalty in twelve or thirteen cases. **PCR Tr. pp. 756-57; 1039-40.**

In the present case, he utilized the city directory, the bi-annual report of the city election committee[25] and other resources available to him to develop demographic information concerning the jurors. Among the available resources, Mr. Runyon had the assistance of an individual who worked across the street from his office named Steward Fludd. Mr. Fludd was able to gather demographic information about certain jurors through use of a computer.[26] This information included where jurors went to church, where their children attended school, where they lived and worked, and the voting precinct in their district. In this regard, counsel testified that his preparation for the 1994 *voir dire* and that of the 1996 *voir dire* were the same. **PCR Tr. pp. 792-93; 843-48; 923-36; 945.**

In his testimony concerning the 1996 *voir dire*, he explained the significance of knowing which school district a family resided because one of the school districts was *de facto* segregated. On the other hand, the other school district was integrated. It was his impression that those who lived in the integrated school district would probably be fairer to his client. **PCR Tr. pp. 923-33.** He explained that his goal was to get minorities, who may be less prone to impose the death penalty. Also, he was "trying to look for people who, for example, may have gone to integrated churches. In a county like Dorchester, ...

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[25] He received this because he was Chairman of the Charleston County Election Commission at the time. **PCR Tr. p. 945.**

[26] Applicant suggests throughout his Proposed Order that Mr. Runyon's responses concerning his representation were fabricated. The Court, however, rejects that assertion and would note that 1994 Record on Appeal specifically corroborates that the defense had the assistance of a "computer expert." **1994 R. pp. 524-25.**

if you have the church information, you can pretty well tell if their churches have an integrated congregation or not. You're looking at people trying to be fair." **PCR Tr. p. 794.**

When questioned about his failure to ask questions on capital punishment of some jurors, he testified that he "always" relies upon information gathered from jurors through the questioning by the trial judge and the Solicitor. He explained that some jurors might have a bias towards the Solicitor since at least half of the population voted for him in an election. More importantly, Dorchester County was "an extremely conservative community as a whole during this time, ... so you don't want to ask pointed questions to basically say are you a racist, you know, for an example." Although race had been injected into the case simply because the victim was white and the defendant was black, he did not wish to interject race anymore than it was already present in the case. He expressly did not wish to overtly interject questions concerning racial attitudes of jurors if he could avoid it because "white jurors don't want to be accused of being a racist." However, he was quite a well aware of his right to ask questions on *voir dire* about the impact of the victim of the race and the defendant upon the jurors' ability to be fair. He further explained that, during the course of *voir dire*, he and co-counsel would discuss whether or not to question certain jurors in the presence of Applicant. Finally, he indicated that he would rely upon a juror's demeanor and the manner in which they answered questions posed to them by the trial judge and the Solicitor. **PCR Tr. pp. 796-800;** *see also* **Tr. pp. 936-38; 940-43** (1996 resentencing *voir dire*).

The Court finds that Applicant has not shown either deficient performance or prejudice resulting from counsel's failure to question the four jurors or one alternate at

issue. The Court finds that counsel's strategy for *voir dire* – set forth in Mr. Runyon's credible testimony - was neither egregious nor "so ill chosen that it permeates the entire trial with obvious unfairness." *Teague*, 60 F.3d at 1172.[27]

Also, and despite Applicant's complaint about the brevity of counsel's questioning, the Court finds that counsel did question twenty-three of the thirty-six qualified jurors – including seven jurors seated on Applicant's jury and one of the alternates.[28] Applicant's complaint about the failure to examine a number of jurors about

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[27] In connection with **Grounds 9(B)(2)-(3)**, Applicant presented expert testimony from a jury consultant who downplayed the significance of a juror's demeanor during *voir dire*. However, counsel's reliance upon that demeanor is consistent with the United States Supreme Court's recognition that the evaluation of the state of mind of a juror lies "peculiarly within a trial judge's province." *See Wainwright v. Witt*, 469 U.S. 412, 428 (1985). "Deference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations. *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003). *See also State v. Casey*, 325 S.C. 447, 454, 481 S.E.2d 169, 173 (Ct.App.1997) ("The trial court must often base its decision on credibility determinations, and its rulings on discrimination are accorded great deference on appeal"); *Gavin v. State*, 473 So.2d 952, 955 (Miss. 1985) ("even if we wanted to be fact finders, our capacity for such is limited in that we have only a cold, printed record to review. The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire"). *Cf. State v. Weik*, 356 S.C. 76, 587 S.E.2d 683 (2002) (holding the court did not err in refusing to order a second competency evaluation where deference was given to the trial judge who was able to view the appellant's demeanor).

[28] **1994 R. pp. 97-100(Juror Gruber); 110-14; 123-26(Juror Smith); 136-40; 164-67(Juror Knight); 175-77; 187-89(Juror Tyson); 198-201; 222-23; 263-65; 278-80; 289-91; 341-42(Juror Rivera); 350-51; 376-77; 391-92(Juror Langenstein); 426-28; 441-42(Alternate Juror Norris); 453(Juror Kasper); 462-64; 497; 548-51 and 553-54; 577-79.** Likewise, the Court finds that this record demonstrates that counsel unsuccessfully moved to have several jurors removed for cause, including the wife of an investigator in the Ninth Circuit Solicitor's Office. **1994 R. pp. 292-307.** Counsel also unsuccessfully argued against the removal of several jurors whom the trial judge found were not qualified. Contrary to Applicant's argument, counsel did participate adequately in *voir dire*; he simply did not engage in the lengthy *voir dire* that collateral counsel asserts is necessary.

their views on capital punishment totally ignores that counsel did question eight[29] of the nine jurors he struck.

Of the jurors he struck, his cross-examination revealed that Ms. Whatley had eighteen years experience as a clinical psychologist and roughly 5% of the people she saw had committed criminal offenses; Mr. Brooks was a member of the "Fraternal Order of Police;" Mrs. Balcerzak's husband worked for the Ninth Circuit Solicitor's Office; Ms. Ahl was aware of the facts of the case from when it occurred; Mr. Garrett had been involved in two "incidents" recently, including one within the past year, and he had experience working on missile systems while in the military; Ms. King really would rather have gone home instead of serving on a jury if she had a choice; and Mr. Phillips had only lived a relatively short period of time in Dorchester County, but he had served as a military policeman for four years in England while in the United States Air Force. The remaining *venireman* struck by the defense was Ms. Muckenfuss. Although not examined by trial counsel, she testified that worked with and she was friends of the wife of potential prosecution witness James Robinson. She had also followed media accounts of the crime at the time it occurred. **1994 R. pp. 617-25.**

Further, the Court finds that the trial court's and Solicitor's *voir dire* of these jurors – together with the questions asked by the trial court in qualifying the *venire* - was sufficient for counsel to make an informed decision regarding the jurors' views on the death penalty. **1994 R. pp. 478-88 (Juror Addison); 499-509 (Juror Hutto); 510-20 (Alternate Juror Norris); 597-606 (Juror Floyd); and 637-44 (Juror Berkaw).** Nor

[29] **1994 R. pp. 151-55 (Ms. Whatley); 175-77 (Mr. Jas. Brooks); 198-201 (Ms. Balcerzak); 263-65 (Ms. Ahl); 278-80 (Mr. Garrett); 350-51 (Ms. King); 462-64 (Mr. Phillips); 497 (Ms. Je. Brooks).**

has there been ay demonstration that these *voir dire* responses were false or misleading, or that additional questioning by defense counsel would have resulted in use of a peremptory challenge or a strike for cause. *Cf. Beintema v. State*, 936 P.2d 1221, 1227 (Wyo. 1997) ("Although his attorney's questioning of the jurors on voir dire was not extensive, it, coupled with the introductions and the state's questions, was sufficient for the attorney to utilize his peremptory challenges."); *Arner v. State*, 872 P.2d at 105 ("The information elicited by the trial judge's questioning was sufficient for Arner's trial counsel to utilize his challenges....").[30]

Finally, the Court notes that Applicant received a new sentencing proceeding on direct appeal in *Rogers I, supra*. For this reason and those articulated above, the Court finds that Applicant has also not shown prejudice. *See* Ground 9(B)(1), *infra*. *See also* Morgan, 504 U.S. at 729; *Henry v. Horn*, 218 F.Supp.2d 671, 696 n. 4 (E.D. Pa. 2002) (petitioner could not demonstrate prejudice from his trial counsel's failure to question the prospective jurors about whether they would automatically sentence him to death if he were convicted of first-degree murder under *Morgan* because "any prejudice that he would be capable of demonstrating from such a violation would affect only his sentence of death, which has been vacated").

C. Failure to question jurors about racial bias. Ground 9(A)(2)

[30] The Court further finds that counsel's generalization about black jurors is not an unreasonable one without some basis in fact. *See* Kendra Meinhart, *Criminal Injustice: Continuing Racial Inequities in Death Penalty Sentencing*, 22 Sw. U. L. Rev. 1177, 1190 (1993) (in arguing the importance of ensuring that blacks are on juries in capital cases, noting that statistics show blacks are less likely to support the use of the death penalty than whites); Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 Harv. L. Rev. 456, 467 (1981) (relying on Gallup polls for proposition that whites generally favor death sentences more than blacks).

Applicant further asserts that trial counsel's failure to question prospective jurors about racial prejudice, in accordance with the United States Supreme Court's decision in *Turner v. Murray*, 476 U.S. 28 (1986), was ineffective. The Court disagrees and finds that this allegation is without merit.

First, the Court finds that the allegation cannot have any plausible merit because Applicant receive a new sentencing proceeding on direct appeal in *Rogers I, supra.* In *Turner*, the defendant was an African American who had been convicted and sentenced to death for the murder of a white victim. On appeal, he argued that the trial court had improperly denied his request to ask the *veniremen* about racial prejudices during *voir dire*. The United States Supreme Court agreed and held that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." 476 U.S. at 36-37. The Court noted that the failure to question potential jurors about racial bias created "an unacceptable risk of racial prejudice infecting the *capital sentencing proceeding*." *Id.* (emphasis in original).

However, when it recognized the right to such questioning in interracial capital cases in *Turner*, the Court also explicitly held that this error predominantly affects the sentencing phase of the trial. *See Turner*, 476 U.S. at 37. The Court listed three factors that supported this determination. The last two of those factors are "special circumstances" which are present in capital sentencing proceedings but are not present during the guilt phase of most trials. *Id.*[31] As discussed, Rogers received a new

[31] The three factors are (1) the fact that the crime charged involved interracial violence, (2) the broad discretion given the jury at the death-penalty hearing, and (3) the special seriousness of the risk of improper sentencing in a capital case. *Turner*, 476 U.S. at 37.

sentencing hearing following his appeal of the 1994 death sentence. Therefore, he cannot show any conceivable prejudice from counsel's performance and the present argument lacks merit. *See Henry*, 218 F.Supp.2d at 697-98 (concluding Pennsylvania Supreme Court's decision that habeas corpus petitioner could not establish prejudice under *Strickland* resulting from counsel's to question potential jurors about racial bias because his death sentence had been vacated was neither contrary to nor an unreasonable application of *Strickland* or *Turner*; thus, petitioner was not entitled to federal habeas corpus relief).

Alternatively, and assuming that the present allegation is viable despite the fact Applicant's death sentence was vacated in *Rogers I, supra*, the Court finds that he has failed to prove either deficient performance or prejudice under *Strickland*. As noted, counsel testified that he did not wish to further inject the issue of race into the case any more than it was already present, and he did not wish to expressly question jurors on their racial attitudes because he did not think this line of inquiry would be well received by jurors from a small, conservative and predominately white community. Also, he had other information at his disposal from which he thought he could make a reasonable assessment of the desirability of the various members of the *venire* as jurors in his client's case.

In *Turner*, the Court made clear that the decision to question prospective jurors about racial bias is best left in the hands of trial counsel. *See* 476 U.S. at 36-37; *see also Henry*, 218 F.Supp.2d at 697-98; *Spencer v. Murray*, 18 F.3d 229, 234 n. 6 (4th Cir.1994). In light of *Turner*, the Court finds that counsel's stated reasons demonstrate a

reasonable trial strategy under *Strickland*. *Cf. Spencer*, 18 F.3d at 234 n. 6 ("In light of *Turner*, we believe that Sexton's trial counsels' decision not to question prospective jurors about racial bias was binding on Sexton and, therefore, trial counsel were not constitutionally ineffective for allegedly failing to secure Sexton's consent").

Moreover, there is absolutely no prejudice in the present record. First, Applicant received a new sentencing proceeding. Second, the trial court asked the entire panel to determine whether if any of them had formed or expressed an opinion about the case, and if any of them could not be fair and impartial, either because of heir exposure to information about the case or for any reason. No *venireman* was qualified as a juror unless he or she stated that he or she could be fair and impartial. **1994 R. pp. 67-79**.

Also, and despite Applicant's complaint regarding the brevity of counsel's questioning, the Court finds that counsel did question twenty-three of the thirty-six qualified jurors – including all but one of the *veniremen* he struck, seven jurors seated on Applicant's jury and one of the alternates. *See also* Ground 9(A)(1), *supra*. Again, Applicant's complaint about the failure to examine jurors about race completely ignores that counsel did question eight of the nine jurors he struck; and his examination developed sound reasons to strike these *veniremen*. **1994 R. pp. 617-25**.

Moreover, the individual *voir dire* of the jurors who were qualified for jury selection clearly reflected that the jurors could be fair and impartial; that they were qualified under *Morgan* and *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) to serve as jurors in a capital case; and that the jurors could base their verdict solely on the evidence

presented and the law as charge by the trial court.[32] The Court finds that this inquiry and the remaining questioning ensured that Applicant received a fair and impartial trial.

Finally, the Court finds that Applicant has failed to prove that these *voir dire* responses were false or misleading, or that additional questioning by defense counsel would have resulted in use of a peremptory challenge or a strike for cause. *Cf. Beintema v. State*, 936 P.2d at 1227; *Arner v. State*, 872 P.2d at 105. *See also, e.g. Moore v. Commonwealth*, 983 S.W.2d 479 (Ky. 1998) (stating that counsel can not possibly ask every conceivable question and noting counsel did ask several thought-provoking questions). In the absence of any prejudice, the Court finds that this argument is without merit. As Mr. Runyon properly explained, "[t]here are a lot of factors that go into whether or not you decide to challenge a juror or not." **PCR Tr. p. 940**. "I've had some other capital cases where I've been very active on voir dire. ... [I]t depends upon the juror, the case, the judge, just a lot of factors ... go into it." **PCR Tr. p. 941**.

GROUNDS 9(A)(4)-(7), and (10)

Applicant further alleges that trial counsel were ineffective for failing to adequately investigate and prepare the guilt phase of the trial (**Ground 9(A)(4)**); for failing to seek expert assistance regarding a material medical condition of Applicant (**Ground 9(A)(5)**); for failing to effectively confront and rebut the State's witnesses (**Ground 9(A)(6)**); for failing to present readily available and favorable defense

[32] **1994 R. pp. 91-100 (Juror Gruber); 102-115; 116-26 (Juror Smith); 127-42; 156-67 (Juror Knight); 168-77; 179-89 (Juror Tyson); 189-203; 214-23; 256-65; 266-80; 282-92; 292-307; 321-31 (Juror Lane); 332-43 (Juror Rivera); 343-51; 352-60; 361-68; 369-78; 380-93 (Juror Langenstein); 433-42 (Alternate Juror Norris); 445-54 (Juror Kasper); 455-65; 465-77; 478-88(Juror Addison); 490-98; 499-509 (Juror Hutto); 510-20 (Alternate Juror Morris); 526-36; 538-56; 567-82; 597-606 (Juror Floyd); 607-15; 617-26; 627-35; 637-44 (Juror Berkaw).**

witnesses and evidence (**Ground 9(A)(7)**); and for failing to review "critical evidence" which the prosecution had made for inspection by the defense (**Ground 9(A)(10)**). The Court finds that he has not met his burden of proof under *Strickland* on any of these allegations for the following reasons:

A. Trial Witnesses

1. Eyewitnesses to the shooting

Other than Mr. B[redacted] Mr. Carver and Applicant, the only eyewitnesses to the shooting were assault victim and Daxton A. Patterson. Ms. assault victim was called as a prosecution witness, as discussed in the Statement of Facts. Patterson was under subpoena by the State but was not called as a witness. The Court finds that Applicant failed to prove deficient performance or any prejudice resulting from counsel's failure to interview these witnesses or present testimony consistent with the witnesses' PCR testimony.

assault victim testified in 1994 that she[33] was Applicant's girlfriend in late 1992, and that he is the father of her child. assault victim spent the afternoon of November 25, 1992, with Applicant and Patterson, who were working on an automobile at a house on Pigeon Bay Road. All three were drinking beer and some "white liquor" that Patterson had brought with him. assault victim was not very intoxicated, but both Patterson and Applicant drank "[q]uite a bit ..." At some point, they walked up Pigeon Bay Road and went to Spell's Grocery Store. Applicant carried a .380 caliber semi-automatic pistol

[33] The State originally filed a Juvenile Petition in the Family Court, charging assault victim with murder, as a result of the November 25, 1992, incident. Her case was later waived up to the Court of General Sessions. However, the State agreed to dismiss the charges against her if she testified truthfully, **1994 R. pp. 834-35**, and the charges were later dismissed. *See* **1994 R. p. 879**.

with him, which assault victim had seen in Applicant's possession earlier that day. **1994 R. p. 822-28.**

When they reached the store, Applicant walked over to the telephone and made a call. However, Patterson soon began arguing with white two men who were present for some reason unknown to assault victim.[34] The confrontation was not violent, and assault victim could not hear what was being said. Neither of the white men was fighting with Patterson. Nor had either done anything else to make him mad. Yet, at some point, he spit on one of them. Applicant then turned around, dropped the telephone and began arguing with the men as well. When he did so, assault victim went over to the phone and started talking to the person on the other end of the line. **1994 R. p. 829-32; 835-39.**

She heard a gunshot while she was talking on the phone. When she turned around, she saw Applicant pointing the gun at the bottom of the truck. She then turned back around and resumed her conversation. "[A] couple of minutes" later, she heard a second gunshot and turned around again. The truck was in the process of leaving the store; and Applicant was standing in the back of the truck, with the gun in his hand. Applicant and Patterson immediately ran away from the scene. The other two men were yelling. assault victim got scared because she saw blood. So, she also ran away from the store. Neither of the two men had threatened Applicant, her or Patterson at any time. Nor had they done anything to provoke Applicant or Patterson. **1994 R. p. 833-34; 839-41.**

Ms. assault victim's testimony at the PCR hearing, however, was quite different in several respects from her 1994 trial testimony and her statement to police (Applicant's Ex. 21). Contrary to Mr. B[redacted]'s testimony (**1994 R. p. 734**), she testified that

[34] assault victim claimed that she did not see Patterson arguing with a black man.

Applicant did not get up in the driver's side door with Mr. B[redacted]and put a gun to Mr. B[redacted]'s head; that Applicant was never anywhere near the truck; and that he did not see the victim. She likewise claimed that she did not see the victim and, from her perspective, the shooting appeared to be an accident because Applicant did not see the victim. **PCR Tr. pp. 309-12.** She further testified that Applicant did not make any comment to either of the white men in the truck when they first arrived and denied that Applicant had cussed at the men. She again said that Patterson had started the argument while Applicant was on the telephone; and that she was uncertain what caused the argument. She attempted to intervene and persuade Patterson to leave the men alone but he would not do so. Applicant then became involved in the argument. **PCR Tr. pp. 312-15.**

As she had testified in 1994, she indicated that Patterson spit on one of the white men. However, she added that Applicant never spit on either of them and she claimed that she heard the word "n----r" used by one of the men as she was standing at the phone. She indicated that this was both insulting and scary. When the white man got in the truck and started to pull away from the store, she claimed that Mr. B[redacted]and Mr. Carver "were reaching for something," and that the truck had hooks on it. She thought they were reaching for a weapon. At roughly the same time, she noticed that the brake lights were coming on and off. Applicant then fired a second shot.[35] When assault victim turned around, both Applicant and Patterson were gone. **PCR Tr. pp. 315-23.**

She again turned around when she heard one of the white men use a racial slur; and she also ran. She again testified that, from her perspective, it appeared that Applicant

[35] It is confusing from her PCR testimony (**PCR Tr. p. 322**) as to when she claims the first shot was fired.

was merely trying to scare off Mr. B[redacted] and Mr. Carver and he did not appear to be aiming at anyone. She further claimed that she did not mention use of the racial insult or other information to which she testified at the PCR hearing because she was shocked and scared. Also, she claimed that no one asked her about these matters at trial. She testified that Mr. Bailey interviewed her prior to the 1994 trial, but neither of Applicant's attorneys spoke with her. **PCR Tr. pp. 305; 307-09; 323-25; 331; 337-38.**

On cross-examination, Respondent impeached [assault victim] with her inconsistent 1994 testimony. **PCR Tr. pp. 339-40.** At trial, she had testified that the men in the truck had not threatened either Patterson or Rogers. Nevertheless, Applicant was "[s]tanding there" with the gun in his hand in the back of the truck at the time the shooting occurred. **1994 R. p. 834.** She was then cross-examined extensively by Mr. Runyon and admitted that she could not tell him what the argument was about. Also, she did not recall any mention of weapons. However, she was a little frightened because of the argument. With respect to what was said, she indicated that there was a lot of anger between everybody, but she did not remember what anyone had said. **1994 R. pp. 836-38.** Also, although she turned around each time she heard a gunshot, she did not see what led up to either shot. **1994 R. pp. 838-41.**

Patterson, who was belligerent throughout his testimony on cross-examination, testified that neither of Applicant's attorneys ever spoke with him before the 1994 trial or the 1996 resentencing; and that he would have spoken to them had they contacted him. According to Patterson, he, Applicant and [assault victim] went to Spell's Grocery Store on the night of the shooting in order to use the telephone. Upon their arrival, *he got on the phone* and, while he was talking to Applicant's brother, a man came out of the store.

This man asked him in a vulgar manner how long he was going to be on the phone and he indicated it was a payphone. The next thing he knew, Mr. Carver (whom we described as a "little short dude") jumped out of the door of the truck and onto his back. He also claimed that Mr. B[redacted] attempted to reach behind the seat of his truck and get one of two weapons which Patterson saw.[36] Patterson further testified that he saw a box of Bush Beer on the floorboard of the truck. (See Applicant's Ex. 18). **PCR Tr. pp. 222-30.**

After Mr. B[redacted] reached into the back of the truck for a weapon, "*my partner* [Applicant] ... came around the back of the truck, [and] fired two [shots] in the air." (Emphasis added). Patterson then grabbed Mr. B[redacted]. He claimed that neither he nor Applicant saw the victim. He further claimed that Mr. B[redacted] had started the conflict and he could have refuted Mr. B[redacted]'s trial testimony, set forth in the Statement of Facts, *supra*. Like [assault victim], he claimed that it appeared from his perspective that the shooting was an accident and he reiterated that neither he nor Applicant ever saw the victim before the shooting. **PCR Tr. pp. 230-38.**

On cross-examination, he admitted that he and Applicant were still good friends and would remain so "until I leave this earth or him." Also, he admitted that he signed an authorization permitting Applicant's attorneys to obtain copies of all of his records and reports (see Respondent's Ex. 4), which were otherwise confidential. **PCR Tr. pp. 239-41.** Although he admitted that counsel represented him at the time of the first trial, he denied that he did not wish to be cooperative with the defense at that time. He also denied on cross-examination that the shooting was anything other than an accident. And,

[36] He claimed he saw a 9mm. Pistol and a shotgun. **PCR Tr. pp. 228.**

he testified that Applicant was not wearing glasses at that point in time. **PCR Tr. pp. 241-48.**

Moreover, his testimony was that Applicant had watched someone work on a truck that afternoon, as opposed to [assault victim]'s testimony, both at trial and in PCR, that the person had worked on a car. *See* **PCR Tr. pp. 248-50.**[37] Patterson also did not recall Mr. Riley being present on the night of the shooting. Finally, Respondents impeached Patterson's account by noting that the inconsistency between that version of the shooting and Applicant's December 2, 1992 statement, in which he indicated that he was the one on the phone, as opposed to Patterson. **PCR Tr. pp. 251-53; 255-56.**

Robert D. Robbins, Esquire, testified that before he became Solicitor in June 1997, he had been employed for ten years with Jim Bell, Esquire, in St. George. As part of his practice, he represented Patterson on charges stemming from the killing of Stephanie B[redacted] From the very first time Mr. Robbins spoke with Patterson, Patterson indicated that he wanted "to make sure everybody understood that he did not have anything to do with shooting the little girl, and that he did not ask anyone to shoot her, and that he basically wanted everyone to know that that was not his intent that day, and he wanted me to advocate that for him."[38] **PCR Tr. pp. 731-33.**

Patterson told Mr. Robbins that he got on the telephone when he and his group were at Spell's Grocery Store, and that he eventually got into an argument with the victim's father over the use of the phone. It was Mr. Robbins' recollection that this was

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[37] The sun was going down when the incident occurred but there was lighting outside the store. **PCR Tr. p. 251.**

[38] Patterson went so far as to engage in writing letters in an effort to make sure everyone understood that he was not involved in shooting a defenseless child. He in fact fired his first attorney and Mr. Robbins' appointment came thereafter. **PCR Tr. pp. 735-37.**

strictly a verbal argument and that no weapons were involved. Also, Patterson told Mr. Robbins that Applicant "presented a weapon and fired it, and after the weapon was fired, they ran down Pigeon Bay Road." Patterson never asked Mr. Robbins to assist him in contacting either Applicant or Applicant's attorney; and he never signed a release allowing trial counsel to have access to Mr. Robbins' file and notes. Mr. Robbins did not recall whether or not trial counsel ever approached him. However, he would not have allowed trial counsel to speak to his client, unless he had some assurances from the Solicitor as to what would happen to his client if his client cooperated and gave a statement to them. Mr. Robbins did not recall what had happened to the charges against his client. **PCR Tr. pp. 733-29.**

As pertains to the allegations in this subheading as well as those pertaining to counsel's performance in the sentencing phase and the State's failure to comply with the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), former Solicitor Bailey testified that his general practice was to maintain an "open file policy" regarding the disclosure of evidence to counsel. He typically would only withhold from the defense those matters that he considered to be work product, including his personal notes. **PCR Tr. pp. 1060-69; 1071.** He would disclose the information by utilizing a cover letter to document and inventory the materials provided, unless the material was too voluminous or otherwise difficult to produce, in which case he would notify defense counsel of the material's existence and make it available for inspection. He followed this method in order to be able to prove exactly what had been provided to or otherwise disclosed to counsel. On those occasions when defense counsel did review his actual file, he would sit down with

counsel and personally hand over materials from the file. He did not recall that happening in this case. **PCR Tr. pp. 1069-80.**

Applicant's Proposed Order contains the following list of documents that he alleges were either disclosed to defense counsel or made available for defense counsel's inspection by Solicitor Bailey:

- The existence of raw television film footage of the crime scene, as previously discussed.
- Stephanie Simmons: that she "saw Rogers in Alabama, and he re-related to her the shooting was an accident." **PCR Tr. p. 1061.**
- Applicant's statement to Alabama authorities with his description of the racial slur and his acknowledgment of responsibility. *Id.*
- assault victim: that Assistant Solicitor Peter Them has promised to drop all charges against [assault victim] "prior to my election," according to Solicitor Bailey in a letter dated February, 1994. **PCR Tr. p. 1062.** The Court notes, however, that Solicitor Bailey was elected to office on January 2, 1993.
- Daxton Patterson: Solicitor Bailey had agreed to a PR bond for Patterson after some months in jail, that after several conversations with Patterson, Bailey had subpoenaed him but was undecided on whether to call Patterson as a witness. **PCR Tr. p. 1062.**
- assault victim: letter to Runyon that after an interview with her, Solicitor Bailey would call her as a witness and that her testimony would be exculpatory to some extend and a summary of how it would be exculpatory. **PCR Tr. p. 1062.**
- A letter to Runyon with inventory of enclosures and with enclosures purporting to be Solicitor Bailey's file as of December 30, 1993. **PCR Tr. p. 1064.**
- Daxton Patterson: letter to Runyon indicating that he would at least partially corroborate Applicant's statement regarding the sequence of events on then night of the shooting.

PCR Tr. p. 1064.

As discussed, *supra,* Mr. Leiendecker testified that his main responsibility prior to the 1994 trial was to work on *voir dire* and jury selection. He testified that he did not talk with either [assault victim] or Patterson and he simply did not recall whether or not there were

any discussions between Mr. Runyon and himself concerning her or Patterson. **PCR Tr. pp. 137-40.**

Mr. Runyon testified that he made a strategic decision not to interject race into the case any more than it was already present; and he thought that the reference to racial epithets in Applicant's statement, had sufficiently injected race. Also, the defense checked on Mr. B[redacted]s reputation and discovered that he did not discriminate. Moreover, Mr. Runyon's strategy was to try to blame Mr. B[redacted], in part, because Mr. B[redacted] had been drinking and he thought this information had been presented sufficiently to the jury, but the Supreme Court had rejected this evidence as supporting an instruction on manslaughter. **PCR Tr. pp. 804-06; 840-41; 856-57; 920-22.**

Mr. Runyon made the decision not to talk to Patterson because he had background information on Patterson and thought he had written statements, whether through a formal statement to police or through incident reports. Also, Patterson was represented by counsel; and Mr. Runyon did not know how he could ethically contact him without counsel's permission, which he did not have. He also did not talk to assault victim. However, he knew what she was going to say by virtue of her statement; and he and co-counsel made a joint decision because they knew that her testimony would not be that bad to Applicant. **PCR Tr. pp. 836-39; 855-56.**

He acknowledged that an investigator could have spoken to Patterson, assault victim or other witnesses, such as Stephanie Simmons. However, counsel made a decision to withdraw their request for an investigator because the case was rather simply factually and did not require extensive investigation. Also, it was unnecessary to interview assault victim in order to see whether or not she had corroborated Applicant because had a

copy of a statement she had given police, which Applicant introduced at the PCR hearing. Further, counsel had all of the information provided by the State during discovery.

Mr. Runyon also went to the crime scene on several occasions, in order to determine whether or not there was "any conceivable way that Mr. Roger could have thought Mr. B[redacted] was going out to wheel around in that truck and come at him. Because the vehicle in its smallest state is a deadly weapon, trying to look for some shred of something to further pursue that might get us out of, quote, the unjustifiable act of shooting that seemed to be in our face." However, he did not find any information that helped. To the contrary, he spoke with Detective Asbell. Det. Asbell had a chart that had the various measurements from every point in the parking lot; and the chart seemed to be inconsistent with Applicant's version of what happened. Moreover, either he or Mr. Leiendecker spoke to the various officers involved; Mr. Runyon had contacted the pathologist's office and discussed the case; and counsel had the hospital records of Stephanie's treatment after the shooting. Finally, he indicated that they were aware that assault victim would be a prosecution witness and he noted the problem at the time of the original trial was that a party who presented a witness was "vouching" for the witness. **PCR Tr. pp. 761-65; 769-71; 830-33; 978-86.**

Mr. Runyon testified that because Mr. Leiendecker practiced in St. George, he relied upon co-counsel to handle many matters in Dorchester County, such as talking to Applicant's family.[39] He could not remember the precise number of times he may have met with Applicant prior to the 1994 trial, but testified that "I would think there are

[39] He testified that Mr. Leiendecker had a better ongoing relationship with Applicant's mother than he did, and Mr. Leiendecker advised him that Leiendecker had spoken with one of Applicant's teachers in the past. **PCR Tr. p. 758.**

substantial times; in addition to that I relied upon Mr. Leiendecker, since he was up here with general sessions more often that I was, to ... keep in touch with Mr. Rogers. I really don't know how many times combined we met with Mr. Rogers." **PCR Tr. pp. 756-58.**[40]

Based upon the information he received from Applicant, Mr. Runyon thought that "[t]he facts were pretty well uncontradicted. I was actually looking for someone to tell me that there was a reason for him to pull that gun and fire it." **PCR Tr. p. 759.** He explained that

> there was the use of the telephone by either Mr. Rogers or Mr. Patterson. Mr. B[redacted] at some point in time made an inquiry about using the telephone, an argument ensued between Mr. Patterson and Mr. B[redacted], no blows were thrown, Mr. Rogers interceded and ..., except for the alleged spitting, [it was] still verbal. At that point in time Mr. B[redacted] got in the truck and they left, they were leaving the parking lot and Mr. Rogers apparently fired the weapon with no justification. A young child was hit and they ran.

PCR Tr. pp. 759-60.

In *Strickland*, the Court stated that

> strategic decisions made after thorough investigation of the 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

[40] Applicant suggests that he only met with counsel on three occasions and that counsel had only had three telephone conversations with him prior to the 1994 trial because these were the only matters reflected in the time sheets that Mr. Runyon submitted to the Office of Indigent Defense in order to be reimbursed for his work. See Applicant's Ex. 46. This Exhibit also reflects a group meeting with Applicant's family shortly before the trial. However, Mr. Runyon was clear in his testimony that the matters reflected in Applicant's Ex. 46 were under-inclusive because he is a sloppy record keeper. While he did all the activities described therein, he did other matters that were not reflected in these records. **PCR Tr. pp. 868-72; 1044-45.** The Court finds that this explanation is credible.

> 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.

466 U.S. at 690-91. S*ee also Wiggins*, 539 U.S. at 525 (further investigation is excusable where counsel has evidence suggesting it would be fruitless); *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (concluding that limited investigation was reasonable because all witnesses brought to counsel's attention provided predominantly harmful information).

The Court finds that trial counsel made a reasonable investigation into the matter and made reasonable decisions that made further particular investigations unnecessary. *Id.* Specifically, the Court finds that trial counsel had a copy of Ms. [assault victim]'s statement, which is consistent with her trial testimony, including trial counsel's cross-examination of her. To the extent she gave contrary testimony at the PCR hearing, the Court finds that her testimony simply lacks credibility. In addition to being inconsistent with the prior testimony and statement, the Court notes that she was impeached with prior convictions in accordance with Rule 609, SCRE, and she no longer has any charges against her concerning this case because the State dismissed those charges in exchange for her testimony in 1994. **1994 R. pp. 834-35; 879**. More importantly, she is the mother of Applicant's child.

The Court further finds that Patterson's testimony isn't credible because it is inconsistent with that of his former attorney. Based on the credible evidence before the Court, the Court finds that Patterson would not have cooperated with counsel even if counsel had wished to speak with him because Mr. Robbins would not have allowed it. *See* Rule 407, SCACR, Rule 4.2, RPC ("[A] lawyer shall not communicate about the

subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter"). Also, the Court finds that Patterson wished to distance himself from Applicant's actions at the time of the shooting; and that any contrary representation simply is not credible. Moreover, the Court would note that Patterson's demeanor in this Court was belligerent and simply not credible. Under these circumstances, the Court finds that counsel's performance was not deficient. *Id. See also* See *United States v. Shetterly*, 971 F.2d 67, 74 (7th Cir.1992) (although counsel is required to conduct a reasonable investigation, including possible defenses, the amount of preparation necessary is a matter of professional judgment deserving of deference).

Finally, the Court would note that Applicant cannot show any conceivable prejudice from counsel's performance with respect to the supposed failure to adequately investigate and impeach these witnesses. The principle reason he cannot show any conceivable prejudice is that, assuming *arguendo* that the evidence was credible, it still would not support a jury instruction on voluntary manslaughter. *See Rogers I, supra. See also State v. Childers*, Op. No. 26319 (S.C S.Ct., April 23, 2007) (holding that trial judge did not error in failing to charge, and two Justices indicating transferred doctrine inapplicable to manslaughter case). Also, counsel was correct in observing that he would have been vouching for the credibility of [assault victim] and Patterson. *See State v. Sierra*, 337 S.C. 368, 379, 523 S.E.2d 187, 192-93 (Ct App. 1999) (before adoption of Rule 607, SCRE, the rule in South Carolina was that the "party who called a witness was said to vouch for the witness's credibility, and it was improper to impeach one's own witness unless the witness was first declared hostile") (*citing State v. Anderson*, 304 S.C. 551, 406 S.E.2d 152 (1991)). Furthermore, there was overwhelming evidence of guilt; and it

appears that the testimony would have done nothing more than corroborate much of the information in Applicant's statement to police concerning what occurred on the night of the murder. This, however, did not support a manslaughter instruction. *See Jones v. State*, *supra* (where defendant's presentation of mitigation evidence in PCR was cumulative to that presented in sentencing phase of the trial, defendant could not show prejudice under Strickland); *Byram v. Ozmint*, 339 F.3d 203, 211 (4th Cir. 2003) (same); *cf. Tucker v. Ozmint*, 350 F.3d 433 (4th Cir. 2003) (trial counsel's failure to discover that one prosecution expert was on probation from practice of medicine when he testified during penalty phase of capital murder trial did not prejudice defendant, and thus did not support ineffective assistance of counsel claim, inasmuch as counsel highlighted speculative nature of testimony of expert, who did not speak with or examine defendant, expert's testimony was cumulative to prior testimony of prosecution's other two expert witnesses, and any error did not undermine confidence in outcome of proceeding in light of the aggravating and mitigating circumstances presented).

2. Other witnesses who testified at trial.

Applicant further contends that trial counsel was ineffective for failing to adequately investigate and develop information through several other witnesses who testified at trial: Stephanie Simmons, George Scharf, James Robinson, Anthony Riley, and Lieutenant Earl Asbell. Again, the Court finds that he has not shown either deficient performance or resulting prejudice.

First, he contends that counsel was ineffective for failing to interview Ms. Simmons and present testimony consistent with her testimony before this Court. Applicant fled the State of South Carolina following the murder. Ms. Stephanie

Simmons, a student at Tuskegee University, testified in 1994 that he showed up at her home on November 29, 1992. Applicant told Ms. Simmons that he needed a place to stay but did not explain why he left South Carolina to come to Alabama. Although Ms. Simmons was preparing to go to Montgomery with her friends, she allowed him to use her telephone. Later that week, she saw him sitting down on the steps of her apartment complex, but they did not speak. **1994 R. p. 894-98.**

Ms. Simmons testified at the PCR hearing that she did not recall either of Applicant's attorneys discussing the case with her prior to either the 1994 or 1996 proceedings. The only one whom she had spoken to was Solicitor Bailey. With respect to the events of November and December 1992, she testified that she was a student and lived in off-campus housing at Tuskegee University, in Alabama. She claimed that Applicant called her after the incident and said that he was coming to Alabama. He "wasn't really coherent, he was upset, [and] he had been crying." He did not tell her what had happened, other than saying it was "something really bad" and that it "was a bad accident that had happened." On the following day, he arrived in Alabama and told her that there was an incident which occurred while he was at a pay phone in Summerville. He claimed that he and Dax Patterson had gotten into an altercation and there were some "racial slurs that were thrown."[41]

Ms. Simmons further testified that Applicant also talked to her over the telephone following his arrest and return to South Carolina for prosecution. She added that

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[41] According to Simmons, Applicant told her that someone said, "the n-i-g-g-a needs to get off the phone." He also supposedly told her that one of the men involved in the altercation "had gone to the truck" and Applicant thought there was going to be "some altercation with weapons." Then, he fired a shot "more or less to say back off, and a little girl had been shot." **PCR Tr. pp. 258-65.**

Applicant and Patterson "hung out together" constantly; and that Applicant was protective of everybody. **PCR Tr. pp. 265-67.** Further, she testified that Applicant had a reputation for being truthful. **PCR Tr. pp. 272.**

On cross-examination, it became clear that the information imparted to her by Applicant did not occur all in one conversation. In fact, she testified that they "really didn't talk much in Alabama. I was going to class, I had my own thing going on at school. And mainly, he wanted some place to stay." Rather, most of the information that was imparted to her came in her conversations with him after his arrest. Applicant had previously contacted her while she was living in Tuskegee, but he had never driven six hours to see her before the day he showed up at her house. **PCR Tr. pp. 275-78.**

Mr. Runyon testified he did not interview Ms. Simmons prior to trial, but either he or Mr. Leiendecker has spoken with her in the courtroom before she testified. Also, he noted that there was a problem with her testimony because Applicant had left South Carolina and fled to her residence. **PCR Tr. pp. 1041-42.**

The Court finds that trial counsel's performance was not deficient because counsel was able to speak to her prior to her testimony. Further, Applicant fled this jurisdiction and went to her residence in Alabama. *See State v. Thompson*, 278 S.C. 1, 292 S.E.2d 581 (1982) (evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension); *State v. Walker*, 366 S.C. 643, 655, 623 S.E.2d 122, 128 (Ct.App.2005) ("Unexplained flight is admissible as indicating consciousness of guilt, for it is not as likely that one who is blameless and conscious of that fact would flee"). Also, there is nothing in her testimony at the 1994 trial that was beneficial to him. The Court further finds that her testimony at the PCR hearing that the

crime was an "accident" and that racial epithets were used was not credible because it is inconsistent with her testimony from 1994.

The Court further finds that Applicant has failed to show any prejudice resulting from counsel's failure to present her testimony. There was overwhelming evidence of guilt. Also, any conversations that she may have had with him were inadmissible as a matter of state law, both in 1994 and the subsequent 1996 resentencing proceeding because the statements by him would be hearsay, and he was not an available declarant. *See State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000) (defendant who asserts fifth amendment privilege is not unavailable under Rule 804(3), SCRE); *State v. South*, 285 S.C. 529, 331 S.E.2d 775 (1985) (defendant's out-of-court and self serving hearsay statements made to others are inadmissible); *State v. Sweet*, 270 S.C. 97, ___ 240 S.E.2d 648, 649 (1978) (same); *State v. Atchison*, 268 S.C. 588, ___ 235, S.E.2d 294, 296-97 (1977) (same). Moreover, even if the testimony was admissible, it is only relevant to whether or not the killing was manslaughter, as opposed to murder. The problem with Applicant's argument is that the Court in *Rogers I, supra*, indicated that he was not entitled to a voluntary manslaughter instruction although similar information was presented at the original trial. Thus, at worse, Applicant has merely shown that he could have presented corroborative and cumulative evidence. Because this evidence was already before the jury and because it did not support an instruction on manslaughter, he cannot show any prejudice. *See Strickland, supra*; *Jones, supra*; *Byram, supra*.

Applicant further contends that trial counsel were ineffective for failing to interview George Scharf and proper testimony consistent with testimony he gave at the

PCR hearing that the shooting appeared to be accidental. The Court finds that he has not shown either deficient performance or resulting prejudice.

Mr. Scharf testified at trial that he "was working with Summerville Ambulance Service under contract with Dorchester County E.M.S." at the time of the murder. He was a paramedic and was the crew chief. He responded to the scene on November 25, 1992. "When we arrived, there was a pickup truck with [the] driver and [the] passenger door[s] open with a small girl in the front seat." The first responder on the scene was attending to her at that time. **1994 R. pp. 854-55.**

They called for a helicopter, but there was not one available. So, "we decided to load and go which is a quick-response-type thing where we take the patient ... to the hospital as rapidly as possible." When asked what he observed, he testified that there was a "lot of blood around the head and shoulder areas." **1994 R. pp. 855-56.** After detailing other injuries that he observed,[42] he testified that they loaded her onto a backboard, placed her in a stretcher and headed to the hospital. He was unable to intubate her, so a tube was inserted into her nose for oxygen. Also, she pulled out an I.V. he attempted to insert. She was eventually taken to Trident Hospital. **1994 R. pp. 856-57.**

Mr. Scharf testified at the PCR hearing that he went to the scene on the night of the murder and transported Stephanie to Trident Hospital. There, he relayed basic information to the emergency room staff. In a physician's form from the hospital (Applicant's Ex. 20), he characterized the shooting as a "firearm accident." When asked

[42] Aside from the head wound described to him by the first responder, he stated that Stephanie had a lot of swelling above her left eye and the eye was swollen shut. Also, she was in a "seizure-like state" at that point, with her teeth gritted and her body would occasionally go rigid.

why he characterized it as an accident, he explained that it "just appeared to be that way from the fact that the shot went through the back window in the middle of the seat rather than in the direction of the passenger's seat or the driver's seat. And with the size of the little girl, it didn't appear to us at the time that her head would have been visible above the seat." **PCR Tr. pp. 293 l. 24 – p. 296 l. 3; 298.**

On cross-examination, however, he clearly testified, "I'm not trying to say ... that there was no intentional shot." Rather, he was saying that it did not appear that the victim had been selected. **PCR Tr. p. 299.** On redirect examination, he indicated that trial counsel had not spoken to him before his testimony in 1994 or 1996. **PCR Tr. pp. 300-01.**

The Court does not find that Applicant has proven that counsel's performance was deficient, in part because the credible evidence shows that counsel had a copy of the medical records, which would include the report at issue. However, the Court need not address that in this Order because the Court finds that he has failed to prove any possible prejudice resulting from the failure to introduce Applicant's Ex. 20 or the testimony by Mr. Scharf at the PCR hearing. *See Strickland*, 466 U.S. at 687 ("a court need not determine whether counsel's performance was deficient before examining the prejudice offered by the defendant as a result of the alleged deficiencies," and, "[i]f it is easier to dispose of an ineffective assistance claim on the ground of lack of sufficient prejudice, ... that course should be followed"). First, there was overwhelming evidence of guilt. Second, any evidence that the shooting was an "accident" would be merely cumulative to Applicant's statement that the shots were not fired directly at any individual. *See Jones, supra*; *Byram, supra*. Moreover, the South Carolina Supreme Court has already indicated

on direct appeal that such evidence did not support a jury instruction on voluntary manslaughter. *Rogers I, supra.*

Likewise, the Court finds that this evidence could not support a jury instruction on involuntary manslaughter. As noted, the Court finds that the evidence did not support a jury instruction on involuntary manslaughter, even though one was given by the trial judge. Even if the evidence presented at trial supported an involuntary manslaughter charge, the Court find that this evidence does not support such an instruction. At best, it showed Applicant's willingness to endanger the lives of more than one individual and supports an inference of malice. Finally, the Court cannot find any prejudice because any suggestions that this was an "accident" is inconsistent with the testimony from Dr. Price, addressed in **Ground 9(A)(5)**, which Applicant likewise suggests should have been presented. Dr. Price opines that Applicant should have been able to discern that there were three people in the cab of the truck under the circumstances that were reflected in the transcript. Thus, he would have been aware that he was endangering the lives of all three occupants in the cab. *See Childers, supra.* In the absence of any conceivable prejudice, this Court finds that he is not entitled to relief.

Applicant further contends that trial counsel were ineffective for failing to adequately examine Mr. James Robinson, the clerk at Spell's Store and one of three people in the store when the shooting occurred who testified at trial.[43] Several minutes after Mr. Isaiah Jennings walked up to the store (shortly before closing time) and a white man outside of the store unsuccessfully attempted to pick a fight with him, all three witnesses heard two gunshots. After the second shot, Mr. B[redacted]ran into the store and

[43] Mr. Isaiah Jennings and his cousin, Herthenia Lincoln, were also in the store.

asked the owner to call the police because someone had shot his daughter in the head. **1994 R. p. 842-53.**

At the PCR hearing, Mr. Robinson testified that he knew Applicant before the November 25, 1992, shooting. In Mr. Robinson's estimation, Applicant "was an allright fellow (sic), he was fine, he stopped by the store at my job all the time and just come in and say hello and he was always respectful." He had known Applicant since Applicant was approximately 12 or 13 years old; and Applicant had never been disrespectful to him. Nor had he ever heard of his boss or anyone else claim that Applicant had stolen anything. He indicated that Applicant's attorneys had not spoken to him prior to his testimony in 1994 or in 1996. **PCR Tr. pp. 282-86.**

Mr. Robinson also testified that Applicant had stopped by the store the morning of the shooting to say "hello." However, he did not know what Applicant did when Applicant was away from the store. Finally, Mr. Robinson was inside the store at the time of the shooting, **PCR Tr. pp. 286-89**. Thus, he did not and could not know what occurred at the time of the shooting.

