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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

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Indeed, Applicant admits, in Ground 9(G), that "*trial counsel failed to preserve the error for appellate review.*" **Third Amended Application, p. 18. (Emphasis added).** Thus, he cannot raise a direct appeal issue in PCR. Further, and assuming that he could do so, he cannot prevail because he concedes that the issue was not preserved for appellate review. As a result, to the extent he is permitted to raise an allegation related to a supposed error under *Burkhart*, he may only do so in the context of an allegation that he received ineffective assistance of trial counsel.

As to both allegations 9(G) and 9(H), Respondent notes that Applicant bases his allegations upon the January 8, 2007 decision of the South Carolina Supreme Court in *Burkhart*, 371 S.C. at 487-88, 640 S.E.2d at 453 (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 Bryant*, 372 S.C. at 317, 642 S.E.2d at 589 ("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 submits, however, that *Burkhart* clearly established a new rule of law that cannot be applied retroactively to this case because this case became final before that rule was announced. *Teague v. Lane*, 489 U.S. 288, 309 (1989).

Therefore, retroactive application of *Burkhart* would 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").[5] 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).

As the United States Supreme 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." *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).

Respondent submits that 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 *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984)[6] that the admission of evidence regarding general prison conditions constituted error. Although *dicta*

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[5] 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.

[6] As discussed, the majority in *Burkhart* cited *Plath* in support of its decision. *See* 372 S.C. at 487-88, 640 S.E.2d at 453.

in *Bowman*, which also was not decided until this case was in collateral review, indicated that it was error to admit evidence regarding general prison conditions, the Court did not disturb the death sentence in *Bowman*. The Court likewise did not disturb the death sentence of the defendant in *State v. Gardner*, 332 S.C. 389, 505 S.E.2d 338 (1998).[7] 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.[8]

Further, *Plath*'s holding, 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: *Bryant*, *Bowman* and *Gardner*, without the Court disturbing the death sentences in any of those cases. As a result, Respondent submits that the rule in *Burkhart* was a new rule that cannot be applied retroactively under *Teague*, and Applicant's Grounds 9(G) and (H) should be rejected on that basis.

Moreover, trial counsel was not ineffective for failing to anticipate a change in the law that did not occur until over twelve years after Rogers' December 1996 resentencing proceeding.

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[7] The defendant in *Gardner* argued on appeal 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, nothing in that decision indicated that the cross-examination was prejudicial or even improper.

Gardner has now exhausted both his state court and federal habeas corpus remedies. *See Gardner v. Ozmint*, 511 F.3d 420 (4th Cir. 2007), *cert. denied*, ___ S.Ct. ___, 2008 WL 2328355 (U.S.S.Ct., Oct. 6, 2008). He filed a Petition for Writ of Habeas Corpus in the original jurisdiction of the South Carolina Supreme Court, dated October 6, 2006, seeking relief on issues similar to those before this Court. In the lower federal courts, Gardner had pursued an ineffectiveness claim similar to Applicant's 9(G). However, he abandoned that allegation on appeal.

[8] *Burkhart* is likewise the first decision to suggest that introduction of such evidence violates S.C.Code Ann. § 16-3-25(C)(1) (Supp. 2008), since – in the majority's view - 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.

Again, *Burkhart* is inconsistent with the result reached in post-*Skipper* cases dealing with the current allegation. Applicant would have the Court hold trial counsel ineffective based upon counsel's failure to utilize a crystal ball or have Periclean foresight.

However, this type of standard is inconsistent with *Strickland v. Washington*, 466 U.S. 668 (1984), where the Court 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. Therefore, an attorney is never required to anticipate or discover changes in the law or facts that did not exist at the time of trial. *E.g.*, *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) (even though victim changed her mind by the time of the PCR hearing and testified for defendant, counsel was not ineffective for encouraging defendant to plead guilty without first interviewing the victim because he had her written statement against 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) (counsel cannot be considered ineffective for failing to anticipate changes in law); *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").

Indeed, to support his failure to timely present Grounds 9(G) and (H) to this Court, Applicant has claimed that he could not have discovered these allegations in time to assert them in any of his earlier Applications. If Applicant could not have anticipated this change in the law, then trial counsel certainly was not ineffective for failing to anticipate that the South Carolina Supreme Court would reach the result it did in *Burkhart*.

Further, Applicant's claim 9(G) must also 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 he 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).[9] 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 discrimination" 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).

Finally, the Supreme Court in *Strickland* held that "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

[9] His failure to present any evidence, once again, supports the conclusion that amendment is improper under *Arnold*.

the ground of lack of sufficient prejudice, ... that course should be followed." 466 U.S. at 687. Here, Applicant cannot meet his burden of proving that he was prejudiced by counsel's error, *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). 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 v. Smith*, 539 U.S. 510, 537 (2003); *Jones v. State*, 504 S.E.2d 822, 829-30 (S.C. 1998) (petitioner did not meet burden). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Jones*, 504 S.E.2d at 823-824. *Accord Plath v. Moore*, 130 F.3d 595 (4th Cir. 1997) ("given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed.").

There are only limited exceptions where prejudice is presumed – none of which apply here. In *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006), our state supreme court outlined these limited exceptions:

> In [*United States v. Cronic*, 466 U.S. 648 (1984)], the [United States Supreme] Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." *Cronic*, 466 U.S. at 659. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." *Id.* Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual

> conduct of the trial." *Id.* (citing *Powell v. Alabama*, 287 U.S. 45 (1932)). A finding of per-se prejudice under any of these three prongs is "an extremely high showing for a criminal defendant to make." *Brown v. French*, 147 F.3d 307, 313 (4th Cir.1998).

The Supreme Court in *Nance* pointed out that these situations of presumed prejudice are rare, and concluded with this instruction:

> Absent these narrow circumstances of presumed prejudice under *Chronic*, defendants must show actual prejudice under *Strickland*.

Nance, 367 S.C. at 552, 626 S.E.2d at 880.

Obviously these limited exceptions of presumed prejudice do not apply here. Counsel was present at all critical stages of Applicant's trial, so the first exception is inapplicable. The third exception is clearly not viable either, as it applies only when extreme circumstances external to counsel would prevent anyone from providing effective representation. The classic case, discussed in *Chronic*, is *Powell v. Alabama*, 287 U.S. 45 (1932), where in 1930's Alabama black youths were charged with a horrible crime. Hostile sentiment pervaded the community, and the defendants had to be kept under guard of soldiers. Only on the day of trial was a lawyer appointed, and he was not only unprepared but also was from a different state and unfamiliar with local procedure. Obviously, Applicant's trial nowhere approaches the inherently prejudicial circumstances of *Powell*.

Finally, the second *Cronic* exception, where counsel "entirely fails to subject the prosecution's case to adversarial testing," is also inapplicable. An example of this exception is *Nance* itself – where lead counsel was hampered by alleged alcoholism, drug intake, and health issues affecting his memory, and co-counsel was a new lawyer who had only been practicing for eighteen months. The lawyers only interviewed one family member in preparation, and the mental expert was not provided with any requested background information. The lawyer told the

jury in opening argument that he did not ask for the case; counsel only called three witnesses in the guilt phase during which they elicited prejudicial information; they failed to even qualify their expert; and they called the sister at the last minute without any preparation. The defense sentencing phase case only lasted seven minutes, and during closing co-counsel did not plead for his client's life, but instead described him as a "sick" man who did "sick" things. *Nance*, 367 S.C. at 554-58, 626 S.E.2d at 881-84.

Such a woeful description is of course nothing like the aggressive representation that Applicant received in this case, where he had two highly qualified and active lawyers, one of whom was already an experienced capital defense litigator. Whether or not they made an individual mistake during the course of the representation, counsel in this case certainly endeavored to challenge the State's case throughout the proceedings.

Clearly, this is not a *Nance*-type situation where counsel "entirely failed to subject the prosecution's case to any meaningful adversarial testing." Thus, where, as here, there was a sufficient effort overall, then any alleged individual mistakes are properly adjudged through *Strickland*'s normal process, which includes the prejudice analysis.

This conclusion is consistent with the language of Strickland itself, despite the majority view in *Burkhart* of conditions of confinement evidence as an arbitrary factor for which it did not perform a prejudice analysis on direct appeal. Unlike a case on direct appeal – where the conviction is not yet considered final – during collateral attack concerns of finality are of "profound importance". *See generally Strickland*, 466 U.S. at 693-94 (discussing concerns of finality when deciding the appropriate standard for prejudice). *See also Aice*, *supra*. Hence, on collateral attack, it is appropriate and, indeed, necessary to filter claims through a prejudice analysis to ensure that the extreme social cost of reversing final convictions and sentences is only

borne by society where the alleged error had a reasonable probability of affecting the result of the proceedings.

An example of this principle is found in *Franklin v. Catoe*, 346 S.C. 563, 552 S.E.2d 718 (2001). There, the South Carolina Supreme Court held that a prejudice analysis should be applied to a claim that the defendant was not advised of and thus did not waive his right to personally give closing argument in the guilt phase of a capital trial – despite the fact that prior cases had not engaged in a prejudice analysis. The Court in *Franklin* noted the general rule that claims under *Strickland* include a prejudice analysis, and went on to conclude that since *in favorem vitae* review had been abolished and a PCR system of collateral attack established to explore such issues, a finding of *per se* reversible error was no longer warranted. *Franklin*, 346 S.C. at 571-74, 552 S.E.2d at 723-24. Finally, the Court noted that it and the United States Supreme Court have repeatedly held that "a harmless error analysis is appropriate where a capital defendant has suffered a deprivation of a *constitutional right*." *Franklin*, 346 S.C. 563 at 575 n.8, 552 S.E.2d at 725 n.8 (emphasis in original).

That last statement precisely raises the final point why a prejudice analysis is necessary to a claim that counsel failed to object to evidence of conditions of confinement. While *Burkhart* phrases its issue as a statutory one – that introduction of evidence of conditions of confinement injects an arbitrary factor under S.C. Code Ann. § 16-3-25(C)(1) – Applicant in PCR is raising, as he must, a *constitutional* issue – that he was effectively denied his Sixth Amendment right to counsel based on counsel's omission.

Therefore, he must filter his underlying statutory claim through the context of a constitutional challenge – as a fundamental and legal matter, the claim he pled before this Court is constitutional. As *Franklin* specifically notes, this overriding constitutional claim upon which

the statutory claim depends is subject to a harmless error analysis – – like any other constitutional claim.[10]

Applicant cannot meet his burden in this case because there was overwhelming evidence that he was guilty of murder and the statutory aggravating circumstance. *See Strickland*, 466 U.S. at 694. Further and as discussed, Applicant's Grounds 9(G) and (H) complain of evidence elicited from Associate Warden Priscilla Mack, from Broad River Correctional Institution. This testimony was relatively brief, **1996 R. pp. 764-70; pp. 774-90**, with the majority of the testimony elicited by trial counsel. **1996 R. pp. 764-70; 780-90.** [11]

Moreover, the record reflects that much of trial counsel's cross-examination focused upon the conditions to which *the Applicant* was subject at the time of resentencing. Respondent submits that this portion of his cross-examination was clearly proper under *Burkhart*; and although the evidence elicited through Ms. Mack was discussed relatively briefly in closing, the challenged evidence was not the basis for the State's argument that Applicant deserved the death penalty. Given the relative equality of presentation by both sides on the issue of conditions of confinement, it cannot be said there would be a reasonable probability of a different result. Had counsel objected to the State's evidence on the issue, it would not have been allowed to make its own points along these lines as well. In light of the overwhelming evidence in aggravation and the limited evidence of prison conditions, had both the State's and defense evidence of

---

[10] It is also worth noting that Justice Pleicones is but one vote of five in expressly rejecting a harmless error analysis in Burkhart, as the majority made no such express analysis and the dissent clearly disagreed with Justice Pleicones's view. Moreover, even Justice Pleicones was not analyzing the issue in the context of PCR, where the necessary constitutional overlay of ineffective assistance would have had to be addressed.

[11] Again, Applicant failed to present any evidence to support either allegation and even argued that it would be improper for the Court to receive testimony thereon.

conditions of confinement been excluded, *Strickland* prejudice still would not be established. Therefore, there was no prejudice with Respect to Ground 9(G) because "there is [no] reasonable probability that ... the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

Respectfully submitted,

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By: _____
ATTORNEYS FOR RESPONDENT

October 13, 2008.

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

CERTIFIED COPY
2008 OCT 15 PM 12:05
CLERK OF COURT
DORCHESTER COUNTY

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 Return to Motion to Amend Third Amended Application for Post Conviction Relief, 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
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Columbia, SC 29260

This 13th day of October, 2008.

WILLIAM EDGAR SALTER, III

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2000CP1800575

CERTIFIED COPY
2009 JUN 19 AM 11:30
CLERK OF COURT
DORCHESTER COUNTY

Timothy Dion Rogers *vs.* **State of south carolina**

CHECK ONE:

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

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

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

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*:**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED: ☑ See attached order; ☐ Statement of Judgment by the Court:

Dated at St. George, South Carolina, this 19th day of June, 2009.

Court Reporter:

Cheryl Graham

- Cheryl Graham, Clerk of Court, By: Carolyn Ayer, Deputy

This judgment was entered on the 19th day of June, 2009, and a copy mailed first class this 19th day of June, 2009, to attorneys of record or to parties (when appearing pro se) as follows:

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER)	
)	Case Number 2000-CP-18-575
TIMOTHY DION ROGERS,)	
)	
Applicant,)	
)	
vs.)	**ORDER GRANTING APPLICANT'S**
)	**MOTION TO AMEND**
JON E. OZMINT, Director,)	
South Carolina Department)	
of Corrections,)	
)	
Respondent.)	
)	

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2009 JUN 19 AM 9:52
CLERK OF COURT
DORCHESTER COUNTY

Applicant moved by letter motion to amend his post-conviction relief action to include a "*Burkhart* Claim" and for summary judgment on that claim. Therewith, Applicant filed a Third Amended Application for Post Conviction relief pursuant to *State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007). Respondent filed a detailed and complex Motion to Strike Applicant's Third Amended Application for Post Conviction Relief. The Court conducted a hearing on January 2, 2008, at which both parties were present and both ably argued their respective positions. The Court hereby grants Applicant's motion to amend his PCR application and denies Respondent's motion to strike.

Applicant's third-amended application included Applicant's claims both (1) that he was deprived of the effective assistance of counsel due to counsel's failures related to the introduction of evidence concerning prison life in general, and, (2) that Applicant's due process rights were violated by the introduction of that evidence into his capital sentencing proceeding, which is strictly prohibited by state law, the Due Process principles and Eighth and Fourteenth Amendment prohibition against injection of arbitrary factors into a capital sentencing

proceeding,[1] according to the bright line rule announced in *Burkhart, supra*.

Applicant's amended claim was very factually and legally detailed. Specifically, Applicant claimed as follows:

> 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 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.

Applicant's Third Amended Application for Post Conviction Relief pp. 17-18.

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[1]Applicant raised these two claims in Ground G, the *Burkhart* ground of his Third Amended Application for Post Conviction Relief.

Applicant alleged the following 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.[2] 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 entertainment and church programs, and increased family visitation allowances, as well as the choice not to work at all.

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[2]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).

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, and 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, and 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 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).[3] a statutory provision premised in part on Eighth 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. The Court did not conduct a harmless error analysis[4]. *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.[5] 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.

Applicant's Third Amended Application for Post Conviction Relief pp. 19-20.

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[3]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 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 "the 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)).

[4]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.

[5]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.

The Respondent filed a motion to strike the Applicant's Third Amended Application *in toto*. Although initially Respondent complained that Applicant had not filed a formal motion with the amended application, Respondent candidly acknowledged that Applicant's cover letter to the Amended Application acted as a motion and that Respondent's ability to respond to the filing was not impeded.[6] To the contrary, I find that Respondent responded very cogently and with great acumen. The Court denies Respondent's motion to strike based on the absence on Applicant's part of a formal motion to amend.

Respondent moved to strike the amended application primarily based on Respondent's assertion that Applicant was too late to raise the *Burkhart* claims, pursuant to *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Respondent contended that *Arnold* stands for the proposition that Applicant "cannot raise [a claim], for the first time, after both parties have submitted their respective proposed Orders for this Court's consideration." Motion to Strike, p. 15.

Respondent's reliance on *Arnold* is misplaced. *Arnold* turns on unique facts. Arnold had already completed and lost his original PCR, and was only back before the PCR court because the U.S. Supreme Court had remanded Arnold's PCR case for the narrow issue of reconsideration in light of *Yates v. Aiken*, 484 U.S. 211 (1988). *Arnold*, 309 S.C. at 161, 420 S.E.2d 862. In other words, Arnold had completed the entire PCR process once, had been denied relief, had been allowed an additional PCR evidentiary hearing on the narrow issue presented by *Yates*, the PCR court had ruled and had again denied PCR relief to Arnold. *Id.* It was *then*, after Arnold had been through the PCR process twice and been denied twice, that Arnold sought to

[6]Applicant orally moved to amend his application at the hearing.

add entirely new claims for relief and by way of a motion to reconsider. *Id.*

The Court held that Arnold could not use a motion to reconsider as a vehicle to raise entirely new claims which the trial court had never considered in the first place. *Arnold*, 309 S.C. at 172-73, 420 S.E.2d at 842-43. The Court held, rather, that Rule 15(a), SCRCP, applied in a situation where "a party wishes to amend a pleading after final judgment from a full trial on the merits." While Rule 15(a) *allows* a PCR litigant to amend the application to confirm to evidence already adduced and in the record, the rule was not a vehicle to reopen the record for additional evidence. *Id.* Thus, the Court finds it interesting that *Arnold* would actually allow applicant to amend his application in this particular situation, if this Court had indeed already ruled. Because the Court has not yet ruled, *Arnold* has no definitive bearing on this matter.

The Supreme Court's ruling in *Arnold* turned on crucial procedural facts present there, that are not present in Applicant's case. Applicant's case has not yet been submitted to the Court. The Court has not ruled on the merits of Applicant's case. Furthermore, at the time Applicant raised his *Burkhart* claims, the parties had not yet submitted their final papers. Specifically, Applicant was within the window of time allowed by the Court for replying to Respondent's proposed order and Applicant subsequently did respond. Moreover, unlike *Arnold*, Applicant specifically *did not* seek to amend the record of the case. Applicant merely sought to conform his pleadings to proof already in the record of this case to include an additional ground pursuant to *Burkhart*. In fact, Applicant expressly stated his position that *Burkhart* announced a bright-line rule prohibiting the admission *by anyone*, the State or the defense, of testimony or other evidence concerning prison life in general, as being a violation of Eighth and Fourteenth Amendment and state law guarantees against the injection of impermissible considerations into a

capital sentencing trial. Respondent's motion to strike Applicant's Third Amended Application based on *Arnold* is denied.

Respondent also claimed that *Burkhart* established a new rule of law which cannot be applied retroactively to Applicant's benefit because this case became final before that rule was announced. Respondent posited that "retroactive application of *Burkhart* would, therefore, violate *Teague v. Lane*, 489 U.S. 288, 309 (1989) and *State v. Jones*, 312 S.C. 100, 439 S.E.2d 282 (1994). The Court disagrees.

As Applicant has pointed out, defendant Burkhart, himself, was the recipient of retroactive application by the Supreme Court of its decision in *State v. Bowman*, 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2006). The *Burkhart* Court specifically acknowledged the fact that Burkhart's case was tried *prior* to the Court's decision in *Bowman*. *Burkhart*, 371 S.C. at 453, 640 S.E.2d at 488. Even though Burkhart's counsel objected to the State's admission of the pertinent impermissible testimony – importantly – defense counsel then *waived* any objection to the pertinent impermissible testimony by introducing equally impermissible testimony of like kind. *Id.* Nevertheless, the Court held, defendant Burkhart was entitled to a new sentencing trial because "the entire subject matter" of the harshness of prison life "injected an arbitrary factor into the jury's sentencing considerations." The Court further found that "[w]hen the jury is invited to speculate about irrelevant matters upon which a death sentence may be based, § 16-3-25(C)(1) is violated,' no matter who invited the speculation. *Burkhart*, 371 S.C. at 453, 640 S.E.2d at 488-489 (citing *State v. Sloan*, 278 S.C. 435, 298 S.E.2d 92 (1982). Thus, *Burkhart* created a bright line rule regarding a substantive constitutional right.

Respondent relies on *Teague v. Lane*, 489 U.S. 288, 309 (1989). *Teague* is no help to or

haven for Respondent's position. *Teague* is inapplicable to state court proceedings and, even if it were, it is no bar to *Burkhart*'s applicability to Applicant. *Teague* stands for the proposition that a federal habeas litigant may not receive the benefit retroactively from a new procedural rule of law, with some exceptions. Applicant, of course, is a state court litigant. Moreover, *Burkhart* delineates a *substantive* constitutional and state law rule. *Teague* has no applicability whatsoever when a substantive rule or right is concerned.

Because *Burkhart* wholly bans evidence of the nature that was injected into Applicant's sentencing proceeding as unconstitutional *per se*, there is no need to inquire of trial counsel concerning their failure to object to the evidence or as to strategy reasons for not objecting.

Wherefore, for all the foregoing reasons, the Court hereby **denies** Respondent's motion to strike on all grounds. The Court hereby **grants** Applicant's motion to amend his PCR application to include his claims pursuant to *State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007).

AND IT IS SO ORDERED!

Hon. Diane Schafer Goodstein
Presiding by Designation of Supreme Court
First Judicial Circuit

June 18, 2009
St George, 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.)	
)	PROPOSED ORDER ON GROUNDS 9(G)-(H)
Jon E. Ozmint, Director, South)	OF APPLICANT'S THIRD
Carolina Dept. of Corrections,)	AMENDED APPLICATION
)	
Respondent.)	
)	

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.

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 sought 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 filed "Respondent's Return to Motion to Amend Third Amended Application for Post Conviction Relief" dated October 13, 2008.

On June 19, 2009, the Court filed an "Order Granting Applicant's Motion to Amend." The Court specifically rejected Respondent's previously-filed motion to strike, including Respondent's arguments that the amendment was barred by *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) and *Teague v. Lane*, 489 U.S. 288, 309 (1989); that the amendment deprived Respondent of due process and a fair determination of the PCR proceeding; that it was contrary to notions of finality of litigation; that *Plath*'s holding - 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 v. South Carolina*, 476 U.S. 1 (1986); and that the Court should not permit the addition of Ground 9(H) because it was not raised until 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). [2] The Court now denies relief on Applicant's Ground 9(G).

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

[2] Respondent objected to the proposed amendment to assert Grounds 9(G) and (H) at the hearing and reasserted its objection in its Return.

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-examination, 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 it concluded that:

> 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. This conclusion was 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).

The current issue was thereafter raised in the 1998 case of Dorchester County death row inmate Jospeh M. L. Gardner. *State v. Gardner*, 332 S.C. 389, 505 S.E.2d 338 (1998). On appeal, the defendant in *Gardner* argued 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. However,

the Supreme Court did not disturb Gardner's death sentence. Although the Court found that Gardner's claim was procedurally barred, *id* at 393-94, 505 S.E.2d at 340, nothing in that decision indicated that the cross-examination was prejudicial or even improper.[3]

Two decades after *Plath*, the state supreme court decided *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005). In *Bowman*, 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 that it violated 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 for appellate review because the arguments made on appeal had not presented 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 ... 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.

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[3] In its October 2008 Return referenced above, Respondent informed the Court that Gardner had exhausted both his state court and federal habeas corpus remedies, *see Gardner v. Ozmint*, 511 F.3d 420 (4th Cir. 2007), *cert. denied*, **Error! Main Document Only.**129 S.Ct. 125 (2008); and that he had filed a Petition for Writ of Habeas Corpus in the original jurisdiction of the South Carolina Supreme Court, dated October 6, 2006, seeking relief on issues similar to those before this Court. Respondent also informed this Court that Gardner had pursued an ineffectiveness claim similar to Applicant's 9(G) in the lower federal courts, but that he abandoned that allegation on appeal. The Court takes judicial notice that Gardner was executed on December 5, 2008.

Bowman, 366 S.C. at 498-99, 623 S.E.2d at 384.

Subsequent to *Bowman*, the South Carolina Supreme Court addressed a case in which 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, although it later presented its own evidence of "bad" prison conditions. *State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007).

Justice Moore, who was joined by Justice Waller, 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's decision took the position that, even though Burkhart 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 must 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.[4] 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,[5] 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. *Id.*

Unlike *Burkhart*, *Bowman*, or *Bryant*, this case is in PCR. The Court finds that because this is a collateral attack on his conviction, Applicant must establish his claims through the constitutional vehicle of ineffective assistance of counsel. Thus, although the Court has allowed him to amend the Application, the Court finds that his proposed Ground 9(H) is not proper for Post-Conviction Relief, since any erroneous evidence or argument by the prosecution could have

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[4] 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).

[5] "[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).

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.

Indeed, Applicant admits in Ground 9(G) that "*trial counsel failed to preserve the error for appellate review.*" **Third Amended Application, p. 18. (Emphasis added).** Thus, he cannot raise a direct appeal issue in PCR. Further, and assuming that he could do so, he cannot prevail because he concedes that the issue was not preserved for appellate review. As a result, to the extent he is permitted to raise an allegation related to a supposed error under *Burkhart*, he may only do so in the context of an allegation that he received ineffective assistance of trial counsel.

The Court further finds that trial counsel was not ineffective for failing to anticipate 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. The Court rejects Applicant's position because he

would have this Court hold that trial counsel was ineffective based upon counsel's failure to utilize a crystal ball or have Periclean foresight.

