

The Supreme Court of South Carolina

Timothy Dion Rogers,

Respondent,

v.

State of South Carolina,

Petitioner.

ORDER

This matter is before the Court by way of a notice of appeal filed by the State from an order of the circuit court vacating respondent's convictions for second degree criminal sexual conduct with a minor, granting respondent's application for post-conviction relief as to the sentencing phase of his trial, and denying the application as to the guilt phase.

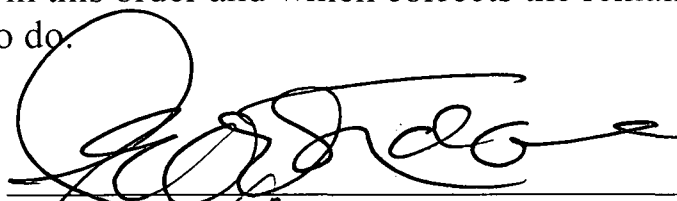
Counsel for respondent has filed a motion in which she contends the State has filed an appendix with so many redactions it is "practically incomprehensible." She asserts few of the redactions are in accordance or compliance with this Court's August 13, 2007 order in In re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings. She further asserts most of the redactions are "wholly inappropriate." Counsel states her attempts to have the matter corrected by conferring with counsel for the State have not been successful. Accordingly, she moves the Court to require the State to file an unredacted appendix, or a properly redacted appendix.

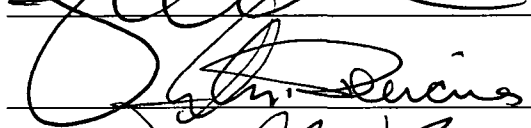
The State has filed a return in which it states it opposes the motion only in part and would consent to the filing of a properly redacted appendix or an unredacted appendix under seal.

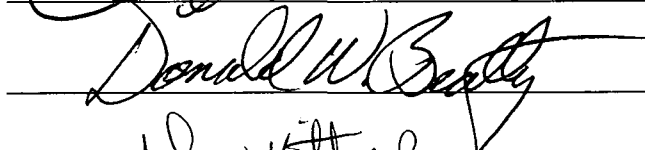
This Court's order of August 13, 2007, states, "Parties shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court: . . . 2. Names of

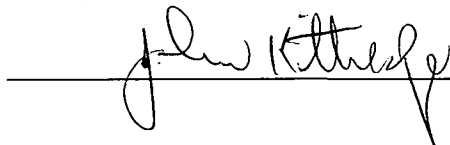
Minor Children. If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" should be used. In all other cases, only the minor's first name and first initial of the last name (i.e., John S.) should be used. . . 4. Home Addresses. If a home address must be included, only the city and state should be used." The order further states that parties wishing to file documents containing the personal data identifiers listed above may file unredacted documents under seal, together with redacted versions for the public file. An order of the appellate court is not required to file the sealed appendix.

The State is correct in asserting that based on the language of this Court's order, the names of all minors involved in the case in any fashion should be redacted to reveal only the minor's first name and the first initial of their last name, with the exception of the victim of the alleged sexual assault, who should be referred to using a term such as "assault victim." We also agree with the State that it would serve no purpose to partially redact the name of the victim of the shooting pursuant to the order, but identify her father by his full name. Finally, while the names at issue were included in prior opinions of this Court, which were issued before this Court's order on personal identifiers was filed, this is not a sufficient reason for the State not to comply with this Court's order requiring redaction of this information. The State has indicated it does not oppose the request of counsel for respondent to correct any other redactions. Accordingly, counsel for the State is hereby directed to work with his legal assistant to prepare a substitute appendix which contains only the redactions discussed in this order and which corrects the remaining redactions, as he has agreed to do.


C. J.


J.


J.


J.

 J.

Columbia, South Carolina

May 3, 2012

cc: William Edgar Salter, III
Diana L. Holt

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

RECEIVED

APR 02 2012

S.C. Supreme Court

TIMOTHY DION ROGERS,

Respondent,

vs.

THE STATE,

Petitioner.

RETURN TO MOTION TO REQUIRE THE PETITIONER
TO FILE UNREDACTED OR CORRECTED APPENDIX

On March 20, 2012, Respondent filed a motion asking this Court to require Petitioner (the State) to file an unredacted appendix or a properly redacted appendix. An amended motion was filed on March 23, 2012. For the following reasons, the State only opposes the motion in part, and would consent to the filing of a properly redacted Appendix or an Appendix that is not redacted, under seal:

The undersigned first became aware that there were potentially unspecified problems with the redaction of the Appendix in this case on February 29, 2012, when the undersigned received an email, from counsel for Respondent, asking for the "basis for redacting information in places in the Rogers [Appendix] (and not in other places). What is it, please?" (A copy of all email correspondence related to this issue is attached to this Return). In another email sent that day, Respondent's counsel sent an example of what she felt needs to be corrected.

Following receipt of that email, the undersigned acknowledged that there were problems with the redaction that had been done, and has attempted to resolve this matter without requiring this Court's intervention. In an email sent on March 1, 2012, counsel became more specific regarding the complaints about the redaction of the Appendix. Both the undersigned and his Administrative Assistant, Donna D'Alessio, have attempted to accommodate Respondent's requests, to the extent that those requests are consistent with this Court's August 13, 2007 *In re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings*, 375 S.C. 56, 650 S.E.2d 462 (2007).

In particular, the undersigned would note that the murder victim in this case was a minor, Stéphanie B. Consistent with the undersigned's construction of this Court's Order in *In re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information*, the undersigned has opposed using her surname or that of her father, even though their surname is referenced in both *State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996) (*Rogers I*) and *State v. Rogers*, 338 S.C. 435, 527 S.E.2d 101 (2000) (*Rogers II*). Rogers' daughter, Tamika's last name should be represented by an initial because she was a minor.

Likewise, Rogers' girlfriend at the time of the murder, Tonya B., was also a minor at the time of the murder, although she was not a minor and was, in fact, serving time in an adult correctional facility at the time she testified in PCR.

The State does not oppose the remaining requests for redaction, has communicated this to Respondent's counsel and has attempted to correct the Appendix, without requiring this Court's resolution of a formal motion, as it has repeatedly informed Respondent's counsel. However, Respondent's counsel has refused to work with the undersigned's Administrative Assistant.

Therefore, the State only opposes the motion in part, and would consent to the filing of a properly redacted Appendix, as instructed by this Court's Order, or an Appendix that is not redacted, under seal, whichever the Court directs.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

DAVID M. PASCO, JR.
Solicitor, First Judicial Circuit

Post Office Box 1525
Orangeburg, SC 29116
(803) 533-6252

By: 

WILLIAM EDGAR SALTER, III
ATTORNEYS FOR PETITIONER

March 29, 2012
WES

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

RECEIVED

TIMOTHY DION ROGERS,

Respondent,

APR 02 2012

vs.

S.C. Supreme Court

THE STATE,

Petitioner.

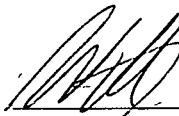
PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Petitioner, certify that I have served the within Return to Motion to Require the Petitioner to File Unredacted or Corrected Appendix (with attachments), and Proof of Service on Respondent by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Diana Holt, Esq.
Diana Holt, LLC
P.O. Box 6454
Columbia, SC 29260-6454

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

This 29st day of March, 2012.



WILLIAM EDGAR SALTER, III

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR PETITIONER

Ed Salter - Rogers- Question about redaction

From: Diana Holt <dianaholt@alumni.utexas.net>
To: Ed Salter <AGESALTER@scag.gov>
Date: 2/29/2012 3:43 PM
Subject: Rogers- Question about redaction

Hi Ed~

I want to double check with you as to your basis for redacting information in places in the Rogers ROA (and not in other places). What is it, please?

Thank you~dh

Diana Holt
 DianaHolt@utexas.edu
 Diana Holt, LLC
 Post Office Box 6454
 Columbia, South Carolina 29260
 803.782.1663 (Office)
 803.787.0374 (Facsimile)
 803.351.8100 (Mobile)
 803.753.9243 (E-Fax to iPhone)

--- Scanned by M+ Guardian Messaging Firewall ---

 FROM: DIANA HOLT <dianaholt@alumni.utexas.net>
 TO: ED SALTER <AGESALTER@scag.gov>
 DATE: 2/29/2012 3:43 PM
 SUBJECT: ROGERS- QUESTION ABOUT REDACTION

1. NAME: [REDACTED]
 2. ADDRESS: [REDACTED]
 3. CITY: [REDACTED]
 4. STATE: [REDACTED]
 5. ZIP: [REDACTED]
 6. PHONE: [REDACTED]
 7. FAX: [REDACTED]
 8. E-MAIL: [REDACTED]
 9. OCCUPATION: [REDACTED]
 10. EDUCATION: [REDACTED]
 11. MARITAL STATUS: [REDACTED]
 12. NUMBER OF CHILDREN: [REDACTED]
 13. DATE OF BIRTH: [REDACTED]
 14. DATE OF DEATH: [REDACTED]
 15. DATE OF INTERVIEW: [REDACTED]
 16. INTERVIEWER: [REDACTED]
 17. DATE OF REPORT: [REDACTED]
 18. REPORTER: [REDACTED]
 19. DATE OF REVIEW: [REDACTED]
 20. REVIEWER: [REDACTED]

From: Diana Holt <dianaholt@alumni.utexas.net>
To: Ed Salter <AGESALTER@scag.gov>
Date: 2/29/2012 4:02 PM
Subject: RE: Rogers- Question about redaction
Attachments: States statement of facts used in orig order.pdf; Official factual bases final order.pdf

Attached: an example of a section not redacted in the first (superceded) order, but redacted intensely in the final order.

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-----Original Message-----

From: Ed Salter [mailto:AGESALTER@scag.gov]
Sent: Wednesday, February 29, 2012 3:48 PM
To: Diana Holt
Subject: Re: Rogers- Question about redaction

Diana,

Could you be more specific so that I can respond to your inquiry? I did not personally redact the Appendix but every effort was made to comply with the SCT's rule governing redaction. If you can provide any instances where an error has been made, we'll try to correct it (them).

Sincerely,
Ed

William Edgar Salter, III
Senior Assistant Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
803-734-6305
803-734-4035(FAX)
agesalter@scag.gov

>>> Diana Holt <dianaholt@alumni.utexas.net> 2/29/2012 3:42 PM >>>
Hi Ed~

I want to double check with you as to your basis for redacting information in places in the Rogers ROA (and not in other places). What is it, please?

Thank you~dh

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INTERSTATE INSURANCE
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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 Burditt'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 Burditt lived in Summerville, South Carolina, with his wife and his nine-year-old daughter, Stephanie. On the week of November 25, 1992, the Burditts were staying on the houseboat at Santee Resort, with

Mrs. Burditt's parents. Because school was in session, Mr. Burditt 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. Burditt 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. Burditt 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. Burditt 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. Burditt 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. Burditt more beer. However, Mr. Carver stayed in the truck. On his way into the store, Mr. Burditt saw Mr. Anthony Riley, a friend and employee talking on the telephone.³ 1994 R. p. 720-30; 744-45; 791-97.

When Mr. Burditt 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. Burditt and Mr. Riley were talking, Applicant,⁴ Tonya Bickham (Bickham) 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. Burditt nor Mr. Carver had ever seen these people before. Mr. Riley had seen Applicant, but not Patterson or Bickham. It is uncontested that Mr. Patterson is the person who first engaged in a verbal dispute with Mr. Carver and Mr. Burditt, 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. Burditt 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. Burditt and Mr. Carver testified applicant pointed his gun at Mr. Burditt's forehead and said, "I'll kill you." Evidence at the PCR trial was that Mr. Burditt or Mr. Carver or both used racial slurs

³ While Mr. Burditt and Mr. Carver are white, Mr. Riley is black.

⁴ Applicant and Bickham 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. Burditt 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. Burditt then cranked up his truck and testified he attempted to leave the parking lot. Applicant testified Burditt 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 Burditt's head and exited through her forehead. Applicant, Mr. Patterson and Ms. Bickham fled the scene. 1994 R. p. 734-40; 750-53; 754-55; 761; 945-50; 953-57; 960.

Stephanie Burditt was transported to Trident Hospital where she died the next day. 1994 R. p. 854-59.

Tonya Bickham⁷ is Applicant's seventeen year old girlfriend, and he is the father of her child. Bickham 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. Bickham 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 Bickham 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 Bickham testified Bickham 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, Bickham 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. Bickham 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. Burditt 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 officers⁹ 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 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.

In affirming Applicant's conviction for the murder of [REDACTED] [REDACTED] in vacating Applicant's convictions for Criminal Sexual Conduct, 2nd degree, which were entirely unrelated to [REDACTED] [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, Tonya B. [REDACTED] and Daxton Patterson, walked to Spell's Grocery Store in Summerville, SC, to use a pay phone located at the front of the exterior of the store. Applicant, Mr. Patterson, and Ms. B. [REDACTED] had been drinking alcoholic beverages and smoking marijuana most of the afternoon. While at the phone, the trio encountered Mike [REDACTED] and his friend, James Carver, who had arrived at Spell's in Mr. [REDACTED] pick-up truck, along with Mr. [REDACTED] nine-year-old daughter, [REDACTED]. Mr. [REDACTED] had been drinking beer that the afternoon. Carver claimed he had not consumed any alcohol. [REDACTED] went inside the store to get a sandwich. Mr. [REDACTED] purchased more beer. At some point, Mr. [REDACTED] engaged in a brief conversation with a family friend and employee, Anthony Riley, in front of the store. Mr. [REDACTED] and Mr. Carver were planning on hunting and fishing at the [REDACTED] family lake house, where they were to gather with other [REDACTED] family members for the Thanksgiving holiday.

Mr. Patterson first engaged in a verbal dispute with Mr. Carver and Mr. [REDACTED]. As the dispute among Carver, [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. [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. [REDACTED] 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. [REDACTED] 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. [REDACTED] truck was pulling away from the store or backing up toward Applicant. It matters not. Assuming arguendo that the [REDACTED] truck was backing toward Applicant, he was in unlawful possession of a firearm that he intentionally fired, killing [REDACTED] [REDACTED] [REDACTED] 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 [REDACTED] head, and exited through her forehead. Applicant, Mr. Patterson, and Ms. E [REDACTED] fled the scene. [REDACTED] 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 [REDACTED]. 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, [REDACTED] 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 [REDACTED] 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

From: Ed Salter
To: Diana Holt
CC: Donna D'Alessio
Date: 3/1/2012 3:01 PM
Subject: Re: Rogers

Diana, you still have not told me what you are specifically complaining about. I do not handle the redactions, personally. Rather, they are done by my administrative assistant, Donna D'Alessio, who apparently uses a software program that our Office has purchased.

I have looked at the attachments to your last email and it appears that the program we have completely blocked out the last names in places, instead of leaving the first initial of the surnames, and it is clear that the names were not picked up on a number of occasions. Obviously, we cannot leave any identifying information for the minor victim or any witness who was a minor, as I understand the Rule. Just discuss whatever corrections you feel need to be made with Donna.

Sincerely,
Ed

William Edgar Salter, III
Senior Assistant Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
803-734-6305
803-734-4035(FAX)
agesalter@scag.gov

>>> Diana Holt <dianaholt@alumni.utexas.net> 3/1/2012 2:33 PM >>>

What can you tell me about the redactions. I have a motion to go on them but if you want to do a correction I'm happy not to file it. It's not a biggie motion, but still.

Diana Holt
DianaHolt@utexas.edu
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803.787.0374 (Facsimile)
803.351.8100 (Mobile)
803.753.9243 (E-Fax to iPhone)

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From: Diana Holt <dianaholt@alumni.utexas.net>
To: Ed Salter <AGESALTER@scag.gov>
Date: 3/1/2012 3:03 PM
Subject: RE: Rogers

Would you please tell me the rule to which you refer?

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-----Original Message-----

From: Ed Salter [mailto:AGESALTER@scag.gov]
Sent: Thursday, March 01, 2012 3:01 PM
To: Diana Holt
Cc: Donna D'Alessio
Subject: Re: Rogers

Diana, you still have not told me what you are specifically complaining about. I do not handle the redactions, personally. Rather, they are done by my administrative assistant, Donna D'Alessio, who apparently uses a software program that our Office has purchased.