Mr. Runyon's testified at the PCR hearing that he had gone by the crime scene on several occasions. He had also spoken to people at the store to make sure that "we didn't have anybody in the grocery store who would be saying, oh yeah, ... I saw everything, and the man with the gun was this terrible fellow." **PCR Tr. pp. 854**. The Court finds this to be credible testimony and, based on it, finds that counsels' performance was not deficient.

Additionally, the Court is at a loss to determine precisely how this evidence was supposedly admissible. He indicates that the testimony from Mr. Robinson would be

consistent with the defense's case. However, the Court finds that the evidence in question was inadmissible since Applicant did not testify in the guilt phase of the 1994 trial. South Carolina law, as it existed in 1994 prohibited the bolstering of a witness until after the witness' credibility was attacked. *See State v. Lynn*, 277 S.C. 222, 284 S.E.2d 786 (1981); *Woods v. Thrower*, 116 S.C. 165, 107 S.E. 250 (1921).[44] Nor was counsel deficient in failing to present this as evidence of Applicant's character for peacefulness. Under both Rule 404(a)(1), SCRE and the evidentiary law prior to 1995, the accused has a right to present evidence of good character regarding specific character traits relevant to the crime charged. *See State v. Major*, 301 S.C. 181, 391 S.E.2d 285 (1990). However, under the law at the time of Applicant's trial, only testimony as to a person's general reputation for peacefulness or nonviolence would be admissible. *See State v. Groome*, 374 S.C. 189, 262 S.E.2d 31 (1980); *In re Greenfield's Estate*, 245 S.C. 595, 141 S.E.2d 916 (1965). Here, Applicant does not allege counsel should have presented reputation evidence and Mr. Robinson's PCR testimony was not reputation evidence. Rather, he asserts counsel should have presented evidence of specific acts by Applicant identified with peacefulness. This evidence was inadmissible. *Id.*

The Court likewise finds that the evidence at issue was not admissible under Rule 405(b) SCRE, because it was not an essential element of the defense, which is required for admission under this subsection. The Court's decision in *State v. Day*, 341 S.C. 410, 535 S.E.2d 31 (2000) does not support Applicant's position that all evidence remotely consistent with the defense are admissible. The Court finds that the *Day* ruling is not so

[44] The only exception to this rule was if the witness was a stranger to the community. *Id.* Under current law, the rule is the same (*see* Rule 608(a), SCRE). Even after the penalty phase in 1996, however, the Court concludes that Applicant cannot show any conceivable prejudice.

broad as to allow a defendant to present this evidence, which was not relevant to a manslaughter or involuntary manslaughter charge, and could only show evidence of Applicant's nonviolent behavior, *i.e.*, his character. *Cf. State v. Hamilton*, 344 S.C. 344, 359, 543 S.E.2d 586, 594 (Ct.App. 2001)("While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence, regardless of its admissibility under the rules.").[45]

Moreover, the Court finds that Applicant has failed to prove any prejudice. If counsel had introduced evidence of Applicant's reputation for peacefulness, the State would have the right to introduce evidence to refute this character trait. In the present case, the State would have had a right to introduce evidence that he was convicted in 1986 of carrying a pistol. Obviously, Applicant was not prejudiced by the failure to allow the State to present such evidence, which it presented in the 1994 penalty phase. *See* **1994 R. pp. 1056-57**. The Court further finds that it would have permitted the State to introduce opinion evidence from Stephanie Simmons that "the bad things he did always outshone the good that he did." **PCR Tr. pp. 270; 279**. Particularly in light of

[45] In *Day*, the Court held that an incident which occurred four months prior to victim's death "was admissible to prove Day had a reasonable apprehension of violence" from victim. *Day*, *Id* at 421, 535 S.E.2d at 437. Testimony in that case showed that the victim "held a double-barreled shotgun to Szumowicz's head for eighteen hours as he drove around Aiken County and accused her of being involved with others in a drug trafficking scheme in his residence." *Id.* at 420, 535 S.E.2d at 436. The defense offered Szumowicz's testimony as permissible character evidence as Day pleaded self defense. The incident would demonstrate that victim "acted very violently when he felt he had been deceived or double-crossed by a confidant." *Id* at 421, 535 S.E.2d at 437. The evidence would also demonstrate victim's "continuous and consistent pattern" of violent reaction from "drug-induced, violent paranoia." *Id.* The Supreme Court ruled that the trial judge erred in not admitting Szumowicz's testimony. This case is legally and factually distinguishable from *Day*

the overwhelming evidence of guilt, Applicant cannot show any prejudice on this allegation.

Applicant further contends that trial counsel was ineffective for failing to interview Anthony Riley because, if they had done so, counsel would have learned that Mr. Riley was close friends with Mike B[redacted], the victim's father. Counsel would also have learned that Mr. Riley had previously been involved in an incident with Applicant, and that the two "did not see eye to eye." The Court finds that trial counsel was not deficient. However, the Court does not need to address the question of deficiency in the Order, since there is absolutely no evidence of prejudice in the record. *See Strickland*, 466 U.S. at 687 (it is unnecessary for a reviewing court to determine whether performance is deficient if the record clearly demonstrates an absence of prejudice).[46]

Mr. Riley testified at the PCR hearing that he was close friends with the B[redacted] family and Mike B[redacted]'s brother-in-law. He also indicated that his family babysat Stephanie at times and his daughter played with her. Mr. Riley likewise testified to an incident that occurred back in 1980's in the Dorchester County jail. He denied that he had any type of problem with Applicant but indicated that Applicant had taken the clippers from someone who was giving him a haircut before the haircut was finished. Mr. Riley "felt hurt" but stated that he did not know Applicant, and that this was the reason why he testified that Applicant was not his friend. **PCR Tr. pp. 40-48.**

On cross-examination, Mr. Riley made clear that he and Applicant did not exchange words or fight during this incident; and that he did not hold a grudge against

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[46] The Court, however, would note that trial counsel testified that he was aware of the friendship between the victim's family and Mr. Riley. Counsel also had available to him a copy of Mr. Riley's statement to police, in which he referred to Mr. B[redacted] simply as "Mike."

Applicant because of it. He simply did not like what Applicant had done. More importantly, the incident had not caused him to falsely implicate Applicant in Stephanie's murder or exaggerate his role in it. Likewise, his friendship with the extended B[redacted] family did not cause him to either falsely implicate Applicant or exaggerate his role in the murder. **PCR Tr. pp. 60-63.**

Based on the present record, the PCR Court finds that there is no conceivable prejudice to Applicant resulting from counsel's failure to present evidence concerning this incident. Applicant conveniently ignores that had counsel presented this evidence, it would have resulted in a claim that counsel was ineffective for introducing evidence of Applicant's bad character in the guilt phase of the 1994 trial because the incident occurred while Applicant was in the Dorchester County Jail. It also would have induced evidence of bad conduct by him that would have opened the door to further evidence of bad conduct, including but not limited to the prior conviction for an unlawful weapon. The Court further finds that the Record on Appeal from the 1994 trial specifically reflects the fact that Mr. Riley and Mike B[redacted] were friends. This is clear from the testimony of both Mr. Riley and Mr. B[redacted]. In fact, Mr. B[redacted]'s testimony was that when he reached Spell's Store, he got out to get his daughter a sandwich. When he did so, he saw Mr. Riley on the phone; and the two men "hailed" each other. When asked who Mr. Riley was, he testified that "[h]e's a black friend of mine," and "I've known him for about ten years." **1994 R. pp. 725-26.**

Mr. Riley testified that he had known Mike B[redacted] for approximately thirteen years and that Mr. B[redacted] had "started me out in the carpet business." He further testified that he knew the victim. "I used to stay next door to Mike and his little girl used

to play with my four girls and I baby-sat Stephanie several times." He further testified that he had known Mr. Carver for approximately seven years and met him through Mr. B[redacted]. **1994 R. pp. 792-93.**

Thus, there was evidence already before the jury concerning the friendship between Mr. Riley and the B[redacted] family. Perhaps it was not as detailed as Applicant's current lawyers contend it should have been, but Applicant was not prejudiced by trial counsel's failure to introduce this evidence of an interracial friendship, which is inconsistent with Applicant's allegations addressed elsewhere in this Order that racial epithets were used by Mr. B[redacted]nd/or Mr. Carver. Further trial counsel had statement (**1994 R. p. 810**), in which Riley refers to B[redacted] as Mike; and counsel did develop evidence of the friendship between the men. **1994 R. pp. 819-20**. However, Applicant cannot show any prejudice resulting from counsel's decision to focus more heavily upon fact Mr. Riley had heard about Mr. B[redacted]'s bad temper; and that a threat had been made of Mr. Riley by a member of the B[redacted]family (**1994 R. pp. 819-22**), which he later exploited in closing argument. See Ground 9(D).

Most importantly, the Court finds that Mr. Riley's testimony that he did not exaggerate or falsely implicate Applicant in the murder because of his friendship with the B[redacted] family or because of the incident in the Dorchester County Jail is credible. Also, there is overwhelming evidence of guilt. The Court therefore finds that there is no prejudice under *Strickland*.

Lt. Earl V. Asbell was a crime scene technician employed by the Dorchester County Sheriff's Department in 1992. He arrived at Spell's store around 7:00 p.m. on November 25. He then photographed the scene and searched for evidence. He saw

where a bullet had entered through the rear window of the truck's cab, passed through the cab and exited through the front windshield. *See* State's Exs. 1-7. Also, he photographed an area of the back, left (driver's side) tire of the truck, where the paint had been knocked off of the vehicle. *See* State's Ex. 10. **1994 R. p. 859-70; 881; 884-89**. Lt. Asbell found a spent .380 caliber cartridge (State's Ex. 13) on the ground, underneath the front of the truck. He found another spent .380 caliber cartridge (State's Ex. 13) on the ground to the left of the truck.[47] **1994 R. p. 859-70; 881; 884-89.**

In addition to the spent cartridges, Lt. Asbell found a very small piece of lead on the far left window of the store front, and a piece of a copper bullet "jacket" on the sidewalk behind a garbage can. See State's Exs. 14-A and 14-B. However, these items were of no evidentiary value. He also measured the parking lot at Spell's store. His measurements corroborated eyewitness testimony that the parking lot was a closely-confined area. **1994 R. p. 870-89.**

Lt. Asbell also testified at the PCR hearing. He stated that he had been subpoenaed by Applicant's counsel to bring to Court "all photographs, negatives or any videotapes that the police might have taken." However, he was unable to locate the Dorchester County Sheriff Department's file in the matter and it apparently is missing. Consistent with his trial testimony, he testified that he went to the crime scene on November 25, 1992, and photographed it. He also did a drawing of the crime scene, in which he triangulated the measurements of the parking lot. In a response to the subpoena

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

issued by Applicant, he likewise brought evidence he had collected at the crime scene but which was not entered into evidence. **PCR Tr. pp. 436-38; 440; 443-44; 453-54.**

Lt. Asbell testified that the evidence he produced for this Court had been sealed from the time he collected it on the night of November 25, 1992, until it was opened for Applicant's collateral counsel. **PCR Tr. p. 448.** He also produced a photograph that he had taken but was not introduced at trial. See Applicant's Ex. 18. This photograph – which he removed from the Solicitor's file - was available through the Solicitor's open file police. It depicts a clothes basket in the bed of the pickup truck with clothes in it.[48] He also produced an unopened Bush beer (Applicant's Ex. 29) and a bloodstained brown paper bag, which he collected from the trash can at the front of the parking lot of Spell's. **PCR Tr. pp. 440-43; 446-50; 764; 774; 833-34.**

Lt. Asbell testified that he sees Mr. Runyon "all the time" and he has spoken with Mr. Runyon. However, he was unable to recall whether or not he had spoken to Mr. Runyon in connection with the case. He also did not recall whether or not he had sat down with Mr. Runyon, Mr. Leiendecker, or Mr. Feeley. **PCR Tr. pp. 457-58.**

Mr. Runyon testified that he distinctly remembered talking to Lt. Asbell about the case. In fact, the sketch that Lt. Asbell did of the crime scene caused Mr. Runyon to go "back to him to find out ... how ... and why he took all the time to do that."[49] The Court

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[48] Applicant suggests that it depicts "a firearm pack sitting on top of clothes in a clothes basket." Applicant's (Proposed) Order, p. 30. However, Lt. Asbell specifically declined to agree with counsel's description of this and he could not determine what was in the basket other than clothes. **PCR Tr. p. 443.**

[49] Mr. Runyon described the diagram as "very comprehensive" and indicated that the diagram covered every conceivable angle in the parking lot. **PCR Tr. pp. 773-74.** He further testified that either he or Mr. Leiendecker had spoken to all of the officers involved. They had contact with the pathologist's office in an effort to determine the angle of the bullet, in an obvious effort to corroborate Applicants version of what had

finds that Mr. Runyon's testimony is credible and that he, in fact, spoke to Lt. Asbell about the case prior to trial. As a result, the Court finds that his conduct was not deficient even if he did not physically view the beer can and other items that were not introduced at trial.

More importantly, the Court finds that Applicant has utterly failed to prove any prejudice, whatsoever, resulting from counsel's performance. Mr. B[redacted]admitted that he had been drinking prior to the shooting on direct examination. He admitted that he had three or four beers before they left Mr. Carver's place of business and went to Spell's Grocery Store. He also admitted buying a beer at the grocery store but said that he did not get a chance to drink it and that he threw it into the trash can after his daughter was shot. **1994 R. pp. 717-20; 727-28.**

Despite Applicant's criticism of counsel's performance, the Record on Appeal demonstrates that trial counsel fully cross-examined Mr. B[redacted]about his drinking on the day of the shooting. Counsel unsuccessfully attempted to establish that Mr. B[redacted]drank beers while fishing on the houseboat that morning. **1994 R. p. 743.** He thereafter re-established that Mr. B[redacted]had had at least three or four beers before the shooting and that Mr. B[redacted]did not know how many beers were left in the twelve pack. **1994 R. pp. 743-44.**

Although Mr. Carver testified subsequently that he was unaware of whether or not there was any beer in the truck and that Mr. B[redacted]did not have anything to drink in his presence (**1994 R. pp. 931-32**), Mr. B[redacted]'s contrary testimony was already before the

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occurred; and they had the record's of Stephanie's treatment at Trident Hospital. **PCR Tr. pp. 773-74; 833-35.**

jury in the guilt phase. Moreover, Mr. Carver clearly testified that he had a 9 mm. pistol in the clothes basket which was in the bed of the pickup truck. **1994 R. pp. 933.**

Further, there was overwhelming evidence of guilt. Based on this record, the Court finds that Applicant has failed to demonstrate any conceivable prejudice resulting from counsel's performance because the evidence which he now claims should have been before the guilt phase jury was, in fact, already before it.

B. PCR witnesses who did not testify at trial.

Applicant further contends that trial counsel were ineffective for failing to utilize the services of a private investigator; and that trial counsel was ineffective for failing to present two witnesses whom he contends were readily available: Dr. William Price and Mr. Homer Fesperman. For the reasons which follow, the Court finds that he has failed to prove deficiency on counsel's part or any resulting prejudice under *Strickland, supra.*

1. Failure to use an investigator.

First, he contends that trial counsel was ineffective for failing to utilize the services of an investigator, even after counsel had requested funding for investigative services. The Court finds that this allegation is without merit.

One of the various witnesses presented by Applicant at the PCR hearing was Mr. Walter Mitchell. Mr. Mitchell testified that he was a private investigator from 1992 until 2002 and was licensed by SLED throughout that time period. This was his own business and he worked on murder cases, domestic matters and cases involving mutual funds. Before opening his private business, he had worked as a field investigator for SLED and had worked for the Charleston County Sheriff's Department. **PCR Tr. pp. 468-70.**

Mr. Mitchell learned about Applicant's case by seeing it on the television. He thereafter received a phone call from Mr. Runyon, whom he knew well. Mr. Runyon said, "big Mitch ... I understand that you have a private detective business now, and I may need your services in this particular case." After that call, however, he did not receive any further contact from Mr. Runyon. **PCR Tr. pp. 470-71.** Mr. Mitchell testified that based on his experience, he knew how to locate witnesses if necessary. Also, he could collect school, probation, correctional and jail records, as well as general background records for any individual. If he had a potential witness' date of birth and social security number or their race and gender, he could get a subpoena from an attorney and go to the appropriate law enforcement agency to get information on an individual. He was not asked to do this in this case and was never employed by the defense. **PCR Tr. pp. 471-75.**

On cross-examination, he admitted he did not know what anyone else had done in the case. Also, he agreed that there was no need to go out and discover facts if a person already knows the facts. Further, although he thought he could do a better job as a private investigator, he agreed that other individuals can go out and interview witnesses or obtain records. He further reiterated that he would have to rely upon an attorney to give him a subpoena in order to utilize databases to investigate people. **PCR Tr. pp. 475-77.**

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

In fact, he had tried approximately four hundred jury trials. Of those trials, fifty or sixty of these were in Dorchester County. **PCR Tr. pp. 756-58; 1039-40.**

Mr. Runyon testified, as discussed, that he felt the facts were relatively simple and he was looking for someone who could provide some justification for the shooting. Although counsel filed three pretrial motions for funding in order to hire an investigator (See Applicant's Exs. 43-45), at some point, he and co-counsel made a decision that they did not need the services of an investigator because of the simplicity of the facts. He also explained that "things were so tied up by that point in time as to what actually happened," he felt the chances of finding someone who would provide unfavorable material were better than "50/50." Moreover, he felt that any effort to further investigate might result in someone going to the Sheriff's Department with unfavorable information concerning the case. Mr. Runyon was quite familiar with Walter Mitchell and indicated that he may very well have spoken to Mr. Mitchell about the case but did not have a specific independent recollection because he did not have his file. He later reiterated that he did not feel that the facts were such that they warranted "us going out and looking for, quote, additional witnesses or what have you." Even later, he again reiterated that the request for an investigator, which is reflected on pages 10-14 of Applicant's Ex. 1, was not followed up on because of the way the case developed. **PCR Tr. pp. 759-60; 770-72; 830-33; 978-80.**

Based upon the current record, the Court finds that Applicant has failed to show any deficiency on the part of counsel in failing to hire the services of an investigator. As discussed, *Strickland* places upon counsel a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

Strickland, 466 U.S. at 691. Again, in assessing whether or not counsel's performance was unreasonable, a review in Court must give a heavy measure of deference to counsel's judgments. *Id. See also United States v. Green*, 882 F2d 999, 1002-1003 (5th Cir. 1989). A defendant who alleges failure to investigate on the part of trial counsel must allege with specificity what a reasonable investigation would have revealed and how it would have altered the outcome of the trial. *See Gray v. Lucas*, 677 F2d 1086 (5th Cir. 1982). In the present case, the Court finds that trial counsel made a reasonable investigation into a factually simple case and thereafter determined that the services of a private investigator would be unnecessary. The Court further finds that trial counsel had available to him the various witness statements and other information provided to him by the prosecution; counsel had talked on numerous occasions to his client and several if not all of the police officers involved in the case. Counsel likewise visited the crime scene. Under these circumstances, the Court cannot find that the failure retain the services of an investigator was deficient. *Id. See also Carter v. Lee*, 202 F.3d 257, 1999 WL 1267353, **6 (4th Cir. Dec. 29, 1999) (unpublished).

The Court further finds that Applicant cannot show any prejudice. First, he has failed to demonstrate that evidence pertaining to [assault victim] or Patterson would have been available at any time prior to 1994, since their testimony is simply not credible. With respect to Mr. Robinson, there is neither deficiency nor prejudice because his testimony was inadmissible. Likewise, for the various reasons found elsewhere in this heading, the Court finds that counsel took reasonable steps and the Applicant wasn't prejudiced by counsel's performance as alleged. Also, there was overwhelming evidence of guilt. Further, for the reasons set forth elsewhere in this section and in Ground 9(D), *infra*, the

Court finds that Applicant has failed to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," as required for relief under *Strickland*, see 466 U.S. at 694; *Palacio, supra,* since he has not demonstrated that any thing he has presented could undermine confidence in the outcome of the proceeding. *Id. Contra United States v. Gray*, 878 F2d 702 (3rd Cir. 1989) (where a number of witnesses were available whose testimony could have cleared the defendant of the crime and counsel failed to subpoena two such witnesses even though suggested by his client and made no attempt to hire an investigator to search for any other witnesses, counsel was rendered ineffective assistance.

2. Failure to employ and present an ophthalmologist. (Ground 9(A)(5))

Applicant further contends that counsel were ineffective because they "failed to seek expert assistance regarding a material medical condition of Applicant. Specifically, she contends counsel should have employed an expert in ophthalmology. The Court, however, rejects this allegations and finds that Applicant failed to prove that counsel were deficient or any resulting prejudice.

applicant's mother, Applicant's mother, testified at the PCR hearing that she began noticing that even as a young child, Applicant would sit very close to the television set, and he had trouble picking up things from the floor. Through the school system, it was determined that Applicant had trouble with his vision and glasses were prescribed for him. She thought he was in kindergarten at the time. However, Applicant did not like to wear his glasses as a child, and he would not wear them when he had an opportunity not to do so. **PCR Tr. pp. 409-14; 421-22; 426.** Moreover, Applicant introduced a series of

photographs to substantiate that he has worn glasses for some time. *See* Applicant's Exs. 24-26.

Applicant's social worker, Jeffrey Yungman, testified that Applicant's school records reflected that he received an eyesight test in the fifth grade. A newspaper photograph of Applicant in Mr. Yungman's file, taken after Applicant's arrest, reflects that he is wearing glasses (*See* Respondent's Ex. 5), as does a wanted poster (Applicant's Ex. 30). **PCR Tr. pp. 532-33, 562-63, 902.**

Dr. William Price testified that he is an ophthalmologist with a general practice in Summerville, South Carolina. Applicant's collateral counsel contacted him, and asked him to review certain records and perform an eye examination on Applicant. The records he reviewed included SCDC records dated July 5, 1989; some SCDC sick call clinic mates beginning July 1994 and going through December 1994; an analytical eye examination by SCDC's Division of Health Services and dated November 22, 1994; "a similar record" from September 21, 1994; and some computer generated notes entitled "medical summary" from SCDC generated on November 20, 2000. (*See* Applicant's Ex. 36). Dr. Price relied upon these records as background information. He likewise reviewed "very cursory" school records, which contained referenced to visual acuities on May 1974, October 1974, September 1975, March 1977 and September 1978. (Applicant's Ex. 37). **PCR Tr. pp. 568-75.**

Dr. Price further testified that the eye examination he performed on Applicant on November 1, 2002, revealed that Applicant had myopia and astigmatism. He explained that myopia is commonly referred to as near-sightedness; and that a person who has myopia has blurred vision unless this is corrected by some refractive means. Also, a

myopic person sees things better close than at a distance. Dr. Price described Applicant's myopia as "[m]oderate," and he opined that Applicant is correctible to 20/30 in his right eye and 20/25 in his left eye. Dr. Price's report was introduced as Applicant's Ex. 35. The school records reflected that Applicant had an uncorrected visual acuity of 20/70 in each eye in 1974. In September 1978, his uncorrected vision was 20/70 in his left eye and 20/100 in his right eye. **PCR Tr. pp. 575-79.**

Dr. Price testified on cross-examination that between 1994 and his examination in 2002, Applicant's visual acuity had varied between 20/70 to 20/200; and he opined that this was not abnormal. Also, both myopia and astigmatism are common; and he opined that "probably at least half of the population" is myopic. Additionally, he testified that 20/40 is the visual acuity needed to get a driver's license in South Carolina; and that 20/70 is not significantly worse than 20/40 "in terms of the amount of blurriness" that a person would have (although the person would have blurrier vision).[50] More importantly, Dr. Price opined that it was not possible to determine what Applicant's visual acuity was on November 25, 1992. Further, if Applicant could see well enough to run through the woods in the dark on the night of the murder, Dr. Price "would expect that he would see better in a lighted parking lot;" and he opined that a person with 20/70 vision "[p]robably [could] make out" that there were three people in a truck from a distance of twenty feet. **PCR Tr. pp. 586-91.**

Mr. Runyon's recollection was that Applicant's school records reflected that Applicant did not have perfect vision but he never claimed that he had problems with his

[50] He agreed that there is a degree of subjectiveness in an eye examination because the examiner must depend upon the examinee to indicate his vision has improved. **PCR Tr. pp. 588.**

eyesight. Also, counsel had Applicant medically evaluated before the 1994 trial, and there were never any significant problems with his eyesight reported. Also, counsel never noticed any problems with Applicant's eyesight. Mr. Runyon testified that he, personally, had 20/200 vision; and that he was unaware of this until an eighth grade eye examination. Mr. Runyon further testified that it would be difficult to argue to a jury that his client produced a weapon and shot at a truck that was moving away from him and he hit a child in the back of the head, as a result of his faulty eyesight. In Mr. Runyon's estimation, this would be inflammatory and would not be well received by a jury in Dorchester County. **PCR Tr. pp. 776; 802-03; 900-02; 1994 R. pp. 1272-75.**

Mr. Leiendecker likewise testified that he did not recall Applicant making any complaints about his eyesight or suggesting that his poor eyesight played some part in the shooting, at any point in counsel's representation of him. **PCR Tr. p. 182.**

In *Strickland,* the Court stated that "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." 466 U.S. at 690-91. S*ee also Wiggins*, 539 U.S. at 525 (further investigation is excusable where counsel has evidence suggesting it would be fruitless). Further, *Strickland* clearly states that:

> the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain

> investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

466 U.S. at 691. *See also Drayton v. Evatt*, 312 S.C. 4, 11-12, 430 S.E.2d 517, 521-22 (1993); *Barnes v. Thompson*, 58 F.3d 971, 978 (4th Cir. 1995).

In the present case, the record demonstrates that, before the November 25, 1992 murder, glasses had been prescribed for Applicant, which is corroborated by photographs of him. Further, counsel was aware of some evidence in their possession at the time of their representation that Applicant had less than perfect eyesight, but that his problems with his vision were not very severe. More importantly, Applicant never told either attorney that his eyesight played any roll in the shooting; and there was no suggestion of this in his statement to police, State's Ex. 18. Also, Applicant was given a complete physical before the 1994 trial, and he apparently did not complain of his eyesight at that time. Under these circumstances, the Court finds that Applicant has failed to show deficient performance. *Id.*

The Court likewise finds that he has failed to show any prejudice. First, it is impossible to know the precise acuity he had at the time he murdered Stephanie B[redacted] but Dr. Price's testimony makes clear that the limitations on Applicant's vision were only moderate and although his vision might be blurrier than a person with 20/40 vision, it would not be significantly worse. More importantly, squinting would improve his eyesight; and Dr. Price's testimony is that he could probably see that there were three people in the truck from a distance of twenty feet. Also, Dr. Price would expect him to be able to see better in a lighted parking lot than in a dark wooded area, where the record demonstrates Applicant ran after the shooting.

The Court further finds that this evidence would not help support a jury instruction on involuntary manslaughter. A charge on involuntary manslaughter must be given if there is any evidence warranting it. *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006); *State v. Cabrera-Pena*, 361 S.C. 372, 605 S.E.2d 522 (2004); *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999). Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others. *Id*; *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996).

The trial judge in this case gave an instruction on involuntary manslaughter although this Court finds that there is no evidence thereof in the record, despite the fact Applicant's statement refers to an "accident." Yet, even assuming the record supported this charge, the Court finds that any claim that Applicant's problems with his eyesight – of which he was obviously aware and nevertheless chose not to wear glasses – would only tend to aggravate the shooting and make the shooting appear even more malicious. Therefore, there is no reasonable probability of a different result but for counsel's errors under *Strickland*, and this argument lacks merit. Moreover, there was overwhelming evidence of guilt.

3. Failure to employ video production and audio enhancement expert.

Applicant further contends that trial counsel were ineffective for failing to present an expert in audio and video enhancement. He further contends that trial counsel was ineffective in failing to utilize a portion of a videotape taken at the crime scene to impeach State's witness James Carver with inconsistent statements contained on the

crime scene video footage, and for failing to present still photographs from that footage which depicts an empty twelve pack of Bush beer. The Court finds that counsel was not deficient, and that Applicant has failed to prove any resulting prejudice from counsel's supposed nonprofessional conduct.

The key witness Applicant contends counsel should have presented in this regard was Homer V. Fesperman, who owns a video production business in West Columbia, South Carolina. Although the largest percentage of his work is in corporate video production, he has done work for law enforcement in the past. Collateral counsel contacted him and asked him to make a copy of a videotape that had originally been in the Solicitor's file and which had been supplied by a television station. He copied this onto a DVD. **2005 PCR Tr. pp. 7-14.**[51] [52]

Over the State's objection that the tape contained hearsay within hearsay and that there was not adequate authentication of either the participants therein or the circumstances surrounding the creation of the videotape, the Court allowed Applicant to introduce the DVD created by Mr. Fesperman (Applicant's Ex. 56) for the non-hearsay purpose of showing that counsel was ineffective. Mr. Fesperman testified that he made audio enhancements to the section specified by collateral counsel, but he did not otherwise change or alter the contents of the tape when he created the DVD, other than making a loop of the section of the VHS tape upon which counsel asked him to focus. He also explained the manner in which he had enhanced the audio portion of it and indicated that this technology was available in 1994 and 1996. However, it would have

[51] This transcript is of the hearing was held on August 23, 2005.
[52] He originally copied the VHS video onto a digital tape and then transferred that onto a DVD. **2005 PCR Tr. pp. 13-14.**

been somewhat more cumbersome for someone to make that type of enhancement during that time period. Also, the enhancement would have not been to a DVD, but to a VHS videotape. The Court listened to the unenhanced audio and watched the video portion of Applicant's Ex. 56. The Court clearly heard a question being asked by someone off camera and saw a person on camera answering that question. Mr. Fesperman also developed two still photographs from the videotape, which were introduced as Applicant's Exs. 57 and 58. He indicated that the technology needed to make these photographs would have existed in the 1990's, but stated that the photographs may have only been in black and white. **2005 PCR Tr. pp. 14-50.**

Mr. Leiendecker, who had previously testified that he had very little involvement in the 1994 trial, also testified at the August 23, 2005, hearing as a reply witness. He did not recall Applicant's Ex. 59, a February 9, 2004 letter from then-Solicitor Bailey to Mr. Runyon disclosing additional documents in the course of the State's compliance with the requirements of discovery.[53] The first paragraph of this letter references news footage from two different television stations, Channel 2 and Channel 4. There was a reference to a videotape that the Solicitor had and a portion of which was later introduced in the penalty phase of both the 1994 and 1996 proceedings. Mr. Leiendecker remembered viewing only the portion of the videotape which contained the footage of Applicant being transported following his bond hearing. However, he admitted that the letter was sent over eleven years prior to the hearing and he simply did not recall it. He identified the individual making the statements in Applicant's Ex. 56 as James Carver. **2005 PCR Tr. pp. 52-58; 63-64.**

[53] In his experience in dealing with Solicitor Bailey, this was typical of the type of disclosure or discovery letter that Mr. Bailey would employ. **2005 PCR Tr. p. 54.**

With respect to the portion of the audio on Applicant's Ex. 56 where the person supposedly identified as Mr. Carver made a statement "we just pulled up," Mr. Leiendecker testified that this "certainly wasn't what they have had at trial and not what the evidence demonstrated, because the had been there, gone into the store, gotten some stuff, had an altercation and were leaving." Mr. Leiendecker further testified that the defense could have given some consideration to the negative response by Mr. Carver when asked if he had any idea why he was shot at because the testimony showed that there was a heated argument between all of the parties. When asked about whether trial counsel could have used Applicant's Exs. 57 and 58, he testified that, in hindsight, "it certainly is something that could have or maybe should have been discussed at least in the penalty phase concerning the conduct of the parties and the aggravation, whether there were elements involving alcohol that were involved in the argument that ensued or that took place outside that proceeded the shooting." **2005 PCR Tr. pp. 59-62.**

Former Solicitor Bailey was the remaining witness called at the August 23, 2005 hearing. He testified, again, concerning the manner in which he disclosed documents to the defense. Before the 1994 and 1996 proceedings, he disclosed documents to the defense pursuant to Rule 5 and *Brady v. Maryland*, 373 U.S. 83 (1963). He explained that he had "an open file policy." He basically sent everything that he had to the defense, with the exception of anything he considered to be work product or documents that were voluminous like the videotape of the news footage from Channel 2 and Channel 4. However, he advised counsel that he had the videotapes. "I previously described it for the purposes of identifying the case in case of a discovery question and invited them to look at it at any time they wanted." He specifically identified Applicant's Ex. 59 as a

letter from his file. However, he did not recall whether or not the defense ever came to his Office and inspected the videotape. On the second page of his February 9, 1994 letter, he listed both a transcript dated 11/25/92 from Channel 4 and a computer printout dated 11/30/92 from Channel 4. Copies of these documents were provided to the defense. **2005 PCR Tr. pp. 68-71.**

The State then introduced a copy of the February 9, 1994, letter complete with the attached itemization and the transcript and computer printout referred to in the letter as Respondent's Ex. 7. The Transcript in Respondent's Ex. 7 clearly reflects on the third page that a question was asked "do you have any idea why they shot at your truck?" the answer was "shakes head no." Mr. Bailey indicated that he had, at least on one occasion, carefully watched the videotape and would have seen the entire tape prior to its disclosure because he redacted a portion of it so that he could utilize the portion actually presented to the sentencing phase jury in 1994 and 1996. **2005 PCR Tr. pp. 71-73.**

The Court finds that Applicant has failed to prove deficient performance or, more importantly, prejudice resulting from trial counsel's failure to employ an expert in audio and video enhancement, such as Mr. Fesperman. First, the Court finds that counsel had been provided a copy of the transcript of the crime scene video. Although it only contained one of the two statements on the videotape, it certainly alerted counsel to the existence of potential impeachment information on the videotape, which was made available to the defense by former-Solicitor Bailey. Yet, it is undisputed that review of the tape would not have disclosed the empty twelve pack of beer in the truck bed. Applicant's (Proposed) Order, p. 37.

The fact that lead counsel, Mr. Runyon did not utilize the prior inconsistent statements on Applicant's Ex. 56 in his cross-examination of Mr. Carver does not demonstrate that his performance was deficient. To the contrary, the Court would note that "decisions whether to engage in cross-examination and if so to what extent and in what manner, are . . . strategic in nature" and will not support an ineffective assistance claim." *United States v. Nersesian*, 824 F.2d 1294, 3121 (2d Cir. 1987); *see also Hunt v. Nuth*, 57 F.3d 1327, 1333 (4th Cir.1995) (refusing to indulge in a "grading of the quality of counsel's cross-examination"); *Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978) (*Marzullo v. Maryland*, 561 F.2d 540, 543 (4th Cir.1977), was not intended to promote judicial second-guessing on questions of strategy as basic as handling of a witness).

"In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." *Willis v. United States*, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel. *Yarrington v. Davies*, 779 F.Supp. 1304, 1308 (D. Kan. 1991), *aff'd*, 992 F.2d 1077 (10th Cir. 1993). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. *Dyer v. Crisp*, 613 F.2d 275 (10th Cir. 1980). In the present case, counsel did cross-examine Mr. Carver - just not in the manner Applicant and collateral counsel suggest he should have. This does not show deficient performance under *Strickland*. *Id.*

Counsel cross-examined Mr. Carver at length concerning his version of the events of November 25, and the roles of the various participants involved. Specifically, he established that Patterson started the confrontation, and that Applicant only later intervened. Further, he established the friendship between Mr. B[redacted]and Mr. Carver; and that they had spoken to each other the next day, supposedly without discussing the incident. He examined Carver about the fact he testified at trial that Applicant spit at Mr. B[redacted], but he indicated in his statement to police that Patterson had spit. He did so even though Applicant and Patterson were different races and different sizes. Counsel also elicited that B[redacted]never lost his temper during the conversation and Carver had never seen Mr. B[redacted]lose his temper. Again, this testimony was inconsistent with Mr. Riley's testimony he had heard that Mr. B[redacted]had a temper. **1994 R. pp. 950-60.** Under *Strickland*, there is no ineffective assistance of counsel where the attorney chooses one reasonable strategy to the exclusion of another. *See United States v. Guerrero*, 938 F.2d 725, 730 (7th Cir.1991); *United States v. Adamo*, 882 F.2d 1218, 1227-28 (7th Cir.1989) (same).

The same is true of counsel's failure to have still photographs developed from the videotape, such as Applicant's Exs. 57-58. First, it is undisputed that review of the tape would not have disclosed the empty twelve pack of beer in the truck bed. *See* Applicant's (Proposed) Order, p. 37. As a result, counsel would not have been alerted to the need for further investigation. Second, counsel examined Mr. Carver regarding the fact that he did not see any twelve pack of beer in the truck. Although the answer of no **(1994 R. p. 950)** was consistent with his testimony on direct examination **(1994 R. pp. 932-33)**, the response was completely *inconsistent* with B[redacted]'s testimony that he was

drinking that day and evening, discussed *supra*. ***See also*** **1994 R. p. 744** (cross-examination of Mr. B established that the twelve pack of beer he had been drinking from earlier was in the cab of the truck, as opposed to the bed; and, he purchased another beer at Spell's to drink).[54] Mr. Carver was thereby impeached. The other portions of counsel's cross-examination referred to earlier also provided additional impeachment of him. Mr. B 's testimony was likewise impeached in 1994, as discussed elsewhere in the order.

Nor has Applicant proven any Sixth Amendment prejudice from counsel's performance. There was overwhelming evidence of Applicant's guilt of murder from all three eyewitnesses. Also, counsel had already impeached Mr. Riley, Mr. B and Mr. Carver, as discussed.[55] As to the statements on Applicant's Ex. 56, the Court finds that Mr. Carver appeared to be stunned, he never made eye contact with the camera and it did not appear that he was fully paying attention to the - as of yet unidentified - questioner.

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[54] Contrary to Applicant's argument, the Court finds that Mr. B was not denying that there was an empty beer container in the bed of his truck, but that the twelve pack from which he had been drinking was in the cab.

[55] Counsel's examination of Mr. B elicited that Mr. B had drank three or four beers by the time he reached Spell's grocery. He purchased yet another beer at the store, which he threw in the trash, unopened, after his daughter was shot. Counsel thereafter suggested that Mr. B had consumed too much alcohol. Counsel further established that Patterson started the confrontation and Applicant only later intervened. Also, counsel established that Mr. B was angry, and that the confrontation with Patterson became so heated that Mr. Riley left the store and went home. Mr. B was impeached with his statement to Solicitor Bailey, in which he did not indicate Applicant and Patterson had laughed in his face. Nor could Mr. B remember at what point Mr. Carver got out of the truck. Further, he established the friendship between Mr. B and Mr. Carver; and he established that a 9 mm. pistol was in the clothes basket in the bed of the truck.[55] Additionally, Mr. Carver admitted that he had a twelve pack of beer in the cab of the truck. Finally, counsel established that Mr. B did not think Applicant threatened to kill him right before B got back into the truck. **1994 R. pp. 741-68.**

For these reasons, the Court finds that any impeachment from the prior inconsistent statements would have been marginal, at best.

Further, all that could be gained through presentation of the photographs is that Mr. B[redacted] might have been drinking. This point, however, was not in dispute. Moreover, the Court finds that the photographs do not show the presence of beer in the bed of the truck, merely an empty container; and, thus, they could not any significant impeachment value. Also, Applicant did not present any evidence at the PCR hearing to establish how long the container had been there, whether it contained beer close to the time of the shooting or whether it was seen by Carver.

The Court further finds that counsel's cross-examination fully set forth enough information, so that the jury could properly assess the credibility of Carver and B[redacted], and so that counsel could demonstrate the supposed lack of it. *See Mills v. Singletary*, 161 F.3d 1273, 1288 (11th Cir. 1998) (defendant's Sixth Amendment right to confront witnesses is satisfied where the cross-examination permitted exposes the jury to facts sufficient to evaluate the witness' credibility and "enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable"). Additionally, in light of the abundance of other evidence and argument impeaching both Mr. B[redacted] and Mr. Carver's credibility, the additional impeachment at issue would have been merely cumulative and, hence, Applicant cannot show prejudice from counsel's omissions. *Cf. State v. Gunn*, 313 S.C. 124, 136-38, 437 S.E.2d 75, 82 (1993) (given abundance of other evidence detailing witness' disrespect for law, defendants could not show failure to disclose evidence witness bribed or attempted to bribe magistrate was "material" under *Brady*).

Finally, with respect to the statements on Applicant's Ex. 56, the Court finds that Applicant did not prove a reasonable probability of a different result, but for counsel's errors, because he did not present Carver as a witness, and all the Court has is speculation as to what his responses would be if confronted with the statements or photographs (Applicant's Exs. 57-58). Likewise, Mr. B[redacted] was not presented as a witness and the Court is forced to speculate as to how he would respond if Applicant's Exs. 58-58 were presented to him. *See Moss v. Hofbauer*, 286 F.3d 851, 864-65 (6th Cir. 2002) (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued); *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented). *See also, e.g., Beaver v. Thompson*, 93 F.3d 1186, 1995 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present mitigation evidence by family members, where there was no proffer of this testimony); *Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990) (petitioner's allegation that attorney performed ineffective investigation does not support relief, absent proffer of the supposed witness's favorable testimony). *Cf. Williams v. French*, 146 F.3d 203 (4th Cir. 1998) (habeas petitioner failed to establish prejudice that would excuse procedural default of claim that trial counsel were ineffective for failing to investigate statements of witnesses regarding conversations which they had in jail with petitioner's cohort, where counsel extensively cross-examined cohort during guilt phase of trial regarding inconsistent statements he made at jail and to

police, and any impeachment value derived from witnesses would have been cumulative at best).

This rule is also well established in South Carolina. *E.g., Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807, 809 (1999) (state's failure to object to applicant's testimony as to what purported witness would testify did not relieve applicant of burden of producing witness or offering witness' testimony in accordance with the rules of evidence); *Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998) (applicant failed to establish prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses where he failed to substantiate at PCR hearing that victims and witnesses had criminal records); *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995) (because three witnesses applicant claimed could have provided an *alibi* defense did not testify at the PCR hearing, applicant could not establish prejudice from counsel's failure to contact these witnesses). In the absence of prejudice, this allegation lacks merit.

GROUND 9 (A)(11)

The Court rejects Applicant's argument (**Ground 9(A)(11)**) that this Court should employ a cumulative prejudice analysis, such as employed in *Brady* cases. *See Kyles v. Wheatly*, 514 U.S. 419 (1985). In *Green v. State*, 569 S.E.2d 318, 324-25 (S.C. 2002), the state supreme court expressly declined to address the novel question of whether a PCR applicant is entitled to relief based upon the supposed cumulative effect of trial counsel's alleged errors. *See also Simpson v. Moore*, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina" and holding that "[b]ecause the PCR court found that only one of Simpson's

allegations had merit, there was no need to conduct a cumulative-error analysis"). This Court finds that such an analysis is not constitutionally required and declines to employ that analysis.

Before an alleged error may be considered as a factor contributing to cumulative prejudice, a court first must find that the alleged error is, in fact, constitutional error. Only then can the cumulative prejudice arising from the error be considered. To hold otherwise is to conclude that even non-deficient performance might result in reversal of a conviction, a conclusion that is manifestly contrary to the analysis set forth in *Strickland v. Washington*. *See Strickland*, 466 U.S. at 687 ("Unless a defendant makes both showings [i.e., both deficient performance and prejudice –] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable").

Even in the absence of a cumulative prejudice analysis, a reviewing court, quite properly, analyzes the same class of errors together, such as the failure to present adequate evidence of mitigation. Yet, it is inappropriate to consider the cumulative prejudice from various alleged errors that are not related, such as the failure to request a jury charge and the failure to introduce certain testimony. This is especially true where, as in this case, counsel's performance was determined not to be deficient on most of the individual claims that Petitioner wishes to aggregate, and there was no prejudice on any Ground.[88]

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[88] While it is perfectly logical to consider the cumulative effect of failing to disclose evidence under *Brady*, since the determination to be made is whether non-disclosure of evidence deprived the defendant of due process, *see Kyles v. Wheatly*, 514 U.S. 419 (1985), the Court finds that the same is not true when focusing upon whether trial counsel rendered ineffective assistance of counsel. For example, the adequacy of counsel's

A number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. *See Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998); *Wainwright v. Lockhart*, 80 F.3d 1226 (8th Cir. 1996); *Jones v. Sotts*, 59 F.3d 143, 147 (10th Cir. 1995). As the Fourth Circuit Court of Appeals explained in *Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998):

> Next, Fisher argues that the cumulative effect of his trial counsel's individual actions deprived him of a fair trial. We disagree. Having just determined that none of counsel's actions could be considered constitutional error, *see Lockhart v. Fretwell*, 506 U.S. 364, 369 n. 2, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) ("[U]nder *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance *and* (2) prejudice.' (emphasis added)), it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of this Court individually to assess claims under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See, e.g., Hoots v. Allsbrook*, 785 F.2d 1214,

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advice to enter the guilty plea to murder and receive an LWOP sentence should not be aggregated to supposed errors by counsel that occurred during Applicant's subsequent trial. Likewise, counsel's performance in *voir dire* is not connected in any manner with counsel's supposed ineffectiveness for failing to hire an ophthalmologist. Moreover, the Court finds that alleged errors, which are not unconstitutional individually, simply cannot be added together to create a constitutional violation. *See United States v. Stewart*, 20 F.3d 911, 917-18 (8th Cir.1994). Following Applicant's position would result in a PCR applicant obtaining relief, even though no one alleged constitutional violation was prejudicial to him, simply by raising a vast number of allegations such as Applicant has in the present case. This is a ludicrous result that is not mandated by *Strickland* or any decision of the South Carolina Supreme Court or Court of Appeals. Indeed, it appears to be contrary to *Florida v. Nixon*, 534 U.S. 175 (2004) and *Bell v. Cone*, 535 U.S. 685, 696-97 (2002), both of which clearly require inmates to meet both prongs under *Srickland*.

> 1219 (4th Cir. 1986) (considering ineffective assistance claims individually rather than considering their cumulative impact). In fact, in *Arnold v. Evatt*, 113 F.3d 1352 (4th Cir 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 715, 139 L. Ed. 2d 655 (1998), this Court recently rejected a similar request to review the alleged errors of a trial court cumulatively rather than individually. See id. at 1364 ("Based on the findings of this court concerning the individual claims of error, we reject this claim.').
>
> To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits that have considered the issue.