However, Applicant's suggested standard is inconsistent with *Strickland v. Washington*, 466 U.S. 668 (1984), where the Court 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. Therefore, an attorney is never required to anticipate or discover changes in the law or facts that did not exist at the time of trial. *E.g.*, *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) (even though victim changed her mind by the time of the PCR hearing and testified for defendant, counsel was not ineffective for encouraging defendant to plead guilty without first interviewing the victim because he had her written statement against 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) (counsel cannot be considered ineffective for failing to anticipate changes in law); *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").

Indeed, to explain his failure to present Grounds 9(G) and (H) to this Court in earlier pleadings, Applicant has claimed that he could not have discovered these allegations in time to

assert them in any of his earlier Applications. The Court finds that, if Applicant could not have anticipated this change in the law, then trial counsel certainly was not ineffective for failing to anticipate that the South Carolina Supreme Court would reach the result it did in *Burkhart*.

The Court further finds that Applicant's claim 9(G) must also 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 he 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).[6] 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 discrimination" 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).

Finally, the Supreme Court in *Strickland* held that "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." 466 U.S. at 687.

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[6] His argument that it was unnecessary to present any evidence in connection with his Ground 9(G) ignores that trial counsel may have had a valid strategy for his presentation of evidence concering Applicant's confinement.

Here, Applicant cannot meet his burden of proving that he was prejudiced by counsel's error, *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). 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 v. Smith,* 539 U.S. 510, 537 (2003); *Jones v. State*, 504 S.E.2d 822, 829-30 (S.C. 1998) (petitioner did not meet burden). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Jones*, 504 S.E.2d at 823-824. *Accord Plath v. Moore*, 130 F.3d 595 (4th Cir. 1997) ("given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed.").

There are only limited exceptions where prejudice is presumed – none of which apply here. In *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006), our state supreme court outlined these limited exceptions:

> In [*United States v. Cronic*, 466 U.S. 648 (1984)], the [United States Supreme] Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." *Cronic*, 466 U.S. at 659. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." *Id.* Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* (citing *Powell v. Alabama*, 287 U.S. 45 (1932)). A finding of per-se prejudice under any of these three prongs is "an extremely high

> showing for a criminal defendant to make." *Brown v. French*, 147 F.3d 307, 313 (4th Cir.1998).

The Supreme Court in *Nance* pointed out that these situations of presumed prejudice are rare, and concluded with this instruction:

> Absent these narrow circumstances of presumed prejudice under *Chronic*, defendants must show actual prejudice under *Strickland*.

Nance, 367 S.C. at 552, 626 S.E.2d at 880.

Obviously these limited exceptions of presumed prejudice do not apply here. Counsel was present at all critical stages of Applicant's trial, so the first exception is inapplicable. The third exception is clearly not viable either, since it applies *only* when extreme circumstances external to counsel would prevent anyone from providing effective representation. The classic case, discussed in *Chronic*, is *Powell v. Alabama*, 287 U.S. 45 (1932), where in 1930's Alabama black youths were charged with a horrible crime. Hostile sentiment pervaded the community, and the defendants had to be kept under guard of soldiers. Only on the day of trial was a lawyer appointed, and he was not only unprepared but also was from a different state and unfamiliar with local procedure. Obviously, Applicant's trial nowhere approaches the inherently prejudicial circumstances of *Powell*.

Finally, the second *Cronic* exception, where counsel "entirely fails to subject the prosecution's case to adversarial testing," is also inapplicable. An example of this exception is *Nance* itself – where lead counsel was hampered by alleged alcoholism, drug intake, and health issues affecting his memory, and co-counsel was a new lawyer who had only been practicing for eighteen months. The lawyers only interviewed one family member in preparation, and the mental expert was not provided with any requested background information. The lawyer told the jury in opening argument that he did not ask for the case; counsel only called three witnesses in

the guilt phase during which they elicited prejudicial information; they failed to even qualify their expert; and they called the sister at the last minute without any preparation. The defense sentencing phase case only lasted seven minutes, and during closing co-counsel did not plead for his client's life, but instead described him as a "sick" man who did "sick" things. *Nance*, 367 S.C. at 554-58, 626 S.E.2d at 881-84.

Such a woeful description is of course nothing like the aggressive representation that Applicant received in this case, where he had two highly qualified and active lawyers, one of whom was already an experienced capital defense litigator. Whether or not they made an individual mistake during the course of the representation, counsel in this case certainly endeavored to challenge the State's case throughout the proceedings.

Clearly, this is not a *Nance*-type situation where counsel "entirely failed to subject the prosecution's case to any meaningful adversarial testing." Thus, where, as here, there was a sufficient effort overall, then any alleged individual mistakes are properly adjudged through *Strickland*'s normal process, which includes the prejudice analysis.

This conclusion is consistent with the language of *Strickland* itself, despite the majority view in *Burkhart* of conditions of confinement evidence as an arbitrary factor for which it did not perform a prejudice analysis on direct appeal. Unlike a case on direct appeal – where the conviction is not yet considered final – during collateral attack concerns of finality are of "profound importance". *See generally Strickland*, 466 U.S. at 693-94 (discussing concerns of finality when deciding the appropriate standard for prejudice). *See also Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). Hence, on collateral attack, it is appropriate and, indeed, necessary to filter claims through a prejudice analysis to ensure that the extreme social cost of reversing

final convictions and sentences is only borne by society where the alleged error had a reasonable probability of affecting the result of the proceedings.

An example of this principle is found in *Franklin v. Catoe*, 346 S.C. 563, 552 S.E.2d 718 (2001). There, the Court held that a prejudice analysis should be applied to a claim that the defendant was not advised of and thus did not waive his right to personally give closing argument in the guilt phase of a capital trial – despite the fact that prior cases had not engaged in a prejudice analysis. The Court in *Franklin* noted the general rule that claims under *Strickland* include a prejudice analysis, and went on to conclude that since *in favorem vitae* review had been abolished and a PCR system of collateral attack established to explore such issues, a finding of *per se* reversible error was no longer warranted. *Franklin*, 346 S.C. at 571-74, 552 S.E.2d at 723-24. Finally, the Court noted that it and the United States Supreme Court have repeatedly held that "a harmless error analysis is appropriate where a capital defendant has suffered a deprivation of a *constitutional right*." *Franklin*, 346 S.C. 563 at 575 n.8, 552 S.E.2d at 725 n.8 (emphasis in original).

That last statement precisely raises the final point why a prejudice analysis is necessary to a claim that counsel failed to object to evidence of conditions of confinement. While *Burkhart* phrases its issue as a statutory one – that introduction of evidence of conditions of confinement injects an arbitrary factor under S.C. Code Ann. § 16-3-25(C)(1) – Applicant in PCR is raising, as he must, a *constitutional* issue – that he was effectively denied his Sixth Amendment right to counsel based on counsel's omission. Therefore, he must filter his underlying statutory claim through the context of a constitutional challenge – as a fundamental and legal matter, the claim he pled before this Court is constitutional. As *Franklin* specifically notes, this overriding

constitutional claim upon which the statutory claim depends is subject to a harmless error analysis -- like any other constitutional claim.[7]

To establish that he was prejudiced by counsel's error in his capital sentencing proceeding, Applicant 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*, 332 S.C. 329,344-45, 504 S.E.2d 822, 829-30 (1998) (petitioner did not meet burden).

The Court finds that Applicant cannot meet his burden in this case. First, there was overwhelming evidence that he was guilty of murder and the statutory aggravating circumstance. *See Strickland*, 466 U.S. at 694. Second and as discussed, Applicant's Grounds 9(G) and (H) complain of evidence elicited from Associate Warden Priscilla Mack, from Broad River Correctional Institution. The Court finds that this testimony was relatively brief, **1996 R. pp. 764-70; pp. 774-90**, and that the majority of the testimony was elicited by trial counsel. **1996 R. pp. 764-70; 780-90.**[8]

Moreover, the record reflects that much of trial counsel's cross-examination focused upon the conditions to which *the Applicant* was subject at the time of resentencing. The Court finds that this portion of counsel's cross-examination was clearly proper under *Burkhart*. Also,

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[7] It is also worth noting that Justice Pleicones is but one vote of five in expressly rejecting a harmless error analysis in *Burkhart*, as the majority made no such express analysis and the dissent clearly disagreed with Justice Pleicones's view. Moreover, even Justice Pleicones was not analyzing the issue in the context of PCR, where the necessary constitutional overlay of ineffective assistance would have had to be addressed.

[8] Again, Applicant failed to present any evidence regarding whatever strategic reason counsel may have had.

although the evidence elicited through Ms. Mack was discussed relatively briefly in closing, this Court finds that the challenged evidence was not the basis for the State's argument that Applicant deserved the death penalty. Given the relative equality of the presentation by both sides on the issue of conditions of confinement, the Court concludes that it cannot find that there would be a reasonable probability of a different result.

The Court finds that if trial counsel had objected to the State's evidence on the issue, it would not have been permitted to make its own points along these lines as well. In light of the overwhelming evidence in aggravation and the limited evidence of prison conditions, had both the State's and defense evidence of conditions of confinement been excluded, *Strickland* prejudice still would not be established. Therefore, there was no prejudice with respect to Ground 9(G) because "there is [no] reasonable probability that ... the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

IT IS, THEREFORE, ORDERED:

That the Application for Post-Conviction Relief in this matter is dismissed with prejudice; and

AND, IT IS SO ORDERED this ____ day of _____, 2009.

_____
DIANE SHAFER GOODSTEIN
Judge, First Judicial Circuit

_____, 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,)	
)	
v.)	CERTIFICATE OF SERVICE
)	
S Jon E. Ozmint, Director, South Carolina Dept. of Corrections,)	
)	
Respondent.)	

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 Proposed Order on Grounds 9(G)-(H) of Applicant's Third Amended Application, in the foregoing action, on counsel for Applicant both electronically and 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 20th day of July, 2009.

s/William Edgar Salter, III
WILLIAM EDGAR SALTER, III

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER TIMOTHY DION ROGERS, Applicant, vs. JON E. OZMINT, Director, South Carolina Department of Corrections Respondent.	IN THE COURT OF COMMON PLEAS 00-CP-18-575 **(APPLICANT'S PROPOSED) ORDER GRANTING RELIEF:** GROUNDS 9 (G-H) OF APPLICANT'S THIRD AMENDED PCR APPLICATION

I. INTRODUCTION.

Applicant moved by letter motion to amend his post-conviction relief action to include a "*Burkhart* Claim" and for summary judgment on that claim. Therewith, Applicant filed a Third Amended Application for Post Conviction relief pursuant to *State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007). Respondent filed a detailed and complex Motion to Strike Applicant's Third Amended Application for Post Conviction Relief. The Court conducted a hearing on January 2, 2008, at which both parties were present and at which both ably argued their respective positions. The Court declined to grant Applicant's motion for summary judgment. In the interest of thoroughness and fairness, the Court provided ample opportunity and time for the Respondent to adduce additional evidence on the *Burkhart* claims, if the Respondent so chose; the Court extended the same time and opportunity to the Applicant. Trial counsel *did testify* specifically that the failure to object to the introduction of the information about prison life in general *was not* a strategic decision. PCR Tr. 159-160. The Respondent did

not avail itself of the opportunity to submit additional testimony or other evidence related to the *Burkhart* claims. After careful consideration of all of the facts and record evidence before the Court and the law applicable to the matter, the Court entered an order on June 19, 2009, granting the Applicant's motion to amend his post-conviction relief application to include the *Burkhart* claims and denying Respondent's motion to strike the *Burkhart* claims.

The Court grants Applicant a new sentencing trial on the merits of Ground 9(G) and 9(H) of his third amended application for post-conviction relief. The Court finds that Applicant was: (1) deprived of the effective assistance of counsel due to counsel's failures related to the introduction of evidence concerning prison life in general, and, (2) his constitutional right to due process of law was violated by the introduction of that evidence into his capital sentencing proceeding, all of which are matters that are strictly disallowed by state law, Due Process principles, and Eighth and Fourteenth Amendment prohibitions against injection of arbitrary factors into a capital sentencing proceeding, and according to the bright line rule announced in *Burkhart, supra.*

II. RELEVANT FACTS.

The Court hereby adopts the facts as set forth in Applicant's claim for relief as follows: (footnote contained in original):

> 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.[1] 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 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

[1]Applicant made clear that he was not 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).

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 information about life generally in the general population of SCDC facilities. *Id.*

III. LEGAL STANDARDS AND ANALYSIS.

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), a statutory provision premised in part on Eighth Amendment principles and prohibitions. *State v. Burkhart*, 371 S.C. at 453-54, 640 S.E.2d at 488-89.

The *Burkhart* 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 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 "the 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)). 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. *Id.*

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 pertinent 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. The Court finds that this was prejudicial and harmful. 1996 Tr. 952-53.

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.

Under the facts of Applicant's case, the Court 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 properly to the State eliciting the impermissible information that the Supreme Court has declared completely off limits by either party, any such claim by trial counsel would be of little 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. Applicant's Third Amended Application for Post Conviction Relief pp. 19-20. Trial counsel had no strategic reason or any reason in failing to object properly, or in throwing in the towel and themselves eliciting additional improper information.[2]

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[2] The Court acknowledges *State v. Bryant*, 354 S.C. 390, 581 S.E.2d 157 (2003), a case which is, at first blush, similar to *Bowman*, *Burkhart*, and Applicant's case. *Bryant*, a case in which the Supreme Court did not grant relief on direct appeal under somewhat

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 already noted by this Court, trial counsel testified that failing to object to the introduction of the evidence, specifically about basketball, canteen, soccer matches and TV, among other things, *was not* a strategic decision. PCR Tr. 159-160. 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. The Court finds that trial counsel had no strategic reason for failing to object to the introduction of the improper evidence.

In Applicant's case, the State introduced detailed and lengthy testimony at sentencing as to prison conditions. The Solicitor elicited the following about prison conditions if the Applicant were sentenced to life instead of death: educational programs for inmates; salaried employment in the institutions for inmates, as well as the choice not to work at all; social work group sessions; church programs; various recreation programs to general population inmates including soccer matches, handball courts, large and small recreation yards, uniforms, basketball courts; prison libraries; inmates' owning personal color televisions and having them in their cells; prison day rooms and inmates' access to televisions in those common areas; what the inmates did while there on their free time; how the inmates in the dorm that wins the cleanest dorm award each week are treated with special movie screenings; details about the frequency and availability of

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similar circumstances, is readily distinguishable from *Burkhart* and the case before this Court. In *Bryant*, it was trial counsel who injected the impermissible *Burkhart* evidence into the trial of that case, not the state, which is a distinct difference.

family and friend visitation; canteen privileges and available items; special holiday dinner menus; medical and dental facilities; and dietician nutritional services. 1996 Tr. 771-73, 777-79.

Trial counsel had "no problem" with, "no objections whatsoever" to, and "no objection" to the State asking such questions. 1996 Tr. 771-73. On cross-examination, trial counsel elicited further information in this regard. 1996 Tr. 781-790. Additionally, the prosecutor then argued such testimony to the jurors at closing in support of a death sentence. 1996 Tr. 952-53.

This Court now finds that such evidence injected arbitrary and capricious matters into Applicant's sentencing trial, constituted ineffective assistance of counsel, and that Applicant's right to due process of law was violated. There was no strategic reason for trial counsel's failure to object. Moreover, the Court finds that Applicant was prejudiced by such evidence at the capital sentencing proceeding.

First, *Burkhart* delineates a *substantive* constitutional and state law rule, and specifically prohibits the introduction of arbitrary and capricious matters into sentencing. Defendant Burkhart himself, was the recipient of retroactive application by the Supreme Court of its decision in *State v. Bowman*, 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2006). The *Burkhart* Court specifically acknowledged the fact that Burkhart's case was tried *prior* to the Court's decision in *Bowman*. *Burkhart,* 371 S.C. at 453, 640 S.E.2d at 488. Even though Burkhart's counsel objected to the State's admission of the pertinent impermissible testimony – importantly – defense counsel then *waived* any objection to the pertinent impermissible testimony by introducing equally impermissible testimony of a like kind. *Id.* (The Court notes that this scenario is exactly the same as in the instant case.) Nevertheless, the Court held, defendant Burkhart was entitled to a

new sentencing trial because "the entire subject matter" of the harshness of prison life "injected an arbitrary factor into the jury's sentencing considerations." The Court further found that "[w]hen the jury is invited to speculate about irrelevant matters upon which a death sentence may be based, § 16-3-25(C)(1) is violated," no matter who invited the speculation. *Burkhart*, 371 S.C. at 453, 640 S.E.2d at 488-489 (citing *State v. Sloan*, 278 S.C. 435, 298 S.E.2d 92 (1982).

The impermissible testimony in Applicant's case is at least as egregious as the improper testimony elicited in *Burkhart's* case. The objectionable testimony in *Burkhart* included an inmate's access to the yard, work, education, meals, canteen, phone, library, recreation, mail, television, and outside visitors. *Id.*, 371 S.C. at 487, 640 S.E.2d at 453. Here, the testimony included sports activities such as soccer, handball, basketball, and even uniforms. The testimony in Applicant's case further involved movie screenings for clean dorms, special holiday dinner menus, and medical, dental, and nutritional services. Thus, just as in *Burkhart*, such testimony violated the Applicant's right against arbitrary and capricious matters from being introduced into his capital sentencing trial. *Burkhart, supra.;* S.C. Code Ann. § 16-3-25(C)(1) (2009).

Second, a claim of ineffective assistance of counsel must be examined under the standard established in *Strickland v. Washington*, 466 U.S. at 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). The *Strickland* standard is satisfied if a petitioner establishes both that his attorney's representation "fell below an objective standard of reasonableness," 466 U.S. at 688, and that the petitioner was "prejudiced" by his attorney's substandard performance," *Id.* at 692. *See also, Pauling v. State*, 331 S.C. 606, 609, 503 S.E.2d 468, 470 (1998).

In order to determine whether counsel's conduct was deficient, an applicant must show that the particular acts or omissions of counsel were outside the "wide range of professionally competent assistance." *Strickland*, 466 U.S. at 694. *Strickland's* prejudice component is *not* an outcome determinative test. Applicant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland supra.*, 466 U.S. at 694; *Accord (Terry) Williams v. Taylor,* 529 U.S. 362 (2000). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Pauling v. State, supra.*

The U.S. Supreme Court has informed all courts considering ineffectiveness of counsel claims in capital cases of the appropriate standard. *Wiggins v. Smith,* 539 U. S. 510 (2003); *(Terry) Williams v. Taylor, supra.* In *Williams* the reasonable probability standard was met where unpresented mitigating evidence "might well have influenced the jury's appraisal of [Applicant's] moral culpability." *Williams*, 529 U.S. at 398. Thus, *Williams* makes clear that *Strickland* means what it says. Deviations, big or small, from a prejudice inquiry governed by reliability fails to secure the Sixth Amendment's guarantee of meaningful counsel for the accused. Indeed, *Williams* actually involved the Fourth Circuit's application of an *erroneous* prejudice standard:

> Take, for example, our decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need

> only demonstrate a "reasonable probability that ... the result of the proceeding would have been different."

(Terry) Williams v. Taylor, 529 U.S. at 405-06. (concurring opinion of O'Conner, J.).

This means that the "Strickland standard" for judging ineffective assistance of counsel claims is "reasonable probability," which is less than a preponderance. *Id.*

Normally, a reviewing court also has an obligation to ensure that any alleged "strategy" by trial counsel is reasonable only if trial counsel had first conducted the necessary investigation and review of the facts and the law in order to reach an independent strategy decision. Attorneys in capital cases "must be conversant with constantly new interpretations of constitutional law by not only the United States Supreme Court, but by courts of all jurisdictions, both Federal and State." *Bailey v. State*, 309 S.C. 455, 460, 424 S.E.2d 503, 506 (1992). If counsel fails to object to prejudicial legal errors at trial, a valid strategy cannot be found where "counsel . . . fail[s] to object to comments which constitute an error of law and are inherently prejudicial." *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). Likewise, a valid strategy cannot be found when the professed strategy is invalid under an objective standard of reasonableness. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Finally, 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).

Because *Burkhart* wholly bans evidence of the nature that was injected into Applicant's sentencing proceeding as unconstitutional *per se*, there is no need to inquire of trial counsel concerning their failure to object to the evidence or as to strategy reasons for not objecting. Trial counsel admitted that they had no strategic reason for failing to object to the introduction of the

evidence at issue. PCR Tr. 159-160. The State did not avail itself of the opportunity to seek additional testimony or evidence on this point. In Applicant's case, it is readily apparent from the trial record itself that trial counsel had no strategy reason in allowing the evidence, and made no objection whatsoever to the testimony. Indeed, it is hard to see how allowing testimony about television sets, soccer uniforms, special holiday menus, movie screenings, and the like, advanced any part of Applicant's case at sentencing as put forth by trial counsel. Our Supreme Court has "long held 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." *Burkhart,* 371 S.C. at 487, 640 S.E.2d at 453, *citing State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982).* Here, it is obvious that none of the prison condition evidence had anything remotely to do with the defendant's character, circumstances of the offense, or any reasonable strategy related to convincing a juror that Applicant should receive life over death.

It is irrelevant that the *Burkhart* decision was issued in 2007, while Applicant's sentencing trial was held in 1996. *Burkhart* was primarily founded upon established South Carolina law, including a statute in effect at the time of Applicant's sentencing trial: "[W]e 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." *Burkhart,* 371 S.C. at 488, 640 S.E.2d at 453. Thus, trial counsel's failure to object constituted ineffective assistance of counsel.

Third, the evidence concerning prison conditions violates due process. Our Court has held that such testimony constitutes arbitrary and capricious evidence. *Burkhart, supra.;*

Bowman, supra. The introduction of arbitrary and capricious evidence violates basic due process guarantees at a capital sentencing trial. *See Darden v. Wainwright,* 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); *Caldwell v. Mississippi,* 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985); *State v. Copeland,* 278 S.C. 572, 300 S.E.2d 63 (1982).

Essentially, the evidence amounted to the introduction by the State of additional non-statutory aggravating factors that were, in the first instance, not even admissible. It is significant that the State then relied on this same evidence during its closing argument to persuade jurors to vote for a death sentence. Thus, the Applicant's due process rights were violated by the introduction of such evidence. Such evidence, and closing argument by the prosecutor, "so infected the trial with unfairness" as to make the resulting death sentence a denial of due process. *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S. Ct. 1868, 1871, 40 L.Ed.2d 431, 437 (1974); *State v. Cockerham,* 294 S.C. 380, 382, 365 S.E.2d 22, 23 (1988).

Lastly, the Applicant was prejudiced by this evidence. At the critical sentencing stage, the jurors heard evidence about television sets, soccer uniforms, canteen privileges, and similar evidence already recounted herein. The jurors then heard extensive argument by the prosecutor to consider such evidence in favor of a death verdict. None of this was relevant to the Applicant's character or the offense. It created an environment for jurors to speculate about irrelevant conditions surrounding a sentence of life without parole. "When the jury is invited to speculate about irrelevant matters upon which a death sentence may be based, *§ 16-3-25(C)(1)* is violated." *Burkhart,* 371 S.C. at 489, 640 S.E.2d at 453, *citing State v. Sloan,* 278 S.C. 435, 298 S.E.2d 92 (1982). Fundamentally, the prejudice to the Applicant is that the prosecution was

allowed to use -- and the jurors consider in deciding between life (without parole) and death—information and factors which were not even admissible.

ORDER

IT IS THEREFORE ORDERED that Applicant's sentence of death is vacated and for all of the foregoing reasons, the Court hereby **grants** Applicant relief under PCR Claim 9 (G, H), and vacates Applicant's death sentence. The matter is remanded to the Court of General Sessions for a new sentencing proceeding, unless the State chooses not to seek the death penalty for a third time. This Order is issued pursuant to *State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007), S.C. Code Ann. § 16-3-25(C)(1) (2009), U.S. Const. Amend. 5, 8, and 14; S.C. Const. Art. I §§ 3, 14, and 15; and other applicable law.

AND IT IS SO ORDERED.

_____
Honorable Diane Schafer Goodstein
Presiding by Designation of the Supreme Court
First Judicial Circuit

_____, 2009
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 Proposed Order Granting Post Conviction Relief on Grounds 9(G) and 9(H) on counsel for Respondent by U.S. Mail and by electronic transmission via .pdf file and Word file to his address as follows:

Wm. Edgar Salter, III
Senior Assistant Attorney General
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P.O. Box 11549
Columbia, S.C. 29211
AGESALTER@SCAG.GOV

DIANA L. HOLT
Counsel for Mr. Rogers

July 24, 2009
Columbia, South Carolina

The Supreme Court of South Carolina

The State, Respondent,

v.

Timothy D. Rogers, Appellant.

The Honorable Charles W. Whetstone, Jr.
Dorchester County
Trial Court Case No. 1993-GS-18-101

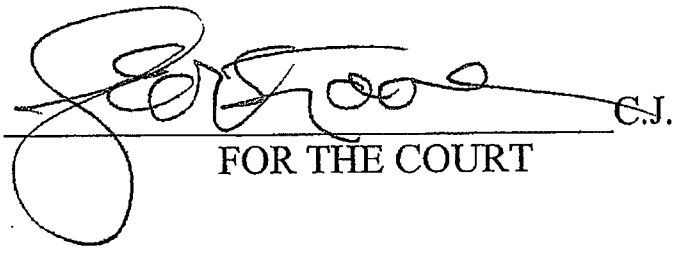
ORDER

By order dated March 9, 2000, this Court issued an order staying the execution of appellant to allow him to proceed in post-conviction relief (PCR). The PCR action was filed as Rogers v. State, 2000-CP-18-00575. Apparently, the evidentiary hearing has been held, but no final order has been issued.