I have looked at the attachments to your last email and it appears that the program we have completely blocked out the last names in places, instead of leaving the first initial of the surnames, and it is clear that the names were not picked up on a number of occasions. Obviously, we cannot leave any identifying information for the minor victim or any witness who was a minor, as I understand the Rule. Just discuss whatever correction's you feel need to be made with Donna.

Sincerely,
Ed

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From: Diana Holt <dianaholt@alumni.utexas.net>
To: Ed Salter <AGESALTER@scag.gov>
Date: 3/1/2012 3:45 PM
Subject: RE: Rogers

This is the information redacted. The victim's name has been in two published opinion. Also, she is not a category of protected children because she is deceased. Arguably, Ms. Bickham fits a category, but her name has been published in both opinions as well. The rest of these redactions are not compliant with the 2007 order. Moreover, they render the final order practically unintelligible.

1. The murder victim's first and last name. ROA 4859 and passim;
2. The murder victim's father's name. Id.;
3. A witness, Tonya Bickham, 's first and last names, though at times redacted all but the first initials of her first and last name and at times does not redact her first name at all. Id.;
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4. Witness Stephanie Simmon's first name. ROA 4860 and passim;
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6. The last name of any of the victim's family. ROA 4894 and passim.
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9. Respondent's step-father's surname, except for the first initial. ROA 4958 and passim;
10. Respondent's sister's name Faith Nichols Brown, except for the initial of her first name (ROA 4958) or the first initial of her first, maiden and married surname. ROA 4959 and passim.
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12. All but the first initial of the name of Respondent's eldest daughter, Tamika Rogers, but not her last name. ROA 4964.

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-----Original Message-----

From: Ed Salter [mailto:AGESALTER@scag.gov]
Sent: Thursday, March 01, 2012 3:21 PM
To: Diana Holt
Subject: RE: Rogers

Diana,
You still have not told me what you are specifically complaining about, and I have told how this may be quickly resolved. Again, this can be readily resolved. However, here is a link to the August 2007 Order to which I was referring: <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2007-08-13-02>.

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>>> Diana Holt <dianaholt@alumni.utexas.net> 3/1/2012 3:03 PM >>>
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Cc: Donna D'Alessio
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Donna D'Alessio - Rogers redactions

From: Donna D'Alessio
To: DianaHolt@alumni.utexas.net
Date: 3/1/2012 5:44 PM
Subject: Rogers redactions

Dear Ms. Holt:

If it is alright with you, can I contact you first thing in the a.m. regarding correcting the redactions in this matter?

I apologize for any inconvenience.

*Donna D'Alessio, Legal Assistant
Capital Litigation Section
Office of the Attorney General
State of South Carolina*

*Direct Line: 803-734-1494
Main Line: 803-734-6305
Fax: 803-734-4035*

Donna D'Alessio - Roger redactions

From: Donna D'Alessio
To: DianaHolt@alumni.utexas.net
Date: 3/2/2012 4:20 PM
Subject: Roger redactions

When you get a chance...I am here to do any and all corrections to the appendix that is needed.

Have a great weekend.

*Donna D'Alessio, Legal Assistant
Capital Litigation Section
Office of the Attorney General
State of South Carolina*

*Direct Line: 803-734-1494
Main Line: 803-734-6305
Fax: 803-734-4035*

From: Ed Salter
To: Diana Holt
CC: Don Zelenka; Donna D'Alessio
Date: 3/15/2012 5:25 PM
Subject: RE: The redaction issue --ROGERS

Diana,

I do not understand why you do not think it is appropriate to deal with Donna D'Alessio, my administrative assistant, upon my request, on this issue or why you are uncomfortable doing so. The reason I have directed you to contact Donna and work with her is because this is the quickest resolution to your request, since she is the person who will do the corrections, where necessary. I do not personally redact any of the Appendices or Records on Appeal that we file in state or federal court. Like other members of this section and the Office of Appellate Defense, I leave that to other personnel. This is why she has unsuccessfully attempted to contact you about this case.

I have informed Donna that the software program we utilize did not redact anything in several instances on the victim's name and that of Tonya B., while in other instances it redacted both the first and last names in error. It is my understanding of the South Carolina Supreme Court's Order that a minor's first name may be used as well as the first initial of the last name. In my estimation, this means redacting the last name of the victim's father, as well, with the exception of the first initial thereof.

I do not believe that the mention of the surnames of the minors in opinions issued prior to the redaction Order that I have provided to you changes this requirement in new filings and litigation. Finally, Stephanie Simmon's name was erroneously redacted and I have asked that this be corrected.

Sincerely,
Ed

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Senior Assistant Attorney General
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agesalter@scag.gov

>>> Diana Holt <dianaholt@utexas.edu> 3/15/2012 4:32 PM >>>
Ed~

It is not appropriate, in my view, for me to interact with your very dedicated employee on that level and I do not feel at all comfortable doing so. My attempts to address the issues with you, the appropriate point person, have not been successful. I am going to file a motion with the Court seeking an order to have the Petitioner correct the ROA.

Best~dh

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-----Original Message-----

From: Ed Salter [<mailto:AGESALTER@scag.gov>]
Sent: Thursday, March 15, 2012 4:26 PM
To: Diana Holt
Cc: Donna D'Alessio
Subject: Re: The redaction issue --ROGERS

Again,
You'll need to speak to Donna about this issue.

William Edgar Salter, III
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>>> Diana Holt <dianaholt@utexas.edu> 3/15/2012 10:43 AM >>>
Hey Ed~ Just touching base one more time. Where are you on this problem? Thanks~dh

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Ed Salter - Rogers v. State Motion

From: Diana Holt <dianaholt@utexas.edu>
To: "agesalter@scag.gov" <agesalter@scag.gov>, "rdudek@sccid.sc.gov" <rdudek...>
Date: 3/20/2012 1:37 PM
Subject: Rogers v. State Motion
Attachments: Motion to Require Petitioner to Correct ROA-Fin Whole.pdf

Please see attached. Best~d Following by US Mail to Ed only.

Diana Holt
DianaHolt@utexas.edu
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DIANA HOLT, LLC

DIANA L. HOLT ATTORNEY AT LAW

Post Office Box 6454
Columbia, South Carolina 29260
Voice 803.782.1663
Fax 803.787.0374
Email DianaHolt@alumni.utexas.net

March 20, 2012

The Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211-1330

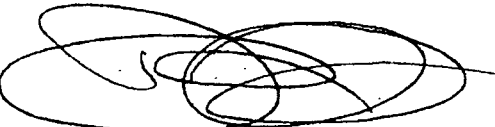
Re: *Timothy Dion Rogers (Respondent) v. State (Petitioner)*, 2000-CP-18-575,
REQUEST to exceed Page limit for the Return to Petitioner's over-sized
Petition and Filing of Return to the Petition.

Dear Mr. Shearouse:

Enclosed for filing are the original and six copies of Respondent's Motion To
Require the Petitioner to Correct the ROA, with certificate of service. Please also find an
SASE and another copy of the motion. Please file stamp and return to me in the SASE.

With highest personal regards, I remain

Very truly yours,



Diana L. Holt

cc: Mr. Ed Salter, Esq., to AGESalter@scag.gov (And by U.S. Mail) ✓
Mr. Robert Dudek, Esq., to rdudek@sccid.sc.gov

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

The Honorable Diane Schafer Goodstein, Circuit Court Judge
2000-CP-18-575

TIMOTHY DION ROGERS,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

MOTION TO REQUIRE THE PETITIONER TO FILE UNREDACTED
OR CORRECTED RECORD ON APPEAL

The Petitioner filed the record of appeal with so many redactions that the record on appeal is practically incomprehensible; few of the redactions are in accordance or compliance with this Court's order of August 13, 2007, *RE: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings*. Most of the redactions are wholly inappropriate. Respondent moves this Honorable Court to require the Petitioner to file an unredacted Record on Appeal or a properly redacted Record on Appeal.

Petitioner redacted the following information from the PCR Court's final order, but did not redact the information in the PCR Court's original order, petitioner's motion to alter or amend, or respondent's motion to alter or amend, nor from most of the two trial records or the PCR hearing

transcripts.. The PCR Court's final order is rendered largely unintelligible due to the Petitioner's redactions, such as:

1. The murder victim's first and last name. ROA 4859 and *passim*;
2. The murder victim's father's last name. *Id.*;
3. Tonya Bickham's first and last names, though at times redacts all but the first initials of her first and last name and at times does not redact her first name at all. *Id.*; Ms. Bickham's birth date, which is appropriate but the redaction eliminates an important fact tied to her birth date. Respondent is filing her birth date under seal, herewith. ROA 4872.
4. Witness Stephanie Simmon's first name. ROA 4860 and *passim*;
5. The name of the street on which respondent lived. ROA 4893
6. The last name of any of the victim's family. ROA 4894 and *passim*.
7. At times, all but the first initial of the last name of the forensic pathologist who conducted the autopsy, but at times not. ROA 4896;
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ROA 4959 and *passim*.

12. The last name, except for the first initial, of Respondent's brother, Robert Bryant.

ROA 4959 and *passim*.

13. All but the first initial of the name of Respondent's eldest daughter, Tamika Rogers, but not her last name. ROA 4964.

Undersigned counsel attempted to correct the matter by conferring with Petitioner's counsel and raised the issue of improper redactions with Petitioner's counsel, providing the specific list of improperly redacted names, *supra*. Petitioner's counsel responded that he left redaction matters to his assistant and did not directly involve himself with redactions. His redaction program was part of the blame for the errant redactions. He stated that undersigned counsel should direct the administrative assistant assigned to Petitioner's counsel in correcting the improper redactions in the ROA, even though it is immediately apparent in the communications that counsel have arguably reasonable differences of interpretation of this Court's 2007 order concerning redactions, making Petitioner's suggestion rather untenable. Attachment A Communications between counsel for the parties on the redaction issue, for informational purposes only. As Petitioner's counsel stated in Attachment A, his belief is that the Court's 2007 order requires the redaction of not only the victim's name, but also redaction of her father's name, even despite the fact that the names of the victim and her father are included in the two direct appeal opinions issued by this Court. Counsel for Petitioner further interprets this Court's 2007 regarding redactions to bar including the name of any minor. *Id.* The effect of the redactions is to render the record on appeal and the lower court's final order difficult, at best, to interpret.

WHEREFORE, Respondent respectfully request that the Court require the Petitioner to file an unredacted or properly redacted ROA in this matter, in order that this Court may have an intelligible version of the case below, which is necessary to this Court's review.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Diana Holt", written over a horizontal line.

Diana Holt, LLC
P.O. Box 6454
Columbia, S.C. 29260
(803) 782-1663

Counsel for Respondent.

March 20, 2012

ATTACHMENT A

Diana Holt

From: Diana Holt
Sent: Thursday, March 01, 2012 3:41 PM
To: Ed Salter
Subject: RE: Rogers

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Final PCR ORDER

In affirming Applicant's conviction for the murder of [REDACTED] [REDACTED] in vacating Applicant's convictions for Criminal Sexual Conduct, 2nd degree, which were entirely unrelated to [REDACTED] [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, Tonya B. [REDACTED] and Daxton Patterson, walked to Spell's Grocery Store in Summerville, SC, to use a pay phone located at the front of the exterior of the store. Applicant, Mr. Patterson, and Ms. B. [REDACTED] had been drinking alcoholic beverages and smoking marijuana most of the afternoon. While at the phone, the trio encountered Mike [REDACTED] and his friend, James Carver, who had arrived at Spell's in Mr. [REDACTED] pick-up truck, along with Mr. [REDACTED] nine-year-old daughter, [REDACTED]. Mr. [REDACTED] had been drinking beer that the afternoon. Carver claimed he had not consumed any alcohol. [REDACTED] went inside the store to get a sandwich. Mr. [REDACTED] purchased more beer. At some point, Mr. [REDACTED] engaged in a brief conversation with a family friend and employee, Anthony Riley, in front of the store. Mr. [REDACTED] and Mr. Carver were planning on hunting and fishing at the [REDACTED] family lake house, where they were to gather with other [REDACTED] family members for the Thanksgiving holiday.

Mr. Patterson first engaged in a verbal dispute with Mr. Carver and Mr. [REDACTED]. As the dispute among Carver, [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. [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. [REDACTED] 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. [REDACTED] 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. [REDACTED] truck was pulling away from the store or backing up toward Applicant. It matters not. Assuming arguendo that the [REDACTED] truck was backing toward Applicant, he was in unlawful possession of a firearm that he intentionally fired, killing [REDACTED] [REDACTED] [REDACTED] 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 [REDACTED] head, and exited through her forehead. Applicant, Mr. Patterson, and Ms. B [REDACTED] fled the scene. [REDACTED] 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 [REDACTED]. 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, [REDACTED] 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 [REDACTED] 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

Superseded Order - PCR Court
Reduction - Free

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 Burditt'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 Burditt lived in Summerville, South Carolina, with his wife and his nine-year-old daughter, Stephanie. On the week of November 25, 1992, the Burditts were staying on the houseboat at Santee Resort, with

Mrs. Burditt's parents. Because school was in session, Mr. Burditt 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. Burditt 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. Burditt 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. Burditt 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. Burditt 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. Burditt more beer. However, Mr. Carver stayed in the truck. On his way into the store, Mr. Burditt saw Mr. Anthony Riley, a friend and employee talking on the telephone.³ 1994 R. p. 720-30; 744-45; 791-97.

When Mr. Burditt 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. Burditt and Mr. Riley were talking, Applicant,⁴ Tonya Bickham (Bickham) 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. Burditt nor Mr. Carver had ever seen these people before. Mr. Riley had seen Applicant, but not Patterson or Bickham. It is uncontested that Mr. Patterson is the person who first engaged in a verbal dispute with Mr. Carver and Mr. Burditt, 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. Burditt 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. Burditt and Mr. Carver testified applicant pointed his gun at Mr. Burditt's forehead and said, "I'll kill you." Evidence at the PCR trial was that Mr. Burditt or Mr. Carver or both used racial slurs

³ While Mr. Burditt and Mr. Carver are white, Mr. Riley is black.

⁴ Applicant and Bickham 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. Burditt 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. Burditt then cranked up his truck and testified he attempted to leave the parking lot. Applicant testified Burditt 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 Burditt's head and exited through her forehead. Applicant, Mr. Patterson and Ms. Bickham fled the scene. 1994 R. p. 734-40; 750-53; 754-55; 761; 945-50; 953-57; 960.

Stephanie Burditt was transported to Trident Hospital where she died the next day. 1994 R. p. 854-59.

Tonya Bickham⁷ is Applicant's seventeen year old girlfriend, and he is the father of her child. Bickham 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. Bickham 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 Bickham 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 Bickham testified Bickham 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, Bickham 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. Bickham 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. Burditt 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 officers⁹ 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 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 STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Case No. 2000-CP-18-575

TIMOTHY DION ROGERS Respondent,

v.

STATE of SOUTH CAROLINA, ...Appellant.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Respondent's Motion to Require Respondent to File a Properly Redacted or Corrected Record on Appeal, in the above-entitled case has been served upon Petitioner's counsel by first class mail, postage prepaid, addressed to counsel of record, Edgar Salter, III, Post Office Box 11549, Columbia, South Carolina 29211-1549.


DIANA L. HOLT

Diana Holt, LLC
P.O. Box 6454
Columbia, S.C. 29260
(803) 782-1663

Counsel for Respondent.

March 20, 2012



ALAN WILSON
ATTORNEY GENERAL

March 29, 2012

RECEIVED

APR 02 2012

S.C. Supreme Court
pm 3-29-12

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *Timothy Dion Rogers v. The State*

Dear Mr. Shearouse:

Enclosed please find an original and six (6) copies of Respondent's Return to Motion to Require the Petitioner to File Unredacted or Corrected Appendix, together with Proof of Service regarding the above matter.

By copy of this letter I am serving two (2) copies of same upon Respondent's counsel and all interested parties.

Thank you for your assistance in this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd

Enclosures

cc: Diana Holt, Esq. (w/copies of encls.)