Id. (footnote omitted).[89] See also *Meuller v. Angelone*, 181 F.3d 557, 586n.22 (4th Cir. 1999) ("Petitioner also urges us to consider the cumulative effect of his ineffective assistance of counsel claims rather than whether each claim, considered alone, establishes a constitutional violation. This argument is squarely foreclosed by our recent decision in *Fisher v. Angelone*, 163 F.3d [...at] 852-53 [...]"). Therefore, the Court finds that prejudice must be considered on an individual, not a collective basis. *Fisher*, 163 F.3d at 852.

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[89] Several circuit courts of appeal have reached the same conclusion. *See, e.g., Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir.), *cert. denied*, 519 U.S. 968 (1996) (an attorney's acts or omissions "that are not unconstitutional individually cannot be added together to create a constitutional violation"); *Moore v. Reynolds*, 153 F.3d 1086, 1113 (10th Cir.1998) (stating that cumulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors). *Cf. Martinez v. Spencer*, 195 F.Supp.2d 284, 311 (D.Mass. 2002); *Lenz v. Warden of the Sussex I State Prison*, 593 S.E.2d 292, 305 (Va. 2004). *But see Williams v. Washington*, 59 F.3d 673, 682 (7th Cir.1995) ("a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was [prejudicial]"); *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir.1991) (a "claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions").

Further, and analyzing the various allegations raised by Applicant cumulatively, the Court finds that it is clear that he is not entitled to relief because the record does not support a finding that he was prejudiced by any or all of the alleged errors. *See Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir.1996) (claims that are not prejudicial cannot be cumulated, regardless of the number raised). Therefore, the Court denies relief on this allegation as well.

Finally, the Court notes that Applicant raised a number of additional ineffective assistance of counsel allegations in his Second Amended Application and at the PCR hearing[56] that he did not address in his proposed Order. The Court finds that he has made a knowing and intelligent decision to abandon each of those allegations.

GROUND 9(B)(1)

Once again, Applicant challenges trial counsel's advice with respect to the aborted murder plea. In particular, he contends that trial counsel inadequately advised

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[56] One such allegation is that counsel was ineffective for failing to request a jury instruction pursuant to *State v. King*, 158 S.C. 251, 155 S.E. 409 (1930) (if jury has a reasonable doubt between lesser and greater offenses, it must resolve the doubt in the defendant's favor). Ground 9(A)(x). **See PCR Tr. pp. 158-59; 806-07; 970.** Again, the Court finds that this allegation was abandoned because not set forth in applicant's proposed Order. The Court would note, however, that in *Brightman v. State*, 336 S.C. 348, 351-52, 520 S.E.2d 614, 615-16 (1999), the South Carolina Supreme Court overruled *King* and held that a "*King* charge is unnecessary in light of the modern general reasonable doubt charge which instructs the jury to resolve doubts in favor of the defendant." Nor would he be entitled to relief on the theory that he was prejudiced by counsel's failure to request a charge that was appropriate under the law at the time of his trial because this would grant Applicant a "windfall to which the law does not entitle him." *See Lockhart v. Fretwell*, 506 U.S. 364, 366 (1993); *Bell v. Ozmint*, 332 F.3d 229 (4th Cir. 2003) ("[I]t is clear Applicant has not shown any prejudice resulting from trial counsel's failure to request a jury charge on Applicant's parole eligibility under then-existing law .... The mere fact that he had the right to request such an instruction is not determinative. 'To hold otherwise would grant [Applicant] a windfall to which [he is] not entitled.' *Lockhart v. Fretwell*, 506 U.S. 364, 366 (1993)").

him concerning the possibility of an *Alford* plea. The Court finds that his argument is without merit for the reasons set forth in **Ground 9(A)(1)**, *supra*, and rejects this allegation accordingly.

In connection with **Ground 9(C)**,[57] he also contends that counsel was ineffective in failing to adequately investigate the CSC with a minor charge because a thorough investigation would have revealed that the offenses occurred in Charleston County and not Dorchester County. *See* Applicant's (Proposed) Order, pp. 109, 113-18. The Court rejects this argument and finds that he has failed to prove either deficient performance of any resulting prejudice under *Strickland* and *Hill*.

Applicant's co-defendant in the murder case and the mother of one of his children, assault victim, testified at the PCR hearing that she lived at her grandmother's home at the time of the murders. This residence is located at [redacted], in Charleston County. See Applicant's Ex. 22. She testified that she had known Applicant for five or six months at the time of Stephanie's murder; and that she only had sex with Applicant in her grandmother's home. She claimed that her uncles allowed this to occur. She also stated that neither of Applicant's 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. **PCR Tr. pp. 303; 306; 308-09; 326-27; 333-34.**

Mr. Runyon stated that the facts of this case were relatively simple but the "case started to develop as just a bad case" because there was a "totally innocent" nine year old

[57] For the reasons set forth *intra*, the Court finds that (1) his challenge to the pleas was improperly joined with this Application, which challenges his murder convictions and death sentence; and (2) any challenge to the guilty plea is barred by S.C. Code Ann. § 17-27-45 (Supp. 2007).

which had been shot in the back of the head. In going through the evidence, he discovered that assault victim, Applicant's girlfriend, was underage at the time she had sex with Applicant; and he realized that this could create a possible plea to murder with an LWOP sentence if there were two prior offenses for violent crimes. 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. **PCR Tr. pp. 759-60; 775-80; 846-52; 1019-20.**[58]

Former Solicitor Bailey testified that Mr. Runyon had proposed that Applicant plead guilty to two charges of CSC with a minor, which were violent crimes under South Carolina law. Then, under the "three-strikes law" which was in effect, he would be parole ineligible if he pled guilty to murder. Solicitor Bailey discussed this with the family and they reluctantly agreed to the plea bargain, with the assurance that Applicant would be parole ineligible. This is the plea that later went forward. **PCR Tr. pp. 1055-58.**

On cross-examination by collateral counsel, Mr. Runyon admitted that he did not interview assault victim, **PCR Tr. pp. 986; 1013-14; 1030; 1032;**[59] but he explained that he did not need to do so in connection with the CSC with a minor offenses because his

[58] Counsel had previously worked out a similar plea in a Berkeley County case that had racial overtones. **PCR Tr. pp. 775-77.** 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 equivocation, he wanted a guilty plea," in which Applicant admitted his guilty. Also, the Solicitor wanted closure for the victim's family. Further, Applicant had remained in apparent agreement with counsel's proposed strategy until he refused to go forward at the plea for his own reasons. **PCR Tr. pp. 781-82; 1020-27.**

[59] Mr. Leiendecker also did not interview assault victim.

client did not deny where the offenses occurred in Dorchester County; and he never learned that the offenses supposedly occurred in Charleston County. **PCR Tr. pp. 1030; 1032.** Mr. Leiendecker also testified that Applicant never told him that the sex occurred in Charleston County. **PCR Tr. p. 182.**

Based upon the current record, the Court finds that Applicant has failed to meet his burden of proof. A guilty plea is a solemn, judicial admission of the truth of the charges against an individual. Thus, a defendant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *Blackledge v. Allison*, 431 U.S. 63 (1977). Statements made during a guilty plea should be considered conclusive, unless a defendant presents reasons why he should be allowed to depart from the truth of his statements. *Crawford v. United States*, 519 F.2d 317 (4th Cir. 1975); *Edmonds v. Lewis*, 546 F.2d 566 (4th Cir. 1976). In the present case, Applicant clearly and unequivocally admitted his guilt in the January 25 and 27, 1994 guilty pleas; and he never claimed at that time that the offenses actually occurred in Charleston County. *See* Applicant's Ex. 2, pp. 1-25.

The Court finds that he has not presented any credible reason for this Court to conclude that the offenses, in fact, occurred in Charleston County. The Court finds that the only credible evidence is that Applicant, who was in agreement with counsel's strategy to try and receive an LWOP sentence for murder, until he reneged on that plea, never told counsel that the sexual activity occurred in Dorchester County. The Court further finds that he was obviously aware of where the sexual activity occurred at the time of the two CSC guilty please.

assault victim's PCR testimony is not credible for several reasons. First, she was originally Applicant's co-defendant. However, the charges against her have long ago been dismissed,[60] and she no longer has any reason to fear prosecution in this case. Also, her credibility was impeached with her criminal record under Rule 609, SCRE, and she was incarcerated under a five year sentence for shoplifting and a probation revocation at the time of the PCR hearing. **PCR Tr. pp. 347-48.** Additionally she is the mother of the child which resulted form the criminal sexual conduct with a minor.

Moreover, for the reasons stated *supra*, the Court finds that her account of the crime to which she testified in PCR was untruthful, since it was inconsistent with her statement to law enforcement and her trial testimony. Finally, her testimony ignores that she was with Rogers on the night of the murder; she ran in the same direction as he and Patterson after the murder; and there has never been any suggestion that she was going home that night. Therefore, the Court finds that counsel was not deficient and Applicant was not prejudiced under *Strickland* and *Hill*, *supra*.

GROUNDS 9(B)(2) – (3)

Next, Applicant alleges that trial counsel in the 1996 resentencing proceeding: (1) failed to conduct any *voir dire* with respect to a number of jurors (Ground 9(B)(2)), and (2) failed to ask jurors if they would discriminate against Applicant because he was black and his victim was white. Ground 9(B)(3). As with his attack on counsel's *voir dire* in

[60] The State originally filed a Juvenile Petition in the Family Court, charging assault victim with murder, as a result of the November 25, 1992 incident. Her case was later waived up to the Court of General Sessions. However, the State agreed to dismiss the charges against her if she testified truthfully, **1994 R. p. 834-35**, and the charges were later dismissed. *See* **1994 R. p. 879.**

the original trial, the Court finds that he has not proved either deficient performance or resulting prejudice under *Strickland*.

A. General Rules for *Voir Dire* in Capital Cases.

It is unquestioned that the Sixth and Fourteenth Amendments guarantee a capital defendant the right to an impartial jury panel. *Morgan v. Illinois,* 504 U.S. 719, 728 (1992). However, the Court would note, once again, that the conducting of *voir dire* is particularly within the control of counsel; and that *voir dire* techniques are vastly different. Therefore, the review of counsel's performance in *voir dire* is "highly deferential;" and any *voir dire* error must be egregious and obvious. *See, e.g., Yeatts,* 166 F.3d at 265 (citing *Strickland*, 466 U.S. at 689); *Teague*, 60 F.3d at 1172 (a petitioner claiming ineffective assistance of counsel during *voir dire* must show that trial counsel's actions were "so ill chosen that it permeates the entire trial with obvious unfairness"); *Beintema*, 936 P.2d at 1227; *Arner*, 872 P.2d at 105. A challenged action is ineffective assistance if it cannot be considered sound trial strategy under the wide range of reasonable professional conduct. *Arnold, supra.*

Although § 16-3-20(D) permits the attorney for a capital defendant to examine potential jurors, it does not expand the scope of voir dire in § 14-7-1020. Also, the control of *voir dire* still remains within the discretion of the trial court. *Hill, supra.* Section 14-7-1020 provides that *voir dire* is permissible to explore relation to a party, interest in the cause, prior expression or forming of opinions on the case, or bias and prejudice.

Jurors in capital cases should be excluded if their views on capital punishment would "prevent or substantially impair" their ability to follow their oath and the trial

court's instructions on the law. Jurors should be excluded for cause either if they "in no case would vote for capital punishment, regardless of [their] instructions," or if they would "automatically vote for the death penalty in every case [and] will fail in good faith to consider ... aggravating and mitigating circumstances." *Morgan*, 504 U.S. at 729-30. *See also Bennett, supra. Voir dire* must be sufficient to allow a determination of whether a juror falls within one of the prohibited categories, but general questions about whether a juror can be fair and follow the law are insufficient. *Morgan*, 504 U.S. at 734-36. *Cf. Mu'Min v. Virginia*, 500 U.S. 415, 425-26 (1991)(in reviewing trial court's failure to ask questions on *voir dire*, the Court held that "it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair").[61]

B. Failure to *Voir Dire* Jurors concerning views on capital punishment. (Ground 9(B)(1).

Applicant first complains that his counsel conducted no *voir dire* with respect to three *veniremen* who were seated as jurors or alternate jurors: **1996 R. pp. 42-49 (Juror O'Neal); 398-406 (Juror White); 513-21 (Alternate Juror Connolly).** He also complains that eleven jurors or alternates were not asked about their opinions on capital punishment, citing **1996 R. pp. 42-49(Juror O'Neal); 57-65 (Juror Bowen); 110-20 (Juror Bates); 120-29 (Juror Bradley); 211-20 (Juror Howard) 398-406 (Juror White); 423-31 (Juror Helwig); 436-44 (Juror Miller); 470-78 (Juror Owens); 513-**

[61] The Fourth Circuit Court of Appeals has held that a jury panel is sufficiently questioned under *Morgan* if the jurors are asked if they hold any opinions that would prevent the conviction, if they are able to give due and fair consideration of either punishment by life imprisonment or death, and whether they would be willing, after a conviction, to consider voting for a sentence less than death. *Yeatts*, 166 F.3d at 265-66. *See also Hill*, 331 S.C. at 103-04, 501 S.E.2d at 127.

21(Alternate Juror Connolly); and 529-37 (Alternate Juror Campell). The Court, however finds that counsel only failed to question two of the jurors who actually participated in the deliberations which resulted in his death sentence: Jurors O'Neal and White. **See 1996 R. p 1022.**[62] Also, Juror Bradley was removed for hardship and was replaced by an alternate. **See 1996 R. pp. 578-83.**

Mr. Leiendecker testified that Mr. Runyon was, again, in charge of the *voir dire* process in the 1996 resentencing proceeding. He did not ignore Mr. Leiendecker, but Mr. Leiendecker was not making the strategic decisions. According to Mr. Leiendecker, his only responsibilities for the 1996 resentencing proceeding were to meet with Applicant, explain the resentencing process and discuss Applicant's testimony. Also, he received the transcript and helped co-counsel prepare for the direct and cross-examination of witnesses. **PCR Tr. pp. 117-18; 129; 165-66; 168-69; 174-75.**

Both parties again examined Mr. Runyon by at length concerning his *voir dire* strategy for the 1996 resentencing trial. He testified that he had tried three death penalty cases before the original trial and between fifty and sixty of his four hundred jury trials were in Dorchester County. Also, he consulted with two attorneys who practice in Dorchester County, Norb Cummings and Peter Them, Esquires, and "ran names of certain [jurors to] ... courthouse folks, who might be able to talk to [me] about [potential jurors]." Additionally, the defense was looking to put as many minorities on the resentencing jury as possible because experts opine that minorities are less likely to

[62] The Jurors who actually imposed the death sentence were Jurors O'Neal, Bowen, Bates White, Howard, Helwig, Miller, Owens, Parham (**1996 Rpp. 91-92**), Williams (**1996 R. pp. 465-67**), Baldwin (**1996 R. pp. 484-85**) and Pigate (**1996 R. pp. 65-72**). **1996 R. p 1022**.Juror Pigate, a student, was examined by counsel but was not asked questions about her views on the death penalty. **1996 R. pp. 69-71**. Of the jurors who decided Applicant's sentence, counsel asked such questions of Jurors Parham, Williams and Baldwin

impose the death penalty. However, counsel did not get as many as they would like. Also, he was "trying to look for people who, for example, may have gone to integrated churches. In a county like Dorchester, ... if you have the church information, you can pretty well tell if their churches have an integrated congregation or not. You're looking at people trying to be fair." **PCR Tr. pp. 793-95.**

As he did for the *voir dire* in 1994, Mr. Runyon utilized the city directory, Mr. Fludd, the bi-annual report of the city election committee[63] and other resources available to him to develop demographic information concerning the jurors. This information included where jurors went to church, where the children went to school, where they lived and worked, and the voting precinct in their district. In this regard, counsel testified that his preparation for the 1994 *voir dire* and that of the 1996 *voir dire* were the same. **PCR Tr. pp. 792-93; 848-53; 923-36; 945.** He explained the significance of knowing which school district a family resided because one of the school districts was *de facto* segregated. On the other hand, the other school district was integrated. It was his impression that those who lived in the integrated school district would probably be fairer to his client. **PCR Tr. pp. 923-33.**

With respect to his failure to ask questions on capital punishment of some of the jurors, he testified that he "always" relies upon information gathered through the questioning of jurors by the trial judge and the Solicitor. He also thought that the trial judge had sufficiently covered *Morgan* related questioning. He further explained that he tailored his questioning of veniremen based upon the questioning already done by the trial judge and the State, and he stated that he tries not to ask a question that has been

[63] He received this because he was Chairman of the Charleston County Election Commission at the time. **PCR Tr. p. 945.**

asked and answered. He explained that some jurors may have a bias towards the Solicitor, since at least half of the population voted for him in an election. More importantly, he explained that Dorchester County was "an extremely conservative community as a whole during this time, ... so you don't want to ask pointed questions to basically say are you a racist, you know, for an example." Although race had been injected into the case because the victim was white and the defendant was black, he did not wish to interject race anymore than it was already present in this case. He expressly did not wish to overtly interject questions concerning racial attitudes of jurors if he could avoid it because "white jurors don't want to be accused of being a racist." **PCR Tr. pp. 796-800; 933-38; 940-43; 953-56.**

However, he was quite a well aware of his right to ask questions on *voir dire* about the impact of the race of the victim and the defendant upon the jurors' ability to be fair. He further explained that during the course of *voir dire*, he and co-counsel would discuss whether or not to question certain jurors in the presence of Applicant. Also, he would rely upon a juror's demeanor and the manner in which they answered questions posed to them by the trial judge and the Solicitor. Finally, Mr. Runyon testified that the defense considered having a jury consultant but rejected the idea because Dorchester County is a small county that does not have a "broad spectrum or people," such as one would find in Charleston County; and counsel could discover information about the jurors through the means he had employed. **PCR Tr. pp. 796-800; 850-51; 923-38; 940-43.**

In connection with the current allegations, Applicant presented Denise de la Rue, a Georgia attorney who operates a jury selection consultation practice. She testified that

she had begun her business fourteen years ago and she had participated in ten capital trials.[64] Five of these were in South Carolina. As a part of her services, she has sat in court and assisted attorneys with recommendations on ways to question jurors if the defense wished to qualify a juror(s), who were the subject of a motion to disqualify under *Witt* and *Witherspoon*; she could have proposed questions concerning a juror's being victims of crimes; she could have offered questions designed to ensure that jurors understood aggravating and mitigating circumstances; she could have proposed questions about the case in general; she could have proposed death qualification questions; she could have proposed questions related to juror's views on firearms; she could have proposed questions to ensure that jurors understood the legal definition of murder; she could have proposed questions related to the victim's age; she could have proposed questions related to the jurors' views on race; she could have proposed questions relating to media coverage; and she could have proposed several "role playing" related services, such as practice *voir dire*. **PCR Tr. pp.** 657-61; 669-87; 690-91.

She likewise testified that she could have assisted in preparing a jury questionnaire, and she could have recommended follow-up questions for counsel to ask. **PCR Tr. pp. 687-90**. However, she admitted on cross-examination that asking questions of prospective jurors was not the only way to get "as clear a picture [as] possible" of a juror. She also admitted that attorneys can obtain demographic information from the jury questionnaire, but suggested this would be "[b]asic demographic information." Further, she did not utilize demographics greatly. She conceded that a jury pool in Dorchester

[64] In accordance with *Green v. State*, 351 S.C. 184, 569 S.E.2d 184, 569 S.E.2d 318 (2002) (PCR Applicant was not entitled to present expert testimony on which trial counsels performance was deficient under *Strickland*), the Court limited her testimony to factual evidence. *Cf. Dawkins v. Fields*, 354 S.C. 58, 66-67, 580 S.E.2d 433, 437 (2003).

County would probably differ from a jury pool in Charleston County. She further agreed that an attorney can acquire information on jurors from the questions asked by the trial judge and its prosecutor, or from asking questions of persons who may know the juror. Although she acknowledged that non-verbal communications can be important, she thought they could be "misleading as well" and "I don't put a whole lot of importance on body language unless its not in congress with what is being said." Finally, she agreed there are other reasons than a juror's views on capital punishment to exercise a peremptory challenge. **PCR Tr. pp. 694-700.**

The Court finds that Applicant has not shown either deficient performance or prejudice resulting from counsel's failure to question the four jurors or one alternate at issue. The Court finds that counsel's strategy for *voir dire* – as credibility described by Mr. Runyon - was neither egregious nor "so ill chosen that it permeates the entire trial with obvious unfairness." *Teague*, 60 F.3d at 1172.

Also, and despite Applicant's complaint about the brevity of counsel's questioning, the Court finds that counsel did question twenty-nine of the thirty-six qualified jurors[65] – including eleven of the petit jurors who sentenced Applicant.[66]

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[65] **1996 R. pp. 42-49; 49-56; 57-64; 65-72; 83-93; 93-102; 110-20; 120-28 (Juror Whatley, later removed); 144-55; 169-80; 181-90; 202-11; 211-20; 220-29; 250-57; 289-97; 298-306; 320-30; 330-43; 346-64; 364-72; 376-83; 383-98; 398-405; 406-22; 423-31; 436-44; 454-69; 470-78; 478-86; 492-99; 502-13; 513-20; 521-29; 529-37; 537-47.**

[66] **1996 R. pp. 54-55; 62-63 (Juror Bowen); 69-71 (Juror Pigate); 91-92(Juror Parham); 99-101; 117-18 (Juror Bates); 127 (Juror Whatley, later removed for hardship); 186-87; 217-18 (Juror Howard); 225-26; 254; 295-96; 303-05; 326-28; 338-40; 357-58; 370; 394-96; 414-15; 429-30 (Juror Helwig); 442-43 (Juror Miller); 465-67 (Juror Williams); 476 (Juror Owens); 484-85 (Juror Baldwin); 497; 510-11; 527-28; 535-36 (Juror Campbell); 544.** Likewise, the Court finds that the record demonstrates that counsel unsuccessfully moved to have several jurors removed for

Further, the Court finds that the trial court's and Solicitor's *voir dire* of the various jurors – together with the questions asked by the trial court in qualifying the *venire* - was sufficient for counsel to make an informed decision as to whether or not the jurors were qualified to serve under *Whit*, and whether or not to exercise a peremptory challenge. *See Hill*, 361 S.C. at 309, 604 S.E.2d at 702 ("On review, a juror[']s responses must be examined in light of the entire voir dire, with the primary consideration being that the juror is unbiased, impartial, and capable of following instructions on the law").

Nor has there been ay demonstration that these *voir dire* responses were false or misleading, or that additional questioning by defense counsel would have resulted in use of a peremptory challenge or a strike for cause. *Cf. Beintema v. State*, 936 P.2d 1221, 1227 (Wyo. 1997) ("Although his attorney's questioning of the jurors on voir dire was not extensive, it, coupled with the introductions and the state's questions, was sufficient for the attorney to utilize his peremptory challenges."); *Arner v. State*, 872 P.2d at 105 ("The information elicited by the trial judge's questioning was sufficient for Arner's trial counsel to utilize his challenges....").[67]

C. Racial Bias and *Turner v. Murray*. Ground 9(B)(2).

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cause, and unsuccessfully attempted to rehabilitate jurors who gave initial responses that suggested they were not qualified under *Whit*. Contrary to Applicant's argument, counsel did participate adequately in *voir dire*; he simply did not engage in the lengthy *voir dire* that collateral counsel asserts is necessary, which is not what *Strickland* mandates.

[67] The Court further finds that counsel's generalization about black jurors is not an unreasonable one without some basis in fact. *See* Kendra Meinhart, *Criminal Injustice: Continuing Racial Inequities in Death Penalty Sentencing*, 22 Sw. U. L. Rev. at 1190 (in arguing the importance of ensuring that blacks are on juries in capital cases, noting that statistics show blacks are less likely to support the use of the death penalty than whites); Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 Harv. L. Rev. at 467 (relying on Gallup polls for assertion that whites generally favor death sentences more than blacks).

Applicant further asserts that trial counsel's failure to question prospective jurors about racial prejudice, in accordance with the United States Supreme Court's decision in *Turner v. Murray*, 476 U.S. 28 (1986), was ineffective. The Court disagrees and finds that this allegation is without merit.

As discussed, the United States Supreme Court held that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." 476 U.S. at 36-37. The Court noted that the failure to question potential jurors about racial bias created "an unacceptable risk of racial prejudice infecting the *capital sentencing proceeding*." *Id.* (emphasis in original). The Court also explicitly held that this error predominantly affects the sentencing phase of the trial. *Id* at 37. The Court listed three factors that supported this determination. Two of those factors are "special circumstances" which are present in capital sentencing proceedings but are not present during the guilt phase of most trials. *Id.*[68] *See also State v. Patterson*, 299 S.C. 280, 384 S.E.2d 699 (1989), *rev'd*, 493 U.S. 1013 (U.S. 1990). The rule is "minimally intrusive," and the trial judge retains discretion over the extent of questioning. *Patterson*, 299 S.C. at 284, 384 S.E.2d at 284 (citing *Turner*, 476 U.S. at 37). The *Turner* Court "made clear that the decision to question prospective jurors about racial bias *is best left in the hands of trial counsel*." *Sexton*, 163 F.3d at 886 (citing Turner) (emphasis added).

The Court finds that Rogers has failed to prove either deficient performance or prejudice under *Strickland*. As noted, Mr. Runyon testified that he did not wish to further

[68] The three factors are (1) the fact that the crime charged involved interracial violence, (2) the broad discretion given the jury at the death-penalty hearing, and (3) the special seriousness of the risk of improper sentencing in a capital case. *Turner*, 476 U.S. at 37.

inject the issue of race into the case any more than it was already present, and that he did not wish to expressly question jurors on their racial attitudes because he did not think this line of inquiry would be well received by jurors from a small, conservative and predominately white community. Also, he had other information at his disposal from which he thought he could make a reasonable assessment of the desirability of the various members of the *venire* as jurors in his client's case.

In light of *Turner*, the Court finds that counsel's stated reasons demonstrate a reasonable trial strategy under *Strickland*. See *Henry, supra; Cf. Spencer v. Murray*, 18 F.3d at 234 n. 6 ("In light of *Turner*, we believe that Sexton's trial counsels' decision not to question prospective jurors about racial bias was binding on Sexton and, therefore, trial counsel were not constitutionally ineffective for allegedly failing to secure Sexton's consent").

Moreover, there is absolutely no prejudice in the present record. First, despite Applicant's complaint regarding the brevity of counsel's questioning, the Court finds that counsel did question twenty-nine of the thirty-six qualified jurors – including all but one of the petit jurors who determined his sentence. *See also* Ground 9(B)(1), *supra*. As Mr. Runyon properly recognized, "[t]here are a lot of factors that go into whether or not you decide to challenge a juror or not." **PCR Tr. p. 940**. "I've had some other capital cases where I've been very active on voir dire. ... [I]t depends upon the juror, the case, the judge, just a lot of factors ... go into it." **PCR Tr. p. 941**.

The Court specifically rejects the testimony from Ms. De la Rue, who downplayed the significance of a juror's demeanor during *voir dire*. Contrary to her belief, counsel's reliance upon juror demeanor is consistent with the United States

Supreme Court's recognition that the evaluation of the state of mind of a juror lies "peculiarly within a trial judge's province." *See Wainwright v. Witt*, 469 U.S. at 428. "Deference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations." *Miller-El*, 537 U.S. at 339. *See also Casey*, 325 S.C. at 454, 481 S.E.2d at 173 ("The trial court must often base its decision on credibility determinations, and its rulings on discrimination are accorded great deference on appeal"); *Gavin*, 473 So.2d at 955 ("even if we wanted to be fact finders, our capacity for such is limited in that we have only a cold, printed record to review. The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire"). *Cf. Weik, supra* (deference was given to the trial judge who was able to view the appellant's demeanor).

The Court further finds that Applicant's contention that inquiry into racial issues should be part of a "general approach" to *voir dire* in capital cases is directly in conflict with *Turner,* where the majority stated that the decision to inquire into racial matters is one for counsel to make, because such an inquiry could possibly have more negative effects than positive ones. 476 U.S. at 37 n.10 ("Justice Powell contends that inquiry into racial prejudice 'in the absence of circumstances that make clear a need for it could well have the negative effect of suggesting to the jurors that race somehow is relevant to the case.' Whether such a concern is purely chimerical or not is a decision we leave up to a capital defendant's counsel"). Because there are both pros and cons to a decision of whether to inquire into race, counsel cannot be faulted for either decision. *See DeLong v.*

Thompson, 790 F. Supp. 594 (E.D. Va. 1991) (rejecting a similar *Turner* ineffective assistance claim merely by noting that *Turner* does not mandate such inquiries), *aff'd*, 985 F.2d 553 (4th Cir. 1993) (unpublished).

Also, the individual *voir dire* of the jurors who were qualified for jury selection clearly reflected that the jurors could be fair and impartial; and that the jurors could base their verdict solely on the evidence presented and the law as charge by the trial court. The Court finds that this inquiry and the remaining questioning ensured that Applicant received a fair and impartial trial, and that race did not impact the jury deliberations. Finally, the Court finds that Applicant has failed to prove that the individual *voir dire* responses were false or misleading, or that additional questioning by defense counsel would have resulted in use of a peremptory challenge or a strike for cause. *Cf. Beintema*, 936 P.2d at 1227; *Arner*, 872 P.2d at 105. *See also, e.g. Moore*, *supra* (counsel cannot possibly ask every conceivable question and noting counsel did ask several thought-provoking questions). In the absence of any prejudice, the Court finds that this argument is without merit.

GROUND 9(B)(6)-(8), (10) & (12)

Applicant further contends that his attorneys were ineffective because they failed to present available mitigating evidence (*Ground 9(B)(6)*); they failed "to see expert assistance regarding a material medical condition of Applicant" (*Ground 9(B)(7)*); they did not adequately confront and rebut the State's witnesses and evidence (*Ground 9(B)(8)*); they did not object to the introduction of an SCDC incident report (*Ground 9(B)(10)*); and they failed to review "critical evidence" that the State had made available

to the defense for inspection (*Ground 9(B)(12)*). The Court finds that Applicant has not met his burden of proof as to any of these allegations for the following reasons.

In addition to the work done before the 1994 trial, Mr. Runyon testified that he sent his original case file to Appellate Defense when Applicant's first appeal was taken. However, when he called to obtain his file after the case was reversed in *Rogers I*, he was told that they could not find the file. So, he and Mr. Leiendecker reconstructed the file.[69] They obtained copies of all the statements, photographs and other matters. They also had to "go back and check on the various cases and what have you that we might have to use." **PCR Tr. pp. 754-56.**[70]

Mr. Runyon testified that the Solicitor's Office cooperated with counsel in their efforts to reconstruct the file. Once they had reconstructed the file, counsel sat down and "talked about what do we do now." They discussed whether or not to present Applicant's stepfather as a witness, and ultimately decided not to present him because they felt that he was not an effective witness. **PCR Tr. pp. 808-12.**

Applicant again received a physical examination. **1996 R. p. 549.** Again, counsel made a strategic decision not to inject race as an issue in the case any more than it was already present. The defense's primary objective was to obtain a sentence of LWOP, and an LWOP instruction was given by the trial judge. They also unsuccessfully sought to exclude the videotape of Applicant's "perp walk." Although Mr. Leiendecker dealt primarily with Applicant's family because he had a good relationship with Applicant's

[69] His file from the 1996 trial was also sent to Appellate Defense, and this file was also lost. Mr. Savitz corroborated that his office could not locate the files although he did have a letter showing they had been sent to Appellate Defense. **PCR Tr. pp. 86-87.**

[70] Also, either he or Mr. Leiendecker had interviewed the police officers involved at some point.

mother (whom he continued to represent in matters at the time of the 2004 hearings), Mr. Runyon had previously met with family members and discussed the case before the 1994 trial (**PCR Tr. pp. 868-72**; Applicant's Ex. 46). He also had at least three conference calls with Applicant's family and one with Applicant's mother before the resentencing, as reflected by his timesheets. Applicant's Ex. 47. Yet, he explained that the time sheets were under-inclusive and did not reflect everything he did in preparation for trial. **PCR Tr. pp. 805-06; 808-09; 835; 840-42; 866; 895-900; 1009-12; 1016-18; 1049-50.**

Counsel did not interview either Patterson or [assault victim] before the 1996 proceedings but he had [assault victim,]'s statement and was aware that Patterson would not provide favorable testimony. With respect to the case in mitigation, counsel knew either from discussions with Applicant's family, from Mr. Leiendecker or the records in counsel's possession, that Applicant's family was poor; that there was evidence of drug and alcohol problems; that he and his brothers had been in trouble; that Applicant's mother had been a very strict disciplinarian; that the parents "rode herd" on the boys; that the family "didn't have the best background with regards to paying bills and holding long-term jobs, things of that sort." At that point, counsel had to make a decision of whether to "demonize" Applicant's mother and blame his problems on his background or to have a sympathetic mother plead for her son's life. Mr. Runyon further testified that counsel discussed whether or not to hire a social worker. Ultimately, counsel decided not to present a social worker and not to demonize [applicant's mother]. He had done this in *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1991), and the jury was very unreceptive to that

approach.[71] This factored into counsel's decision not to present that type of information to a jury from a small, predominantly white and conservative county. Counsel also did not think that presenting expert testimony on why jurors should spare Applicant's life would play well with a Dorchester County jury. Moreover, "it wasn't inherently bad for him in one sense. Mother was a big church lady." Therefore, counsel did not present a social worker or the type of evidence presented by Applicant at the PCR hearing. **PCR Tr. pp. 760; 786-88; 790-92; 835; 842-48; 866-72; 895-900; 1049-50.**

Mr. Leiendecker testified that he had attended a national continuing educational program on representing capital defendants entitled "Life in the Balance," between the 1994 trial and the resentencing proceeding. This seminar greatly emphasized the importance of using mitigation experts in the penalty phase, so the defense could be prepared to show the defendant's background and to determine "if there were factors or influences that could or should be presented to a jury that would mitigate the need for a death sentence." This seminar purportedly "opened my eyes as to avenues in the zealous representation" in a capital case. He then gave conflicting responses as to why the defense did not present this type of case in mitigation. He first testified that "I think it was discussed ... but there was some disbelief that he had been convicted and sentenced to death a first time." Counsel did not think that he would be resentenced to death, and they "did not ever seriously discuss hiring any expert." However, he immediately thereafter testified that he and Mr. Runyon considered and did discuss hiring a mitigation investigator for the resentencing proceeding. **PCR Tr. pp. 121-24; 127-29; 185-86.**

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[71] They considered this same approach in 1994 but rejected it for the same reason. **PCR Tr. p. 786.**

He added that counsel felt that the facts of the case "were fairly simple." Also, "we felt that his family and the people that knew his family could provide some history or background." Counsel allegedly "had not found anything in initial reviews that suggested we had any of these outstanding or interesting facts, like he was a victim of drugs before birth or ... he had some traumatic accident in his youth or [had] been the victim of violence as a child." Counsel supposedly "didn't have any information, and I think we decided not to follow up on it." In hindsight, Mr. Leiendecker felt that counsel had not done an adequate job in presenting the case in mitigation. He also denied being involved in any in-depth interview of any of Applicant's family members or others who knew him. He added that his only responsibilities for the 1996 resentencing was meeting with Applicant to prepare his testimony, reviewing the original transcript and helping prepare for the examination of witnesses. **PCR Tr. pp. 124-26; 128-30; 170; 185.**

Mr. Leiendecker then testified that he did not "remember any strategic decision either way regarding an expert in mitigation. **PCR Tr. p. 135.** He also indicated that counsel were attempting not to belittle the grief of the victim's family but to demonstrate that what happened was simply a tragedy. With respect to the work he did admit doing before the resentencing hearing, Mr. Leiendecker testified that he met with Applicant one or two times at Lieber Correctional Institution and he remembered discussing matters with Applicant when Applicant at the courthouse in St. George. However, he did not remember any regular meetings. He also testified that he had represented Dax Patterson at some point between the 1994 trial and the 1996 proceeding. He had contact information in his file on Patterson for the other charge, but he denied discussing this case with Patterson. He also said that he did not interview [assault victim] or Simmons. And,

he admitted that he was given some specific responsibility concerning witnesses. He worked on preparing for those witnesses he examined in the resentencing proceeding. Finally, he admitted that he never voiced any objection to co-counsel's strategy. **PCR Tr. pp. 165-69; 174-76; 179; 185-89.**

The Court finds that Mr. Runyon's testimony concerning the pretrial preparation for resentencing is more credible, and that it is unfathomable that counsel would not have thoroughly discussed and considered whether or not to present a social worker or to otherwise present evidence of Applicant's social history of which the Court finds that counsel was aware. The testimony by Mr. Leiendecker to the contrary is patently inconsistent with the testimony that he attended a death penalty-related seminar wherein the importance of these matters was emphasized. The Court is simply unable to accept that counsel would have deliberately neglected a matter as important as Applicant's sentencing proceeding.

The Court likewise finds that Mr. Leiendecker's testimony that he did not interview Patterson lacks credibility; and the Court finds that it is difficult to believe he represented Patterson in a matter shortly after the original trial in this case and the senseless murder of a nine year old victim would not be discussed.[72] Therefore, the Court accepts Mr. Runyon's testimony as credible and adopts it as a basis for denying relief on the various sentencing phase allegations.

A. Witnesses who previously testified at trial.

[72] His testimony also appears to be in conflict with representations made by him and co-counsel at a November 20, 1996 hearing on a continuance motion, in which Applicant admitted working on the case and counsel wanted to alert the trial court that a continuance may be necessary because of the terminal illness of Mr. Leiendecker's grandfather in Ohio. **1996 R. pp. 138-49.**

1. Eyewitnesses [assault victim] and Patterson.

Applicant first contends that trial counsel were ineffective because they failed to interview [assault victim] and Patterson and failed to present evidence consistent with the PCR testimony given by the witnesses. As with the same allegation raised in connection with the original trial, the Court finds that Applicant has not proved either deficient performance or resulting prejudice.

As discussed, before an inmate is entitled to relief on the ground of ineffective assistance of counsel, he must satisfy both prongs of *Strickland*'s test: *i.e.*, he must prove that counsel's performance was deficient, and that he was prejudiced by his attorneys' errors. In order to meet this burden, he must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. *See also Palacio*, *supra*. In the context of a capital sentencing proceeding, he must prove that "there is a reasonable probability that ... the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. See also *Wiggins*, 539 U.S. at 537; *Jones v. State*, 504 S.E.2d at 829-30 (petitioner did not meet burden).

Further, the Court stated in *Strickland* that

> strategic decisions made after thorough investigation of the 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.

466 U.S. at 690-91. *See also Wiggins*, 539 U.S. at 525 (further investigation is excusable where counsel has evidence suggesting it would be fruitless); *Burger v. Kemp*, 483 U.S. at 794 (concluding that limited investigation was reasonable because all witnesses brought to counsel's attention provided predominantly harmful information). Further, "[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id* at 691. *See also Drayton*, 312 S.C. at 11-12, 430 S.E.2d at 521-22.

Here, Applicant testified in 1996 and gave his account of the shooting. He stated that he had been working on a car that day with his cousin. He admitted that he and Patterson[73] had been drinking on the day of the murder, and that they went to Spell's around 6:00 p.m. When he got there, he went to use the phone. A pickup truck containing Mr. E[redacted], Mr. Carver and Stephanie thereafter pulled into the parking lot. Applicant knew where Patterson was but he "wasn't really paying attention to what" Patterson was doing. **1996 R. pp. 877-79.**

Applicant claimed that the trouble began when Mr. B[redacted] said that he needed to use the phone and Applicant told B[redacted] that he would be through in a minute. After

[73] He indicated that Patterson was twenty-three or twenty-for at the time of the resentencing. **1996 R. p. 877.**

Applicant turned back around to talk on the phone, Mr. B[redacted] continued "mumbling that he needed to use the phone now" and said "give [me] the phone, boy." Applicant said that Mr. B[redacted] was being very vulgar about it, and that Patterson and Mr. B[redacted] got into a verbal argument. Applicant got involved when he heard Mr. B[redacted] and Mr. Carver get out of the truck. At that point, Patterson was trying to attack the men and assault victim was trying to restrain him. Mr. B[redacted] and Mr. Carver were approaching Patterson, with Carver toward the back of the truck. **1996 R. pp. 881-82.**

Applicant then asked the person to whom he had been talking to hold on; he put the phone down and he stepped between Mr. B[redacted] and Mr. Carver. He admittedly was not "as polite as a scholar or anything, but I asked him ... what's up." Although Mr. Carver "pretty much stayed by the back of the truck," Mr. B[redacted] turned around and "was pulling something from the behind the backseat of the truck." Applicant thought that Mr. B[redacted] was reaching for a weapon. So, he immediately pulled out his gun and fired it into the air to stop Mr. B[redacted] from producing a weapon. Mr. B[redacted] stopped what he was doing. "Then, Dax told me that I had shot somebody in the truck."[74] This all occurred before the truck moved. He denied laughing and claimed that he was scared. Therefore, he ran "down the street through some woods." Eventually, he made his way to Alabama. **1996 R. pp. 882-86**

He denied knowing that he killed a child at the time of the shooting. Also, he said he did not know the B[redacted] or Mr. Carver before the shooting. He denied pointing a gun at Mr. B[redacted], or telling B[redacted] to get in the truck or Applicant would kill him. He likewise denied spitting and said that he did see Patterson spit. Although he understood

[74] Applicant admitted that he possibly shot twice, but both shots were fired while the truck was stationary.

he had been convicted of murder for killing Stephanie, he claimed the shooting was "an accident," and that he had not intended to kill either Stephanie or anyone else in the truck. He further claimed that his statement to the police in Alabama accurately described what had happened on November 25, 1992. Finally, he acknowledged that his actions ruined the B[redacted]'s lives, his family members' lives and his life. Finally, he asked to spend the rest of his life in prison. **1996 R. p. 886-92.**

[assault victim] testified again in 1996 and her testimony in both trials is very similar. ***Compare* 1994 R. pp. 822-41 *with* 1996 R. pp. 646-58.** Patterson did not testify in either trial.

[assault victim]'s testimony at the PCR hearing, however, was quite different in several respects from her 1994 trial testimony, her 1996 testimony and her statement to police (Applicant's Ex. 21). Contrary to Mr. B[redacted]'s testimony (**1996 R. pp. 619-21**), she testified that Applicant did not get up in the driver's side door with Mr. B[redacted] and put a gun to Mr. B[redacted]'s head. She stated that Applicant was never near the truck and that he did not see the victim. She likewise did not see the victim and, from her perspective, the shooting appeared to be an accident because Applicant did not see the victim. **PCR Tr. pp. 309-12.**

She further testified that Applicant did not make any comment to either of the white men in the truck when they first arrived; and she denied that Applicant had cussed at the men. She stated that Patterson had started the argument when Applicant was on the telephone, and that she was uncertain what the argument was about. She attempted to intervene and persuade Patterson to leave the men alone but he would not do so. Applicant then became involved in the argument. **PCR Tr. pp. 312-15.**

As she had testified in 1994 and 1996, she indicated that Patterson spit on one of the white men. However, she added that Applicant never spit on either of them and she claimed that she heard the word "n----r" used by one of the men while she was standing at the phone. She indicated that this was both insulting and scary. When the white man got in the truck and started to pull away from the store, she claimed that Mr. B[redacted]and Mr. Carver "were reaching for something," and that the truck had hooks on it. She thought they were reaching for a weapon. At roughly the same time, she noticed that the brake lights were coming on and off. Applicant then fired a second shot.[75] When assault victim turned around, both Applicant and Patterson were gone. **PCR Tr. pp. 315-23.**

She again turned around when she heard one of the white men use a racial slur, and she ran. She again testified that, from her perspective, it appeared that Applicant was merely trying to scare off Mr. B[redacted]and Mr. Carver and he did not appear to be aiming at anyone. She claimed that she did not mention use of the racial insult or other information to which she testified at the PCR hearing because she was shocked and scared. She also claimed that no one asked her about these matters at trial. She testified that Mr. Bailey interviewed her prior to the 1994 trial or before the 1996 resentencing, but neither of Applicant's attorneys spoke with her. **PCR Tr. pp. 305; 307-09; 323-25; 331; 337-38.**

On cross-examination, Respondent impeached assault victim, noting that her 1996 testimony was inconsistent with the account given at the PCR hearing. **PCR Tr. pp. 339-40.** In the resentencing hearing, she had testified that the men in the truck had not threatened either Patterson or Rogers. Still, Applicant was standing with the gun in his

[75] It is confusing from her PCR testimony (**PCR Tr. p. 322**) as to when she says the first shot was fired.

hand in the back of the truck at the time the shooting occurred. Although she turned around each time she heard a gunshot, she did not see what led up to either shot. **1996 R. pp. 652-56.** She was then cross-examined extensively by Mr. Runyon and admitted that she could not tell him what the argument was about. Also, she did not remember what anyone had said. **1996 R. pp. 656-58.**

Patterson, who was belligerent throughout his testimony on cross-examination, testified that neither of Applicant's attorneys ever spoke with him before the 1994 trial or the 1996 resentencing; and that he would have spoken to them had they contacted him. According to Patterson, he, Applicant and [assault victim] went to Spell's Grocery Store on the night of the shooting in order to use the telephone. Upon their arrival, *he got on the phone* and, while he was talking to Applicant's brother, a man came out of the store. This man asked him in a vulgar manner how long he was going to be on the phone and he indicated it was a payphone. The next thing he knew, Mr. Carver (whom we described as a "little short dude") jumped out of the door of the truck and onto his back. He also claimed that Mr. B[redacted] attempted to reach behind the seat of his truck and get one of two weapons which Patterson saw.[76] Patterson further testified that he saw a box of Bush Beer on the floorboard of the truck. (See Applicant's Ex. 18). **PCR Tr. pp. 222-30.**

After Mr. B[redacted] reached into the back of the truck for a weapon, "*my partner* [Applicant] ... came around the back of the truck, [and] fired two [shots] in the air." (Emphasis added). Patterson then grabbed Mr. B[redacted]. He claimed that neither he nor Applicant saw the victim. He further claimed that Mr. B[redacted] had started the conflict and he could have refuted Mr. B[redacted]'s trial testimony, set forth in the Statement of Facts,

[76] He claimed he saw a 9mm. Pistol and a shotgun. **PCR Tr. pp. 228.**

supra. Like assault victim he claimed that it appeared from his perspective that the shooting was an accident and he reiterated that neither he nor Applicant ever saw the victim before the shooting. **PCR Tr. pp. 230-38.**

On cross-examination, he admitted that he and Applicant were still good friends and would remain so "until I leave this earth or him." Also, he admitted that he signed an authorization permitting Applicant's attorneys to obtain copies of all of his records and reports (see Respondent's Ex. 4), which were otherwise confidential. **PCR Tr. pp. 239-41.** Although he admitted that counsel represented him at the time of the first trial, he denied that he did not wish to be cooperative with the defense at that time. He also denied on cross-examination that the shooting was anything other than an accident. And, he testified that Applicant was not wearing glasses at that point in time. **PCR Tr. pp. 241-48.**

Moreover, his testimony was that Applicant had watched someone work on a truck that afternoon, as opposed to assault victim's testimony in both trials and in PCR, that the person had worked on a car. *See* **PCR Tr. pp. 248-50.**[77] Patterson also did not recall Mr. Riley being present on the night of the shooting. Finally, Respondents impeached Patterson's account by noting that the inconsistency between that version of the shooting and Applicant's December 2, 1992 statement, in which he indicated that he was the one on the phone, as opposed to Patterson. **PCR Tr. pp. 251-53; 255-56.**

The Court finds that trial counsel made a reasonable investigation into the matter and made reasonable decisions that made further particular investigations unnecessary. *See Strickland,* 466 U.S. at 690-91; *see also Wiggins*, 539 U.S. at 525. Specifically, the

[77] The sun was going down when the incident occurred but there was lighting outside the store. **PCR Tr. p. 251.**

Court finds that trial counsel had a copy of [assault victim,]'s statement, which is consistent with her resentencing testimony, including trial counsel's cross-examination of her. To the extent she gave contrary testimony at the PCR hearing, the Court finds that her testimony simply lacks credibility.[78] As a result, counsel was not deficient in failing to discover it.