A final order shall be issued in the PCR case by September 1, 2010. If the order cannot be issued within this time period, the PCR judge

shall request a continuance from this Court.

IT IS SO ORDERED.



C.J.

FOR THE COURT

Columbia, South Carolina

June 17, 2010

cc: Jeffrey P. Bloom, Esquire
Diane Holt, Esquire
Assistant Deputy Attorney General Donald J. Zelenka
Senior Assistant Attorney General William Edgar Salter, III
The Honorable Diane Schafer Goodstein

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2000CP1800575

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2010 SEP -2 PM 2:13
CLERK OF COURT
DORCHESTER COUNTY

Timothy Dion Rogers *vs.* **State of south carolina**

CHECK ONE:

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

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

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

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

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Emailed on this date to the attys below, attached is a certified copy of the first page to be attached to the order.

Dated at St. George, South Carolina, this 2nd day of September,2010.

Court Reporter:

Cheryl Graham

- Cheryl Graham, Clerk of Court, By: Carolyn Ayer, Deputy

This judgment was entered on the 2nd day of September, 2010, and a copy mailed first class this 2nd day of September, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Jeffrey P. Bloom Attorney at Law 1911 Pickens St. Columbia, SC 29201
Diana L. Holt Attorney at Law P.O. Box 6454 Columbia, SC 29260

Wm. Edgar Salter III Attorney at Law P.O. Box 11549 Columbia, SC 29211

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2010 SEP -2 PM 2:13
CLERK OF COURT
DORCHESTER COUNTY

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER)

Timothy Dion Rogers,

Applicant,

vs.

Jon E. Ozmint, Director, South Carolina Dept. of Corrections,

Respondent.

C. A. No. 00-CP-18-575

ORDER

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CLERK OF COURT
DORCHESTER COUNTY

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

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	)	IN THE COURT OF COMMON PLEAS
Timothy Dion Rogers, Applicant, vs. Jon E. Ozmint, Director, South Carolina Dept. of Corrections, Respondent.	)	C. A. No. 00-CP-18-575 ORDER

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(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 in part and grants relief in part 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.

Applicant timely served and filed a Notice of Appeal. Applicant later 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, 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.

Final Brief of Appellant, p. 3. Respondent filed the Final Brief of Respondent on July 7, 1995.

The South Carolina Supreme Court affirmed his murder conviction, but reversed his death sentence and remanded the matter back for resentencing because the trial judge erroneously refused to give a *Simmons v. South Carolina*, 512 U.S. 154 (1994), instruction on his parole ineligibility. *State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996) (*Rogers I*). Chief Deputy Appellate Defender Joseph L. Savitz, III, represented Applicant on direct appeal.

Judge Whetstone held motions hearings in connection with the resentencing proceeding on February 8 and November 20, 1996.[1] On December 2-5, 1996, a resentencing proceeding was held before Judge Whetstone and a jury. Mr. Runyon and Mr. Mark Leiendecker represented Applicant. The State, again, relied upon the statutory aggravating circumstances that the offender, by his act of murder, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and, that he killed a child under the age of eleven years old. The jury unanimously found that Applicant had killed a child under the age of eleven, *see* § 16-3-20(C)(a)(10), and it recommended a sentence of death.

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,

[1]The February 8, 1996, hearing was before the Honorable Victor A. Rawl. Judge Whetstone conducted the November 20, 1996, hearing.

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 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. Burditt'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 Burditt'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]s 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.. 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 testified was not intoxicated, and he was able to drive without any difficulty. **1994 R. p. 717–20; 740; 743–44; 928-34; 950.**

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

[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.

[2] Mr. Carver testified he took this weapon in case he needed it for deer hunting.

the store and near a pay telephone. He and Stephanie went inside to get her a sandwich and Mr. B[redacted] more beer. However, Mr. Carver stayed in the truck. On his way into the store, Mr. B[redacted] saw Mr. Anthony Riley, a friend and employee 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. After Stephanie got her sandwich, she walked outside and got into the truck. **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 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. It is uncontested that Mr. Patterson is the person who first engaged in a verbal dispute with Mr. Carver and Mr. B[redacted], which quickly dangerously escalated.[6] **1994 R. p. 728-32; 734; 745-48; 754-55; 764; 798-801; 939-41; 958.**

When Patterson flipped a lit cigarette on Mr. Riley's shoe, Mr. Riley simply left the store and walked back home. Mr. B[redacted] walked back over to his truck and got into it; but Patterson would not allow him to close the door. The verbal altercation continued to escalate. Mr. B[redacted] and Mr. Carver testified applicant pointed his gun at Mr. B[redacted]'s forehead and said, "I'll kill you." Evidence at the PCR trial was that Mr. B[redacted] or Mr. Carver or both used racial slurs

[3] While Mr. B[redacted] and Mr. Carver are white, Mr. Riley is black.
[4] Applicant and assault victim are black. Patterson is white.
[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 or Patterson saying, "Don't fuck with them crack-head-mother fuckers ..."

towards applicant in their anger. Applicant shot once at the left hubcap of the pickup truck. Mr. B[redacted] then cranked up his truck and testified he attempted to leave the parking lot. Applicant testified B[redacted] was backing up towards him and reaching behind the seat as if for a gun. Applicant, who by all accounts was not wearing his prescription glasses that night fired a second shot. The second bullet pierced the middle of the back window of the truck, entered the back of Stephanie B[redacted]'s head and exited through her forehead. Applicant, Mr. Patterson and Ms. assault victim fled the scene. **1994 R. p. 734-40; 750-53; 754-55; 761; 945-50; 953-57; 960.**

Stephanie B[redacted] was transported to Trident Hospital where she died the next day. **1994 R. p. 854-59.**

assault victim[7] 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.**

[7] 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 during a recess in the trial just following her testimony. *See* **1994 R. p. 879.**

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.[8] assault victim testified assault victim could not hear what was being said. Neither of these men was fighting with Patterson. 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.**

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. She testified 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

[8] Bickham claimed that she did not see Patterson arguing with a black man.

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.**

It is notable that shortly before trial a relative of decedent's family approached witness, Anthony Riley in an apparent attempt to intimidate him to give testimony favorable to the State. This Court notes Solicitor disclosed this event to the Court and while defense counsel cross examined witness Riley regarding the encounter, no such on the record inquiry was made of other witnesses. **1994 R. p. 783-88.**

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 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.**

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 Burditt'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[9] 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 officer identified himself, no one responded.

[9] Chief McLaughlin and Lieutenant Lester Patrick of the Tuskegee Police Department, as well as an agent from the Alabama Bureau of Investigations accompanied him.

The officers subsequently found Applicant in the apartment. **1994 R. p. 892-93; 906-13; 916; 919-20.**

After the officers arrested Applicant, Detective Douglas read Applicant's *Miranda* rights[10] 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. Applicant claimed that he thought the man in the pickup (Mr. B[redacted]) was reaching behind the seat for a weapon. Applicant has not 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. Applicant acknowledged that he had possessed and fired the weapon that killed Stephanie, that he had pulled the gun and fired it after what he described was a racially charged confrontation, and that he never meant to harm the child, only to break up the confrontation.

FAILED PLEA

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

[10] *Miranda v. Arizona*, 384 U.S. 436 (1966).

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 murder 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 circumstances found by the jury.

GROUNDS 9(A)(ii)-(iii

The court will first discuss Applicant's grounds 9(A)(ii) - (iii). Applicant's allegations are that trial counsel: (1) failed to conduct any *voir dire* with respect to a number of jurors (Ground 9(A)(ii)), and (2) failed to ask jurors if they would discriminate against Applicant because he was black and his victim was white. Ground 9(A)(iii). 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).[11] 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.

[11] 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 addressing the process and purpose of voir dire, we quoted the United States Supreme Court:
>
> > "'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).

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 within the discretion of the trial court. *State v. Hill*, 331 S.C. 94, 501 S.E.2d 122 (1998).[12]

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

[12] 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.

county and helping prepare for *voir dire*." He further testified that counsel 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."[13] **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.**

[13] 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.

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 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[14] 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.[15] 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

[14] He received this because he was Chairman of the Charleston County Election Commission at the time. **PCR Tr. p. 945.**

[15] 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.**

penalty. 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. 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 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.[16]

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.[17] Applicant's complaint about

[16] In connection with **Grounds 9(B)(ii)-(iii)**, 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).

[17] **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.

the failure to examine a number of jurors about their views on capital punishment totally ignores that counsel did question eight[18] 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 has there been any demonstration that

[18] **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).**

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....").

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)(i), *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)(ii)

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.*[19] As discussed, Rogers received a new sentencing hearing following his appeal of the 1994 death sentence. Therefore, he cannot show any conceivable prejudice from counsel's performance. *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

[19] 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.

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 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)(i), *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.[20] 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

[20] **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).**

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)(iv)-(vii), and (x)

Applicant further alleges that trial counsel were ineffective for failing to adequately investigate and prepare the guilt phase of the trial (**Ground 9(A)(iv)**); for failing to seek expert assistance regarding a material medical condition of Applicant (**Ground 9(A)(v)**); for failing to effectively confront and rebut the State's witnesses (**Ground 9(A)(vi)**); for failing to present readily available and favorable defense witnesses and evidence (**Ground 9(A)(vii)**); and for failing to review "critical evidence" which the prosecution had made for inspection by the defense (**Ground 9(A)(x)**). 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 Tonya Bickham and Daxton A. Patterson. 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[21] 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 with him, which Bickham 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.[22] The confrontation at that point was escalating, however, assault victim could not hear what was being said. She testified at trial that neither of the white men was fighting with Patterson. She further testified that neither had done anything to make him mad. Yet, at some point, Mr. Patterson spat on one of them. assault victim testified Applicant then turned around, dropped the telephone and began arguing with the men as well. When he did so,

[21] 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 during the recess in the trial following her testimony. *See* **1994 R. p. 879**.

[22] assault victim claimed that she did not see Patterson arguing with a black man.

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 stated 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. She testified 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. She testified, neither of the two men had threatened Applicant, her or Patterson at any time. She further testified that neither had they done anything to provoke Applicant or Patterson. **1994 R. p. 833-34; 839-41.** At the first recess following her testimony, the Solicitor announced he was dismissing her murder charges. **1994 R. p. 878-79.**

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 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.**

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.[23] 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 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 when she testified at trial as she was now testifying 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 challenged 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

[23] It is confusing from her PCR testimony (**PCR Tr. p. 322**) as to when she claims the first shot was fired.

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 told him 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 he 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.[24] 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**.

[24] He claimed he saw a 9mm. Pistol and a shotgun. **PCR Tr. pp. 228**.

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, 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 Applicant had worked on a car. *See* **PCR Tr. pp. 248-50.**[25] Patterson also did not recall Mr. Riley being present on the night of the shooting. Finally, Respondents challenged Patterson's account by noting that the inconsistency between that version of the shooting and Applicant's December 2,

[25] The sun was going down when the incident occurred but there was some limited lighting outside the store. **PCR Tr. p. 251.**

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."[26] **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 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

[26] 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.**

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 extent 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 Patterson 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, Bickham or other witnesses, such as Stephanie Simmons. However, counsel made a decision to withdraw their request for an investigator because the case was rather simple 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 they 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.[27] 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 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.**[28]

[27] 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.**

[28] 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.**

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. Burditt 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 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. 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 great 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 suspect. Moreover, the Court would note that Patterson's demeanor in this Court was such to render him less credible. Under these circumstances, the Court finds that counsel's performance in the guilt phase 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*, 373 S.C. 367, 645 S.E.2d 2006 (2007) (holding that trial judge did not err 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."[29]

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 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.**

[29] 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.**

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,[30] 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 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

[30] 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.

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 the trial judge gave the charge. 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)(v)**, 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.[31] 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. **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.

[31] Mr. Isaiah Jennings and his cousin, Herthenia Lincoln, were also in the store.

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).[32] 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

[32] 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.

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 is admissible. The Court finds that the *Day* ruling is not so 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.").[33]

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,

[33] 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*

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 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 a close friend of 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).[34]

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

[34] 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."

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 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 this evidence 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] and/or Mr. Carver. Further, trial counsel had used a 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).

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.[35] **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 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.**

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[35] 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.

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.[36] 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."[37] The Court finds that Mr. Runyon's testimony is credible and that he, in fact, spoke to Lt. Asbell about the case prior to

[36] 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**.

[37] 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**.

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 failed to prove any prejudice, resulting from counsel's in the guilt phase. 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 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 in the guilt phase, there was overwhelming evidence of guilt. Based on this record, the Court finds that in the guilt phase Applicant has failed to demonstrate 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)(v))

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).[38] 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 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

[38] 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.**

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. *See 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.**[39] [40]

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 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 un-enhanced 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

[39] This transcript is of the hearing was held on August 23, 2005.
[40] He originally copied the VHS video onto a digital tape and then transferred that onto a DVD. **2005 PCR Tr. pp. 13-14.**

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.[41] 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.**

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

[41] 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.**

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[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).[42] 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 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.

[42] 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.

Also, counsel had already impeached Mr. Riley, Mr. B[redacted] and Mr. Carver, as discussed.[43] 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 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

[43] Counsel's examination of Mr. B[redacted] elicited that Mr. B[redacted] 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[redacted] had consumed too much alcohol. 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 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, he 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.[43] 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 think Applicant threatened to kill him right before B[redacted] got back into the truck. **1994 R. pp. 741-68.**

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)(xi)

The Court rejects Applicant's argument (**Ground 9(A)(xi)**) 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]

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.

[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 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 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*.

> 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, 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

[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").

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 in the guilt phase trial. *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[44] 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.

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[44] 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)").

GROUND 9(B).

Ineffective Assistance of Counsel at Applicant's Resentencing Trial.

Although the Court denies relief as it relates to the guilt phase, the Court grants relief requested in the Application as it relates to the resentencing phase. *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127, 128 (1992). 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."[45] *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).

[45]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).

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. 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 make motion to withdraw the part of the plea related to the 2 CSC with a minor second degree convictions.
- 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; and,

- Failed to object to improper closing arguments by the State.

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.

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.[46] PCR Tr. 104.

[46]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 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 Ms. [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

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 specific individualized intention of causing her death. Mr. Leiendecker described Applicant's reticence 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

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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.

unable to complete the final leg of the three-part plea agreement that Runyon had devised. PCR 777-81. 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).[47] 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.

[47]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.

- 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 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.*

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 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").[48]

B. Failure to *Voir Dire* Jurors concerning views on capital punishment. (Ground 9(B)(i).

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); 513-21(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.**[49] Also, Juror Bradley was removed for hardship and was replaced by an alternate. **See 1996 R. pp. 578-83.**

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[48] 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.

[49] 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

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 that he had tried 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 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[50] 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 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

[50] He received this because he was Chairman of the Charleston County Election Commission at the time. **PCR Tr. p. 945.**

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.[51] Five of these were in South Carolina. As a part of her services, she has sat in court and assisted

[51] 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).

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 only be "[b]asic demographic information." Further, she did not utilize demographics greatly. She conceded that a jury pool in Dorchester 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[52] – including eleven of the petit jurors who sentenced Applicant.[53] 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

[52] **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.**

[53] **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 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.

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 any 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....").[54]

C. Racial Bias and *Turner v. Murray*. Ground 9(B)(ii).

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

[54] 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).

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.*[55] *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 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

[55] 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.

("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, relief cannot be granted on this ground.

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 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 Burditt 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 Ms. 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 [redacted] (applicant's mother), 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 Ms. 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 Ms. 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 s' 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.[56]

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]

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

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 before any shooting. PCR Tr. 317. Ms. Bickham 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. It is important that assault victim's testimony during resentencing would have come after her murder charges were dismissed "with prejudice" rather than while the murder charges were still pending.

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 of suspect creditability. 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 not have made a difference at the resentencing trial and therefore there is no prejudice. 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 no difference to the jury 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." Their failure to do resulted in prejudice to Applicant.

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.[57] 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.

[57]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.

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 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). Even if not all need to testify regarding whether the shooting was an accident; I do find he would have been able to testify regarding the child's visibility above the seat. 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.

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 Burditt'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 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 Burditt'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 and the fact that evidence was missing 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 no difference to the jury 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 M[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 8-2005 Supp. 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).

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 8-2005 Supp. 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 8-2005 Supp. 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 8-2005 Supp. 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, if they had determined it was possessed by the Solicitor.

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 8-2005 Supp. 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 8-2005 Supp. Tr. 59. Additionally, trial counsel strategically asked Mr. Carver about the presence of and consumption of beer in the Burditt truck on cross-examination. 1994 Tr. 951. I find that the videotape would have provided trial counsel with additional impeachment evidence against Mr. Carver, the state's star closing witness in 1994. I find that this evidence may 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. Bailey'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 8-2005 Supp. 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 8-2005 Supp. 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 Burditt'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 8-2005 Supp. 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, [applicant's mother], prior to the resentencing trial. He testified that he has also had some interaction with Ms. [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.

Trial counsel admitted that they 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 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 and the 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 Ms. [applicant's mother]' 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]' 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").[58]

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. *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 deficiently because "counsel abandoned their investigation of petitioner's background

[58]Respondents rely on *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 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*, 550 U.S. 286, 127 S. Ct. 1706 (2007).

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.[59]

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.

[59]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 9(C)

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

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."[60] *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

[60]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).

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 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.[61] 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

[61] 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 Ms. [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.

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 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.

This court finds the plea court had subject matter jurisdiction in that case. The court is further satisfied that Mr. Rogers waived any right to have the matter resolved in Charleston County.

2. Trial Counsel Rendered Ineffective Assistance of Counsel in Failing to Investigate and Determine Jurisdiction of the two CSC with a Minor Charges.

As an independent ground requesting 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 minor indictments.

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

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).

The prejudice of these convictions 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 an 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. When

the murder plea failed counsel failed to move to set aside the CSC convictions and pleas. 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, Ms. Bickham, 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 9(D)

Ineffective Assistance of Appellate Counsel.

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."[62] 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

[62]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."[63] *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

[63]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.

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 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 fail to find that the outcome of the direct appeal would have been different. Therefore, I find that Applicant fails to be entitled to the relief he seeks.

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. Burditt 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).[64] *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

[64] 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.

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:

> 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.[65] 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.

[65] However, it is determined that review of the tape may or may not have disclosed the empty twelve pack of beer in the truck bed. Applicant's (Proposed) Order, p. 37.

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.[66] This requires a reviewing 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

[66] 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 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.

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.**

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.[67] 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 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.[68] 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 says 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.

[67] Counsel thereafter suggested that Mr. B[redacted] had consumed too much alcohol.
[68] Other evidence established that there was a shotgun in the truck as well.

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 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).[69] 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 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 Bickham. 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

[69] Contrary to Applicant's argument, the Court finds that Mr. Burditt 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.

(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 as it relates to the guilt phase of the trial is denied. The application for Post-Conviction Relief as it relates to the sentencing phase of the trial is granted and a new trial for the sentencing phase is hereby ordered.

AND, IT IS SO ORDERED this ____ day of _____, 2010.

_____
DIANE S. GOODSTEIN
Judge, First Judicial Circuit

_____, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	Case No. 00-CP-18-575
	)	
TIMOTHY D. ROGERS, Applicant,	)	
	)	
v.	)	MOTION TO ALTER OR AMEND THE JUDGMENT
	)	
JOHN OZMINT, Commissioner, South Carolina Department of Corrections, and State of South Carolina Respondent.	)	

FILED - RECORDED
2010 SEP 13 AM 10:31
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

Pursuant to Rule 59, SCRCP, Applicant moves this Court to alter or amend the judgment signed by the Court on September 1, 2010, and received by Applicant's counsel from the Dorchester Clerk of Court via electronic mail on September 2, 2010. Applicant requests this Court alter or amend the judgment because this Court made findings of fact that are not supported by the record (and are contrary to the record), made potentially inconsistent findings of fact, and made erroneous legal conclusions by rulings and analyses that are contrary to established, applicable state and U.S. Constitutional law.

I. Introduction. [1]

Applicant primarily addresses the Court's findings of fact and holdings on Applicant's claims of ineffective assistance of counsel and violations of Due Process in his 1994 trial regarding the "guilt" phase, and how such claims impact upon the Court's findings in favor of sentencing relief from his 1996 resentencing trial, and one claim which was left unaddressed in the Court's Order. Applicant will first address the basic facts of this case and the factual findings of this Court

[1] Applicant does not waive or abandon the claims not addressed herein and incorporates all prior pleadings and arguments.

that are either significant to the legal claims addressed in this motion and/or are not supported by the evidence before this Court. Applicant reserves his right to supplement this motion as needed.

II. The Relevant Facts Found by This Court.

The Court found that Applicant was responsible for this homicide, although also finding that Applicant has always maintained it was an "accident" - in layman's language, and not legal terms. Order at 16, 20; *See also*, Order at 108-109 (Court's finding of Applicant's relevant testimony at trial). The Court found material the testimony of several witnesses, including: two eyewitnesses who were also friends of Applicant, [assault victim] and Dax Patterson; witnesses who had knowledge of the Applicant particularly around the time of the incident, Stephanie Simmons and James Robinson; EMS responder George Scharf, and law enforcement Det. Earl Asbell who processed the crime scene evidence and related evidentiary items, including a news media video of the scene immediately after the incident and in possession of the State prior to trial. Order at 15-19, 110-123. The Court also found material other witnesses in mitigation regarding claims submitted by Applicant as to sentencing. Order at 123-141, 172.

In making its findings and in granting sentencing relief from the 1996 resentencing trial, the Court properly vacated Applicant's death sentence and ordered a new sentencing trial. Order at 172. The Court also vacated the Applicant's two staggered convictions for criminal sexual conduct with a minor (hereinafter, "CSC"), involving his underage girlfrien[assault victim]. Order at 144-151.

The Court, however, denied relief from applicant's 1994 trial convictions, as well as other claims the Court also decided and denied. Order at 44-46, 172. The Court found that no prejudice resulted from any alleged errors as to the 1994 "guilt" phase trial. Order at 21-94. The Court also made findings as to credibility of and performance by trial counsel at the 1994 trial which are

inconsistent with the Court's findings of fact and rulings vacating the 1996 resentencing determination, in granting a new sentencing trial.

Thus, while the Court vacated Applicant's death sentence and reversed Applicant's guilty pleas to the two CSC charges, Applicant respectfully submits that there are inconsistencies within the Court's Order, and other remaining matters, which need to be addressed so that the Court's findings and conclusions are clear, supported by the record, and consistent with applicable, established law, and provide finality to this proceeding. *See Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008), *cert. denied, South Carolina v. Council*, 129 S. Ct. 2770, 174 L. Ed. 2d 284 (2009); *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007), *cert. denied, Ozmint v. Ard*, 128 S. Ct. 370, 169 L. Ed. 2d 247 (2007); *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004), *cert. denied*, 544 U.S. 943, 125 S. Ct. 1645, 161 L. Ed. 2d 511 (2005).

III. Material Witnesses and Inconsistent Findings.

The Court found both assault victim and Dax Patterson to be credible witnesses based on their testimony at the PCR hearing, in granting sentencing relief from the 1996 sentence.[2] Order at 110-113. The Court, however, in analyzing claims for "guilt" phase relief from the 1994 trial, found both assault victim and Patterson not credible. Order at 44-45. In this regard, the Court also found counsel ineffective for not interviewing or presenting assault victim's and Patterson's testimony

[2] The Court specifically lists the many reasons why assault victim and Patterson are credible, and then inadvertently in the same paragraph states that they are of "suspect credibility," while continuing to list the reasons that they are, in fact, credible, and why trial counsel was ineffective for failing to interview them and present their credible testimony. Order at 112-113. Thus, Applicant respectfully submits that some of the Court's "findings" in this regard may actually be simple typographical errors.

in the 1996 resentencing trial, Order at 112-113, but then found counsel effective in the same manner as applied to guilt phase issues from the 1994 trial. Order at 44-45.

Similarly, the Court made inconsistent findings as to credibility and/or ineffectiveness of trial counsel, with: Stephanie Simmons,[3] *Cf.* Order at 113-114 *with* Order at 47-49; George Scharf (EMS paramedic), *Cf.* Order at 114-115 *with* Order at 50-51; James Robinson, *Cf.* Order at 115-116 *with* Order at 53-55; Det. Earl Asbell, *Cf.* Order at 116-117 *with* Order at 58-60; Homer Fesperman (testimony about video enhancements), *Cf.* Order at 118-120, 122-123 *with* Order at 71-75.

Additionally, in making its prejudice finding to vacate the death sentence and grant sentencing relief, the Court incorporated its previous findings as to the credibility of witnesses. Order at 141, fn. 59. But as noted above, these credibility findings are inconsistent, leaving it unclear which findings the Court is referencing. Potentially, it appears that the Court might unintentionally have incorporated its findings of non-credibility to support its findings of credibility as to the named witnesses.