Post Office Box 6454
Columbia, South Carolina 29260
Voice 803.782.1663
Fax 803.787.0374
Email DianaHolt@alumni.utexas.net

March 23, 2012

RECEIVED

MAR 26 2012

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211-1330

Re: *Timothy Dion Rogers (Respondent) v. State of South Carolina (Petitioner)*,
2000-CP-18-575, CORRECTED Motion to Require Petitioner to File
Correctly Redacted or Unredacted Copy of the Appendix

Dear Mr. Shearouse:

Enclosed for filing are six copies and the original corrected motion referenced
above, with certificate of service.

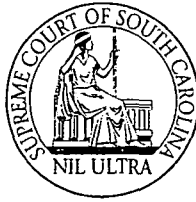
With highest personal regards, I remain

Very truly yours,

A handwritten signature in black ink, appearing to be "Diana L. Holt", enclosed within a large, loopy oval shape.

Diana L. Holt

cc: Mr. Ed Salter, Esq., to AGESalter@scag.gov (By U.S. Mail, also)
Mr. Robert Dudek, Esq., to rdudek@sccid.sc.gov



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 9, 2012

Diana L. Holt, Esquire
P.O. Box 6454
Columbia, SC 29260-6454

Re: Rogers, Timothy Dion v. State

Dear Counsel:

The following Order has been endorsed on your Motion to Exceed Page Limit on Return to Petition for Writ of Certiorari in the above entitled case on appeal.

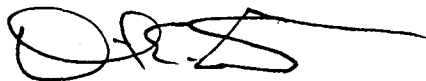
“Granted.

s/ Costa M. Pleicones J.
For the Court

March 9, 2012.”

By copy of this letter we are advising opposing counsel of the action of the Court in this matter.

Very truly yours,



CLERK

DES/dmh

cc: Senior Assistant Attorney General William Edgar Salter, III

Post Office Box 6454
Columbia, South Carolina 29260
Voice 803.782.1663
Fax 803.787.0374
Email DianaHolt@alumni.utexas.net

March 5, 2012

HAND DELIVERY

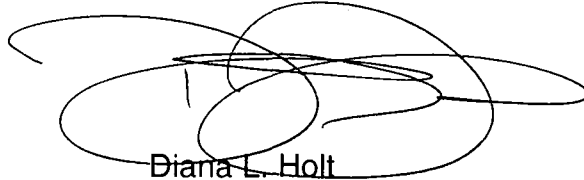
The Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211-1330

Re: *Timothy Dion Rogers (Respondent) v. State (Petitioner)*, 2000-CP-18-575,
REQUEST to exceed Page limit for the Return to Petitioner's over-sized
Petition and Filing of Return to the Petition.

Dear Mr. Shearouse:

Enclosed for filing are the original and six copies of both the Motion to Exceed Page
Limits and the Return to the Petition for Writ of Certiorari, with certificates of service.
With highest personal regards, I remain

Very truly yours,



Diana L. Holt

(CC recipients via facsimile and electronically only)

cc: Mr. Ed Salter, Esq., to AGESalter@scag.gov
Mr. Robert Dudek, Esq., to rdudek@sccid.sc.gov

RECEIVED

MAR 5 2012

S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal From Dorchester County

The Honorable Diane Schafer Goodstein, Circuit Court Judge

RECEIVED

MAR 5 2012

S.C. Supreme Court

TIMOTHY DION ROGERS,

Respondent,

vs.

State of South Carolina,

Petitioner.

MOTION TO EXCEED PAGE LIMIT
ON RETURN TO PETITION FOR *WRIT OF CERTIORARI*

Respondent, Timothy D. Rogers, a death-sentenced inmate requests authorization to exceed the 25 page limit in his Return to the state's petition for *writ of certiorari* from the grant of post-conviction relief, which is due to be filed on March 5, 2012. Petitioner sought authority to file a petition for writ of certiorari in excess of the 25 page limit, which was granted. In support of this motion, Petitioner respectfully submits the following, pursuant to Rule 243(g), SCACR, which provides that a return to a petition for writ of certiorari "shall not exceed twenty-five (25) pages:"

This is a capital case. The petition for writ of certiorari is 63 pages in length. Respondent requests permission to exceed this limit and to file a petition not to exceed 51 pages. This extended return to the petition is necessary for a number of reasons. First, the post-conviction

record in this case includes approximately 5000 pages and the PCR court's order granting relief is itself approximately 150 pages long. In order to adequately address all of the findings of the PCR court and the 18 issues in 10 questions Petitioner raised to this Court, Mr. Rogers will need to file a return to the petition approximately 51 pages in length.

Second, in addition to addressing the questions Petitioner raised to this Court, Mr. Rogers will need to file an oversized return to the oversized petition in order to adequately preserve all issues for federal habeas corpus proceedings, just in case this Court grants Petitioner relief. In short, a federal court will not review an issue that has not been "exhausted" in state court. 28 U.S.C. § 2254(b). Exhaustion requires that the issue be "fairly presented" to the "highest" state court, *Brown v. Allen*, 344 U.S. 443, 447 (1953), either on direct appeal or in state post-conviction proceedings, *Castille v. Peoples*, 489 U.S. 346, 351 (1989). Exhaustion also requires pursuit of all available discretionary review options, which are a part of the ordinary appellate process. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). Exhaustion requires that the state court be presented with the facts and the specific legal arguments necessary for the state court to address the issue. *Anderson v. Harless*, 459 U.S. 4 (1982); *Picard v. Connor*, 404 U.S. 270 (1971).

Exhaustion means more than notice. In requiring exhaustion of a federal claim in state court, Congress surely meant that exhaustion be serious and meaningful.

The purpose of exhaustion is . . . to channel claims into an appropriate [state court] forum, where meritorious claims may be vindicated Comity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court. Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits.

Keeney v. Tamayo-Reyes, 504 U.S. 1, 10 (1992). Failure to exhaust the claims will result in the federal court denying relief without reviewing the substance of the unexhausted claims. 28 U.S.C. § 2254(b)(3). Thus, Respondent requests leave to file a petition not to exceed 51 pages.

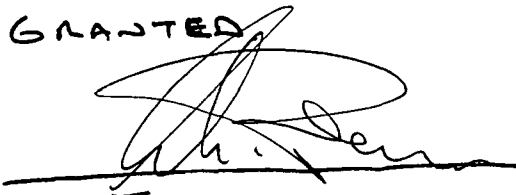
WHEREFORE, Respondent requests that this Court grant leave to file the Return to the Petition, not to exceed 51 pages in length.

Respectfully Submitted,

DIANA L. HOLT
Diana Holt, LLC
Post Office Box 6454
Columbia, South Carolina 29260
(803) 782-1663

BY: 
COUNSEL FOR RESPONDENT

March 5, 2012.

GRANTED

FOR THE COURT J.
March 9, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Case No. 2000-CP-18-575

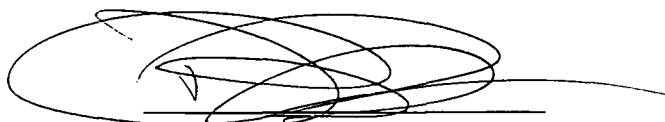
TIMOTHY DION ROGERS Respondent,

v.

STATE of SOUTH CAROLINA, ...Appellant.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Respondent's request to exceed 25 page limit in the return to the petition for *writ of certiorari* in the above-entitled case has been served upon Petitioner's counsel by first class mail, postage prepaid, addressed to counsel of record, Edgar Salter, III, Post Office Box 11549, Columbia, South Carolina 29211-1549.


DIANA L. HOLT

Diana Holt, LLC
P.O. Box 6454
Columbia, S.C. 29260
(803) 782-1663

Counsel for Respondent.

March 5, 2012

The Supreme Court of South Carolina

Timothy Dion Rogers, Respondent,

v.

State of South Carolina, Petitioner.

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2000-CP-18-00575

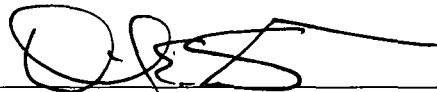
ORDER

For good cause shown, the request for an extension to serve and file the Return to Petition for a Writ of Certiorari is granted and extended until March 5, 2012. Any further extension request must show the existence of extraordinary circumstances and state what actions are being taken to insure that no further extension will be required.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

February 6, 2012

cc: Diana L. Holt, Esquire
Senior Assistant Attorney General William Edgar Salter, III

Post Office Box 6454
Columbia, South Carolina 29260
Voice 803.782.1663

Fax 803.787.0374

Email DianaHolt@alumni.utexas.net

February 3, 2012

RECEIVED

Via Facsimile Transmission and U.S. Mail FEB 04 2012

The Honorable Daniel E. Shearouse

Clerk of South Carolina Supreme Court

P.O. Box 11330

Columbia, S.C. 29211-1330

(803) 734-1499

S.C. SUPREME COURT

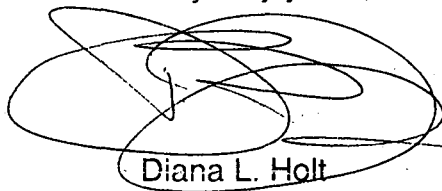
Re: *Timothy Dion Rogers (Respondent) v. State of South Carolina (Petitioner)*,
2000-CP-18-575, REQUEST FOR THIRD EXTENSION OF TIME

Dear Mr. Shearouse:

I write on behalf of the Respondent to request a third (and final) extension of time. Please note that Respondent's Return to the Petitioner's petition was due today, February 3, 2012. I request an extension of 30 days additional time in which to file the Return. The extension is made necessary due to work in other capital matters and is in no way intended to cause delay. Please be advised that I have contacted Mr. Ed Salter and he does not oppose the request in any regard.

With highest personal regards, I remain

Very truly yours,



Diana L. Holt

(CC recipients via facsimile and electronically only)

cc: Mr. Ed Salter, Esq., to AGESalter@scag.gov (734-4035)
Mr. Robert Dudek, Esq., to rdudek@sccid.sc.gov (803-734-1397)

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

The Honorable Diane Schafer Goodstein, Circuit Court Judge
2000-CP-18-575

TIMOTHY DION ROGERS,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

PETITION FOR EXTENSION OF TIME IN WHICH TO
FILE RETURN TO PETITION FOR WRIT OF CERTIORARI

The undersigned counsel respectfully requests a thirty day extension in which to file the petition for writ of certiorari and accompanying appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

1. The return to the petition for writ of certiorari is due to be served and filed today.
2. The post-conviction relief transcripts, the trial records, and evidence of all types in this case are voluminous.
3. Counsel endeavored to file the return as currently scheduled, but simply was unable to do it. Additionally, counsel has been embroiled in litigation on several different

RECEIVED

FEB 06 2012

S.C. SUPREME COURT

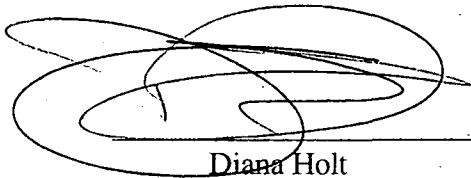
fronts, including the unexpected full grant of relief issued by the Fourth Circuit Court of Appeals in the matter of *Edward Lee Elmore v. Jon Ozmint*, in that the state has announced its intention to retry Mr. Elmore. *Starnes v. State*, a capital post conviction relief action, due to time constraints that required counsel to proceed at a highly accelerated pace, has also necessarily consumed a lot of counsel's available time during this period.

4. This request is made in good faith, and not for purposes of delay. Barring a catastrophic event, Counsel avers that she will absolutely *not* request another extension from the Court. In fact, Counsel intends to make an all out effort to file the return prior to the new deadline, should the Court grant the request for a thirty day extension.

5. Counsel for the state does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension. Counsel respectfully requests that the time limits for filing the return to the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

Respectfully submitted,



A handwritten signature in black ink, appearing to read 'Diana Holt', is written over a horizontal line. The signature is stylized with loops and a long horizontal stroke.

Diana Holt, LLC
P.O. Box 6454
Columbia, S.C. 29260
(803) 782-1663

Counsel for Respondent.

February 3, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2000-CP-18-575

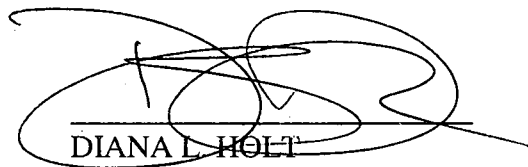
TIMOTHY DION ROGERS Respondent,

v.

STATE of SOUTH CAROLINA, ... Appellant.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Supplemental Motion for Extension of Time in the above entitled case has been served upon Respondent's counsel by first class mail, postage prepaid, addressed to counsel of record, Edgar Salter, III, Post Office Box 11549, Columbia, South Carolina 29211.



DIANA L. HOLT

Diana Holt, LLC
P.O. Box 6454
Columbia, S.C. 29260
(803) 782-1663

Counsel for Respondent.

February 3, 2012

DIANA HOLT, LLC**DIANA L. HOLT ATTORNEY AT LAW****RECEIVED**

FEB 03 2012

Post Office Box 6454
Columbia, South Carolina 29260
Voice 803.782.1663
Fax 803.787.0374
Email DianaHolt@alumni.utexas.net

February 3, 2012

S.C. SUPREME COURT

Via Facsimile Transmission and U.S. Mail
The Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211-1330
(803) 734-1499

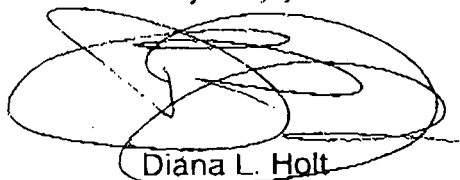
Re: *Timothy Dion Rogers (Respondent) v. State of South Carolina (Petitioner)*,
2000-CP-19-575, REQUEST FOR THIRD EXTENSION OF TIME

Dear Mr. Shearouse:

I write on behalf of the Respondent to request a third (and final) extension of time. Please note that Respondent's Return to the Petitioner's petition was due today, February 3, 2012. I request an extension of 30 days additional time in which to file the Return. The extension is made necessary due to work in other capital matters and is in no way intended to cause delay. Please be advised that I have contacted Mr. Ed Salter and he does not oppose the request in any regard.

With highest personal regards, I remain

Very truly yours,


Diana L. Holt

(CC recipients via facsimile and electronically only)

cc: Mr. Ed Salter, Esq., to AGESalter@scag.gov (734-4035)
Mr. Robert Dudek, Esq., to rdudek@sccid.sc.gov (803-734-1397)

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

The Honorable Diane Schafer Goodstein, Circuit Court Judge
2000-CP-18-575

TIMOTHY DION ROGERS,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

PETITION FOR EXTENSION OF TIME IN WHICH TO
FILE RETURN TO PETITION FOR WRIT OF CERTIORARI

The undersigned counsel respectfully requests a thirty day extension in which to file the petition for writ of certiorari and accompanying appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

1. The return to the petition for writ of certiorari is due to be served and filed today.
2. The post-conviction relief transcripts, the trial records, and evidence of all types in this case are voluminous.
3. Counsel endeavored to file the return as currently scheduled, but simply was unable to do it. Additionally, counsel has been embroiled in litigation on several different

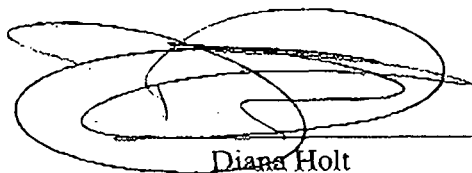
fronts, including the unexpected full grant of relief issued by the Fourth Circuit Court of Appeals in the matter of *Edward Lee Elmore v. Jon Ozmint*, in that the state has announced its intention to retry Mr. Elmore. *Starnes v. State*, a capital post conviction relief action, due to time constraints that required counsel to proceed at a highly accelerated pace, has also necessarily consumed a lot of counsel's available time during this period.

4. This request is made in good faith, and not for purposes of delay. Barring a catastrophic event, Counsel avers that she will absolutely *not* request another extension from the Court. In fact, Counsel intends to make an all out effort to file the return prior to the new deadline, should the Court grant the request for a thirty day extension.