The Court further finds that Patterson's testimony is not credible because it is inconsistent with that of his former attorney, and it is inconsistent with the testimony of Mr. Runyon, which the Court finds credible. Based on the credible evidence before it, the Court finds that Patterson would not have cooperated with counsel in 1996, even if counsel had wished to speak with him because Patterson wished to distance himself from Applicant's actions at the time of the shooting.[79] Therefore, the Court finds that any contrary representation simply is not credible. Moreover, the Court would note that Patterson's demeanor in this Court was belligerent and underscored his lack of credibility.

Finally, the Court would note that Applicant has not proven any conceivable prejudice from counsel's performance with respect to the supposed failure to adequately investigate and impeach these witnesses. First, there was overwhelming proof that

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[78] In addition to being inconsistent with the prior testimony and statement, the Court notes that she was impeached with prior convictions in accordance with Rule 609, SCRE, and she no longer has any charges against her concerning this case because the State dismissed those charges in exchange for her testimony in 1994. **1994 R. pp. 834-35; 879.** More importantly, she is the mother of Applicant's child.

[79] The Court finds that Mr. Runyon did not interview Patterson and finds Mr. Leiendecker's testimony that he did not talk to Patterson during his representation of Paterson lacks credibility. Nevertheless, the Court finds that counsel were aware of Patterson's version from there preparation in 1994 and does not accept his testimony that he would have cooperated with the defense simply is not credible. Thus counsel was not deficient under *Strickland*.

established Applicant's guilt of murder and the statutory circumstance found by the sentencing jury. However, the principle reason he cannot show any conceivable prejudice is that, assuming *arguendo* that the evidence was credible, it still would not support a jury instruction on voluntary manslaughter, s*ee Rogers I, supra*; *Childers, supra;* and it would not have otherwise mitigated his conduct in any fashion. Also, it appears that the testimony would have done nothing more than corroborate much of the information in Applicant's statement to police concerning what occurred on the night of the murder (*see* State's Ex. 18) and Applicant's testimony. However, this statement and Applicant's testimony were before the sentencing jury. Also, Patterson's testimony is inconsistent with Applicant's own testimony as to what occurred at the time of the shooting and inconsistent with [assault victim]'s as well. Finally, the Court would note that the United States Supreme Court has previously held that the Eighth Amendment "in no way mandates reconsideration by capital juries, in the sentencing phase, of their 'residual doubts' over a defendant's guilt ... [s]uch lingering doubts are not over any aspect of petitioner's 'character,' 'record,' or 'circumstance of the offense.'" *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988); *Simpson v. Moore*, 367 S.C. 587, ___ n. 5, 627 S.E.2d 701, 716 n. 8 (2006) (same). *See also Abdul-Kabir v. Quarterman*, ___ S.Ct. ___, ___, 20 Fla. L. Weekly Fed. S 197 (U.S. S.Ct., Apr. 25, 2007) ("we have never held that capital defendants have an Eighth Amendment right to present "residual doubt" evidence at sentencing"); *Oregon v. Guzek*, 126 S.Ct. 1226 (2006) (Neither the Eighth nor the Fourteenth Amendment granted capital murder defendant a right to present additional *alibi* evidence at resentencing that was inconsistent with his prior conviction, that shed no

light on manner in which he committed crime for which he was convicted, and that defendant did not contend was unavailable to him at time of original trial).[80]

For these reasons, the Court finds that he did not show "a reasonable probability that ... the sentencer ... [can] conclude [] that the balance of aggravating and mitigating circumstances [do] not warrant death," as required for relief under *Strickland*, 466 U.S. at 695, by its exclusion. *See also Wiggins*, 539 U.S. at 537. This allegation lacks merit.

2. Other witnesses who testified at trial.

Applicant further contends that trial counsel was ineffective for failing to adequately investigate and develop information through several other witnesses who testified at trial: Stephanie Simmons, George Scharf, James Robinson, Anthony Riley and Lieutenant Earl Asbell. Again, the Court finds that he has not shown either deficient performance or resulting prejudice.

First, he contends that counsel was ineffective for failing to interview Ms. Simmons and present testimony consistent with her testimony before this Court. The Court finds that his argument is without merit, and that he has not proved either deficient performance or resulting prejudice.

The prosecution presented Simmons in the 1994 trial, and her testimony from that proceeding (**1994 R. p. 894-98**) is discussed in Ground 9(A), *supra*. She did not testify at the resentencing trial.

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[80] While the evidence discussed throughout this allegation and the remaining portions of 9(B) technically show how as opposed to who committed the offense, *contra Guzek*, Applicant has offered it to show the crime was less than murder. Although he clearly may present evidence concerning the circumstances of the crime, he cannot prove any prejudice from counsel's failure to relitigate his guilt or innocence. He does not have the right to re-litigate the murder conviction under *Franklin* and its progeny. Moreover, each of his allegations are rejected for alternative reasons.

Ms. Stephanie Simmons, a student at Tuskegee University, testified in 1994 that he showed up at her home on November 29, 1992. Applicant told Ms. Simmons that he needed a place to stay but did not explain why he left South Carolina to come to Alabama. Although Ms. Simmons was preparing to go to Montgomery with her friends, she allowed him to use her telephone. Later that week, she saw him sitting down on the steps of her apartment complex, but they did not speak. **1994 R. p. 894-98.**

Ms. Simmons testified at the PCR hearing that she did not recall either of Applicant's attorneys discussing the case with her prior to either the 1994 or 1996 proceedings. The only one whom she had spoken to was Solicitor Bailey. With respect to the events of November and December 1992, she testified that she was a student and lived in off-campus housing at Tuskegee University, in Alabama. She claimed that Applicant called her after the incident and said that he was coming to Alabama. He "wasn't really coherent, he was upset, [and] he had been crying." He did not tell her what had happened, other than saying it was "something really bad" and that it "was a bad accident that had happened." On the following day, he arrived in Alabama and told her that there was an incident which occurred while he was at a pay phone in Summerville. He claimed that he and Dax Patterson had gotten into an altercation and there were some "racial slurs that were thrown."[81]

Ms. Simmons further testified that Applicant also talked to her over the telephone following his arrest and return to South Carolina for prosecution. She added that

[81] According to Simmons, Applicant told her that someone said, "the n-i-g-g-a needs to get off the phone." He also supposedly told her that one of the men involved in the altercation "had gone to the truck" and Applicant thought there was going to be "some altercation with weapons." Then, he fired a shot "more or less to say back off, and a little girl had been shot." **PCR Tr. pp. 258-65.**

Applicant and Patterson "hung out together" constantly; and that Applicant was protective of everybody. **PCR Tr. pp. 265-67**. Further, she testified that Applicant had a reputation for being truthful. **PCR Tr. pp. 272.**

On cross-examination, it became clear that the information imparted to her by Applicant did not occur all in one conversation. In fact, she testified that they "really didn't talk much in Alabama. I was going to class, I had my own thing going on at school. And mainly, he wanted some place to stay." Rather, most of the information that was imparted to her came in her conversations with him after his arrest. Applicant had previously contacted her while she was living in Tuskegee, but he had never driven six hours to see her before the day he showed up at her house. **PCR Tr. pp. 275-78.**

Mr. Runyon testified that he did not interview Ms. Simmons prior to trial, but either he or Mr. Leiendecker spoke with her in the courtroom before she testified. Also, he noted that there was a problem with her testimony because Applicant had left South Carolina and fled to her residence. **PCR Tr. pp. 1041-42.**

The Court finds that trial counsel's performance was not deficient because counsel was able to speak to her prior to her testimony in 1994. Also, there is nothing in her testimony at the 1994 trial that was beneficial to him. The Court also finds that her testimony at the PCR hearing that the crime was an "accident" or that racial epithets were used was not credible because it is inconsistent with her testimony from 1994.

The Court further finds that Applicant has failed to show any prejudice resulting from counsel's failure to present her testimony. First, there was overwhelming proof that established Applicant's guilt of murder and the statutory circumstance found by the sentencing jury. Also, any conversations that she may have had with him were

inadmissible as a matter of state law, both in the subsequent resentencing proceeding because the statement by him would be hearsay, and he was not an available declarant. *See State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000) (defendant who asserts fifth amendment privilege is not unavailable under Rule 804(3), SCRE); *State v. King*, 367 S.C. 131, 623 S.E.2d 865 (Ct. App. 2005) (same). *See also South, supra.*

Moreover, even if the testimony was admissible, it is cumulative to Applicant's own testimony. Further, the testimony is only relevant to whether or not the killing was manslaughter, as opposed to murder. The problem with Applicant's argument is that the Court in *Rogers I, supra*, indicated that he was not entitled to a voluntary manslaughter instruction although similar information was presented at the original trial. Thus, at worse, Applicant has merely shown that he could have presented corroborative and cumulative evidence. Because this evidence was already before the jury and because it did not support an instruction on manslaughter or otherwise mitigate his conduct, he cannot show any prejudice. *See Strickland, supra.*

The Court further finds that if Simmons had been presented as a defense witness, then the State would have been able to elicit evidence, such as that presented at the PCR hearing, that "the bad things that he did do, whether it be small or few, out-shined all the good things that he always did." **PCR Tr. p. 270**. ***See also*** **PCR Tr. pp. 279-80**. Also, her assessment of Mr. Rogers' family was contrary to the presentation of the family history at the PCR hearing and consistent with the presentation by trial counsel. **PCR Tr. p. 279.**

Finally, the Court would note that the United States Supreme Court has previously held that the Eighth Amendment "in no way mandates reconsideration by

capital juries, in the sentencing phase, of their 'residual doubts' over a defendant's guilt ... [s]uch lingering doubts are not over any aspect of petitioner's 'character,' 'record,' or 'circumstance of the offense.'" *Franklin*, 487 U.S. at 174; *Simpson*, 367 S.C. at ___ n. 5, 627 S.E.2d at 716 n. 8 (same). *See also Abdul-Kabir v. Quarterman*, ___ S.Ct. ___, ___, 20 Fla. L. Weekly Fed. S 197 (U.S. S.Ct., Apr. 25, 2007) ("we have never held that capital defendants have an Eighth Amendment right to present "residual doubt" evidence at sentencing"); *Oregon v. Guzek*, *supra* (neither the Eighth nor the Fourteenth Amendment granted capital murder defendant a right to present additional *alibi* evidence at resentencing that was inconsistent with his prior conviction, that shed no light on manner in which he committed crime for which he was convicted, and that defendant did not contend was unavailable to him at time of original trial); *Southerland*, 316 S.C. at 386, 447 S.E.2d at 868.

Applicant further contends that trial counsel were ineffective for failing to interview George Scharf and proper testimony consistent with testimony he gave at the PCR hearing that the shooting appeared to be accidental. The Court finds that he has not shown either deficient performance or resulting prejudice.

Mr. Scharf testified in 1996 that he "was employed by Summerville Ambulance Service under contract with Dorchester County E.M.S." at the time of the murder. He was a paramedic and was the crew chief. He responded to the scene on November 25, 1992. When he arrived, there was "a pickup truck with both doors open," and there was with a small girl in the front seat. Another paramedic, who arrived on the scene before Mr. Scharf, was attending to her at that time. **1996 R. pp. 672-76.**

They called for a helicopter, but there was not one available. So, they decided to "load and go," which is a quick-response procedure designed to get the patient to the hospital as quickly as possible. When asked what he observed, he testified that there was a "blood all over the inside of the truck. And all over the girl." Also, he saw the wound to the back of Stephanie's head. She had a lot of swelling above her left eye and the eye was swollen shut. After detailing other injuries that he observed, he testified that they loaded her onto a backboard, placed her in a stretcher and headed to the hospital. He was unable to intubate her, so a tube was inserted into her nose for oxygen. Further, she pulled out an I.V. he attempted to insert. She was eventually taken to Trident Hospital. **1996 R. pp. 675-79.**

As discussed in Ground 9(A), Mr. Scharf testified at the PCR hearing that he went to the scene on the night of the murder and transported Stephanie to Trident Hospital. There, he relayed basic information to the emergency room staff. In a physician's form from the hospital (Applicant's Ex. 20), he characterized the shooting as a "firearm accident." When asked why he characterized it as an accident, he explained that it "just appeared to be that way from the fact that the shot went through the back window in the middle of the seat rather than in the direction of the passenger's seat or the driver's seat. And with the size of the little girl, it didn't appear to us at the time that her head would have been visible above the seat." **PCR Tr. pp. 293 l. 24 – p. 296 l. 3; 298.** On cross-examination, however, he clearly testified "I'm not trying to say ... that there was no intentional shot." Rather, it did not appear that the victim had been selected. **PCR Tr. p. 299.** On redirect examination, he indicated that trial counsel had not spoken to him before his testimony in 1994 or 1996. **PCR Tr. pp. 300-01.**

The Court does not find that Applicant has proven that counsel's performance was deficient.[82] However, the Court need not address that in this Order because the Court finds that he has failed to prove any possible prejudice resulting from the failure to introduce Applicant's Ex. 20 or the testimony by Mr. Scharf at the PCR hearing. *See Strickland*, 466 U.S. at 687 ("a court need not determine whether counsel's performance was deficient before examining the prejudice offered by the defendant as a result of the alleged deficiencies," and, "[i]f it is easier to dispose of an ineffective assistance claim on the ground of lack of sufficient prejudice, ... that course should be followed"). First, the Court finds that Applicant did not have a right to present this evidence under *Franklin, supra*, and its progeny because this would be evidence relevant to residual doubt.

Even assuming that Applicant had a right to present this evidence, the Court finds that any evidence that the shooting was an "accident" would be merely cumulative to Applicant's statement and his 1996 testimony that the shots were not fired directly at any individual. Also, there was overwhelming proof that established Applicant's guilt of murder and the statutory circumstance found by the sentencing jury. Moreover, the South Carolina Supreme Court has already indicated on direct appeal that such evidence did not support a jury instruction on voluntary manslaughter, and this Court finds that the testimony does not mitigate his conduct by establishing that the shooting was accidental, in sudden heat of passion, or otherwise.

Likewise, the Court finds that the evidence at issue, at best, showed Applicant's willingness to endanger the lives of more than one individual and would support an inference of malice and aggravate the murder. *See* § 16-3-20(C)(a)(3) ("The offender by

[82] As noted in 9(A), the credible evidence is that counsel would have had the hospital report.

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"). Nor did the testimony at issue mitigate Applicant's conduct in any manner not already before the sentencing jury. Finally, the Court cannot find any prejudice because any suggestions that this was an "accident" is inconsistent with the testimony from Dr. Price, which is addressed in **Ground 9(A)(5)**, that Applicant likewise suggests should have been presented. Dr. Price opined that Applicant should have been able to discern that there were three people in the cab of the truck under the circumstances that were reflected in the transcript. Thus, the shooting was anything but an "accident." In the absence of any conceivable prejudice, this Court finds that he is not entitled to relief.

Applicant next contends that trial counsel were ineffective for failing to adequately examine Mr. James Robinson, the clerk at Spell's Store was one of three people in the store when the shooting occurred who testified at trial.[83] Several minutes after Mr. Isaiah Jennings walked up to the store (shortly before closing time) and a white man outside of the store unsuccessfully attempted to pick a fight with him, all three witnesses heard two gunshots. After the second shot, Mr. B[redacted] ran into the store and asked the owner to call the police because someone had shot his daughter in the head. **1996 R. p. 661-71.**

At the PCR hearing, Mr. Robinson testified that he knew Applicant before the November 25, 1992, shooting. In Mr. Robinson's estimation, Applicant "was an allright fellow (sic), he was fine, he stopped by the store at my job all the time and just come in

[83] Mr. Isaiah Jennings and his cousin, Herthenia Lincoln, were also in the store. **1996 R. pp.661-67.**

and say hello and he was always respectful." He had known Applicant since Applicant was approximately 12 or 13 years old; and Applicant had never been disrespectful to him. Nor had he ever heard of his boss or anyone else claim that Applicant had stolen anything. He indicated that Applicant's attorneys had not spoken to him prior to his testimony in 1994 or in 1996. **PCR Tr. pp. 282-86.**

Mr. Robinson also testified that Applicant had stopped by the store the morning of the shooting to say "hello." However, he did not know what Applicant did when Applicant was away from the store. Finally, Mr. Robinson was inside the store at the time of the shooting, **PCR Tr. pp. 286-89**. Thus, he did not and could not know what occurred at the time of the shooting.

Mr. Runyon's testimony at the PCR hearing was that he had gone by the crime scene on several occasions. Also, he had spoken to people at the store to make sure that "we didn't have anybody in the grocery store who would be saying, oh yeah, ... I saw everything, and the man with the gun was this terrible fellow." **PCR Tr. pp. 854**.

The Court finds this to be credible testimony and thereon finds that counsels' performance was not deficient. Additionally, the Court finds that counsel was not deficient in failing to present this as evidence of Applicant's character in the sentencing phase even though it would have been admissible. *See Payne v. Tennessee*, 501 U.S. 808, 818 (1991) ("the Constitution requires the jury to make an individualized determination as to whether the defendant should be executed based on the 'character of the individual and the circumstances of the crime'") (*quoting Booth v. Maryland*, 482 U.S. 496, 502 (1987); *State v. Gaskins*, 284 S.C. 105, 124, 326 S.E.2d 132, 143 (1985) (evidence which is probative of the defendant's character is admissible in a capital

sentencing proceeding) (citations and quotation omitted); *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987) (jury's sole function is to make a sentencing determination based on these factors and not to legislate a plan of punishment). The Court likewise finds no prejudice because this evidence would have been merely cumulative to the evidence counsel actually presented and which Applicant now contends amounted to ineffective assistance of counsel. See *Jones* and *Byram, supra.* ***See*** **1996 R. pp. 863; 865-67; 874-76; 914-26.**[84]

And, there was overwhelming proof that established Applicant's guilt of murder and the statutory circumstance found by the sentencing jury. As a result, the Court finds that he did not show "a reasonable probability that ... the sentencer ... [can] conclude [] that the balance of aggravating and mitigating circumstances [do] not warrant death," as required for relief under *Strickland*, 466 U.S. at 695, by its exclusion. *See also Wiggins*, 539 U.S. at 537. This allegation lacks merit.

Applicant also contends that trial counsel was ineffective for failing to interview Anthony Riley because, if they had done so, counsel would have learned that Mr. Riley was close friends with Mike B[redacted] the victim's father; and that Mr. Riley had previously been involved in an incident with Applicant and the two "did not see eye to eye." Counsel could have thereby impeached his trial testimony. The Court finds that trial counsel was not deficient and that Applicant has failed to demonstrate Sixth Amendment prejudice because Mr. Riley did not testify in 1996 The Court further finds

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

that the issue lacks merit for the reasons stated in connection with counsel's performance in the guilt phase. See Grounds 9(A)(4)-(7), and (10).[85]

Lt. Earl V. Asbell also testified in the 1996 resentencing, and his testimony at that time closely followed his testimony in 1994, which is discussed in Ground 9(A)(4)-(7) and (10). ***Compare* 1994 R. p. 859-89 *with* 1996 R. pp. 692-706**. Applicant maintains that his trial attorneys were ineffective because they failed to elicit testimony and evidence from him similar to the testimony and evidence presented at the PCR hearing. He contends that the PCR evidence and testimony was favorable to him because it supported his defense at trial. The Court rejects this allegation for several reasons.

Lt. Asbell testified at the PCR hearing that he had been subpoenaed by Applicant's counsel to bring to Court "all photographs, negatives or any videotapes that the police might have taken." However, he was unable to locate the Dorchester County Sheriff Department's file in the matter, and it apparently is missing. Consistent with his trial testimony, he testified that he went to the crime scene on November 25, 1992, and photographed it. He also did a drawing of the crime scene, in which he triangulated the measurements of the parking lot. In a response to the subpoena issued by Applicant, he brought evidence he had collected at the crime scene but which was not entered into evidence. **PCR Tr. pp. 436-38; 440; 443-44; 453-54.**

Lt. Asbell further testified that the evidence he produced for this Court had been sealed from the time he collected it on the night of November 25, 1992, until it was opened for Applicant's collateral counsel. **PCR Tr. p. 448.** He also produced a

[85] Additionally, the Court would note that the only complaint stated by Applicant in connection with this allegation is that Riley's testimony could have been impeached. The Court finds that this would have been improper under *Franklin v. Lynaugh*, *supra*, and its progeny.

photograph which he had taken but was not introduced at trial. See Applicant's Ex. 18. This photograph depicts a clothes basket in the bed of the pickup truck with clothes in it.[86] This photograph was removed by him from the Solicitor's file and would have been provided to counsel. **PCR Tr. pp. 761-62; 774; 833-34.** He also produced an unopened Bush beer (Applicant's Ex. 29) and a bloodstained brown paper bag, which he collected from the trash can at the front of the parking lot of Spell's. **PCR Tr. pp. 440-43; 446-50.**

Lt. Asbell testified that he sees Mr. Runyon "all the time" and he has spoken with Mr. Runyon. However, he was unable to recall whether or not he had spoken to Mr. Runyon in connection with the case. He also did not recall whether or not he had sat down with Mr. Runyon, Mr. Leiendecker, or Mr. Feeley. **PCR Tr. pp. 457-58.** Mr. Runyon testified that he distinctly remembered talking to Lt. Asbell about the case. In fact, the sketch that Lt. Asbell did of the crime scene caused Mr. Runyon to go "back to him to find out ... how ... and why he took all the time to do that."[87] The Court finds that Mr. Runyon's testimony is credible and that he, in fact, spoke to Lt. Asbell about the case prior to trial in 1994. As a result, the Court finds that his conduct was not deficient even if he did not physically view the beer can and other items that were not introduced at trial.

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[86] Applicant suggests that it depicts "a firearm pack sitting on top of clothes in a clothes basket." Applicant's (Proposed) Order, p. 30. However, Lt. Asbell specifically declined to agree with counsel's description of this and he could not determine what was in the basket other than clothes. **PCR Tr. p. 443.**

[87] Mr. Runyon described the diagram as "very comprehensive" and indicated that the diagram covered every conceivable angle in the parking lot. **PCR Tr. pp. 773-74.** He further testified that either he or Mr. Leiendecker had spoken to all of the officers involved. They had contact with the pathologist's office in an effort to determine the angle of the bullet, in an obvious effort to corroborate Applicants version of what had occurred; and they had the record's of Stephanie's treatment at Trident Hospital. **PCR Tr. pp. 773-74; 833-35.**

More importantly, the Court finds that Applicant has utterly failed to prove any prejudice, whatsoever, resulting from counsel's performance. As discussed, he had to prove that "there is a reasonable probability that ... the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. See also *Wiggins*, 539 U.S. at 537. He utterly failed to meet this burden of proof.

First, this appears to be further evidence relevant to lingering doubt, which he was not entitled to present. *Franklin* and *Simpson, supra*. Moreover, Mr. B[redacted] admitted that he had been drinking three beers prior to the shooting. He also admitted buying a beer at the grocery store but said that he did not get a chance to drink it and that he threw it into the trash can after his daughter was shot. **1996 R. pp. 604; 606-07; 613-14; 627-28; 637-38.** Despite Applicant's criticism of counsel's performance, the Record on Appeal demonstrates that trial counsel did cross-examine Mr. B[redacted] about his drinking on the day of the shooting. Counsel re-established that Mr. B[redacted] had had at least three before the shooting and that Mr. B[redacted] had purchased another beer before the shooting. **1996 R. pp. 627-28; 637-38.**

Although Mr. Carver subsequently testified that he was unaware of whether or not there was any beer in the truck and that Mr. B[redacted] did not have anything to drink in his presence, Mr. B[redacted]'s contrary testimony was already before the sentencing phase jury. Moreover, Mr. Carver clearly testified that he had a 9 mm. pistol in the clothes basket that was in the bed of the pickup truck and an unloaded shotgun, in a case, in the cab of the truck. **1996 R. pp. 722-24.** Finally, there was overwhelming proof of Applicant's

guilt of murder and the statutory aggravating circumstances. Based on this record, the Court finds that Applicant has failed to demonstrate any conceivable prejudice resulting from counsel's performance because the evidence that he now claims should have been before the guilt phase jury was, in fact, already before it. Therefore, there is not a reasonable probability of a different result but for counsel's errors. *Id.*

B. PCR witnesses who did not testify in 1996.

Applicant further alleges that trial counsel were ineffective because they did not utilize the services of an ophthalmologist or an expert in audio and video enhancement. He likewise contends that counsel were ineffective because they failed to present a correctional officer, whom Applicant argues could have testified to his adaptability to confinement. The Court rejects each of these allegations.

1. Failure to employ an ophthalmologist. Ground 9(B) (7).

As he did in his guilt phase, Applicant contends that counsel were ineffective in the 1996 resentencing proceeding because counsel did not employ an expert in ophthalmology. **Ground 9(B)(7)**. However, the Court rejects this allegation and finds that Applicant failed to prove that counsel were deficient or any resulting prejudice.

As thoroughly discussed in **Ground 9(A)(5)**, ***supra***, Applicant presented evidence, primarily through his mother, applicant's mother, and his social worker, Mr. Yungman, that it was determined through the school system that Applicant had trouble with his vision; and that glasses were prescribed for him. applicant's mother thought he was in kindergarten at the time. However, Applicant did not like to wear his glasses as a child, and he would not wear them when he had an opportunity not to do so. **PCR Tr. pp. 409-14; 421-22; 426 (applicant's mother); 532-33, 562-63, 902 (Mr. Yungman)**. Applicant also

introduced a series of photographs to substantiate that he wore glasses. *See* Applicant's Exs. 24-26; *See also* Applicant's Ex. 30 (wanted poster); Respondent's Ex. 5 (newspaper photograph of Applicant, from Mr. Yungman's file, taken after Applicant's arrest).

Applicant's collateral counsel contacted Dr. William Price, an ophthalmologist with a general practice in Summerville, South Carolina, and asked him to review certain records and to perform an eye examination on Applicant.[88] Dr. Price testified that he relied upon these records as background information. He likewise reviewed "very cursory" school records, which contained referenced to visual acuities in May 1974, October 1974, September 1975, March 1977 and September 1978. (Applicant's Ex. 37). **PCR Tr. pp. 568-75.**

Dr. Price further testified that the eye examination he performed on Applicant on November 1, 2002, revealed that Applicant had myopia and astigmatism. He explained that myopia is commonly referred to as near-sightedness; and that a person who has myopia has blurred vision, unless this is corrected by some refractive means.[89] Dr. Price described Applicant's myopia as "[m]oderate," and he opined that Applicant is correctible to 20/30 in his right eye and 20/25 in his left eye. Dr. Price's report was introduced as Applicant's Ex. 35. The school records indicated that Applicant had an uncorrected visual acuity of 20/70 in each eye in 1974. In September 1978, his

[88] The records he reviewed included SCDC records dated July 5, 1989; some SCDC sick call clinic mates beginning July 1994 and going through December 1994; an analytical eye examination by SCDC's Division of Health Services and dated November 22, 1994; "a similar record" from September 21, 1994; and computer generated notes entitled "medical summary" from SCDC generated on November 20, 2000. (*See* Applicant's Ex. 36).

[89] Also, a myopic person sees things better close than at a distance.

uncorrected vision was 20/70 in his left eye and 20/100 in his right eye. **PCR Tr. pp. 575-79.**

Dr. Price testified on cross-examination that between 1994 and Dr. Price's examination in 2002, Applicant's visual acuity had varied between 20/70 to 20/200; and he opined that this was not abnormal. Also, both myopia and astigmatism are common; and he opined that "probably at least half of the population" is myopic. Additionally, he testified that 20/40 is the visual acuity needed to get a driver's license in South Carolina; and that 20/70 is not significantly worse than 20/40 "in terms of the amount of blurriness" that a person would have (although the person would have blurrier vision).[90] More importantly, Dr. Price opined that it was impossible to determine what Applicant's visual acuity was on November 25, 1992. He further opined that if Applicant could see well enough to run through the woods in the dark on the night of the murder, Dr. Price "would expect that he would see better in a lighted parking lot." He further opined that a person with 20/70 vision "[p]robably [could] make out" that there were three people in a truck from a distance of twenty feet. **PCR Tr. pp. 586-91.**

Mr. Runyon testified that his recollection was Applicant's school records reflected that Applicant did not have perfect vision but he never claimed that he had problems with his eyesight, or that his eyesight played any part in the shooting. Moreover, Applicant presented evidence that Mr. Runyon met or had telephone contact with Applicant's family on several occasions prior to the 1996 resentencing hearing. Also, counsel had Applicant medically evaluated before the 1994 and 1996 proceedings.

[90] He agreed that there is a degree of subjectivity in an eye examination because the examiner must depend upon the examinee to indicate his vision has improved. **PCR Tr. pp. 588.**

There were never any significant problems with his eyesight reported, and counsel never noticed any problems with Applicant's eyesight. **PCR Tr. pp. 776; 802-03; 871-72900-02; Applicant's Ex. 42; 1994 R. pp. 1272-75; 1996 R. p. 549.**

Mr. Runyon testified that he, personally, had 20/200 vision; and that he was unaware of this until an eighth grade eye examination. Mr. Runyon further testified that it would be difficult to argue to a jury that his client produced a weapon, shot at a truck that was moving away from him and hit a child in the back of the head, as a result of his eyesight. In Mr. Runyon's estimation, this would be inflammatory and would not be well received by a jury in Dorchester County. **PCR Tr. pp. 776; 802-03; 900-02; 1994 R. pp. 1272-75.**

Although the Court has previously rejected, as not credible, testimony from Mr. Leiendecker about the extremely limited role he supposedly played in preparing for the resentencing, the Court finds his testimony that he met with Applicant on several occasions prior to the resentencing, in order to prepare Applicant for testifying in the sentencing phase, is credible. The Court further accepts as credible Mr. Leiendecker's testimony that Leiendecker did not recall Applicant making any complaints about his eyesight or suggesting that his poor eyesight played some part in the shooting, at any point in counsel's representation of him. **PCR Tr. pp. 129; 164-66; 174-75; 182-83.**

In the present case, the Court finds that counsel made a "reasonable investigation, as required by *Strickland*. *See* 466 U.S. at 691. S*ee also Wiggins*, 539 U.S. at 525 (further investigation is excusable where counsel has evidence suggesting it would be fruitless); *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (concluding that limited

investigation was reasonable because all witnesses brought to counsel's attention provided predominantly harmful information). *Strickland* clearly states that:

> the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

466 U.S. at 691. *See also Drayton v. Evatt*, 312 S.C. at 11-12, 430 S.E.2d at 521-22.

The Court finds the record demonstrates that, before the November 25, 1992 murder, glasses had been prescribed for Applicant, which is corroborated by photographs of him. The Court further finds that counsel was aware of some evidence in their possession at the time of their representation that Applicant had less than perfect eyesight, but that his problems with his vision were not very severe. More importantly, Applicant never told either attorney that his eyesight played any role in the shooting; and there was no suggestion of this in his statement to police, State's Ex. 18, or his subsequent 1996 testimony. Also, Applicant was given a complete physical before the 1994 trial and again before the 1996 resentencing proceeding; but he apparently did not complain of his eyesight on either occasion. Therefore, the Court finds that Applicant has failed to show deficient performance. *Id.*

The Court further finds that he has failed to show any prejudice. First, appears that this is additional evidence relevant to residual doubt, which Applicant does not have a right to present in sentencing or resentencing. *See Franklin* and *Simpson*, *supra*. *See*

also Abdul-Kabir v. Quarterman, ___S.Ct. ___, 20 Fla. L. Weekly Fed. S 197 (U.S. S.Ct., Apr 25, 2007) Second, it is impossible to know the precise acuity he had at the time he murdered Stephanie B[redacted], but Dr. Price's testimony makes clear that the limitations on Applicant's vision were only moderate; and although his vision might be blurrier than a person with 20/40 vision, it would not be significantly worse.

More importantly, squinting would improve his eyesight; and Dr. Price's testimony is that he could probably see that there were three people in the truck from a distance of twenty feet. Additionally, Dr. Price would expect him to be able to see better in a lighted parking lot than in a dark wooded area, where the record demonstrates Applicant ran after the shooting. Finally, nothing in his testimony about the events of the crime suggests any vision impairment. **See 1996 R. pp. 877-92.**

The Court further finds that this evidence would not mitigate his conduct and lessen the crime of murder, or otherwise lessen his moral culpability. More importantly, the Court finds that any claim that Applicant's problems with his eyesight contributed to the shooting would only tend to aggravate the shooting and make the shooting appear even more malicious because he was obviously aware of his "need" to wear glasses to see properly but he nevertheless chose not to wear glasses. He thereby endangered the lives of three people at the time of the shooting. *See* § 16-3-20(C)(a)(3). As a result, the Court finds that Applicant has not established that "there is a reasonable probability that ... the sentencer ... [can] conclude [] that the balance of aggravating and mitigating circumstances [do] not warrant death." *Strickland*, 466 U.S. at 695; *see also Wiggins*, 539 U.S. at 537. This argument lacks merit.

2. Failure to employ audio and video enhancement expert or otherwise use videotape and its contents for impeachment purposes.

The Court further finds that Applicant has failed to prove deficient performance or, more importantly, prejudice resulting from trial counsel's failure to employ an expert in audio and video enhancement, such as Mr. Fesperman.

First, the Court finds that counsel had been provided notice of and access to the videotape in question, and they were provided a copy of the transcript of the crime scene video on February 9, 1994. See Respondent's Ex. 4. Although the transcript only contained one of the two statements on the videotape, it alerted counsel to the existence of potential impeachment information on the videotape, which was made available to the defense by former-Solicitor Bailey. Yet, it is undisputed that review of the tape would not have disclosed the empty twelve pack of beer in the truck bed. Applicant's (Proposed) Order, p. 37.

The fact that lead counsel, Mr. Runyon did not utilize the prior inconsistent statements on Applicant's Ex. 56 in his 1996 cross-examination of Mr. Carver, however, does not demonstrate that his performance was deficient. To the contrary, the Court would note that "decisions whether to engage in cross-examination and if so to what extent and in what manner, are . . . strategic in nature" and will not support an ineffective assistance claim." *Nersesian*, 824 F.2d at 3121; *Hunt*, 57 F.3d at 1333 (refusing to indulge in a "grading of the quality of counsel's cross-examination"); *Sallie*, 587 F.2d at 640 (*Marzullo* was not intended to promote judicial second-guessing on questions of strategy as basic as handling of a witness).

"In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." *Willis*, 87 F.3d at 1006. The extent

of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel. *Yarrington*, 779 F.Supp. at 1308. Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. *Dyer*, *supra*.

In the present case, Mr. Carver testified in the resentencing proceeding that he did not drink anything that day, and that he did not see Mr. B[redacted] drink in his presence. Also, he did not see Mr. B[redacted] come out of Spell's with anything; and he was unaware that Mr. B[redacted] had any beer in the truck. **1996 R. pp. 722; 739-40;744; 749-50.** Counsel did cross-examine Mr. Carver - just not in the manner Applicant and collateral counsel suggest he should have. This does not show deficient performance under *Strickland*. *Id.*

Counsel cross-examined Mr. Carver at length concerning his version of the events of November 25, and the roles of the various participants involved. Counsel established that Patterson started the confrontation and Applicant only later intervened. Further, he established the friendship between Mr. B[redacted] and Mr. Carver; and that they had spoken to each other the next day, supposedly without discussing the incident. He examined Carver about the fact he testified at trial that Applicant spit at Mr. B[redacted], but he indicated in his statement to police that Patterson had spit. He did so even though Applicant and Patterson were different races and different sizes. Similarly, counsel established that Mr. Carver did not mention Applicant's threat to kill Mr. B[redacted] or that Applicant fired a shot at the truck before the fatal shot, in his statement to police on the night of the shooting. Further, counsel established that, before he testified, Carver never said to anyone that Applicant and Patterson were laughing after the shooting. Finally, he

established that Carver's 9 mm. weapon was in the clothes basket in the bed of the truck. **1996 R. pp. 736-50.** A defendant does not establish ineffective assistance of counsel under *Strickland* where the attorney chooses one reasonable strategy to the exclusion of another. *See Guerrero*, 938 F.2d at 730; *Adamo*, 882 F.2d at 1227-28 (same).

Applicant has not proven deficient performance based upon counsel's failure to have still photographs developed from the videotape, such as Applicant's Exs. 57-58. First, it is undisputed that review of the tape would not have disclosed the empty twelve pack of beer in the truck bed. *See* Applicant's (Proposed) Order, p. 37. As a result, counsel would not have been alerted to the need for further investigation. Second, counsel examined Mr. Carver regarding the fact that he did not see any twelve pack of beer in the truck and did not see Mr. B[redacted] drink. Although his answers (**1996 R. p. 739-40; 744; 749**) were consistent with his testimony on direct examination (**1996 R. pp. 722-33**), the response was *inconsistent* with B[redacted]'s testimony that he was drinking that day and evening, discussed *supra*. ***See*** **1996 R. p. 7627-45** (cross-examination of Mr. B[redacted] established that the twelve pack of beer he had been drinking from earlier was in the cab of the truck, as opposed to the bed; and, he purchased another beer at Spell's to drink).[91]

Mr. Carver was thereby impeached. The other portions of counsel's cross-examination referred to earlier also provided additional impeachment of him. Mr. B[redacted]'s testimony was likewise impeached in 1996, as discussed elsewhere in the order.

[91] Contrary to Applicant's argument, the Court finds that Mr. B[redacted] was not denying that there was an empty beer container in the bed of his truck, but that the twelve pack from which he had been drinking was in the cab.

Nor has Applicant proven any Sixth Amendment prejudice from counsel's performance. Again, the evidence at issue seeks to exploit lingering or residual doubt and there is no right to present this at sentencing. *See Franklin* and *Simpson*. Further, there was overwhelming evidence of Applicant's guilt of murder and the aggravating circumstance from all eyewitnesses. Also, counsel had already impeached Mr. B[redacted] and Mr. Carver, as discussed.[92] As to the statements on Applicant's Ex. 56, the Court finds that Mr. Carver appeared to be stunned, he never made eye contact with the camera and it did not appear that he was fully paying attention to the - as of yet unidentified - questioner. For these reasons, the Court finds that any impeachment from the prior inconsistent statements would have been marginal, at best.

Further, all that could be gained through presentation of the photographs is that Mr. B[redacted] might have been drinking. This point, however, was not in dispute. Moreover, the Court finds that the photographs do not show the presence of beer in the bed of the truck, merely an empty container; and, thus, they could not any significant impeachment value. Also, Applicant did not present any evidence at the PCR hearing to

[92] Counsel's examination of Mr. B[redacted] elicited that Mr. B[redacted] had drank three beers by the time he reached Spell's grocery and purchased a fourth beer there which he threw in the trash, unopened, after his daughter was shot. Counsel then established that Patterson started the confrontation and Applicant only later intervened. Also, Mr. B[redacted] was impeached with his statement, in which he told Patterson and Applicant that he was going to call the police even though Rogers had not done anything to him at that point. Nor could Mr. B[redacted] remember at what point Mr. Carver got out of the truck. Further, he established the friendship between Mr. B[redacted] and Mr. Carver; and he established that there was a shotgun in the truck as well as a 9 mm. pistol in the clothes basket in the bed of the truck. Additionally, Mr. Carver admitted that he had a twelve pack of beer in the cab of the truck. Finally, counsel established that Mr. B[redacted] did not indicate in his statement to police that Applicant had threatened to kill him. **1996 R. pp. 627-45.**

establish how long the container had been there, whether it contained beer close to the time of the shooting or whether it was seen by Carver.

The Court further finds that counsel's cross-examination fully set forth enough information, so that the jury could properly assess the credibility of Carver and B[redacted] and so that counsel could demonstrate the supposed lack of it. *See Mills*, 161 F.3d at 1288 (defendant's Sixth Amendment right to confront witnesses is satisfied where the cross-examination permitted exposes the jury to facts sufficient to evaluate the witness' credibility and "enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable"). Additionally, in light of the abundance of other evidence and argument impeaching both Mr. B[redacted] and Mr. Carver's credibility, the additional impeachment at issue would have been merely cumulative and, hence, Applicant cannot show prejudice from counsel's omissions. *See Mills, supra; cf. Gunn*, 313 S.C. at 136-38, 437 S.E.2d at 82 (given abundance of other evidence detailing witness' disrespect for law, defendants could not show failure to disclose evidence witness bribed or attempted to bribe magistrate was "material" under *Brady*).

Finally, with respect to the statements on Applicant's Ex. 56, the Court finds that Applicant did not prove a reasonable probability of a different result, but for counsel's errors, because he did not present Carver as a witness, and all the Court has is speculation as to what his responses would be if confronted with the statements or photographs (Applicant's Exs. 57-58). Likewise, Mr. B[redacted] was not presented as a witness and the Court is forced to speculate as to how he would respond if Applicant's Exs. 58-58 were presented to him. *See Moss*, 286 F.3d at 864-65 (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified

had the cross-examination been pursued); *Zettlemoyer*, 923 F.2d at 298 (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented). *See also, e.g., Beaver*, 93 F.3d at 1995 (rejecting claim that counsel was ineffective for failing to present mitigation evidence family members, where there was no proffer of this testimony). *Cf. Williams v. French*, 146 F.3d 203 (4th Cir. 1998) (habeas petitioner failed to establish prejudice that would excuse procedural default of claim that trial counsel were ineffective for failing to investigate statements of witnesses regarding conversations which they had in jail with petitioner's cohort, where counsel extensively cross-examined cohort during guilt phase of trial regarding inconsistent statements he made at jail and to police, and any impeachment value derived from witnesses would have been cumulative at best).

This rule is also well established in South Carolina. *E.g., Bannister*, 333 S.C. at 303, 509 S.E.2d at 809 (state's failure to object to applicant's testimony as to what purported witness would testify did not relieve applicant of burden of producing witness or offering witness' testimony in accordance with the rules of evidence); *Jackson, supra*, (applicant failed to establish prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses where he failed to substantiate at PCR hearing that victims and witnesses had criminal records); *Glover, supra* (because three witnesses applicant claimed could have provided an *alibi* defense did not testify at the PCR hearing, applicant could not establish prejudice from counsel's failure to contact these witnesses). As a result, the Court finds that Applicant has not established that "there is a reasonable probability that ... the sentencer ... [can] conclude [] that the balance of aggravating and

mitigating circumstances [do] not warrant death." *Strickland*, 466 U.S. at 695; *see also Wiggins*, 539 U.S. at 537. This allegation lacks merit.

3. Correctional officer Brown.

Applicant further contends that trial counsel were ineffective for failing to present SCDC correctional officer Anthony Brown in the 1996 resentencing hearing and for not objecting to introduction of an SCDC incident report (State's Ex. 39). The Court finds that Applicant has failed to meet his burden of proof on either prong of the *Strickland* test and denies relief on this allegation as well.

Mr. Brown did not testify in the resentencing trial but was a prosecution witness in the original sentencing phase in 1994. At that time, he testified that he was a Correctional Officer assigned to the Reception and Evaluation Unit of the Broad River Correctional Institution (BRCI). His duties were to supervise, control and insure the safety of the inmates in that unit. On the morning of February 9, 1993, Applicant was accused of being involved in an altercation with another inmate. Although Mr. Brown claimed that his only recollection was that Applicant had conformed and adapted to life in prison, Applicant later testified and admitted that he received three months in lockup, as punishment for this incident. **1994 R. p. 1068-70; 1072; 1137-38.**

Mr. Brown testified at the PCR hearing that he was still employed as a correctional officer, and he was working at BRCI when Applicant was housed there before the 1994 trial. He described Applicant as "always courteous, always complying with what was expected of him as an incarcerated inmate, he's always polite and just self-disciplined." He said that Applicant complied and abide[d] by the rules that's set forth by [SCDC] for the inmates to conduct" themselves. Applicant was "[v]ery easy" to manage,

and Mr. Brown was unaware of any serious problems Applicant had with other inmates. **PCR Tr. pp. 1110-11**[93]

Mr. Brown then testified that he was a witness to the incident reflected in State's Ex. 39 in the 1996 resentencing proceeding, the SCDC incident report. On direct examination, he admitted that another officer prepared the report, but that Brown determined on his arrival that Applicant supposedly "had no involvement at all" in the disturbance. Rather, he was allegedly one of many ""bystanders." He added that "the way they have it charged ..., it seems a little bit harsher than what it really is;" and he stated that inmate fights occur in prison. Mr. Brown also did not see Applicant hit, punch, strike or kick anyone. And, he said that it is customary to charge all inmates present when a fight occurs, until it is determined which inmates were involved. **PCR Tr. pp. 1112-14; 1116.** He further testified that Applicant's trial attorneys did not contact him before either the 194 or 1996 trials. However, he could have testified that Applicant did not have any involvement in the incident. Also, he was not aware that any weapons were involved. **PCR Tr. pp. 1114-17.**[94]

On cross-examination, Mr. Brown admitted that he did not personally witness the fight; and that Applicant was charged, as a result of someone being injured. He also saw the injured inmate. Yet, he again attempted to downplay the seriousness of the incident. He admitted that throwing urine or feces are manners in which inmates may be non-compliant. However, when asked if fighting was another sign of an inmate's non-

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[93] Mr. Brown testified that Applicant was never a problem in the general population. **PCR Tr. p. 1111.** This answer and the question eliciting it ignore that he was being housed on death row, in the Edisto Unit, at the time. ***See*** **PCR Tr. p. 1125.**

[94] The Court sustained Respondent's objection to hearsay testimony about Applicant being remorseful. **PCR Tr. pp. 1119-23.**

compliance, he initially said that it "depend[s] on the circumstances." Eventually, he had to admit that SCDC does not permit inmates to fight. **PCR Tr. pp. 1123-26.**

Respondent's cross-examination further established that, although Mr. Brown's duties include protecting the general public and inmates, he was reluctant to admit that he was protecting them from fights, as well as other forms of misbehavior. As to the February 1993 incident reflected in State's Ex. 39 in resentencing, he claimed that no one knows now whether any inmate was hurt during that incident; and asserted that this was "just pure speculation." However, he finally admitted that the adjustment committee had found that Applicant committed the offense, and that the adjustment committee does not fabricate charges. Rather, Applicant did not have a defense to the charge and was therefore convicted. **PCR Tr. pp. 1126-30.**

When Mr. Runyon was questioned about State's Ex. 39, he testified that he did interview "some correctional people" but he did not recall whether he had spoken to either Mr. Brown or the other officer listed in the incident, Mr. Tommy Powell. If the report was going to come in, however, he did not want to present a witness to discuss, who would then be examined by the Solicitor on how bad Applicant is. **PCR Tr. pp. 1000-02.**

In the present case, the Court does not need to address the first prong under Strickland because it is clear that Applicant cannot meet his burden of proving that he was prejudiced by counsel's performance. *See Strickland,* 466 U.S. at 687 ("a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,

... that course should be followed"). First, there was overwhelming proof that established Applicant's guilt of murder and the statutory circumstance found by the sentencing jury.