The Court need not have found all the referenced witnesses, *infra and supra,* not credible in the guilt phase to deny relief on applicant's guilt phase IAC (ineffective assistance of counsel) claims. Without waiving any and all previous claims in this proceeding, Applicant suggests that, instead, the Court could accomplish its goal of denying guilt phase relief merely by finding that applicant was not prejudiced by any errors trial counsel made in the guilt or innocence phase of

[3] Similar to the above footnote regarding inadvertent, typographical errors as to assault victim and Patterson, the Court finds that Simmons' testimony "probably would have made no difference" to a sentencing jury; but in this same paragraph the Court finds her credible, that trial counsel was ineffective in failing to interview her, and that Applicant was prejudiced at sentencing. Order at 114. Thus, the "would have made no difference" statement is likely a simple scrivener's error, and more than likely should read: "would have made a difference."

Applicant's trial. The Court's order must be interpreted in a manner consistent with its stated conclusions. Removing the negative credibility findings and entering the lack of prejudice findings as to the guilt phase claims will completely serve the goal of making the Court's order consistent with the Court's ruling that a new sentencing phase is required.

Potential appellate review of this matter will involve the following applicable standard of review: The reviewing court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. *Gilchrist v. State*, 350 S.C. 221,565 S.E.2d 281 (2002) *citing Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). The appellate court "gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." *Brown v. State*, 375 S.C. 464, 469, 652 S.E.2d 765, 768 (Ct.App. 2007) *quoting Marlar v. State*, 373 S.C. 275, 279, 644 S.E.2d 769, 771 (Ct. App. 2007) (*citing Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)); *McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995).

The appellate court must affirm the PCR court's decision whenever its findings are supported by any evidence of probative value. *Custodio v. State*, 373 S.C. 4, 9, 644 S.E.2d 36, 38 (2007); *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). However, *if the decision is found not to be supported by any probative evidence*, then the appellate court will not affirm the PCR Court. *State v. Edmond*, 341 S.C. 340, 347, 534 S.E.2d 682, 686 (2006); *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996) (*emphasis supplied*).

The inconsistencies as to witness credibility and ineffective assistance of counsel regarding the previously named witnesses could have the effect of leading a reviewing court to rule that the PCR Court's decision to grant sentencing relief is not supported by any probative evidence, because the PCR Court had already found the same witnesses not credible and had also found trial counsel's performance adequate regarding those witnesses.

Therefore, while Applicant supports the Court's findings of fact and conclusions of law in granting sentencing relief in this matter (and, again, without waiving any and all previous claims in this proceeding), Applicant submits that the PCR Court must address the relevant inconsistencies as to the witnesses and trial counsel's effectiveness, otherwise, the relief granted may be undermined in a manner not intended by the PCR Court.

IV. The Law Applicable to *Brady* Claims.

Similarly, as to the videotape news footage of the scene immediately after the incident, the Court made inconsistent findings. The Court found no *Brady* violation and no prejudice when analyzing the material in the context of the 1994 trial. Order at 40-41, 74-75, 160, 163-166. Then the Court made a finding of materiality and prejudice when analyzing the same evidence in the context of the 1996 resentencing trial. Order at 119-120. The Court specifically made a finding that as it related to the 1996 resentencing trial, the videotape was "valuable" impeachment evidence, especially as to Carver, "the State's star closing witness," and that the evidence would "have made a difference to at least one juror" at sentencing. *Id.* At issue is the State's failure to disclose the exact contents of the tape, and also for the State to create a misleading and false impression at trial as to witnesses B[redacted] and Carver.

It is helpful to first review the appropriate standard under *Brady* and its progeny.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that 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." In *United States v. Bagley*, 473 U.S. 667, 676 (1985), the Court made clear that "impeachment evidence . . . falls

within the *Brady* rule," because impeachment evidence "if disclosed and used effectively, . . . may make the difference between conviction and acquittal."

Brady claims require that "[t]he defendant must show that there is a reasonable probability that . . . 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 test enunciated in *Strickland v. Washington*, 466 U.S. 688 (1984), for resolving Sixth Amendment claims of ineffective assistance of counsel). In making this analysis, the Court must view "the totality of the evidence before the judge or jury," *Strickland*, 466 U.S. at 695, because "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support," *Id.* at 696. *See also State v. Osborne*, 291 S.C. 265, 266, 352 S.E.2d 276, 276 (1987) ("in determining the materiality of nondisclosed evidence, an appellate court must consider that evidence in the context of the entire record"). Finally, *Brady* requires a cumulative analysis of prejudice. *See Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (materiality must be "considered collectively, not item-by-item").

"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*, 194 F.3d at 557 (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*, 514 U.S. at 437. Even a true open file policy does not negate the "duty to learn" announced in *Kyles*. *Strickler*, 527 U.S. at 281.

Nowhere in the *Brady* decisions from the United States Supreme Court and the South Carolina Supreme Court is any exception made for non-disclosure by an alleged open file policy. *See, Riddle v. Ozmint*, 369 S.C. 39, 46-47, 631 S.E.2d 70, 74 (2006) ("Even had a true "open file" policy existed, the existence of such a policy does not negate the solicitor's Brady obligation."); *See also Smith v. Secretary of New Mexico Dept. of Corrections*, 50 F.3d 801 (10th Cir. 1995) (relief granted where material evidence relating to a third person/suspect was not disclosed; prosecutor's lack of actual knowledge was irrelevant because police knew, and prosecution's "open file" was not sufficient to discharge its duty under *Brady* where all of the questioned documents were not contained in the prosecutor's file).

The *Brady* decisions from both the United States Supreme Court and the South Carolina Supreme Court make it clear that the burden is on the prosecution and not on the defense, even under circumstances where the defense has reason to question the existence of available information. For example, in *Bagley*, a narcotics and firearms case, the prosecution failed to disclose contracts to pay two material witnesses for testimony and cooperation. These two witnesses were known to the defense and yet there is no mention that the prosecution's duty was relieved because defense counsel did not seek to interview these witnesses or police officers about possible contracts. To the contrary, the Court held that "the more specifically the defense requests certain evidence, . . ., the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption." 473 U.S. at 682-83. This holding is contrary to the decision of this Court.

Likewise, in *Kyles*, the prosecution failed to disclose, amongst other things, a number of prior inconsistent statements by an informant, who had focused the investigation on the petitioner and assisted law enforcement repeatedly. During the trial, the defense argued that he was framed by the informant, who was the actual killer. 514 U.S. at 429-30. Again, clearly the defense was aware of the informant, but the Court makes no mention of the prosecution's burden being somehow relieved because the defense did not seek to interview the informant or the officers to obtain the prior statements. To the contrary, the court granted *certiorari* and granted relief in *Kyles* because "[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case," 514 U.S. at 422 (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)), and because Due Process places the burden on "the individual prosecutor" and not the defense, 514 U.S. at 437.

The PCR Court's reliance on *United States v. Wilson*, 901 F.2d 378 (4th Cir. 1990), and *Barnes v. Thompson*, 58 F.3d 971 (4th Cir. 1995) is misplaced. In *Wilson*, there was no evidence outside that obtained by defense counsel in interviewing the questioned witness (for whom impeachment information was allegedly undisclosed) that any additional information was available to the government. Indeed, counsel did not offer any evidence of this even after the District Court ordered it to do so. 901 F.2d at 381. In *Barnes*, the court was primarily addressing whether the petitioner's failure to assert the *Brady* issue in his first state habeas was excused. The applicable standard in this situation requires an analysis of whether the petitioner engaged in a "reasonable and diligent investigation" but was prohibited from learning of the evidence and

presenting the claim because of some external factor.[4] *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 498 (1991); *Clanton v. Muncy*, 845 F.2d 1238, 1241 (4th Cir. 1988).

Applicant's case is clearly distinguishable from both of these cases. Unlike *Wilson*, Applicant has presented evidence that impeachment information was in the possession of the prosecution but not disclosed. Moreover, unlike *Barnes*, which is a different procedural status with different legal standards, the burden is not on the defense to show that defense counsel could not discover and present this information. This burden was on "the individual prosecutor" here, *Kyles*, 514 U.S. at 437, not on Applicant's trial counsel.

In Applicant's case, the PCR Court found that *Brady* does not apply to Applicant's claims because the videotape was "reasonably available to Applicant from other sources." Order at 160. The PCR Court also found that the Solicitor complied with Brady through his "open file" policy. Order at 161-162. Additionally, the PCR Court found no prejudice as to the *Brady* claim. Order at 163.

These findings are incorrect factually and also as a matter of law. *See, e.g., Anderson v. South Carolina*, 709 F.2d 887 (4th Cir. 1983) (*Brady* violation found in murder case due to state's failure to disclose pathologist's report even though the defense could arguably have obtained this report directly from the doctor). In *State v. Kennerly* 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998), the court held that "[i]n a *Brady* analysis, information is not deemed 'material' if the defense *discovers the information in time to adequately use it at trial.*" (*emphasis supplied*). This is different, however, than a finding that *Brady* does not apply because the defense *could have discovered* the information.

[4] Under the limited circumstances of *Wilson* and *Barnes*, the law clearly does in fact require diligence by the defense counsel and the burden is on the defense rather than the prosecution.

Solicitor Bailey testified, as the Court recognized, that his "open file" policy was selective, and that he would not turn over everything to trial counsel, typically holding back about "ten percent" of the file based on work product or items that were "too voluminous" to reproduce. Order at 120-121. The videotape was considered by the Solicitor "too voluminous" to provide, and while defense counsel was generally notified of its existence, they were not informed of its detailed contents. Order at 121. The Solicitor further testified that he held back about "approximately four to four-and-a-half inches of pages of materials from his file" in Applicant's case. Order at 121.

Thus, the record does not support any "open file" policy. The law does not support an "open file" policy as allowing a prosecutor to evade the duty to disclose. *Riddle v. Ozmint,* 369 S.C. 39, 46-47, 631 S.E.2d 70, 74 ("Even had a true "open file" policy existed, the existence of such a policy does not negate the solicitor's *Brady* obligation."). Nor does the law allow the prosecutor to let the presentation of misleading and false evidence to go uncorrected. *Id.* 369 S.C. at 47, 631 S.E.2d at 75 ("The issue is not why [the witness] failed to tell the truth: rather, it is why the solicitor, who knew [the witness'] testimony to be false, failed to correct it.").

The obligation of the state to disclose the exact contents of the videotape was an affirmative one and is not negated by a simple finding that defense counsel could have obtained it from other sources or that the Solicitor had an "open file" policy. *Kyles,* 514 U.S. at 437 (*Brady* places the duty on "the individual prosecutor").

Moreover, assuming *arguendo* that the solicitor did have an open file policy and the defense had notice that the witness had made additional statements, the prosecution's burden to disclose those additional statements and officer's notes is not relieved. In *Strickler,* the prosecution failed to disclose interview notes and documents prepared by an alleged eyewitness. The state argued that information was otherwise available to defense counsel because counsel

"must have known . . . [of] multiple interviews with the police." 527 U.S. at 285. The Court specifically rejected this argument because "it by no means follows that they would have known that records pertaining to those interviews . . . existed and had been suppressed." Indeed, if some of the documents were disclosed by the prosecutor in "open file," "it is especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld." *Id.*

The South Carolina Supreme Court in *Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999), held that the defendant was entitled to a new trial despite his guilty plea to manslaughter based on the state's failure to disclose an alleged eyewitness' inconsistent statement and trip to the crime scene. Reversal was required even though the defense counsel was aware of four other witnesses that impeached the testimony of the alleged eyewitness and was aware that the prosecutor believed that the witness "could not have seen what she claimed." 334 S.C. at 526-27, 514 S.E.2d at 326. The prosecutor failed, however, to disclose that she "changed her statement to say that, even if she had not seen the shooting from the window, she must have seen it from the door. Nor did they reveal the on-the-scene confrontation that prompted [her] to change the previous statement." 334 S.C. at 526-27, 514 S.E.2d at 326. The court held – without shifting the burden to the defense to ask more questions – that the trip to the scene and the material change in the testimony should have been disclosed to the defense. 334 S.C. at 522, 514 S.E.2d at 323.[5]

Finally, in granting sentencing relief, the PCR Court found prejudice from trial counsel's failure to use the videotape at the 1996 resentencing trial to impeach "the State's star witness." Order at 120. This is an additional inconsistency in the PCR Order which Applicant respectfully submits must be addressed.

[5]This prosecutor was also subsequently publicly reprimanded for violation of his duty to disclose this information. *See In re Grant*, 343 S.C. 528, 541 S.E.2d 540 (2001).

In that regard, the Court need not at all have found a lack of materiality or prejudice as to the *Brady* claims to deny relief on applicant's guilt phase IAC claims. Without waiving any and all previous claims in this proceeding, Applicant suggests that, instead, the Court could accomplish its goal of denying relief on the *Brady* claims by merely by finding that *Brady* was not violated because the Solicitor informed trial counsel of the videotape and invited them to view it – the Solicitor, obviously, cannot force trial counsel to view it. The Court could further find that Applicant was not prejudiced in the "guilt" phase proceeding in the 1994 trial, while still finding, just as the Court already has, that Applicant was in fact prejudiced at the 1996 resentencing trial by trial counsel's failure to use the videotape.[6] Order at 120. The Court's order must be interpreted in a manner consistent with its stated conclusions, which could be achieved by: a) removing the negative materiality and prejudice findings; b) removing the "open file" policy findings and that the evidence was available from other sources; c) entering lack of prejudice findings as to the guilt phase claims from the 1994 trial; and d) reaffirming the prejudice findings as to the 1996 resentencing trial. This would completely serve the goal of making the Court's order consistent with the Court's ruling that a new sentencing phase is required.

V. The Two Criminal Sexual Conduct Convictions ("CSC").

The PCR Court's Order does not set forth the legal analysis for deciding that the trial court of Dorchester County had jurisdiction over charges that occurred in Charleston County. Order at 147. The Order also states that Applicant waived any right to have the matter heard in Charleston

[6] A similar finding by the PCR Court would address the claim of whether the prosecutor failed to correct misleading and false evidence, by simply finding that the prosecutor invited trial counsel to view the evidence - which may have been subject to interpretation according to the prior Court's findings - but they did not, so that trial counsel failed to use the evidence and Applicant was therefore prejudiced.

County while there is no record of any such waiver. *Id.* Applicant respectfully submits that the law requires vacation of Applicant's CSC pleas not only on the grounds as found by the PCR Court for ineffective assistance of counsel, Order at 147-151, but also under jurisdictional grounds. *See* Applicant's Proposed Order, Ground C; *See also, State v. Dudley*, 364 S.C. 578, 614 S.E.2d 623 (2005).

Applicant also respectfully submits that the "Order" page, Order at 172, which is at the end of the PCR Order and delineates the Court's final decision in the matter, should specifically state and reflect that Applicant's CSC convictions are vacated, since the PCR Court made such a finding under the ineffectiveness ground. Order at 147-151.

VI. The *Burkhart* Claim.

The PCR Court's Order does not address the "Burkhart" claim, wherein the State presented evidence and argued in favor of a death sentence based upon prison conditions (ie., inmate's access in general population under a life sentence to TV, basketball, etc.), and trial counsel not only failed to object but also exacerbated the situation. *State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007); *See* Applicant's Third Amended Application; and, Proposed Order, Ground G-H. The Court conducted a hearing on this additional claim on January 2, 2008, and declined to grant Respondent's Motion for Summary Judgment, thereby allowing Applicant's supplemental claim under *Burkhart* to proceed. Applicant submits that he is entitled, as an additional grounds for sentencing relief, to an additional finding and conclusion for granting relief by this Court under *Burkhart*.

VII. Other Ineffective Assistance of Counsel Claim Findings.

The PCR Court found that trial counsel were not ineffective in voir dire at either the 1994 or 1996 trials. Order at 22-33, 92-104. Applicant submits this finding is contrary to the record facts and applicable law: especially where, for example, at the 1996 resentencing trial the defense attorney failed to ask eleven jurors - nine of whom actually participated in sentencing deliberations - anything about their views on the death penalty. Applicant submits myriad other failures in voir dire contained within the record of these proceedings, including Applicant's basic right to inquire of jurors as to any potential racial prejudice. Avoiding voir dire of jurors is not a matter of strategy. Thus, Applicant respectfully submits that the Court's ruling is contrary to both the facts in the record and the applicable law on this issue. *See, e.g., Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992); *Turner v. Murray*, 476 U.S. 28; 106 S. Ct. 1683; 90 L. Ed. 2d 27 (1986); *See also* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989), Guideline 11.7.2 (Voir Dire and Jury Selection).[7]

The Court found that trial counsel were not ineffective for failing to retain an investigator. Order at 62-65. It is apparent from trial counsel's failures, as found by the PCR Court as it relates to the 1996 resentencing trial, Order at 139-141, that counsel recognized the need for the assistance of a professional investigator, but then inexplicably and without any defensible strategy reason, neglected to follow through and obtain the services of just such a professional. It is uncontested that funds were available for counsel to obtain such services. Thus, Applicant respectfully submits that the PCR Court's ruling is contrary to both the facts in the record and the applicable law on this

[7] Hereinafter, they will be referred to as the "ABA Guidelines," (and the specific Guideline will be abbreviated as "Gdln.") which were in effect in 1989, prior to Applicant's trials. It should be noted that since 1989, the Guidelines have been revised (2003), and the sections renumbered.

issue. *See, eg., Wiggins v. Smith,* 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Council v. State, supra.; Ard v. Catoe, supra.; Bailey v. State*, 309 S.C. 455, 424 S.E.2d 503 (1992).

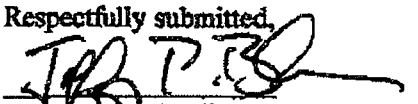
The Court found that trial counsel were not ineffective in not conducting their own investigation. The Court's finding is contrary to the mandates of *Wiggins, supra.*, and *Council, supra.*; *See also* ABA Guidelines, Gdln. 11.4.1 (Investigation). Trial counsel cannot make a strategic decision regarding trial presentations and defense without investigating and without learning what information may help or may hurt a defendant. *Wiggins v. Smith,* 539 U.S. at 527; *Council v. State,* 380 S.C. at 171-72, 670 S.E.2d at 362-63.

Lastly, the PCR Court found that trial counsel were not ineffective for failing to obtain the expert services of an Ophthalmologist or to use available evidence that revealed that Applicant required eyeglasses and was not wearing them at the time of the incident. Order at 66-71. The PCR Court adopts without criticism or comment trial counsel's purported reason that Applicant's failure to be wearing his glasses at the time he fired the weapon is more aggravating than mitigating. Order at 68-69, 71. This rationale offered by trial counsel is more "post-hoc rationalization" than real strategy. *See Wiggins v. Smith,* 539 U.S. at 526-27. The record is replete with Applicant's need for eyeglasses, and that he was not wearing them the night of the incident. Order at 66-67, 111-112. The PCR Court has also recognized that this incident was not premeditated, because, in the layman's language of Applicant himself, it was an "accident." Order at 16, 20; *See also*, Order at 108-109. In this context, the fact that Applicant was not wearing his eyeglasses is consistent with, and corroborates, that he did not see or know the child was in the truck and that she was an unintended victim. Thus, Applicant respectfully submits that the PCR Court's ruling is contrary to both the facts in the record and the applicable law on this issue. *Council v. State, supra.; Ard v. Catoe, supra.*

VIII. Conclusion.

For the foregoing reasons and for the reasons set forth in the Applicant's previously filed pleadings, Applicant requests that this Court alter or amend the judgment in a manner that fortifies and is consistent with the Court's findings of facts and holdings. Applicant further prays that the Court reconsider the denial of post-conviction relief as to Applicant's convictions and additional sentencing phase claims for relief.

Respectfully submitted,



Attorney for Applicant
Dated: September 13, 2010

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER)	Case No.: 00-CP-18-575
)	
)	
Timothy Dion Rogers,)	
Applicant,)	
)	CERTIFICATE OF SERVICE
VS.)	
)	
John Ozmint, Commissioner, of the)	
S.C.Dept. of Corrections, and)	
the State of South Carolina)	
Respondents.)	

I, the undersigned, as counsel for Timothy D. Rogers, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) specified below via electronic mail (to AGESALTER@SCAG.GOV), and in the event such method fails then also by prepaid postage via U.S. Mail, on September 13, 2010, to the following address:

Pleadings: Motion to Alter or Amend the Judgment

Counsel Served: Ed Salter, Esq.
Senior Asst. Attorney General
Office of the S.C. Attorney General
P.O. Box 11549
Columbia, S.C. 29211-1549

Jeffrey R. Bloom, Attorney At Law
Dated: September 13, 2010

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 ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e), SCRCP
Jon E. Ozmint, Director, South Carolina Dept. of Corrections,)	
)	
Respondent.)	

FILED - RECORDED
2010 SEP 13 PM 2:14
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

On September 1, 2010, the Court sent Respondent an unsigned copy of the Court's Order granting Applicant a new resentencing proceeding via e-mail. The signed Order was filed with the Dorchester County Clerk of Court on September 2, 2010. Respondent now moves to alter or amend the judgment pursuant to Rule 59(e), SCRCP, for the following reasons:

GROUND 9(B)(1)

The Court first found that Applicant was entitled to a new resentencing proceeding based upon trial counsel's "[f]ailure to adequately to advise Applicant in accordance with *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), prior to and during his aborted guilty plea" to the murder indictment. **Order pp. 88-92.**

Although the convictions for CSC with a minor in the second degree clearly did not involve any actual 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) by the Attorney General's Office.[1] As a result, these convictions would have made him ineligible for

[1] 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-

parole if sentenced to life imprisonment in the 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).

Counsel 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. **PCR Tr. pp. 781-82; 1020-27.**

Counsel did not make a motion to withdraw the CSC with a minor pleas, although they had been part of a greater plea agreement, after the aborted guilty plea to murder 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.[2] Also, the United States Supreme Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994) was "in the pipeline" and counsel used the two prior convictions for violent crimes to support his request for an LWOP jury instruction. 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.**[3]

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.

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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.

[2] Counsel 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."

[3] The United States Supreme Court granted certiorari 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.

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 pleas could be entered simultaneously, he contacted the South Carolina Department of Probation, Parole and Pardon Services; and they told him that if Applicant's plea to the CSC charges was entered before the murder plea, then 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 point, 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 testified. **PCR Tr. pp. 1057-58.**

To prevail on this allegation under *Strickland v. Washington*, 466 U.S. 668 (1984), Rogers must first demonstrate that his attorneys' "representation fell below an objecting standard of reasonableness." *Strikland*, 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. Even if counsel's performance is deficient, he must prove 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). 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 v. Smith*, 539 U.S. 510, 537 (2003).

Respondent submits that 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, understood those charges and 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 that 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.

Respondent specifically submits 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.[4]

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[4] 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*). Respondent recognizes that the defendant's plea in *Alford* was entered because of a desire to avoid the death penalty. However, neither that fact nor Ms. Holt's experiences with defendants in other cases who were allowed to enter *Alford* pleas after their original murder convictions and death sentences were vacated (*see* **Order. P. 90 n. 47**), alters the uncontroverted evidence that the State was not willing to entertain an *Alford* plea to Applicant's murder indictment, or that he was in complete agreement with the decision to enter a traditional guilty plea, until he was in front of the trial court for that plea. The same is true of the Solicitor's willingness to permit an *Alford* plea to another murder case.

The Court's Order also relies upon Mr. Leiendecker's 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

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 on the plea to murder. Therefore, it was unnecessary to pursue a possible *Alford* plea.

The Order overlooks that Applicant cannot, through his own actions, render counsel's representation constitutionally ineffective under *Strickland*. *See United States v. Pellerito*, 878 F.2d 1535, 1543 (1st Cir. 1989) ("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.

Respondent further submits that the Court erroneously found that counsel was ineffective 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. **Order pp. 92-94**. First, Applicant did not prove deficient performance by counsel.

"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 only 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

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have a constitutional right to enter a guilty plea. Further, he was also unaware of any basis to move to withdraw the August 1994 pleas to the CSC with charges at the time. **PCR Tr. pp. 180-82.**

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).

Respondent submits that Mr. Runyon's explanation for not moving to withdraw the guilty plea is credible and is consistent with Applicant's representations at the time of his pleas. First, 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 he 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.**

Rogers 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 that he had asked counsel to do to prepare the case; that he had enough time to discuss the case with Mr. Runyon; and that 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 properly 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." (p. 18). He also admitted having sex with her before she turned sixteen. (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 this Court's conclusion to the contrary, Respondent submits that the pleas to the counts of CSC with a minor in the second degree were freely and voluntarily extended. Therefore, there was no factual basis to withdraw these pleas.[5] Indeed, the United States Supreme Court addressed the presumption of verity to be given the plea proceeding record when the plea is subsequently challenged in a collateral proceeding in *Blackledge v. Allison*, 431 U.S. 63 (1977). While noting that the defendant's representations at the time of his guilty plea are not "invariably insurmountable" when challenging the voluntariness of his plea, the Court stated that, nonetheless, the defendant's representations, as well as any findings made by the judge accepting the plea, "constitute a formidable barrier . . . . Solemn declarations in open court

[5] For the reason asserted in connection with **Ground 9(C)** of Respondent's proposed Order of Dismissal and as set forth, *infra*, any challenge by Applicant to his CSC convictions was not properly before this Court. *See* **proposed Order, pp. 123-35.** *See also* **Ground 9(C)**, *infra.*

carry a strong presumption of verity." 431 U.S. at 73-74. The Court concluded that a subsequent presentation of conclusory allegations and contentions that are wholly incredible in the face of the record are subject to summary dismissal. *Id* at 74. *See also Crawford v. United States*, 519 F.2d 317 (4th Cir. 1975); *Edmonds v. Lewis*, 546 F.2d 566 (4th Cir. 1976). It is submitted that this Court erred by finding that Rogers provided the Court with sufficient reason to permit him to depart from his earlier representations at the time of his guilty pleas.