5. Counsel for the state does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension. Counsel respectfully requests that the time limits for filing the return to the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

Respectfully submitted,



Diana Holt

Diana Holt, LLC
P.O. Box 6454
Columbia, S.C. 29260
(803) 782-1663

Counsel for Respondent.

February 3, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2000-CP-18-575

TIMOTHY DION ROGERS Respondent,

v.

STATE of SOUTH CAROLINA, ... Appellant.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Supplemental Motion for Extension of Time in the above entitled case has been served upon Respondent's counsel by first class mail, postage prepaid, addressed to counsel of record, Edgar Salter, III, Post Office Box 11549, Columbia, South Carolina 29211.



DIANA L. HOLT

Diana Holt, LLC
P.O. Box 6454
Columbia, S.C. 29260
(803) 782-1663

Counsel for Respondent.

February 3, 2012

Diana Holt, LLC

Attorney

P.O. Box 6454

Columbia, South Carolina 29260

(803)782-1663

(Voice)

(803)787-0374

(Facsimile)

Date: February 3, 2012

**To: The Honorable Daniel Shearouse (803) 734-1499
Wm. Edgar Salter, Esq. 734-4035 (email only by consent)
Robert Dudek, Esquire 734-1397**

RE: ROGERS v. OZMINT, 00-CP-18-575

5 Pages (including cover page)

CONFIDENTIALITY NOTICE:

If this facsimile wasn't intended for you, don't read it: Destroy it immediately, please.

RECEIVED

FEB 08 2012

S.C. SUPREME COURT

Post Office Box 6454
Columbia, South Carolina 29260
Voice 803.782.1663
Fax 803.787.0374
Email DianaHolt@alumni.utexas.net

January 5, 2012

Via Facsimile Transmission and U.S. Mail
The Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211-1330
(803) 734-1499

RECEIVED

JAN 06 2012

S.C. SUPREME COURT

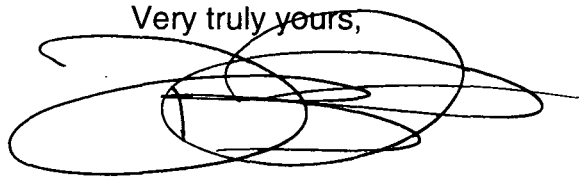
Re: *Timothy Dion Rogers (Respondent) v. Jon E. Ozmint, Director, SC Dept. Of Corrections (Petitioner)*, 2000-CP-18-575, REQUEST FOR SECOND EXTENSION OF TIME

Dear Mr. Shearouse:

I write on behalf of the Respondent to request a second extension of time, nunc pro tunc, from January 4, 2012. Please note that Respondent's Return to the Petitioner's petition was due January 4, 2012. I request an extension of 30 days additional time in which to file the Return. The extension is made necessary due to work in other capital matters and is in no way intended to cause delay. Please be advised that I have contacted Mr. Ed Salter and he does not oppose the request in any regard. My profound apologies to the Court for not filing the request on or before the due date (yesterday).

With highest personal regards, I remain

Very truly yours,

A handwritten signature in black ink, appearing to be "Diana L. Holt", with a large, stylized flourish extending from the end of the signature.

Diana L. Holt

(CC recipients via facsimile and electronically only)

cc: Mr. Ed Salter, Esq., to AGESalter@scag.gov (734-4035)
Mr. Robert Dudek, Esq., to rdudek@sccid.sc.gov (803-734-1397)

The Supreme Court of South Carolina

Timothy Dion Rogers, Respondent,

v.

State of South Carolina, Petitioner.

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2000-CP-18-00575

ORDER

For good cause shown, the request for an extension to serve and file the Return to Petition for a Writ of Certiorari is granted and extended until February 3, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Dwenda A. Shealy
Chief Deputy CLERK

Columbia, South Carolina

January 5, 2012

cc: Senior Assistant Attorney General William Edgar Salter, III
Chief Appellate Defender Robert M. Dudek
Diana L. Holt, Esquire

DIANA HOLT, LLC**DIANA L. HOLT ATTORNEY AT LAW**

Post Office Box 6454
Columbia, South Carolina 29260
Voice 803.782.1663
Fax 803.787.0374
Email DianaHolt@alumni.utexas.net

January 5, 2012

Via Facsimile Transmission and U.S. Mail
The Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211-1330
(803) 734-1499

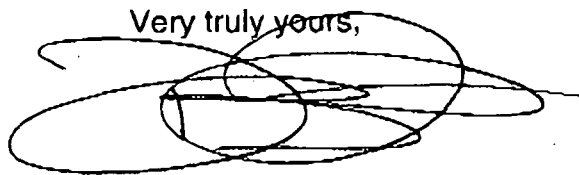
Re: *Timothy Dion Rogers (Respondent) v. Jon E. Ozmint, Director, SC Dept. Of Corrections (Petitioner)*, 2000-CP-18-575, REQUEST FOR SECOND EXTENSION OF TIME

Dear Mr. Shearouse:

I write on behalf of the Respondent to request a second extension of time, nunc pro tunc, from January 4, 2012. Please note that Respondent's Return to the Petitioner's petition was due January 4, 2012. I request an extension of 30 days additional time in which to file the Return. The extension is made necessary due to work in other capital matters and is in no way intended to cause delay. Please be advised that I have contacted Mr. Ed Salter and he does not oppose the request in any regard. My profound apologies to the Court for not filing the request on or before the due date (yesterday).

With highest personal regards, I remain

Very truly yours,



Diana L. Holt

RECEIVED

JAN 05 2012

S.C. SUPREME COURT

(CC recipients via facsimile and electronically only)

cc: Mr. Ed Salter, Esq., to AGESalter@scag.gov (734-4035)
Mr. Robert Dudek, Esq., to rdudek@sccid.sc.gov (803-734-1397)

The Supreme Court of South Carolina

Timothy Dion Rogers, Respondent,

v.

State of South Carolina, Petitioner.

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2000-CP-18-00575

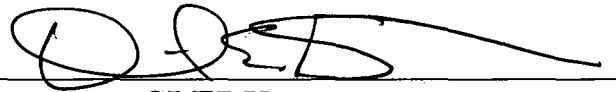
ORDER

The request for an extension to serve and file the Return to Petition for a Writ of Certiorari is granted and extended until January 4, 2012.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

December 7, 2011

cc: Diana L. Holt, Esquire
Assistant Deputy Attorney General Donald J. Zelenka
Senior Assistant Attorney General William Edgar Salter, III

Post Office Box 6454
Columbia, South Carolina 29260
Voice 803.782.1663

Fax 803.787.0374
Email DianaHolt@alumni.utexas.net

December 5, 2011

The Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211-1330

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DEC 6 2011
S.C. SUPREME COURT

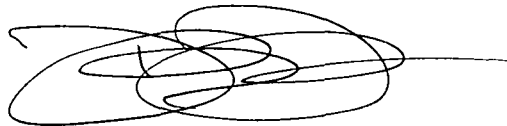
Re: *Timothy Dion Rogers (Respondent) v. Jon E. Ozmint, Director, SC Dept. Of Corrections (Petitioner)*, 2000-CP-18-575

Dear Mr. Shearouse:

I write to request an extension of thirty (30) days in which to file the return to the Petition for Writ of Certiorari and Appendix in the above-referenced case. The Return is currently due to be served and filed today, December 5, 2011. Due to my heavy involvement in other capital case matters, I have not been able to complete the Return as of yet.

With highest personal regards, I remain

Very truly yours,



Diana L. Holt

(CC recipients electronically only)

cc: Mr. Ed Salter, Esq., to AGESalter@scag.gov
Mr. Robert Dudek, Esq., to rdudek@sccid.sc.gov



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 3, 2011

Attorney General Alan Wilson
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Donald J. Zelenka
Senior Assistant Attorney General William Edgar Salter, III
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Rogers, Timothy Dion v. State

Dear Counsel:

The following Order has been endorsed on your Motion to Exceed Twenty-Five Page Limit for a Petition for Writ of Certiorari in the above entitled case on appeal.

"Granted.

s/ Jean H. Toal C.J.
For the Court

November 3, 2011."

Please be advised that by copy of this letter we are advising all interested parties of the action by the Court.

Very truly yours,


CLERK

Rogers, Timothy Dion v. State
Page Two
November 3, 2011

DES/lda

cc: Chief Appellate Defender Robert M. Dudek
Diana L. Holt, Esquire

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Dorchester County
The Honorable Diane S. Goodstein, Circuit Court Judge OCT 21 2011

RECEIVED

TIMOTHY DION ROGERS,

S.C. Supreme Court

Respondent,

vs.

THE STATE,

Petitioner.

**MOTION TO EXCEED TWENTY-FIVE PAGE LIMIT FOR
A PETITION FOR WRIT OF CERTIORARI**

Petitioner, the State, respectfully moves for an order allowing the State to file a Petition for Writ of Certiorari in excess of the twenty-five (25) page limit imposed by Rule 243(e), SCACR. In support of this motion, counsel would respectfully show the Court:

1. The State's Petition for Writ of Certiorari is due to be served and filed in this Court, today, October 21, 2011. This is a capital post-conviction relief appeal matter and the record, pleadings and Amended Order are lengthy. The Appendix prepared for filing with the Petition is eleven (11) volumes, and the Amended Order is one hundred fifty (150) pages long. **App. 4858-5008.** There is no capital case exception on page limitations in Rule 243(e), SCACR to compliment the exception for capital case brief length in direct appeal as found in Rule 208 (b)(5), SCACR.

2. The undersigned counsel for Petitioner, the State, has completed the Petition for Writ of Certiorari, and has raised eighteen (18) issues for this Court's consideration. These issues are grouped into ten (10) separate arguments. The various errors presented for this Court's review

include, but are not limited to (1) erroneously granting relief (**App. 4973-84**) on two charges of CSC with a minor in the second degree based on lack of subject matter jurisdiction and ineffective assistance where Rogers challenged these separate convictions in his Amended Application, which only properly challenged his murder conviction; the statute of limitations for filing a PCR application on these convictions had long since run; the supposed error did not involve the Circuit Court's subject matter jurisdiction and Rogers waived personal jurisdiction; and the grant of relief, based upon T.B's testimony, is inconsistent with the record, including Rogers resentencing phase testimony in 1996 and his representations at the time of the plea (Argument II); (2) erroneously granting relief on counsel's handling of fact witnesses in resentencing (**App. 4936; 4941-43; 4944-49; 4968-73**, Arguments II & VII), where the court found no prejudice in the handling of these witnesses in the guilt phase even though the testimony of the witnesses at both proceedings was virtually identical, Rogers' resentencing claims are weaker because the same points would be made in resentencing by these witnesses, he had already been convicted by the time of resentencing and there is no constitutional right to argue residual doubt. *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988); (3) erroneously granting relief on counsel's failure to adequately impeach a fact witness at resentencing who testified in 1994 but did not testify at resentencing (**App. 4946-47**, Argument VII); (4) erroneously granting relief on two claims even though the Order does not comply with S.C. Code Ann. § 17-27-80 (**App. 4967-68**, Arguments IV-V); and (5) applying the wrong prejudice standard in regard to the resentencing ineffective claims and not applying a balance of aggravating and mitigating factors as required by *Strickland v. Washington*, 466 U.S. 668, 695 (1984). To adequately address the issues, Petitioner has prepared a sixty-three (63) page petition. Petitioner has diligently attempted to trim the petition, but finds it necessary to request the Court's permission to exceed the

standard page limit.

3. Undersigned counsel will serve and conditionally submit the return today, pending resolution of this motion.

WHEREFORE, undersigned counsel for Petitioner would respectfully request an order from this Court granting permission to exceed the twenty-five (25) page limit of Rule 243(e), SCACR, and accepting the conditionally filed Petition.

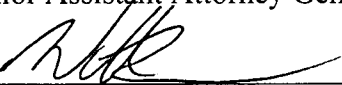
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

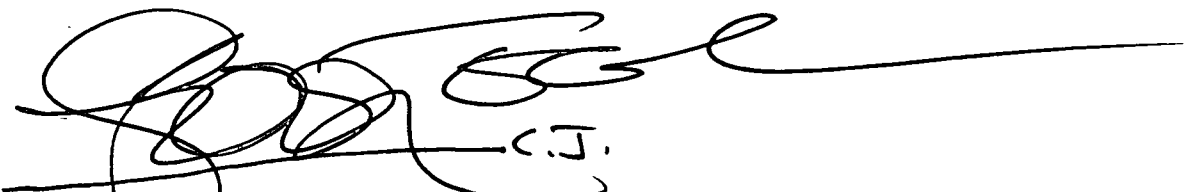
WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

By: 
WILLIAM EDGAR SALTER, III

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305
ATTORNEYS FOR PETITIONER

October 21, 2011.

GRANTED.


C.J.
For THE COURT

November 3, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

TIMOTHY DION ROGERS,

Respondent,

vs.

THE STATE,

Petitioner.

PROOF OF SERVICE

I, William Edgar Salter, III, hereby certify that the *State's Motion to Exceed Twenty-Five Page Limit for a Petition for Writ of Certiorari* has been served upon Respondent by depositing two (2) copies in the United States mail, first class postage prepaid, to his attorney of record, addressed as follows:

Diana Holt, Esq.
Diana Holt, LLC
P.O. Box 6454
Columbia, SC 29260-6454

This 21st day of October, 2011.



WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

ALAN WILSON
ATTORNEY GENERAL



RECEIVED

OCT 21 2011

October 21, 2011

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: Timothy Dion Rogers, Respondent vs. State of South Carolina, Petitioner
Petition for Writ of Certiorari

Dear Mr. Shearouse:

Enclosed please find an original and six copies of the Petition for Writ of Certiorari, Motion to Exceed Page Limit, two copies (one unbound) of the Appendix, and the Proof of Service to be filed in this matter.

By copy of this letter I am serving two (2) copies of same upon Respondent's counsel.

Thank you for your assistance in this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd
Enclosures

cc: Diana Holt, Esq. (w/2 copies of encls.)
Robert Dudek, Esq. (w/copy of encl.)
The Honorable David M. Pascoe, Jr., Solicitor, 1st Judicial Circuit (w/copy of encl.)
Sandi Wofford, Victim Services (w/copy of encl.)

The Supreme Court of South Carolina

Timothy Dion Rogers, Respondent,

v.

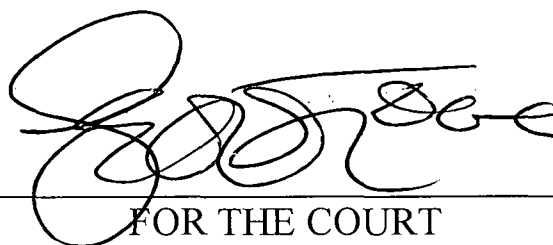
State of South Carolina, Petitioner.

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2000-CP-18-00575

ORDER

Petitioner seeks a fifth extension of time to serve and file the Petition for a Writ of Certiorari and Appendix in the above entitled matter and asserts that extraordinary circumstances justify this extension. The opposing party consents to the extension. The request for an extension is granted until October 21, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.



FOR THE COURT C.J.

Columbia, South Carolina

September 26, 2011

cc: Senior Assistant Attorney General William Edgar Salter, III
Chief Appellate Defender Robert M. Dudek
Diana L. Holt, Esquire



ALAN WILSON
ATTORNEY GENERAL

September 21, 2011

RECEIVED

SEP 21 2011

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

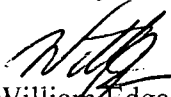
Re: *Timothy Dion Rogers, #4883 vs. Jon E. Ozmint, Director,*
South Carolina Department of Corrections
C.A. No.: 00-CP-18-575

Dear Mr. Shearouse:

I hereby request an extension of thirty (30) days in which to file the Petition for Writ of Certiorari and Appendix in the above-referenced case. The Petition is currently due to be served and filed today, September 21, 2011. However, because of my involvement in other matters in state and federal court, I have been unable to timely complete the Petition.

Therefore, I am enclosing an original and six (6) copies of a Motion for Fourth Extension to File Petition for Writ of Certiorari and Appendix. I have contacted Respondent's counsel and have obtained her consent to this extension.

Sincerely,


William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd
Enclosures
cc: Diana Holt, Esq. (w/2 copies of encls.)