Second, the testimony of Mr. Brown simply is not credible, as clearly shown by Respondent's thorough cross-examination of him, which demonstrated clear evidence of bias that could be readily exploited by a prosecutor in front of a jury. And, his testimony before this Court is inconsistent with his participation in the incident, as reflected in the report, State's Ex. 39.

More importantly, Mr. Brown ultimately admitted, albeit reluctantly, that Applicant was guilty of the offense. Also, counsel established in the 1996 trial on examination of Ms. Priscilla Mack – through whom State's Ex. 39 was introduced - that fights occasionally occur in prison; and, that this was the only substantial infraction against Applicant or evidence of a rules violation. **1996 R. pp. 764-65**. Therefore, his examination established the position points Applicant brought out in the PCR hearing without any of the cross-examination undermining Brown's credibility. *See Bell v. State*, 879 So.2d 423, 444 (Miss. 2004) (trial counsel not deficient for failing to present mitigating evidence regarding defendant's adaptation to prison in sentencing phase of capital murder trial, where defendant failed to cite what evidence of good behavior in prison should have been presented and how such evidence would have affected the outcome of his sentencing proceeding); *Crawford v. State*, 867 So.2d 196, 217-18 (Miss. 2003) (same); *Cf. McNeill v. Polk*, 476 F.3d 206, 217 (4th Cir. 2007) (petitioner could not prove prejudice resulting from counsel's presentation of evidence of an infraction he committed while in prison, where petitioner did not present any admissible evidence in

support of his position that he did not commit the infraction and the infraction was presented in the context of overwhelmingly positive testimony regarding McNeill's time in prison). Finally, Applicant admitted in his resentencing testimony that he had committed a number of bad acts.[95] Based on these reasons, the Court finds that Applicant has not proven that he was prejudiced by counsel's alleged errors.

C. Counsel's failure to present an adequate case in mitigation of punishment.

Applicant further contends that trial counsel were ineffective because they failed to properly investigate and present evidence of Applicant's family life and background. However, the Court rejects this allegation; and finds that counsel made a strategic decision, after a constitutionally adequate investigation, not to present virtually identical evidence of which counsel was aware.

In the 1996 sentencing proceeding, Applicant gave brief testimony concerning his family and background, in addition to his testimony about the November 25, 1990 shooting and his prior criminal record. He testified that his family moved from Brooklyn,

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[95] He stated that he paid a fine in magistrate's court to a charge of trespassing; and in 1986, at age seventeen, he pled guilty to unlawfully carrying a pistol. He received a fine and probation. He also forfeited bond in 1987 on a charge of possession of marijuana; and he forfeited bond in 1988 on a charge of resisting arrest. He indicated that the latter charge resulted from his failure to pay attention when an officer told him that he was under arrest. He likewise pled guilty in 1988 to grand larceny of a motor vehicle and received a six year Youthful Offender Act sentence. He served nine months and was paroled but his parole was revoked and he served his sentence. **1996 R. pp. 867-71.**

In 1991, he pled guilty to simple possession of cocaine, and received a forty-five day sentence. Finally, he admitted to the two CSC convictions involving assault victim, who was his girlfriend at the time. He explained that he and his wife were separated at the time. Also, he explained that he did not know she was fifteen then; that the relationships were voluntary; and that he was misled about her age. However, he pled guilty. **1996 R. pp. 871-74.** On cross-examination, be stated that he was expelled from school for striking a teacher, and he had only been out of prison for seven months when the murder occurred. **1996 R. pp. 899-900; 902-05.**

New York to South Carolina, in 1980 or 1981, when he was in secondary school. He played some sports in school but did not finish school because he was expelled. In addition to his child with [assault victim], he stated that he was married and had three children and a stepchild, with his wife. His wife takes care of his children with the assistance of both grandmothers. **1996 R. pp. 863-65.**

A number of family members and church members were in attendance. He testified that he was housed in the Edisto Unit of the Broad River Correctional Institution, in Columbia; and that he did not get to see his children or family members on a regular basis. He testified that "[m]y mom is everything, ... [we're] best friends. She's more than a mother." Also, he described their relationship as "extremely special" to him. He admitted that he had been in some trouble before the incident for which he was being sentenced, and that some of his trouble had been a disappointment to his mother. Further, he regretted the problems that he had caused his family "[e]very day." **1996 R. pp. 863; 865-67.**

His oldest child, Timeka, was almost nine. His son, Timothy, Jr., was seven; and his daughter Tiffany was five. His son with [assault victim] was three years old, as was his stepson. Trial counsel also introduced photographs of his children as Defendant's Exs. 1-4. **1996 R. pp. 874-76.** Although he acknowledged that he understood he had been convicted of murder for killing Stephanie, he testified that the shooting was "an accident," and that he had not intended to kill either Stephanie or anyone else in the truck. He further claimed that his statement to the police in Alabama accurately described what had happened on November 25, 1992. He acknowledged that his actions ruined the

B[redacted]'s lives, his family members' lives and his life. Finally, he asked to spend the rest of his life in prison. **1996 R. p. 886-92.**

Jesse Middleton testified that he is a minister at worldwide Deliverance Church, where Applicant's mother is a member. Although he is not related to Applicant, he refers to Applicant as "cousin." He has known Applicant since Applicant was born. Applicant's mother raised him alone, most of the time. She tried to raise him right, but he got into "a little trouble." Mr. Middleton testified that Rogers "wanted to be so much like my father," who is also a minister. Applicant was not a mean person and he went to church routinely when he lived at his mother's house. However, he was "just like any other young kid," and he got in trouble because he hung out with the wrong crowd. **1996 R. pp. 914-17.**

Mrs. Elaine Williams testified that Applicant's mother, [applicant's mother], was a tenant in her home in Brooklyn, New York; and that she had known Applicant all of his life. Mrs. Williams stated that she was like his "second mom because his mom worked, she was a single parent. There was no man in the home and I just stepped in as a step mom." (Sic). Hs mother "did the best she could" to raise Applicant right. Early on, he was a good child who went to church three nights a week; and he was very curious. **1996 R. pp. 917-19.**

After Applicant's family came down to Summerville in 1980 or 1981 – following the Williams' move here in 1979 – Mrs. Williams noticed changes in him. He did not like that his mother had recently remarried. He subsequently started to get in trouble and he dropped out of school. This surprised Mrs. Williams because Applicant was "very,

very smart." Before these problems began, he was mannerly, and Mrs. Williams had never seen him get angry. **1996 R. p. 919.**

applicant's mother, Applicant's mother, testified that she had lived in Summerville for eighteen years, and that she was employed by Worldwide Deliverance Ministries. She was thirty years old and had four children: Al (who was thirty); Applicant (who was "going to be 29"); Robert (who was twenty-eight) and Faith (who was eighteen). Applicant's two brothers were employed, and Faith attended college. applicant's mother testified that she tried to raise Applicant in the church and tried to make sure that he attended school. In fact, the only trouble she had with him occurred when she remarried. He did not like that. Thereafter, he started to get in trouble and was expelled from school. **1996 R. p. 920-22.**

After he was expelled, he would get jobs, "but he could not hold a job because he would get in trouble." At the request of the school, he received counseling, but he continued to get in trouble and lose jobs. Eventually, however, he got married. There were three children born in the marriage and Applicant had a stepson. applicant's mother was as concerned for her grandchildren as she was her own children. applicant's mother did not spend much time with his child with assault victim, in order to avoid conflict with Applicant's wife, but the child spent Thanksgiving with the family on one occasion. Further, she testified that Rogers was never a mean person. Nor did she approve of the acts which led to Stephanie's death. But, she loved her son as much as the B[redacted]'s loved Stephanie and she asked for mercy. **1996 R. pp. 922-26.**

At the PCR hearing, Applicant presented several witnesses who testified about the background of Applicant and his family. Most of these witnesses were family members:

applicant's mother (his mother); Robert Bryant (his brother); Mrs. Faith N[redacted] Brown (his younger sister); Carol Rogers (his paternal aunt); Timeka R[redacted] (his child). The remaining witness was Mr. Yungman, the social worker.

Through the family witnesses, Applicant presented evidence that: (1) his mother, applicant's mother, was the third of eight children born to Applicant's maternal grandmother, and the children were fathered by five or six different men; (2) applicant's mother was repeatedly sexually assaulted by several of her mother's boyfriends, beginning when she was six or seven and continuing for several years;[96] (3) applicant's mother's' mother did not believe the reports of the sexual abuse and slapped her, so the abuse continued for some time; (4) applicant's mother learned how to discipline children from her own mother, who would use electrical cords, belts and hands, even when the children were small; (5) applicant's mother met Applicant's father Robert Rogers when she was twelve years old, and although they never married, she had three sons by him. The first was born when she was thirteen, Applicant was born when she was fifteen and a third son was born when she was sixteen; (6) applicant's mother dropped out of school after she completed eighth grade; (7) applicant's mother applied for and received public assistance for her three sons; and she began working full-time in a factory at age fifteen while Applicant's material grandmother cared for the sons; (8) Robert Rogers became more physically abusive and addicted to alcohol, cocaine and heroin; (9) there are problems with alcohol and drug abuse with Applicant's paternal uncles; (10) Applicant and his brothers were exposed to alcohol at an early age by their uncles; (11) applicant's mother eventually met and married Martin N[redacted], and the two of them moved the family to Summerville in 1979; (12) after the

[96] applicant's mother felt powerless because of the size of the men; and she felt ashamed because she accepted treats they gave her to remain silent.

family moved to Summerville, they often were evicted, and they had the electricity or water cut off because they could not pay bills; (13) food was often in short supply and the meals might consists only of rice, grits or bread; (14) [applicant's mother] was a strict disciplinarian and would punish her sons by beating them with and electrical cord, a belt or even a broom handle; (15) Mr. and [applicant's mother] were "role models," in terms of what not to do; (16) Applicant's brother, Robert Bryant, was able to overcome the mistakes he made in his life, including a burglary conviction, and is a productive citizen; (17) Mrs. Brown, Applicant's sister is a productive citizen; (18) Applicant was never able to have his father in his life, in any positive manner, even though he wanted this very much; (19) Applicant attempted to save the life of a child on one occasion when he was a teen; (20) Applicant was very protective of his family; (21) and his daughter, Timeka, would have been willing to testify at resentencing, as would the other family members. **PCR Tr. pp. 360-426; 461-69; 598-645; 709-29.**

Applicant also presented the testimony of Mr. Yungman, the social worker. In preparing a psycho-social assessment of Applicant, Mr. Yungman reviewed trial, school, divorce and criminal records; as well as family death certificates. He also conducted several personal interviews with several of Applicant's family members and people who have had a significant impact on his life. Mr. Yungman critiqued group interviews, such as Mr. Runyon had with Applicant's family; and he suggested this type of interview might not be effective because of the reluctance of people to talk about embarrassing "family secrets." **PCR Tr. pp. 486-98.** Mr. Yungman thereafter testified to his findings, which were consistent with the testimony of Applicant's family members; and he

explained why each factor was significant, such as the history, corporal punishment, as well as drug and alcohol abuse. **PCR Tr. pp. 508-15.**

Despite this showing, the Court finds that Applicant has not proven that trial counsel's performance was deficient. The United States Supreme Court held in *Wiggins* that *Strickland* does not "require defense counsel to present mitigating evidence at sentencing in every case" because this would interfere with right of counsel to make independent decisions as a matter of trial strategy:

> we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland,* 466 U.S., at 689. *We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation."* *Id.*, at 690-691. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id.*, at 691.

Wiggins, 539 U.S. at 533. *See also Lovitt v. True*, 403 F.3d 171, 179 (4th Cir. 2005); *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005); *Id* at 157 (Traxler, J., concurring) (citing *Wiggins* and *Strickland*). In the present case, the Court finds that Mr. Runyon's testimony on this allegation, discussed *supra*, is credible. Based upon his testimony, the Court finds that both counsel's investigation for possible mitigating evidence, and the subsequent strategic decision not to present mitigating evidence similar to that presented in PCR by Applicant's collateral counsel, were objectively reasonable.

The problem with Applicant's allegation is that counsel knew either from discussions with Applicant's family, from Mr. Leiendecker or from the records in counsel's possession, that Applicant's family was poor; that there was evidence of drug and alcohol problems; that he and his brothers had been in trouble; that Applicant's mother had been a very strict disciplinarian; that the parents "rode herd" on the boys; that the family "didn't have the best background with regards to paying bills and holding long-term jobs, things of that sort." Thus, counsel were aware of much of the evidence concerning Applicant's background and family life that was presented in the PCR hearing. **PCR Tr. pp. 760; 786-88; 790-92; 835; 842-48; 866-72; 895-900; 1049-50.**

After counsel discovered this information, counsel had to make a decision of whether to "demonize" Applicant's mother and blame his problems on his background or to have a sympathetic mother plead for her son's life. In connection with this decision, counsel specifically discussed whether or not to hire a social worker. Ultimately, counsel decided not to use a social worker and decided not to demonize applicant's mother. He had done this in *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1991), and the jury was very unreceptive to that approach.[97] This factored into counsel's decision not to present that type of information to a jury from a small, predominantly white and conservative county. Mr. Runyon also did not think that presenting expert testimony on why jurors should spare Applicant's life would play well with a Dorchester County jury. Further, "it wasn't inherently bad for him in one sense. Mother was a big church lady." Therefore, counsel did not present a social worker or the type of evidence presented by Applicant at the PCR hearing. **PCR Tr. pp. 760; 786-88; 790-92; 835; 842-48; 866-72; 895-900; 1049-50.**

[97] They considered this same approach in 1994 but rejected it for the same reason. **PCR Tr. p. 786.**

The Court finds that counsel's strategic choice was reasonable because it was made after an adequate investigation under *Wiggins*, and that "reasonable professional judgments support the limitations on investigation" and their presentation of evidence. *Strickland*, 466 U.S. at 690-691. The Court held in *Wiggins* that Wiggins' trial counsel's investigation was inadequate because "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id* at 524 (citing the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6, p. 133 (1989) (among the topics counsel should consider presenting are medical history, educational history, employment history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences)).[98] However, counsel in Mr. Rogers' case had developed the mitigating evidence but they made a reasonable decision, as his attorneys, to follow a different course to mitigate his conduct.

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[98] Trial counsel did obtain a psychologist to evaluate Wiggins, counsel procured his social services records and had available to them the pre-sentence investigation report. However, the Court found that trial counsel should have nonetheless arranged for a forensic social worker to compile a report of Wiggins' social history, and trial counsel was found ineffective for not so doing. The Court also held that the scope of trial counsel's investigation was unreasonable in light of the investigation that they did conduct. In trial counsel's investigation, they did discover that Wiggins' mother was an alcoholic, that he was shuttled between foster homes, and that his mother often left him and his siblings alone without food. The Court held that based on this information, a reasonably competent attorney would have further investigated Wiggins' background. "In assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 527. The Court held that Wiggins' trial counsel "chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible.... As a result, the court's subsequent deference to counsel's strategic decision not 'to present every conceivable mitigation defense,' despite the fact that counsel based this alleged choice on what we have made clear was an unreasonable investigation, was also objectively unreasonable." *Id* at 527-28.

The Court finds that this was objectively reasonable. *See Kornahrens v. Evatt*, 66 F.3d 1350, 1361 (4th Cir. 1995) (counsel, Mr. Runyon, was not ineffective for failing to present evidence that defendant was in dissociative state at time of murders, where counsel made deliberate decision to portray defendant as a normal person who simply snapped under the pressure of his divorce and his ex-wife's constant badgering, where counsel decided to pursue that approach from his conversations with defendant, and where counsel was attempting to prove voluntary manslaughter at trial, and, at sentencing, was attempting to appeal to the jury's compassion for one of their peers who was thrust into an unfortunate and stressful position; any evidence that defendant was not an average person who snapped under pressure would have been inconsistent with overarching trial strategy); *Henry v. State*, 862 So.2d 679, 685-86 (Fla. 2003) (counsel's decision not to present mental health mitigation evidence during sentencing was not ineffective assistance); *Rutherford v. State*, 727 So.2d 216, 223 (Fla.1998) (finding no error where retrial counsel was aware of mental mitigation "but made a strategic decision under the circumstances ... to instead focus on the 'humanization' of Rutherford through lay testimony"); *Haliburton v. Singletary*, 691 So.2d 466, 471 (Fla.1997) (finding no deficient performance in counsel's decision to humanize the defendant rather than use mental health testimony because the expert would say that the defendant was "dangerous" and likely would kill again); *Bryan v. Dugger*, 641 So.2d 61, 64 (Fla.1994) (finding counsel not ineffective for choosing a mitigation strategy of "humanization" and not calling a mental health expert). *Cf. Thomas v. Gilmore*, 144 F.3d 513, 516 (7th Cir. 1998) (recognizing that "with, the two possible strategies, the 'nice guy' strategy that failed and the 'psycho' strategy which Thomas's current counsel tells us any competent lawyer

would have preferred, could not have been combined; it was either/or"). *Contra Glenn v. Tate*, 71 F.3d 1204, 1207-11 (6th Cir.1995) (finding petitioner was denied the effective assistance of counsel during the sentencing phase as a result of counsel's failure to develop and present mitigation evidence regarding the petitioner's history, background and organic brain damage, noting that "[i]t was not that such information could not be found, or that counsel made a reasoned decision to withhold the information for tactical or strategic reasons").[99]

Therefore, Applicant was not entitled to relief on this ground. Although the Court further finds that there was no prejudice to Applicant from counsel's performance in light of the present record, it is unnecessary to specifically address the prejudice prong.

GROUND 9(B)(13)

The Court rejects Applicant's argument (Ground 9(B)(13) that this Court should employ a cumulative prejudice analysis, such as that used in *Brady* cases. *See Kyles v. Wheatly*, 514 U.S. 419 (1985). In *Green*, 569 S.E.2d at 324-25, the South Carolina Supreme Court expressly declined to address the novel question of whether a PCR applicant is entitled to relief based upon the supposed cumulative effect of trial counsel's alleged errors. *See also Simpson v. Moore*, 367 S.C. at 604, 627 S.E.2d at 710 (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina"

[99] Again, *Wiggins* makes clear that the "principal concern in deciding whether [trial counsel] exercised 'reasonable professional judgment' is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background was itself reasonable." *Id* at 522-24 (internal citations omitted).

and holding that "[b]ecause the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis"). For the reasons previously stated in **Ground 9(A)(11)**, this Court finds that such an analysis is not constitutionally required and declines to employ it. To hold otherwise is to conclude that even non-deficient performance may result in reversal of a conviction, a conclusion that is manifestly contrary to the analysis set forth in *Strickland v. Washington*. *See Strickland*, 466 U.S. at 687 ("Unless a defendant makes both showings [i.e., both deficient performance and prejudice –] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable"). *See also Fisher*, 163 F.3d at 852-53; *Meuller*, 181 F.3d at 586n.22 ("Petitioner also urges us to consider the cumulative effect of his ineffective assistance of counsel claims rather than whether each claim, considered alone, establishes a constitutional violation. This argument is squarely foreclosed by our recent decision in *Fisher v. Angelone*, 163 F.3d [...at] 852-53 [...]"). Therefore, the Court finds that prejudice must be considered on an individual, not a collective basis. *Fisher*, 163 F.3d at 852.

Further, and analyzing the various allegations raised by Applicant cumulatively, the Court finds that it is clear that he is not entitled to relief because the record does not support a finding that he was prejudiced by any or all of the alleged errors. *See Westley*, 83 F.3d at 726 (claims that are not prejudicial cannot be cumulated, regardless of the number raised). Therefore, the Court denies relief on this allegation as well.

Finally, the Court notes that Applicant raised a number of additional ineffective assistance of counsel allegations in his Second Amended Application and at the PCR

hearing, which he did not address in his (Proposed) Order. The Court finds that he has made a knowing and intelligent decision to abandon each of those allegations by failing to argue them in his Applicant's (Proposed) Order.

GROUND 9(C)

Applicant contends in Ground 9(C) 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. He predicates this allegation on [assault victim]'s PCR testimony that she only had sex with him in Charleston County. The Court rejects this argument.

First, the Court finds that Applicant cannot utilize the current Application to challenge both his murder conviction and sentence and his guilty pleas to the two counts of CSC with a minor – 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). The Court finds that the clear intent of the Act was that only one judgment of conviction and sentence may be attacked in a PCR application.

This conclusion is supported by a review of the various provisions in the Act, which refer to a "judgment" or a "conviction" and "sentence," in the singular. *See, e.g.*, § 17-27-40 ("A proceeding is commenced by filing an application verified by the applicant with the clerk of the court in which the conviction took place"); § 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"); § 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, specifically set forth the grounds upon which the application is based, and clearly state the relief desired. ...The application shall identify all previous proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or sentence"); § 17-27-80 ("The application shall be heard in, and before any judge of, a court of competent jurisdiction in the county in which the conviction took place"). *See also* § 17-27-20(a) & (b); § 17-27-160 (governing capital case post-conviction relief procedures). This conclusion is likewise supported by Rule 71.1(b), SCRCP, which provides that "[a]n 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."[100]

Second and even assuming that a PCR applicant may challenge more that one judgment in a PCR application, the Court finds that Applicant's challenge to the convictions for CSC with a minor in the second degree is barred by § 17-27-45(A). Here, Applicant did not take an appeal from those convictions; and there is no allegation that counsel was ineffective in failing to perfect an appeal. *Contra Wilson v. State*, 348 S.C. 215, 559 S.E.2d 581 (2002) (one-year limitations period in which to file a petition for post-conviction relief did not apply where defendant was denied a direct appeal of his

[100] The reason for this requirement is obvious. Often different judgments will involve different trial counsel or different witnesses. Likewise, there may be different defenses, as in the present case, to the separate judgments. In the present case, the CSC convictions were part of Applicant's plea negotiations to the murder charge but were not factually related to it, unlike the underlying non-murder convictions in *State v. Charping*, 313 S.C. 147, 437 S.E.2d 88 (1993), which were originally tried with the charge of murder. The Court would further note that, in this case, the original Application only challenged the conviction and sentence for murder.

conviction due to ineffective assistance of counsel). Applicant did not thereafter challenge these convictions in his Application for Post-Conviction Relief filed on June 12, 2000 and to which Respondents' filed a Return on July 12, 2000. Rather, he first challenged the subject matter jurisdiction for his CSC guilty pleas in Ground 9(C) of the Amended Application for Post Conviction Relief filed on August 27, 2004.

Because Applicant's 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), (all defendants convicted prior to July 1, 1995 - the effective date of 17-27-45 - must be allowed until July 1, 1996, to file a PCR application). He did not do so.[101] Therefore, the Court finds that the challenge to the supposed lack of subject matter is barred by the statute of limitations. *Id.*

Finally, the Court rejects the supposed lack of subject matter jurisdiction on the "merits." For the reasons set forth in connection with Ground 9(B)(1), the Court finds that there is no credible evidence to support this allegation.

GROUND 9(D)

In Ground 9(D), Petitioner asserts that appellate counsel was ineffective for not arguing on direct appeal from the 1994 conviction and death sentence that the trial judge erroneously overruled defense counsel's objection to testimony by Anthony Riley, which

[101] Under §17-27-45(C), "[i]f 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." This subsection does not apply to Applicant's case since he obviously knew where he had sex with [assault victim] before he entered the guilty pleas.

he asserts was inadmissible hearsay. However, the Court finds that he has failed to prove deficient performance or prejudice under Strickland, and denies relief.

Mr. Riley testified in the 1994 trial that he left Spell's store before the shooting occurred and jogged to his home on Pigeon Bay Rd. because Applicant and Patterson were "looking for trouble," and he did not want to be alone with them on a dark road. About the time he reached the graveyard, he heard a gunshot. He heard a second shot as soon as he reached his house and opened his door. He walked inside momentarily. Then, he went back out onto the porch and smoked a cigarette. **1994 R. pp. 802– 04; 813.**

At this point, he testified that, while he was standing outside, he saw two people running down the road "and one of them said." Trial counsel Runyon objected unless Mr. Riley could identify the people, and the trial judge initially sustained his objection. **1994 R. p. 804-05.** Mr. Riley testified that there were two men. Although he could not identify either of them, they were coming from the direction of Spell's Grocery Store, and he had not passed anyone on the way home from the store. **1994 R. p. 805.**

Outside of the jury's presence, the Solicitor argued that the evidence was admissible under the *res gestae* exception to the hearsay rule;[102] and the trial judge agreed to hear the State's proffer. Mr. Riley testified *in camera* that he was unable to identify the race of the men. However, they were running away from Spell's Store. And, he heard the first man ask, "Did you get the mother fucker?" The second man said, "Yeah, I got his ass." [A]bout two or three minutes later, Mr. Riley heard bushes rustling and he saw a black girl run out of some nearby woods and through his yard to Pigeon Bay Rd. She was coming from the direction of Spell's Store. **1994 R. p. 806-08.**

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[102] Because the case was tried before September 3, 1995, the South Carolina Rules of evidence did not apply, Rule 1003(b), SCRE.

Again, the Solicitor agued that this testimony was admissible under the *res gestae* exception. "This man had left the scene with these two people there who had made antagonistic remarks and gestures toward these people. He ran to his house. He heard two shots. Two people came running by his house and made the utterances that he's testified to." The Solicitor also argued that the testimony was admissible as a statement against interest, despite Mr. Riley's inability to identify the two men, since Mr. Riley testified that he did not pass anyone on the way home from Spell's Store. **1994 R. p. 808-09**.

Mr. Runyon, however, argued that there were other people present at Spell's; and that Mr. Riley was unable to identify the two men. He agreed that the testimony was admissible under the *res gestae* exception if Mr. Riley was unable to identify them but not otherwise. **1994 R. p. 809-10**. The trial judge found that the statements were "*res gestae* and not for the truth of it also what occurred." He further noted that the testimony might be beneficial to Applicant. **1994 R. p. 810**.

Subsequently, Mr. Riley testified before the guilt phase jury that as he was standing outside, he saw two men run by his house. He could not identify either of these men, but they were coming from the direction of Spell's Grocery Store, and he had not passed anyone on the way home from the store. He heard the first man ask, "Did you get the mother fucker?" The second man said, "Yeah, I got the mother fucker." Roughly a minute later, Mr. Riley saw a girl running away from the direction of Spell's as she cut across his property to get to Pigeon Bay Rd. **1994 R. p. 813-15**.

Both parties referred to the testimony in closing argument. The State argued that the comments were evidence of malice and the circumstances surrounding the shooting

demonstrated that the men running down the road were Applicant and Patterson, followed shortly thereafter by [assault victim] **1994 R. pp. 994-95.** Mr. Runyon's closing argument suggested that Mr. Riley's testimony was not credible because a member of Mr. B[redacted]s family had threatened him shortly before he testified; and he pointed out that Mr. Riley did not refer to the incident in his statement to police. **1994 R. pp. 1004; 1014.**

Applicant's appellate counsel for both appeals Joseph Savitz, Esquire, testified at the PCR hearing that he was the Acting Chief Attorney at the South Carolina Office of Appellate Defense; and that he was the Deputy Chief Attorney at the time of his representation of Applicant. Before he represented Applicant, he had previously handled "between 15 and 20" appeals in death penalty cases. He also explained that, even though death penalty cases are "a little bit more complex," he generally follows the same routine in handling a direct appeal. **PCR Tr. pp. 72-73; 80-82.**

> I get the transcript, the exhibits, the paper exhibits and go view the physical exhibits at the courthouse; read the transcript, identify the issues that are preserved for appeal and select the ones that I think are most likely to win on appeal, do the research, write the brief, and file the brief [and] record and then go argue it.

PCR Tr. p. 82. He followed this procedure in Applicant's appeal. **PCR Tr. p. 82.**

With respect to the current allegation, he testified that he raised two issues in the first appeal: the trial judge's failure to instruct the jury on voluntary manslaughter, and the trial judge's failure to give a *Simmons* charge on LWOP. At the time, he felt that the manslaughter issue was viable in light of the facts in the case that "one of the parties was going for a gun in the truck and that there were some racial slurs." **PCR Tr. pp. 83-84.**

Mr. Savitz further testified that trial counsel had sufficiently preserved an objection to Mr. Riley's testimony for him to have raised the trial judge's ruling as an issue on appeal. When asked if he thought it was "a legitimate issue for appeal," he replied, "I didn't raise it so at the time I obviously didn't think ... that was a legitimate issue." **PCR Tr. pp. 73-74**. Also, his recollection was that the comments heard by Mr. Riley were "fairly close to the shooting," the comments involved a male and he thought, at the time, that the testimony was admissible. **PCR Tr. pp. 74-75.**

A defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). A PCR applicant has the burden of proving appellate counsel's performance was deficient. *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, *Tisdale v. State*, 357 S.C. 474, 594 S.E.2d 166 (2004), as "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." *Jones v. Barnes*, 463 U.S. 745, 752 (1983). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. *Id.*

To obtain relief a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. *Southerland v. State,* 337 S.C. 610, 524 S.E.2d 833 (1999). In other words, the applicant is required to demonstrate "that his counsel was objectively unreasonable in failing" to identify and argue present significant and obvious issues on appeal, and "a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal."

Smith v. Robbins, 528 U.S. 259, 285 (2000) (citation omitted).[103] Although recognizing that "[n]otwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." *Robbins*, 528 U.S. at 288. "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" *Id.* (*quoting Gray*, 800 F.2d at 646. *See also Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir.2000) (en banc).

In the present case, the Court finds that there was no deficient performance and that Applicant's arguments go to the weight he feels that the testimony in question should be given, as opposed to its admissibility. First, the Court finds that Mr. Riley's testimony was admissible under the *res gestae* exception to the hearsay rule.

Under the law in effect at the time of Applicant's 1994 trial,

> To qualify as part of the res gestae, a statement must be substantially contemporaneous with the litigated transaction and be the spontaneous utterance of the mind while under the active immediate influence of the event. The reason for the exception is that special reliability may be given a statement uttered in a state of spontaneous excitement which suspends the declarant's powers of reflection and fabrication. *State v. Blackburn*, 271 S.C. 324,

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[103] *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) (When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal"). Indeed, "'[w]innowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones*, 463 U.S. at 751); *see also Smith v. South Carolina*, 882 F.2d 895, 899 (4th Cir.1989) (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims").

247 S.E.2d 334 (1978); *Marshall v. Thomason*, 241 S.C. 84, 127 S.E.2d 177 (1962).

State v. Cox, 274 S.C. 624, 627, 266 S.E.2d 784, 785-86 (1980). *See also State v. Quillien*, 263 S.C. 87, 97, 207 S.E.2d 814, 819 (1974) (hearsay testimony concerning the victim's statements to a police officer while in ambulance on the way to the hospital after rape was admissible under the *res gestae* exception to the hearsay rule).[104] "The ruling of the trial judge will not be disturbed on appeal 'unless it clearly appears from undisputed circumstances in evidence that the testimony ought to have been admitted or rejected, as the case may be.'" *Thomason*, 127 S.E.2d at 17 (*quoting Funderburk v. Powell*, 181 S.C. 412, 187 S.E. 742, 751(1936)).

"There are no hard and fast rules as to when *res gestae* ends." *State v. Harrison*, 298 S.C. 333, 336, 380 S.E.2d 818, 820 (1989). However, time clearly is a factor in the excited utterance analysis; and South Carolina appellate courts have held that statements made in excess of an hour, or even up to eleven hours after the startling event were properly admissible as *res gestae*. *See Blackburn*, 271 S.C. at 328, 247 S.E.2d at 336; *Cox, supra* (although there was a lapse in the evening from the time of the sexual battery itself to the time when the declarant's statement was made, the Court concluded that "[t]here was no substantial lapse from the time the victim was freed from the clutches of her assailant to the time when she first had an opportunity to speak to a third party. The requirements for *res gestae* are therefore met"); *Eudy v. Atlantic Greyhound Lines*, 183 S.C. 306, 191 S.E. 85 (1937) (admission of a servant's statement against his principal

[104] The *res gestae* exception has been firmly rooted in South Carolina law for centuries, and it is sufficient to meet any Confrontation Clause demands. *See, e.g., State v. Burdette*, 334 S.C. 34, 45, 515 S.E.2d 525, 531 (1999); excited utterance exception; *State v. Dennis*, 337 S.C. 275, 523 S.E.2d 173 (1999).

under *res gestae* exception upheld where it was made five minutes after the accident occurred); V*an Boven v. F. W. Woolworth Co.*, 239 S.C. 519, 528, 123 S.E.2d 862, 866 (1962), (employee's statement made immediately after escorting an injured customer to her supervisor was within the *res gestae* exception because it was spontaneously made and "tended to unfold the nature and quality of the main or primary fact in showing the reason for respondent's fall").

The Court finds that the trial judge properly concluded that the State's proffer established a sufficient foundation to admit the challenged testimony under the *res gestae* exception. Mr. Riley clearly testified that the statement he heard was made only minutes after the second shot was fired and as the two men were running down Pigeon Bay Rd., away from Spell's Store.[105] Also, he had not passed anyone as he had hurriedly jogged home from where he had witnessed the confrontation between Patterson and Mr. B[redacted].

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[105] In support of this allegation, Applicant relies upon Mr. Riley's testimony at the PCR hearing that he heard the statements five or ten minutes after the second shot. **PCR Tr. p. 56**. As collateral counsel noted when he successfully objected to the State's efforts to introduce this evidence at the hearing under the excited utterance exception, Rule 803(2), SCRE, Mr. Riley testified differently at the PCR hearing. **PCR Tr. p. 57-58**. To consider that testimony in conjunction with the current allegation would be contrary to the admonition in *Strickland* that "every effort [must] be made to eliminate the distorting effects of hindsight ... and to evaluate the [challenged] conduct from counsel's perspective at the time." 466 U.S. at 689.

However, even if the statements were five or ten minutes after the second shooting, this does not mean that they were improperly admitted under the *res gestae* exception because, despite any delay in time, they were still substantially contemporaneous with the litigated transaction and were the spontaneous utterance of the mind while under the active immediate influence of the event. Further, the Court has reconsidered its ruling made at the PCR hearing (**PCR Tr. pp. 53-59**) and has determined that the testimony at issue is admissible under the excited utterance exception, consistent with the reasoning in this Order. *See State v. Burdette*, 335 S.C. 34, 515 S.E.2d 525 (1999) (Applicability of the "excited utterance" exception must be viewed under the totality of the circumstances, and the trial court's evidentiary decisions will not be reversed on appeal absent an abuse of discretion).

Thus, the Court finds that the statement to which Mr. Riley testified was made substantially contemporaneous with the litigated transaction and was the spontaneous utterance of the mind while under the active immediate influence of the event. *Id*; *see also Quillien*; *cf. State v. Dennis*, 337 S.C. 275, 523 S.E.2d 173 (1999) (statement was an excited utterance where declarant had just seen his brother shoot an unarmed man and declarant was walking away from the scene hiding the gun under his shirt). Nor was the testimony inadmissible because Mr. Riley was not able to identify the two men he saw that night. In support of this argument, he relies upon *State v. Hill*, 331 S.C. 94, 501 S.E.2d 122 (1998).

In *Hill*, the appellant was convicted and sentenced to death for murdering Officer Spencer Guerry, of the Georgetown Police Department. He argued on appeal that the trial judge erred in refusing to allow a witness to testify about hearsay evidence from an unknown declarant, under the excited utterance or *res gestae* exceptions. *Id* at 99, 501 S.E.2d at 125. The proffer at trial showed that a witness went to the car wash fifteen minutes after the shooting. After being at the car wash for another fifteen or twenty minutes, he heard an unidentifiable person in the crowd state there were two suspects. The trial judge ruled the evidence was inadmissible.

Although the Court in *Hill* upheld the exclusion of evidence in that case, it did not hold that the excited utterance exception was unavailable when the declarant is unknown or unidentifiable. Instead, it held that:

> The hearsay statement of an unknown bystander is admissible under the excited utterance exception only when the circumstances which surround it would affect the declarant in a way that assures its spontaneity and, therefore, its reliability for trustworthiness. *People v. Mares*, 705 P.2d 1013, 1016 (Colo.App.1985). *See also*

> *People v. Fields*, 71 Ill.App.3d 888, 28 Ill.Dec. 202, 390 N.E.2d369 (1979) (if nature of event or circumstances indicate bystander did not observe the act, declaration should be excluded); S*tate v. Kent*, 157 Mich.App. 780, 404 N.W.2d 668 (1987) (declarant must have had opportunity to personally observe the matter of which he speaks); *Commonwealth v. Stetler*, 494 Pa. 551, 431 A.2d 992 (1981) (declarant must have perceived the happening); *Underwood v. State*, 604 S.W.2d 875 (Tenn.Crim.App.1979) (excited utterance of bystanders admissible when declarant observed the act and the declaration arose from personal observation). *Cf. Crawford v. Charleston-Isle of Palms Traction Co.*, 126 S.C. 447, 120 S.E. 381 (1923) (under res gestae exception, declarant must have had opportunity to personally observe the matter of which he speaks).

Hill, 331 S.C. at 99, 501 S.E.2d at 125.

Applying this standard, the Court in *Hill* found that there was "no evidence the unidentified declarant witnessed the shooting. Further, it is unknown whether the declarant was under the stress of excitement caused by the event. Therefore, the trial judge did not err in ruling this statement inadmissible [under Rule 803(2), SCRE]." *Id* at 100, 501 S.E.2d at 125.

In the present case, the Court finds that the words spoken by the declarant and testified to by Mr. Riley unquestionably satisfy the requirements of *Hill* and *Crawford v. Charleston-Isle of Palms Traction Co.*, that the declarant must have had opportunity to personally observe the matter of which he speaks because, in response to the question while running away from the direction where shots were fired minutes earlier, the declarant states that he "got his ass."

It is clear that the "modern trend" and "prevailing practice" are to consider the declaration itself as sufficient proof of the startling event. Weinstein's *Federal Evidence* § 803.04[2][a] p. 803-21 (2nd ed. 1998); 803App.01[2] at p. 803App.–6. *See, e.g. United*

States v. Brown, 254 F.2d 454 (3rd Cir. 2001) (collecting and citing cases). This logically makes sense despite any "bootstrapping" concerns – the whole rationale behind the excited utterance exception is that we can trust the content because it was made while under the stress of excitement. If the rationale presumes a statement is reliable because such stress exists, there is no reason to distrust content establishing the startling event as opposed to other content.[106]

The Court further finds that words spoken are, at the very least, strong circumstantial evidence that the declarant was the shooter under the circumstances testified to by Mr. Riley. Even assuming that some sort of additional corroboration was required that Applicant fired the shots and fled the scene immediately thereafter, it is more than present in this case. As described in the Statement of Facts, there was ample proof of identity. Also, shortly after the shooting, Mr. riley saw a black female fun through his yard, coming from the direction of Spell's Store. Further, both Mr. B[redacted] testified that after the shooting, Mr. B[redacted] shouted at Applicant and Patterson, "You just shot my daughter ..." However, they stood there and laughed at him. Then, they took off running. **1994 R. p. 734-40; 750-53; 754-55; 761; 945-50; 953-57; 960.** assault victim confirmed that they ran, as well. Also, Applicant has not, even in PCR challenged whether he was the shooter, only the degree of his culpability.

[106] Courts often view the proof that the declarant was in an excited or agitated state as the "circumstantial evidence that something out of the ordinary occurred". *See, e.g., Brown* (noting that "many courts have held that the appearance, behavior, and condition of the declarant may establish that a startling event occurred"); *United States v. Moore*, 791 F.2d 566, 570 (7th Cir. 1986) (same); *United States v. Hills*, 455 F.2d 504, 505 (9th Cir. 1972) (unidentified caller's tone of voice and manner of speaking implicitly established that a startling event had occurred).

Likewise, the Court finds that the statement was not inadmissible because it was made in response to questioning. Simply because someone is answering a question does not necessarily mean they are not still so under the stress of excitement as to preclude the reflective capacity necessary for fabrication. *See United States v. Joy*, 192 F.3d 761 (7th Cir. 1999) (fact that person was answering dispatcher's questions does not indicate he was not excited, and it is very possible for someone to be too excited to volunteer pertinent information); *United States v. Iron Shell*, 633 F.2d 77, 86 (8th Cir. 1980) (asking "what happened" does not destroy the requisite excitement under 803(2)); *United States v. Glenn*, 473 F.2d 191, 194 (D.C. Cir. 1972) ("Declarations relating to the circumstances of a violent crime, made by a victim shortly after its occurrence . . . may be admissible although made in response to an inquiry"). Therefore the Court concludes that the testimony was admissible. *See State v. LaCoste*, 347 S.C. 153, 158-61, 553 S.E.2d 464, 468-69 (Ct. App. 2001) (reversing defendant's convictions for resisting arrest, disorderly conduct, and assault; and holding that hearsay statements by an unknown male bystander that defendant did not assault his wife were admissible as excited utterances under Rule 803(2), SCRE).

Assuming *arguendo* that Mr. Riley's testimony was inadmissible, the Court finds that any error in its admission was non-prejudicial and harmless beyond a reasonable doubt. *See State v. Mitchell*, 286 S.C. 572, 336 S.E.2d 150 (1985) (holding that erroneous admission of hearsay testimony was harmless). Error is only harmless "when it 'could not reasonably have affected the result of the trial.'" *Id.* (citation omitted). Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. *State v. Sherard*, 303 S.C. 172, 399 S.E.2d 595 (1991). Therefore, an

insubstantial error not affecting the result of the trial is harmless when a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989). The circumstances of each individual case are to be considered.

Here, even if the testimony at issue was erroneously introduced, the Court finds that this was an insubstantial error not affecting the result of the trial. At worst, his testimony was circumstantial evidence of the identity of the murderer. However, he had previously identified Applicant as present at Spell's with Patterson, who was starting trouble with Mr. B[redacted]. More importantly, both Mr. B[redacted] and Mr. Carver identified Applicant as the person who had the weapon. [assault victim] likewise provided eyewitness identification. In light of their testimony and the conclusion of the Supreme Court in *Rogers I* that there was no evidence presented which supported a voluntary manslaughter instruction, the Court finds that Applicant's guilt was conclusively proven by competent evidence such that no other rational conclusion can be reached. As a result, any error was harmless beyond a reasonable doubt. *Id*; *see also Mitchell, supra.*

While appellate counsel did not raise the present argument, he raised two issues that he thought would be successful. One of these issues served as the basis for reversal of Applicant's death sentence in *Rogers I, supra.* Based upon this record, the Court finds that appellate counsel's performance was not deficient and, more importantly, Applicant has failed to prove resulting prejudice. *Robbins, supra*; *Barnes, supra.*

GROUNDS 9(E)-(F)

Applicant's final allegations are that the prosecution violated Applicant's due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the

videotape containing news footage of the crime scene with the statements by Mr. Carver (Applicant's Ex. 56), discussed *supra* (Ground 9(E)); and that the prosecution deprived him of a fair trial by failing to correct false testimony of Mr. B[redacted] and Mr. Carver (Ground 9(F). The Court finds that neither claim has any merit for the following reasons.

A. Alleged *Brady* violation.

As discussed in connection with counsel's performance in the guilt phase and the penalty phase of the trial, *supra*, Mr. B[redacted] testified in the original trial that he drank "three or four" beers prior to the murder; that the twelve pack from which he had been drinking was in the cab of the truck, as opposed to the truck's bed; that he had purchased another beer at Spell's but did not get to drink it because of the confrontation leading to his daughter's murder; and that he threw the bloody beer can in the trash can after Stephanie was shot. **1994 R. pp. 719-20; 727-28; 744.** His testimony in the 1996 resentencing proceeding was virtually identical, except for his testimony that he only had three beers. **1996 R. pp. 604; 606-07; 613-14; 627-28; 637-38.**

Mr. Carver testified at the original trial and that he did not drink anything that day and he did not see Mr. B[redacted] drink in his presence. Also, he testified that he was unaware that Mr. B[redacted] had any beer in the truck. **1994 R. pp. 931-32; 950.** In the resentencing proceeding, he testified that he did not drink anything that day and he did not see Mr. B[redacted] drink in his presence. Also, he did not see Mr. B[redacted] come out of Spell's with anything; and he was unaware that Mr. B[redacted] had any beer in the truck. **1996 R. pp. 722; 739-40; 744; 749-50.**

With respect to Applicant's Ground 9(E), the Court initially finds that the videotape (Applicant's Ex. 56) was reasonably available to Applicant from other sources

and that Applicant cannot claim a Brady violation. As the Fourth Circuit Court of Appeals has explained, "where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine." *United States v. Wilson*, 901 F.2d 378, 381 (1990). South Carolina likewise follows this rule. *State v. Cox*, 274 S.C. 624, 629, 266 S.E.2d 784, 787 (1980) (where evidence is equally available to the accused, the State has no obligation to furnish such evidence); *Anderson v. Leeke*, 271 S.C. 435, 248 S.E.2d 120 (1978) (same). The Court finds that it is undisputed that Applicant's Ex. 56 depicts news footage of Applicant outside the courthouse at the time of his bond hearing and footage from the crime scene. The footage on it was provided to the State by Channel 4 and Channel 2 news stations. The portion of which Applicant complains was provided by Channel 4, together with a transcript thereof and a computer printout. The Court finds that the State and Applicant had equal access to this information. Because Applicant's Ex. 56 and the transcript (*see* Respondent's Ex. 7) were available to Applicant through reasonable investigation, the Court finds that *Brady* does not apply. *Id*; *Barnes v. Thompson*, 58 F.3d 971, 975-76 (4th Cir. 1995). *See also Bagley*, 473 U.S. at 675.

More importantly, the Court finds that the State did not violate *Brady*. In *Strickler v. Greene*, 527 S.C. 263, 280-81 (1999), the United States Supreme Court stated the applicable law under *Brady*, as follows:

> "In *Brady* this Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' . . . We have since held that the duty to disclose such evidence is applicable

> even though there has been no request by the accused, . . . and that the duty encompasses impeachment evidence as well as exculpatory evidence. . . . Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'. . . Moreover, the rule encompasses evidence 'known only to police investigators and not to the prosecutor.' In order to comply with Brady, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police."

(Citations omitted).[107] *See also Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667 (1985); *State v. Taylor*, 339 S.C. 159, 508 S.E.2d 870, 879 (1999); *Fradella v. Town of Mount Pleasant*, 325 S.C. 469, 479, 482 S.E.2d 53, 58 (Ct. App. 1997).

The Court in *Strickler*, however, observed that "the term 'Brady violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence;" however, "strictly speaking, there is never a real 'Brady violation' unless the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." 527 U.S. at 281. Thus, the Court recognizes three components of a true *Brady* violation. "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Id.* at 282.

The Court later explained the materiality prong under *Brady* as follows:

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[107] The Court in *Strickler* found that the petitioner could not show prejudice resulting from the procedural default of his *Brady* claim because the suppressed evidence was not material. *Id.* at 292-96.

> As we made clear in Kyles, the materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. . . . . Rather, the question is whether 'the favorable evidence could reasonably be taken to put the case in such a different light as to undermine confidence in the verdict.'