Respondent further submits that 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 is meritless and that the record demonstrates that the reasons stated by Mr. Runyon 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 he 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 attorneys were taken as the result of their 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.[6]

[6] 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." (Proposed) Order p. 10. Although Mr. Runyon did utter the inappropriate expression, "[d]amned right I was upset with him," he apologized the moment that 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 upon hours of cross-examination. *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.

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 state supreme court has ruled that a guilty plea rests upon contract principles. *State v. Thrift*, 312 S.C. 282, 292-93, 440 S.E.2d 341, 347 (1994) (*citing Santobello v. New York*, 404 U.S. 257 (1971)); *see also United States v. Chase*, 466 F.3d 310 (4th Cir. 2006) (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 record conclusively demonstrates 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, his decision does not render the earlier pleas involuntary or provide any basis for a motion to withdraw those pleas. *See Pellerito*, 878 F.2d at 1543 ("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").

In support of its conclusion, the Court 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, United States Supreme Court in *Bobby v. Van Hook*, 130 S.Ct. 13

(2009), re-emphasized that these are merely guidelines, *at best*, and that trial counsel need not comply with them to render objectively reasonable representation:

> To make matters worse, the Court of Appeals (following Circuit precedent) treated the ABA's 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel " 'must fully comply.' " 560 F.3d, at 526 (quoting *Dickerson v. Bagley*, 453 F.3d 690, 693 (C.A.6 2006)). *Strickland* stressed, however, that "American Bar Association standards and the like" are "only guides" to what reasonableness means, not its definition. 466 U.S., at 688, 104 S.Ct. 2052. We have since regarded them as such. *See Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). What we have said of state requirements is *a fortiori* true of standards set by private organizations: "[W]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Roe v. Flores-Ortega*, 528 U.S. 470, 479, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

Van Hook, 130 S.Ct. at 17 (footnote omitted).[7]

Moreover, 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, Mr. Runyon's advise concerning the plea in this case fully complied with those guidelines and it is clear 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 should not permit Applicant to predicate a successful ineffectiveness claim on his own decision to breach the plea agreement

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[7] Justice Alito wrote a separate concurring opinion in *Van Hook*, to more forcefully emphasize his "understanding that the [majority] opinion in no way suggests that the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (2003 Guidelines or ABA Guidelines) have special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment." *Van Hook*, 130 S.Ct. at 20 (Alito, J., concurring). He explained that "[t]he ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the **responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution**, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination." *Id* (emphasis added).

with which the State had fully complied, he and counsel had previously agreed upon and the trial court was willing to accept.

Likewise, the Court's 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).

Alternatively, the Court improperly concluded that Applicant has proven that he was prejudiced as the result of counsel's failure to make the motion. Again, there was no basis for such as discussed. Nor was Applicant prejudiced because the two CSC with a minor convictions resulted in him being convicted of two violent felonies for which he may never have been otherwise charged, and that these convictions provide the specter for future sentencing enforcement. **(Proposed) Order p. 14.** Again, Applicant knowingly, intelligently, and voluntarily allowed counsel to pursue the strategy that was followed. While a defendant's consent to trial strategy does not, alone, vitiate all ineffective assistance claims, his consent is probative both of the reasonableness of the chosen strategy and of counsel's performance. *Strickland*, 466 U.S. at 689; *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995). Further, he was undeniably aware that he was pleading guilty to violent crimes under state law; and there was no suggestion that the entry of his plea to CSC was contingent upon his subsequent guilty plea to

murder. Moreover, without counsel's strategy in 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. This is a benefit that was strategically pursued by counsel after the aborted guilty

plea to murder. 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).

A. PCR witnesses who testified at trial.

The Court granted relief on Applicant's further claims 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 and Lieutenant Earl Asbell. Again, Respondent submits that the Court erred by finding that he has not shown either deficient performance or resulting prejudice. Initially, Respondent would note that the grant of relief is inconsistent with this Court's denial of relief as to the same witnesses in connection with counsel's performance in the guilt phase. **Order, pp. 47-61.** Respondent submits that Applicant's claims are weaker with respect to resentencing because the same points would be made in resentencing by these witnesses and Applicant had already been convicted by the time of resentencing. Additionally, Respondent submits the following:

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. As 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 he was coming to Alabama. She testified that 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."[8]

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 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.**

In granting relief **(Order, pp. 113-14)**, this Court overlooked that it became clear, on cross-examination, 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." Thus, the main information that was imparted to her in her conversations with him after his

[8] 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.**

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 had 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.**

In finding that trial counsel's performance was deficient, the Court ignored that trial counsel was able to speak to her prior to her testimony. Also, and contrary to the Court's Order, there is nothing in her testimony at the 1994 trial that was beneficial to him. Moreover, 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.

Furthermore, the Court's finding that Applicant proved prejudice resulting from counsel's failure to present her testimony is based upon a misapprehension of *Strickland* and state law. First, 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 any statement by him would constitute hearsay and he was not an available declarant. *See State v. Terry*, 339 S.C. 352, 529 SE2d 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 SE2d 648, 649 (1978) (same); *State v. Atchison*, 268 S.C. 588, ___ 235, SE2d 294, 296-97 (1977) (same). Even if her testimony was *somehow* admissible, it is only relevant to whether or not the killing was manslaughter, as opposed to murder. The

problem with Applicant's argument and this Court's conclusion is that the Supreme 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.*

Of equal importance, this Court misapplied the prejudice prong of *Strickland* in granting relief. First, the grant of relief is based upon inconsistent factual findings. Although the Court found that counsel's failure to interview Simmons was prejudicial, the Court specifically found that "I find that her testimony probably would have made no difference to the jury in reaching a decision about the appropriate punishment for Applicant." **(Order, p. 114)**. Aside from this inconsistency, the *Strickland* prejudice prong is not satisfied by a finding that counsel's error "probably would have made [a] difference" in the outcome. Rather, He had to prove that "there is a reasonable probability that ... the sentence . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Rogers did not meet that standard.

Respondent further submits that the Court erred by granting relief based upon trial counsel's failure to interview George Scharf and proper testimony consistent with testimony he gave at the PCR hearing that the shooting appeared to be accidental. **Order, pp. 114-15.** Contrary to this Court's findings, Applicant has not shown either deficient performance or resulting prejudice.

Mr. Sharf 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. On 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 that "*I'm not trying to say ... that there was no intentional shot.*" (Emphasis added). 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.**

Although Respondent submits that Applicant has proven that counsel's performance was deficient, the Court need not address the first prong because he has failed to prove any possible prejudice resulting from the failure to introduce **Applicant's Ex. 20** or the testimony by Mr. Sharf 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, 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. Moreover, the South Carolina Supreme Court has already indicated on direct appeal that such evidence did not support a jury instruction on voluntary manslaughter in *Rogers I.*

Likewise, this evidence could not support a jury instruction on involuntary manslaughter. *Id.* As noted, 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, it would not help support such an instruction. At best, it showed Applicant's willingness to endanger the lives of more than one individual and would support an inference of malice. Finally, any suggestions that this was an "accident" is inconsistent with the testimony from Dr. Price - addressed in **Ground 9(A)(5)** - that Applicant likewise suggests should have been presented. Dr. Price indicates that Applicant should have been able to discern that there were three people in the cab of the truck under the circumstances which were reflected in the transcript. As with the preceding allegation, the Court also applied the improper test for the prejudice prong. **Order, p. 115** ("I find that his testimony probably would have made a difference to at least one juror"). Applying the correct standard, see *Strickland*, 466 U.S. at 695, it is clear that Rogers did not meet his burden of proof. In the absence of any conceivable prejudice, this Court erroneously found that he is entitled to relief.

The Court further erred by finding 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.[9] **Order, pp. 115-16.**

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, 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.**

[9] Mr. Isaiah Jennings and his cousin, Herthenia Lincoln, were also in the store.

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 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 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**. This testimony supports the conclusion that counsels' performance was not deficient. Additionally, Respondent is at a loss to understand precisely how this evidence was admissible.

The Court found that the testimony from Mr. Robinson would be consistent with the defense's case. However, this was error because 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 is attacked. *See State v. Lynn*, 277 S.C. 222, 284 SE2d 786 (1981); *Woods v. Thrower*, 116 S.C. 165, 107 SE 250 (1921).[10] 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 SE2e 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 SE2d 31 (1980); *In re Greenfield's Estate*, 245 S.C. 595, 141 SE2d

[10] 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.

916 (1965). Here, Applicant did not allege that counsel should have presented reputation evidence and the evidence presented at PCR was not reputation evidence. Rather, he asserted that counsel should have presented evidence of specific acts by him identified with peacefulness. This evidence was inadmissible. *Id.*

Nor was Applicant prejudiced by counsel's failure to introduce admissible character evidence under then-existing law. If counsel had introduced evidence of Applicant's reputation for peacefulness, then the State would have the right to introduce evidence to refute this character trait. Thus, 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**.

Respondent likewise submits 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. Moreover, Applicant has failed to prove any prejudice resulting from counsel's failure to present any evidence of specific acts involving peacefulness because this would have resulted in the admission of the 1986 conviction for carrying a weapon. This 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.** As with the preceding allegation, the Court also applied the improper test for the prejudice prong. **Order, p. 116** ("I find that his testimony probably would have made a difference to at least one juror"). Applying the correct standard, see *Strickland*, 466 U.S. at 695, it is clear that Rogers did not meet his burden of proof.

The Court likewise erred by granting relief based upon counsel's handing of Lt. Earl V. Asbell. **Order, pp. 116-17.** He testified at the original trial that he 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. 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.**

Lt. Asbell found a spent .380 caliber cartridge (State's Ex. 13) on the ground, underneath the front of the truck. See State's Ex. 8. He found another spent .380 caliber cartridge (State's Ex. 13) on the ground to the left of the truck.[11] **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.

[11] 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.

In a response to the subpoena 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 further testified at the PCR hearing 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 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.[12] 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, as a result of the sketch that Lt. Asbell did of the crime scene that caused Mr. Runyon to go "back to him to find out ... how ... and why he took all the time to do that."[13] Respondent submits that Mr. Runyon's testimony is credible and that he, in fact, spoke to Lt. Asbell about

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[12] The Court found that it depicts "a firearm pack sitting on top of clothes in a clothes basket." **Order, p. 116.** However, Lt. Asbell specifically declined to agree with PCR counsel's description of this and he could not determine what was in the basket other than clothes. **PCR Tr. p. 443.**

[13] Mr. Runyon described the diagram as "very comprehensive" and he 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 records of Stephanie's treatment at Trident Hospital. **PCR Tr. pp. 773-74; 833-35.**

the case prior to trial. As a result, the Court erroneously found that his conduct was deficient, even if he did not physically view the beer can and other items that were not introduced at trial.

More importantly, the Court improperly found that Applicant had established prejudice resulting from counsel's performance. Mr. B admitted that he had been drinking prior to the shooting on direct examination. He admitted that he had approximately three 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 and after his daughter was shot. **1994 R. pp. 717-20; 727-28.**

Despite this Court's findings as to counsel's performance, the Record on Appeal demonstrates that trial counsel fully cross-examined Mr. B about his drinking on the day of the shooting. Counsel unsuccessfully attempted to establish that Mr. B drank beers while fishing on the houseboat that morning. **1994 R. p. 743.** He thereafter re-established that Mr. B had had at least three or four beers before the shooting and that Mr. B 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 did not have anything to drink in his presence **(1994 R. pp. 931-32)**, Mr. B 's contrary testimony was already before the 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.**

Thus, 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. Finally, as with several other witnesses, the Court also applied the improper test for the prejudice prong. **Order, p. 117** ("I find that his testimony

probably would have made a difference to at least one juror"). Applying the correct standard, see *Strickland*, 466 U.S. at 695, it is clear that Rogers did not meet his burden of proof.

B. PCR witnesses who did not testify at trial.

Although the Court's Order only addresses the failure of trial counsel to adequately impeach Mr. Carver, their failure to utilize videotape enhancement and the failure to present a social worker, family and friends to testify as to evidence in mitigation concerning Rogers' background (*see* **Order, pp. 118-42**), the Court's Order contains the following list of Applicant's sub-grounds:

> **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.*

See Order, p. 137. (Emphasis in original). The Court further states that:

> 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.

Order, pp. 137-38.

The remainder of the Court's discussion of this allegation, however, only discusses the deficiency and prejudice resulting from counsel's failure to present an adequate case in mitigation. To the extent that the Court intended to or has granted relief on any allegation(s) not specifically addressed in the Order, the Order does comply with S.C.Code Ann. § 17-27-80 (2003), which provides that "[t]he court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." See also *Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266, 266 (2007).[14] Because the Court may have granted relief based upon the other maters not specifically addressed by factual findings and legal conclusions within the Order, Respondent will address the various sub-grounds in the Applicant's proposed Order.

Specifically, Respondent submits that Applicant is not entitled to relief based upon his allegations that trial counsel was 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, Respondent submits that Rogers failed to prove deficiency on counsel's part or any resulting prejudice under *Strickland, supra.* In particular Respondent would note that this Court rejected these allegations in connection with the claims of ineffective assistance of counsel in the guilt phase. **Order, pp. 62-80.** Respondent submits that Applicant's claims are weaker

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[14] The Court in Marlar stated that "We take this opportunity to reiterate our admonition that '[c]ounsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by 17-27-80 and Rule 52(a), SCRCP.' " *Marlar*, 375 S.C. at 410, 653 S.E.2d at 267.

with respect to resentencing because the same points would be made in resentencing by these witnesses and Applicant had already been convicted by the time of resentencing. Additionally, Respondent submits the following:

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.[15] 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.**[16]

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 mother (whom he continued to represent in matters at the time of the 2004 hearings), Mr. Runyon had previously met with family members

[15] 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.**

[16] Also, either he or Mr. Leiendecker had interviewed the police officers involved at some point.

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.[17] 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

[17] They considered this same approach in 1994 but rejected it for the same reason. **PCR Tr. p. 786.**

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.**

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 interviev[assault victim] or Simmons. Also, 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.**

Respondent submits 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 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 should be unable to accept that counsel would have **deliberately neglected** a matter as important as Applicant's sentencing proceeding.

Respondent likewise submits that Mr. Leiendecker's testimony that he did not interview Patterson lacks credibility; and that it is almost impossible to believe he that 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.[18] Therefore, the Court should accept Mr. Runyon's testimony as credible and adopts it as a basis for denying relief on the various sentencing phase allegations.

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. 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.**

[18] 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.**

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.**

Based on Mr. Mitchell's 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. He also 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.**

As discussed, Mr. Runyon felt the facts were relatively simple and that 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." **PCR Tr. pp. 759-60; 770-72; 830-33; 978-80.**

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 he did not have a specific independent recollection because he did not have his file. He later reiterated that the facts were relatively simple even for a death penalty case and 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. I, 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, Respondent submits that Applicant has failed to show any deficiency on the part of counsel in failing to hire the services of an investigator. *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. 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, trial counsel made a reasonable investigation into a factually simple case, and they thereafter determined that the services of a private investigator would be unnecessary. Further, lead trial counsel had the various witness statements and other information provided to him by the prosecution available to him; 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 failure retain the services of an investigator was not deficient.

Moreover, Respondent submits 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 discussed elsewhere in this heading, Respondent submits that counsel took reasonable steps to investigate and the Applicant was not prejudiced by counsel's performance, as alleged.

Likewise, for the reasons set forth elsewhere in this section and in Ground 9(D) of this Court's Order and Respondent's proposed Order Respondent submits 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. He simply has not demonstrated that anything he has presented could undermine confidence in the outcome of the proceeding. *Id. Contra United States v. Gray*, 878 F2d 702 (3d 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, an expert in ophthalmology. The Court, however, has rejected this allegation elsewhere in the order. For those reasons Respondent submits that Applicant is not entitled to relief.

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 would not wear them when he had an opportunity not to wear them. **PCR Tr. pp. 409-14; 421-22; 426.** Moreover, Applicant introduced a series of photographs to substantiate this. *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 these computer generated notes entitled "medical summary" from SCDC generated on November 20, 2000. (*See* Applicant's Ex. 36). Dr. Price testified that he relied upon this 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 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 uncorrected vision was 20/70 in his left eye and 20/100 in his right eye. **PCR Tr. pp. 575-79.**

He 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 significantly worse than 20/40 "in terms of the amount of blurriness" that a person would have (although the person would have blurrier vision).[19] More importantly, Dr. Price opined that it was not possible to determine what Applicant's visual acuity was on November 25, 1992; 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 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 that Applicant's school records reflected that Applicant did not have perfect vision but he never claimed that he had problems with his eyesight. Also, counsel had Applicant medically evaluated and there were never any significant problems with his eyesight reported, and 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 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.**

[19] 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.**

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

> 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. 776, 794 (1987) (concluding that limited investigation was reasonable because all witnesses brought to counsel's attention provided predominantly harmful information). Further, *Strickland* makes clear 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, 104 S. Ct. at 2066. *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 role 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 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.*

Respondent likewise submits 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. Finally, 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.

Moreover, 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 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, 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.

3. Failure to employ video production and audio enhancement expert.

Applicant further contends that trial counsel was ineffective for failing to present and 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 one case box of Bush beer. This Court appears to grant relief on this allegation, but there are no specific findings as to deficiency by counsel or prejudice resulting by supposed errors, as required by § 17-27-80. *See* **Order, pp. 118-23**. Respondent furthers submit that was not deficient and 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 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 had been supplied by a television station. He copied this onto a DVD. **2005 PCR Tr. pp. 7-14.**[20]

Over the State's objection that the tape contained hearsay within hearsay and 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.[21] Mr. Fesperman testified that he made audio enhancements to the section specified by collateral counsel and 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 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 and 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

[20] This transcript is of the hearing was held on August 23, 2005. He originally copied the VHS video onto a digital tape and then transferred that onto a DVD. **2005 PCR Tr. pp. 13-14.**

[21] Respondent submits that its objections were improperly overruled for the reasons argued at the hearing.

disclosing additional documents in the course of the State's compliance with the requirements of discovery.[22] The first paragraph of this letter references news footage from two different television stations, Channel 2 and Channel 4. This 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.**

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 they 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.**

[22] 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.**

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. With respect to these he advised them that he had those tapes, "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.**

Respondent submits 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, 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. **Order, p. 116.**

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, 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." *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*. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689.

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 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.** Under *Strickland*, there is no ineffective assistance of counsel even 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* **(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[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).[23]

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 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 both all eyewitnesses. Also, counsel had already impeached Mr. Riley, Mr. B[redacted] and Mr. Carver, as discussed.[24] As to the statements on Applicant's Ex. 56, Respondent submits that Mr. Carver appeared to be

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[23] Contrary to Applicant's argument, Respondent submits 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.

[24] Counsel's examination of Mr. B[redacted] elicited that Mr. B[redacted] 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[redacted] had consumed too much alcohol. 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 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, he 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.[24] 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 think Applicant threatened to kill him right before B[redacted] got back into the truck. **1994 R. pp. 741-68.**

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, 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, however, was not a point in dispute. Moreover, 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.

Thus, Respondent submits 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, Respondent submits 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 this 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. E[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 (3d 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 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.

4. Correctional Officer Brown.

This Court accepted Applicant's allegation 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). Respondent submits that the Court did so erroneously because Applicant has failed to meet his burden of proof on either prong of the *Strickland* on this allegation.

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**[25]

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

[25] 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.**

Applicant did not have any involvement in the incident. Also, he was not aware that any weapons were involved. **PCR Tr. pp. 1114-17.**[26]

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-compliance, he initially said that it "depend[s] on the circumstances." Eventually, he had to reluctantly 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.**

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[26] The Court sustained Respondent's objection to hearsay testimony about Applicant being remorseful. **PCR Tr. pp. 1119-23.**

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. Also, 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). Also, Applicant admitted in his resentencing testimony that he had committed a number of bad acts.[27]

Finally, Respondent would note that the Court misapplied the Strickland prejudice prong in granting relief on this allegation. **Order, p. 172-73** ("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"). Applying the correct standard, see *Strickland*, 466 U.S. at 695, it is clear that Rogers did not meet his burden of proof. In the absence of any conceivable prejudice, this Court erroneously found that he is entitled to relief. Based on these reasons, Respondent submits 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.

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[27] 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.**

This Court found that trial counsel were ineffective because they failed to properly investigate and present evidence of Applicant's family life and background. However, the Court erroneously granted relief on this allegation because the testimony of lead counsel was 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, 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 that 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: Mrs. applicant's mother (his mother); Robert Bryant (his brother); Mrs. Faith [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, Mrs. 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;[28] (3) [applicant's mother]' 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) Mrs. applicant's mother eventually met and married Martin [redacted], and the two of them moved the family to Summerville in 1979; (12) after the 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

[28] 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.

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, Respondent submits 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.[29] 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.**

Respondent submits 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

[29] They considered this same approach in 1994 but rejected it for the same reason. **PCR Tr. p. 786.**

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)).[30] 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.

Contrary to this Court's findings, Respondent submits that this was an objectively reasonable strategy. The Court's Order seems to find deficiency based upon the testimony of the various witnesses that collateral counsel presented on this allegation. However, that analysis is appropriate for the prejudice prong, as opposed to the deficiency prong. Again, trial counsel's decisions were reasonable under *Strickland* *See Wood v. Allen*, 130 S.Ct. 841 (2010) (state court's factual determination that defense counsel made strategic decision not to pursue or present evidence of defendant's mental deficiencies was not unreasonable in light of the evidence presented); *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

[30] 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.

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 Porter v. McCollum*, 130 S.Ct. 447 (2009) (defense counsel's failure to uncover and present during penalty phase any mitigating evidence regarding defendant's mental health, family background, or military service was deficient, and Florida Supreme Court's decision that defendant was not prejudiced by such failure was unreasonable application of federal law, warranting federal habeas relief); *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").[31]

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.

CUMULATIVE PREJUDICE GROUND 9(B)(13)

With respect to Applicant's contention that the Court should employ a cumulative prejudice analysis, Respondent submits that the Court properly rejected this allegation with his claim in the guilt phase and should do so for these same reasons as to his sentencing phase allegation. *See* **Order, pp. 81-84.** *See also* **Respondent's proposed Order of Dismissal, pp. 174-75.**

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 erroneously accepted this argument.

[31] 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).

First, 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). Respondent submits 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") (emphasis added); § 17-27-45(A) ("An application for relief filed pursuant to this chapter must be filed within one year after the entry of *a judgment of conviction* or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later") (emphasis added); § 17-27-50 ("The application shall identify the proceedings in which the applicant was convicted, give the date of the entry of the judgment and sentence complained of, 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*") (emphasis added); § 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") (emphasis added). *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."[32]

Second and even assuming that a PCR applicant may challenge more than one judgment in a PCR application, the Court ignored 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 therefrom. *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 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.[33]

Further, this allegation does not involve the subject matter jurisdiction of the Court of General Sessions, contrary to the allegation and this Court's conclusion. Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong. *State v. Gentry*, 363 S.C. 93, 100-01, 610 S.E.2d 494, 498-99 (2005) ("subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong;" and "[c]ircuit courts obviously have

[32] 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. Respondent would further note that, in this case, the original Application only challenged the conviction and sentence for murder.

[33] This was over four years after he filed the original Application.

subject matter jurisdiction to try criminal matters"). A review of the record clearly indicates that there is no basis upon which to conclude that the trial court lacked subject matter jurisdiction. Rather, Rogers claim is one of personal jurisdiction, which he waived by answering the charges and pleading guilty to them in Dorchester County. *See* "Generally, jurisdiction of the person is acquired when the party charged is arrested or voluntarily appears in court and submits himself to its jurisdiction. *State v. Douglas*, 245 S.C. 83, 138 S.E.2d 845 (1964); *State v. Langford*, 223 S.C. 20, 73 S.E.2d 854 (1953). A defendant may waive any complaints he may have regarding personal jurisdiction by failing to object to the lack of personal jurisdiction and by appearing to defend his case. *See State v. Bethea*, 88 S.C. 515, 70 S.E. 11 (1911); *see also State v. Castleman*, 219 S.C. 136, 138-39, 64 S.E.2d 250, 251 (1951) ('A defendant may, of course, waive his objection to the jurisdiction of the Court over his person ....')." *State v. Adams*, 354 S.C. 361, 374-375, 580 S.E.2d 785, 792 (Ct. App. 2003) (additional citation omitted); *Eaddy v. Eaddy*, 283 S.C. 582, 584, 324 S.E.2d 70, 72 (1984) (personal jurisdiction may be waived, but subject matter jurisdiction may not be waived).

Further, 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.[34] Therefore, the challenge to the supposed lack of subject matter is barred by the statute of limitations. *Id.*

[34] 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 wit[assault victim] before he entered the guilty pleas.

Even if this allegation was not barred by the statute of limitations, the Court should have rejected the supposed lack of subject matter jurisdiction on the "merits." For the reasons set forth in connection with Ground **9(B)(1)** of Respondent's proposed Order, Respondent submits that there is no credible evidence to support this allegation.[35] Applicant, for his part, admitted his guilt to each of the CSC offenses in the Dorchester Court of General Sessions and he never contested that, in fact, the offenses occurred in Charleston County. His representations and the findings made by the trial court in accepting the plea, "constitute a formidable barrier .... Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 at 73-74. Without testimony from him on this allegation, he should not be permitted to depart from the representations at the time of his plea. *Id. Cf. Bean v. Calderon*, 166 F.R.D. 452, 454-55 (E.D.Cal. 1996) (State was entitled to depose capital habeas petitioner who claimed ineffective assistance of counsel and prosecutorial misconduct. While petitioner had the right to invoke Fifth Amendment, the district court could draw adverse inference from invocation of privilege if questions to which privilege was asserted directly related to allegation made by petitioner in verified petition) ("Petitioner has invoked the court's process to overturn what would otherwise be a final state conviction, and must prove that it should be overturned. It is not at all untoward to hold that petitioner must establish the facts that would give rise to the overturning, and if he refuses to put forth facts that are within his knowledge, and which are pertinent to the claims that he has made in habeas, an adverse inference may be drawn").