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

SEP 21 2011

Appeal From Dorchester County
The Honorable Charles W. Whetstone, Jr., Circuit Court Judge

S.C. Supreme Court

TIMOTHY DION ROGERS, #4483

Respondent,

vs.

JON E. OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS

Petitioner.

MOTION FOR FIFTH EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

Petitioner, moves this Court for an additional thirty (30) day extension of time in which to file the Petition for Writ of Certiorari and Appendix. This is Petitioner's fifth and final request for an extension of time in which to file the petition, and no further extensions will be requested, absent an unforeseen emergency. In support of the request and pursuant to this Court's Order dated March 18, 2009, undersigned counsel would respectfully show the Court:

The undersigned counsel for Respondent has been scheduled for a number of state and federal matters in the last thirty (30) days, that include, but are not limited to, the following:

1. Counsel prepared the Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of *George Maurice T. Adams, #181283 vs. Anthony*

Padula, Warden, C/A No. 3:11-31-DCN-JRM on August 22, 2011. Said return was 124 pages in length;

2. Counsel prepared the Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of *Antonio Richards*, #310723 vs. *Leroy Cartledge*, MCI, C/A No. 3:11-738-RBH-JRM on August 24, 2011;

3. Counsel prepared the Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of *Jemol Brown*, #318297 vs. *Gregory Knowlin*, C/A No. 0:11-778-MBS-PJG on August 26, 2011;

4. Counsel prepared the Final Brief of Respondent in the matter of *The State vs. Kendrick Taylor*, a Charleston County direct appeal on September 1, 2011;

5. Counsel prepared the Final Brief of Respondent in the matter of *The State vs. James Keion Spann*, a Lee County direct appeal on September 6, 2011;

6. Counsel prepared the Initial Brief of Respondent in the matter of *The State vs. Rafael Horlbeck*, a Charleston County direct appeal matter on September 13, 2011;

8. Counsel was on previously planned annual leave from September 6, 2011 through September 9, 2011;

9. As per the direction of the Honorable Lee S. Alford, counsel prepared a proposed Order granting the State's motion to dismiss the application for Post-Conviction Relief in the York County Death Penalty PCR matter of *James D. Robertson*, #5067 vs. *State of South Carolina*, 2011-CP-46-00072 on September 15, 2011;

10. Counsel prepared the Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of *Paul Weary McFadden, Jr.*, #147331 vs. *Warden of*

Evans Correctional Institution, C/A No. 6:11-1444-JMC-KFM on September 20, 2011;

11. Counsel is also preparing the Returns and Memorandums of Law in Support of Motions for Summary Judgment in the matters of *Lorenzo Nesbitt*, #265345 vs. *Warden, McCormick C.I.*, C/A No.: 8:11-920-RBH-JDA which is currently on its 4th extension and is now due on October 19, 2011, and *Mike Nathaniel Gray*, #306062 vs. *Warden Padula*, C/A: 0:11-1265-JMC-PJG which is due on October 6, 2011.

12. Also due to voluminous nature of this Appendix, I have been told by the support services section of this Office that they will need at least two weeks to print all of the necessary copies of it.

As a result of my involvement in these cases, I have not been able to prepare the Petition for Writ of Certiorari in this case.

I have obtained the consent of Respondent's counsel and am serving two (2) copies of this Motion on counsel, Ms. Diana L. Holt, Esquire, via regular mail today. The thirty (30) day extension requested will make the Petition for Writ of Certiorari and Appendix due on October 21, 2011. I understand the desire of the Court and respondent's counsel for a speedy resolution of this case, but I reasonably believe this extension is essential to allow me to complete the Petition for Writ of Certiorari with reasonable effectiveness.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

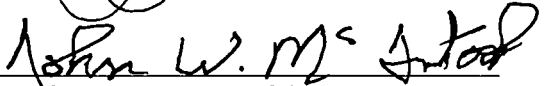
DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

BY: 
WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

BY: 
DONALD J. ZELENKA
Assistant Deputy Attorney General

BY: 
JOHN W. McINTOSH
Chief Deputy Attorney General

September 21, 2011.

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From Dorchester County
The Honorable Charles W. Whetstone, Jr., Circuit Court Judge**

TIMOTHY DION ROGERS, #4483

Respondent,

vs.

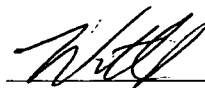
**JON OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF
CORRECTIONS**

Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of September, 2011, a copy of the Petitioner's Motion for a Fifth Extension of Time to File Petition for Writ of Certiorari and Appendix was served on counsel for the Respondent by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, and addressed as follows:

Diana L. Holt, Esq.
P.O. Box 6454
Columbia, South Carolina 29260-6454



WILLIAM EDGAR SALTER, III
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

Post Office Box 6454
Columbia, South Carolina 29260
Voice 803.782.1663
Fax 803.787.0374
Email DianaHolt@alumni.utexas.net

September 21, 2011

The Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211-1330

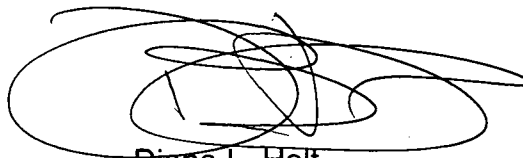
Re: *Timothy Dion Rogers (Respondent) v. Jon E. Ozmint, Director, SC Dept. Of Corrections (Petitioner)*, 2000-CP-18-575

Dear Mr. Shearouse:

Please be advised that Mr. Ed Salter, counsel for the petitioner, has notified me of his request for a fifth extension of time in which to file his petition in this matter. He inquired of my position on his request. The respondent does not object to the request.

With highest personal regards, I remain

Very truly yours,



Diana L. Holt

(CC recipients electronically only)

cc: Mr. Ed Salter, Esq., to AGESalter@scag.gov
Mr. Robert Dudek, Esq., to rdudek@sccid.sc.gov

RECEIVED

SEP 22 2011

S.C. SUPREME COURT

The Supreme Court of South Carolina

Timothy Dion Rogers, Respondent,

v.

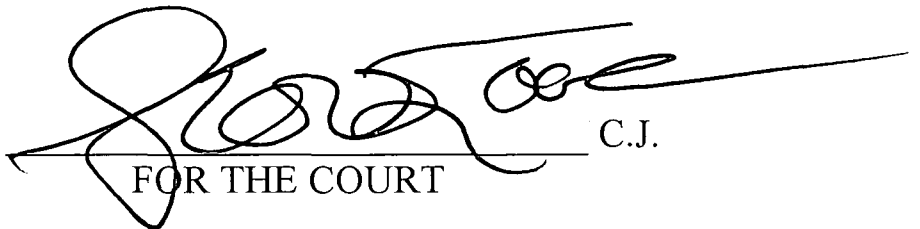
State of South Carolina, Petitioner.

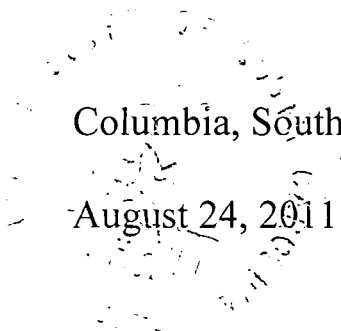
The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2000-CP-18-00575

ORDER

Petitioner seeks a fourth extension of time to serve and file the Petition for a Writ of Certiorari and Appendix in the above entitled matter, and asserts that extraordinary circumstances justify this extension. The opposing party consents to the extension. The request for an extension is granted until September 21, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.


C.J.
FOR THE COURT



Columbia, South Carolina

August 24, 2011

cc: Diana L. Holt, Esquire
Senior Assistant Attorney General William Edgar Salter, III



ALAN WILSON
ATTORNEY GENERAL

August 22, 2011

RECEIVED

AUG 22 2011

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *Timothy Dion Rogers, #4883 vs. Jon E. Ozmint, Director,*
South Carolina Department of Corrections
C.A. No.: 00-CP-18-575

Dear Mr. Shearouse:

I hereby request an extension of thirty (30) days in which to file the Petition for Writ of Certiorari and Appendix in the above-referenced case. The Petition is currently due to be served and filed today, August 22, 2011. However, because of my involvement in other matters in state and federal court, I have been unable to timely complete the Petition.

Therefore, I am enclosing an original and six (6) copies of a Motion for Fourth Extension to File Petition for Writ of Certiorari and Appendix. I have contacted Respondent's counsel and have obtained her consent to this extension.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd
Enclosures

cc: Diana Holt, Esq. (w/2 copies of encls.)

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

AUG 22 2011

Appeal From Dorchester County
The Honorable Charles W. Whetstone, Jr., Circuit Court Judge
S.C. Supreme Court

TIMOTHY DION ROGERS, #4483

Respondent,

vs.

**JON E. OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS**

Petitioner.

**MOTION FOR FOURTH EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI**

Petitioner, moves this Court for an additional thirty (30) day extension of time in which to file the Petition for Writ of Certiorari and Appendix. This is Petitioner's fourth request for an extension of time in which to file the petition. In support of the request, undersigned counsel would respectfully show the Court:

Pursuant to the Supreme court's order dated March 18, 2009, the undersigned counsel for Respondent has been scheduled for a number of state and federal matters in the last thirty-three (33) days, that include, but are not limited to, the following:

1. Counsel prepared a Brief of Petitioner in the South Carolina Supreme Court in the matter of The State vs. Jarod Wayne Tapp on July 20, 2011;

2. Counsel prepared a sixty-nine (69) page Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of Noel Gray, Jr., #307590 vs. Robert M. Stevenson, III, Warden, C/A No. 4:11-227-CMC-TER also on July 20, 2011;
3. Counsel prepared the Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of Bruce M. Byrd, #330141 vs. Tim Riley, Warden, Tyger River Correctional Institution, C/A No.: 6:11-386-JMC-KFM on July 25, 2011;
4. Counsel prepared the Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of Joseph Golson, #266765 vs. Leroy Cartledge, Warden, C/A No.: 4:11-00350-CMC-TER on August 1, 2011. This return was 99 pages in length;
5. Counsel prepared the Respondent's Response Opposing Pleading Captioned Bad Faith Conduct by Respondent in the matter of Noel Gray, #307590 vs. Robert M. Stevenson, III, Warden, C/A No.: 4:11-227-CMC-TER on August 8, 2011;
6. Counsel prepared Respondent's Reply to Response in Opposition to Motion to Dismiss in the York County Death Penalty PCR matter of James D. Robertson, #5067 vs. State of South Carolina, 2011-CP-46-00072 on August 15, 2011;
7. Counsel is currently preparing the Final Brief of Respondent in the matter of The State vs. James Keion Spann, a Lee County direct appeal which is currently due on August 30, 2011. Counsel also prepared a Supplemental Record on Appeal in this matter on August 17, 2011; and
8. Counsel is currently preparing the Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of George Maurice T. Adams, #181283 vs. Anthony Padula, Warden, Alan Wilson, South Carolina Attorney General, C/A No. 3:11-31-

DCN-JRM which is due today, August 22, 2011. Said return is currently 125 plus pages in length.

As a result of my involvement in these cases, I have not been able to prepare the Petition for Writ of Certiorari in this case.

I am serving Respondent's counsel two (2) copies of this Motion via regular mail today. The thirty (30) day extension requested will make the Petition for Writ of Certiorari and Appendix due on September 21, 2011. I understand the desire of the Court and respondent's counsel for a speedy resolution of this case, but I reasonably believe this extension is essential to allow me to complete the Petition for Writ of Certiorari with reasonable effectiveness.

Respectfully submitted,

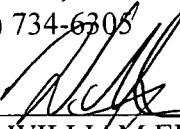
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

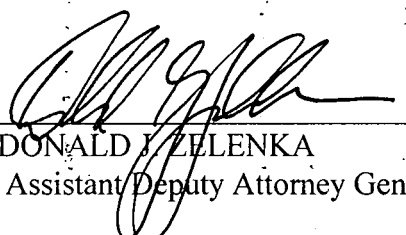
WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

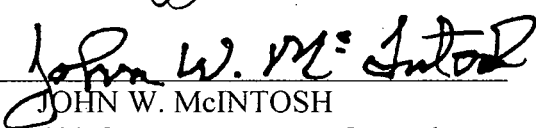
BY: 

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

BY:


DONALD J. ZELENSKA
Assistant Deputy Attorney General

BY:


JOHN W. McINTOSH
Chief Deputy Attorney General

August 22, 2011.

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From Dorchester County
The Honorable Charles W. Whetstone, Jr., Circuit Court Judge**

TIMOTHY DION ROGERS, #4483

Respondent,

vs.

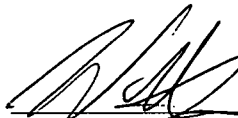
**JON OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF
CORRECTIONS**

Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of August, 2011, a copy of the Petitioner's Motion for a Fourth Extension of Time to File Petition for Writ of Certiorari and Appendix was served on counsel for the Respondent by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, and addressed as follows:

Diana L. Holt, Esq.
P.O. Box 6454
Columbia, South Carolina 29260-6454



WILLIAM EDGAR SALTER, III
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

Hopkins, Debbie

From: Diana Holt <dianaholt@alumni.utexas.net>
Sent: Friday, August 19, 2011 10:36 AM
To: Donna D'Alessio
Subject: Re: Timothy Rogers vs. Jon Ozmint, Director, etal.

Please tell Mr. Salter he can inform the Court that I have no objection. Hope you are doing well. Best-Dh

Sent from my mobile
Diana Holt
DianaHolt@alumni.utexas.net
803.787.0374 (fax)
803.351.8100 (mobile)

On Aug 19, 2011, at 10:35 AM, "Donna D'Alessio" <DDalessio@scag.gov> wrote:

Dear Ms. Holt:

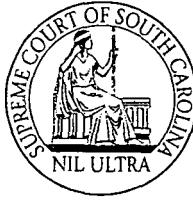
Please advise whether you will consent to the Petitioner requesting a 4th extension of time to file the Petition for Writ of Certiorari and Appendix in the above-referenced case. The Petition is currently due to be served and filed on Monday, August 22, 2011.

Thank you.

*Donna D'Alessio, Legal Assistant
Capital Litigation Section
Office of the Attorney General
State of South Carolina*

*Direct Line: 803-734-1494
Main Line: 803-734-6305
Fax: 803-734-4035*

--- Scanned by M+ Guardian Messaging Firewall ---



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

August 19, 2011

Mr. Timothy Dion Rogers, #4883
Lieber Correctional Institution
P. O. Box 205
Ridgeville, SC 29472

Re: Rogers, Timothy Dion v. State

Dear Mr. Rogers:

Enclosed is the order of this Court issued pursuant to your request regarding the appointment of counsel in the above entitled matter.

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

CLERK

DES/dmh

Enclosure

cc: Senior Assistant Attorney General William Edgar Salter, III
Chief Appellate Defender Robert M. Dudek
Diana L. Holt, Esquire

The Supreme Court of South Carolina

Timothy Dion Rogers, Respondent,

v.

State of South Carolina, Petitioner.

ORDER

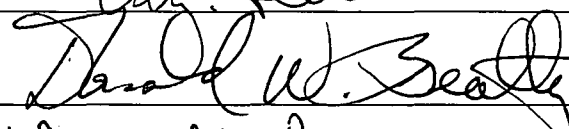
By order dated July 5, 2011, this Court vacated an order of the circuit court designating Diana Holt as counsel for respondent on appeal of this post-conviction relief matter, as jurisdiction over the appeal, and authority over the administration of the appeal, including appointment of counsel, was vested in this Court upon the filing of the notice of appeal. Rule 205, SCACR. The order stated the Division of Appellate Defense is counsel of record for respondent in this matter. Respondent now moves this Court to relieve the Division of Appellate Defense as counsel and appoint Ms. Holt to represent him. The motion is granted. We hereby relieve the Division of Appellate Defense as counsel for respondent in this matter and appoint Ms. Holt to represent him. However, the Division of Appellate Defense shall remain associated for the limited purpose of providing copies of the return

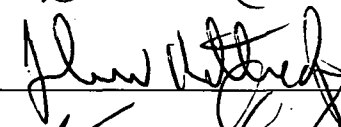
and any brief filed in the matter.