Id. at 290 (citations omitted).

The Court finds that the Solicitor complied with the requirements of *Brady*. Consistent with his "open file policy" and his standard practice for disclosing many items that are not physically provided to defense counsel, former Solicitor Bailey notified trial counsel of the existence of the videotape and provided a partial transcript thereof in his February 9, 1994 letter to Mr. Runyon. *See* Respondent's Ex. 7. Although the transcript provided by the State only contained one of the two statements on the videotape, it alerted counsel to the existence of potential impeachment information on the videotape; and the full videotape was made available to the defense by former-Solicitor Bailey.[108] Therefore, the Court finds that the videotape was made available for counsel's inspection and counsel had notice of its contents, despite Mr. Leiendecker's testimony that he could not remember it eleven years later.

Even assuming *arguendo* that Applicant's Ex. 56 had not been disclosed, the Court finds that Applicant has failed to prove a "reasonable probability" under *Brady* and *Kyles* that "'had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler*, 527 U.S. at 281.[109] This requires a reviewing

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[108] However, it is undisputed that review of the tape would not have disclosed the empty twelve pack of beer in the truck bed. Applicant's (Proposed) Order, p. 37.

[109] As the Supreme Court stressed in *Kyles*: "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but rather

court to determine "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict.'" *Strickler*, 527 U.S. at 290 (*citing Kyles*, 514 U.S. at 435). *See also Youngblood v. West Virginia*, 126 S.Ct. 2188, 2190 (2006); *Smith v. Holtz*, 210 F.3d 186 (3d Cir. 2000) (the prosecution's failure to disclose evidence rises to the level of a due process violation only if the government's evidentiary suppression undermines confidence in the outcome of the trial).

Applicant has not made such a showing in the present case. As the Court has already discussed in connection with the ineffectiveness claim concerning counsel's failure to utilize Applicant's Exs. 56-58, the Court finds that counsel thoroughly cross-examined both Mr. B[redacted]and Mr. Carver at the 1994 trial. He examined Mr. Carver at length concerning his version of the events of November 25, and the roles of the various participants involved.

Specifically, counsel established that Patterson started the confrontation and Applicant only later intervened. Further, he established the friendship between Mr. B[redacted]and Mr. Carver. He examined Carver about the fact he testified at trial that Applicant spit at Mr. B[redacted], but in his statement to police, he indicated that Patterson had spit. He did so even though Applicant and Patterson were different races and different sizes. Counsel also elicited that B[redacted]never lost his temper during the conversation and Carver had never seen Mr. B[redacted]lose his temper. Again, this testimony was inconsistent with Mr. Riley's testimony he had heard that Mr. B[redacted]had a temper. **1994 R. pp. 950-60.**

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in its absence did he receive a fair trial, understood as a trial resulting in a verdict worthy of confidence." 514 U.S. at 434; *see also Strickler*, 527 U.S. at 289.

In the 1996 resentencing proceeding, counsel engaged in similarly effective but ultimately unsuccessful cross-examination. Counsel established that Patterson started the confrontation and Applicant only later intervened. Further, he established the friendship between Mr. B[redacted] and Mr. Carver; and that they had spoken to each other the next day, supposedly without discussing the incident. He examined Carver about the fact he testified at trial that Applicant spit at Mr. B[redacted], but he indicated that Patterson had spit in his statement to police. He did so even though Applicant and Patterson were different races and different sizes. Also, counsel established that Mr. Carver did not mention Applicant's threat to kill Mr. B[redacted] in his statement to police on the night of the shooting. Counsel elicited that B[redacted] never lost his temper during the conversation and Carver had never seen Mr. B[redacted] lose his temper. And, counsel established that, before he testified, Carver never said to anyone that Applicant and Patterson were laughing after the shooting. Finally, he established that Carver's 9 mm. weapon was in the clothes basket in the bed of the truck. **1996 R. pp. 736-50.**

Trial counsel's cross-examination of Mr. B[redacted] was likewise extensive in both 1994 and 1996. At the original trial, counsel's examination of Mr. B[redacted] elicited that Mr. B[redacted] drank three or four beers before he reached Spell's grocery. He purchased yet another beer at the store. He threw this beer in the trash, unopened, after his daughter was shot.[110] Counsel further established that Patterson started the confrontation and Applicant only later intervened. Also, counsel established that Mr. B[redacted] was angry, and that the confrontation with Patterson became so heated that Mr. Riley left the store and went home. Mr. B[redacted] was impeached with his statement to Solicitor Bailey, in

[110] Counsel thereafter suggested that Mr. B[redacted] had consumed too much alcohol.

which he did not indicate Applicant and Patterson had laughed in his face. Nor could Mr. B[redacted] remember at what point Mr. Carver got out of the truck. Further, counsel established the friendship between Mr. B[redacted] and Mr. Carver; and he established that a 9 mm. pistol was in the clothes basket in the bed of the truck.[111] Additionally, Mr. B[redacted] admitted that he had a twelve pack of beer in the cab of the truck. Finally, counsel established that Mr. B[redacted] did not think Applicant threatened to kill him right before B[redacted] got back into the truck. **1994 R. pp. 741-68.**

In the resentencing hearing, counsel initially re-established that Mr. B[redacted] drank three beers before he reached Spell's grocery; and he purchased a fourth beer there, which he threw in the trash, unopened, after his daughter was shot. Counsel then established that Patterson started the confrontation, and Applicant only later intervened. Also, Mr. B[redacted] was impeached with his statement, in which he told Patterson and Applicant that he was going to call the police even though Rogers had not done anything to him at that point. Nor could Mr. B[redacted] remember at what point Mr. Carver got out of the truck. Further, counsel established the friendship between Mr. B[redacted] and Mr. Carver; and he established that there was a shotgun in the truck as well as a 9 mm. pistol in the clothes basket in the bed of the truck. Additionally, Mr. B[redacted] admitted that he had a twelve pack of beer in the cab of the truck. Finally, counsel established that Mr. B[redacted] did not indicate in his statement to police that Applicant had threatened to kill him. **1996 R. pp. 627-45.**

With respect to the still photographs developed from the videotape, Applicant's Exs. 57-58, it is undisputed that review of the tape would not have disclosed the empty

[111] Other evidence established that there was a shotgun in the truck as well.

twelve pack of beer in the truck bed. Rather, this required enhancement, Applicant's (Proposed) Order, p. 37; and, the State would not have been alerted to their existence. *Brady* does not require the prosecution to create exculpatory evidence for the defendant. *See United States v. Harvey*, 756 F.2d 636, 643 (8th Cir. 1985) (government is not required to create exculpatory evidence that does not exist); *United States v. Bracy*, 67 F.3d 1421, 1429 n. 5 (9th Cir.1995); *United States v. Chen*, 754 F.2d 817, 824 (9th Cir.1985) (the government "has no duty to volunteer information that it does not possess or of which it was unaware"); *United States v Sukumolachan*, 610 F.2d 685, 687 (9th Cir. 1980) ("*Brady* ... does not require the government to create exculpatory material that does not exist"); *Bear v. State*, 417 N.W.2d 467 (Iowa App. 1987) ("State is not required 'to create exculpatory evidence that does not exist'") (citation omitted).

Further, counsel examined Mr. Carver regarding the fact that he did not see any twelve pack of beer in the truck. Although the answer of no (**1994 R. p. 950**) was consistent with his testimony on direct examination (**1994 R. pp. 932-33**), the response this was *inconsistent* with B[redacted]'s testimony that he was drinking that day and evening, discussed *supra*. ***See also*** **1994 R. p. 744** (cross-examination of B[redacted] established that the twelve pack of beer he had been drinking from earlier was in the cab of the truck, as opposed to the bed; and, he purchased another beer at Spell's to drink).[112] Mr. Carver was thus impeached. Also, the photographs do not show the presence of beer in the bed of the truck. Instead it shows merely an empty container; and Applicant did not present either Mr. B[redacted] or Mr. Carver at the PCR hearing to establish how long the container

[112] Contrary to Applicant's argument, the Court finds that Mr. B[redacted] was not denying that there was an empty beer container in the bed of his truck, but that the twelve pack from which he had been drinking was in the cab.

had been there, whether it contained beer close to the time of the shooting or whether it was seen by Carver.

Moreover, there was overwhelming evidence of Applicant's guilt of murder and the statutory aggravating circumstance from all eyewitnesses, including [assault victim]. Also, counsel had already impeached Mr. Riley, Mr. B[redacted] and Mr. Carver in 1994, as discussed in Ground 9(A)(4) and (6)-(8), and counsel impeached Mr. B[redacted] and Mr. Carver in 1996, as discussed herein and in Ground 9(B)(6), and (8)-(9). As to the statements on Applicant's Ex. 56, the Court finds that Mr. Carver appeared to be stunned, he never made eye contact with the camera and it did not appear that he was fully paying attention to the - as of yet unidentified - questioner. Based upon the foregoing, the Court finds that any impeachment from the prior inconsistent statements would have been marginal, at best.

The Court further finds that counsel's cross-examination fully set forth enough information so that the jury could properly assess the credibility of Carver and B[redacted], and counsel could demonstrate the supposed lack of it. *See Gunn*, 313 S.C. at 136-38, 437 S.E.2d at 82 (given abundance of other evidence detailing witness' disrespect for law, defendants could not show failure to disclose evidence witness bribed or attempted to bribe magistrate was "material" under *Brady*). *Cf. Mills v. Singletary*, 161 F.3d at 1288 (defendant's Sixth Amendment right to confront witnesses is satisfied where the cross-examination permitted exposes the jury to facts sufficient to evaluate the witness' credibility and "enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable").

Finally, with respect to the statements on Applicant's Ex. 56, the Court finds that Applicant cannot meet his burden under *Strickler* and *Brady* because he did not present Carver as a witness, and all the Court has is speculation as to what his responses would be if confronted with the statements. *See e.g., Bannister*, 333 S.C. at ___, 509 S.E.2d at 809 (state's failure to object to applicant's testimony as to what purported witness would testify did not relieve applicant of burden of producing witness or offering witness' testimony in accordance with the rules of evidence); *Jackson, supra* (applicant failed to establish prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses where he failed to substantiate at PCR hearing that victims and witnesses had criminal records); *Moss v. Hofbauer*, 286 F.3d at 864-65 (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued); *Zettlemoyer v. Fulcomer*, 923 F.2d at 298 (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented); *Beaver*, 93 F.3d at 1995 (rejecting claim that counsel was ineffective for failing to present mitigation evidence family members, where there was no proffer of this testimony); *Bassett, supra* (petitioner's allegation that attorney performed ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony). *Cf. Williams, supra* (habeas petitioner failed to establish prejudice that would excuse procedural default of claim that trial counsel were ineffective for failing to investigate statements of witnesses regarding conversations which they had in jail with petitioner's cohort, where counsel extensively cross-examined cohort during guilt phase of trial regarding inconsistent statements he made at jail and to

police, and any impeachment value derived from witnesses would have been cumulative at best).

Likewise, Applicant has not shown entitled to relief even if the State was required to generate and then disclose Applicant's 57-58 because the Court finds that Applicant cannot show how these photographs constituted "material" impeaching evidence as required for relief under *Strickler* and *Brady*. All that could be gained through presentation of the photographs is that Mr. B[redacted] might have been drinking. This, however, was not a point in dispute in either the 1994 or 1996 trials. Moreover, the Court finds that the photographs do not show the presence of beer in the bed of the truck, merely an empty container. Thus, to the extent there is any impeachment value of the photographs, it is *de minimis*, at best. It certainly cannot be said that these photographs "'could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict.'" *Strickler*, 527 U.S. at 290 (*citing Kyles*, 514 U.S. at 435).

Finally, Applicant did not present either Mr. B[redacted] or Mr. Carver at the PCR hearing to establish how long the container had been there, whether it contained beer close to the time of the shooting or whether it was seen by Carver. Under *Bannister*, *Glover* and the other similar authority cited, *supra*, the Court finds that Applicant cannot meet his burden of proof.

B. Prosecution's alleged failure to correct testimony.

Nor is there any merit to Applicant's argument that the prosecution deprived him of due process by failing to correct supposedly false testimony by of Mr. B[redacted] and Mr. Carver.

In *Napue v. Illinois*, 360 U.S. 264, 269 (1959), the United States Supreme Court held that due process is generally denied if the government knowingly uses perjured testimony against the accused to obtain a conviction. "The same result obtained when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id. See also Giglio v. United States*, 405 U.S. 150 (1972); *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996). Mere inconsistencies in testimony by government witnesses, however, do not establish the government's knowing use of false testimony. *United States v. Griley*, 814 F.2d 967, 971 (4th Cir. 1987). In order to meet his burden of proof, a defendant must show that perjured testimony was presented; that the prosecution knew the evidence was false; and "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Kyles*, 514 U.S. at 433 n. 7; *Boyd v. French*, 147 F.3d 319, 330 (4th Cir. 1998).

In the present case, Applicant contends that Mr. B[redacted] testified falsely about how much beer was in his truck and that Mr. Carver testified falsely about not seeing any beer in the truck. He further contends that Solicitor Bailey knew they had given false testimony but failed to correct it. However, the Court rejects this allegation and finds that Applicant clearly did not meet his burden of proof as to any of these points.

First, the Court has previously rejected the contention that Mr. B[redacted] testified falsely in either trial, and the Court finds that Applicant has misunderstood his testimony. Second, at most, all that was presented at trial or in the resentencing proceeding was that Mr. Carver's testimony differed from and was inconsistent with Mr. B[redacted]'s testimony about how much Mr. B[redacted] had been drinking and the presence of beer in the cab of the

truck. A mere inconsistency such as this, however, does not establish the government's knowing use of false testimony. *Griley*, 814 F.2d at 971. Nor did Applicant demonstrate perjury on the part of either witness with his showing in the PCR hearing because neither Applicant's Ex. 56 nor Applicant's Exs. 57-58 demonstrates that Mr. B[redacted] had more to drink than he admitted or that Mr. Carver, in fact, saw beer in the truck. The photographs merely show an empty box of beer in the truck's bed, and they do not demonstrate the presence of beer or that Carver saw the beer.

The Court further finds that Applicant has failed to demonstrate that the prosecution knew that either witness testified falsely. *Contra Riddle, supra*. The Court finds that there is absolutely no evidence in the voluminous record before it to support this proposition. In this regard, the Court would note that Applicant does not dispute that a review of State's Ex. 56 does not reflect the beer box in the truck bed. Even if it did, this does not support a *Napue/Giglio* claim because, unlike Riddle, 369 S.C. at 46, 631 S.E.2d at 74, the State alerted trial counsel to the existence of the videotape, made it available for counsel's inspection and provided a transcript of the videotape to counsel. *See* Respondent's Ex. 7. *See Harvey*, 756 F.2d at 643 (*Brady* does not require the prosecution to create exculpatory evidence for the defendant); *Chen*, 754 F.2d at 824 (the government "has no duty to volunteer information that it does not possess or of which it was unaware").

Moreover, to prevail on his claim, Applicant must prove that "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Kyles*, 514 U.S. at 433 n. 7; *Boyd v. French*, 147 F.3d 319, 330 (4th Cir. 1998). This is the greatest flaw in Applicant's logic: the State did not dispute in either the 1994

or 1996 trials that Mr. B[redacted] had been drinking before the murder; that there was a twelve pack of beer in the cab of the truck; or that he purchased a cold beer at Spell's but that the confrontation occurred and Applicant shot Stephanie before he could drink the beer. Furthermore, trial counsel's cross-examination in both proceedings developed the inconsistencies between the testimonies of Mr. B[redacted] and Mr. Carver. As a result, the Court finds that Applicant has failed to prove that "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.*

IT IS, THEREFORE, ORDERED:

1. That the Application for Post-Conviction Relief in this matter is dismissed with prejudice; and

2. That Applicant is remanded to the custody of Respondent.

AND, IT IS SO ORDERED this ____ day of _____, 2007.

_____
DAINE S. GOODSTEIN
Judge, First Judicial Circuit

_____, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	00-CP-18-575
TIMOTHY DION ROGERS,	)	
Applicant,	)	Third Amended Application for Post Conviction Relief
vs.	)	
JON E. OZMINT, Director, South Carolina Department of Corrections	)	
Respondent.	)	

{Note: This Application follows SCRCP Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCP}

1. Applicant is detained at Lieber Correctional Institute, S.C. Dept. of Corrections, [redacted], Ridgeville, S.C. [redacted].

2. Sentence of death was imposed at the Dorchester County Court of General Sessions, after a jury trial on September 16 - 23, 1996, with the Hon. Charles Whetstone presiding.

3. (a) For the offense of murder, the indictment number is: 93-GS-18-101.

(b) For the offenses of criminal sexual conduct with a minor, the indictment numbers are: 94-GS-18-47 and 94-GS-18-48.

4. (a) For the offense of murder:

(i) On February 28 - March 5, 1994, Applicant was convicted of murder and sentenced to death at a jury trial, with the Hon. Luke Brown, presiding. On appeal, the murder conviction was affirmed, but the death sentence was reversed and remanded.

(ii) On September 16 - 23, 1996, Applicant was sentenced to death at a re-sentencing jury trial, with the Hon. Charles Whetstone, presiding.

(b) For the offenses of criminal sexual conduct:

(i) On January 25 and 27, 1994, Applicant pled guilty and was sentenced to seven years on each count, with the Hon. Charles W. Whetstone presiding, General Sessions Court of the Second Circuit, Dorchester County.

5. See (4), *supra*.

6. (a) Applicant appealed from the judgment of conviction and imposition of sentence, as to the murder conviction and death sentence.

(b) Applicant did not appeal his guilty pleas to the offenses of criminal sexual conduct with a minor, two counts.

7. (a) The Court to which Applicant appealed the murder conviction and death sentences was: The South Carolina Supreme Court.

(b) The results in the Court to which Applicant appealed were:

(i) Murder conviction affirmed; Death sentence reversed and remanded for re-sentencing ("Rogers I").

(ii) Death sentence affirmed after re-sentencing trial (Rogers II).

(c) The dates of each such result were:

(i) January 22, 1996 (Rogers I).

(ii) January 24, 2000 (Rogers II).

(d) Citations of any written opinions or orders entered pursuant to such results:

(i) *State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996) (Rogers I).

(ii) *State v. Rogers*, 338 S.C. 435, 527 S.E.2d 101 (2000) (Rogers II).

8. Applicant did not appeal the guilty pleas to criminal sexual conduct with a minor because Applicant had pled guilty on advice of trial counsel, prior to Applicant's first capital jury trial in 1994.

9. and 10. Grounds for Relief and Concise Statement of Supporting Facts.[1]

9(A). GROUND A

Applicant was denied the right to effective assistance of counsel at the guilt or innocence phase of his trial in violation of the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that trial counsel (i) failed adequately to advise the Applicant regarding the attempted but failed guilty plea to murder, which, if the Applicant had been properly and effectively advised, would have avoided a death sentence; (ii) failed to conduct adequate or any voir dire examination of several potential jurors, some of whom sat as jurors; (iii) Failed to conduct voir dire examination concerning possible race of victim and race of the Applicant; (iv) failed properly or adequately to investigate and prepare the guilt-innocence phase of the trial; (v) failed to seek expert assistance regarding a material medical condition of Applicant, (vi) failed effectively to confront and rebut the State's witnesses and evidence; (vii) failed to present readily available and favorable defense witnesses and evidence; (viii) failed to object to introduction of actual Department of Corrections incident report; (ix) failed to request a jury instruction to which the applicant was entitled; (x) failed to review critical evidence in the case which the state made available

[1]Applicant reserves his right to amend this application after further discovery, development and analysis of both the audio and video portions of Court's Exhibit 6, and to amend the application to conform to the proof adduced at the evidentiary hearing.

to trial counsel;[2] and (xi) the cumulative impact of these errors and the resulting prejudice. Applicant was prejudiced by trial counsels' failures. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (capital defendant has a right to maintain innocence during a guilty plea); *Hill v. Lockhart*, 474 U.S. 52 (1985) (*Strickland* standard applies to guilty plea challenges based on ineffective assistance of counsel); *Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998) (Counsel ineffective in burglary and criminal sexual conduct case for failing to call triage nurse as witness); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (Ineffective for failing to interview witnesses who could have contradicted state's evidence); *Ingle v. State*, 25416 (2002) (Ineffective for failing to interview a witness before calling the witness to testify). Trial counsel did not investigate and present facts and circumstances which would have supported the defense at the trial phase. *Cobbs v. State*, 305 S.C. 299, 408 S.E.2d 223 (1991) (Ineffective for failing to investigate possible defenses); *Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988) (Ineffectiveness so pervasive that showing of prejudice unnecessary); *State v. King*, 155 S.E. 409, 158 S.C. 251 (1930); *Strickland v. Washington*, 466 U.S. at 668, 695 ("In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the *totality* of the evidence before the judge or jury") (emphasis added); *Wiggins v. Smith*, 123 S.Ct. 2527, 2535-37 (2003) (holding trial counsel's failure to investigate and present mitigation evidence required new trial where counsel's failure to investigate was unreasonable under "prevailing professional norms," as measured in part by the ABA Standards); *Williams v. Taylor*, 529 U.S. at 397 (in assessing

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[2]This claim is raised as an alternative pleading of Ground F, *infra*, and only to the extent trial counsel were ineffective for failing to view the videotaped film and the photograph. However, as stated in Ground F, the State had an independent constitutional duty to correct any false testimony by its witnesses.

prejudice flowing from deficient performance, reviewing court must consider "the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding"); *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted) ("cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial"); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. 263, 289-290 (1999) ("'[t]he question is not whether the defendant would more likely than not have received a different verdict with [effective counsel], but whether in [the] absence [of effective counsel] he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'") (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

10 (A). FACTS IN SUPPORT OF GROUND A

The trial record is replete with counsels' failures to protect Applicant's rights and the integrity of the trial. Trial counsel was ineffective for failing to advise Applicant prior to and during the aborted guilty plea that would have resulted in a life sentence for Applicant, had it been completed. The Solicitor had agreed to a negotiated plea for a life sentence. Trial counsel never advised applicant that he could both plea guilty and maintain his innocence of murder. Applicant never denied firing the shot that killed Stephanie B[redacted], but he has always adamantly said that he never intended to hurt Stephanie. While legally the point is a distinction without a difference, it represented a significant moral difference to Applicant. Trial counsel failed to conduct any voir dire examination of several venirepersons who sat as jurors on the trial of this case. Trial counsel failed to object to the trial court's description to venirepersons during voir dire of the accusation against Applicant as being

that Applicant "shot a child in the back of her head." Trial counsel did not interview available witnesses who could have corroborated the defendant's testimony and defenses at the guilt or innocence phase of his trial. Trial counsel failed effectively to cross-examine several state witnesses. Trial counsel failed to seek the assistance of experts who could have and would have provided crucial information concerning Applicant's diminished guilt and culpability. The State notified trial counsel of several independent witnesses who revealed potentially favorable information during interviews with state agents. The State also notified trial counsel about the existence of videotape film made of the crime scene in the State's possession and offered to allow defense counsel to view the videotape at the State's office, and trial counsel failed to do so. The State may also have provided directly to trial counsel a copy of a photograph that would have revealed the presence of even more empty or partially empty beer packaging. The videotape film and the photograph contained material evidence that would both impeach the state's two primary witnesses and would have mitigated Applicant's culpability. Applicant also separately made the existence of these several independent witnesses known to trial counsel. Applicant also made known to trail counsel the existence of other witnesses who could corroborate Applicant's explanation of the factual developments regarding the events surrounding the death of Stephanie B[redacted]. Trial counsel failed to interview any of these witnesses. Because counsel failed to interview these witnesses to discover what meaningful information they could provide to the jury charged with deciding Applicant's guilt or innocence and because of each of trial counsels' failures, Applicant was deprived of his constitutional guarantee to the effective assistance of counsel and due process of law, and other rights provided by South Carolina law. Trial counsels' ineffective assistance of counsel resulted in prejudice

to Applicant in that the fact-finder was deprived of material evidence that would have diminished applicant's culpability. Applicant will adduce additional evidence at an evidentiary hearing in support of the Ground A for relief.

9 (B). GROUND B

Applicant was denied the right to effective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that during the sentencing phase of Applicant's 1996 trial, trial counsel (i) failed adequately to advise Applicant in accordance with *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), prior to and during the aborted guilty plea; (ii) failed to conduct adequate or any voir dire examination of several potential jurors, some of whom sat as jurors; (iii) Failed to conduct voir dire examination concerning possible race of victim and race of the Applicant; (iv) failed to object to the improper removal of a potential juror for cause; (v) failed to object to removal of a selected African-American juror for hardship when a white juror with an identical situation was not excused from service; (vi) failed to present available mitigating evidence at the sentencing phase of Applicant's trial; (vii) failed to seek expert assistance regarding a material medical condition of Applicant, (viii) failed effectively to confront and rebut the State's witnesses and evidence; (ix) failed to present readily available and favorable defense witnesses and evidence; (x) failed to object to introduction of the actual Department of Corrections incident report; (xi) failed to object to improper closing arguments by the State; (xii) failed to review critical evidence in the case which the state made available to trial counsel;[3] and, (xiii) the cumulative impact of these errors. *See*

[3]This claim is raised as an alternative pleading of Ground F, *infra*, and only to the extent trial counsel were ineffective for failing to view the videotaped film and the photograph. However, as stated in Ground F, the State had an independent constitutional

Williams v. Taylor, 529 U.S. 362 (2000) (Counsel ineffective for failing to investigate, interview witnesses, and present available mitigation evidence). Trial counsel failed to present available mitigating evidence at the sentencing phase. *Id.* Trial counsels' failures were unreasonable. Counsel's conduct was prejudicial to Applicant. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998) (Counsel ineffective in burglary and criminal sexual conduct case for failing to call triage nurse as witness); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (Ineffective for failing to interview witnesses who could have contradicted state's evidence); *Ingle v. State*, 25416 (2002) (Ineffective for failing to interview a witness before calling the witness to testify); *Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988) (Ineffectiveness so pervasive that showing of prejudice unnecessary); *Strickland v. Washington*, 466 U.S. at 668, 695 ("In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the *totality* of the evidence before the judge or jury") (emphasis added); *Williams v. Taylor*, 529 U.S. at 397 (in assessing prejudice flowing from deficient performance, reviewing court must consider "the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding"); *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted) ("cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial"); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. 263, 289-290 (1999) ("'[t]he question is not whether the defendant would more likely than not have received a different verdict with [effective

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duty to correct any false testimony by its witnesses.

counsel], but whether in [the] absence [of effective counsel] he received a fair trial, understood as a trial resulting in a verdict worthy of confidence'") (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

10 (B). FACTS IN SUPPORT OF GROUND B

The record of Applicant's resentencing trial is replete with trial counsels' failures to preserve Applicant's rights and the integrity of the trial, as noted above. Trial counsel failed to investigate and interview available and favorable witnesses for the sentencing phase. The State also notified trial counsel about the existence of videotape film made of the crime scene in the State's possession and offered to allow defense counsel to view the videotape at the State's office, and trial counsel failed to do so. The State may also have provided directly to trial counsel a copy of a photograph that would have revealed the presence of even more empty or partially empty beer packaging. The videotape film and the photograph contained material evidence that would both impeach the state's two primary witnesses and would have mitigated Applicant's sentence. Applicant will adduce additional evidence at an evidentiary hearing in support of Ground B for relief.

9(C). GROUND C

Applicant was denied the right to effective assistance of counsel, and the due process of law, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that the trial court lacked jurisdiction as to the indictment(s) for criminal sexual conduct with a minor, and as such, the convictions for said offense(s) were inadmissible and Applicant's death sentence must be vacated. Additionally, trial counsel was ineffective for failing to object to lack of jurisdiction as to the indictments for criminal sexual conduct with a minor; and, counsel was ineffective for failing to withdraw the plea

to such offenses.[4]

10(C). FACTS IN SUPPORT OF GROUND C

The trial court lacked jurisdiction to accept the defendant's guilty plea of two (2) counts of criminal sexual conduct with a minor because no such offenses occurred in Dorchester County. *Koon v. State*, 358 S.C. 359, 595 S.E.2d 456 (2004); *Hooks v. State*, 353 S.C. 48, 577 S.E.2d 211 (2003); *Odom v. State*, 350 S.C. 300, 566 S.E.2d 528 (2002); *Brown v. State*, 343 S.C. 342, 540 S.E.2d 846 (2001). Lack of subject matter jurisdiction can be raised at any time. *State v. Funderburk*, 259 S.C. 256, 191 S.E.2d 520 (1972). Where a criminal conviction is admitted for the sentencing jurors consideration, and such conviction is later shown to be void, the defendant shall be entitled to a new sentencing trial. *Johnson v. Mississippi*, 486 U.S. 578, 100 L.Ed.2d 575, 108 S.Ct. 1981 (1988). Furthermore, trial counsel was ineffective for failing to object to lack of jurisdiction. *Hopkins v. State*, 317 S.C. 7, 451 S.E.2d 389 (1994) (Counsel ineffective for failing to object to amendment of indictment which enhanced offense). Additionally, counsel was ineffective for failing to move to withdraw defendant's guilty plea to criminal sexual conduct with a minor when the plea to life was withdrawn. *Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988) (Ineffective for failing to move to withdraw the guilty plea entered where prosecution promised not to oppose probation then prosecution reneged). Thus, counsel's conduct was unreasonable and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 104

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[4]Because trial counsel failed to inform Applicant that he could maintain his innocence of murder during the guilty pleas to these charges, trial counsel's ineffectiveness tainted these guilty pleas, which were integral to the guilty plea for murder. *North Carolina v. Alford*, 400 U.S. 25 (1970) (capital defendant has a right to maintain innocence during a guilty plea). The cumulative impact of the two interrelated failures also prejudiced Applicant.

S.Ct. 2052, 80 L.Ed.2d 674 (1984). The *Strickland* standard applies to guilty plea challenges based on ineffective assistance of counsel. *See Hill v. Lockhart*, 474 U.S. 52 (1985). In order to satisfy the Strickland "prejudice" standard, the defendant must show that there was a reasonable probability that, but for counsel"s errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 57-58.

9(D). GROUND D

Appellate counsel was ineffective for failing to raise and argue that reversal of the conviction was required because: (I) trial court improperly admitted a highly prejudicial and wholly unreliable hearsay statement during the guilt-or-innocence phase of Applicant's trial, the admission of which trial counsel preserved for review; and, (ii) Applicant's sentence should be reversed because the trial court erred in striking a qualified juror for cause all thereby depriving Applicant of rights guaranteed him by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law.

10 (D). FACTS IN SUPPORT OF GROUND D

Trial counsel objected to the admission of a previously undisclosed, dubious, and rank hearsay statement by State's witness Anthony Riley. 1994 Tr. 805-12. The trial court allowed Riley to testify that he heard two unidentifiable and unidentified people utter a highly inflammatory statements, "Did you get the mother fucker?" and "Yeah, I got the mother fucker." 1994 Tr. 804-15. The state surely intended for the jurors to insinuate that the words, "Yeah, I got that motherfucker," were uttered by Applicant. Trial counsel objected to the trial court's disqualification of a juror. 1996 Tr. 257-272. Appellate counsel failed to raise the issue on appeal, even though the issue was preserved and meritorious, and would have constituted reversible error. Appellate counsel failed to raise these issues

on appeal, even though the issues were preserved and meritorious, and would have constituted reversible error. *Sanchez v. State,* 351 S.C. 270, 569 S.E.2d 363 (2002) (PCR relief required where trial counsel failed to object to hearsay); *same Matthews v. State,* 350 S.C. 272, 565 S.E.2d 766 (2002); and *see Ingel v. State,* 348 S.C. 467, 560 S.E.2d 401 (2002); *Witherspoon v. Illinois,* 391 U.S. 510 (1968); *Southerland v. State,* 337 S.C. 610, 524 S.E.2d 833 (1999) (requiring new sentencing trial where appellate counsel failed to raise on appeal a preserved and meritorious issue); *Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (to be effective appellate counsel must give assistance of such quality as to make appellate proceedings fair)); and *see Strickland v. Washington,* 466 U.S. 668, 685, 696, 104 S.Ct. 2052, 2063, 2069, 80 L.Ed.2d 674, 692, 699 (1984).

9(E). GROUND E

Applicant was deprived of a fair trial and the interest of justice requires his conviction be vacated and he be granted a new trial because material witnesses committed perjury when one witness testified he had no prior knowledge of or experience with Applicant and two other witnesses either downplayed the amount of beer present in their vehicle and the amount of beer consumed by them. The witnesses' false testimony deprived Applicant and the jury of important facts that would impeach the witnesses' testimony, when it is true that the witness both, in fact, knew Applicant and held a grudge against him, and the other two witnesses had access to and did consume and possess very large amounts of beer, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and South Carolina law, and which resulted in a miscarriage of justice. Far from being an unbiased and uninvolved eyewitnesses, Mr. Riley concealed his bias and Mr. B[redacted] and Mr. Carver lied about the amount of beer they possessed and consumed.

Further, the state failed to disclose the fact that Mr. Riley was also a long-time employee of the victim's uncle, in violation of *Brady v. Maryland*, 373 US 83 (1963). *Brady* entitles Applicant to this information because it would have further exposed the witness' bias against Applicant. In the alternative, to the extent trial counsel failed to discover this close employer/employee relationship, Applicant was deprived of the effective assistance of counsel required by the Sixth, Eighth and Fourteenth Amendments and South Carolina law. see *Strickland v. Washington*, 466 U.S. 668, 685, 696, 104 S.Ct. 2052, 2063, 2069, 80 L.Ed.2d 674, 692, 699 (1984). This false testimony was highly prejudicial to Applicant and requires a new trial for Applicant. Further, the state's failure to disclose the impeachment evidence requires a new trial because the testimony of Mr. Riley, Mr. B[redacted]and, Mr. Carver was highly material. In the alternative, trial counsel's failure to learn this information about Mr. Riley was unreasonable and it prejudiced Applicant at both phases of the trial. As noted in Ground F, *infra*, James Carver and Michael B[redacted] both testified falsely concerning the amount of beer they possessed and consumed. To the extent the State failed to disclose the videotaped film and the photograph depicting numerous empty or partially empty multi-pack beer containers prior to the 1994 and 1996 trials, the State deprived Applicant of a fair trial and to impeachment and exculpatory evidence guaranteed him by the Fifth, Sixth, Eighth and Fourteenth Amendments and South Carolina law.

10(E). FACTS IN SUPPORT OF GROUND E

State's witness Anthony Riley testified in the guilt or innocence portion of Applicant's 1994 trial that he had never seen Applicant before. 1994 Tr. 799. However, Applicant has now learned that Mr. Riley was not telling the truth. Mr. Riley, in fact, by his own sworn testimony, now admits that he had encountered Applicant before and the

result of the contact left Mr. Riley bitter at Applicant. According to Mr. Riley, he briefly encountered Applicant when the two were in the Dorchester County Jail at the same time. During that stay, Mr. Riley had a very negative encounter with Applicant that Mr. Riley was able to recount in great detail almost twenty years later, when he was deposed in 2003 in relation to the instant action. Moreover, Mr. Riley has had now disclosed that, as of 2003, he has worked for the victim's close relatives for more than twenty years, which would have been approximately eleven or more years at the time of his testimony in 1994. Regarding the factual bases for the allegations related to Mr. Carver and Mr. B[redacted], please see Ground F, *infra*. As additional factual bases for this claim, Applicant believes and alleges that the State failed to disclose the photograph in question, Applicant's Exhibit Nine at the September 2004 evidentiary hearing, before either the original 1994 trial or the 1996 resentencing trial. Additionally, even though the State made trial counsel aware of the existence of the videotaped film of the crime scene, Applicant alleges that the State failed to describe the videotaped film with detail sufficient enough to put trial counsel on notice of the exculpatory or impeachment nature of the contents of the videotaped film. Moreover, the Solicitor failed to provide trial counsel with a copy of the videotaped film, unlike almost every other item of potential evidence in this case which the State did reproduce and provide to trial counsel. It is also worth noting that the withheld photograph and the videotaped film both are materially related to the issue of degree of impairment of and bad conduct of the State's two primary witness, the extent to which those witnesses may have caused the encounter that led to the horrible but unintended death of Stephanie B[redacted], and exposes their efforts to minimize their culpability and exaggerate Applicant's.

9(F). GROUND F

Applicant was denied of his right to a fair trial in both phases of his capital murder trial and resentencing, a right guaranteed by both the Fourteenth Amendment and South Carolina law, because the State failed to correct false testimony from one of its primary witnesses, James Carver. The state had possession of photographic and videotape film evidence revealing that James Carver's testimony was patently false regarding the absence of packages of beer in the vehicle driven by the victim's father. The videotaped film of the crime scene was disclosed to the Applicant subsequent to the December 21, 2004, hearing date; a copy of it was marked Court's Exhibit 6 and provided to the Court and Respondent's counsel on March 25, 2005, at a status conference. The possession of beer, the amount of beer possessed, and the amount of beer consumed by the victim's father was in dispute and was an issue of great importance to the Applicant's case and the jury's decision-making process. The Solicitor was aware of the video film footage revealing one of more opened and partially consumed beer cartons in the back portion of B[redacted]'s truck. *See* Letter from Walter Bailey to William L. Runyon, dated February 9, 1994. The Solicitor was aware, according to his sworn testimony during the first week of the evidentiary hearing in this matter, that defense counsel did not view the videotape of the crime scene. The Solicitor was aware as well of the photograph of the empty or almost empty beer carton in the front of Mr. B[redacted]'s truck and on the driver's side floorboard, as the only copy of that photograph none to be in existence was obtained from the Solicitor's file by Lt. Earl Asbell, the photographer of the crime scene, in September of 2004, and introduced as Exhibit 18 at the September, 2004, hearing in this matter. The Solicitor never corrected the false testimony and the jury did not see either the photograph of the beer in the front of the truck

on the floorboard of it or the videotaped film of the crime scene including footage of the beer in the back of the truck, evidence that belies witnesses Carver and Michael B[redacted]s misrepresentation about how much beer they possessed or consumed.

The issue does not turn on whether or not defense counsel knew or should have known about the evidence in the Solicitor's possession that exposed the false testimony.[5] Rather, the Solicitor had an absolute independent constitutional duty to correct the false testimony by the state's witness, James Carver. "[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177 (1959) (internal citations omitted). "[T]he prosecutor has a duty to correct testimony he knows to be false, even if its introduction was not knowing and intentional." *Bracy v. U.S.*, 435 U.S. 1301, 98 S.Ct. 1171 (1978). Mr. Rogers is entitled to a new trial.

10(F). FACTS IN SUPPORT OF GROUND F

During the guilt-or innocence phase of Applicant's 1994 trial, James Carver was allowed to testify that there was no beer in the truck and that he would have seen it, if it were present. 1994 Tr. 950. At Applicant's 1996 resentencing trial, Carver testified that he didn't see any beer, anywhere in the truck. 1996 Tr. 749-50. The Solicitor had possession of both a photograph of a partially empty beer multi-pack carton in the front

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[5]The issues of whether or not the Solicitor violated *Brady v. Maryland* regarding the videotaped film and the photograph and whether counsel were ineffective regarding use of the videotaped film footage and the photograph, will be raised and addressed as separate grounds for relief, *infra*. See Grounds A, B and E, respectively, as amended.

of the Mike B[redacted]'s truck and uncut video film footage, provided to the solicitor from a media outlet, revealing there was at least one more multi-pack beer carton, if not two, in the back of Mike B[redacted]'s truck. The videotape footage clearly shows that at least one multi-ack beer carton in the back section of Mr. B[redacted]s truck was directly beside a laundry basket that James Carver came in contact with when he placed his semi-automatic handgun in the laundry basket. As noted supra, the Solicitor did not correct the false testimony and the juries never saw either the relevant photograph or the relevant videotaped film footage. Reversal of Applicant's conviction and sentence is required.

9(G). GROUND G[6]

Applicant was denied the right to effective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that during the sentencing phase of Applicant's 1996 trial, trial counsel both elicited an and failed to object when the state elicited extensive information concerning general prison conditions, which "impermissibly injected an arbitrary factor into [Applicant's] jury's sentencing considerations," in violation of the Eighth and Fourteenth Amendments to the U. S. Constitution and South Carolina law, S.C. Code Ann. § 16-3-25(C)(1) (2003). *See, e.g., State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450. 453 (2007). Prior to deciding *Burkhart* in January of this year, the Supreme Court cautioned the state and the defense bar in *dicta* "that evidence regarding general prison conditions ... is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment." *State v. Bowman*, 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2006).

The *Bowman* decision was based on a direct appeal of the defendant's conviction and

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[6]Claim added May 30, 2007.

death sentence. The Court did not rule on Mr. Bowman's claim in that procedural posture only because trial counsel failed to object and the trial court, therefore, had not ruled on the issue. Post conviction relief is the appropriate forum in which to raise issues concerning allegations of ineffective assistance of counsel related to claim of failure to preserved error, where an applicant's trial counsel failed to preserve this error for review on direct appeal. *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975). As will be demonstrated in the factual recitation in sec. 10(G), *supra*, Applicant's trial counsel failed to preserve the error for appellate review. *Burkhart* applies to Applicant. In *Burkhart*, the Court found that, even though Mr. Burkhart was tried prior to the Court's decision in *Bowman*, it would "apply that reasoning here because it is consistent with our long-standing rule that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime." Thus, Applicant is entitled to raise this issue now, and what's more, he must raise the issue within one year of the Court's decision Burkhart or lose the right to do so. S.C. Code 1976 § 17-27-45.

10(G). FACTS IN SUPPORT OF GROUND G

During the State's case in chief at Applicant's 1996 sentencing hearing, the State called Associate Warden Priscilla Mack as a witness to testify concerning Applicant's warden's jacket. She recounted his two prison incarcerations prior to the charges related to this action. 1996 Tr. 756-7. The State also introduced a copy of the only SCDC disciplinary report related to Applicant through Ms. Mack. (See Claim 9 (C), *supra*.) 1996 Tr. 760. At that point, trial counsel Runyon began cross-examination of Ms. Mack. During cross-examination, trial counsel Runyon elicited testimony from Ms. Mack concerning the cell size and typical occupancy numbers, and the fact that Applicant would remain within

the confines of a correctional facility, the fact that Applicant only had one disciplinary report against him and that he received administrative segregation or "lock-up" for the violation, and that she was not an appropriate witness relative to prison adaptability assessments.[7] 1996 Tr. 762-65. Trial counsel Runyon then began a line of inquiry into programs available to inmates in general population, delving into the availability of counseling and educational programs, work programs. Mr. Runyon elicited information related to the activities available for inmates in "close confinement," a term he used to avoid alerting the jury that Applicant had been housed on death row for the last few years. 1996 Tr. 769.

Prior to conducting re-direct of Ms. Mack and outside the presence of the jury, the state sought permission to explore the difference between the "adaptability to prison" in "general population" versus adaptability to prison on "death row" (again, without mentioning the phrase death row to the jury). Mr. Runyon then repeatedly and specifically stated that he had "no problem" with, "no objections whatsoever" to and "no objection" to the State asking Ms. Mack questions about "general population." 1996 Tr. 771-73. There being no objection from trial counsel, the trial court allowed the State to proceed with the line of questioning. After the jury returned, the State elicited testimony from Ms. Mack concerning the availability in general population to inmates of educational programs, salaried employment in the institutions, social work group sessions, volunteer

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[7]Applicant does not now and is not now complaining about testimony concerning his own prior history related by this witness concerning adaptability to prison. As *Bowman* and *Burkhart* make clear, that type of limited and defendant-specific testimony is fair game. *State v. Bowman*, 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2006); *State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450. 453 (2007).

entertainment and church programs, and increased family visitation allowances, as well as the choice not to work at all.

The Solicitor then began a series of questions concerning the availability of various recreation programs to general population inmates. The witness described inmate soccer matches, handball courts, large and small recreation yards. 1996 Tr. 776. The State asked the witness about inmate soccer teams and soccer uniforms, and what the uniforms were like. *Id.* The witness was asked about and described the availability to inmates of basketball courts (but no basketball teams). *Id.* The witness testified about prison libraries, inmate's owning personal color televisions and having them in their cells. 1996 Tr. 777. She was asked about and described the prison day rooms, what the inmates did while there on their free time, and their access to and the availability of televisions in those common areas. *Id.* The witness was asked about and allowed to describe how the inmates in the dorm that wins the cleanest dorm award each week is treated with special movie screenings. 1996 Tr. 778. The witness was asked about and did provide details about frequency and availability of family and friend visitation allowances, canteen privileges and available items, special holiday dinner menus, medical and dental facilities, dietician nutritional services. 1996 Tr. 778-79. The witness could not think of any "other amenities available to an inmate in the general population" that she had not "already testified about." 1996 Tr. 780.

On re-cross-examination, trial counsel then weakly attempted to minimize and downplay all of the "amenities" described in detail, without defense objection, by Ms. Mack. 1996 Tr. 781-790. Trial counsel attempted somewhat to counter the amenities with "evidence concerning the harshness of prison life." *State v. Burkhart*, 371 S.C. at 453, 640 S.E.2d at 488. Ultimately instead, trial counsel just elicited *even greater detail* and more

at 488-89. Based on the facts of Applicant's case, *Burkhart* absolutely requires that Applicant's death sentence be vacated and remanded for a sentencing proceeding that comports with South Carolina law and the Eighth and Fourteenth Amendments. The Court did not conduct a harmless error analysis[9]. *Id.*

Under the facts of Applicant's case, Applicant is want to imagine any response or strategy reason trial counsel might offer that would obviate that result. Assuming arguendo that counsel claimed strategic reasons for both failing to object to the State eliciting the impermissible information that the Court has declared completely off limits by either party, Applicant respectfully submits that any such claim by trial counsel would be of no moment to a determination of this claim, given the nature and volume of impermissible information that was injected into Applicant's sentencing proceeding, the entire record of which is already in evidence before this Court.[10] Thus, pursuant to Rule 56(*) SCRCP, Applicant moves for entry of summary judgment on this ground for relief. In the alternative, Applicant requests that the Court conduct an evidentiary hearing on this ground for post-conviction relief.

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[9]If one were to wonder whether harmless error was present, one would only have to consider the State's closing argument, in which the State repeatedly hammered home Ms. Mack's relevant testimony to the jury. For but a few examples: the State at one moment made much ado that Applicant could watch TV, see movies and play basketball and soccer, and at another moment pointing out that Applicant could play soccer and "have a little uniform" to wear while playing soccer; at one moment pointing out that life in general population meant the services of a dietician and access to educational programs, but then noting the victim's education ended in the 4th Grade. 1996 Tr. 952-53.

[10]Trial counsel would be hard-pressed to claim he had some grand strategy (or any) reason for not objecting to this evidence in light of his too-little-too-late effort to minimize it during his re-cross-examination of witness Mack. 1996 Tr. 781-790. As the Burkhart Court made plain, however, trial counsel's continued discussion and further introduction of impermissible evidence only further aggravated the matter. *State v. Burkhart*, 371 S.C. at 453-54, 640 S.E.2d at 488-89.

11. Applicant appealed directly to the South Carolina Supreme Court; however, Applicant, did not petition the United States Supreme Court for a writ of certiorari. Applicant has neither previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court. For reference, in this action, PCR counsel was appointed in state court on April 11, 2000; Applicant's state PCR was filed on June 12, 2000.