---

[35] 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 going through the evidence, he discovered that assault victim, Applicant's girlfriend, was underage at the time she had sex with Applicant; and 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 criminal sexual conduct 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. Mr. Runyon clearly testified that he obtained the information about the crimes at issue from Applicant, and that Applicant never suggested the crimes had occurred in another jurisdiction. **PCR Tr. pp. 759-60; 775-80; 846-52; 1019-20.**

Additionally, because Rogers refused to testify and be subject to cross-examination, this allegation is almost entirely predicated upon assault victim's credibility. For the reasons addressed in the Court's **Order** at pp. 35-40; 45; 112-13, she was not credible. In reaching a contrary conclusion as to this allegation, the finding of credibility is not only inconsistent with the Court's earlier, well-reasoned finding, it ignores her incarceration for an unrelated offense at the time of the PCR hearing and that she had nothing to lose but everything to gain by giving false testimony that might spare the father of her child from either a sentence of death or one of life without parole.

For the above-stated reasons, Respondent moves to Alter or Amend the Judgment.

Respectfully submitted,

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By: _____
ATTORNEYS FOR RESPONDENT

September 13, 2010.

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.	)	
	)	CERTIFICATE OF SERVICE
Jon E. Ozmint, Director, South Carolina Dept. of Corrections,	)	
	)	
Respondent.	)	
	)	

I, the undersigned, as counsel for the Respondent, Jon E. Ozmint, Director, South Carolina Department of Corrections, do hereby certify that I have served all counsel in this action with a copy of the pleadings(s) specified below via electronic mail (to jpbloom803@aol.com; DianaHolt@alumni.utexas.net), and in the event such method fails then also by prepaid postage via U.S. Mail, on September 13, 2010 to the following address:

Pleadings: Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF DORCHESTER) 2000-CP-18-00575

TIMOTHY DION ROGERS,
PLAINTIFF,

VS. TRANSCRIPT OF RECORD

JON OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

DEFENDANTS.

OCTOBER 8, 2010
ST. GEORGE, SOUTH CAROLINA

B E F O R E:

THE HONORABLE DIANE S. GOODSTEIN, JUDGE

A P P E A R A N C E S:

WILLIAM EDGAR SALTER, ESQ.
ATTORNEY FOR THE DEFENDANT

JEFFREY BLOOM, ESQ.
DIANA HOLT, ESQ.
ATTORNEYS FOR THE PLAINTIFF

BONNIE H. KELLY
CIRCUIT COURT REPORTER

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E X H I B I T S

NO.	DESCRIPTION	I.D.	EVID

- NO EXHIBITS INTRODUCED -

THE COURT: All right. And Mr. Rogers is -- is here?

MR. BLOOM: He will not be transported today, Your Honor. The prison was having some other problems

THE COURT: Yes.

MR. BLOOM: And they actually called me and had the legal department call me. And I explained that this was a legal hearing, not a witness or testimonial matter. And so -- otherwise we would have had to continue the hearing, and I didn't want to do that --

THE COURT: Okay.

MR. BLOOM: -- given the fact that there were no witnesses. So ---

THE COURT: Got it.

MR. BLOOM: --- waive his presence.

THE COURT: You're going to waive his presence?

MR. BLOOM: Yes, ma'am.

THE COURT: (To court security) Very well. He won't be here. You let them know -- let them know, right?

MR. MOULTRIE: Thank you, Judge.

THE COURT: Exactly. Thank you.

All right. Now, of course, we are here on the -- both motions to alter and amend pursuant to Rule 59. And we have one -- one from the State and one from the applicant.

And one was filed September the 13th, and the other was filed September the -- the 13th. So, I feel as though

I should flip a coin. Mr. Salters, why don't you let me hear from you.

MR. SALTERS: All right.

THE COURT: You -- or would you rather go second? You're a little bit ---

MR. SALTERS: Well, since I'm responding to -- well, since I am the respondent, I -- we split it in half. So, it really doesn't matter.

THE COURT: Absolutely. Although, you did -- you know, you -- you got some too. You got -- I almost -- thought I had concurrence that I had completely messed it up. All right.

MR. SALTERS: Your Honor, I -- I'm going to try to keep it brief today. I submitted my ---

THE COURT: Okay. Yes.

MR. SALTERS: --- pleading, which is kind of lengthy, and I know Your Honor can read it.

THE COURT: Yes.

MR. SALTERS: So, I'm not going to bore you to death with it.

However, we do take issue with the Court's findings with respect to granting him a new sentencing proceeding, as well as the finding that counsel was ineffective in failing to move to withdraw the plea to --

THE COURT: The two ---

MR. SALTERS: -- the plea -- the plea to murder as well as the two non-murder counts, the two CSC with a minor counts.

THE COURT: Yes.

MR. SALTERS: It's our position that the evidence is fairly undisputed. Counsel testified there was never any discussion about a possible *Alford* plea in this case, because the solicitor was not interested in one. He wanted a straight-up plea.

Initially the victim's family was reluctant to accept anything. And he -- he had to convince them to -- that -- and they were agreeing -- agreeing only if there was a sentence of life without parole.

THE COURT: Sure.

MR. SALTERS: The solicitor wanted a -- wanted closure for the family. And again, this is supported not only by counsel's testimony, but by Mr. Bailey's testimony as well.

Throughout everything, Mr. Rogers remained in complete agreement. He never once voiced any agreement -- any disagreement, either at the plea for criminal sexual conduct with a minor or at any point prior to the plea for murder. He -- he didn't cave into the -- the plea for murder. He refused to admit that he intentionally shot the victim, basically is what happened, and Judge Whetstone refused to accept the plea.

His apparent agreement with this is, I think, probative not only of counsel's -- the reasonableness of the strategy, but also whether or not he should be able to prevail -- just generally whether or not he should be able to prevail since he unilaterally reneged on the deal. That doesn't make counsel ineffective.

You can't say counsel's ineffective because of something -- I can't say that my lawyer's ineffective because of something I do on my own when I've given the counsel reason to believe that I'm in agreement with his strategy, and I don't voice my displeasure until I -- until it's too late.

That -- that's essentially -- and that -- and another factor to consider -- that we think is important -- is the fact that counsel was aware that the *Simmons vs. South Carolina* case was "in the pipeline," I think is what -- an expression he used.

He later used the two convictions for criminal sexual conduct with a minor to go to -- to request a "life without parole" jury instruction. The failure to grant that jury instruction was the sole basis for reversing the ---

THE COURT: Sentencing.

MR. SALTERS: --- the first conviction and sentence in -- in *Rogers 1* by the Supreme Court.

THE COURT: Uh-huh.

MR. SALTERS: Without that, his death sentence would have been affirmed at that time.

He later used the -- those same convictions in the second -- the re-sentencing proceeding to get a "life without parole" jury instruction. This would have been impossible without the existence of those pleas.

Counsel testifies there was -- with respect to failed to move -- failing to move to withdraw, I didn't believe, there was no factual basis to do so. There's no basis for it to -- even with respect to the CSC with a minor pleas.

If you look at the -- the face of the plea: He was asked all the right questions; he answered all the questions correctly; he never once said anything -- said anything to indicate that the plea was involuntary or that he was in disagreement with the plea.

Particularly in light of the recognition by the United States Supreme Court in *Blackledge vs. Allison,* on the presumption of the truthfulness of what you -- what a inmate says at time of a plea when the plea is later collaterally attacked, there -- there's no basis to -- to withdraw the plea.

Now, to find that counsel made -- failed to make a motion as a result of his displeasure with Roger's decision not to go forward, I think it misses -- it misstates the testimony. Because I -- even Mr. Leiendecker clearly

testified that, quote -- this is on pages 163 and 164 of the PCR transcript. (As read) "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. And there's no indication from either attorney that either one of them failed to take any action because of some displeasure with their client's decision not to abide by their trial strategy."

They were just frustrated with the fact he didn't agree -- he didn't follow through with what they thought was a well reasoned trial strategy.

Now, in light of the fact there's been a lot of effort to obtain a sentence of life -- a life sentence now -- even now, settle this thing out, have it go to away -- I don't understand how counsel's -- can be found ineffective for doing precisely that years and years and years ago.

We also take the position that he wasn't ineffective in failing to move -- to move to withdraw those CSC with a minor pleas because of a great -- a part of a greater plea.

It's true that they were part of a greater scheme, but the State's will comport, as indicated, that a guilty plea rests on contract principles. Here, at the time those pleas were entered, everybody received the benefit of the bargain. He avoided potentially the death penalty.

State is -- in exchange for a negotiated sentence of

life without parole, both the State and he had -- his -- I'm sorry -- both the State and his lawyers had fully complied with everything they -- they said they were going to do. He'd done everything up until that point.

Again, he cannot make counsel ineffective by -- or -- or his plea agreement involuntary simply by his unwillingness to go forward at a later date with yet another plea. Again, he unilaterally changed his mind.

Now, another thing I would like to point out, one of the things the Court relied upon, in connection with this issue and one -- in -- in connection with the sentencing phase issues, was the ABA guidelines for appointment -- performance of defense counsel in death penalty cases. Even assuming for a minute that those -- those guidelines existed at the time of counsel's performance -- which I don't believe they did. I think they came -- I think they were enacted actually subsequently, and obviously counsel can't be held to ---

THE COURT: Sure.

MR. SALTERS: --- standards that don't exist at the time of performance.

I would point out that in *Bobby vs. Van Hook* -- V-a-n and a separate word, H-o-o-k -- which is at 130 Supreme Court 13, a 2009 case -- the United States Supreme Court indicated these are merely guidelines at best. And there's

a concurring opinion and it says -- it goes even further. It says, basically (as read): "It's just a private group. It doesn't even necessarily reflect the views of all it's members" -- these guidelines do not. "Alternatively, we submit that the Court had properly concluded that Rogers had proven he was prejudiced as a result of counsel's failure to make motion."

There can't be any prejudice from the fact that these resulted in him being conviction -- convicted of two -- two violent felonies, because he was aware at the time of the pleas that that's what they were. That was the whole point. I -- I get these -- I get these under my belt right now, I go in there and I'm -- I can get myself a sentence of life without parole. I'll avoid -- again, avoid the death penalty.

And while his consent to strategy doesn't vitiate the ineffectiveness claims, his consent is probative of the reasonableness of the chosen strategy and of counsel's performance. And that's cited *Strickland*, 466 US at 689.

Again, without the strategy -- and the failure to move to withdraw the pleas, there would -- there would never have been a reversal of the first death sentence. Also, there would not have been a "life without parole" jury instruction at the second -- on the second re-sentencing proceeding.

Now, the Court also granted relief with respect -- in the -- to -- in the sentencing phase with respect to some witnesses who testified at trial. Some of these testified at PCR, and some did not. Now, I've gone through all those witnesses in my pleading, and I will not bore you with that.

I would point out, however, that the factual findings and conclusions with respect to these witnesses are inconsistent with the findings with the -- with respect to the same witnesses in their testimony for failure to present this testimony in the guilt phase.

Now, my opponent said, "Well, you can just ignore making the factual findings on credibility and not -- and whatnot." I think you -- you can't. I think you have to -- you must, because there -- there's a great deal of conflicting testimony and there's a great deal of conflicting evidence. And that the failure to make specific findings would be a violation of the statute governing the PCR awards, 17-27-80, I believe it is; and the State Supreme Court's opinion in the *Marla* case. I'm sure you're familiar with that and probably heard many a person reference it.

But it's our position that counsel more than adequately represented Mr. Rogers at the re-sentencing proceeding.

Also, his arguments with respect to counsel's performance at the re-sentencing is weaker than it is with respect to argument at the -- in terms of their work in the guilt phase, because the same points would be covered by these witnesses in the re-sentencing proceeding. But Mr. Rogers had already been convicted of murder by that time.

And the other thing I'd point out is that in granting relief with many -- with respect to many, if not all of the witnesses -- because I think there were a couple where the Court did not do that -- the Court found that Rogers had proved prejudice because counsel's errors, quote, "probably would have made a difference," or similar language. And that's just simply not the standard. The standard under *Strickland* is "a reasonable probability of a different result but for counsel's errors."

And with respect to the sentencing proceeding, it's whether or not the -- the finder of fact would weigh the aggravating and mitigating circumstances in a different manner, so as to result in a sentence of life.

Again, I'll try -- I'll skip over those for you -- for Your Honor's benefit, because I'm sure this is going to go on long enough with -- between the two of us, between the two parties. So, I will try to ...

And the other thing I -- under the portion of the order, though, with respect to the PCR witness -- PCR

witnesses who did not testify at trial, the Court's order specifically only addresses that failure of trial counsel to adequately impeach Mr. Carver, their failure to utilize videotape enhancement, and the failure to present a social worker, family members, and friends with respect to errors in mitigation.

However, the Court's order contains a list of all the sub-grounds raised by the applicant. And on page -- that's on page 137. On pages 137 to 138, the Court states, quote, "The Court finds that counsel was ineffective in all manners applicant alleges, and that applicant was prejudiced by counsel's failures in myriad -- in a myriad of ways."

It's our position that, again, this doesn't comply with 17-27-80, to the extent the Court intended to grant relief on any of those claims.

Also, we would submit that as we -- as I've stated earlier, that for the reasons we argued, basically, these are weaker claims in the sentencing phase than they are in the guilt phase. And he wasn't entitled to relief -- the Court properly determined that he wasn't entitled to relief in the guilt phase.

If the Court just bear with me for a second?

THE COURT: Absolutely. Absolutely.

MR. SALTERS: Again, most of this is covered -- I -- I

do believe -- I -- I would like to talk about their failure to put up adequate evidence in mitigation.

THE COURT: Okay.

MR. SALTERS: The problem with the applicant's allegation is counsel knew from either discussions with applicant's family from Mr. Leiendecker -- from the records in counsel's possession to applicant's family -- was poor, and there was evidence of drug and alcohol problems; that he and his brothers had been in trouble; that the mother had been a very strict disciplinarian; that the parents -- quote/unquote -- because he said "rode herd on the boys"; that the family, quote, "didn't have the best background with regard to paying bills and holding long-term jobs," things of that sort.

Counsel was aware of this information, but made a decision, after having become aware of it, not to use it, because he had tried that same type of approach in another death penalty case, one involving Mitchell -- Mitchell Carlton Sims, the Dominos Pizza murderer. And it didn't -- it didn't pan out well there, and he didn't think that this kind of evidence would play well in front of the Dorchester County jury.

We think that's a reasonable tactical decision on his part, he -- in that he was not deficient in failing to -- in failing -- in the failing to put up this evidence. I

mean, he -- again, he made the decision. *Wiggins* doesn't say that you have to put up the evidence. What *Wiggins* says is you have to make reasonable investigations from which -- at which point you can make a determination of whether or not to present the evidence. And we think he made that kind of an effort and he made a decision; that he just disagreed with the decision.

Now, I have some things I'd like to respond to, but I don't want to respond ---

THE COURT: Sure. Absolutely.

MR. SALTERS: --- until they ---

THE COURT: Before they've mentioned them. Absolutely.

MR. SALTERS: Yes, ma'am.

THE COURT: Absolutely. And I just -- I'm going to -- I would make this statement at this point, because I want to be sure that the record is clear. Because I certainly meant for the order to contain my concern about the failure to withdraw the plea -- to move to withdraw the plea.

And -- and interestingly enough, it was not Mr. Runyon that mentioned the -- that the plea -- that the two CSC with a minor pleas were part of one grander scheme, if you will. But it was -- it was Solicitor Bailey that did that.

And I think it was Judge Whetstone that said, "Gentlemen, what is going on here?"

Because I think several days before, he had said, "I just took this plea a week ago."

And I think that's when it was not Mr. Runyon, but thank goodness, for -- for purposes of candor with the Court -- which is not to suggest that Mr. Runyon wasn't being candid -- but it was the solicitor who said, "This is all part and parcel of a grander scheme."

Of course, I think the record is clear that but for Mr. Runyon's statements to Mr. -- to -- to Solicitor Bailey, these things could never have happened, because Solicitor Bailey knew nothing of them.

But my concern is this, my concern is that -- and -- and if Solicitor Bailey had not argued the CSC with a minor convictions, if he hadn't argued those as aggressively as he did in his closing, I -- it would be -- it would be -- of course, that's not the facts I'm dealing with.

The prejudice -- and I consider it to be great prejudice -- was the argument of Solicitor Bailey when he talks about, at that time, the defendant's conduct towards children in general; that he was a man who, you know, murdered children and rapes children. And I just must tell you that I believe that -- that that argument of Solicitor Bailey, in terms -- in terms of the case, had -- did have a great affect on my decision.

That is what undermined my -- that, amongst the other

things I mentioned, but that, to -- to a great extent, undermined my confidence in the verdict that was -- that was reached. And that was a very strong argument that he made. And I do not -- in all candor, I -- I think that -- I do not believe -- but for Mr. Runyon's disclosures, I do not believe he would have ever been convicted. I don't believe he would have ever been charged with the CSC with a minor.

MR. SALTERS: Your Honor, if I might --

THE COURT: Yeah.

MR. SALTERS: -- I do believe that that -- that was Mr. Runyon's testimony. Mr. Runyon said he approached ---

THE COURT: That's right.

MR. SALTERS: --- Solicitor Bailey. And he ---

THE COURT: That's right.

MR. SALTERS: --- and he pointed that out to him.

THE COURT: Because -- and that -- because that arose out of the Family Court, and -- and -- and it arose out of Mr. Runyon's involvement through the Family Court. And because apparently there were -- there were matters -- be -- because she, I gather, was pregnant and because she was -- I believe *ab initio*, I think she was also charged with murder. I think that it was through some involvement with the -- with the Family Court that he became aware of going through those records. So, just that whole scenario being

what it was and given that they had a relationship, the way that -- the way that it arose and the way that it was subsequently utilized in closing arguments in the sentencing phase, had -- I believe had great affect ---

MR. SALTERS: Well, Your --

THE COURT: --- on the jury.

MR. SALTERS: --- Honor, I'd like to respond.

THE COURT: Sure. Sure.

MR. SALTERS: I certainly don't mean to rebut.

THE COURT: No, no.

MR. SALTERS: It is our position --

THE COURT: Uh-huh.

MR. SALTERS: -- that he did all this on his own. That's his problem. He created those problems himself unilaterally. He did -- he backed out later. There's nothing about the pleas themselves that would allow them to be vacated.

The -- the decision whether or not to allow a motion to withdraw a plea is discretionary with the trial judge who's discretion will be reversed absent an abuse. Here there's nothing -- there's nothing in the record other than his balking at the plea to murder that would give any rise to that. There's no reason to vacate those convictions. They were -- they were -- they -- they were -- they were valid.

THE COURT: Well ---

MR. SALTERS: The standard -- I think the standard involved ---

THE COURT: We just agree -- you know, there -- there will be someone else who will ultimately make that determination. I think that they were intimately joined, that they were -- and interestingly enough, the more I thought about that -- the more I thought about the plea itself, you know, and you don't know, as a judge, what you will do until you're in those circumstances.

But while I hear what you say that it was a unilateral withdrawal of the plea, I'm not so sure that -- that it was a unilateral withdrawal of the plea by Ms. Rogers, and that concerns me.

And I -- we do several things. We -- obviously, *United States vs. Alford* often gets called -- I mean, *North Carolina vs. Alford* gets called in. I understand that after the fact, Solicitor Bailey said he would never have taken -- he would never have allowed that plea. And -- and I understand he says that -- he says that after the fact. That -- it never came up and that -- I find that disconcerting.

But beyond that, I'm troubled by -- in all candor, I am troubled by the fact that the -- the -- with the -- with the minds that were in that room at the time that that plea

was made, that it was -- that it was not able to go forward. And -- and in fact, Solicitor Bailey makes that argument to the jury, and the conviction was not based necessarily -- this murder conviction was not based necessarily on what was demanded of Mr. Rogers in the plea.

Because Solicitor Bailey argues, and he does so rightfully, that when a person discharges a firearm in a crowd or group of people, that in and of itself is sufficient to sustain a conviction of murder. And --

MR. SALTERS: Well, Your Honor, that's the statutory aggravating circumstance that ---

THE COURT: But we're talking ---

MR. SALTERS: --- that the judges call -- I'm sorry.

THE COURT: We're talking about the guilt. We're talking about the plea. Without -- you are so right. You are so very right. It is an aggravating circumstance. There's no question.

But what -- what I'm -- what I'm trying to address as I -- obviously as I struggled with this case, one of the -- one of the matters that came to my mind was what happened -- and -- and I had to deal with that issue -- what happened to that plea? What -- what was afoot? What was going on during ---

MR. SALTERS: Your Honor, don't ---

THE COURT: Yeah.

MR. SALTERS: I don't mean to interrupt.

THE COURT: No, no.

MR. SALTERS: From my reading of the plea, what happened was he did not want to say that he intentionally shot the victim. He didn't intend to shoot Stephanie Burdette. That was his -- that -- that's where he got hung up --

THE COURT: Right.

MR. SALTERS: -- as opposed to --

THE COURT: Right.

MR. SALTERS: -- the idea that, well, if I shoot into a group -- well, I hate to be the one to tell him this, but if you shoot into a group of people and you hit the wrong person, that -- that's murder.

THE COURT: None of that got addressed. None of that got discussed. None of that, at the time of that plea, was addressed at all. None of it.

Nobody stopped -- Runyon -- Mr. Runyon didn't stop. Mr. Leiendecker -- you know, and at this point, I can't -- I can't fuss at Mr. Leiendecker too much, because Mr. Leiendecker had not been in this file except beginning January the 1st, and this plea was in -- was the second week of February. So, I can't fuss at Mr. Leiendecker too much about that.

But my concern is -- is -- and -- and you think about

this -- this -- your heart hurts for the victim's family, I got to tell you, because gosh knows the roads that they had already traveled to, to reach this point of this plea.

And nobody stops and says, "That's murder. That's murder. And we've got in place these two convictions, just like you were saying, criminal sexual conduct with a minor. We got murder. We got life imprisonment."

So, when it got down to that moment and nobody had a conversation about that -- that's murder two -- and then -- and then it blows up. It goes away. That's -- and -- and I just discuss that with you, Mr. Salters, only for one reason, to tell you that that's why I'm not so certain that it was unilateral withdrawal of the plea by Mr. Rogers.

MR. SALTERS: Your Honor --

THE COURT: Yeah.

MR. SALTERS: -- I -- I was just looking, but could not find my copy of ---

THE COURT: Sure.

MR. SALTERS: --- the plea transcript. But it's my -- it is my recollection --

THE COURT: Yes.

MR. SALTERS: -- that there was an off-the-record discussion between counsel and Mr. Rogers at that time when he -- when he initially was hesitant.

Now, what was said at that time, I don't recall and I

do not recall whether or not ---

THE COURT: I -- I do. I actually do. I -- I almost have those pages memorized.

What he said was, "I shot that gun. I shot that gun out there. I knew I shot that gun. I meant to shoot that gun. I meant to shoot that gun where I shot that gun. But when you ask me did I intentionally shoot that child, I cannot tell you that I intentionally shot her. But I shot that gun; I meant to shoot that gun; I meant to shoot the gun where I shot the gun."

He shot that gun in that vehicle. He shot that gun -- there were -- there were three people in that vehicle. He knew there were two. There were three. But in addition to that, he shot that gun at a commercial establishment the day before Thanksgiving. That -- that store was crowded with people, because we heard from most of them. There were people milling around that property. He shot that weapon in a crowd of people. Murder, murder.

So, when we talk about whether or not there was -- and you know, Mr. Salters, gosh, again I struggled. And this is -- this -- these are the thoughts that would keep me up at 2 and 3 at night as I -- as I worked through these issues, as I struggled with these issues.

While I hear exactly what your saying and I struggled and thought for hundreds of hours, was it a unilateral

withdrawal of the plea or was this person just being real candid?

I don't -- I must tell you, in his mind I believe that he believed that that was true. I believe ---

MR. SALTERS: I'm sure in his mind he intended to shoot Mr. Burdette. I'm sure that's ---

THE COURT: No. I think his story -- I think -- actually think he had a story. His story was to -- to shoot in between them and scare them or something to that effect.

It doesn't -- it's -- to discharge a firearm, my mind in those -- that's why I believe -- that's why I believe and that really is the basis under which I did not disturb the conviction, to be honest. I mean, that -- that -- and I hope my order is clear. I believe that -- I believe that the evidence of guilt of murder is overwhelming. I believe that the evidence -- that is why -- that is why -- as I struggled through it, why I absolutely did not believe that I could over -- in good conscious, overturn the -- the guilt finding of this jury. Because I -- there was nothing in the record that I believe could overcome the overwhelming evidence of guilt of murder.

My concern was -- and the only reason that I was so concerned about Mr. Runyon not moving to withdraw that plea is -- the plea to the CSC with a minor, aside from all of

the issues about how it came about and whether or not there would have ever been a conviction for that and all of the -- improper venue and all the other stuff. My problem with it was how strongly -- and -- and I must tell you, to my surprise, but how strongly, not only in the first closing argument on the sentencing phase, but in the re-sentencing phase how strongly it was argued.