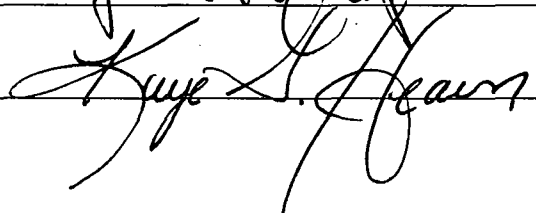
IT IS SO ORDERED.


C. J.


J.

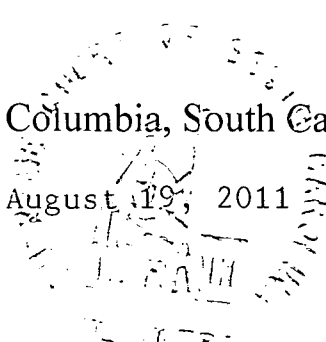

J.


J.

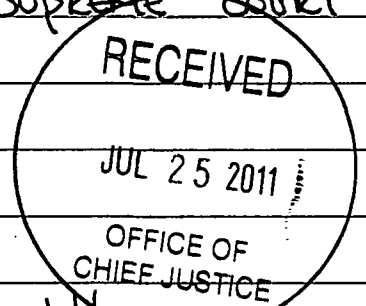

J.

Columbia, South Carolina

August 19, 2011



To the honorable Justices of the Supreme Court
RECEIVED
JUL 25 2011
The Supreme Court of S.C.
1231 Gervais St.
Columbia S.C. 29201
S.C. SUPREME COURT



Regarding the appointment of My Attorney:
Mrs. Diane Holt.

To the honorable Chief Justice J. Toal and the
honorable associate Justices.

I'm writing in response to the removal
of My attorney: Mrs. Holt. I respectfully request
that you reappoint her to My case. As soon
as possible, in place of appellant defense. I've
entrusted the last 11 yrs of My case/Life to
Mrs. Holt. As opposed to the appellant defense.
Whom we've found & filed ineffective claims
against. (In this very P.C.R. case)

Mrs. Holt knows My case, inside & out.
And it's very complicated. She & Mr. Bloom have
fought there hardest for me & won. And I don't
trust appellant. Because there's a conflict of
interest, between me & them. And I respectfully
request that you reappoint Mrs. Holt to re-
present me. In the continuation of My case. I
appreciate your favorable consideration. Of this
heart felt request.

not for school.
Sincerely yours

Timothy D. Rogers SK 4883

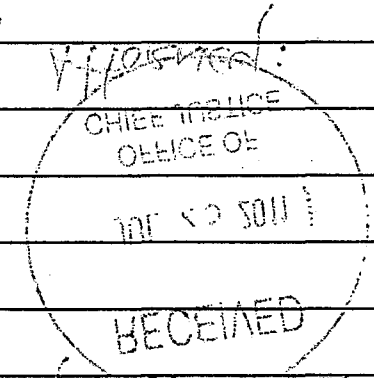
(Death Row)

U.S. B.I.T. Lieber C.I.
P.O. Box 205
Ridgeville, S.C. 29472

P.S. please don't be mad with MR. Bloom for putting the wrong statute in my order, the Judge Goodstein signed. I really hated loosing MR. Bloom in my case. But, I understand why.

Thanks Again,

Timothy D. Rogers 4883



FIRST CLASS



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MAILED FROM ZIP CODE 29472

To the honorable Justices of the Supreme Court
The Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina
29201

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Timothy D. ROGERS SK 4883
U-8117 Lieber C.I.
PO Box 205
Ridgelyville, S.C.

29472

THE DEPARTMENT OF CORRECTIONS HAS NEITHER
CENSORED NOR REVIEWED THIS ITEM. THEREFORE
THE DEPARTMENT DOES NOT ASSUME RESPONSIBILITY
FOR ITS CONTENTS.

MAILED
LIEBER CORRECTIONAL INSTITUTION
S.C. DEPARTMENT OF CORRECTIONS

The Supreme Court of South Carolina

Timothy Dion Rogers, Respondent,

v.

State of South Carolina, Petitioner.

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2000-CP-18-00575

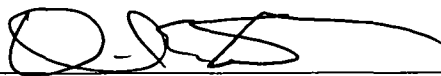
ORDER

For good cause shown, the request for an extension to serve and file the Petition for a Writ of Certiorari and Appendix is granted and extended until August 22, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

July 26, 2011

cc: Chief Appellate Defender Robert M. Dudek
Senior Assistant Attorney General William Edgar Salter, III

ALAN WILSON
ATTORNEY GENERAL



RECEIVED

JUL 25 2011

S.C. Supreme Court

July 25, 2011

Robert M. Dudek, Esq.
SCCID/Division of Appellate Defense
1330 Lady St., Ste. #401
Columbia, SC 29201

Re: *Timothy Dion Rogers, #4883 vs. Jon E. Ozmint, Director,*
South Carolina Department of Corrections
C.A. No.: 00-CP-18-575

Dear Robert:

On July 22, 2011 I forwarded to the South Carolina Supreme Court Petitioner's Third Motion for Extension of Time to File Petition for Writ of Certiorari and Appendix in the above-referenced case. The Petition was currently due to be served and filed on Friday, July 22, 2011. However, inadvertently your written consent was not obtained on the motion.

Therefore, if you consent to the extension please sign below where indicated.

Thank you for your anticipated cooperation.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd

I consent:



ALAN WILSON
ATTORNEY GENERAL

July 22, 2011

RECEIVED

JUL 22 2011

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

S.C. Supreme Court

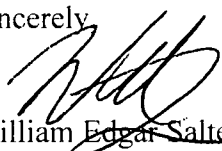
Re: *Timothy Dion Rogers, #4883 vs. Jon E. Ozmint, Director,*
South Carolina Department of Corrections
C.A. No.: 00-CP-18-575

Dear Mr. Shearouse:

I hereby request an extension of thirty (30) days in which to file the Petition for Writ of Certiorari and Appendix in the above-referenced case. The Petition is currently due to be served and filed today, July 22, 2011. However, because of my involvement in other matters in state and federal court, I have been unable to timely complete the Petition.

Therefore, I am enclosing an original and six (6) copies of a Motion for Third Extension to File Petition for Writ of Certiorari and Appendix. I am informing opposing counsel of my request by copy of this letter.

Sincerely,


William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd
Enclosures
cc: Robert Dudek, Esq. (w/2 copies of encls.)

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Appeal From Dorchester County
The Honorable Charles W. Whetstone, Jr., Circuit Court Judge

JUL 22 2011

S.C. Supreme Court

TIMOTHY DION ROGERS, #4483

Respondent,

vs.

JON E. OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS

Petitioner.

MOTION FOR THIRD EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

Petitioner, moves this Court for an additional thirty (30) day extension of time in which to file the Petition for Writ of Certiorari and Appendix. This is Petitioner's third request for an extension of time in which to file the petition. In support of the request, undersigned counsel would respectfully show the Court:

Pursuant to the Supreme court's order dated March 18, 2009, the undersigned counsel for Respondent has been scheduled for a number of state and federal matters in the last thirty (30) days, that include, but are not limited to, the following:

1. Counsel argued on behalf of the Respondent before the South Carolina Supreme Court in the matter of Gary Dubose Terry vs. The State, a Lexington County Death Penalty

PCR Appeal matter on June 21, 2011;

2. Counsel prepared the Return to Petition for Writ of Certiorari in the matter of The State vs. Darrell Burgess in the South Carolina Supreme Court on June 24, 2011;

3. Counsel attended an all day CLE seminar "Courtroom Tech. Training" on June 27, 2011;

4. Counsel attended an Appointment of Counsel hearing before the Honorable Lee S. Alford on July 5, 2011 in York County for the Death Penalty PCR matter of James Robertson vs. State of South Carolina, C.A. No.: 2011-CP-46-00072;

5. Counsel is preparing the Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of Joseph Golson, #266765 vs. Leroy Cartledge, Warden, 4:11-00350-CMC-TER which was due on July 1, 2011. Counsel has requested a thirty (30) day extension to complete the return;

6. Counsel prepared the Initial Brief of Respondent in the matter of The State vs. James Keion Spann, a Lee County direct appeal matter on July 11, 2011;

7. Counsel prepared the Respondent's Return to Petition for Writ of Certiorari in the matter of The State vs. Nathaniel Noel Bradley in the South Carolina Supreme Court on July 12, 2011;

8. Counsel prepared a Brief of Petitioner in the South Carolina Supreme Court in the matter of The State vs. Jarold Wayne Tapp on July 20, 2011;

9. Counsel prepared the Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of Noel Gray, Jr., #307590 vs. Robert M. Stevenson, III, Warden, C/A No. 4:11-227-CMC-TER on July 20, 2011; and

10. Counsel is preparing the Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of Bruce M. Byrd, #330141 vs. Tim Riley, Warden, Tyger River Correctional Institution, 6:11-386-JMC-KFM which is due on Monday, July 25, 2011. No further extensions of time will be granted.

As a result of my involvement in these cases, I have not been able to prepare the Petition for Writ of Certiorari in this case.

I am serving petitioner's counsel two (2) copies of this Motion via regular mail today. The thirty (30) day extension requested will make the Petition for Writ of Certiorari due on August 22, 2011. I understand the desire of the Court and petitioner's counsel for a speedy resolution of this case, but I reasonably believe this extension is essential to allow me to complete the Petition for Writ of Certiorari with reasonable effectiveness.

Respectfully submitted,

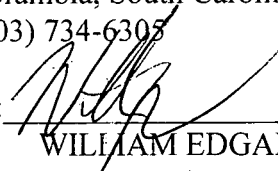
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

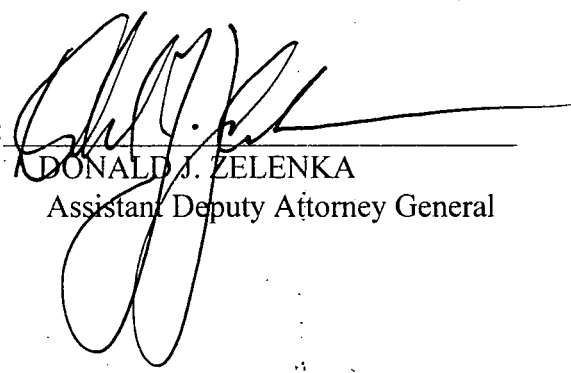
WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

BY: 

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

BY:


DONALD J. ZELENKA

Assistant Deputy Attorney General

July 22, 2011.

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From Dorchester County
The Honorable Charles W. Whetstone, Jr., Circuit Court Judge**

TIMOTHY DION ROGERS, #4483

Respondent,

vs.

**JON OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF
CORRECTIONS**

Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of July, 2011, a copy of the Petitioner's Motion for a Third Extension of Time to File Petition for Writ of Certiorari and Appendix was served on counsel for the Respondent by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, and addressed as follows:

Robert M. Dudek, Esq.
SCCID/Division of Appellate Defense
1330 Lady St., Ste. #401
Columbia, SC 29201



WILLIAM EDGAR SALTER, III
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

The Supreme Court of South Carolina

Timothy Dion Rogers, Respondent,

v.

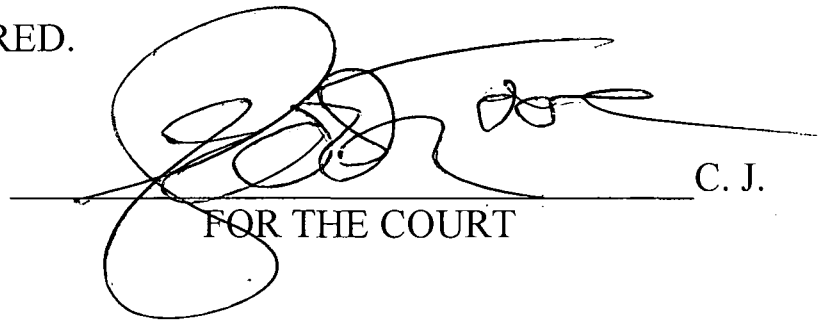
State of South Carolina, Petitioner.

ORDER

This matter is before the Court by way of a notice of appeal, filed on January 7, 2011, from an order of the circuit court on respondent's application for post-conviction relief (PCR). Jeffrey P. Bloom and Diana Holt were appointed to represent respondent before the circuit court. However, upon the filing of the notice of appeal, Mr. Bloom and Ms. Holt were automatically relieved as appellate counsel for respondent and the Commission on Indigent Defense, Division of Appellate Defense, having determined respondent is indigent, assumed representation of respondent in this matter. Rule 602(e), SCACR. It has now been brought to this Court's attention that by order dated February 17, 2011, the circuit court judge who presided over this action "designated" Ms. Holt as "appellate counsel" for

respondent and relieved Mr. Bloom as counsel.¹ We hereby vacate the order of the circuit court, as jurisdiction over the appeal, and the authority over the administration of the appeal, including appointment of counsel, was vested in this Court upon the filing of the notice of appeal. Rule 205, SCACR. The Division of Appellate Defense is designated as counsel of record for respondent in this matter.

IT IS SO ORDERED.



C. J.
FOR THE COURT

Columbia, South Carolina

July 5, 2011

cc: Diana L. Holt, Esquire
Chief Appellate Defender Robert M. Dudek
Senior Assistant Attorney General
William Edgar Salter, III

¹ The circuit court judge states the order is issued pursuant to S.C. Code Ann. § 16-3-26(B)(1)(2003); however, that statute applies to the appointment of counsel for *trial*. South Carolina Code Ann. § 17-27-160 (2003) addresses appointment of counsel in PCR matters.

Hopkins, Debbie

From: Robert M. Dudek <RDudek@sccid.sc.gov>
Sent: Friday, June 24, 2011 10:04 AM
To: Allen, Linda
Cc: Hopkins, Debbie
Subject: FW: Timothy Rogers v. State
Attachments: Order Appointing Appellate Counsel Holt.pdf

Linda and Debbie:

Diana Holt emailed this appointment order from Judge Goodstein for this appeal. Please advise me. Thank you.

Robert M. Dudek
Chief Appellate Defender
Commission on Indigent Defense
Appellate Division
PO Box 11589
Columbia, South Carolina 29211
(803) 734-1330

From: Diana Holt [mailto:dianaholt@alumni.utexas.net]
Sent: Friday, June 24, 2011 9:43 AM
To: Hopkins, Debbie
Cc: Robert M. Dudek; AGESALTER@scag.gov
Subject: RE: Timothy Rogers v. State

Hey Ms. Debbie Hopkins~

Hope you are doing well. Mr. Dudek indicated that he received the Court's grant of extension to Mr. Salter in the State's petition for writ of certiorari. Please note that I represented Mr. Rogers in relation to his successful PCR action and was appointed to continue representation of Mr. Rogers, who's PCR allegations included an allegation that Mr. Savitz, formerly of Appellate Defense, was ineffective in his appellate representation of Mr. Rogers. The PCR court found that Mr. Savitz' representation was deficient. Please let me know if you need additional information.

As always, thanks so much for all you do. Best regards~DHolt

Diana Holt
DianaHolt@alumni.utexas.net
Diana Holt, LLC
Post Office Box 6454
Columbia, South Carolina 29260
803.782.1663 (Office)
803.787.0374 (Facsimile)
803.351.8100 (Mobile)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	Case No. 00-CP-18-575
	)	
TIMOTHY DION ROGERS,	)	
APPLICANT	)	
	)	
VS.	)	ORDER DESIGNATING
	)	APPELLATE COUNSEL
STATE OF SOUTH CAROLINA,	)	
and John OZMINT, Commissioner,	)	
S.C. Dept. of Corrections	)	
<u>Respondents</u>	)	

This matter comes before me as the Circuit Court Judge who is designated with jurisdiction of this case, for the designation of appellate counsel in a capital case on behalf of the Applicant. It appears that only one attorney may be designated to represent the Applicant in this capital-PCR appeal. The Court had previously appointed attorney Diana Holt and Jeffrey Bloom to represent the Applicant throughout the capital-PCR process. The Court now relieves attorney Jeffrey Bloom, and designates attorney Diana Holt as appellate counsel for the Applicant. This Order is issued pursuant to S.C. Code § 16-3-26 (B)(1) (2010 Cum.Supp.), and other applicable law.