12. See response to section 11, *supra.*

13. Applicant has not previously set forth any of the grounds listed in section 9, *supra,* to this or any other Court, State or Federal, in any petition, motion or application.

14. Not Applicable.

15. These grounds, as listed in section 9, *supra,* rely on additional facts outside the record considered by the previous courts in this case.

16. Applicant was represented at trial, both in 1994 and 1996, and at his guilty pleas to criminal sexual conduct with a minor in 1994, by the following attorneys: William L. Runyon, Jr., One Carriage Lane, Bldg. B, Ste. 203, Charleston, S.C., 29407; and, Mark Leiendecker, 610 N. Cedar St., Summerville, S.C., 29483. Applicant was represented on direct appeal by Joseph Savitz, Chief Deputy, Office of Appellate Defense, 1122 Lady St., Ste. 940, Columbia, S.C., 29201.

17. See section 16, *supra.*

18. Applicant seeks vacation of his convictions and sentences, as to the indictments for both murder and criminal sexual conduct with a minor.

19. Applicant is also under sentence for criminal sexual conduct with a minor as reflected in Indictment No. 94-GS-18-47 and 94-GS-18-48. These convictions arose from

a guilty plea related to Applicant's pre-trial capital proceedings. The guilty plea was entered before the Hon. Charles W. Whetstone, General Sessions Court of the Second Circuit, Dorchester County, on January 25 and 27, 1994, and the Applicant was sentenced to seven (7) years on each indictment. Applicant was represented by William Runyon, Esq., and Mark Leiendecker, Esq.

Respectfully submitted,

Jeffrey P. Bloom
Attorney at Law
1911 Pickens St.
Columbia, SC 29201
(803)256-7001

Diana Holt
Diana Holt, LLC
P.O. Box 6454
Columbia, SC 29260
(803)782-1663

By: _____
Counsel for Applicant

May 31, 2007
Columbia, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF DORCHESTER)	00-CP-18-575
TIMOTHY DION ROGERS,)	
Applicant,)	CERTIFICATE OF SERVICE
vs.)	
JON E. OZMINT, Director, South Carolina Department of Corrections)	
Respondent.)	

I, Diana L. Holt, hereby certify that I have this date served the Applicant's Third Amended Application for Post-Conviction Relief, in the above-captioned case upon counsel for Respondents by U.S. Mail, postage paid, to their counsel of record, addressed as follows:

Wm. Edgar Salter, III
Senior Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211
agesalter@ag.state.sc.us

1.

DIANA L. HOLT
Counsel for Mr. Rogers

May 31, 2007

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER)

Timothy Dion Rogers, #4883,) CASE NO. 00-CP-18-575
☐ Plaintiff)

v.) MOTION INFORMATION FORM
Jon E. Ozmint, Director, South Carolina) AND COVER SHEET
Department of Corrections,
☐ Defendant.

Plaintiff's Attorney: Jeffrey P. Bloom , Bar No. Address: 1911 Pickens Street Columbia, SC 29201 phone: fax: e-mail: other:	Defendant's Attorney: William Edgar Salter, III , Bar No. Address: P.O. Box 11549 Columbia, SC 29211 phone:803-734-6305 fax: e-mail: other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
xxFORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion Type

x☐ Written motion attached
☐ Form Motion --
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐Plaintiff / ☑Defendant Date submitted 06/09/07

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☑ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☑ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☑ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:
Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (1/2003)

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF DORCHESTER)	00-CP-18-575
TIMOTHY DION ROGERS,)	
Applicant,)	
)	CERTIFICATE OF SERVICE
vs.)	
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JON E. OZMINT, Director, South Carolina Department of Corrections)	
)	
Respondent.)	

I, Diana L. Holt, hereby certify that I have this date served the Applicant's Third Amended Application for Post-Conviction Relief, in the above-captioned case upon counsel for Respondents by U.S. Mail, postage paid, to their counsel of record, addressed as follows:

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1.

DIANA L. HOLT
Counsel for Mr. Rogers

May 31, 2007

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	
Timothy Dion Rogers, #4883	)	C. A. No. 00-CP-18-575
	)	
Applicant,	)	
	)	
vs.	)	
	)	MOTION TO STRIKE
Jon E. Ozmint, Director, South Carolina Dept. of Corrections,	)	THIRDAMENDED APPLICATION
	)	
Respondent.	)	

On June 1, 2007, Respondent received Applicant's third Amended Application, in which he attempts to assert, for the first time in these protracted proceedings, that trial counsel was ineffective for eliciting evidence about the conditions of prison confinement and for not objecting to the State eliciting similar evidence on redirect examination of State's witness, Associate Warden Priscilla Mack. Applicant has raised this allegation as Ground 9(g), and bases his allegation upon the January 8, 2007 decision of the South Carolina Supreme Court in *State v. Burkhart*, 371 S.C. 482, 487-88, 640 S.E.2d 450, 453 (2007) (testimony by state's witness regarding the privileges available to an inmate who receives a sentence of life without parole required reversal of defendant's death sentence). *See also State v. Bryant*, 372 S.C. 305, 642 S.E.2d 582, 589 (2007) ("We ... remain firm in our view that testimony seeking to portray life imprisonment as preferable to capital punishment is improper, particularly where, as here, the expert's testimony did not focus specifically on the defendant, but on prison conditions generally"). Respondent opposes this amendment and hereby move to strike the Third Amended Application for the following reasons:

On April 11, 2000, the Court signed an Order appointing Mr. Bloom and Ms. Holt. Applicant thereafter timely filed his PCR Application in accordance with *In Re: Stays*.

Applicant raised the following ground for relief in his June 12, 2000 Application:

> 9. (a) Applicant was denied the effective assistance of counsel at the guilt phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.
>
> Applicant's trial counsel failed to conduct an adequate and independent investigation of applicant's case in order to develop and present evidence to create a reasonable doubt as to applicant's guilt or to effectively cross-examine state's witnesses.
>
> 9. (b) Applicant was denied the effective assistance of counsel at the sentencing phase of his trial due to counsel's deficient performance in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.
>
> Defense counsel failed to thoroughly investigate and present relevant evidence in mitigation of punishment during applicant's resentencing trial although such evidence was available. Counsel failed to adequately prepare for the sentencing re-trial and failed to prepare and present adequate defenses to the aggravating circumstances presented by the State, and failed to adequately cross-examine state's witnesses.

The Respondent's Return was filed on July 12, 2000. Applicant submitted an Amended Application for Post Conviction Relief on August 27, 2004, in which he alleged the following grounds for relief:

> 9(A) Applicant was denied the right to effective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that trial counsel
> (i) failed adequately to advise the Applicant regarding the attempted but failed guilty plea to murder, which, if the Applicant had been properly and effectively advised, would have avoided a death sentence;
> (ii) failed to conduct adequate or any voir dire examination of several potential jurors, some of whom sat as jurors;

(iii) failed to conduct voir dire examination concerning possible race of victim and race of the Applicant;
(iv) failed to object to the improper removal of a potential juror for cause;
(v) failed to object to removal of a selected and seated African-American juror for hardship when a white selected and seated juror with an identical situation was not excused from service;
(vi) failed properly or adequately to investigate and prepare the guilt-innocence phase of the trial;
(vii) failed to seek expert assistance regarding a material medical condition of Applicant,
(viii) failed effectively to confront and rebut State's witnesses and evidence;
(ix) failed to present readily available and favorable defense witnesses and evidence;
(x) failed to object to introduction of actual Department of Corrections incident report;
(xi) failed to object to improper closing arguments by the State; failed to request jury instructions to which the applicant was entitled and,
(xii) the cumulative impact of these errors and the resulting prejudice.
Applicant was prejudiced by trial counsels' failures. Trial counsel did not investigate and present facts and circumstances which would have supported the defense at the trial phase.

9(B) Applicant was denied the right to effective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that during the sentencing phase of applicant's trial, trial counsel
(i) failed adequately to advise Applicant in accordance with *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), prior to and during the aborted guilty plea;
(ii) failed to conduct adequate or any voir dire examination of several potential jurors, some of whom sat as jurors;
(iii) failed to conduct voir dire examination concerning possible race of victim and race of the Applicant;
(iv) failed to object to the improper removal of a potential juror for cause;
(v) failed to object to removal of a selected and seated African-American juror for hardship when a white selected and seated juror with an identical situation was not excused from service;
(vi) failed to present available mitigating evidence at the sentencing phase of Applicant's trial;

(vii) failed to seek expert assistance regarding a material medical condition of Applicant,
(viii) failed effectively to confront and rebut State's witnesses and evidence;
(ix) failed to present readily available and favorable defense witnesses and evidence;
(x) failed to object to introduction of actual Department of Corrections incident report;
(xi) failed to object to improper closing arguments by the State;
(xii) failed to request jury instructions to which the applicant was entitled; and,
(xiii) the cumulative impact of these errors.
Trial counsel failed to present mitigating evidence at sentencing phase. Trial counsel's failures were un-reasonable. Counsel's conduct was prejudicial to Applicant.

9(C) Applicant was denied the right to effective assistance of counsel, and the due process of law, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that the trial court lacked jurisdiction as to the indictment(s) for criminal sexual conduct with a minor, and as such, the convictions for said offense(s) were inadmissible and Applicant's death sentence must be vacated. Additionally, trial counsel was ineffective for failing to object to lack of jurisdiction as to the indictments for criminal sexual conduct with a minor; and, counsel was ineffective for failing to withdraw the plea to such offences.

9(D) Appellate counsel was ineffective for failing to raise and argue that reversal of the conviction was required because (i) trial court improperly admitted a highly prejudicial and wholly unreliable hearsay statement during the guilt-or-innocence phase of applicant's trial, the admission of which trial counsel preserved for review; and, (ii) Applicant's sentence should be reversed because the trial court erred in striking a qualified juror for cause all thereby depriving Applicant or rights guaranteed him by the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and South Carolina law.

9(E) Applicant was deprived of a fair trial and the interest of justice requires his conviction be vacated and he be granted a new trial because a material witness committed perjury when the witness testified he had no prior knowledge of or experience with Applicant. The witness' false testimony, when it is true that the witness both, in fact, knew Applicant and held a grudge against him, all in violation of the Fifth, Sixth, Eighth, and Fourteenth

> Amendments to the U.S. Constitution and South Carolina law, which resulted in a miscarriage of justice. Far from being an unbiased and uninvolved eyewitness, Mr. Riley concealed his bias. Further, the state failed to disclose the fact that Mr. Riley was also a long-time employee of the victim's uncle, in violation of *Brady v. Maryland*, 373 US 83 (1963). *Brady* entitles Applicant to this information because it would have further exposed the witness' bias against Applicant. In the alternative, to the extent trial counsel failed to discover this close employer/employee relationship, Applicant was deprived of the effective assistance of counsel required by the Sixth, Eighth, and Fourteenth Amendments and South Carolina law. ... This false testimony was highly prejudicial to Applicant and requires a new trial for Applicant. The state's failure to disclose the impeachment evidence requires a new trial because Mr. Riley's testimony was highly material. In the alternative, trial counsel's failure to learn this information about Mr. Riley was unreasonable and it prejudiced Applicant at both phases of the trial.

Applicant submitted a Second Amended Application for Post Conviction Relief on March 30, 2005, in which he alleged the following grounds for relief:

> 9(A) Applicant was denied the right to effective assistance of counsel at the guilt or innocence phase of his trial in violation of the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that trial counsel
> (i) failed adequately to advise the Applicant regarding the attempted but failed guilty plea to murder, which, if the Applicant had been properly and effectively advised, would have avoided a death sentence;
> (ii) failed to conduct adequate or any voir dire examination of several potential jurors, some of whom sat as jurors;
> (iii) failed to conduct voir dire examination concerning possible race of victim and race of the Applicant;
> (iv) failed properly or adequately to investigate and prepare the guilt-innocence phase of the trial;
> (v) failed to seek expert assistance regarding a material medical condition of Applicant;
> (vi) failed effectively to confront and rebut the State's witness and evidence;
> (vii) failed to present readily available and favorable defense witnesses and evidence;
> (viii) failed to object to introduction of actual Department of Corrections incident report;

(ix) failed to request jury instructions to which the applicant was entitled;
(x) failed to review critical evidence in the case which the state made available to trial counsel; and
(xi) the cumulative impact of these errors and the resulting prejudice.
Applicant was prejudiced by trial counsels' failures. Trial counsel did not investigate and present facts and circumstances which would have supported the defense at the trial phase.

9(B) Applicant was denied the right to effective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that during the sentencing phase of Applicant's 1996 trial, trial counsel
(i) failed adequately to advise Applicant in accordance with *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), prior to and during the aborted guilty plea;
(ii) failed to conduct adequate or any voir dire examination of several potential jurors, some of whom sat as jurors;
(iii) failed to conduct voir dire examination concerning possible race of victim and race of the Applicant;
(iv) failed to object to the improper removal of a potential juror for cause;
(v) failed to object to removal of a selected and seated African-American juror for hardship when a white selected and seated juror with an identical situation was not excused from service;
(vi) failed to present available mitigating evidence at the sentencing phase of Applicant's trial;
(vii) failed to seek expert assistance regarding a material medical condition of Applicant,
(viii) failed effectively to confront and rebut State's witnesses and evidence;
(ix) failed to present readily available and favorable defense witnesses and evidence;
(x) failed to object to introduction of actual Department of Corrections incident report;
(xi) failed to object to improper closing arguments by the State;
(xii) failed to review critical evidence in the case which the state made available to trial counsel; and
(xiii) the cumulative impact of these errors.
Trial counsel failed to present mitigating evidence at sentencing phase. Trial counsel's failures were un-reasonable. Counsel's conduct was prejudicial to Applicant.

9(C) Applicant was denied the right to effective assistance of counsel, and the due process of law, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that the trial court lacked jurisdiction as to the indictment(s) for criminal sexual conduct with a minor, and as such, the convictions for said offense(s) were inadmissible and Applicant's death sentence must be vacated. Additionally, trial counsel was ineffective for failing to object to lack of jurisdiction as to the indictments for criminal sexual conduct with a minor; and, counsel was ineffective for failing to withdraw the plea to such offences

9(D) Appellate counsel was ineffective for failing to raise and argue that reversal of the conviction was required because (i) trial court improperly admitted a highly prejudicial and wholly unreliable hearsay statement during the guilt-or-innocence phase of applicant's trial, the admission of which trial counsel preserved for review; and, (ii) Applicant's sentence should be reversed because the trial court erred in striking a qualified juror for cause all thereby depriving Applicant or rights guaranteed him by the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and South Carolina law.

9(E) Applicant was deprived of a fair trial and the interest of justice requires his conviction be vacated and he be granted a new trial because a material witness committed perjury when the witness testified he had no prior knowledge of or experience with Applicant and two other witnesses either downplayed the amount of beer present in their vehicle and the amount of beer consumed by them. The witnesses' false testimony deprived Applicant and the jury of important facts that would impeach the witnesses' testimony, when it is true that the witness both, in fact, knew Applicant and held a grudge against him, and the other two witnesses had access to and did consume and possess very large amounts of beer, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and South Carolina law, and which resulted in a miscarriage of justice. Far from being an unbiased and uninvolved eyewitness, Mr. Riley concealed his bias and Mr. B[redacted] and Mr. Carver lied about the amount of beer they possessed and consumed. Further, the state failed to disclose the fact that Mr. Riley was also a long-time employee of the victim's uncle, in violation of *Brady v. Maryland*, 373 US 83 (1963). *Brady* entitles Applicant to this information because it would have further exposed the witness' bias against Applicant. In the alternative, to the extent trial counsel failed to discover this close employer/employee relationship, Applicant was

deprived of the effective assistance of counsel required by the Sixth, Eighth, and Fourteenth Amendments and South Carolina law. ... This false testimony was highly prejudicial to Applicant and requires a new trial for Applicant. Further, the state's failure to disclose the impeachment evidence requires a new trial because the testimony of Mr. Riley, Mr. B[redacted]and, Mr. Carver was highly material. In the alternative, trial counsel's failure to learn this information about Mr. Riley was unreasonable and it prejudiced Applicant at both phases of the trial. As noted in Ground F, *infra*, James Carver and Michael B[redacted] both testified falsely concerning the amount of beer they possessed and consumed. To the extent the State failed to disclose the videotaped film and the photograph depicting numerous empty or partially empty multi-pack beer containers prior to the 1994 and 1996 trials, the State deprived Applicant of a fair trial and to impeachment and exculpatory evidence guaranteed him by the Fifth, Sixth, Eighth and Fourteenth Amendments and South Carolina law.

9(F) Applicant was denied of his right to a fair trial in both phases of his capital murder trial and resentencing, a right guaranteed by both the Fourteenth Amendment and South Carolina law, because the State failed to correct false testimony from one of its primary witnesses, James Carver. The state had possession of photographic and videotape film evidence revealing that James Carver's testimony was patently false regarding the absence of packages of beer in the vehicle drove by the victim's father. The videotaped film of the crime scene was disclosed to the Applicant subsequent to the December 21, 2004, hearing date; ... The possession of beer, the amount of beer possessed, and the amount of beer consumed by the victim's father was in dispute and was an issue of great importance to the Applicant's case and the jury's decision-making process. The Solicitor was aware of the film footage revealing one or more opened and partially consumed beer cartons in the back portion of B[redacted]s truck. ... The Solicitor was aware, according to his sworn testimony during the first week of the evidentiary hearing in this matter, that defense counsel did not view the videotape of the crime scene. The Solicitor was aware as well of the photograph of the empty or almost empty beer carton in the front of Mr. B[redacted]'s truck and on the driver's side floorboard, as the only copy of that photograph none to be in existence was obtained from the Solicitor's file ... The Solicitor never corrected the false testimony and the jury did not see either the photograph of the beer in the front of the truck on the floorboard of it or the videotaped film of the crime scene including footage of the beer in the back of the truck, evidence that belies witnesses Carver and

Michael B[redacted]'s misrepresentation about how much beer they possessed or consumed.

An evidentiary hearing into these issues was held on September 27-October 1, November 22, December 21, 2004, as well as May 5 and August 23, 2005. On September 27, 2006, Applicant submitted his (Proposed) Order. Respondent's Proposed Order was submitted on May 11, 2007.

Applicant did not raise the allegation pertaining to the handling of Ms. Mack in any of his three previous applications. He also did not raise this issue at the evidentiary hearing or in his (Proposed) Order. Instead, he raises it after the parties have fully briefed all of the issues previously raised by him. Respondent submits that it would be an abuse of discretion to permit the untimely attempted amendment because the proposed amendment is barred by Rule 15(b), SCRCP, and the South Carolina Supreme Court's 1992 decision in *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992).

In *Arnold*, the PCR judge court issued his Order on May 5, 1989. Both petitioners then filed motions to amend their PCR Applications. They also filed a motion under Rule 59(e), SCRCP, to amend the judgment on May 12, 1989. The PCR judge held hearings on both petitioners' motions. He thereafter denied both petitioners' motion to amend as untimely. He also held that Rule 59(e), SCRCP, was not the proper vehicle to amend a PCR application to add additional grounds for relief. *Id* at 172, 420 S.E.2d at 842.

The Supreme Court upheld his ruling on certiorari. First, the Court recognized that Rule 71.1(a), SCRCP, "directs that the South Carolina Rules of Civil Procedure shall apply to post-conviction relief actions to the extent the rules are not inconsistent with the Uniform Post-Conviction Procedure Act." *Id.* Then, the Court held that:

> When a party wishes to amend a pleading after final judgment from a full trial on the merits, South Carolina Rule of Civil Procedure 15(b) applies. Amendments under South Carolina Rule of Civil Procedure 15(b) are allowed not to assert new claims, but rather to conform the pleadings to the evidence presented at trial. *See Baxley v. Rosenblum*, 303 S.C. 340, 400 S.E.2d 502 (Ct.App.1991). Thus, petitioners' motion to amend the post-conviction relief petition was properly denied by the circuit court.
>
> The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to "reconsider matters properly encompassed in a decision on the merits." *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200, 108 S.Ct. 1717, 1720, 100 L.Ed.2d 178, 184 (1988) (citing *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451, 102 S.Ct. 1162, 1166, L.Ed.2d 325, 330-31 (1982)). The petitioners, here, sought after full hearings and a decision on the merits to add new grounds and new claims for post-conviction relief. The trial judge was correct in denying their motions.
>
> The gravamen of petitioners' motions is a request for subsequent petitions for post-conviction relief. South Carolina Code Ann. Section 17-27-90 provides:
>
> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application. (Emphasis added.)
>
> "This statute forbids a successive PCR application unless an applicant can point to a 'sufficient reason' why the new grounds for relief he asserts were not raised, or were not raised properly." *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392, 393-94 (1991).
>
> Additionally, "[t]his Court has by promulgation of rule interpreted Section 17-27-90 and the phrase '*sufficient reason*' very narrowly."*Id.* (Emphasis added.)

Id at 172-73, 420 S.E.2d at 842-43.

Finally, the Court in *Arnold* observed that then-Supreme Court Rule 50(3) provided that "Under Section 8 of the Act, successive applications for relief are not to be entertained, and the burden shall be on the applicant to establish that any new ground raised in a subsequent application *could not have been raised* by him in the previous application." *Id* at 173, 420 S.E.2d at 843 (emphasis in original). The Court found that the petitioners had "failed to present to the circuit court facts and circumstances to show why the new grounds were not and could not have been presented in the prior petitions nor have they presented any to this Court." *Id* at 173-74, 420 S.E.2d at 843 (footnote omitted). Therefore, the Court affirmed the PCR judge's ruling. *Id* at 174, 420 S.E.2d at 843.

Much as the petitioners in *Arnold*, Applicant has not and cannot show why the new allegation "*could not have been raised* by him in the previous application." *Id* at 173, 420 S.E.2d at 843 (emphasis in original). *See also Hunter v. State*, 271 S.C. 48, 244 S.E.2d 530, 533 (1978) (successive application barred where applicant was aware of claim at the time of the filing of prior applications but did not raise it); *cf. Aice*, 305 S.C. at 451, 409 S.E.2d at 394 ("[T]he contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive application under § 17-27- 90"); *Land v. State*, 274 S.C. 243, 262 S.E.2d 735, 737 (1980) (applicant's conclusory assertion that PCR counsel was "inadequate" held not a "sufficient reason" warranting a successive application).[1]

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[1] The Supreme Court has entertained successive applications in cases in which the successive claims potentially could have been raised in the first PCR application. However, each of these cases involved very rare procedural circumstances that are not present in this case. For example, the Court permitted a successive application where the applicant did not have counsel to assist in the preparation of his first PCR application. *See Case v. State*, 277 S.C. 474, 289 S.E.2d 413, 413-14 (1982) (court permitted a successive application where the applicant's first PCR application was filed without the benefit of counsel and was dismissed without a hearing). In another case, the Court allowed a successive application where the applicant's trial counsel was also his PCR counsel. *See Carter v. State*, 293 S.C. 528, 362 S.E.2d 20, 20-21 (1987) (permitting a successive application

Indeed, Respondent submits that the genesis of a claim such as that now raised by applicant arguably lies in *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984), which was cited by the majority in *Burkhart*. 372 S.C. at 487-88, 640 S.E.2d at 453. In *Plath*, the Court first found no error in the State's examination of defense expert witnesses on cases in which they testified but the jury still found the death penalty. The Court noted that the experts were there to testify about the declining acceptance of and international trends away from capital punishment, which it ruled was entirely impermissible. However, it concluded that since the trial court allowed the defense testimony, the State was permitted to respond with the challenged cross-examination. 281 S.C. at 1, 313 S.E.2d at 619.

Next, *Plath* addressed state's cross-examination of a professor who generally testified that life imprisonment was a punishment superior to the death penalty. During his direct examination, the professor testified about conditions of life imprisonment at CCI, and called life imprisonment "a form of slavery" – which this Court concluded was "to demonstrate the permanence and deprivation entailed in life imprisonment". On cross, the State asked about another inmate's escape, which the Court ultimately held was permissible:

> Since the witness claimed an intimate knowledge of CCI, and based his testimony upon that knowledge, it was not amiss for the State to pursue his claim more closely.

Id at 12, 313 S.E.2d at 626.

After also rejecting a claim that the State was improperly was allowed to cross a prison social worker on a complaint letter she wrote about an inmate's freedom of movement, the Court

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where the applicant raised the issue of ineffective assistance of trial counsel in his successive application and trial counsel represented the applicant during his first PCR application). Finally, the Court allowed a successive application where the applicant did not have direct review of a claim he brought in his first and second PCR applications, because of "so many procedural irregularities." *See Washington v. State*, 324 S.C. 232, 478 S.E.2d 833, 834-35 (1996).

The Court in *Washington* permitted a successive application under "unique circumstances" including evidence the applicant "did not have the benefit of a direct appeal, because his attorney failed to file an appellate brief. Moreover, the first PCR court decided, in effect, that Washington was entitled to a new trial, but allowed the relief to be addressed on direct appeal; however, this Court denied certiorari as to the question. Additionally, the second PCR court granted relief, but did so through an improper procedure, specifically, by amending the first order. Thus, Washington has never received the benefit of a direct review. Even if his application is successive, the unique combination of facts in this case entitle him to the relief granted below." *Id* at 478 S.E.2d at 833-34.

Absent sufficient reason for not raising a claim in a first PCR application, or in these types of very "rare procedural circumstances, § 17-27-90 bars the claim in a successive application." *See Matthews v. Evatt*, 105 F.3d 915-16 & n. 6 (4th Cir. 1997). In the present case, there is no "unique combination of facts."

very strongly rebuked sentencing phase defenses which "sought to portray life imprisonment as preferable to capital punishment as a matter of social policy", or "drew a picture of life imprisonment as slavery, a condition of irretrievable loss". *Id* at 14, 313 S.E.2d at 626-27. The Court stated that such defenses improperly "invite[d] the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment", and concluded:

> In the sentencing phase of a capital case, the function of the jury is not to legislate a plan of punishment but to make the "either/or" selection . . . . Such determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury.

Id at 14-15, 313 S.E.2d at 627.

The Court went on to note that while psychiatric testimony of future dangerousness was permissible, it had held that future adaptability to prison evidence was not – a conclusion subsequently overruled by the United States Supreme Court in *Skipper v. South Carolina*, 476 U.S. 1 (1986) (due process required admission of prison adaptability evidence). In the context of justifying this distinction, that the *Plath* stated that:

> A jury needs to know how a given defendant came to commit a given aggravated murder, to include aspects of his background, his character and the setting of the crime itself which may explain or even mitigate the conduct of which he has been found guilty. A jury does not need to know how often he will take a shower or whether or not he will be lonely and withdrawn during his tenure at CCI.

281 S.C. at 15, 313 S.E.2d at 627.

Despite these admonitions, the Court in *Plath* returned to how the State's challenged questioning was only proper response to what that Court considered at the time to be improper sentencing phase defenses on the utility of capital punishment or the conditions of capital punishment:

> In the case before us, defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be. . . . [The solicitor's] references [were] . . . merely reminders to the jury that life imprisonment was by no means as hopeless as defendants would have it believed. *The State was entitled to make this response.*

Id at 15-16, 313 S.E.2d at 627-28 (emphasis added). *See also State v. Woomer*, 278 S.C. 468, 299 S.E.2d 317 (1982) (evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison).

Plath thus addressed several issues arguably relevant to the allegation Applicant attempts to raise in the Third Amended Application. Because *Plath* was decided over twenty years ago, Applicant could have raised the current allegation at any time during the PCR proceedings.

Even if the Court finds that *Plath* did not sufficiently alert Applicant to the possibility of pursuing the present claim since it was overruled by the United States Supreme Court's decisions in *Skipper v. South Carolina*, 476 U.S. 1 (1986), and it was issued long before the line of cases following *Simmons v. South Carolina*, 512 U.S. 154 (1994), he still cannot meet his burden under *Arnold* because similar issues have been raised by capital defendants in South Carolina for almost a decade. For instance, the defendant in *State v. Gardner*, 332 S.C. 389, 505 S.E.2d 338 (1998), contended that "the trial court erred in permitting the officers to be cross-examined on the particulars of the 'easy life' afforded an inmate housed in the general population, and in allowing the solicitor to argue in his closing argument that this easy life was not an appropriate punishment for appellant's crimes. " *Id* at 393, 505 S.E.2d at 340. Although the Court found that Gardner's claim was procedurally barred, *id* at 393-94, 505 S.E.2d at 340, it is clear that Applicant could have but did not raise this allegation when he filed either his original Application or either of his two amended Applications.

However, he cannot raise it, for the first time, after both parties have submitted their respective proposed Orders for this Court's consideration. *Id.* Applicant has had his "full bite at the apple" before this Court. In the PCR proceedings, he has enjoyed the benefit of two competent attorneys who are experienced in handling capital PCR cases; he had an evidentiary hearing which took eleven months to complete; and this Court is fully and fairly adjudicating his previously-raised claims. *See Matthews*, 105 F.3d at 916 (concluding death row inmate had not established cause for procedural default of allegation not raised in state PCR). Thus, he cannot meet his burden under *Arnold.*

In support of his efforts to amend Applicant's counsel states in a May 31, 2007 letter to the Court that "[i]f we do not raise the issue now –or before January of 2008- [Applicant] may be deemed to have waived what we now realize to be a substantial *Burkhart* claim." At best, Applicant has shown that his PCR attorneys may have been ineffective for failing to pursue a claim under *Burkhart.* However, a PCR applicant is generally not entitled to relief based upon the ineffective assistance of his PCR counsel. *See Aice*, 305 S.C. at 451, 409 S.E.2d at 394 ("[T]he contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive application under § 17-27- 90"); *cf. Land*, 274 S.C. 243, 262 S.E.2d at 737 (applicant's conclusory assertion that PCR counsel was "inadequate" held not a "sufficient reason" warranting a successive application). Also, allegations are frequently waived or simply not pursued for one reason or another in virtually every capital or non-capital PCR proceeding, even where competent counsel represents the Applicant.

Further, litigation must end at some point. "[T]he principle of finality ... is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). The South Carolina

Supreme Court has forcefully emphasized this same sentiment in *Aice*: "Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice". 305 S.C. at 451, 409 S.E. 2d at 394. *See also Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation").[2]

Permitting Applicant to amend his Application to assert an allegation, after not only the evidentiary hearing but after the briefing of the issues by the parties as well, undermines the essential principle of finality; and it would thereby deprive Respondent of a fair determination of the issues presented, particularly since Applicant had the opportunity to litigate this allegation at the evidentiary hearing but did not pursue it. As Justice Jackson stated in *Stein v. New York*, 346 U.S. 156, 197 (1953): "[t]he petitioners have had fair trial and fair review. The people of the

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[2] *Cf. Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct.App.1995) (recognizing that the doctrine of *res judicata* flows from the principle that public interest requires an end to litigation); *Webb v. Greenwood County*, 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956) ("[t]here is universal acceptance of the logic of Statutes of Limitations that litigation must be brought within a reasonable time in order that evidence be some end to litigation").

"The fact that life and liberty are at stake in criminal prosecutions 'shows only that 'conventional notions of finality' should not have *as much* place in criminal as in civil litigation, not that they should *have none*.' Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments, 38 U.Chi.L.Rev. 142, 150 (1970)." *Teague*, 489 U.S. at 309 (emphasis added by Court); Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv.L.Rev. 441, 450-451 (1963) ("[I]f a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competence to determine legality") (emphasis omitted).

State are also entitled to due process of law." Our own Supreme Court similarly admonished the defense bar over two decades ago, when Justice Gregory wrote for a unanimous Court that "[i]t would do well for defense counsel to remember that the people of the State as well as the defendant are entitled to a fair trial." *State v. Stewart*, 283 S.C. 104, 110, 320 S.E.2d 447, 450 (1984). Therefore, Respondent moves to strike the Third Amended Application.

Assuming *arguendo* that the Court permits amendment, Respondent submits that *Burkhart* established a new rule of law which cannot be applied retroactively to this case because this case became final before that rule was announced Retroactive application of *Burkhart* would, therefore, violate *Teague* and *State v. Jones*, 312 S.C. 100, 439 S.E.2d 282 (1994). *See also Talley v. State*, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007) ("In determining whether Respondent was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court's decisions on retroactivity").[3] Old rules of constitutional law are those that were "dictated by precedent existing at the time the defendant's conviction became final." *See Teague*, 489 U.S. at 301. "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id* at 301 (internal citations omitted) (emphasis in original).

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[3] The United States Supreme Court has explained that the "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus ... generally far outweigh the benefits of this application." *Solem v. Stumes*, 465 U.S. 638, 654 (1984) (Powell, J., concurring in judgment). Further, "[i]n many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, *cf. Younger v. Harris*, 401 U.S. 37, 43-54, 91 S.Ct. 746, 750- 755, 27 L.Ed.2d 669 (1971), for it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Teague*, 489 U.S. at 310.

As the Court subsequently explained, a rule is not dictated by precedent - and is therefore a new rule of constitutional law - if, prior to its announcement, its existence was "susceptible to debate among reasonable minds." *See Butler v. McKellar*, 494 U.S. 407, 415 (1990). In other words, a rule is an old rule of constitutional law only if all reasonable jurists would have agreed that it existed prior to its announcement. This definition of a new rule is meant to "validate[ ] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997).

It cannot fairly be said that all reasonable jurists would have agreed that the rule set forth in *Burkhart* existed before it was decided. In *Burkhart*, the Court held for the first time since its decision in *Plath* that the admission of evidence regarding general prison conditions constituted error, although *dicta* in *Bowman*, which also was not decided until this case was in collateral review, indicated that it was error. More importantly, the Court did not disturb the death sentences in either *Gardner* or *Bowman*. Rather, the *Burkhart* decision is the first time the Court concluded that the State's examination of a witness about general prison conditions constituted reversible error.[4] Further, the result in *Plath* – that the defense could not present evidence of adaptability to life imprisonment - had been overruled by the United States Supreme Court's Opinion in *Skipper* and the type of evidence found to be reversible in *Burkhart* was raised in at least three cases: *Wood*, *Bowman* and *Gardner*. Therefore, the rule in *Burkhart* was a new rule that cannot be applied retroactively under *Teague*.

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[4] *Burkhart* is likewise the first decision to suggest that introduction of such evidence violates S.C.Code Ann. § 16-3-25(C)(1) (Supp. 2007), since the jury is invited to speculate about irrelevant matters upon which a death sentence may be based. 371 S.C. at 488-89, 640 S.E.2d at 453.

Alternatively, Respondent submits that counsel was not ineffective for not anticipating a change in the law that did not occur until over twelve years after Rogers' December 1996 resentencing proceeding. Again, *Burkhart* is inconsistent with the result reached in post-*Skipper* cases dealing with the current allegation. Applicant would hold trial counsel ineffective based upon counsel's failure to utilize a crystal ball or have Periclean foresight.

This type of standard, however, is inconsistent with *Strickland v. Washington*, 466 U.S. 668 (1984), because an attorney is never required to anticipate or discover changes in the law or facts that did not exist at the time of trial. *See Kornahrens v. Evatt*, 66 F.3d 1350, 1360 ("*Skipper* was on appeal to the Supreme Court at the time of Kornahrens's trial, and Runyon testified that he was aware of that fact. Nevertheless, the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law"); *Gilmore v. State*, 314 S.C. 453, 445 S.E.2d 454 (1994) (attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial), *overruled on other grounds*, *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes v. State*, 310 S.C. 306, 426 S.E.2d 764 (1993) (finding counsel not ineffective for encouraging defendant to plead guilty although counsel never interviewed the victim because he had her written statement against defendant, even though victim changed her mind by the time of the PCR hearing and testified for defendant); *Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992) (finding counsel not ineffective for failing to use a defense that would not receive acceptance until several years after the trial).*See also United States v. McNamara*, 74 F.3d 514, 515-17 (4th Cir.1996) (holding that counsel cannot be considered ineffective for failing to anticipate changes in law).

Indeed, the Court in *Strickland* expressly mandated that a reviewing court must eliminate the effects of hindsight to reconstruct the circumstances of counsel's challenged conduct and evaluate the conduct from counsel's perspective at the time. 466 U.S. at 689. Trial counsel in this case simply was not ineffective for failing to anticipate that the South Carolina Supreme Court would reach the result it did in *Burkhart*.

Further, Respondent submits that Applicant's claim must be rejected because he failed to present any evidence at the evidentiary hearing on this allegation. He had the burden of proof as to any allegations raised by him but did not present any evidence on this allegation. *See id* at 687-96; *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998).[5] His failure to present any such testimony means that the allegation is a conclusory claim that will not support Post-Conviction Relief. *E.g. Nickerson v. Lee*, 971 F.2d 1125, 1136 (4th Cir. 1992) (conclusory statement that discrimination occurred in selecting the jury was not enough), *abrogated on other grounds*, *Trest v. Cain*, 522 U.S. 87 (1997) (Court of Appeals is not required to raise issue of procedural default *sua sponte*); *Ellis v. Lynaugh,* 873 F.2d 830, 838-39 (5th Cir. 1989) (habeas petitioner's "mere conclusory allegations of discriminations" in grand jury selection were "insufficient to entitle an individual to relief"). *See also Tejada v. Dugger,* 941 F.2d 1551, 1559 (11th Cir. 1991) ("a petitioner is *not* entitled to an evidentiary hearing, however, when his claims are merely conclusory allegations unsupported by specifics or contentions that in the face of the record are wholly incredible") (internal quotations omitted) (emphasis in original).

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[5] His failure to present any evidence, once again, supports the conclusion that amendment is improper under *Arnold*.

Finally, Respondent submits that Applicant cannot meet his burden of proving that he was prejudiced by counsel's errors, *i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. *See also Florida v. Nixon*, 543 U.S.175 (2004); *Palacio v. State*, 511 S.E.2d 62 (S.C. 1999). In the context of a capital sentencing proceeding, he must prove that "there is a reasonable probability that ... the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537; *Jones v. State*, 504 S.E.2d 822, 829-30 (S.C. 1998) (petitioner did not meet burden). He cannot meet his burden in this case because there was overwhelming evidence that he was guilty of murder and the statutory aggravating circumstance; the testimony at issue in the new allegation was brief (and Applicant only references four pages of testimony, **1996 R. pp. 776-80**, and two pages of the prosecution's closing argument, **1996 R. pp.m952-53**); and, although discussed relatively briefly in closing, the challenged evidence was not the basis for the State's argument that Applicant deserved the death penalty. Therefore, there was no prejudice.

For the above-stated reasons, Respondent moves to dismiss the Third Amended Application. Alternative, Respondent submits the Court should deny relief on Ground 9(g).

Respectfully submitted,

HENRY D. MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: _____
ATTORNEYS FOR RESPONDENT

June 7, 2007.

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	)	IN THE COURT OF COMMON PLEAS
Timothy Dion Rogers, #4883 Applicant, v. S Jon E. Ozmint, Director, South Carolina Dept. of Corrections, Respondent.	)	C. A. No. 00-CP-18-575 CERTIFICATE OF SERVICE

I, William Edgar Salter, III, Senior Assistant Attorney General, Office of the Attorney General, do hereby certify that I have this date served Respondent's Motion to Strike Third Amended Application in the foregoing action on counsel for Applicant by depositing one copy of the same in the United States mail, first class postage prepaid, and addressed as follows:

Jeffrey P. Bloom, Esquire
1911 Pickens Street
Columbia, SC 29201

Diana Holt, Esquire
Post Office Box 6454
Columbia, SC 29260

This 7th day of June, 2007.

WILLIAM EDGAR SALTER, III

4461

STATE OF SOUTH CAROLI)
) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER)
)
Timothy Dion Rogers) CASE NO.
☐ Plaintiff) 00-CP-18-575
)
v.) MOTION AND ORDER INFORMATION
) FORM AND COVER SHEET
Jon E. Ozmint, Director, SC Dept. Of Corrections)
☒ Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
Jeffrey P. Bloom, Esq., Bar No.	William E. Salter, Esq., Bar No. 4806
Address:	Address:
1911 Pickens St., Columbia, SC 29201	Attorney General's Office, P.O. Box 11549, Cola, SC 29211
phone: fax:	phone: 803-734-6305 fax: 803-734-4035
e-mail: other:	e-mail: other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ September 11, 2008
Signature of Attorney for ☐ Plaintiff / ☒ Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	)	IN THE COURT OF COMMON PLEAS
Timothy Dion Rogers, #4883 Applicant, vs. Jon E. Ozmint, Director, South Carolina Dept. of Corrections, Respondent.	)	C. A. No. 00-CP-18-575 ORDER

CERTIFIED COPY
2008 SEP 22 PM 12: 03
CLERK OF COURT
DORCHESTER COUNTY

The Court held a hearing on January 2, 2008, on Applicant's motion to served Respondent with his Third Amended Application on June 1, 2007,[1] and Respondent' Motion to Strike the amendment. In the Third Amended Application, Applicant included an additional claim, as Ground 9(G), that trial counsel was ineffective for eliciting evidence about the conditions of prison confinement and for not objecting to the State eliciting similar evidence on redirect examination of State's witness, Associate Warden Priscilla Mack. Following the hearing on January 2, 2008, the Court permitted Applicant to file the Third Amended Application, and denied the Respondent's Motion to Strike.

At the hearing, Applicant sought to orally amend his Third Amended Application at the January 2, 2008 hearing, to include an allegation that his due process rights were violated by the introduction of this evidence into his capital sentencing proceeding. He argued that this injected an arbitrary factor, in violation of the Eighth and Fourteenth Amendments of the United States Constitution and *State v. Burkhart*, 371 S.C. 482, 487-88, 640 S.E.2d 450, 453 (2007). Respondent objected to the amendment because Applicant had not given adequate notice. The

[1] His pleading was dated May 30, 2007.

Court agrees and finds that Applicant must provide adequate notice of this claim. The Court further finds that any deficiency in providing notice may be clarified by a formal amendment to his Third amended Application.

IT IS, THEREFORE, ORDERED:

1. That Applicant shall have (15) fifteen days within which to amend his Third Amended Application for Post-Conviction Relief in this matte; and

2. That Respondent shall have fifteen (15) fifteen days within which to file a response.

AND, IT IS SO ORDERED this 16 day of Sept, 2008.

DIANE S. GOODSTEIN
Judge, First Judicial Circuit

, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	00-CP-18-575
TIMOTHY DION ROGERS,	)	
Applicant,	)	Revised Third Amended Application for Post Conviction Relief
vs.	)	
JON E. OZMINT, Director, South Carolina Department of Corrections	)	
Respondent.	)	

{Note: This Application follows SCRCP Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCP}

1. Applicant is detained at Lieber Correctional Institute, S.C. Dept. of Corrections, [redacted], Ridgeville, S.C. [redacted].

2. Sentence of death was imposed at the Dorchester County Court of General Sessions, after a jury trial on September 16 - 23, 1996, with the Hon. Charles Whetstone presiding.

3. (a) For the offense of murder, the indictment number is: 93-GS-18-101.

   (b) For the offenses of criminal sexual conduct with a minor, the indictment numbers are: 94-GS-18-47 and 94-GS-18-48.

4. (a) For the offense of murder:

   (i) On February 28 - March 5, 1994, Applicant was convicted of murder and sentenced to death at a jury trial, with the Hon. Luke Brown, presiding. On appeal, the murder conviction was affirmed, but the death sentence was reversed and remanded.

(ii) On September 16 - 23, 1996, Applicant was sentenced to death at a re-sentencing jury trial, with the Hon. Charles Whetstone, presiding.

(b) For the offenses of criminal sexual conduct:

(i) On January 25 and 27, 1994, Applicant pled guilty and was sentenced to seven years on each count, with the Hon. Charles W. Whetstone presiding, General Sessions Court of the Second Circuit, Dorchester County.

5. See (4), *supra*.

6. (a) Applicant appealed from the judgment of conviction and imposition of sentence, as to the murder conviction and death sentence.

(b) Applicant did not appeal his guilty pleas to the offenses of criminal sexual conduct with a minor, two counts.

7. (a) The Court to which Applicant appealed the murder conviction and death sentences was: The South Carolina Supreme Court.

(b) The results in the Court to which Applicant appealed were:

(i) Murder conviction affirmed; Death sentence reversed and remanded for re-sentencing ("Rogers I").

(ii) Death sentence affirmed after re-sentencing trial (Rogers II).

(c) The dates of each such result were:

(i) January 22, 1996 (Rogers I).

(ii) January 24, 2000 (Rogers II).

(d) Citations of any written opinions or orders entered pursuant to such results:

(i) *State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996) (Rogers I).

(ii) *State v. Rogers*, 338 S.C. 435, 527 S.E.2d 101 (2000) (Rogers II).

8. Applicant did not appeal the guilty pleas to criminal sexual conduct with a minor because Applicant had pled guilty on advice of trial counsel, prior to Applicant's first capital jury trial in 1994.