And it -- it was a though -- when I read that closing argument it's -- it's where it really clicked, that that's -- that that was compelling, I believed, to the jury. That argument I thought was very strong.

And that's where it -- you know, the standard -- and we -- you know, there are all kind of -- you know, you've said I -- said probably and if -- and -- and I very well may have to look at that language, because without -- for me, beyond a shadow of a doubt, that closing argument -- coupled with the fact that there was effectively no work done on mitigation, to my mind -- that that's what undermined my confidence in the sentence -- in the sentencing phase, really.

And I know you want to speak to some things that -- that counsel has. Yes.

MR. BLOOM: Yes, ma'am. This last issue, I'm going to be very succinct. I would just note there are two additional cases. I don't think, skimming the order as I

sit here today again for the umpteenth time, there's two decisions I think that support Your Honor's finding in that. And that would be *Jordan vs. State;* J-o-r-d-a-n, as well as the *Thrift Brothers* case. And that goes to the part and parcel nature of Your Honor's analysis.

And I would note one correction in -- in opposing counsel's argument. The ABA guidelines were in effect as of 1989. They've since been amended I think two times, but they were in effect in 1989. And our state has -- the Supreme Court, through decisions of the U.S. Supreme Court, has adapted those as a guidepost. So, I -- I would just note those two things.

As my colleague across the aisle has stated, I am not going to reiterate our entire motion. There are two, we believe, critical points ---

THE COURT: Okay.

MR. BLOOM: --- we need to call to Your Honor's attention. And -- and again, I -- I -- I think it's the -- the precedent from our State Supreme Court requires us to file Rule 59s in all ---

THE COURT: It does.

MR. BLOOM: --- its proceedings ---

THE COURT: No question.

MR. BLOOM: --- or we waive issues.

THE COURT: That's right.

MR. BLOOM: The two we need to call to Your Honor's attention are these: First, the credibility findings, and secondly, the *Burkhart* claim.

As to the credibility findings, that's a little more complicated. The -- without waiving any rights or allegations or claims on behalf of Mr. Rogers, we would acknowledge if it's Your Honor's intent to deny relief as to the guilt phase -- which your order indicates -- there -- the credibility findings create, we think, a potential inherent problem for Your Honor granting relief in the other part of your order as to sentencing phase.

I think I would be somewhat presumptuous, if Your Honor will forgive me, but how this may come -- have come about is Your Honor, of course, requested from us both sides to submit orders.

THE COURT: Exactly.

MR. BLOOM: Both in printed form and -- and computer electronic form.

The first part of your order denying relief in guilt, of course, goes through a number or witnesses Your Honor heard from during the PCR proceedings, and finds them not credible.

Then when Your Honor analyzes sentencing relief, Your Honor -- the court order takes those same witnesses and finds them credible. Again, risking a bit presumption on

my part, I assume that may have been perhaps an inadvertent finding by the Court ---

THE COURT: I need to take a look at that. Yes.

MR. BLOOM: --- that --

THE COURT: What my intention was ---

MR. BLOOM: --- cut and pasted.

THE COURT: Here is my intention. Now, let me -- and -- and I may need to go back and re-tool. Because here's my intention. My intention was to -- to hear and to reflect what -- what the testimony was. And then, to go back and say, "Even so, even so, the evidence of guilt is overwhelming."

MR. BLOOM: Yes. And Your Honor's hit on that this morning. Again, without waiving anything on Mr. Roger's part --

THE COURT: Yes.

MR. BLOOM: -- I think the order could be mended in that regard, so it's still consistent with your final ---

THE COURT: Right.

MR. BLOOM: --- decision wherein you amended the current order of the state, Your Honor finds all witnesses credible. But be that as it may, as Your Honor has said so clearly here today --

THE COURT: Sure.

MR. BLOOM: -- it doesn't matter. One, you don't find

ineffective assistance of counsel at the guilt phase; and two, there can be no prejudice for the reasons Your Honor has -- has stated.

THE COURT: And ---

MR. BLOOM: That even by Mr. Rogers's own testimony admissions in -- in at least one of the proceedings, as well as the testimony of all the witnesses as to how the case transpired.

Even if it's in a light most reasonable to Mr. Rogers, as Your Honor has indicated, it's still murder and -- and not some lesser offense.

So, we would just ask Your Honor to consider amending ---

THE COURT: Sure.

MR. BLOOM: --- the first part of the order ---

THE COURT: Sure.

MR. BLOOM: --- to -- to remove those credibility ---

THE COURT: Sure.

MR. BLOOM: --- findings. Because we think it could jeopardize the second half of Your Honor's order where relief is granted, and Your Honor finds those same witnesses credible.

THE COURT: Right. And -- and -- and that would be accurate, because it wasn't -- and -- and you know, the only testimony that I had great difficulty with in terms of

the credibility issue. And -- and -- and -- and -- and I want to explain it away and say that it was -- it was because of the time lapse more than anything else. And that's the testimony of Mr. Runyon, who -- you know, I don't mind telling everyone here that I hold great respect, great esteem for. I do.

But it would have been impossible, it would have been impossible for Mr. Leiendecker to have done the things that Mr. Runyon says he did. I just -- there were too many -- particularly on cross-examination, there were too many things that were -- before the first trial -- that were attributable to Mr. Leiendecker being in charge of or having done that he just didn't do. And -- and -- and again, I -- I -- because -- and maybe he was relying on the public defender who was there before to have done that work.

He clearly didn't do it. I -- I saw his file. He didn't do anything. And -- and I think Mr. -- I believe it was a public defender. And then Mr. Leiendecker started in January, and as Mr. Leiendecker testified, Mr. Runyon told him, "Don't worry about it. It was going to a plea. Just don't worry about it."

And then when the plea went awry, that Mr. Leiendecker was basically told, "I got this. You just work on the jury. Help me with the jury." I think that is more

credible.

So, in terms of credibility issue, the credibility issues -- I guess the biggest concern that I have was with Mr. Runyon's testimony. Again, in -- in the guilt phase, there's no prejudice. There is overwhelming -- there is overwhelming evidence of -- of guilt. But when you get to the sentencing phase, that's a whole new kettle of fish for me.

MR. BLOOM: And in that regard, we would just note some of the witnesses, for example -- where in the first part of the order finds them not credible, within the ---

THE COURT: Yes.

MR. BLOOM: --- second part of the order, finds them credible -- would be Stephanie Simmons, George Sharf, James Robinson --

THE COURT: Yeah.

MR. BLOOM: -- Detective Asbill, Homer Festerman, as well as assault victim and Dex Patterson.

THE COURT: Yeah.

MR. BLOOM: And -- and so, we just think that's a inconsistency in the order.

THE COURT: Yeah. Uh-huh.

MR. BLOOM: I -- I admit, I've been guilty of cutting and pasting, and then not going back and carefully seeing what -- what I cut and pasted.

THE COURT: Yeah. Yeah.

MR. BLOOM: And without being ---

THE COURT: Absolutely.

MR. BLOOM: --- too presumptuous, I think that may have been ---

THE COURT: Yes. Absolutely.

MR. BLOOM: --- have been part ---

THE COURT: And -- and you are correct.

MR. BLOOM: --- inadvertent issue here.

THE COURT: You are obviously -- let me tell you what happens, here's the reality. The reality is is -- and -- and -- and a lot of the order is my -- of my creation. It obviously had to be, because of -- because of the way that I went about it.

But you know, when I've got brilliant Ed Salters doing half of it, and the brilliant two of you doing -- I would be -- I would be a fool to -- to try to intellectually not take advantage of your work. So, you're exactly right.

And -- and I hope that the portions that I thought were -- that I wanted to use, I -- I thought I had done that. But I'm not at all surprised, given the length and the complexity of the order, that it didn't happen completely. So, I'm delighted to -- to have those comments, quite frankly.

MR. BLOOM: And -- and the last issue we would note

today is the order doesn't address the *Burkhart* claim. And of course, that was a supplemental issue, and under Rule 59, we're ---

THE COURT: Yes.

MR. BLOOM: --- it's incumbent on us to -- to call that to Your Honor's attention, and perhaps an amended fashion --

THE COURT: I thought we'd done that. I thought we had handled that already previously by order.

MR. BLOOM: Your Honor's previous order --

THE COURT: Uh-huh.

MR. BLOOM: -- merely allowed the claim to proceed.

THE COURT: I understand.

MR. BLOOM: You didn't rule on the merits. And of course, the *Burkhart* claim is simply a sentencing issue regardless.

THE COURT: Got it.

MR. BLOOM: So, it may be subsumed to in your ---

THE COURT: Absolutely.

THE COURT REPORTER: I'm sorry. Say that one more time.

MR. BLOOM: It may need -- it may have been "subsumed" in your other findings. Word for the day.

THE COURT: SAT word for the day. Wonderful.

Yeah. And Mr. Salters, you wanted to respond.

MR. SALTERS: Just briefly.

THE COURT: Sure. Please.

MR. SALTERS: Your Honor, with respect to the sentencing proceeding, if the Court finds Mr. Leiendecker didn't do any more than what he testified to, then he intentionally neglected the matter entrusted to his care, because he testifies that he went to a seminar and learned all sorts of stuff about how to handle the sentencing phase in a capital trial, a life in the day -- a day in the life or something like that.

THE COURT: Right.

MR. SALTERS: And if he didn't do anything, he's still obligated to do it, regardless ---

THE COURT: Yes, he was.

MR. SALTERS: --- of, you know, the -- the division among counsel and all.

But going back to the credibility findings, the Court's order found that assault victim and Mr. Patterson were of suspect credibility. The Court went through a lot of that. And I think the Court has to make findings with respect to them, because first off, assault victim shows up in a prison jumpsuit; she'd been incarcerated a number of times for a variety of convictions. She also -- also her testimony was consistent with that of another witness, her former lawyer, Mr. Robbins. And the Court's order address

-- addresses that and finds that.

The Court never found that she was a credible witness, by the way. The Court -- with both -- with respect to guilt and sentencing found that she was of suspect credibility, and Mr. Patterson was also.

Again, we -- we would submit you -- Your Honor needs to make the -- those findings of credibility.

With respect to the *Burkhart* claim, we obviously -- obviously we oppose that, because we opposed the -- the amendment of the application to assert.

THE COURT: Yes.

MR. SALTERS: We submit that it would be improper for the Court to address the subsequent claim, you know, that there was a, quote/unquote, *Burkhart* violation, separate and apart from one of ineffective assistance.

Secondly, it is our position that counsel couldn't be ineffective, because as the Court noted in -- in overruling my motion to strike, they couldn't have -- they couldn't have seen -- foreseen this case, because the South Carolina Supreme Court hadn't decided it. And so, then they -- that's why we allowed them to amend it.

However, counsel couldn't have foreseen a case they couldn't have foreseen several years later. And so, therefore, that's not ineffectiveness.

We'd also argued, I think, under *Teague*, T-e-a-g-e --

I'm sorry -- T-e-a-g-u-e, *vs. Lane*, a United States Supreme Court case that was not subject to being retroactively applied.

Again, as a result of the evidence presented at PCR in support of this claim, I mean, they -- they chose not to present witnesses. Now, I had an opportunity to do so, but it's not my burden to prove.

THE COURT: That's right.

MR. SALTERS: So ...

THE COURT: That's right. Absolutely.

MR. SALTERS: I believe that's all I have, Your Honor.

THE COURT: Thank you. Well, you know, I'm interested -- we are all three, all -- all of us are now so -- I almost said "all three sides."

All of us are so intimate now with these issues, and I -- you know, I am interested in -- in having really your comments from probably more -- having your -- benefit of -- of your language. I certainly don't want you to have to go back and redraft it, because it is what it is.

I'm not going -- let me just share this with you, and we'll -- we'll -- we'll sort of go from that point. I'm not going to change my decision. I'm not going to reverse my decision with regards to either the guilt phase or the sentencing phase. So, I -- you know, I am interested, and do crave and want your help with regards to making the

changes that you talk about in terms of inconsistencies, because I do not intend that at all.

And so, I -- I would -- and -- and with regards to *Burkhart*, I certainly want to have benefit of -- of -- of language that -- that would address it very specifically, Mr. Salters. So, I'm interested in that. It doesn't mean I'm going to use it. But I certainly do want to have benefit of it, and I'd love to have that within 30 days.

MR. SALTERS: Well, Your Honor, I've already -- actually already provided Your Honor with a copy. I can just send out -- I can email again that same pleading, if you like.

THE COURT: That would be wonderful. And I tell you what you -- even be more magnificent, if you'd send it to by law -- my geeky law clerk. He's got to be frustrated with dealing with his, you know, computer dinosaur boss. You know, we'll have conversations about the computer and I'll nod, but I don't have a clue what he's talking about.

And that would be -- and I -- let me introduce y'all to Ryan Miller. He feels like he knows all of y'all, I can assure you of that, because you've worked so hard on -- on these things already. But "dgoodsteinlc" would be wonderful. Great.

And again, let me just ask and be -- just so our record is absolutely clear, now that we're coming to

conclusion, you all are still satisfied that Mr. Rogers has not been present here today.

MR. BLOOM: That's correct, Your Honor.

THE COURT: Yes? Is that a "yes"?

MR. BLOOM: Yes.

THE COURT: Very well. All right. Thank you all so much. I think that will conclude our matters. Thank you.

MR. SALTERS: Thank you, Judge.

(Briefly off the record.)

MR. BLOOM: Judge, before we go off the record --

THE COURT: Yes.

MR. BLOOM: -- I would just note in response to Mr. Salter's argument regarding *Burkhart*, the *Plath* case, *Plath II*, addresses many of those issues.

THE COURT REPORTER: The -- you said the *Plath* --

THE COURT: *Plath*, P-l-a-t-h.

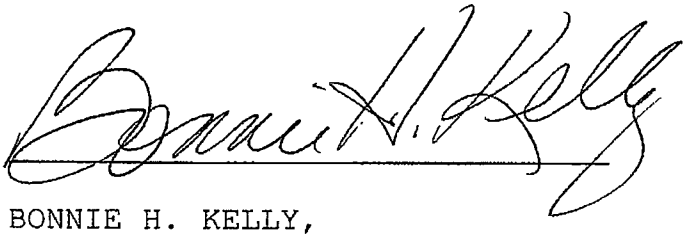
MR. BLOOM: P-l-a -- thank you. Number 2, from 1984.

-- END OF TRANSCRIPT RECORD --

CERTIFICATE

I, THE UNDERSIGNED BONNIE H. KELLY, OFFICIAL COURT REPORTER FOR THE FIRST JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR DORCHESTER COUNTY, SOUTH CAROLINA, ON THE 8TH DAY OF OCTOBER, 2010.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.



BONNIE H. KELLY,

COURT REPORTER

COLUMBIA, SOUTH CAROLINA

MARCH 18, 2011

STATE OF SOUTH CAROLINA)	THE COURT OF COMMON PLEAS
)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER)	
	00-CP-18-575
TIMOTHY DION ROGERS,)	
)	**AMENDED ORDER**
Applicant,)	**GRANTING A NEW SENTENCING**
v.)	**TRIAL AND VACATING APPLICANT'S**
)	**CSC 2d CONVICTIONS**
JON E. OZMINT, Director,)	
South Carolina Department)	
of Corrections,)	
)	
Respondent.)	
)	

2010 DEC 10 PM 2:20

This matter came before the Court on cross motions by both parties to alter or amend the Court's September 1, 2010 order granting relief in part and denying relief in part. The Court held a hearing on the cross motions. Both parties were provided the opportunity to argue their respective positions. The Court provided the parties extensive and thoughtful additional explanation for its findings in affirming its ruling that Applicant was entitled to a new sentencing trial and to vacation of his two convictions for Criminal Sexual Conduct with a minor. Toward the end of that hearing, the State posited that both of Applicant's trial counsel were ineffective during Applicant's resentencing trial, to the extent that the state went so far as to allege that one of Applicant's trial counsel was guilty of dereliction of his ethical duty to Applicant. While this Court will not go that far in assessing the failure of and prejudice to applicant of trial counsels' performance, which was both a failure and prejudicial to Applicant, this Court affirms the clear intent of the original order. Thus, the Court, after careful consideration of the pleadings and arguments of the parties, withdraws its original order dated September 1, 2010, and substitutes this amended order as the final merits order of the Court in this matter.

In affirming Applicant's conviction for the murder of Stephanie B[redacted], in vacating Applicant's convictions for Criminal Sexual Conduct, 2nd degree, which were entirely unrelated to Stephanie B[redacted] or her death, and vacating Applicant's death sentence, the Court makes the following amended 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 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 that 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]t 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.

Mr. Patterson 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, who

had at least one felony conviction at the time of Ms. B[redacted]'s shooting, had a handgun in a pocket of his clothing.

As the argument became more heated, involving all four men by that point, Applicant produced a firearm and intentionally fired his weapon, in what he testified was meant to be a warning shot, in an attempt to quell the argument. Tempers and tension were high. There is a dispute as to whether Mr. B[redacted]'s truck was pulling away from the store or backing up toward Applicant. It matters not. Assuming arguendo that the B[redacted] truck was backing toward Applicant, he was in unlawful possession of a firearm that he intentionally fired, killing Stephanie B[redacted]. Stephanie was seated in the center of the truck cab's interior bench seat. A bullet pierced the middle of the back window of the truck, entered the back of Stephanie's head, and exited through her forehead. Applicant, Mr. Patterson, and 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 a primary goal of the negotiated plea. On January 25th and 27th 1994, Applicant pled guilty to those two charges, the Honorable Charles W. Whetstone, presiding. Judge Whetstone sentenced Applicant to seven years on each count. *See* 94-GS-18-47 and 94-GS-18-48. On February 2, 1994, Applicant was unable to complete the previously scheduled negotiated plea to the murder charge because he could not agree to say that he fired his weapon with the malicious intent to kill Stephanie B[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 circumstances for the new jury's consideration: murder of a child the age of eleven or under and that the offender created a great risk of death to more than one person in a public place with a weapon. The jury found the existence of only the former. Applicant timely appealed.

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

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

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

15. Thereafter, prior to the Court's ruling in this matter, the Supreme Court decided *State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450. 453 (2007). Applicant moved to amend his PCR action to include his claims for relief under *Bowman* and *Burkhart*. The State moved to strike the claims. The Court held a hearing on those motions. The Court offered the parties an opportunity to adduce any additional evidence either party wanted to present related to those additional claims. Neither party sought to adduce additional evidence to the Court. Ultimately, the Court granted Applicant's timely motion to amend his PCR application to include claims related to *Bowman* and *Burkhart*, and requested that the parties provide proposed orders related to those claims.

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). The South Carolina Supreme Court recently reaffirmed and embraced that jurisprudence:

> When evaluating the reasonableness of counsel's conduct, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial

testing process work in the particular case." *Strickland v. Washington*, 466 U.S. at 690, 104 S.Ct. 2052.

Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 *cert. denied*, 128 S.Ct. 370 (2007).

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.

Critical to the representation of any defendant, especially a defendant on trial for capital murder, is an independent investigation of the allegations against the defendant. Investigation of the State's allegations against the client at a minimum requires counsel to interview and investigate all witnesses and evidence identified and provided by the State to trial counsel. Trial counsel may not simply rest and rely on the State's investigation. Trial counsel must conduct an independent investigation. The investigation must be reasonable and meaningful:

[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).

> Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty. American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases, reprinted in 31 Hofstra L.Rev. 913, 1015 (2003).

Ard v. Catoe, 372 S.C. at 332, 642 S.E.2d at 597. The Supreme Court also thereby acknowledged that the duties and responsibilities of trial counsel regarding the guilt or innocence phase of a capital murder trial are just as heightened as they are at the sentencing phase of a capital murder trial. *Accord Council v. State*, 380 S.C. 159, 171, 670 S.E.2d 356, 362 (2008), *cert.* denied, *South Carolina v. Council*, 129 S.Ct. 2770 (2009) (referencing *Wiggins* and *Ard's* affirmation of PCR court's decision finding trial counsel ineffective in failing to further investigate gunshot residue evidence in capital murder case); *see also Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006), *cert. denied Ozmint v. Nance*, 549 U.S. 943 (2006) (holding the extremeness of trial counsel's deficient performance required reversal of capital murder applicant's convictions and sentences).

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, the analysis follows as to each of Applicant's allegations regarding ineffective assistance of counsel at his 1994 guilt-or-innocence trial.

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.

This Court finds that trial counsel's failures rendered their representation constitutionally deficient during Applicant's guilt or innocence murder trial in 1994. However, it is not possible for Applicant to prove that he was prejudiced by his counsel's failures regarding the murder charge. At the time of the shooting, Applicant was a felon in possession of a firearm and he has consistently acknowledged that he fired the weapon, and that his action in so doing resulted in the death of Stephanie. The Court finds that, under the specific circumstances and facts of this case, Applicant's claim that he did not intend to shoot Stephanie, accepted at face value by the Court, does not and cannot help him regarding the legal hurdle of proving that his attorneys performance was both deficient *and* prejudicial to him. Therefore, this Court must deny Applicant's claim that ineffective assistance of counsel entitles him to a new trial regarding his murder conviction.

However, this Court finds that Applicant has proven that he is entitled to have the two convictions for Criminal Sexual Conduct with a minor vacated. Applicant pled guilty to those two charges because, and only because, they were part of the plea structured by the state, the terms of

which provided that Applicant would receive a sentence of life without the possibility of parole, a sentence he otherwise would not have been subject to. As noted, the plea agreement was not completed because Applicant would not state that he intended to kill Stephanie. At the end of the plea, the state was left to benefit from the failed contract it had entered with Applicant. The state was unjustly enriched by the guilty pleas to the CSC charges when it proceeded to trial seeking the death penalty against Applicant, instead of proceeding to trial without seeking the death penalty; a conviction for murder against Applicant would have resulted in the LWOP sentence the state desired and bargained for. Thus, the Court finds that Applicant's counsel were deficient in their representation of him regarding the murder conviction, that Applicant failed to show that he was prejudiced by counsels' deficient performance. Further, this Court finds that Applicant has proven both deficient performance and demonstrated prejudice as a result of counsels' representation of him regarding the fractured guilty plea involving the two CSC charges that were unrelated to Stephanie B[redacted]

The Court hereby **denies** Applicant's claim that he is entitled to a new trial on the murder charge, but the Court grants Applicant's claim that his convictions Criminal Sexual Conduct with a minor should be vacated based on ineffective assistance of counsel and those charges are hereby remanded for a new trial as to those two charges only, all of which the Court bases 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 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:

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[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 Ms. [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] 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 profane 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. The Court cannot find this was counsel's strategy – to take advantage of a ruling which did not yet exist.

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 Ms. 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, 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 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 candidly 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 Court believes 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 pleas 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 this Court finds 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. This Court finds 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.

Applicant now stands convicted of two independent violent felonies, two sexual offenses against a child no less, as a direct and sole result of ineffective assistance of counsel. Standing alone, they subject Applicant to all manner of sentencing enhancement. 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). The Court concludes that Applicant was prejudiced by trial counsel's failures because the Court finds there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[3] *Wiggins*, 539 U.S. at 534-35; *Strickland*, 466 U.S. at 695. The Court reverses 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

[3]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).

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).

i. 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 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.

i 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 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."[4] 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.

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[4] 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.

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 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.

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.[5] 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, ... 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

[5] 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.

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 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.[6]

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4 In connection with Grounds 9(B)(ii)-(iii), 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

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.[7] Applicant's complaint about the failure to examine a number of jurors about their views on capital punishment totally ignores that counsel did question eight[8] 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

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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).

[7] 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.

[8] 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).

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 has there been any 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....").

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)(i), *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").

Failure to question jurors about racial bias. Ground 9(A)(ii)

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 received 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.*[9] As discussed, Rogers received a new sentencing hearing following his appeal of the 1994 death sentence. Therefore, he cannot show any conceivable prejudice from counsel's performance. *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

[9] 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.

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 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)(i), *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.[10] The Court finds that this inquiry and the remaining questioning ensured that Applicant received a fair

[10] 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

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.

GUILT OR INNOCENCE 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. E[redacted], and Mr. Patterson, that Applicant had been talking on the phone but left it to assist Patterson in the dispute,

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(Juror Berkaw).

that Applicant had a gun, and that he fired two shots. 1994 Tr. 823-835 (832-833). Trial counsel cross-examined 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.

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, the Court finds her testimony generally credible. The Court has significant experience assessing witnesses and their testimony. While assault victim has been in legal trouble over the years, the Court finds that she was earnest and truthful.

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] an 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. In fact, Mr.Patterson became 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. 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, the Court finds the testimony of these two witnesses generally 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. The Court attributes 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. The Court finds 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. Counsel were constitutionally deficient for failing to interview Ms. assault victim and Mr. Patterson. Having found the two witnesses' testimony generally credible, the Court does not find, however, that the testimony probably would have would have likely resulted in a different outcome during the guilt or innocence phase of Applicant's trial. Applicant was not prejudiced by counsel's failure to interview these two witnesses or to adduce their testimony at trial. Their testimony would not have made a difference to a jury considering Applicant's guilt or innocence for Stephanie's death, under the unique circumstances of the facts of Applicant's case.