IT IS THEREFORE ORDERED that attorney Diana Holt is designated as appellate counsel in this case. It is further ordered that attorney Jeffrey Bloom is relieved from any further representation as counsel in this case. *at this time.*

AND IT IS SO ORDERED.

Dated: February 17, 2011
St. George, S.C.


Hon. Diane S. Goodstein
Designated PCR Judge
Court of Common Pleas
First Judicial Circuit

The Supreme Court of South Carolina

Timothy Dion Rogers,

Respondent,

v.

State of South Carolina,

Petitioner.

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2000-CP-18-00575

ORDER

For good cause shown, the request for a second extension to serve and file the Petition for Writ of Certiorari is granted and extended until July 22, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

Brenda J. Shealy
Clerk

Chief Deputy

Columbia, South Carolina

June 23, 2011

cc: Senior Assistant Attorney General William Edgar Salter, III
Chief Appellate Defender Robert M. Dudek

WLS:MLP

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUN 22 2011

S.C. Supreme Court

Appeal From Dorchester County
The Honorable Charles W. Whetstone, Jr., Circuit Court Judge

TIMOTHY DION ROGERS, #4483

Respondent,

vs.

JON E. OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS

Petitioner.

MOTION FOR SECOND EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

The undersigned counsel for the State of South Carolina requests a second extension of thirty (30) days within which to complete, serve and file the Petition for Writ of Certiorari and Appendix in the above-referenced appeal. The Return is currently due to be served and filed today, June 22, 2011. This request is made in good faith and not for the purpose of delay.

The Court's March 18, 2009 Order *re: Extension Requests in Criminal Direct Appeals and Post-Conviction Relief Certiorari Proceedings* provides, in pertinent part, that:

(2) A second extension request may be granted upon a showing of good cause. The facts supporting good cause shall be set forth in the motion. The signature of the attorney on the motion shall be a certification that the attorney believes that the extension is warranted and that there is good cause to seek the

extension.

In compliance with that Order and in support of this motion, counsel would respectfully show the Court the following:

1. Counsel prepared a Brief in Opposition to the Petition for Writ of Certiorari in the matter of Tony Stevenson Johnson, No.: 10-9236 in the United States Supreme Court on May 25, 2011;
2. Counsel prepared Respondent's Response to Motion to Compel Complete Record and Hold Response Time in Abeyance in the matter of James Arthur Brown, #282981 vs. McCall, C/A No.: 0:10-3025-CMC-PJG on May 26, 2011;
3. Counsel prepared the Initial Brief of Respondent in the South Carolina Court of Appeals for The State vs. Kendrick Taylor on June 6, 2011;
4. Counsel prepared Respondent's Response Opposing Motion for Writ of Mandamus in the matter of Noel Gray, #307590 vs. Robert M. Stevenson, III, Warden, C/A No.: 4:11-227-CMC-TER also on June 6, 2011;
5. Counsel prepared the Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of Macario Santamaria, #330240 vs. Warden, Turbeville Correctional Institution, C/A No.: 9:10-3183-RMG-BM on June 10, 2011;
6. Counsel also assisted in the preparation for and attended the Competency Hearing before The Honorable Derham Cole on June 15th through 17th, 2011 in the Death Penalty matter of James W. Wilson vs. State of South Carolina; and,
7. Counsel prepared for and argued in front of the South Carolina Supreme Court on June 21, 2011 in the Death Penalty matter of Gary Terry vs. State of South Carolina.

As a result of my involvement in these cases, I have not been able to prepare the Return to Petition for Writ of Certiorari in this case.

I am serving petitioner's counsel two (2) copies of this Motion via regular mail today. The thirty (30) day extension requested will make the Petition for Writ of Certiorari due on July 22, 2011. I understand the desire of the Court and petitioner's counsel for a speedy resolution of this case, but I reasonably believe this extension is essential to allow me to complete the Return to Petition for Writ of Certiorari with reasonable effectiveness.

Respectfully submitted,

ALAN WILSON
Attorney General

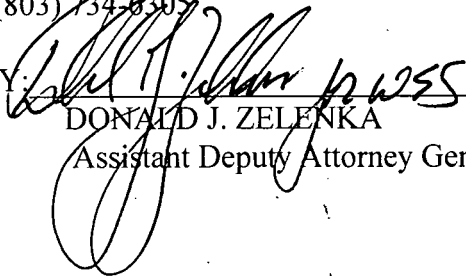
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

BY:


DONALD J. ZELENKA
Assistant Deputy Attorney General

June 22, 2011.

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From Dorchester County
The Honorable Charles W. Whetstone, Jr., Circuit Court Judge**

TIMOTHY DION ROGERS, #4483

Respondent,

vs.

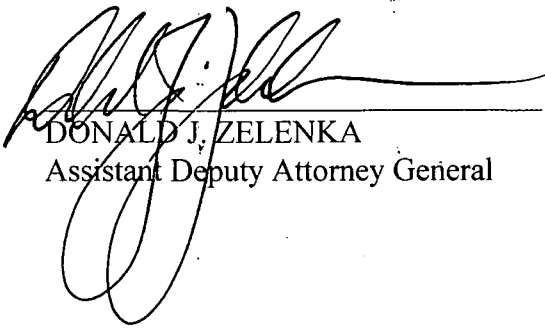
**JON OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF
CORRECTIONS**

Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of June, 2011, a copy of the Respondent's Motion for Extension of Time to File Petition for Writ of Certiorari and Appendix was served on counsel for the Petitioner by depositing two (2) copies of the same in the United States mail, postage prepaid, and addressed as follows:

Diana Holt, Esq.
Diana Holt, LLC
P.O. Box 6454
Columbia, SC 29260-6454


DONALD J. ZELENKA
Assistant Deputy Attorney General

ALAN WILSON
ATTORNEY GENERAL



RECEIVED

JUN 22 2011

S.C. Supreme Court

June 22, 2011

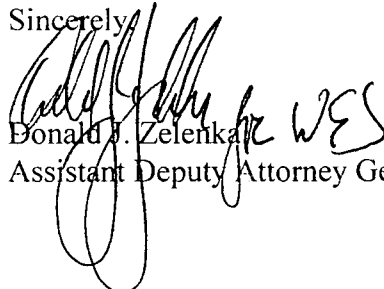
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *Timothy Dion Rogers, #4883 vs. Jon E. Ozmint, Director,*
South Carolina Department of Corrections
C.A. No.: 00-CP-18-575

Dear Mr. Shearouse:

Please find enclosed the original and (1) copy of Respondent's Motion for Extension of Time to File Petition for Writ of Certiorari and Appendix with Proof of Service dated June 22, 2011.

Sincerely,


Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/arb

Enclosures

cc: Diana Holt, Esquire (with enclosure)
The Honorable David M. Pascoe, Jr., Solicitor, 1st Judicial Circuit (with enclosure)

The Supreme Court of South Carolina

Timothy Dion Rogers,

Respondent,

v.

State of South Carolina,

Petitioner.

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2000-CP-18-00575

ORDER

The request for an extension to serve and file the Petition for a Writ of Certiorari and Appendix is granted and extended until June 22, 2011.

Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

May 24, 2011

cc: Chief Appellate Defender Robert M. Dudek
Senior Assistant Attorney General William Edgar Salter, III



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

MAY 23 2011

May 23, 2011

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *Timothy Dion Rogers, #4883 vs. Jon E. Ozmint, Director,*
South Carolina Department of Corrections
C.A. No.: 00-CP-18-575

Dear Mr. Shearouse:

I hereby request an extension of thirty (30) days in which to file the Petition for Writ of Certiorari and Appendix in the above-referenced case. The Petition is currently due to be served and filed today, May 23, 2011. However, because of my involvement in other matters in state and federal court, I have been unable to timely complete the Petition.

Therefore, I am requesting this extension within which to serve and file the Petition for Writ of Certiorari and Appendix. I am informing opposing counsel of my request by copy of this letter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES/dmd

cc: Diana Holt, Esq.
The Honorable David M. Pascoe, Jr., Solicitor, 1st Judicial Circuit



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

March 23, 2011

MAR 23 2011

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

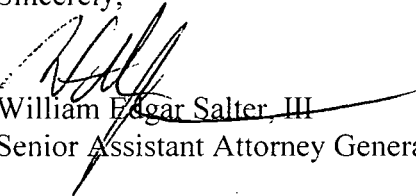
Re: *Timothy Dion Rogers #4883 v. Jon E. Ozmint, Direction,*
South Carolina Department of Corrections
C.A. No.: 00-CP-18-575

Dear Mr. Shearouse:

Please be advised that this office received the transcript in *Timothy Dion Rogers vs. Jon Ozmint, Director, South Carolina Department of Corrections*, 2000-CP-18-00575 (heard October 8, 2010) from court reporter Bonnie H. Kelly yesterday, March 22, 2011. In light of this Court's Order of May 16, 2001, I am calendaring the petition for writ of certiorari to be due sixty (60) days from March 22, 2011 which is May 23, 2011. By copy of this letter I am advising opposing counsel of the status of this state appeal from the granting of a new sentencing trial.

If you have any questions please do not hesitate to contact me.

Sincerely,


William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd

cc: Diana Holt, Esq.
The Honorable David M. Pascoe, Jr., Solicitor, 1st Judicial Circuit

Hopkins, Debbie

From: Donna D'Alessio <DDalessio@scag.gov>
Sent: Monday, March 21, 2011 1:53 PM
To: Bonnie Kelly
Cc: Allen, Desiree; Hopkins, Debbie
Subject: Re: Timothy Rogers - Transcript of Hearing from October 8, 2010 before Jude Goodstein

tk's so very much Bonnie..have a great week.

*Donna D'Alessio, Legal Assistant
Capital Litigation Section
Office of the Attorney General
State of South Carolina*

*Direct Line: 803-734-1494
Main Line: 803-734-6305
Fax: 803-734-4035*

>>> Bonnie Kelly <bonniekelly21@gmail.com> 3/21/2011 1:31 PM >>>

It is in the mail to you. Hopefully you'll get it tomorrow. I'm surprised you didn't get it today. If you don't get it by Wednesday, let me know and I'll trace it.

On Mon, Mar 21, 2011 at 1:08 PM, Donna D'Alessio <DDalessio@scag.gov> wrote:

Dear Ms. Kelly:

This is just a follow-up to my letter to you dated January 14, 2011, and also to your email to me dated March 3, 2010.

At your earliest convenience, please advise as to the status of the above-referenced transcript.

Thank you.

*Donna D'Alessio, Legal Assistant
Capital Litigation Section
Office of the Attorney General
State of South Carolina*

*Direct Line: 803-734-1494
Main Line: 803-734-6305
Fax: 803-734-4035*

--- Scanned by M+ Guardian Messaging Firewall ---

Hopkins, Debbie

From: Donna D'Alessio <DDalessio@scag.gov>
Sent: Monday, March 21, 2011 1:08 PM
To: bonniekelly21@gmail.com
Cc: Allen, Desiree; Hopkins, Debbie
Subject: Timothy Rogers - Transcript of Hearing from October 8, 2010 before Jude Goodstein

Dear Ms. Kelly:

This is just a follow-up to my letter to you dated January 14, 2011, and also to your email to me dated March 3, 2010. At your earliest convenience, please advise as to the status of the above-referenced transcript.

Thank you.

*Donna D'Alessio, Legal Assistant
Capital Litigation Section
Office of the Attorney General
State of South Carolina*

*Direct Line: 803-734-1494
Main Line: 803-734-6305
Fax: 803-734-4035*



ALAN WILSON
ATTORNEY GENERAL

January 14, 2011

RECEIVED

JAN 18 2011

S.C. SUPREME COURT

Bonnie H. Kelly
P.O. Box 50614
Columbia, South Carolina 29250-0614

Re: *Timothy Dion Rogers #4883 v. Jon E. Ozmint, Direction,*
South Carolina Department of Corrections
C.A. No.: 00-CP-18-575

Dear Ms. Kelly:

I am writing to request a copy of the Hearing transcript which was held on October 8, 2010 before the Honorable Diane Schafer Goodstein in St. George, South Carolina regarding the parties' Rule 59(e) motions.

If further information is needed, please do not hesitate to contact me.

Sincerely,



William Edgar Salter, III
Senior Assistant Attorney General

WES/dmd

cc: The Honorable Daniel E. Shearouse, Clerk, South Carolina Supreme Court
South Carolina Court Administration
Jeffrey P. Bloom, Esq.
Diana Holt, Esq.



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED

JAN 07 2011

January 7, 2011

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *Timothy Dion Rogers #4883 v. Jon E. Ozmint, Direction,*
South Carolina Department of Corrections
C.A. No.: 00-CP-18-575

Dear Mr. Shearouse:

Enclosed for filing in your office is a Notice of Appeal, together with a copy of the Amended Order Granting a New Sentencing Trial and Vacating Applicant's CSC 2d Convictions dated December 10, 2010, together with Proof of Service. By copy of this letter, we are serving opposing counsel with this Notice today, as well as a copy of the Notice to the Clerk of Court, Dorchester County.

Thank you for your consideration.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd

cc: Jeffrey P. Bloom, Esq. (w/copy of encls.)
Diana Holt, Esq. (w/copies of encls.)
The Honorable Cheryl Graham, Clerk of Court, Dorchester County (w/copy of encls.)

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Honorable Diane Schafer Goodstein

Case No. 00-CP-18-575

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

Petitioner,

vs.

Timothy Dion Rogers, #4883,

Respondent.

NOTICE OF APPEAL

The Petitioner, Jon E. Ozmint, Director, South Carolina Department of Corrections, appeals from the Order of the Honorable Diane Schafer Goodstein granting a new sentencing trial and vacating applicant's CSC 2d convictions dated December 10, 2010, and received in this office via email from the Dorchester County Clerk's office the same date.

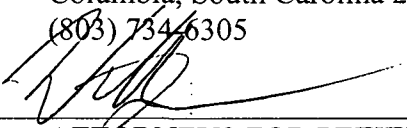
HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: 

ATTORNEYS FOR PETITIONER

January 7, 2011.

RECEIVED

JAN 07 2011

S.C. Supreme Court

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

00-CP-18-575

TIMOTHY DION ROGERS,)

Applicant,)
v.)

**AMENDED ORDER
GRANTING A NEW SENTENCING
TRIAL AND VACATING APPLICANT'S
CSC 2d CONVICTIONS**

JON E. OZMINT, Director,)
South Carolina Department)
of Corrections,)

Respondent.)

2010 DEC 10 PM 2:20
CLERK OF COURT
DORCHESTER COUNTY

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 Burditt, in vacating Applicant's convictions for Criminal Sexual Conduct, 2nd degree, which were entirely unrelated to Stephanie Burditt 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, Tonya Bickham and Daxton Patterson, walked to Spell's Grocery Store in Summerville, SC, to use a pay phone located at the front of the exterior of the store. Applicant, Mr. Patterson, and Ms. Bickham had been drinking alcoholic beverages and smoking marijuana most of the afternoon. While at the phone, the trio encountered Mike Burditt and his friend, James Carver, who had arrived at Spell's in Mr. Burditt's pick-up truck, along with Mr. Burditt's nine-year-old daughter, Stephanie. Mr. Burditt 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. Burditt purchased more beer. At some point, Mr. Burditt engaged in a brief conversation with a family friend and employee, Anthony Riley, in front of the store. Mr. Burditt and Mr. Carver were planning on hunting and fishing at the Burditt family lake house, where they were to gather with other Burditt family members for the Thanksgiving holiday.

Mr. Patterson first engaged in a verbal dispute with Mr. Carver and Mr. Burditt. As the dispute among Carver, Burditt, 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. Burditt 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. Burditt'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. Burditt'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. Burditt's truck was pulling away from the store or backing up toward Applicant. It matters not. Assuming arguendo that the Burditt truck was backing toward Applicant, he was in unlawful possession of a firearm that he intentionally fired, killing Stephanie Burditt. 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 Ms. Bickham 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 Burditt. 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, Tonya Bickham. 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 Burditt. 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. Cronin*, 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:

¹The 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).

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 Burditt.