9. and 10. Grounds for Relief and Concise Statement of Supporting Facts.[1]

9(A). GROUND A

Applicant was denied the right to effective assistance of counsel at the guilt or innocence phase of his trial in violation of the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that trial counsel (i) failed adequately to advise the Applicant regarding the attempted but failed guilty plea to murder, which, if the Applicant had been properly and effectively advised, would have avoided a death sentence; (ii) failed to conduct adequate or any voir dire examination of several potential jurors, some of whom sat as jurors; (iii) Failed to conduct voir dire examination concerning possible race of victim and race of the Applicant; (iv) failed properly or adequately to investigate and prepare the guilt-innocence phase of the trial; (v) failed to seek expert assistance regarding a material medical condition of Applicant, (vi) failed effectively to confront and rebut the State's witnesses and evidence; (vii) failed to present readily available and favorable defense witnesses and evidence; (viii) failed to object to introduction of actual Department of Corrections incident report; (ix) failed to request a jury instruction to which the applicant was entitled; (x) failed to review critical evidence in the case which the state made available

[1]Applicant reserves his right to amend this application after further discovery, development and analysis of both the audio and video portions of Court's Exhibit 6, and to amend the application to conform to the proof adduced at the evidentiary hearing.

to trial counsel;[2] and (xi) the cumulative impact of these errors and the resulting prejudice. Applicant was prejudiced by trial counsels' failures. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (capital defendant has a right to maintain innocence during a guilty plea); *Hill v. Lockhart*, 474 U.S. 52 (1985) (*Strickland* standard applies to guilty plea challenges based on ineffective assistance of counsel); *Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998) (Counsel ineffective in burglary and criminal sexual conduct case for failing to call triage nurse as witness); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (Ineffective for failing to interview witnesses who could have contradicted state's evidence); *Ingle v. State*, 25416 (2002) (Ineffective for failing to interview a witness before calling the witness to testify). Trial counsel did not investigate and present facts and circumstances which would have supported the defense at the trial phase. *Cobbs v. State*, 305 S.C. 299, 408 S.E.2d 223 (1991) (Ineffective for failing to investigate possible defenses); *Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988) (Ineffectiveness so pervasive that showing of prejudice unnecessary); *State v. King*, 155 S.E. 409, 158 S.C. 251 (1930); *Strickland v. Washington*, 466 U.S. at 668, 695 ("In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the *totality* of the evidence before the judge or jury") (emphasis added); *Wiggins v. Smith*, 123 S.Ct. 2527, 2535-37 (2003) (holding trial counsel's failure to investigate and present mitigation evidence required new trial where counsel's failure to investigate was unreasonable under "prevailing professional norms," as measured in part by the ABA Standards); *Williams v. Taylor*, 529 U.S. at 397 (in assessing

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[2]This claim is raised as an alternative pleading of Ground F, *infra*, and only to the extent trial counsel were ineffective for failing to view the videotaped film and the photograph. However, as stated in Ground F, the State had an independent constitutional duty to correct any false testimony by its witnesses.

prejudice flowing from deficient performance, reviewing court must consider "the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding"); *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted) ("cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial"); *Kyles v. Whitley,* 514 U.S. 419 (1995); *Strickler v. Greene,* 527 U.S. 263, 289-290 (1999) ("'[t]he question is not whether the defendant would more likely than not have received a different verdict with [effective counsel], but whether in [the] absence [of effective counsel] he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'") (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

10 (A). FACTS IN SUPPORT OF GROUND A

The trial record is replete with counsels' failures to protect Applicant's rights and the integrity of the trial. Trial counsel was ineffective for failing to advise Applicant prior to and during the aborted guilty plea that would have resulted in a life sentence for Applicant, had it been completed. The Solicitor had agreed to a negotiated plea for a life sentence. Trial counsel never advised applicant that he could both plea guilty and maintain his innocence of murder. Applicant never denied firing the shot that killed Stephanie B[redacted], but he has always adamantly said that he never intended to hurt Stephanie. While legally the point is a distinction without a difference, it represented a significant moral difference to Applicant. Trial counsel failed to conduct any voir dire examination of several venirepersons who sat as jurors on the trial of this case. Trial counsel failed to object to the trial court's description to venirepersons during voir dire of the accusation against Applicant as being

that Applicant "shot a child in the back of her head." Trial counsel did not interview available witnesses who could have corroborated the defendant's testimony and defenses at the guilt or innocence phase of his trial. Trial counsel failed effectively to cross-examine several state witnesses. Trial counsel failed to seek the assistance of experts who could have and would have provided crucial information concerning Applicant's diminished guilt and culpability. The State notified trial counsel of several independent witnesses who revealed potentially favorable information during interviews with state agents. The State also notified trial counsel about the existence of videotape film made of the crime scene in the State's possession and offered to allow defense counsel to view the videotape at the State's office, and trial counsel failed to do so. The State may also have provided directly to trial counsel a copy of a photograph that would have revealed the presence of even more empty or partially empty beer packaging. The videotape film and the photograph contained material evidence that would both impeach the state's two primary witnesses and would have mitigated Applicant's culpability. Applicant also separately made the existence of these several independent witnesses known to trial counsel. Applicant also made known to trail counsel the existence of other witnesses who could corroborate Applicant's explanation of the factual developments regarding the events surrounding the death of Stephanie B[redacted]. Trial counsel failed to interview any of these witnesses. Because counsel failed to interview these witnesses to discover what meaningful information they could provide to the jury charged with deciding Applicant's guilt or innocence and because of each of trial counsels' failures, Applicant was deprived of his constitutional guarantee to the effective assistance of counsel and due process of law, and other rights provided by South Carolina law. Trial counsels' ineffective assistance of counsel resulted in prejudice

to Applicant in that the fact-finder was deprived of material evidence that would have diminished applicant's culpability. Applicant will adduce additional evidence at an evidentiary hearing in support of the Ground A for relief.

9 (B). GROUND B

Applicant was denied the right to effective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that during the sentencing phase of Applicant's 1996 trial, trial counsel (i) failed adequately to advise Applicant in accordance with *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), prior to and during the aborted guilty plea; (ii) failed to conduct adequate or any voir dire examination of several potential jurors, some of whom sat as jurors; (iii) Failed to conduct voir dire examination concerning possible race of victim and race of the Applicant; (iv) failed to object to the improper removal of a potential juror for cause; (v) failed to object to removal of a selected African-American juror for hardship when a white juror with an identical situation was not excused from service; (vi) failed to present available mitigating evidence at the sentencing phase of Applicant's trial; (vii) failed to seek expert assistance regarding a material medical condition of Applicant, (viii) failed effectively to confront and rebut the State's witnesses and evidence; (ix) failed to present readily available and favorable defense witnesses and evidence; (x) failed to object to introduction of the actual Department of Corrections incident report; (xi) failed to object to improper closing arguments by the State; (xii) failed to review critical evidence in the case which the state made available to trial counsel;[3] and, (xiii) the cumulative impact of these errors. *See*

[3]This claim is raised as an alternative pleading of Ground F, *infra*, and only to the extent trial counsel were ineffective for failing to view the videotaped film and the photograph. However, as stated in Ground F, the State had an independent constitutional

Williams v. Taylor, 529 U.S. 362 (2000) (Counsel ineffective for failing to investigate, interview witnesses, and present available mitigation evidence). Trial counsel failed to present available mitigating evidence at the sentencing phase. *Id.* Trial counsels' failures were unreasonable. Counsel's conduct was prejudicial to Applicant. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998) (Counsel ineffective in burglary and criminal sexual conduct case for failing to call triage nurse as witness); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (Ineffective for failing to interview witnesses who could have contradicted state's evidence); *Ingle v. State*, 25416 (2002) (Ineffective for failing to interview a witness before calling the witness to testify); *Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988) (Ineffectiveness so pervasive that showing of prejudice unnecessary); *Strickland v. Washington*, 466 U.S. at 668, 695 ("In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the *totality* of the evidence before the judge or jury") (emphasis added); *Williams v. Taylor*, 529 U.S. at 397 (in assessing prejudice flowing from deficient performance, reviewing court must consider "the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding"); *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted) ("cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial"); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. 263, 289-290 (1999) ("'[t]he question is not whether the defendant would more likely than not have received a different verdict with [effective

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duty to correct any false testimony by its witnesses.

counsel], but whether in [the] absence [of effective counsel] he received a fair trial, understood as a trial resulting in a verdict worthy of confidence'") (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

10 (B). FACTS IN SUPPORT OF GROUND B

The record of Applicant's resentencing trial is replete with trial counsels' failures to preserve Applicant's rights and the integrity of the trial, as noted above. Trial counsel failed to investigate and interview available and favorable witnesses for the sentencing phase. The State also notified trial counsel about the existence of videotape film made of the crime scene in the State's possession and offered to allow defense counsel to view the videotape at the State's office, and trial counsel failed to do so. The State may also have provided directly to trial counsel a copy of a photograph that would have revealed the presence of even more empty or partially empty beer packaging. The videotape film and the photograph contained material evidence that would both impeach the state's two primary witnesses and would have mitigated Applicant's sentence. Applicant will adduce additional evidence at an evidentiary hearing in support of Ground B for relief.

9(C). GROUND C

Applicant was denied the right to effective assistance of counsel, and the due process of law, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that the trial court lacked jurisdiction as to the indictment(s) for criminal sexual conduct with a minor, and as such, the convictions for said offense(s) were inadmissible and Applicant's death sentence must be vacated. Additionally, trial counsel was ineffective for failing to object to lack of jurisdiction as to the indictments for criminal sexual conduct with a minor; and, counsel was ineffective for failing to withdraw the plea

to such offenses.[4]

10(C). FACTS IN SUPPORT OF GROUND C

The trial court lacked jurisdiction to accept the defendant's guilty plea of two (2) counts of criminal sexual conduct with a minor because no such offenses occurred in Dorchester County. *Koon v. State*, 358 S.C. 359, 595 S.E.2d 456 (2004); *Hooks v. State*, 353 S.C. 48, 577 S.E.2d 211 (2003); *Odom v. State*, 350 S.C. 300, 566 S.E.2d 528 (2002); *Brown v. State*, 343 S.C. 342, 540 S.E.2d 846 (2001). Lack of subject matter jurisdiction can be raised at any time. *State v. Funderburk*, 259 S.C. 256, 191 S.E.2d 520 (1972). Where a criminal conviction is admitted for the sentencing jurors consideration, and such conviction is later shown to be void, the defendant shall be entitled to a new sentencing trial. *Johnson v. Mississippi*, 486 U.S. 578, 100 L.Ed.2d 575, 108 S.Ct. 1981 (1988). Furthermore, trial counsel was ineffective for failing to object to lack of jurisdiction. *Hopkins v. State*, 317 S.C. 7, 451 S.E.2d 389 (1994) (Counsel ineffective for failing to object to amendment of indictment which enhanced offense). Additionally, counsel was ineffective for failing to move to withdraw defendant's guilty plea to criminal sexual conduct with a minor when the plea to life was withdrawn. *Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988) (Ineffective for failing to move to withdraw the guilty plea entered where prosecution promised not to oppose probation then prosecution reneged). Thus, counsel's conduct was unreasonable and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 104

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[4]Because trial counsel failed to inform Applicant that he could maintain his innocence of murder during the guilty pleas to these charges, trial counsel's ineffectiveness tainted these guilty pleas, which were integral to the guilty plea for murder. *North Carolina v. Alford*, 400 U.S. 25 (1970) (capital defendant has a right to maintain innocence during a guilty plea). The cumulative impact of the two interrelated failures also prejudiced Applicant.

S.Ct. 2052, 80 L.Ed.2d 674 (1984). The *Strickland* standard applies to guilty plea challenges based on ineffective assistance of counsel. *See Hill v. Lockhart*, 474 U.S. 52 (1985). In order to satisfy the Strickland "prejudice" standard, the defendant must show that there was a reasonable probability that, but for counsel"s errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 57-58.

9(D). GROUND D

Appellate counsel was ineffective for failing to raise and argue that reversal of the conviction was required because: (I) trial court improperly admitted a highly prejudicial and wholly unreliable hearsay statement during the guilt-or-innocence phase of Applicant's trial, the admission of which trial counsel preserved for review; and, (ii) Applicant's sentence should be reversed because the trial court erred in striking a qualified juror for cause all thereby depriving Applicant of rights guaranteed him by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law.

10 (D). FACTS IN SUPPORT OF GROUND D

Trial counsel objected to the admission of a previously undisclosed, dubious, and rank hearsay statement by State's witness Anthony Riley. 1994 Tr. 805-12. The trial court allowed Riley to testify that he heard two unidentifiable and unidentified people utter a highly inflammatory statements, "Did you get the mother fucker?" and "Yeah, I got the mother fucker." 1994 Tr. 804-15. The state surely intended for the jurors to insinuate that the words, "Yeah, I got that motherfucker," were uttered by Applicant. Trial counsel objected to the trial court's disqualification of a juror. 1996 Tr. 257-272. Appellate counsel failed to raise the issue on appeal, even though the issue was preserved and meritorious, and would have constituted reversible error. Appellate counsel failed to raise these issues

on appeal, even though the issues were preserved and meritorious, and would have constituted reversible error. *Sanchez v. State,* 351 S.C. 270, 569 S.E.2d 363 (2002) (PCR relief required where trial counsel failed to object to hearsay); *same Matthews v. State,* 350 S.C. 272, 565 S.E.2d 766 (2002); and *see Ingel v. State,* 348 S.C. 467, 560 S.E.2d 401 (2002); *Witherspoon v. Illinois,* 391 U.S. 510 (1968); *Southerland v. State,* 337 S.C. 610, 524 S.E.2d 833 (1999) (requiring new sentencing trial where appellate counsel failed to raise on appeal a preserved and meritorious issue); *Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (to be effective appellate counsel must give assistance of such quality as to make appellate proceedings fair)); and *see Strickland v. Washington,* 466 U.S. 668, 685, 696, 104 S.Ct. 2052, 2063, 2069, 80 L.Ed.2d 674, 692, 699 (1984).

9(E). GROUND E

Applicant was deprived of a fair trial and the interest of justice requires his conviction be vacated and he be granted a new trial because material witnesses committed perjury when one witness testified he had no prior knowledge of or experience with Applicant and two other witnesses either downplayed the amount of beer present in their vehicle and the amount of beer consumed by them. The witnesses' false testimony deprived Applicant and the jury of important facts that would impeach the witnesses' testimony, when it is true that the witness both, in fact, knew Applicant and held a grudge against him, and the other two witnesses had access to and did consume and possess very large amounts of beer, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and South Carolina law, and which resulted in a miscarriage of justice. Far from being an unbiased and uninvolved eyewitnesses, Mr. Riley concealed his bias and Mr. B[redacted] and Mr. Carver lied about the amount of beer they possessed and consumed.

Further, the state failed to disclose the fact that Mr. Riley was also a long-time employee of the victim's uncle, in violation of *Brady v. Maryland*, 373 US 83 (1963). *Brady* entitles Applicant to this information because it would have further exposed the witness' bias against Applicant. In the alternative, to the extent trial counsel failed to discover this close employer/employee relationship, Applicant was deprived of the effective assistance of counsel required by the Sixth, Eighth and Fourteenth Amendments and South Carolina law. see *Strickland v. Washington*, 466 U.S. 668, 685, 696, 104 S.Ct. 2052, 2063, 2069, 80 L.Ed.2d 674, 692, 699 (1984). This false testimony was highly prejudicial to Applicant and requires a new trial for Applicant. Further, the state's failure to disclose the impeachment evidence requires a new trial because the testimony of Mr. Riley, Mr. B[redacted]and, Mr. Carver was highly material. In the alternative, trial counsel's failure to learn this information about Mr. Riley was unreasonable and it prejudiced Applicant at both phases of the trial. As noted in Ground F, *infra*, James Carver and Michael B[redacted] both testified falsely concerning the amount of beer they possessed and consumed. To the extent the State failed to disclose the videotaped film and the photograph depicting numerous empty or partially empty multi-pack beer containers prior to the 1994 and 1996 trials, the State deprived Applicant of a fair trial and to impeachment and exculpatory evidence guaranteed him by the Fifth, Sixth, Eighth and Fourteenth Amendments and South Carolina law.

10(E). FACTS IN SUPPORT OF GROUND E

State's witness Anthony Riley testified in the guilt or innocence portion of Applicant's 1994 trial that he had never seen Applicant before. 1994 Tr. 799. However, Applicant has now learned that Mr. Riley was not telling the truth. Mr. Riley, in fact, by his own sworn testimony, now admits that he had encountered Applicant before and the

result of the contact left Mr. Riley bitter at Applicant. According to Mr. Riley, he briefly encountered Applicant when the two were in the Dorchester County Jail at the same time. During that stay, Mr. Riley had a very negative encounter with Applicant that Mr. Riley was able to recount in great detail almost twenty years later, when he was deposed in 2003 in relation to the instant action. Moreover, Mr. Riley has had now disclosed that, as of 2003, he has worked for the victim's close relatives for more than twenty years, which would have been approximately eleven or more years at the time of his testimony in 1994. Regarding the factual bases for the allegations related to Mr. Carver and Mr. B[redacted] please see Ground F, *infra*. As additional factual bases for this claim, Applicant believes and alleges that the State failed to disclose the photograph in question, Applicant's Exhibit Nine at the September 2004 evidentiary hearing, before either the original 1994 trial or the 1996 resentencing trial. Additionally, even though the State made trial counsel aware of the existence of the videotaped film of the crime scene, Applicant alleges that the State failed to describe the videotaped film with detail sufficient enough to put trial counsel on notice of the exculpatory or impeachment nature of the contents of the videotaped film. Moreover, the Solicitor failed to provide trial counsel with a copy of the videotaped film, unlike almost every other item of potential evidence in this case which the State did reproduce and provide to trial counsel. It is also worth noting that the withheld photograph and the videotaped film both are materially related to the issue of degree of impairment of and bad conduct of the State's two primary witness, the extent to which those witnesses may have caused the encounter that led to the horrible but unintended death of Stephanie B[redacted], and exposes their efforts to minimize their culpability and exaggerate Applicant's.

9(F). GROUND F

Applicant was denied of his right to a fair trial in both phases of his capital murder trial and resentencing, a right guaranteed by both the Fourteenth Amendment and South Carolina law, because the State failed to correct false testimony from one of its primary witnesses, James Carver. The state had possession of photographic and videotape film evidence revealing that James Carver's testimony was patently false regarding the absence of packages of beer in the vehicle driven by the victim's father. The videotaped film of the crime scene was disclosed to the Applicant subsequent to the December 21, 2004, hearing date; a copy of it was marked Court's Exhibit 6 and provided to the Court and Respondent's counsel on March 25, 2005, at a status conference. The possession of beer, the amount of beer possessed, and the amount of beer consumed by the victim's father was in dispute and was an issue of great importance to the Applicant's case and the jury's decision-making process. The Solicitor was aware of the video film footage revealing one of more opened and partially consumed beer cartons in the back portion of B[redacted]s truck. *See* Letter from Walter Bailey to William L. Runyon, dated February 9, 1994. The Solicitor was aware, according to his sworn testimony during the first week of the evidentiary hearing in this matter, that defense counsel did not view the videotape of the crime scene. The Solicitor was aware as well of the photograph of the empty or almost empty beer carton in the front of Mr. B[redacted]'s truck and on the driver's side floorboard, as the only copy of that photograph none to be in existence was obtained from the Solicitor's file by Lt. Earl Asbell, the photographer of the crime scene, in September of 2004, and introduced as Exhibit 18 at the September, 2004, hearing in this matter. The Solicitor never corrected the false testimony and the jury did not see either the photograph of the beer in the front of the truck

on the floorboard of it or the videotaped film of the crime scene including footage of the beer in the back of the truck, evidence that belies witnesses Carver and Michael B[redacted]s misrepresentation about how much beer they possessed or consumed.

The issue does not turn on whether or not defense counsel knew or should have known about the evidence in the Solicitor's possession that exposed the false testimony.[5] Rather, the Solicitor had an absolute independent constitutional duty to correct the false testimony by the state's witness, James Carver. "[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177 (1959) (internal citations omitted). "[T]he prosecutor has a duty to correct testimony he knows to be false, even if its introduction was not knowing and intentional." *Bracy v. U.S.*, 435 U.S. 1301, 98 S.Ct. 1171 (1978). Mr. Rogers is entitled to a new trial.

10(F). FACTS IN SUPPORT OF GROUND F

During the guilt-or innocence phase of Applicant's 1994 trial, James Carver was allowed to testify that there was no beer in the truck and that he would have seen it, if it were present. 1994 Tr. 950. At Applicant's 1996 resentencing trial, Carver testified that he didn't see any beer, anywhere in the truck. 1996 Tr. 749-50. The Solicitor had possession of both a photograph of a partially empty beer multi-pack carton in the front

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[5]The issues of whether or not the Solicitor violated *Brady v. Maryland* regarding the videotaped film and the photograph and whether counsel were ineffective regarding use of the videotaped film footage and the photograph, will be raised and addressed as separate grounds for relief, *infra*. See Grounds A, B and E, respectively, as amended.

of the Mike B[redacted]s truck and uncut video film footage, provided to the solicitor from a media outlet, revealing there was at least one more multi-pack beer carton, if not two, in the back of Mike B[redacted]s truck. The videotape footage clearly shows that at least one multi-ack beer carton in the back section of Mr. B[redacted]'s truck was directly beside a laundry basket that James Carver came in contact with when he placed his semi-automatic handgun in the laundry basket. As noted supra, the Solicitor did not correct the false testimony and the juries never saw either the relevant photograph or the relevant videotaped film footage. Reversal of Applicant's conviction and sentence is required.

9(G). GROUND G[6] and GROUND H[7]

Applicant was denied the right to effective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that during the sentencing phase of Applicant's 1996 trial, trial counsel both elicited an and failed to object when the state elicited extensive information concerning general prison conditions, which "impermissibly injected an arbitrary factor into [Applicant's] jury's sentencing considerations," in violation of the Eighth and Fourteenth Amendments to the U. S. Constitution and South Carolina law, S.C. Code Ann. § 16-3-25(C)(1) (2003). *See, e.g., State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007). In the alternative, applicant's right to due process of law was violated when the State "impermissibly injected an arbitrary factor into [Applicant's] jury's sentencing considerations," in violation of the Eighth and Fourteenth Amendments to the U. S. Constitution and South Carolina law, S.C. Code Ann. § 16-3-25(C)(1) (2003). *See, e.g., State v. Burkhart*, 371 S.C. 482, 488, 640

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[6]Claim added May 30, 2007.

[7]Claim added January 2, 2008.

S.E.2d 450. 453 (2007). Prior to deciding *Burkhart* in January of this year, the Supreme Court cautioned the state and the defense bar in *dicta* "that evidence regarding general prison conditions ... is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment." *State v. Bowman*, 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2006).

The *Bowman* decision was based on a direct appeal of the defendant's conviction and death sentence. The Court did not rule on Mr. Bowman's claim in that procedural posture only because trial counsel failed to object and the trial court, therefore, had not ruled on the issue. Post conviction relief is the appropriate forum in which to raise issues concerning allegations of ineffective assistance of counsel related to claim of failure to preserved error, where an applicant's trial counsel failed to preserve this error for review on direct appeal. *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975). As will be demonstrated in the factual recitation in sec. 10(G), *supra*, Applicant's trial counsel failed to preserve the error for appellate review. *Burkhart* applies to Applicant. Even though trial counsel here failed to preserve the issue for review, the *Burkhart* Court made clear there that it was proper to "apply that reasoning ... because it is consistent with our long-standing rule that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime." Thus, Applicant is entitled to raise this issue now, and what's more, he must raise the issue within one year of the Court's decision Burkhart or lose the right to do so. S.C. Code 1976 § 17-27-45.

10(G) and (H). FACTS IN SUPPORT OF GROUND G and GROUND H

During the State's case in chief at Applicant's 1996 sentencing hearing, the State called Associate Warden Priscilla Mack as a witness to testify concerning Applicant's

warden's jacket. She recounted his two prison incarcerations prior to the charges related to this action. 1996 Tr. 756-7. The State also introduced a copy of the only SCDC disciplinary report related to Applicant through Ms. Mack. (*See* Claim 9 (C), *supra.*) 1996 Tr. 760. At that point, trial counsel Runyon began cross-examination of Ms. Mack. During cross-examination, trial counsel Runyon elicited testimony from Ms. Mack concerning the cell size and typical occupancy numbers, and the fact that Applicant would remain within the confines of a correctional facility, the fact that Applicant only had one disciplinary report against him and that he received administrative segregation or "lock-up" for the violation, and that she was not an appropriate witness relative to prison adaptability assessments.[8] 1996 Tr. 762-65. Trial counsel Runyon then began a line of inquiry into programs available to inmates in general population, delving into the availability of counseling and educational programs, work programs. Mr. Runyon elicited information related to the activities available for inmates in "close confinement," a term he used to avoid alerting the jury that Applicant had been housed on death row for the last few years. 1996 Tr. 769.

Prior to conducting re-direct of Ms. Mack and outside the presence of the jury, the state sought permission to explore the difference between the "adaptability to prison" in "general population" versus adaptability to prison on "death row" (again, without mentioning the phrase death row to the jury). Mr. Runyon then repeatedly and specifically

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[8]Applicant does not now and is not now complaining about testimony concerning his own prior history related by this witness concerning adaptability to prison. As *Bowman* and *Burkhart* make clear, that type of limited and defendant-specific testimony is fair game. *State v. Bowman*, 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2006); *State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450. 453 (2007).

stated that he had "no problem" with, "no objections whatsoever" to and "no objection" to the State asking Ms. Mack questions about "general population." 1996 Tr. 771-73. There being no objection from trial counsel, the trial court allowed the State to proceed with the line of questioning. After the jury returned, the State elicited testimony from Ms. Mack concerning the availability in general population to inmates of educational programs, salaried employment in the institutions, social work group sessions, volunteer entertainment and church programs, and increased family visitation allowances, as well as the choice not to work at all.

The Solicitor then began a series of questions concerning the availability of various recreation programs to general population inmates. The witness described inmate soccer matches, handball courts, large and small recreation yards. 1996 Tr. 776. The State asked the witness about inmate soccer teams and soccer uniforms, and what the uniforms were like. *Id.* The witness was asked about and described the availability to inmates of basketball courts (but no basketball teams). *Id.* The witness testified about prison libraries, inmate's owning personal color televisions and having them in their cells. 1996 Tr. 777. She was asked about and described the prison day rooms, what the inmates did while there on their free time, and their access to and the availability of televisions in those common areas. *Id.* The witness was asked about and allowed to describe how the inmates in the dorm that wins the cleanest dorm award each week is treated with special movie screenings. 1996 Tr. 778. The witness was asked about and did provide details about frequency and availability of family and friend visitation allowances, canteen privileges and available items, special holiday dinner menus, medical and dental facilities, dietician nutritional services. 1996 Tr. 778-79. The witness could not think of any "other amenities available to an inmate in the

general population" that she had not "already testified about." 1996 Tr. 780.

On re-cross-examination, trial counsel then weakly attempted to minimize and downplay all of the "amenities" described in detail, without defense objection, by Ms. Mack. 1996 Tr. 781-790. Trial counsel somewhat attempted to counter the amenities with "evidence concerning the harshness of prison life." *State v. Burkhart*, 371 S.C. at 453, 640 S.E.2d at 488. Ultimately instead, trial counsel just elicited *even greater detail* and more information about life generally in the general population of SCDC facilities. *Id.*

The impermissible and arbitrary information that was injected into Applicant's sentencing trial was far greater and more detailed than the evidence adduced at Mr. Burkhart's sentencing trial and which rendered Mr. Burkhart's death sentence invalid. In *Burkhart*, "State's witness James Sligh, Director of Inmate Classification for the Department of Corrections" only testified (over defense objection) "regarding the privileges available to an inmate who receives a sentence of life without parole. These privileges include access to the yard, work, education, meals, canteen, phone, library, recreation, mail, television, and outside visitors." *State v. Burkhart*, 371 S.C. at 452-53, 640 S.E.2d at 487. Even though Burkhart's counsel attempted to diminish the impact of that testimony by eliciting testimony about the harshness of prison life, the Court found that testimony *just as impermissible* as the testimony about privileges. *State v. Burkhart*, 371 S.C. at 453, 640 S.E.2d at 488. That was so, the Court held, because "this entire subject matter injected an arbitrary factor into the jury's sentencing considerations," which was a per se violation of S.C.Code Ann. § 16-3-25(C)(1),[9] a statutory provision premised in part on Eighth

[9]The Court held that S.C.Code Ann. § 16-3-25(C)(1) specifically states that "[a] capital jury may not impose a death sentence under the influence of any arbitrary factor." *Id.* Just as the statute bars a capital defendant from adducing evidence concerning any "deterrent

Amendment principles and prohibitions. *State v. Burkhart*, 371 S.C. at 453-54, 640 S.E.2d at 488-89. Based on the facts of Applicant's case, *Burkhart* absolutely requires that Applicant's death sentence be vacated and remanded for a sentencing proceeding that comports with South Carolina law and the Eighth and Fourteenth Amendments and the concomitant due process requirements. The *Burkhart* Court did not conduct a harmless error analysis. *Id.*

Regarding Ground G: Under the facts of Applicant's case, Applicant is want to imagine any response or strategy reason trial counsel might offer that would obviate that result. Assuming arguendo that counsel claimed strategic reasons for both failing to object to the State eliciting the impermissible information that the Court has declared completely off limits by either party, Applicant respectfully submits that any such claim by trial counsel would be of no moment to a determination of this claim, given the nature and volume of impermissible information that was injected into Applicant's sentencing proceeding, the entire record of which is already in evidence before this Court.[10]

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effect of capital punishment" or about the gruesome realities of "the process of electrocution," evidence concerning *either* the harshness of prison life or the relative benefits of life in general population is just as irrelevant to the jury's life or death decision. The Court held that "determinations as the time, place, manner, and conditions of execution *or incarceration* ... are reserved ... to agencies other than the jury." *State v. Burkhart*, 371 S.C. at 453, 640 S.E.2d at 487-88. (quoting *State v. Plath (Plath II)*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984). The Court concluded that "he jury's sole function is to make a sentencing determination based on these factors and not to legislate a plan of punishment." *State v. Burkhart*, 371 S.C. at 453, 640 S.E.2d at 487 (citing *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987)).

[10]Trial counsel would be hard-pressed to claim he had some grand strategy (or any) reason for not objecting to this evidence in light of his too-little-too-late effort to minimize it during his re-cross-examination of witness Mack. 1996 Tr. 781-790. As the *Burkhart* Court made plain, however, trial counsel's continued discussion and further introduction of impermissible evidence only further aggravated the matter. *State v. Burkhart*, 371 S.C. at 453-54, 640 S.E.2d at 488-89.

Regarding Ground H: As noted, the *Burkhart* Court did not conduct a harmless error analysis is granting *Burkhart* relief on this identical claim. However, if one were to wonder whether harmless error was present, one would only have to consider the State's closing argument, in which the State repeatedly hammered home Ms. Mack's relevant testimony to the jury. For but a few examples: the State at one moment made much ado that Applicant could watch TV, see movies and play basketball and soccer, and at another moment pointing out that Applicant could play soccer and "have a little uniform" to wear while playing soccer; at one moment pointing out that life in general population meant the services of a dietician and access to educational programs, but then noting the victim's education ended in the 4th Grade. 1996 Tr. 952-53.

At the January 2, 2008 hearing on this matter, Respondent was given an opportunity to request an evidentiary hearing on this claim and declined the offer. Applicant's is entitled to relief based on the record before this court, a record that contains more contaminated testimony than either *Bowman* or *Burkhart*. Thus, pursuant to Rule 56 SCRCP, Applicant moves for entry of summary judgment on this ground for relief.

11. Applicant appealed directly to the South Carolina Supreme Court; however, Applicant, did not petition the United States Supreme Court for a writ of certiorari. Applicant has neither previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court. For reference, in this action, PCR counsel was appointed in state court on April 11, 2000; Applicant's state PCR was filed on June 12, 2000.

12. See response to section 11, *supra*.

13. Applicant has not previously set forth any of the grounds listed in section 9, *supra*,

to this or any other Court, State or Federal, in any petition, motion or application.

14. Not Applicable.

15. These grounds, as listed in section 9, *supra,* rely on additional facts outside the record considered by the previous courts in this case.

16. Applicant was represented at trial, both in 1994 and 1996, and at his guilty pleas to criminal sexual conduct with a minor in 1994, by the following attorneys: William L. Runyon, Jr., One Carriage Lane, Bldg. B, Ste. 203, Charleston, S.C., 29407; and, Mark Leiendecker, 610 N. Cedar St., Summerville, S.C., 29483. Applicant was represented on direct appeal by Joseph Savitz, Chief Deputy, Office of Appellate Defense, 1122 Lady St., Ste. 940, Columbia, S.C., 29201.

17. See section 16, *supra.*

18. Applicant seeks vacation of his convictions and sentences, as to the indictments for both murder and criminal sexual conduct with a minor.

19. Applicant is also under sentence for criminal sexual conduct with a minor as reflected in Indictment No. 94-GS-18-47 and 94-GS-18-48. These convictions arose from a guilty plea related to Applicant's pre-trial capital proceedings. The guilty plea was entered before the Hon. Charles W. Whetstone, General Sessions Court of the Second Circuit, Dorchester County, on January 25 and 27, 1994, and the Applicant was sentenced to seven (7) years on each indictment. Applicant was represented by William Runyon, Esq., and Mark Leiendecker, Esq.

Respectfully submitted,

Jeffrey P. Bloom
Attorney at Law
1911 Pickens St.
Columbia, SC 29201

(803)256-7001

Diana Holt
Diana Holt, LLC
P.O. Box 6454
Columbia, SC 29260
(803)782-1663

By:_____
Counsel for Applicant

September 29, 2008
Columbia, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF DORCHESTER)	00-CP-18-575
TIMOTHY DION ROGERS,)	
Applicant,)	
)	Motion to Amend Third Amended Application for Post Conviction Relief
vs.)	
)	
JON E. OZMINT, Director, South Carolina Department of Corrections)	
)	
Respondent.)	

Comes now the Applicant and hereby formally seeks leave of Court to amend his Third Amended Application for Post Conviction Relief in this matter, pursuant to Rule 15 SCRCP. Specifically, Applicant moves this Court to amend his application for post conviction relief to include the claim that the state violated his rights to due process of law under the South Carolina Supreme Court's decision in *State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007). *Burkhart* requires a new sentencing trial where the State "impermissibly injected an arbitrary factor into [Applicant's] jury's sentencing considerations," in violation of the Eighth and Fourteenth Amendments to the U. S. Constitution and South Carolina law, S.C. Code Ann. § 16-3-25(C)(1) (2003).

This motion was first made orally on January 2, 2008.

Wherefore, applicant prays that the Court grant his motion to amend his third amended applicant for post conviction relief to include applicant's claim that the state violated applicant's right to due process of law, as guaranteed him by the Eighth and Fourteenth Amendments and South Carolina law, when the state injected arbitrary

information and factors into the jury's sentencing considerations.

Respectfully submitted,

Jeffrey P. Bloom
Attorney at Law
1911 Pickens St.
Columbia, SC 29201
(803)256-7001

Diana Holt
Diana Holt, LLC
P.O. Box 6454
Columbia, SC 29260
(803)782-1663

By: _____
Counsel for Applicant

September 29, 2008
Columbia, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF DORCHESTER)	00-CP-18-575
TIMOTHY DION ROGERS,)	
Applicant,)	CERTIFICATE OF SERVICE
vs.)	
JON E. OZMINT, Director, South Carolina Department of Corrections)	
Respondent.)	

I, Diana L. Holt, hereby certify that I have this date served the Applicant's Motion to Amend Applicant's Third Amended Application for Post Conviction Relief and Applicant's Revised Third Amended Application for Post Conviction Relief, the same having been orally amended on January 2, 2008, in the above-captioned case upon counsel for Respondent by U.S. Mail and by electronic transmission via .pdf file to their address as follows:

Wm. Edgar Salter, III
Senior Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

DIANA L. HOLT
Counsel for Mr. Rogers

September 29, 2008
Columbia, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF DORCHESTER)	
Timothy Dion Rogers, #4883)	C. A. No. 00-CP-18-575
)	
Applicant,)	
)	
vs.)	
)	RETURN TO MOTION TO AMEND THIRD AMENDED APPLICATION FOR POST-CONVICTION RELIEF
Jon E. Ozmint, Director, South Carolina Dept. of Corrections,)	
)	
Respondent.)	
)	

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DORCHESTER

Applicant served Respondent with his third Amended Application on June 1, 2007, in which he raised an additional claim, as Ground 9(G), that trial counsel was ineffective for eliciting evidence about the conditions of prison confinement and for not objecting to the State eliciting similar evidence on redirect examination of State's witness, Associate Warden Priscilla Mack. (Respondent filed a Motion to Strike Applicant's third Amended Application, which is dated June 7, 2007). Following a hearing on January 2, 2008, the Court permitted Applicant to file the Third Amended Application, and denied the Respondent's Motion to Strike.

Without any notice to Respondent, Applicant sought to orally amend his Third Amended Application at the January 2, 2008 hearing, to include an allegation that his due process rights were violated by the introduction of this evidence into his capital sentencing proceeding. He argued that this injected an arbitrary factor, in violation of the Eighth and Fourteenth Amendments of the United States Constitution and *State v. Burkhart*, 371 S.C. 482, 487-88, 640 S.E.2d 450, 453 (2007).

In accordance with this Court's Order filed on September 22, 2008, Applicant served Respondent with his Motion to Amend Third Amended Application on September 29, 2008,[1] in which he formally seeks to amend his Third Amended Application to add Ground 9(H).

Applicant's proposed amendment states Grounds 9(G) and (H), as follows:

> Applicant was denied the right to effective assistance of counsel in violation of the Sixth, Eight, and Fourteenth Amendments of the U.S. Constitution in that during the sentencing phase of Applicant's 1996 trial, trial counsel both elicited an and failed to object when the state elicited extensive information concerning general prison conditions, which "impermissibly injected an arbitrary factor into [Applicant's] jury's sentencing considerations," in violation of the Eight and Fourteenth Amendments to the U.S. Constitution and South Carolina law, S.C. Code Ann. § 16-3-25(C)(1) (2003). *See, e.g., State v. Burkhart,* 371 S.C. 482, 488, 640 S.E.2d 450. 453 (2007). In the alternative, applicant's right to due process of law was violated when the State impermissibly injected an arbitrary factor into [Applicant's jury sentencing considerations," in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution and South Carolina law, S.C. Code § 16-3-25(C)(1) (2003). *See,e.g., State v. Burkhart,* 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007). Prior to deciding *Burkhart* in January of this year, the Supreme Court cautioned the state and the defense bar in *dicta* " that evidence regarding the general prison conditions ... is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment." *State v Bowman,* 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2006).
>
> The *Bowman* decision was based on a direct appeal of the defendant's conviction and death sentence. The Court did not rule on Mr. Bowman's claim in that procedural posture only because trial counsel failed to object and the trial court, therefore, had not ruled on the issue. Post conviction relief is the appropriate forum in which to raise issues concerning allegations of ineffective assistance of counsel related to claim of failure to preserved error, where an applicant's trial counsel failed to preserve this error for review on direct appeal. *Simmons v. State,* 264 S.C. 417, 215 S.E.2d 883 (1975). As will be demonstrated in the factual recitation in sec. 10(G), *supra,* Applicant's trial counsel failed to

[1] His pleading was dated May 30, 2007.

> preserve the error for appellate review. *Burkhart* applies to Applicant. In *Burkhart,* the Court found that, even though Mr. Burkhart was tried prior to the Court's decision in *Bowman,* it would "apply that reasoning here because it is consistent with our long-standing rule that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime." Thus, Applicant is entitled to raise this issue now, and what's more, he must raise the issue within one year of the Court's decision Burkhart or lose the right to do so. S.C. Code 1976 § 17-27-45.

Respondent objected to the proposed amendment to assert Grounds 9(G) and (H) at the hearing and hereby reasserts that objection for the following reasons.

In *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984), the Court addressed the state's cross-examination of a professor who generally testified that life imprisonment was a punishment superior to the death penalty. During his direct examination, the professor testified about conditions of life imprisonment at CCI, and called life imprisonment "a form of slavery" – which the state supreme court concluded was "to demonstrate the permanence and deprivation entailed in life imprisonment". On cross, the State asked about another inmate's escape, which the court ultimately held was permissible:

> Since the witness claimed an intimate knowledge of CCI, and based his testimony upon that knowledge, it was not amiss for the State to pursue his claim more closely.

Plath, 281 S.C. at 12, 313 S.E.2d at 626.

After also rejecting a claim that the State was improperly was allowed to cross a prison social worker on a complaint letter she wrote about an inmate's freedom of movement, the court very strongly rebuked sentencing phase defenses which "sought to portray life imprisonment as preferable to capital punishment as a matter of social policy", or "drew a picture of life imprisonment as slavery, a condition of irretrievable loss". *Plath*, 281 S.C. at 14, 313 S.E.2d at

626-27. The Court stated that such defenses improperly "invite[d] the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment", and concluded:

> In the sentencing phase of a capital case, the function of the jury is not to legislate a plan of punishment but to make the "either/or" selection . . . . Such determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury.

Plath, 281 S.C. at 14-15, 313 S.E.2d at 627.

The *Plath* Court went on to note that while psychiatric testimony of future dangerousness was permissible, it had held that future adaptability to prison evidence was not – a conclusion subsequently overruled by the United States Supreme Court in *Skipper v. South Carolina*, 476 U.S. 1 (1986). Only in the context of justifying this distinction, *Plath* stated:

> A jury needs to know how a given defendant came to commit a given aggravated murder, to include aspects of his background, his character and the setting of the crime itself which may explain or even mitigate the conduct of which he has been found guilty. A jury does not need to know how often he will take a shower or whether or not he will be lonely and withdrawn during his tenure at CCI.

Plath, 281 S.C. at 15, 313 S.E.2d at 627.

Despite these admonitions, the *Plath* Court returned to how the State's challenged questioning was only proper response to what that Court considered, at the time, to be improper sentencing phase defenses on the utility of capital punishment or the conditions of capital punishment:

> In the case before us, defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be. . . . [The solicitor's] references [were] . . . merely reminders to the jury that life imprisonment was by no means as hopeless as defendants would have it believed. *The State was entitled to make this response.*

Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28 (emphasis added). *See also State v. Woomer*, 278 S.C. 468, 299 S.E.2d 317 (1982) (evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison).

Two decades later, the state supreme court decided *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005). There, the defendant contended that the Solicitor's questioning about movies, television, and books was irrelevant under the South Carolina Supreme Court's decision in *Plath*, and violative of the constitutional due process mandate in *Gardner v. Florida*, 430 U.S. 349 (1977), that a death sentence cannot be based "on information the defendant had no opportunity to deny or explain". The State argued, *inter alia*, that the issue was not preserved as the arguments made on appeal were not made to the trial court. The South Carolina Supreme Court agreed that the defendant had not preserved the issue for appellate review, but it added a cautionary instruction to both sides that evidentiary presentations along these lines are improper in South Carolina:

> We take this opportunity, however, to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant.

State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 384 (2005).

Subsequent to *Bowman*, the South Carolina Supreme Court addressed a case where the Solicitor *preemptively* called a witness who extensively testified as to the conditions of confinement for an inmate serving life without parole. The defense objected to the state's

evidence, and later put in its own evidence of "bad" prison conditions. *State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007).

Justice Moore was joined by Justice Waller and wrote the Opinion of the Court in *Burkhart*. Justice Moore cited *Plath* and other cases from the 1980s and 1990s for the proposition that evidence outside of the circumstances of the crime and the characteristics of the defendant was inadmissible in a sentencing phase. This included conditions of incarceration, the process of execution, or the deterrent effect of capital punishment. *Burkhart*, 371 S.C. at 487-88, 640 S.E.2d at 453. Justice Moore noted that while the case at issue was tried before the decision in *Bowman*, its result was consistent with the "long-standing rule that evidence in the sentencing phase of a capital trial . . . be relevant to the character of the defendant or the circumstances of the crime". *Id.* Thus, Justice Moore concluded that reversible error had occurred, since the evidence of conditions of confinement "invited the jury to speculate about irrelevant matters" and injected an arbitrary factor in the proceedings in violation of S.C. Code Ann. § 16-3-25(C)(1) (2003). *Burkhart*, 371 S.C. at 488-89, 640 S.E.2d at 453.

In a concurring decision, Justice Pleicones wrote that he did not believe that the Court should apply the normal harmless error standard for constitutional violations to this issue, concluding that "once improper evidence of any kind injects an arbitrary factor into the jury's consideration, [the] Court cannot uphold the death sentence under § 16-3-25(C)(1)." *Burkhart*, 371 S.C. at 489-90, 640 S.E.2d at 454 (Pleicones, J., concurring). Justice Pleicones saw no prejudice component once a statutory violation was established.

In dissent, Chief Justice Toal, joined by Justice Burnett, applied the normal rule that the introduction of evidence will not result in reversal unless it prejudiced the defendant.[2] The dissent concluded that the issue was fully joined by both sides and that the defendant had used it to his advantage. Finally, the dissent noted that the standard in § 16-3-25(C)(1) was merely a recitation of the Eighth Amendment requirements,[3] and coextensive with the Eighth Amendment – which is subject to a harmless error analysis. *Burkhart*, 371 S.C. at 493-95, 640 S.E.2d at 454-57 (Toal, C.J., dissenting).

Subsequent to *Burkhart*, the South Carolina Supreme Court decided *State v. Bryant*, 372 S.C. 305, 642 S.E.2d 582, 589 (2007). There, the defense called an expert that testified in great detail as to the "dismal conditions of prison life in general". Like *Bowman*, the Court in *Bryant* reiterated that *defense* evidence on conditions of confinement was just as improper as State evidence on the subject.

Respondent strenuously opposes Applicant's request to amend his Application with respect to Grounds 9(G) and (H). As to Ground 9(H), he did not seek the Court's permission to further amend to assert this allegation at the January 2, 2008 hearing and he failed to give Respondent notice of his intention to do so. Rather, the current motion to amend resulted from the Court's review of Respondent's Proposed Order, Ground 9(G) of Applicant's Third Amended Application. Permitting yet another amendment - over two years after the last evidentiary hearing and almost ten months after the January 2, 2008 hearing, at which the Court permitted him to add Ground 9(G) - deprives the State of a fair disposition of the PCR action:

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[2] The dissent "would not reach the question of whether the trial court's error in admitting the above described evidence was harmless because I would find no constitutional violations occurred." *Id* at 492, 640 S.E.2d at 455 (Toal, C.J., dissenting).

[3] "[T]he Eighth Amendment's requirements are primarily concerned with the ultimate result in capital cases, which is 'preventing the imposition of excessive and disproportionate punishment upon the individual prisoner.'" 371 S.C. at 493, 640 S.E.2d at 456 (Toal, C.J., dissenting).

i.e., those issues that were properly raised and litigated in hearings that began in September 2004 and concluded in August 2005.

This is particularly true since Applicant had the opportunity to litigate Ground 9(G) at the evidentiary hearing but did not pursue it. As Justice Jackson wrote in *Stein v. New York*, 346 U.S. 156, 197 (1953): "[t]he petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law." Our own Supreme Court similarly admonished the defense bar over two decades ago, when Justice Gregory wrote for a unanimous Court that "[i]t would do well for defense counsel to remember that the people of the State as well as the defendant are entitled to a fair trial." *State v. Stewart*, 283 S.C. 104, 110, 320 S.E.2d 447, 450 (1984).

Furthermore, in *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) the Court admonished inmates that "[f]inality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice." *Cf. Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct.App.1995) (recognizing that the doctrine of *res judicata* flows from the principle that public interest requires an end to litigation); *Webb v. Greenwood County*, 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956) ("[t]here is universal acceptance of the logic of Statutes of Limitations that litigation must be brought within a reasonable time in order that evidence be some end to litigation"). The United States Supreme Court has also emphasized the importance of finality in our criminal justice system. *E.g.*, *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) ("No one, not criminal defendants, not the

judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation").[4] Therefore, Respondent opposes further amendment to assert Ground 9(H).

Second, unlike *Burkhart*, *Bowman*, or *Bryant*, this case is in PCR, and in such a collateral attack Applicant must establish his claims through the constitutional vehicle of ineffective assistance of counsel. Thus, his proposed Ground 9(H) is not proper for Post-Conviction Relief, since any erroneous evidence or argument by the prosecution could have been objected to at trial and an adverse ruling challenged on appeal. *See* S.C. Code Ann.§ 17-27-20(b) (1986) ("This 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"); *Drayton v. Evatt*, 430 S.E.2d 517, 520 (S.C. 1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); *Hyman v. State*, 299 S.E.2d 330 (S.C. 1983) (same). Also, he cannot take advantage of any error by counsel or invited error. *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (a party "'cannot complain of an error which his own conduct has induced'") (citation omitted); *State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991); *State v. Washington*, 315 S.C. 108, 432 S.E.2d 448 (1993); *State v. Logan*, 279 S.C. 345, 306 S.E.2d 622 (1983); *Wilson v. Lindler*, 995 F.2d 1256 (4th Cir. 1993); *Drayton*, 312 S.C. at 10-11, 430 S.E.2d at 521.

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[4] "The fact that life and liberty are at stake in criminal prosecutions 'shows only that 'conventional notions of finality' should not have *as much* place in criminal as in civil litigation, not that they should *have none*.' Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments, 38 U.Chi.L.Rev. 142, 150 (1970)." *Teague*, 489 U.S. at 309 (emphasis added by Court); Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv.L.Rev. 441, 450-451 (1963) ("[I]f a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competence to determine legality") (emphasis omitted).