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 the Court's observations of Ms. Simmons' testimony and demeanor, the Court find that she is a credible witness. The Court finds 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. The Court finds 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 fell below the prevailing professional norms and rendered their performance deficient. *Wiggins,* 539 U.S. at 521. However, the Court finds that Applicant failed to prove he was prejudiced by trial counsel's deficient performance regarding their failure to interview and adduce Ms. Simmon's testimony during the guilt or innocence phase of Applicant's trial. The Court finds that Ms. Simmons' additional testimony would not have made a difference to a jury considering Applicant's guilt or innocence for Stephanie's death, under the unique circumstances of the facts of Applicant's case.

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.[11] 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

[11]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.

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

Based on the Court's observations of Mr. Scharf's testimony and demeanor, the Court finds that he is a credible witness. The Court finds that his additional testimony was favorable to Applicant because it supported the defense that trial counsel pursued at trial. The Court finds 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. The Court finds that their failure to do so falls below the prevailing professional norms, rendering their representation of Applicant deficient. However, the Court finds Applicant has failed in meeting his burden of proof that he was prejudiced by trial counsels' failure to interview Mr. Scharf or to adduce his testimony during the guilt or innocence phase of Applicant's trial. The Court finds that Mr. Scharf's additional testimony would not have made a difference to a jury considering Applicant's guilt or innocence for Stephanie's death, under the unique and specific circumstances of the facts of

Applicant's case.

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 this Court's observations of Mr. Robinson's testimony and demeanor, this Court finds that he is a credible witness. This Court finds that his additional testimony was favorable to Applicant because it supported the defense that trial counsel pursued at trial. This Court finds that trial counsel should have, at a minimum, interviewed Mr. Robinson to determine what information he could provide. This Court finds that their failure to do so falls below the prevailing professional norms and that their performance was constitutionally deficient, under *Strickland.* However, the Court finds that Applicant failed to demonstrate that he was prejudiced by trial counsels' deficiencies and Applicant, therefore, failed to meet his burden of proof. The Court finds that Mr. Robinson's additional testimony would not have made a difference to a jury considering Applicant's guilt or innocence for Stephanie's death, under the unique and specific circumstances of the facts of Applicant's case.

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.

This Court finds 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. This Court finds 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 of their duties. This Court finds that trial counsel should have, at a minimum, interviewed Mr. Riley to determine what information he could provide. This Court finds that their failure to do so falls below the prevailing professional norms and their performance was deficient under prong one of the *Strickland* standard. However, Applicant failed to demonstrate that he was prejudiced by trial counsels' deficiencies and he did not meet his burden of proof under *Strickland*. The Court finds that Mr. Riley's additional testimony would not have made a difference to a jury considering Applicant's guilt or innocence for Stephanie's death, under the unique and specific circumstances of the facts of Applicant's case.

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]t'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 the Court's observations of Lt. Asbell's testimony and demeanor, the Court finds that he is a credible witness. The Court finds that his additional testimony was favorable to Applicant because it supported the defense that trial counsel pursued at trial. This Court finds that

trial counsel should have, at a minimum, viewed the physical evidence in this witness' possession to determine what information he possessed. The Court finds 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. The Court finds that their failure to do so falls below the prevailing professional norms and that their performance was deficient in this regard under *Strickland.* However, the Court finds that Applicant failed to demonstrate he was prejudiced by counsels' deficient performance, as also required by *Strickland,* in failing to present the additional evidence and Lt. Asbill's additional testimony. The Court finds that the additional evidence and Lt. Asbill's additional testimony would not have made a difference to a jury considering Applicant's guilt or innocence for Stephanie's death, under the unique and specific circumstances of the facts of Applicant's case.

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 unclear to the Court, the Court must interpret or attempt to interpret it in a logical fashion. This Court finds 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.[12] PCR Tr. 137-39, 860, 866, 862.

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.

[12]Despite Respondents' 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 each witness denied that either Mr. Runyon or Mr. Leiendecker ever attempted to interview them at any time. In the face of Mr. Runyon's eventual concession that he did not interview the witnesses, the Court finds that the Respondent's position is without record support.

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 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 testified that he probably would not have presented testimony that Applicant had impaired vision and had not been wearing his corrective lenses that night. 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 concerned that the eyesight argument made the act more reckless than accidental, as opposed to the State's theory that it was all intentional. PCR Tr. 905. The Court fails to follow Mr. Runyon's "strategy" in that regard in that it was incongruent with his stated theory of defense. The Court finds Mr. Leiendecker's characterization of the lack of investigation correct.

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, the trial was set to commence just twenty-six days later. Mr. Runyon did not seek a continuance in order to prepare for

trial despite having only previously prepared for the guilty pleas. PCR Tr. 1031. Mr. Runyon testified that he did not need to utilize an investigator because the case was "simple." 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 he 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 the Court paraphrases 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 did 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 collected and reviewed 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 increases 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.[13] Dr. Price practiced in Summerville, South Carolina, and was 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

[13]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. E[redacted] testified that they exterior lighting at the store was "not that good" (1994 Tr. 721) and "kind of poor." 1996 Tr. 608.

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.* The Court finds 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.[14] 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 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

[14]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.

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. The Court finds that the videotape would have provided trial counsel with solid impeachment evidence against Mr. Carver, the State's 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 volunteered, "Not in this case that I can recall," thereby indicating that Applicant's trial 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. However, Applicant has failed to prove that he was prejudiced by any of trial counsel's errors in regard to the guilt or innocence phase of his murder trial.

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

The Court finds that trial counsel's effort to investigate and prepare Applicant's case for trial was 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. The Court finds 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 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 insufficient and apply,

to some extent, to all of the witnesses they failed to interview. The Court finds 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 because trial counsel failed to interview any of these 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, the Court rejects trial counsel's purported strategy regarding their failure to interview Mr. Patterson because it is 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, the Court must reject these reasons and "strategy." Trial counsel simply and without justification failed to even interview Mr. Patterson.

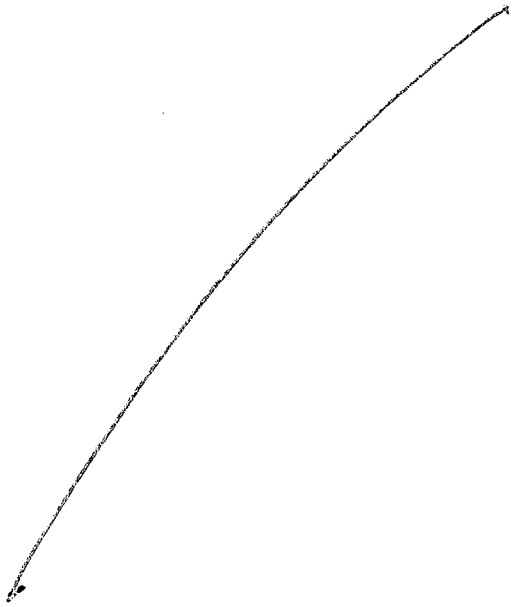
Trial counsel offered several reasons for failing to utilize the evidence that Mr. B[redacted] or Mr. Carver used a racial slur, specifically, the word "nigger." Counsel's supposed strategy was that they did not want to "beat up" on Mr. B[redacted], or to "inject race" into the case, and that Applicant's 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.

If trial counsel had chosen to interview the witnesses, trial counsel then 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.

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.



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 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 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. However, Applicant failed to prove he was prejudiced by trial counsel's failure to avail themselves of the evidence on Applicant's behalf in the guilt-or-innocence phase of his murder trial.

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.

Our Supreme Court has recently held that the failure of trial counsel to seek expert or other assistance can result in ineffective assistance of counsel:

> Moreover, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case. *Troedel v. Wainwright*, 667 F. Supp. 1456, 1461 (S.D.Fla. 1986),aff'd, 828 F.2d 670 (11th Cir. 1987) (emphasis in original).

The American Bar Association (ABA) has specifically provided guidelines for defense counsel's performance regarding investigation of a capital case: [HN4] Counsel at every stage have an obligation to conduct thorough and **independent** investigations relating to the issues of both guilt and penalty. American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases, reprinted in 31 Hofstra L. Rev. 913, 1015 (2003) (emphasis added) (hereinafter ABA Guidelines). With

respect to forensic evidence, the ABA directs the following: With the assistance of appropriate experts, counsel should aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence. *Id.* at 1020.

Ard v. Catoe, 372 S.C. at 331-332, 642 S.E.2d at 597. Because trial counsel failed to conduct even a minimal investigation, the Court finds that they failed to make a reasonable determination about the usefulness of the assistance of these particular witnesses or these categories of witnesses, *per se.*

iv. Applicant failed to demonstrate he was prejudiced by trial counsels' deficient performances

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. The Court finds that counsel's failure to interview the eye witnesses and crime scene witnesses, who were within the same courthouse as trial counsel and/or whom trial counsel knew to possess exculpatory information or information favorable to trial counsel's theory of the case, did not prejudice Applicant in the guilt or innocence phase of his murder trial. The Court finds that trial counsel's failures did not prejudiced Applicant and that Applicant failed to prove "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). Under the circumstances

and facts of Applicant's unique situation, the Court finds that the additional evidence would not have made a difference in the jury's determination of Applicant's guilt or innocence for Stephanie's death. *See Williams*, 529 U.S. 362, 397; Wiggins, 539 U.S. at 534.

v. The cumulative impact of the prejudice does not render Applicant's trial fundamentally unfair.

Because Applicant was a felon in possession of a firearm he had no legal right to possess or use, and because he intentionally fired the weapon and his action in intentionally firing the weapon caused Stephanie's death, Applicant has failed to demonstrate that he was prejudiced by trial counsels' deficient performances, whether the deficiencies are viewed seriatim or cumulatively. Applicant's claim that he is entitled to a new trial regarding the murder charge fails.

GROUND A

The Court **denies** Applicant's claim for relief under Ground A regarding Applicant's conviction for the murder of Stephanie B[redacted]. The **Court grants** Applicant's claim for relief under Ground A regarding the convictions for CSC with a minor that were part of a failed plea agreement and that were unrelated to the murder.

GROUND B.

Ineffective Assistance of Counsel at Applicant's Resentencing Trial.

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."[15] *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.*

[15]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).

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. 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'"). The Supreme Court has recently found that failure to investigate a client's background and social history adequately, to collect records, or to obtain the assistance of an investigator is unreasonable conduct that is below the necessary standard, as applied from the ABA Guidelines. *See Council v. State*, 380 S.C. at 173-74, 670 S.E.2d at 363-64.

With the appropriate legal standard in mind, the Court now addresses 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.

This Court finds 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. Although the Court has vacated the CSC convictions as a result of Applicant's proven allegations concerning his legal representation in Ground A, the Court also vacates those two CSC convictions based on Applicant's claim for relief

under Ground B.

Therefore, the Court hereby reverses Applicant's convictions for Criminal Sexual Conduct with a minor, vacates his death sentence, and remands this matter for a new sentencing trial, based on the following findings of fact and conclusions of law:

PRE-TRIAL

1. Failure to adequately 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.[16] 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.

[16]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 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 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.

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 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 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).[17] 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.
- Solicitor 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

[17]Although Respondents indicated they were not aware of any death penalty cases in which an *Alford* plea was 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.

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 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.

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 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.

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").

B. Failure to Voir Dire Jurors concerning views on capital punishment.

Ground 9(B)(I).

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); 513-21(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. 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 that he had tried 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 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 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 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 any more 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. 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 only be "[b]asic demographic information." Further, she did not utilize demographics greatly. She conceded that a jury pool in Dorchester 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 it's 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 - including eleven of the petit jurors who sentenced Applicant. 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 any 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....").

C. Racial Bias and *Turner v. Murray*.

Ground 9(B)(ii).

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. 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 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, relief cannot be granted on this ground.

RESENTENCING 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.*

11. *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 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], 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 Ms. 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.

1. Witnesses who also previously testified at the trials.[18]

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 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

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

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, the Court finds her testimony generally credible and corroborated in many respects. The Court finds her additional testimony would have made a difference to at least one juror.

Mr. Patterson's testimony was materially consistent with assault victim 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, the Court finds the testimony of these two witnesses generally 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. The Court attributes 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.

The Court finds that counsel's failure to interview these witnesses fell below 'prevailing professional norms." The Court finds 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. The Court finds 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 this Court's observations of Ms. Simmons' testimony and demeanor, the Court finds that she is a credible witness. The Court finds 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. The Court finds 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, The Court finds 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.[19] 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 spoken with them about his assessment and findings, if asked. PCR Tr. 290-1, 300-1.

Based on the Court's observations of Mr. Scharf's testimony and demeanor, the Court finds that he is a credible witness. The Court finds that his additional testimony was favorable to Applicant because it supported the defense that trial counsel pursued at trial. The Court finds 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. The Court finds 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). The Court finds that his testimony probably

[19]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.

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 this Court's observations of Mr. Robinson's testimony and demeanor, the Court finds that he is a credible witness. The Court finds that his additional testimony was favorable to Applicant because it supported the defense that trial counsel pursued at trial. The Court finds that trial counsel should have, at a minimum, interviewed Mr. Robinson to determine what information he could provide. The Court finds that their failure to do so falls below the prevailing professional norms. The Court finds 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.

The Court finds 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. The Court finds that trial counsel should have, at a minimum, interviewed Mr. Riley to determine what information he could provide. The Court finds that their failure to do so falls below the prevailing professional norms, and as such rendered their performance constitutionally deficient. The Court finds that his testimony probably would have made a difference in the outcome of the sentencing proceeding and likely would have led 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 the Court's observations of Lt. Asbell's testimony and demeanor, the Court finds that he is a credible witness. The Court finds that his additional testimony was favorable to Applicant because it supported the defense that trial counsel pursued at trial. The Court finds 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. The Court finds that trial counsel should have, at a minimum, viewed the physical evidence in the witnesses possession to determine what information Lt. Asbell possessed. The Court finds that their failure to do so falls below the prevailing professional norms, rendering their performance constitutionally deficient. The Court finds that his testimony and the physical evidence he produced probably would have made a

difference to the outcome of the trial and 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 been *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 8-2005 Supp. 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 testified that he probably would not have presented testimony that Applicant had impaired vision and had not been wearing his corrective lenses that night. 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 concerned that the _eyesight argument_ made the act more reckless than accidental, as opposed to the State's theory that it was all intentional. 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 8-2005 Supp. 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.* The Court finds 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 [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 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. The Court finds that the videotape would have provided trial counsel with solid impeachment evidence against Mr. Carver, 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). The Court finds 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 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 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, 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 they knew Applicant had grown up in harsh conditions. They said 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. 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, but deferred to Mr. Runyun. PCR Tr. 121-22.

SCDC correctional officer Anthony Brown, a twenty-three year veteran of that agency, 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. 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 character were highly favorable to Applicant and consistent with Officer Brown's testimony before me. 1994 Tr. 1070-72. Trial counsel had no reasoned basis 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." The Court finds 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 the Court's observation of these witnesses, the Court finds their testimony compelling. They testified forthrightly about very painful and intimate aspects of their lives and Applicant's life, as they touched and concerned each other.

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 Applicant's Mother's 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 dry or with water. 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, Ms. 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 and 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 all questions asked of her. PCR Tr. 417-18. The Court finds that trial counsel's failure to conduct a meaningful investigation of Applicant's life rendered their representation below the "prevailing professional norms" and, therefore, deficient. The Court further find that applicant's mother additional testimony was credible and probably would have made a difference in the outcome of the resentencing proceeding.

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,

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, the Court finds accepts his assertion 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. The Court finds 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." The Court further finds that Mr. Bryant's testimony probably would have made a difference in the outcome of the resentencing for the jury charged with determining the appropriate punishment for Applicant. The Court has already found that trial counsel did not conduct a meaningful investigation in 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 the Court's observations of Faith's testimony and demeanor, the Court finds that she is a credible witness. The Court finds that her testimony was favorable to Applicant because it was consistent with the defense that trial counsel pursued at resentencing. The Court finds 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, the Court finds 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," and it was deficient.

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 the Court's observations of Ms. Rogers' testimony and demeanor, the Court finds

that she is a credible witness. The Court finds that her testimony was favorable to Applicant because it was consistent with the mitigation defense that trial counsel pursued at trial. The Court finds 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, the Court finds 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 the Court's observations of Timeka R[redacted]' testimony and demeanor, the Court finds that she is a credible witness. The Court finds that her testimony was favorable to Applicant because it was consistent with the mitigation defense that trial counsel pursued at trial. The Court finds that her testimony probably would have made a difference to at least one juror in reaching a decision about the appropriate punishment for Applicant. The Court finds 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.

This Court finds 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 abundant 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 the Court finds that Applicant is entitled to a new sentencing trial, the Court hereby vacates 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.

The Court finds 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"). This is exactly the type of testimony and evidence about a defendant's background and social history which the Court in *Council* found to be powerfully mitigating evidence which trial counsel should have investigated and presented:

> We believe it was unreasonable for trial counsel not to further investigate Respondent's background and present even the minimal mitigating evidence that was obtained...
>
> Even the limited information obtained should have put counsel on notice that Respondent's background, with additional investigation, could potentially yield powerful mitigating evidence....
>
> [N]ot only did counsel delay in investigating Respondent's background, he failed to conduct an adequate investigation...
>
> [E]ven though the funding was available, trial counsel chose not to hire a social history investigator...
>
> [E]ven counsel's brief interviews with several of Respondent's family members and the DJJ

> records should have alerted him to the fact that the family was dysfunctional, Respondent had been raised in a violent home environment, and experienced learning disabilities. All of these factors constituted mitigating evidence and warranted further investigation.
> Even if trial counsel's investigation could be deemed sufficient or adequate, we believe trial counsel also failed to present any significant mitigating evidence. Trial counsel's mitigation presentation consisted solely of Respondent's mother's extremely limited testimony.

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

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, the Court finds that "they could not reasonably have ignored mitigation evidence or red flags." *Rompilla*, 125 S.Ct. at 2468. *Accord Council v. State*, 670 S.E.2d at 363.

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").[20]

Based on all the mitigation evidence before this Court and with deference to trial counsel's stated strategies, the Court finds that trial counsel had no justifiable strategy for failing to conduct an investigation of Applicant's life history. *Council v. State*, 670 S.E.2d at 364-65 (finding counsel's decision was not reasonable and any strategic reasons asserted would not excuse the deficient conduct, as counsel would have had everything to gain by presenting the available mitigating evidence). The Court further finds 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. The Court finds that trial counsel conducted no meaningful investigation. In fact, this Court is hard-pressed to find that trial counsel

[20]Respondents rely on *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (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 *Abdul-Kabir* 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, *Abdul-Kabir* distinguishes the admissibility and importance of mitigating evidence, quoting extensively from *Franklin v. Lynaugh*, 487 U.S. 164 (1988), on this point. *Abdul-Karir*, 550 U.S. at 234-235. If anything, *Abul-Karir* 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*, 550 U.S. 286.

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."). The Court finds counsel performed 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.[21]

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 a person with little regard for his mother, society, or the law. Applicant suffered his mother's trauma. Far from demonizing Applicant's mother, the Court 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. The Court finds 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']

[21]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.

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 had been presented as such is "sufficient to undermine confidence in the outcome" reached at sentencing, *Strickland,* 466 U.S. at 694. Therefore, based on all the foregoing findings of fact and conclusions of law, the Court finds that Applicant is entitled to a new sentencing trial on this Ground for relief, as well.

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). The South Carolina Supreme Court recently reaffirmed and embraced that jurisprudence:

> When evaluating the reasonableness of counsel's conduct, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. *Strickland v. Washington,* 466 U.S. at 690, 104 S.Ct. 2052.

Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 *cert. denied,* 128 S.Ct. 370 (2007).

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."[22] *Id.,* at 534-35; *Strickland,* 466 U.S. at 695.

Critical to the representation of any defendant, especially a defendant on trial for capital murder, is an independent investigation of the allegations against the defendant. Investigation of the State's allegations against the client at a minimum requires counsel to interview and investigate all

[22]The Supreme Court has made clear that the adjective "reasonable" is important; in fact, a reasonable

witnesses and evidence identified and provided by the State to trial counsel. Trial counsel may not simply rest and rely on the State's investigation. Trial counsel must conduct an independent investigation. The investigation must be reasonable and meaningful:

> "'Counsel at every stage have an obligation to conduct thorough and *independent* investigations relating to the issues of both guilt and penalty.'" *American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases*, reprinted in 31 Hofstra L.Rev. 913, 1015 (2003)."

Ard v. Catoe, 372 S.C. at 332, 642 S.E.2d at 597. The Supreme Court also thereby acknowledged that the duties and responsibilities of trial counsel regarding the guilt or innocence phase of a capital murder trial are just as heightened as they are at the sentencing phase of a capital murder trial. *Accord Council v. State*, 380 S.C. 159, 171, 670 S.E.2d 356, 362 (2008), *cert. denied, South Carolina v. Council*, 129 S.Ct. 2770 (2009) (referencing *Wiggins* and *Ard's* affirmation of PCR court's decision finding trial counsel ineffective in failing to investigate gunshot residue evidence independently in capital murder case); *see also Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006), *cert. denied Ozmint v. Nance*, 549 U.S. 943 (2006) (holding the extremeness of trial counsel's deficient performance required reversal of capital murder applicant's convictions and sentences).

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

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probability is a lower standard than even the preponderance of the evidence standard. *Williams v. Taylor*, 529 U.S. 362, 406 (2000).

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, the Court now addresses Applicant's allegations regarding lack of jurisdiction in the first instance. As an alternative ground, this Court 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.[23] PCR Tr. 104. The pleas would

[23]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

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 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. assault victim stated that her sexual relationship with Applicant always occurred at her grandmother's house, located at [redacted], Ladson, South Carolina. PCR

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with a minor (the allegedly then-fifteen-year-old 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 assault victim 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. 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.

This Court rejects Applicant's argument on this subground and finds the plea court *had subject matter jurisdiction* in that case. The court is further satisfied that Applicant waived any right to have the matter resolved in Charleston County.

2. Trial Counsel Rendered Ineffective Assistance of Counsel in Failing to Investigate and Determine Jurisdiction of the two CSC with a Minor Charges.

However, 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, under the circumstances of the case and the terms of the plea.

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, 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, and only 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 on the ground 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."[24] 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 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.

[24]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.

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."[25] *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 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 Hearsay.

This Court finds 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

[25]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.

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. The Court finds that the statements leave too much to pure speculation as to the identities of the makers of the statements and as to the meaning of the statements.

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. 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.

This Court finds 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. The Court finds 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, the Court finds that Applicant has met his burden of proof regarding the first prong of the *Strickland* standard.

iii. Applicant was not 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, the Court cannot conclude that Applicant has met his burden of proof regarding the prejudice prong under *Strickland* on Ground D. Therefore, the Court *denies* Applicant's claim as to Ground D.

GROUNDS E, F, & G.

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.

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").[26]

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

[26]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.*

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 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.[27] 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. Ms. assault victim testified consistently at both trials that they were all drinking "white liquor" and beer (1994 Tr. 827) and "beer and 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

[27]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.

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, the Court finds 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, the Court finds his testimony credible.

c. The State fulfilled its duty to the Applicant regarding these materials.

The Court finds that the state met its *Brady* and *Napue* obligation to Applicant and the Court, and these claims are without merit. The state provided to the defense, regarding the complained of evidence. The Court denies relief as to Applicant's Grounds E and F

GROUNDS G and H

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.

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,[28] in which he formally sought 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 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 filed "Respondent's Return to Motion to Amend Third Amended Application for Post

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28 His pleading was dated May 30, 2007.

Conviction Relief" dated October 13, 2008.

On June 19, 2009, the Court filed an "Order Granting Applicant's Motion to Amend." The Court specifically rejected Respondent's previously-filed motion to strike, including Respondent's arguments that the amendment was barred by *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) and *Teague v. Lane*, 489 U.S. 288, 309 (1989); that the amendment deprived Respondent of due process and a fair determination of the PCR proceeding; that it was contrary to notions of finality of litigation; that *Plath*'s holding - 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 v. South Carolina*, 476 U.S. 1 (1986); and that the Court should not permit the addition of Ground 9(H) because it was not raised until 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).[29] The Court now denies relief on Applicant's Ground 9(G).

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-examination, 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

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29 Respondent objected to the proposed amendment to assert Grounds 9(G) and (H) at the hearing and reasserted its objection in its Return.

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 it concluded that:

> 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. This conclusion was 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).

The current issue was thereafter raised in the 1998 case of Dorchester County death row inmate Joseph M. L. Gardner. *State v. Gardner*, 332 S.C. 389, 505 S.E.2d 338 (1998). On appeal, the defendant in *Gardner* argued 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. However, the Supreme Court did not disturb Gardner's death sentence. Although the Court found that Gardner's claim was procedurally barred, *id* at 393-94, 505 S.E.2d at 340, nothing in that decision indicated that the cross-examination was prejudicial or even improper.[30]

Two decades after *Plath*, the state supreme court decided *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005). In *Bowman*, 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 that it violated 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 for appellate review because the arguments made on appeal had not been presented 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

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30 In its October 2008 Return referenced above, Respondent informed the Court that Gardner had exhausted both his state court and federal habeas corpus remedies, see *Gardner v. Ozmint*, 511 F.3d 420 (4th Cir. 2007), *cert. denied*, 129 S.Ct. 125 (2008); and that he had filed a Petition for Writ of Habeas Corpus in the original jurisdiction of the South Carolina Supreme Court, dated October 6, 2006, seeking relief on issues similar to those before this Court. Respondent also informed this Court that Gardner had pursued an ineffectiveness claim similar to Applicant's 9(G) in the lower federal courts, but that he abandoned that allegation on appeal. The Court takes judicial notice that Gardner was executed on December 5, 2008.