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 Burditt." 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:

²In his testimony before this Court, Mr. Runyon admitted that he revealed to Solicitor Bailey that Applicant was the father of Ms. Bickham's child and raised the idea of charging Applicant with criminal sexual conduct with a minor (the allegedly then-fifteen-year-old Ms. Bickham) prior to discussing it with and gaining the approval of Applicant. PCR Tr. 777-78. Mr. Runyon indicated that Ms. Bickham was still pregnant at the time he approached the Solicitor with the idea. *Id.* The Court notes that the latest Ms. Bickham 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. Bickham'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. Bickham, 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. Ms. Bickham's birthday is October 3, 1976. PCR Ex. P-19. Her child that she conceived with Applicant was born on August 2, 1993. 1996 Tr. 914. Thus, Ms. Bickham was not fifteen years of age when she became impregnated with Applicant's child, as both Mr. Bailey and Mr. Runyon have stated repeatedly. It would have been relatively easy to establish that Ms Bickham 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

³The 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.

⁴ In his initial assessment, it appeared that the *venire* had a higher percentage of whites than 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

⁶ 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 eight⁸ 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

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 their 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.

Tonya Bickham testified that a loud verbal dispute arose among Mr. Carver, Mr. Burditt, and Mr. Patterson, that Applicant had been talking on the phone but left it to assist Patterson in the dispute,

(Juror Berkaw).

that Applicant had a gun, and that he fired two shots. 1994 Tr. 823-835 (832-833). Trial counsel cross-examined Ms. Bickham about the argument that arose among Burditt, Carver, and Patterson, and Applicant's subsequent involvement in the dispute. 1994 Tr. 835-841. The State dismissed all the charges against Ms. Bickham 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. 894-897, 895. Applicant had made his way to Ms. Simmons' home in Alabama shortly after the shooting.

Mr. Burditt 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 Burditt, but who left the scene prior to any shots being fired, corroborated much of Mr. Burditt'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 Burditt'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. Burditt 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. Burditt'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.

Ms. Bickham testified before this Court to the following material facts: Mr. Patterson started the argument with Mr. Burditt. Applicant did not swear at Mr. Burditt or Mr. Carver when they arrived at the store. PCR Tr. 313. Mr. Patterson, *not* Applicant, spit on Mr. Burditt, which, the Court

notes, is consistent with *Mr. Carver's* initial statement to law enforcement (PCR Tr. 316, PCR Ex. P-9) and with Ms. Bickham's trial testimony (1994 Tr. 831). This witness indicated that she heard either Mr. Burditt 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. Ms. Bickham did not see a child in Mr. Burditt's truck. PCR Tr. 311.

Ms. Bickham indicated that she perceived Mr. Carver and Mr. Burditt to be reaching for guns in the truck. PCR Tr. 321. She indicated either Mr. Burditt 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. Burditt's head or ever point the gun at Mr. Burditt. PCR Tr. 312. Applicant did not block Mr. Burditt's truck door. PCR Tr. 312. Applicant did not spit on Mr. Burditt. 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 Ms. Bickham 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 Ms. Bickham's testimony. He acknowledged that the argument started between himself and Mr. Burditt. PCR Tr. 227-8, 233. Mr. Patterson admitted to being the one who spit on Mr. Burditt, 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 Burditt. *Id.* Mr. Patterson admitted that it was he – not Applicant – who was near Mr.

Burditt 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. Burditt's truck. Indeed, law enforcement officers confiscated two firearms, a .410 shotgun and a .9 mm handgun, from Mr. Burditt's truck. PCR Tr. 148, Ex. P-8. Mr. Patterson testified that he saw Mr. Burditt 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. Burditt'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*, Ms. Bickham 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. Bickham'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 Ms. Bickham to discover what information these eye witnesses to the events knew, good or bad. Counsel were constitutionally deficient for failing to interview Ms. Bickham 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. Burditt 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. Burditt 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

¹¹At 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 Burditt family friend and even had worked for some of the family members for almost twenty years – facts which he and Mr. Burditt had somewhat divulged at trial (1994 Tr. 726, 792-93). PCR Tr. 39-40. Mr. Riley described his relationship with the Burditt family as practically familial in that Mr. Riley would often babysit Stephanie, considered Mike Burditt like a brother, and felt free to borrow money from the Burditt 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 Burditt 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 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 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 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 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. Burditt 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 Ms. Bickham, 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.

¹²Despite 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 Ms. Bickham 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

¹³The 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. Burditt testified that the 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 Burditt's truck, along with more empty beer cans.¹⁴ PCR 8-2005 Supp. 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 Burditt'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 8-2005 Supp. Tr. 57 and 62. Mr. Leiendecker noted that he had no

¹⁴The 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. Burditt 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. Burditt 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 Burditt 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.*
- Tonya Bickham: that Assistant Solicitor Peter Them had promised to drop all charges against Tanya "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.
- Tonya Bickham: 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 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 8-2005Supp. 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 Burditt 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 *Knighon 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, Ms. Bickham, 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 Ms. Bickham 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 Ms. Bickham, 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. Burditt 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. Burditt, 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.

Burditt 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 Ms. Bickham, 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 Ms. Bickham 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. Burditt 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 Ms. Bickham, Mr. Patterson, and Ms. Simmons had information that corroborated Applicant's account of the shooting and contradicted

Mr. Burditt'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 prejudice 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 Burditt. 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.*

¹⁵The 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

I. 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.

¹⁶In his testimony before this Court, Mr. Runyon admitted that he revealed to Solicitor Bailey that Applicant was the father of Ms. Bickham's child and raised the idea of charging Applicant with criminal sexual conduct with a minor, the then fifteen-year-old Ms. Bickham, prior to discussing it with and gaining the approval of Applicant. PCR Tr. 777-78. Mr. Runyon indicated that Ms. Bickham was still pregnant at the time he approached the Solicitor with the idea. *Id.* The Court notes that the latest Ms. Bickham 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. Bickham'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 Burditt." 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 overturned 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 Burditt, 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 through, 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.

GROUND 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 of 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 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.

Tonya Bickham testified that a loud, verbal dispute arose between Mr. Carver, Mr. Burditt, 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. Bickham generally as to the argument that arose among Burditt, Carver, and Patterson, and Applicant's subsequent involvement in the dispute. 1996 Tr. 656-658. In his very brief cross-examination of Ms. Bickham, trial counsel failed to bring out in the resentencing trial that the State dismissed the charges against Ms. Bickham 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. Burditt 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. Burditt's testimony. 1996 Tr. 728-32, 741-2. Mr. Carver swore he did not see a twelve-pack of beer anywhere in Burditt's truck and he never saw Burditt 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 Alethia Nichols, 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. Bickham 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. Burditt and Mr. Carver – who wanted to use the phone. 1996 Tr. 879. Applicant said that Mr. Burditt was being “vulgar about” wanting the phone and that Mr. Burditt 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 Ms. Bickham and Mr. Patterson. 1996 Tr. 881. Applicant testified he interceded by placing himself between Mr. Burditt and Mr. Carver and Ms. Bickham and Mr. Patterson. When he did that, he saw Mr. Burditt 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. Bickham must have run after he did. 1996 Tr. 884-6. Applicant testified that he did not stand there and laugh at Mr. Burditt afterwards. 1996 Tr. 885.

Applicant was able to admit freely that he had caused Stephanie Burditt's death. However,

he denied putting a gun to Mr. Burditt's head and threatening to kill him. He denied spitting in Mr. Burditt'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 Burditt 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 Burditt 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, Alethia Nichols. Ms. Nichols 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. Ms. Nichols did not approve of what happened to Stephanie and wished with all her heart she could bring Stephanie back to life. Ms. Nichols' 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

Ms. Bickham testified before this Court to the following material facts: Mr. Patterson started the argument with Mr. Burditt. Applicant did not swear at Mr. Burditt or Mr. Carver when they arrived at the store. PCR Tr. 313. Mr. Patterson, *not* Applicant, spit on Mr. Burditt, 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. Burditt 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. Burditt'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.*

Ms. Bickham indicated that she perceived Mr. Carver and Mr. Burditt 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. Burditt's head or ever point the gun at Mr. Burditt. PCR Tr. 312. Applicant did not block Mr. Burditt'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 Ms. Alethia Nichols 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 Ms. Bickham's testimony. He acknowledged that the argument started between himself and Mr. Burditt. PCR Tr. 227-8, 233. Mr. Patterson admitted to being the one who spit on Mr. Burditt. PCR Tr. 235. Mr. Patterson was adamant that Applicant did not spit on Burditt. *Id.* Mr. Patterson admitted that it was he – not Applicant – who was near Mr. Burditt 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. Burditt's reach in Mr. Burditt's truck. Indeed, law enforcement officers confiscated two firearms, a .410 shotgun and a .9 mm handgun, from Mr. Burditt's truck. PCR Tr. 148, Ex. P-8. Mr. Patterson testified that he saw Mr. Burditt 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. Burditt'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*, Ms. Bickham 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. Bickham'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 Ms. Bickham 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. Burditt 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. Burditt 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

¹⁹At 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 Burditt 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 Burditt family as practically

familial in that Mr. Riley would often babysit Stephanie, considered Mike Burditt like a brother, and felt free to borrow money from the Burditt 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 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 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 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 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 Ms. Bickham, 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 Burditt'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 Burditt'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 8-2005 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. Burditt 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. 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.*
- Tonya Bickham: that Asst. Sol. Peter Them had promised to drop all charges against Tanya "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.
- Tonya Bickham: 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 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 personally aware of its contents. PCR 8-2005Supp. Tr. 79-80.

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

daughter testify because she was too close in age to the victim or by blaming Applicant's crime on society. PCR Tr. 847-48.

Mr. Leiendecker did have some limited interaction with Applicant's mother, Ms. Nichols, prior to the resentencing trial. He testified that he has also had some interaction with Ms. Nichols 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.

Ms. Alethia Nichols described her own harrowing childhood and how it affected her as a mother in raising Applicant and his three siblings. Alethia 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 Alethia was about five years of age. PCR Tr. 365. Alethia 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 Alethia 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. Alethia never again complained to her mother about being raped by her mother's boyfriends, and the rapes continued. PCR Tr. 373-74. Alethia's mother's reaction to the rapes left Alethia 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, Alethia Nichols testified she has only recently learned to forgive herself and her mother for her role in these events. PCR Tr. 373-4.

Alethia 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 Alethia desperate for love. PCR Tr. 375.

When she was twelve years old, Alethia 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, Alethia had given birth to her third child. PCR Tr. 376-77.

Alethia's mother applied for and received public assistance for each of Alethia's children. PCR Tr. 380. Alethia started working full-time in a factory at the age of fifteen. Care of Applicant

and his brothers was left to Alethia's grandmother, while Alethia worked full-time. PCR Tr. 386. Including Alethia'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. Alethia and her three young sons eventually escaped the harsh brutality of Alethia's mother's home, when she took them to live with her pastor and her family who lived in the area. PCR Tr. 388.

Alethia Bryant 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 Alethia and their sons.

After some years, Alethia met and married Martin Nichols, 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 Alethia'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. Alethia 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.

Alethia 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.

Alethia could only remember striking Faith with her hand a time or two before Faith reached adulthood. PCR Tr. 416. Each of Alethia'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 Nichols Brown and Jeffrey Yungman).

During her testimony before this Court about the squaller in which her family lived, Ms. Nichols 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 Ms. Nichols' 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 Nichols 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 Burditt'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 where 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 Rogers, 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 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. The Court finds that trial counsel should have interviewed Timeka Rogers 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. Alethia's three sons each experienced extreme corporal punishment at the hand of their mother, as had Alethia 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 Ms. Nichols' 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 Alethia Bryant's marriage to Martin Nichols 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 Nichols 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 Nichols' presence, in part, because Mr. Nichols was just as physically abusive toward the boys as was their mother and because Mr. Nichols 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]”

²¹The 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. Cronin*, 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

²²The Supreme Court has made clear that the adjective “reasonable” is important; in fact, a reasonable
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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

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 Ms. Bickham, 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

²³In his testimony before this Court, Mr. Runyon admitted that he revealed to Solicitor Bailey that Applicant was the father of Ms. Bickham'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. Tonya Bickham testified that the underlying alleged incidents in these indictments arose in Charleston County, not Dorchester County. PCR Tr. 326-330. Ms. Bickham stated that her sexual relationship with Applicant always occurred at her grandmother's house, located at 4471 Donwood Circle, Ladson, South Carolina. PCR

with a minor (the allegedly then-fifteen-year-old Ms. Bickham) prior to discussing it with and gaining the approval of Applicant. PCR Tr. 777-78. Mr. Runyon indicated that Ms. Bickham was still pregnant at the time he approached the Solicitor with the idea. *Id.* The Court notes that the latest Ms. Bickham 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. Bickham's PCR testimony that she was pregnant at the time of the murder in late November 1992. Thus, the Court finds that Mr. Runyon's efforts were focused on preparing a negotiated plea as early as August 31, 1993.

Tr. 326. The evidence is uncontested that 4471 Donwood Circle 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 Ms. Bickham 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, Ms. Bickham. 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, Ms. Bickham, and only Ms. Bickham. In fact, assuming that Applicant even engaged in the requisite conduct with Ms. Bickham 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 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.

²⁴However, 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.

GROUND 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

²⁶Like *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 Burditt was a key issue at both of Applicant’s trials. Applicant, Ms. Bickham 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. Bickham 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, Ms. Bickham characterized the degree of drunkenness: she had “a good bit,” Applicant had “sort of a lot,” and Mr. Patterson had “a lot” to

²⁷Mr. 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. Burditt 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. Burditt'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 (Burditt testimony that he had three beers over "two and a half to three hour[]" period). Burditt 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. Burditt 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. Burditt 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 Burditt's truck and he never saw Burditt 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. Burditt testified at length about a dispute that arose between the two of them and Applicant and Patterson. Mr. Burditt 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 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. 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 8-2005Supp. 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. Burditt 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 Burditt truck on cross-examination and about his and Mr. Burditt's beer consumption. 1994 Tr. 951. Based on the Court's observation of Mr. Leindecker'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

GROUND 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. Burkhardt*, 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, Eighth, and Fourteenth Amendments of the U.S. Constitution in that during the sentencing phase of Applicant's 1996 trial, trial counsel both elicited and failed to object when the state elicited extensive information concerning general prison conditions, which "impermissibly injected an arbitrary factor into [Applicant's] jury's sentencing considerations," in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution and South Carolina law, S.C. Code Ann. § 16-3-25(C)(1) (2003). *See, e.g., State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007). In the alternative, applicant's right to due process of law was violated when the State impermissibly injected an arbitrary factor into [Applicant's jury 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

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

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

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.

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.

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.³¹ 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,³² 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

³¹ 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).

³² “[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).

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 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*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (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*, 278 S.C. 501, 299 S.E.2d 330 (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).³³ 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. 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

³³ 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 concerning Applicant's confinement.

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 lawyer told the jury in opening argument that he did not ask for the case. 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.

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 some meaningful effort overall, the 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 setting aside of final convictions and sentences occurs only where the alleged error had a reasonable probability of affecting the result of the proceedings.

IV. CONCLUSION.

With regards to the result herein, the court specifically denies the Applicant's ground for Post-Conviction Relief on the basis of *Burkhart*. Other than the corrections and other stylized changes that the court has made in the body herein, the Court's prior order in terms of determinations remains. Hence, Applicant's convictions for CSC 2nd with a minor are vacated and the application is granted with regard to the sentencing phase and denied with regard to the guilt phase.

AND IT IS SO ORDERED.


Honorable Diane Schafer Goodstein
Circuit Court Judge
Presiding by Order of the Supreme Court

December 10, 2010

St. George, South Carolina

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Honorable Diane Schafer Goodstein

Case No. 00-CP-18-575

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

Petitioner,

vs.

Timothy Dion Rogers, #4883

Respondent.

PROOF OF SERVICE

I, William Edgar Salter, III, Senior Assistant Attorney General, Office of the Attorney General, do hereby certify that I have this date served Petitioner's Notice of Appeal, in the foregoing action, on counsel for Respondent 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
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This 7th day of January, 2011.



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